



BACKGROUND PAPER

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards—Award stage—Group 4—*Social, Community, Home Care and Disability Services Industry Award 2010*—

Substantive claims

(AM2018/26)

JUSTICE ROSS, PRESIDENT

DEPUTY PRESIDENT CLANCY

COMMISSIONER LEE

MELBOURNE, 4 DECEMBER 2019

This is a background paper only and does not purport to be a comprehensive discussion of the issues involved. It does not represent the view of the Commission on any issue.

Introduction

[1] The Australian Municipal, Administrative, Clerical and Services Union (**ASU**) seeks to insert a new clause 20.10 in the *Social, Community, Home Care and Disability Services Industry Award 2010* (**SCHADS Award**) to provide for a community language skills allowance to remunerate employees when they use a language other than English in the course of their duties.

[2] The clause the ASU seeks is as follows:

“20.10 Community Language and Signing Work

20.10.1 Employees using a community language skill as an adjunct to their normal duties to provide services to speakers of a language other than English, or to provide signing services to those with hearing difficulties, shall be paid an allowance in addition to their weekly rate of pay.

20.10.2 A base level allowance shall be paid to staff members whose language skills are required to meet occasional demands for one-to-one language assistance. Occasional demand means that there is no regular pattern of demand that necessitates the use of the staff members language skills. The base level rate shall be paid as a weekly all purposes allowance of \$45.00.

20.10.3 The higher level allowance is paid to staff members who use their language skills for one-to-one language assistance on a regular basis according to when the skills are used. The higher level rate shall be paid as a weekly all purposes allowance of \$68.00.

20.10.4 Such work involves an employee acting as a first point of contact for non-English speaking service users or service users with hearing difficulty. The employee identifies the resident's area of inquiry and provides basic assistance, which may include face-to-face discussion and/or telephone inquiry.

20.10.5 Such employees convey straightforward information relating to services provided by the employer, to the best of their ability. They do not replace or substitute for the role of a professional interpreter or translator.

20.10.6 Such employees shall record their use of community language skills.

20.10.7 Where an employee is required by the employer to use community language skills in the performance of their duties

a) the employer shall provide the employee with accreditation from a language/signing aide agency

b) The employee shall be prepared to be identified as possessing the additional skill(s)

c) The employee shall be available to use the additional skill(s) as required by the employer.

20.10.8 The amounts at 20.10.2 and 20.10.3 will be adjusted in accordance with increases in expense related allowances as determined by the Fair Work Commission.”

[3] The Employer parties in the proceeding oppose the claim.

[4] On 2 September 2019, we issued a Decision¹ stating that we did not propose to determine the ASU’s claim at that time and that a Background Paper would be prepared summarising the submissions, evidence and other material before us. We also indicated we would issue a Statement setting out how we propose to finalise our consideration of this claim.

Submissions of the ASU dated 18 February 2019

[5] The ASU submits that the proposed variation to the SCHADS Award to provide a community language skills allowance would:

- Recognise and endorse the fundamental principles of the Equal Remuneration Order (ERO), which recognises equal pay for equal work in the social and community services sector;
- Improve the position of community sector organisations to meet the policy challenges in ensuring access and equity for Australia’s culturally and linguistically diverse population;
- Assist in the provision of the highest standard of effective professional communication, programmes and services that are responsive to the needs of all Australians;
- Be an efficient and effective use of limited resources in the community sector, allowing less reliance upon external translators and interpreters; and
- Be capacity building for the community sector workforce, which is currently the fastest growing sector in the country.

¹ [2019] FWCFB 6067.

[6] The ASU asserts that Australia is one of the most diverse societies in the world with almost one in four Australian residents born outside of Australia, and many more that are first- or second-generation Australians, being the children and grandchildren of recently arrived migrants and refugees. As a result, the ASU submits that many people in Australia speak one or more languages other than English and that they use those languages in their working lives. It contends that the insertion of the proposed clause would promote flexible modern work practices and the efficient and productive performance of work by attracting skilled staff to the social and community sector, thereby reducing the costs associated with the sector's reliance on interpreters.

[7] The ASU submits that while the ability to communicate in more than one language is a highly sought skill in the social and community sector, it is not contemplated by the classifications of the SCHADS Award. Accordingly, the ASU asserts that employees are not compensated for language skills in the base rates of pay provided by the SCHADS Award.

[8] The ASU further suggests that possessing language skills is often enhanced by a deep understanding of the cultural issues associated with the language(s) in which the individual is proficient. Due to the nature of the work performed by employees in the social and community sector, the ASU submits that it is very common for organisations to seek employees who are multilingual, even if the position description does not specify this as a requirement, to ensure that they can service their diverse client base. In particular, the ASU contends that organisations value their multilingual employees as they recognise that a superior professional service can be provided, especially to complex and traumatised clients and communities where the establishment of a professional counselling and/or trusting relationship is essential. The ASU suggests that in these circumstances it is undesirable to use interpreters, as they are not usually specially trained social and community workers and often lack the qualifications and experience required for work in the sector. It further submits that greater use of multilingual employees would mean that professional interpreters and translators would not be required to deal with traumatic work, for which they are unsuited.

[9] Moreover, the ASU contends that engaging bilingual employees is more efficient and cost-effective than using translation services or fee-for-service interpreters. It submits that the costs of interpreters are significant and that because the burden of funding interpreters is placed on the organisation, it is very common for organisations to find ways to work around the inconvenience and expense of using interpreters. It submits that the availability of appropriate multilingual employees would enable funds, that would otherwise be used to pay for interpreters, to be redirected towards the delivery of programs to the community.

[10] Finally, the ASU submits that employers in the social and community sector report difficulty finding and retaining adequately skilled staff due to competition with government, who can offer better pay and conditions, including a community language skills allowance. It suggests that providing a community language skills allowance equal to that paid to government employees would enhance opportunities for the sector to attract the best possible employees. As organisations are not currently funded to offer anything more than the modern award pay and conditions, the ASU contends that the proposed variation to the SCHADS Award would oblige funders to adjust their funding to reflect the change. Furthermore, the ASU submits that providing for the community language skills allowance would be capacity building for the social and community sector as current and potential multilingual employees would be required to undertake additional training and skills development to enable them to be eligible for payment.

[11] Dr Ruchita is a Family Violence Case Manager at inTouch Multicultural Centre Against Family Violence (inTouch) who, in addition to English, speaks Hindi, Punjabi and Urdu.

[12] Dr Ruchita's work history includes work as a Health Promotion Worker at the Women's Health in the South East (WHISE) between 2009 to 2013, where she provided support to migrant women such as providing information and referral services for health promotion, and language support to Indian women during group and health services. The position description annexed to Dr Ruchita's statement suggested that the position had a particular emphasis on developing support services for Indian women students. Dr Ruchita stated she used Hindi, Punjabi and Urdu as a core part of her role.

[13] In June 2012, Dr Ruchita said she commenced a casual position as a Bilingual Facilitator and Community Leader at inTouch, where she worked on a primary family violence prevention project. Dr Ruchita said that the aim of the project was to raise awareness in Indian communities in South East Melbourne about family violence and to prevent family violence before it occurred. She said that she planned, organised and evaluated eight awareness-raising events in the Indian community including resident groups, temples and religious organisations. Dr Ruchita attributes her ability to quickly build rapport with the community and to gain access to community groups and religious organisations to her ability to speak Hindi, Punjabi and Urdu.

[14] Dr Ruchita said that family violence is a highly sensitive and taboo topic in the Indian community and that establishing trust with the community before providing information about the topic is important. She attributes her ability to speak to the community in their languages as well as her understanding of the cultural dynamics of the community building connections and to being able to establish trust more readily, enabling her to have more meaningful engagement with the community. Dr Ruchita indicated that it would not be feasible to engage an interpreter as it was too spontaneous and would also be too expensive.

[15] In her current role as Family Violence Case Manager, Dr Ruchita said that her clients comprised of mainly refugee and migrant women from India, Pakistan, Bangladesh, Sri Lanka and Nepal, where speaking their language and understanding their culture is important in assisting them to navigate the support services and government systems as well as communicating complex information to them. She says that when she provides the information to her clients in their language, they are in a better position to absorb that information and make informed decisions about their issues.

[16] Dr Ruchita said that she also provides translation services, for example in the context of immigration where the client is on a partner visa but has left a violent relationship and needs to explain to the immigration department their reasons for doing so. In circumstances where a client is unable to pay for a professional interpreter, Dr Ruchita said that many clients disclose to her highly personal and sensitive information and that her ability to speak their language makes them feel more comfortable in telling her their story.

[17] As to professional interpreters and translators, Dr Ruchita described only using them in circumstances where there is no worker who speaks or writes in that particular language available. She stated that if inTouch were to employ staff who could speak the languages she was unable to speak, she would not be required to engage the assistance of an interpreter.² While she said that the work of interpreters was very important at inTouch, she said that there were also some disadvantages:

² PN584.

- Firstly, it is time consuming for inTouch to engage an interpreter each time they needed to speak with clients, especially given that a Family Violence Case Manager can provide phone and face-to-face support for up to 15-20 clients a day. Further, Dr Ruchita said that in using an interpreter, the meaning of the information exchanged could get lost in translation, oftentimes because the interpreter does not have the legal vocabulary to properly explain the process and/or concepts. As a result, Dr Ruchita said that she cannot be certain that her clients have been properly informed;
- Secondly, Dr Ruchita said that interpreters are not experts in family violence and that while they can interpret the language, they are unable to understand the client's circumstances that would enable the client to be effectively supported. Furthermore, clients feel more comfortable and trusting of someone they know and regularly speak to;
- Thirdly, some clients are reluctant to engage with interpreters, particularly if their language is spoken by very few communities in Australia as the interpreter can be known to the client or be from their community; and
- Fourthly, the quality of interpreters can vary. Dr Ruchita described engaging interpreters who provided their opinion in addition to providing their interpreting services.

Evidence of Ms Nadia Saleh

[18] Ms Nadia Saleh is a Manager of Child, Youth and Family Services at the Riverwood Community Centre. In addition to English, she speaks Arabic fluently.

[19] Ms Saleh said that the Riverwood Community Centre is a non-government organisation which provides a range of services to residents in Riverwood, a suburb in south-west Sydney, and surrounding suburbs. She said the community in Riverwood is one where more than half of the population were born outside of Australia and that while 62% of the population could speak English, according to the 2016 census only about 30% of the population spoke English at home.³

[20] In her current role as Manager of Child, Youth and Family Services, Ms Saleh said she is responsible for a number of programs including the Riverwood Family Support Service, Riverwood Children's Centre, Riverwood Youth Service, Riverwood Out of School Hours Centre, Riverwood Vacation Care and Community Builders. She said that the Riverwood Community Centre is obliged under its funding arrangements with the New South Wales Department of Family and Community Services (FACS) to provide "culturally capable" services that reflect the cultural diversity of the Riverwood community.

[21] Ms Saleh said that she has been using her community language, Arabic, for her entire career and currently "nearly every day, but not all day"⁴ at work. She described Arabic as a common language for people from a wide range of countries including Algeria, Egypt, Morocco, Saudi Arabia, Sudan, Somalia, Syria, Jordan, Iraq, Lebanon and Yemen, all of which have communities living in the Riverwood and surrounding areas and whom access services at

³ PN623.

⁴ PN610.

the Riverwood Community Centre. As such, Ms Saleh said that Arabic is an integral or essential part of her job,⁵ and that she used it according to the needs of the community and the individual.⁶

[22] Ms Saleh said that she uses her community language with her practice skills to be a better case worker. She suggested that by using her client's language, she is able to build trust with them and their families better than someone who did not speak Arabic, which is important given that the discussions can relate to complex or sensitive issues such as sexual assault and domestic violence. Ms Saleh described that being a member of the Lebanese community also meant that she had a better understanding of issues impacting on families from her community than an outsider.

[23] Ms Saleh also said that she can be called upon by other services and government agencies to provide translating services. She said that while telephone interpreters are available for this work, staff members of these agencies prefer to refer clients to an Arabic-speaking person the client is already familiar with. Furthermore, Ms Saleh suggested that her bilingual skills enables her to facilitate meetings between vulnerable families and different service providers in circumstances where there is a lack of understanding about specific cultural diversity issues.

[24] Ms Saleh said that she manages a team of 25-30 people who use their community language skills in the same way she does. She suggested that the Riverwood Community Centre employs over 65 skilled and bilingual staff who speak a range of languages and that without the diverse community language skills, the centre would not be able to meet the needs of the community. She described there being a real need in her organisation for workers with practice skills and community languages, and that when recruiting new staff, community language skills are desirable.

[25] As to interpreters, Ms Saleh said that while they played an important and vital role in the centre's service, government funding is very restricted and does not always cover the cost of interpreters. She suggested that because she spoke a community language, she would not need to arrange an interpreter when speaking to Arabic-speaking clients, therefore saving the Riverwood Community Centre a significant amount of money. Moreover, Ms Saleh said that the use of professional translation and interpretation services can make it more complicated as interpreters may lack the cultural knowledge and sensitivity or the practice skills to deal with sensitive or severely complex issues such as sexual assault, domestic violence and other complex relationship problems. She said that clients need to trust the workers enough to talk openly about their issues and that it takes skills and experience to build the relationships and rapport, which is easier with someone who spoke their language and understood their culture.

Evidence of Mr Lou Bacchiella

[26] Mr Lou Bacchiella is the CEO of Metro Assist, formerly the Migrant Resource Centre, in the inner-west suburbs of Sydney. The centre services culturally and linguistically diverse (CALD) communities with services and programs in migrant and refugee settlement, family services, financial inclusion, employment support and health awareness. Mr Bacchiella said that while some programs are specifically targeted at CALD communities, the centre also ran mainstream programs.

⁵ PN613.

⁶ PN613, PN620, PN622.

[27] Mr Bacchiella said that the centre employs 71 staff who speak around 24-25 languages,⁷ with the three most common being Chinese, Hindi and Arabic. He described the use of community languages as being an essential and integral part of the job⁸ as support for the client is greatly enhanced when workers are able to engage with the client in their own language.

[28] Mr Bacchiella said that part of the fundamentals of case work involved in migrant settlement and family services is building rapport and trust by engaging with clients in their own language. In circumstances where clients divulge deeply private and personal information, Mr Bacchiella suggested that doing this in their own language made the process less confronting.

[29] Mr Bacchiella said that Metro Assist employs a number of specialist staff who speak community languages such as financial counsellors, health workers and migration agents. Moreover, administrative employees who speak the same language as the client may assist from time to time. Mr Bacchiella also said that the centre employs an English-speaking psychologist who may be forced to make referrals to external psychologists where there is an apparent language barrier. From his perspective, Mr Bacchiella attributes his centre's ability to engage effectively with clients to their use of community language skills.

[30] As to interpreters, Mr Bacchiella said that they are engaged when necessary, but that they are costly and not suitable to all situations. He said that the cost of interpreters comes out of the organisational budget and that funding from various sources can only be allocated to the centre's programs, with no discretion for other purposes.⁹ As such, Mr Bacchiella said that using an interpreter was a burden to the centre.

[31] Mr Bacchiella gave several examples as to when using an interpreter would not be suitable. First, using an interpreter for simple matters, such as filling in a form or assisting with documentation, is impractical as an in-house language speaker could assist a client to do this immediately without the need to send the documentation to an interpretive service. Second, interpreters are unsuited to casework, particularly when interpreters have no rapport with the client, who then need to relay intimate details of their lives through the interpreter. Mr Bacchiella suggested that building rapport is fundamental because it enables the client to open up and get the support they require. Moreover, Mr Bacchiella suggested that using an interpreter for community engagement work is not an effective way to engage with ethnic groups and that it is "off putting" for clients to seek help and speak about private matters with an interpreter present.

[32] Mr Bacchiella said that he found it difficult to recruit and retain experienced and qualified staff with the appropriate skills at the Award rate of pay. While the centre is not prohibited from paying its workers more than the Award rates of pay, he said it would be difficult to offer any financial reward to employees for using or attaining community language skills because funding restraints only covers the SCHADS Award pay and conditions. He hopes that by varying the Award by including the proposed allowance, the centre's funders would be obliged to increase their funding and that this would enable the centre to compete with the government sector, which does pay an allowance for multilingual staff to use their skills at work.

⁷ PN718.

⁸ PN725.

⁹ PN735-736.

[33] Ms Natalie Lang is the Branch Secretary of the ASU in its New South Wales and Australian Capital Territory Branch. She said that because most non-for-profit organisations in the disability and community sector relied entirely or almost entirely upon government funding, enterprise bargaining is rare. She said that the majority of employees in the sector are covered by the Award and paid according to the 2012 Equal Remuneration Order and as such, even if cooperation and industrial power exists in some organisations, their ability to bargain is stymied by the nature of the industry.

[34] Ms Lang said that community sector employers are constrained by funding arrangements dictated by government and funding bodies, forcing them to engage in competitive tendering processes in order to obtain funding contracts that would enable them to deliver services deemed by the government to be essential for the safety and wellbeing of the community. However, she suggested that the government does not participate in negotiating and setting the wages and conditions of the workforce. Although the ASU have attempted to bargain for community language allowances in the past, they have not been successful.

[35] Ms Lang suggested that in the community sector, it was common for organisations to employ staff who are multilingual as the individuals, families and communities who engage in their services include those who do not speak, read or write in English. Further, she suggested that bilingual workers also possess a deep understanding of the cultural issues associated with the language(s) in which they are proficient.

[36] In her evidence, Ms Lang also referred to the Community Language Allowance Scheme (CLAS), an allowance paid to qualified state, federal and local government employees who have a basic level of competency in a language other than English and who work in locations where their language can be used to assist customers and clients.

Submissions of Employer Groups

Submissions of ABI dated 5 April 2019

[37] On 5 April 2019, reply submissions were filed by Australian Business Industrial (ABI) on behalf of the New South Wales Business Chamber Ltd (NSWBC), Aged & Community Services Australia (ACSA) and Leading Age Services Australia Limited (LASA).

[38] ABI submits that as a threshold issue pursuant to s.139(1)(g)(ii) of the *Fair Work Act 2009* (the Act), the Commission must be satisfied that the existing wage structure does not already contemplate employees exercising a “community language skill”. It submits that while the current classification structures in the Award do not expressly refer to language skills or proficiency, the ability to speak a language other than English is not a new capability that may have been taken into account in the determination of wages in the industry. It submits that the ASU’s evidence falls short of establishing there has been some proliferation of the requirement to use these skills in the industry.

[39] Further, ABI submits that there is no explanation as to how the ASU reached the quantum of the allowances sought, nor sufficient evidence that would allow the Commission to make a proper assessment as to the value of the skill.

[40] ABI does not dispute that certain employers would value the ability of an employee or prospective employee to speak a community language other than English. However, it suggests that employers in the SCHADS industry value a whole range of different life skills, experiences

and attributes held by employees that may not be an inherent part of the particular role. By way of example, employers may wish to match workers with clients who have shared experiences or interests.

[41] ABI submits that a community language skill is just one of a number of life skills that employees in the SCHADS industry may possess. Moreover, it considers that use of a community language is not an issue that arises across the industry or even in a large part of the industry and submitted that a community language skills allowance would be better dealt with at the enterprise level.

[42] As to the wording of the clause, ABI submits that the proposed variation was unclear in a number of respects. For example:

- “community language skill” in Clause 20.10.1 is introduced but not defined;
- the purpose and effect of “according to when the skills are used” in Clause 20.10.3 are unclear;
- Clause 20.10.4 commences by stating “Such work...” but it is unclear whether the work being referred to is the work contemplated by Clauses 20.10.1-20.10.3;
- Clause 20.10.5 commences by stating “Such employees...” but it is unclear to which employees the clause is referring;
- the purposes of Clauses 20.10.4 and 20.10.5 are unclear;
- Clause 20.10.1 imposes an obligation on employers to pay an allowance but does not state that the allowance is only payable where the employee is “required by their employer” to use the skill.

[43] ABI also submits that while the above issues may be easily rectified, the proposed variation suffers from additional concerns that are less easily resolvable.

[44] Firstly, ABI submits that the proposed variation is expressed to apply to employees who use a community language skill “as an adjunct to their normal duties” thereby requiring employers and employees to assess whether the language skills are utilised as an “adjunct” to their normal duties or whether it is used as a core part of their work. It submits that such a distinction could be difficult to draw in many cases.

[45] Secondly, ABI submitted that there was a lack of clarity as to which allowance is payable as the language used in Clauses 20.10.2 and 20.10.3 require an assessment as to the frequency of use.

[46] Thirdly, ABI submits there is a lack of clarity as to when the allowance is payable or how it is to be calculated. For example, it queried whether the allowance is payable on an ongoing basis where there is some expectation that the employee may need to use their community language skills in the future on an occasional basis, or whether the allowance is only payable in respect of pay periods where the skill is actually used; and questioned whether the clause required employers to make the assessment at the conclusion of each pay period and if so, over which period is the assessment to be made.

[47] Fourthly, ABI submits that the proposed clause does not provide clarity as to whether the allowance is payable if the level of community language skills use fluctuates over time between occasional and regular and how often a review and assessment must be made.

[48] ABI submits that the proposed variation should include a requirement for employees to have their community language skill accredited by an appropriate body as a precondition of receiving the allowance which the proposed variation does not provide for this. Additionally, it asserts that the proposed variation imposes an obligation on employers to provide the employee with accreditation if the purported skill is required in circumstances where there is no sound basis for that burden to be placed on employers.

[49] ABI further submits that there was insufficient evidence to measure the extent of the cost imposition of the proposed variation, such as the number of employees who possess community language skills, the proportion of those who use them as an adjunct to their role and how frequently the skill is used or required to be used.

[50] Lastly, ABI contends that the proposed variation would create a significant administrative burden on employers arising from the need to maintain a new suite of records regarding the language proficiency of certain employees and their usage of that language skill.

Submissions of the Ai Group dated 8 April 2019

[51] On 8 April 2019, reply submissions were filed by the Australian Industry Group (Ai Group) which addressed its opposition to the claim.

[52] Ai Group submits that it identified a number of deficiencies in the proposed claim, including that the clause does not clearly define “community language skill”. It submits that while it can be inferred that this is an ability to communicate in a language other than English, the provision does not establish any clear criteria against which an employee could be assessed and said to possess and utilise such skills. Further, it asserts that the clause does not require any particular level of proficiency in the relevant language so as to entitle the employee to payment of the allowance.

[53] Ai Group also observes that while Clause 20.10.7 mandates an employer requiring an employee to use community language skills to “provide the employee with accreditation from a language/signing aide agency”, it is not clear what this would require and says no explanation has been provided by the ASU.

[54] It also submits that difficulties will flow from the fact that eligibility to the entitlement under the proposed clause appears to only arise if the employee is using the relevant skill “as an adjunct” to their normal duties, which would appear to mean that the payment would only apply where the use of the skill was separate and not essential to the employee’s ordinary or normal duties. As such, it suggests that difficult questions may arise as to the line between an employee’s normal duties and the adjunct exercise of such skills. On this basis, Ai Group submits that both employee witnesses advanced by the ASU would not actually be eligible for the allowance as their evidence suggests that their use of community language skills forms part of their normal duties.

[55] Ai Group contends that the proposed variation appears to entitle an employee to payment whenever an employee simply uses their community language or signing skills, rather than confine the entitlement to circumstances only where the employer has required the employee to utilise such skills, or where utilisation of the skill is either essential or even beneficial to the provision of the service.

[56] It further submits that the argument for justifying or necessitating the proposed variation is undermined by the fact that an employee does not require any kind of training or qualification to be entitled to the allowance, such that an employee who simply possessed these language skills by virtue of their background would potentially be eligible for a payment if they happened to use such skills in their course of work.

[57] In comparing the wording of the proposed variation to that of the first aid allowance provided for in the Award, Ai Group submits that this provides an example of the manner in which awards deal with additional entitlements in circumstances where an employee possesses and is required to exercise special skills. On this basis it suggests that the proposed variation lacked the kind of rigour surrounding eligibility that could be expected of an award clause affording an entitlement to a substantial monetary allowance.

[58] As to the quantum of the proposed allowances, Ai Group submits that the ASU have not identified any reasoning behind its selection and accordingly, the Commission has no basis upon which it could reasonably conclude that the specific allowances proposed are necessary in the sense contemplated by s.138 of the Act. It further contends that the criteria for eligibility to one allowance over the other is unclear, as the base level allowance is payable when there is no regular pattern of demand for the skills while the higher level allowance is payable in circumstances where the assistance is provided on a regular basis. Moreover, Ai Group submits that it was unclear whether the allowances were to be paid every week, regardless of whether the skills were utilised in that period. It suggests that the base level allowance appears to be payable every week, regardless of whether the skill was used in that week, while the higher allowance is only payable when the skills are actually used.

[59] Ai Group also takes issue with characterising the allowance as an “all-purpose allowance” as it submitted that this would raise uncertainties about whether and how various other clauses under the Award intended to interact with the new provision, such as whether penalty rates were applicable to the allowance.

[60] According to Ai Group, the ASU have also failed to propose a provision for calculating a pro-rata entitlement for casual or part-time employees. It submits that a high proportion of employees covered by the Award worked on either a casual or part-time basis and that structuring the allowance in this manner could have significant adverse cost implications for employers.

[61] In relation to Clause 20.10.7, Ai Group identifies the following as deficiencies in the drafting of the proposed clause:

- Uncertainty associated with what the obligation to provide the employee with accreditation requires;
- Lack of evidence regarding the administrative burden that could be imposed upon employers, and the lack of evidence to assess the associated costs with obtaining the accreditation;
- Whether subclauses 20.10.7(b) and (c) are intended to be requirements that must be met for an employee to be eligible to receive the allowance or whether they are obligations imposed on an employee if they are “...required by the employer to use community language skills in the performance of their duties”.

[62] In relation to Clause 20.10.8, Ai Group queries whether the reference to expense related allowances meant that the ASU intended the allowance to be an expense related allowance and if so, suggested it is unclear what expense the allowance could be related to. Further, it submits that the ASU has not identified an appropriate adjustment factor for the allowance pursuant to Clause 20.1 of the Award.

[63] Ai Group submits that the deficiencies in the drafting of the proposed clause cannot be remedied by mere amendment to the wording of the provision without fundamentally altering the nature of the claim pursued and therefore, the claim ought to be rejected.

[64] Ai Group agrees with the ASU's submission that Australia is one of the most diverse societies in the world and that many people in the society speak one or more languages other than English as well as use those languages in their working lives. However, it observes that the need to operate in the context of a multicultural society was not unique to the circumstances of the employers and employees covered by the SCHADS Award. While it accepts that the evidence advanced by the ASU demonstrated circumstances in which using a community language skill is useful and the preference of an employer to hire employees with community language skills, Ai Group submits that the nature of the evidence did not enable a proper assessment of the extent to which community language skills are used across the industry, much less establish that the skills are vital to the industry generally. Further, it does not accept that the ASU was able to establish the extent to which use of community language skills influenced recruitment decisions.

[65] Ai Group also takes issue with the ASU's submission that possession of the language skills was enhanced by an understanding of the cultural issues and/or acceptance of the employee within a particular community being serviced. It submits that the payment of the community languages allowance was dependent only upon an employee possessing and using the language skills and that no element of the proposed clause requires the broader cultural attributes. It asserts that under the current proposal, an employee that lacks the attributes but possesses a rudimentary knowledge of a language other than English appeared to be eligible for the allowance.

[66] Ai Group refutes the ASU's assertion that employees are not compensated for their use of language skills by the base rates of pay provided by the Award on the basis that such matters were not contemplated by the classification structure. It submits that the content of the Award's classification structure could not be relied upon to provide a definitive guide as to what considerations were taken into account in setting the rates within the Award and that the ASU had not analysed the history of the instrument and the rates. Further, it submitted that the proper course was for the ASU to seek an increase to the Award rates on work value grounds, as contemplated by s.157 of the Act.

[67] Ai Group accepts the ASU's submission that employers are constrained by funding arrangements and have no capacity to pay any additional amounts to their employees on account of such constraints, identifying this as its core reason for opposing the claim. Further, while it accepts that funding arrangements are often set having regard to obligations under the Award, it submits that based on the evidence before the Commission, it cannot accept that the funding arrangements provide for recovery of all costs imposed upon employers or that any amendment to the Award would be a catalyst for a change to funding.

[68] Ai Group asserts that ASU's own submission that the use of bilingual employees is preferable to using interpreters was at odds with the wording of Clause 20.10.5, which contains the sentence, "They do not replace or substitute for the role of a professional interpreter or translator." Further, it submitted the ASU's contention that the government placed the burden

of funding interpreters on employers was undermined by the fact that it would be open to employers to redirect funds that may otherwise have been spent on interpreters towards the remuneration of multilingual workers instead. Moreover, it submits that by requiring employers to pay their employees a further allowance, a disincentive to the engagement of employees who possess community language skills would be created or, alternatively, employees may be directed not to engage in activities that could attract the payment. As such, Ai Group submits that it was not the role of the safety net of minimum terms and conditions of employment to guide, incentivise or otherwise influence employer decisions around the engagement of interpreters versus multilingual employees – this is instead a matter for managerial prerogative.

[69] Ai Group rejects the ASU’s submissions that the proposed allowance would attract employees to the sector on the basis that the content of awards is constricted by the legislation to only terms that are necessary to ensure a fair and relevant minimum safety net, and therefore cannot be set by reference to what may constitute attractive market rates. It observed that many sectors in Australia’s economy face labour shortages and that the SCHADS sector was not unique in this regard. Further, it submitted that acceptance of the ASU’s argument would likely be a catalyst for arguments that other awards under review should be varied to include comparable benefits. Further, it asserts that the fact the public sector may be able to offer better conditions than some community-based organisations was not justification for increasing remuneration payable under a modern award.

[70] Finally, as to the modern awards objective, Ai Group addressed s.134 of the Act as follows:

- Section 134(1)(a): Ai Group observes that no detailed evidence was advanced dealing with the impact of the proposed allowance on the relative living standards and needs of low paid employees relative to other employees. Further, it submitted that the needs of the low paid were more appropriately addressed through the Annual Wage Review rather than through allowances.
- Section 134(1)(b): Ai Group observes that the evidence demonstrated the ASU had previously attempted to bargain for a community language allowance and that if the proposed claim was granted, this would remove motivation for the ASU and its members to continue to pursue such entitlements through bargaining.
- Section 134(1)(c): Ai Group submits that the evidence advanced by ASU did not enable the Commission to conclude that the grant of the claim would improve social inclusion through increased workforce participation, nor can it be asserted that the claim would enable more employers to offer employment opportunities.
- Section 134(1)(d): Ai Group submits that the imposition of an additional financial obligation may cause employers to minimise the extent to which employees are permitted to use their community language or signing skills, which would undermine the need to promote flexible modern work practices and the efficient and productive performance of work.
- Section 134(1)(da): Ai Group submits this was a neutral consideration.
- Section 134(1)(e): Ai Group submits this was a neutral consideration.
- Section 134(1)(f): Ai Group submits that the introduction of a new financial obligation would increase employment costs and would therefore have an adverse impact on business, which is compounded in circumstances where funding sources do not

provide additional employment costs contemplated by the proposed allowance. It further contends that the ASU failed to provide sufficient information with which the Commission could make a firm assessment about the extent of the impact of the claim, such as the number of employees covered by the Award possessing community language skills; frequency of the skills used; proportion of employers who will be able to recover any costs through variations to funding arrangements; and requirements in obtaining accreditation for an employee who utilises the relevant skills.

- Section 134(1)(g): Ai Group contends that the proposed clause was far from simple and easy to understand.

Submissions of the AFEI filed 8 April 2019

[71] On 8 April 2019, submissions were received from the Australian Federation of Employers & Industries (AFEI) opposing the ASU's claim for a community language skills allowance on the following bases:

- The employer could be required to pay an additional allowance to employees where there is no clear additional work value: AFEI submits that the proposed variation purported to provide an allowance to employees who used a community language skill as an adjunct to their normal duties irrespective of whether they had been required by their employer to do so and in circumstances where the employer has no verification of the employee's actual skill level in the community language; and
- The ASU's submission that the skill is not contemplated by the classification of the Award is deficient: AFEI submits that it would be unworkable for a modern award to list every skill associated with the requirements of a particular classification. Further, in circumstances where speaking a second language is not uncommon and not a new skill that has only developed since the introduction of the modern award, AFEI submits that the Commission should not accept on the limited evidence available that the SCHADS Award rates of pay do not adequately compensate a person who speaks a second language in the performance of their duties.

Submissions of the NDS dated 5 April 2019

[72] Submissions were received from the National Disability Services Ltd (NDS) opposing the ASU's claim for a community language skills allowance primarily in regard to the effect of the claim on the disability sector.

[73] NDS accepts the ASU's submission that providers with CALD clients sometimes seek to hire multilingual employees and that there are benefits in having such employees to provide culturally and professionally appropriate communication where needed. However, NDS submits that the employment of bilingual employees to work with CALD communities and clients is a long standing feature of the sector and that there have been no material changes to warrant the introduction of an allowance for their work.

[74] NDS submits that on this basis, the matter ought to be dealt with at enterprise bargaining, though it acknowledges the ASU's submissions on the constraints in this regard. It further observes that in the absence of funding, employers are constrained in their ability to bargain on this matter but submits that the modern awards objective do not provide for the substitution of bargaining by modern awards.

[75] According to NDS, the ASU also did not provide any evidence or reasoning to support the level of payment proposed by the draft determination. It submits that the proposed allowance amounted to 4-6% of the wage rate of a disability support worker. In the context of NDS which currently sets a capped fixed price for supports, the effect of the allowance would be to place services that specialised in support for CALD clients at a financial and competitive disadvantage as they would need to absorb 4-6% of costs for the relevant employees without the ability to adjust pricing. Furthermore, a weekly allowance payable even if no language skills are required for most clients would be an additional labour cost that is not covered by the price paid for the service.

Background Document

[76] On 26 April 2019, the Commission issued a [Background Document](#) setting out the provisions from Modern Awards and Modern Enterprise Awards which contained references to translators and interpreters or contained some form of language allowances.

[77] Below is a list of the modern awards and modern enterprise awards referred to in the Background Document:

1. Aboriginal Community Controlled Health Services Award 2010;
2. Aged Care Award 2010;
3. Airline Operations—Ground Staff Award 2010;
4. Amusement, Events and Recreation Award 2010;
5. Australian Bureau of Statistics (Interviews) Enterprise Award 2016;
6. Australian Capital Territory Public Sector Enterprise Award 2016;
7. Australian Government Industry Award 2016;
8. Australian Public Service Enterprise Award 2015;
9. Broadcasting, Recorded Entertainment and Cinemas Award 2010;
10. Christmas Island Administration Enterprise Award 2016;
11. Health Professionals and Support Services Award 2010;
11. Nurses and Midwives (Victoria) State Reference Public Sector Award 2015; and
12. Parliamentary Departments Staff Enterprise Award 2016.

[78] Parties were directed to file any submission in relation to the Background Document and in particular, whether the information was correct and the relevance of the information to this matter by 17 May 2019. Any interested party wishing to file a submission in reply were directed to do so by 31 May 2019.

Submissions of the ASU dated 17 May 2019

[79] The ASU submits that the information contained in the Background Document is correct but notes that it is not relevant to its application as the proposed clause is not concerned with translators or interpreters. The ASU clarified its application as relating to employees who use their community language in the course of their duties, but who are not otherwise engaged in the capacity of translators or interpreters.

[80] The ASU submits that Awards that provide remuneration for employees for their use of language skills are relevant to its application because they show that:

- Many awards in the community, local government, public services and private sectors provide for language skill related allowances; but
- There is no standard rate of remuneration for the use of language skills in Modern Awards;

- There is no standard way of describing the use of language skills in Modern Awards;
- Many awards provide allowances for language skills without requiring accreditation as a condition of payment.

[81] The ASU submits the following examples from the list contained in the Background Document to support its contention:

- The *Health Professionals and Support Services Award 2010* provides for an “occasional interpreting allowance” at clause 18.9 which is paid where an employee, who is not employed as a full-time interpreter, is required to perform interpreting duties. No accreditation is required under this clause and the allowance is 0.11% of the standard rate per occasion, capped at 1.27% of the standard rate per week.
- The *Aboriginal Community Controlled Health Services Award 2010* provides for an annual “bilingual qualification allowance” at clause 15.1 which is paid to employees with a recognised proficiency in English as well as “any one of the languages normally used by the employer’s customers/clients” who is “regularly required in the course of their duties to use one or more of those languages”. Proof of bilingual proficiency and accreditation is required.
- The *Airline Operations – Ground Staff Award 2010* provides for a “foreign language allowance” at clause 21.14 which is paid when an employee “is required by the employer to speak a foreign language”. There is no requirement for accreditation.

Submissions of NDS dated 17 May 2019

[82] In its submissions, the NDS provided a table comparing the minimum rates of pay for unqualified and qualified interpreters as indicative duties for particular classification levels to the minimum rates of pay for social and care services (SACS) employees as follows:

Award	Classification	Pay rate	SCHADS – nearest equivalent classification and paypoint	Pay rate
Aged Care Award 2019	Level 5 (Secretary interpreter unqualified)	\$865.70	Level 2.2	\$863.60
	Level 7 Interpreter (qualified)	\$928.80	Level 3.1	\$913.70
Amusement, Events & Recreation Award 2010	Grade 3 International host required to speak a second language	\$794.70	Level 1.1	\$782.00
	Grade 4 Interpreter	\$837.40	Level 2.1	\$837.40
Health Professionals and Support Services Award 2010	Level 5 Interpreter (unqualified)	\$865.70	Level 2.2	\$863.60
	Level 7 Interpreter (qualified)	\$928.80	Level 3.1	\$913.70

[83] It submits that where the awards have classified the duties of interpreters, they are generally at skill levels equivalent to SACS level 2 for unqualified interpreters and level 3 for qualified interpreters. NDIS further submits that while the *Aged Care Award 2010* and the *Health Professionals and Support Services Award 2010* apply to similar types of workers and workplaces as the SCHADS Award, the SACS classification definitions contemplate a far wider and non-exhaustive range of skills than the classification definitions for most of the awards identified in the Background Document.

Submissions of ABI dated 19 May 2019

[84] ABI submits that while its clients did not identify any inaccuracies in respect of the information contained in the Background Paper, it had identified two other awards that were not listed in the Background Paper as follows:

- The *Professional Diving Industry (Recreational) Award 2010* which contains an entitlement to an allowance for employees required by their employer to “instruct” in a language other than English; and
- The *Educational Services (Post-Secondary Education) Award 2010* which contains classifications for Teachers and Tutors/instructors at Schedule C to contain references to “TESOL” qualifications required to be held by employees who are “Teachers employed in English language colleges or in TESOL courses”.

[85] As to the relevance of the Background Document and the additional award provisions identified above, ABI submits there are 15 modern awards or modern enterprise awards that contain references to translators/interpreters and/or language allowances and that of these 15 awards, 12 contain an allowance in respect of the use of language skills, while the other three contain references to interpreters or other language skills within the classification structures. As such, ABI submits that it did not consider the remaining three awards had any relevance to the current proceedings or to the claim advanced by the ASU.

[86] ABI asserts that by reference to the considerations contemplated by s.134 of the Act and any other consideration consistent with the purpose of the objective, the Commission’s task is to review the SCHADS Award (and not any other award) by considering factors relevant or peculiar to the SCHADS industry. As such, it submits that 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 the particular modern award, with exception to where there is similarity between industries covered by those awards. ABI contends that 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.

[87] ABI observes that of the 12 awards that contained some form of language allowance, six are modern awards, five are modern enterprise awards and one is a State reference public sector award. As only six modern awards out of approximately 122 contain a language allowance, it submits that this suggests there is no compelling industry-specific basis for including such a term in a modern award. Moreover, it submits that the existence of similar allowances in a small number of other modern awards is of limited, if any, relevance to the Commission’s task in determining whether it is appropriate to insert a language allowance into the SCHADS Award. Further, it submits that most of the six awards applied to industries that bore no similarity to the SCHADS industry and that each of the terms in those awards is different to the variation advanced by the ASU. For example:

- In *Airline Operations – Ground Staff Award 2010*, the allowance is only payable in very confined circumstances where an employee “is required to work in an international terminal and required to speak a foreign language” and the quantum of the allowance payable is dependent on the number of foreign languages the employee is required to speak;
- 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 *Health Professionals and Support Services Award 2010* 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 *Professional Diving Industry (Recreational) Award 2010* provides an entitlement to an allowance where employees are “instructing in a language other than English, where required”;
- The *Aboriginal Community Controlled Health Services Award 2010* 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.

[88] As to the modern enterprise awards, ABI submits that they are instruments of a very different character to modern awards as they apply to a specific enterprise only (or part of a single enterprise) or to a group of enterprises within the same franchise chain. Further, modern enterprise awards are made under a different statutory framework. ABI submits that the same observations could be made in respect of the State reference public sector modern awards. It suggests that the materially different character of modern enterprise awards and State reference public sector modern awards, as well as the fact that the coverage of these instruments do not apply to a particular industry at large, do not lend any weight to the suggestion that the SCHADS Award should contain any similar allowances. As such, ABI submits that the existence of language allowances in the small number of modern enterprise awards or State reference public sector modern awards has no relevance to the current matter before the Commission.

[89] ABI otherwise submits that if the Commission was to be satisfied that a community language allowance of some kind should be inserted into the SCHADS Award, the award clauses listed in the Background Document are only relevant to the extent that they provide general guidance or assistance to the Commission in formulating the terms of any such clause.

Submissions of AFEI dated 22 May 2019

[90] AFEI identifies the following as minor inconsistencies between the Background Document and two awards:

- Page 14 of the Background Document refers to O.12.79(a) in the *Australian Government Industry Award 2010* where there is no such provision; and
- Page 14 of the Background Document also refers to Clause 11.15(b) of the *Parliamentary Departments Staff Enterprise Award 2016* where there is no such provision.

[91] As to the relevance of the Background Document, AFEI submits that the inclusion of interpreter/translator/language provisions contained within it do not support the ASU's proposed allowance being included in the SCHADS Award.

[92] Firstly, AFEI submits that more than half the Awards in the Background Document are not private-sector industry awards, while the remaining are enterprise awards, state reference public sector awards or government staff awards. In particular, AFEI submits that terms in modern enterprise awards are tailored to reflect employment arrangements specific to the enterprise, terms in state reference public sector awards are adapted to the effective administration of a state and tailored to reflect employment arrangements that have developed in relation to state reference public sector employers and employees, and government staff awards relate to employment that is also in the public sector. As the SCHADS Award applies largely to private-sector employers and employees and is specific to SCHADS industries, AFEI submits that it is not appropriate to draw any conclusions about the inclusion of translator/interpreter/language provisions in those awards.

[93] Secondly, AFEI submits that of the private-sector industry awards contained in the Background Document, none of them contain a "community language skills allowance" and rather, there are provisions for:

- Bilingual qualifications in the *Aboriginal Community Controlled Health Services Award 2010*;
- Interpreter in the *Aged Care Award 2010*;
- Foreign language use in the *Airline Operations Ground Staff Award 2010*;
- International host requirements to speak a second language in the *Amusement, Events and Recreation Award 2010*;
- Language allowance for proficiency in English as well as the employee's traditional Aboriginal and Torres Strait Islander language in the *Broadcasting, Recorded Entertainment and Cinemas Award 2010*; and
- Interpreting duties in the *Health Professionals and Support Services Award 2010*.

[94] In particular, AFEI observes that the ASU have not defined "community language skill" and the breadth of the circumstances in which a person may qualify for such an allowance, and submits that the allowance sought goes beyond what is contemplated in the other private-sector industry awards listed in the Background Document. In particular, it submits that:

- There is no requirement in the ASU's proposed allowance that the individual be proficient in oral and/or written communication in the second language;
- A person who has a "community language skill" may not be capable of, or required to, perform work in interpreting or translating in circumstances where an employee only speaks their native language and communicates their native language with a client; and
- The provision for an "international host required to speak a second language" in the *Amusement, Events and Recreation Award 2010* is not an allowance but a requirement to speak a second language that would appear to cause the individual to be classified at a Grade 3 in the Award.

[95] Thirdly, AFEI submits that the allowances claimed by the ASU are significantly higher than and disproportionate to the majority of interpreter/language/translator allowances referred to in the Background Document. By way of example, it submitted a table that purported to show a summary of the lowest and maximum translator/language/interpreter allowances in each modern award and modern enterprise award identified in the Background Document as compared to the “occasional demand” and “regular demand” allowances sought to be included by the ASU. It contends that the results demonstrated that the allowance sought by the ASU for “occasional demand” is 83-750% higher than the lowest allowance provided in the provisions set out in the Background Document, and that the “regular demand” allowance is 71.9%-553.3% higher than the maximum allowance provided by the Background Document provisions.

[96] As to the “bilingual qualification allowance” provided by the *Aboriginal Community Controlled Health Services Award 2010* (ACCHE Award), AFEI submitted that its rates of between \$36.95 and \$73.96 per week do not support the ASU’s claims in respect of a community language skills allowance for the following reasons:

- The SCHADS Award rates of pay, inclusive of the equal remuneration order, are already substantially higher than the rates of pay in the ACCHE Award, consistent with its submission that the classifications and rates of pay in the SCHADS Award already compensate employees for any use of community language skills;
- Eligibility for the allowance in the ACCHE Award is conditional upon the employee providing proof of bilingual proficiency and accreditation; and
- The allowance in the ACCHE Award is derived from the *Aboriginal Organisations Health and Related Services (Northern Territory) Award 2002* and is specific to the Aboriginal community and controlled health industry.

[97] Fourthly, AFEI submits that all private-sector industry award allowances for interpreter/translator/language skills require verification of the skill, provided by the employee, as a condition for eligibility to the allowance. It submits that the ASU’s proposed clause may still render a person eligible for the allowance even where the employer has not required the person to use community language skills and that this feature is not supported by any of the other awards listed in the Background Document.

[98] Lastly, AFEI submits that none of the Awards in the Background Document provide support for the ASU’s proposed allowance requiring an employer to source verification of the employee’s “community language skill”. Rather, in all of the provisions contained in the Background Document, verification is to be provided by the employee to the employer.

Other industrial instruments that contain community language allowances

[99] During the course of proceedings on 16 April 2019, this Full Bench requested information regarding other industrial instruments that contain community language allowances. Directions issued on 1 May 2019 directed the ASU and Ai Group to file in the Commission any agreed material they considered relevant by 17 May 2019. Interested parties who wished to respond to the joint material filed by the ASU and Ai Group were directed to file by 31 May 2019, and any remaining submissions in reply were directed to be filed by 7 June 2019.

[100] The joint submissions of the ASU and Ai Group identified a list of 39 awards and agreements that contained language allowance provisions:

1. Clause 15 of the North Australian Aboriginal Justice Agency Enterprise Agreement 2015-2019;
2. Clause 48 and Schedule H of the Australian Fisheries Management Authority Enterprise Agreement 2016;
3. Clause 15 of the Northern Territory Council of Social Service Inc. (NTCOSS) Enterprise Agreement 2017;
4. Clause 20 of the Central Australian Aboriginal Family Legal Unit Aboriginal Employee Collective Agreement 2013-2017;
5. Clause 5.09 of the Indian Ocean Territories (Administration) Enterprise Agreement 2018;
6. Clause 20 of the Central Land Council Enterprise Agreement 2017-2020;
7. Clause 63 of the Fair Work Ombudsman Enterprise Agreement 2017-2020;
8. Clause 29.8 of the Department of Agriculture and Water Resources Enterprise Agreement 2017-20;
9. Clause 5.17 of the Department of the Environment and Energy Enterprise Agreement 2016-2019;
10. Clause 4.11 of the Aboriginal Hostels Limited Enterprise Agreement 2017;
11. Clause 18 and Table 2 of the Lake Macquarie City Council Enterprise Agreement 2018;
12. Clause 6.3 of the National Disability Insurance Agency Enterprise Agreement 2016-2019;
13. Clause 25 and Attachment A of Schedule 4 of the Australian Taxation Office (ATO) Enterprise Agreement 2017;
14. Clause 61 of the Department of Health Enterprise Agreement 2019-2022;
15. Clause 4.4 of the Department of Social Services Enterprise Agreement 2018 to 2021
16. Clause 50 of the Office of the Commonwealth Ombudsman Enterprise Agreement 2017-2020;
17. Clause 6.11 and Item 1 of Schedule 3 of the *WaterNSW Enterprise Agreement 2018*;
18. Clause 143 of the Fair Work Commission Enterprise Agreement 2017-2020;
19. Clause 132 and Part J of the Australian War Memorial Teamwork Agreement 2017-2020;
20. Clause 54 of the Northern Land Council Enterprise Agreement 2018;
21. Clause 31 and Attachment C of the Federal Court of Australia Enterprise Agreement 2018-2021;
22. Clause D7 and Part D of the Department of Human Services Agreement 2017-2020;
23. Clause 54 of the Darebin City Council Enterprise Agreement 2018 - 2022;
24. Clause 21.3 and Schedule 2 of the Broken Hill City Council Consent Award 2015;
25. Clause 18.4 of The City of Sydney Wages/Salary Award 2014;
26. Clause 15(xii) and Table 2 of the Local Government (State) Award 2017 [NSW];
27. Crown Employees (Public Sector – Salaries 2018) Award [NSW];
28. Clause 20 and Schedule B of the Service NSW (Salaries and Conditions) Employees Award 2016;

29. Clause 12.18 of the Australian Capital Territory Public Sector Enterprise Award 2016 [ACT];
30. Clause 11.15 of the Australian Public Service Enterprise Award 2015;
31. Clause 11.10 of the Christmas Island Administration Enterprise Award 2016;
32. Clause 11.15 of the Parliamentary Departments Staff Enterprise Award 2016;
33. Clause 31.4 of the Victorian Public Service Enterprise Agreement 2016;
34. Clause 50 and Table 1 of the Crown Employees (Administrative and Clerical Officers – Salaries) Award 2007;
35. Clause 50 and Table 1 of the Crown Employees (Public Service Conditions of Employment) Reviewed Award 2009;
36. Clause 3.8 of the State Government Entities Certified Agreement 2015 (QLD);
37. Clause 12.7 of the Department of Education and Training Teacher Aides' Certified Agreement 2015 (QLD);
38. Clause 2.1 of the Part-Time Interpreters or Translators (Public Service) (SA) Award; and
39. Clause 9.8 of the Australian Bureau of Statistics (Interviewers) Enterprise Award 2016.

[101] Of this agreed list, 26 appear to be enterprise collective agreements, eight appear to be modern enterprise awards and five appear to be state reference public sector awards.

Submissions of ABI dated 3 June 2019

[102] ABI contests the ASU's contention that "many awards in the community, local government, public services and private sectors provide for language skill related allowances" by suggesting that the material before the Commission demonstrated that language allowances were not a common feature of the federal industrial relations system. It submits that the incidence of instruments containing language allowances is limited to only 46 instruments comprising modern awards, modern enterprise awards, one State reference public sector award, enterprise agreements made under the Act, as well as awards and enterprise agreements made under the state industrial relations system. Once the public sector instruments were removed from the analysis, ABI contends that the rarity of such allowances operating in the private sector was stark.

[103] ABI does not dispute ASU's submission that there is no standard rate of remuneration for the use of language skills in the relevant modern awards, although it questions the relevance of this fact to the ASU's application. It submits that in making its application, the ASU failed to articulate:

- How the quantum sought was formulated;
- Why the quantum sought is appropriate; or
- How the quantum sought reflects an appropriate level of payment for the particular skill to which it is attached.

[104] ABI observed that the rate of remuneration varies considerably for each of the six modern awards. It outlined that the *Health Professionals and Support Services Award 2010* provides that the maximum payable for the allowance is a total of 1.27% of the standard rate per week which is a maximum compensation of \$11.59 per week and noted this is an amount lower than 4.90% or 7.35% of the standard rate proposed by the ASU.

[105] ABI also does not dispute the ASU's observation that there is no standard way of describing the use of language skills in modern awards, but again questioned the relevance of this fact to the ASU's application.

[106] Finally, ABI challenges the ASU’s submission that “many” awards contained allowances for language skills without requiring accreditation. It notes that of the 13 awards listed in the Background Document, only five did not require accreditation and of those five awards, the allowances were considerably lower than the quantum sought by the ASU and the allowances contained in awards which did require accreditation.

Submissions of the ASU in Reply dated 4 June 2019

[107] In its additional submissions dated 4 June 2019, the ASU submitted an annexure containing an analysis of the 39 industrial instruments containing language allowance provisions referred to in its joint submissions with Ai Group. It challenges AFEI and ABI’s assertion that the public sector awards and industrial instruments were irrelevant to the proposed claim. ASU submits that there is recognised similarity between the work performed by employees in the social and community sector to the public sector, which it claimed was the basis the Full Bench Decision in the 2012 Equal Remuneration Case.

[108] ASU further submits that the modern awards and other industrial instruments are relevant to the question of whether accreditation should be a prerequisite for payment of the allowance. It asserts that accreditation is not a standardised requirement for the payment of language related allowances in either the federal or state industrial relations system.

[109] In respect of public sector industrial instruments, the ASU submits that while most of the Commonwealth public sector awards and industrial instruments provide for formal accreditation as one form of language fluency, some instruments also allow other assessments of an employee’s fluency. For example, clause D7 of the *Department of Human Services Enterprise Agreement 2017-2020* provides for a community language allowance where the employee is required to have “language competency of the required standard”. The ASU notes that in a 2012 submission to the House of Representatives Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into language learning in indigenous communities, the Department stated that eligibility for the community language allowance for an indigenous language speaker only required verification from an indigenous elder that the candidate is fluent in the language.

[110] The ASU advanced a further example from the *Australian Public Service Enterprise Award 2015*, which provided for a community language allowance at clause 11.15 with two rates according to levels of competence, neither of which required formal accreditation. Rate 1 is paid to an employee with “adequate language skills, as determined by an individual or body approved by the Agency Head, for simple communication” and Rate 2 is paid to an employee who “is certified by the National Accreditation Authority for Translators and Interpreters (NAATI) as a Translator or Interpreter at any level; or is assessed to be at the equivalent levels by an individual or body approved by the Agency Head”. On this premise, the ASU submits that accreditation is not a standard requirement in public sector awards.

[111] The ASU rebuts the AFEI’s assertion that no private sector award required payment of language allowance without accreditation by referring to clause 21.14 of the *Airline Operations – Ground Staff Award 2010*, which provides for a “foreign language allowance” that did not require the employee to be accredited. Similarly, it observed that the *Health Professionals and Support Services Award 2010* does not require any accreditation for payment of the “occasional interpreting allowance”.

[112] The ASU submits that the SCHADS Award generally does not rely on qualifications to demonstrate skill. For example, a SACS Employee Level 7 may require qualifications at tertiary

level, lesser formal qualifications or “a combination of experience, expertise and competence sufficient to perform the duties required at this level” and a SACS Employee Level 8 could be a person who “attained through previous appointments, service and/or study with a combination of experience, expertise and competence sufficient to perform the duties of the position”. Moreover, it submits that it may be difficult to find accreditation in languages that are only spoken by a few people in Australia which could lead to a situation where one employee is paid the allowance because accreditation is available, but the speaker of a less common language will not be paid the allowance because they could not be accredited. Finally in respect of accreditation, the ASU submits that if formal accreditation was a prerequisite for payment of the allowance, employers would simply continue using the community language skills of their unaccredited employees without being required to pay the allowance.

[113] As to the AFEI and ABI’s assertion that the rates proposed by the ASU are excessive compared to those found in other awards, the ASU submits that the proposed rates reflect the circumstances of the social and community sector, where employees who would receive these allowances deal with vulnerable communities and highly sensitive issues, as evidenced by Dr Ruchita and Ms Saleh.

Community Language Allowance Scheme Handbook and Accreditation process

[114] Also at the proceedings on 16 April 2019, Ai Group tendered into evidence the CLAS Handbook 2018, which is a six-page document issued by Multicultural NSW of the NSW Government. This document outlines that NSW Government agencies must provide language assistance programs for people who do not speak English well, or at all, to access government services. The Handbook further suggests that the CLAS assists agencies to provide those language services by remunerating employees who are selected for CLAS and use community language skills as part of or in addition to their normal duties.

[115] The Handbook states that CLAS is only to be used for on-the-spot language assistance for simple matters such as answering counter inquiries, providing directions or making appointments. It suggests that for matters which will take a longer time to investigate or require an in-depth or formal interview, agencies should use interpreters.

[116] In order to receive an allowance under CLAS, employees must first be nominated by their employing agency and then either pass an examination administered by Multicultural NSW, have NAATI accreditation at interpreter level or have a NAATI language recognition award. However, the allowance is not payable to employees employed as interpreters and translators or those who work in positions where particular language skills are part of the essential requirements of the position. Furthermore, employees must be:

- Public contact staff, counter staff or other clerical staff who are required to deal with public inquiries;
- Identified as possessing another language skill that assists the work of the organisation;
- Available to use the language skill as required by the organisation; and
- Recognised by their organisation as occasional or regular users of their language skills as an adjunct to their normal duties.

[117] The Handbook sets out two levels of the allowance: a base level rate and a higher level rate. It describes the base allowance (currently \$1,413 per annum) as payable to staff who speak

a “community language” (such as Arabic, Croatian, Greek, Macedonian, Serbian, Spanish, Turkish and Vietnamese) and who pass the CLAS language examination. It further sets out that the base level rate is paid to staff who, in addition to the requirements set out in [116], are required to meet occasional demands for language assistance where there is no regular pattern of demands that necessitate the use of the staff member’s language skills.

[118] The Handbook further describes the higher level rate, which is one and a half times the base allowance (currently \$2,124 per annum) and paid to staff who, in addition to the requirements set out in [116], meet any of the following criteria:

- Regularly meet high levels of customer demand involving a regular pattern of usage of the staff members’ language skills; or
- Having achieved qualifications of NAATI interpreter level and above.

[119] The remainder of the Handbook sets out the responsibilities of agencies and CLAS recipients as well as suggests arrangements that can be put in place to facilitate the CLAS.

[120] In relation to the CLAS, we sought further information regarding the scheme including:

- How does the scheme operate?
- How does the scheme intersect with employers who operate under this award?
- Are there similar schemes operating in other states?
- If so, what are the relevant funding arrangements?
- Further information regarding the accreditation process and arrangements for community language skills

[121] Directions issued on 1 May 2019 directed the ASU to file any information they considered relevant to this request by 17 May 2019. Interested parties who wished to respond to the material filed by the ASU were directed to file submissions by 31 May 2019, and any submissions in reply were directed to be filed by 7 June 2019.

Submissions of the ASU dated 17 May 2019 and ABI Response dated 3 June 2019

[122] The ASU submits that the CLAS Handbook appeared to be an administrative document describing the New South Wales state government’s community language allowance scheme which operationalises the community language allowances provided by several NSW State awards such as the *Crown Employees (Public Sector – Salaries 2018) Award (NSW)*, the *Services NSW (Salaries and Conditions) Employees Award 2016 (NSW)* and the *Crown Employees (Administrative and Clerical Officers – Salaries) Award 2007*. The ASU further submits that based on the agreed list of other industrial instruments that contain community language allowances, the Commonwealth, Victoria, Queensland, South Australia and the Australian Capital Territory appear to have similar schemes.

[123] As to the accreditation process, the ASU states that the leading body for accreditation of interpreters and translators is the National Accreditation Authority for Translators and Interpreters (NAATI), which is a company jointly owned by the nine governments of Australia. It suggests that NAATI is responsible for setting, maintaining and promoting professional standards for translating and interpreting as well as offering professional accreditation for interpreters and translators. However, as the ASU’s application does not concern interpreters and translators, it submits that these accreditations are not relevant to its application.

[124] The ASU also submits that NAATI offers testing for community language skills through Community Language Aide testing, which is described as being “used by public and private sectors to determine eligibility for language allowances”. It also says that this level of “testing is appropriate for anyone needing to communicate at a basic level in a language other than English (LOTE) in the workplace” and the test assesses “a person’s ability to perform certain routine customer service-related tasks in a Language other than English (LOTE) and it is suitable for anyone wanting to test this ability”. The fee for Community Language Aide testing is said to be \$385.00.

[125] The ASU submits that the evidence before the Commission demonstrates that the SACS sector has relied on the community language skills of its employees without requiring accreditation for a significant period of time and that it would be unfair to require accreditation as a condition for payment of the allowance, since employers have actively sought out accredited employees. Furthermore, it contends that any requirement for accreditation would add undue administrative burden on the employer.

[126] In written submissions dated 3 June 2019 filed in response, ABI questioned the logic of the ASU submission that, because of the existence of a small number of awards in certain States that contain a language allowance, those States “appear” to have schemes similar to the NSW Community Language Allowance Scheme. ABI submitted that while industrial instruments made under various State jurisdictions might contain language allowances, it is not clear that those States have similar schemes to that of NSW.

[127] ABI submitted that it appears only Victoria has a similar scheme, with the *Victorian Public Service Language Allowance Guidelines 2014-153* outlining which Victorian public sector employees will be entitled to receive a language allowance pursuant to the *Victorian Public Service Enterprise Agreement 2016* and the *Nurses (Department of Education and Training) Agreement 2016*.

[128] ABI asserts that the ASU overstates the findings that can be made from the evidence adduced during the proceedings. It submitted the evidence cannot be said to have demonstrated that ‘the SACS sector has relied on the community language skills of its employees without requiring accreditation for a significant period of time’. ABI submits the evidence suggests that only a few niche multicultural focussed businesses have done so.

[129] Finally, ABI submitted the ASU submission that ‘any requirement for accreditation would add an undue administrative burden on the employer’ was confusing, given that the ASU’s proposed variation requires employers to obtain and cover the costs of accreditation for relevant employees.

Community language skills and the classification structure

[130] In a further request made during the course of proceedings on 16 April 2019, we asked parties to consider whether the community language skills are contemplated within the existing classification structure. Interested parties were directed on 1 May 2019 to make submissions relating to whether community language skills are contemplated within the existing classification structure. by 17 May 2019. Any interested parties who wished to respond were directed to file submissions by 31 May 2019, and any submissions in reply were directed to be filed by 7 June 2019.

Submissions of the ASU dated 17 May 2019

[131] The ASU made submissions addressing only the classifications covered by it, namely the SACS and Crisis Accommodation employees. It notes that these classifications can be found in Schedule B for SACS employees and Schedule C for Crisis Accommodation employees, where the latter classification descriptors replicate that of the SACS Levels 3 to 6 almost word for word.

[132] The ASU submits that the classification descriptors for SACS and Crisis Accommodation employees do not reference community language skills, bilingual workers, interpreters or translators. It submits that there is only one specific reference to any language skills in the classification descriptors for SACS Levels 1 and 2, which list “basic numeracy, written and verbal communication skills relevant to the work area” as requirements for the position, but that community language skills could not be characterised as “basic” skills given the prevalence of English in Australia. Moreover, it submits that the classification descriptors for higher classifications do not provide a means for differentiating between employees in the same role, but who do and do not use community language skills in that role.

[133] The ASU contends that the history of the SCHADS Award suggests that community language skills were not contemplated in the SACS and Crisis Accommodation classifications either in the making of the SCHADS Award or in the making of the pre-modern awards from which the classification structure was derived. It notes that the classifications are derived from the *Social and Community Services (Queensland) Award 2001* and the *Crisis Assistance Supported Housing (Queensland) Award 1999*, which were based on the *Queensland Local Government Officer’s Award 1992* “Community and Environment Stream”. The ASU observed that a different classification structure applied to disability services employees based on a Victorian federal award, before the Australian Industrial Relations Commission varied the SCHADS Award so that the Disability Services would also be covered by the SACS classification definitions in Schedule B. It further references its previous claim for an “occasional interpreting allowance” at award modernisation, which did not eventuate in the final version of the SCHADS Award, a decision which the ASU contends was made without reasons having been outlined.

Submissions of NDS dated 17 May 2019

[134] The NDS observes that the classification definitions for SACS employees are set out at Schedule B of the SCHADS Award and further notes that the classification definitions set out:

- The generic characteristics of work at each classification level; and
- A non-exhaustive list of indicative duties and responsibilities that would sit at each classification level; and
- The skills and experience required; and
- The organisational relationships and extent of authority at each level.

[135] On this premise, the NDS submits that whilst “community language skills” are not explicitly named in the classification definitions, they can be considered to be “contemplated” by reference to the generic related skills. By way of example, the NDS observes that at B.2.3(a)(i), the skills needed to perform work at SACS Level 2 include “...basic skills in oral and written communication with clients and other members of the public...”, however the reference to skills in communication does not specify any particular language. It submits that ordinarily the language would be presumed to be English, but that in services where workers are required to use their native non-English language in working within the community, the level of skill required would be equivalent to “basic skills in oral and written communication”.

[136] Further, the NDS submits that one of the general characteristics of SACS Level 2 is provided at B.2.1(b), which states that a worker “...may contribute specific knowledge and/or specific skills to the work of the organisation...” It contends that knowledge of a second language can be considered a “specific knowledge or skill”.

[137] The NDS also refers to specific descriptors of SACS Level 3 including “...scope for exercising initiative in the application of established work procedures...” at B.3.2(j), “...where prime responsibility lies in a specialised field, employees at this level would undertake at least some of the following:... b. perform duties of a specialised nature; c. provide a range of information services;...” at B.3.2(n), “...may utilise limited professional or specialised knowledge...” at B.3.3(a)(iii) and “...involve solving problems of limited difficulty using knowledge, judgment and work organisational skills acquired through qualifications and/or previous work experience...” at B.3.1(b).

[138] The NDS submits that the definitions at both SACS Levels 2 and 3 describe a range of generic skills and indicative tasks, and are therefore not a narrow list of tasks or occupations. As such, it contends that where a job role contains duties that are not specifically mentioned in the classification definitions, the generic descriptors enable an assessment of the classification to be made by referring to equivalent types of skills and responsibilities.

Submissions of ABI dated 19 May 2019

[139] ABI submits that while it could not identify any decision or authority that would provide a definitive basis to conclude that the classifications in the SCHADS Award contemplate the use of community language skills, or the use of a language other than English, or the use of Auslan, the classifications within the SCHADS Award contain a number of references to communication skills including:

- For the SACS stream of the Award:
 - “written and verbal communication skills, and where relevant, skills required to assist with personal care and lifestyle support” at B.1.1(e)
 - “basic numeracy, written and verbal communication skills relevant to the work area” at B.1.3(a)(iv); and
 - “basic skills in oral and written communication with clients and other members of the public” at B.2.3(a)(i).

- For the Home Care Employees stream of the Award:
 - Having specialist knowledge and skills including “assistance with communication” at E.2.3; and
 - Having interpersonal skills, including “oral communication skills and where appropriate written skills, with clients, members of the public and other employees” at E.2.4.

[140] ABI contends that whilst there is no authority that supports its proposition, the references to “communication” within the SCHADS Award possibly contemplate the utilisation of bilingual skills or other language skills. It also notes that the classification structure is derived from the *Social and Community Services (Queensland) Award 2001*, but it did not trace back the history of the instrument to determine whether there was any consideration of community language skills. Absent this evidence, ABI concedes that it was reasonably open for the Commission to conclude that community language skills are not contemplated within the existing classification structure of the SCHADS Award.

Submissions of AFEI filed 22 May 2019

[141] AFEI contends that speaking a second language is common and is not a new skill that has only developed since the introduction of the SCHADS Award. Further, it says that the need for communication skills, whether in English or another language, is an important aspect, and sometimes an inherent requirement, of all roles. On this basis, AFEI submitted that the classifications of the SCHADS Award already compensate employees for using written and oral communication skills as well as acquired skills and knowledge in the discharge of their duties.

[142] In support of its contentions, AFEI submitted various extracts from the classifications descriptors for Levels 2 to 8, highlighting where it contends the community language skills have already been contemplated in the Award classifications.

Submissions in Reply of the ASU dated 4 June 2019

[143] In response to the employers' submissions that the SCHADS classification structure contemplated the use of community language skills by the general references to basic interpersonal and communication skills, the ASU submits that the classification structure is not so broad as to encompass any skill or ability. It contends that while many people speak languages other than English in Australia, only small numbers of people can speak any particular language. For example in the 2016 census, the ASU noted that 21 per cent of Australians reported speaking a language other than English in the home and that no more than 2.5 per cent of the population speak any one language at home. It observes that indigenous language speakers are even rarer with only 63,754 persons reporting to speak an Australian indigenous language at home. The ASU notes that while the census did not capture every fluent language speaker, this evidenced the community's needs and availability of community language skills and that any particular language skill is highly specialised, so is therefore not accounted for in the classification structure where it refers to basic communication skills.