

Fair Work Act 2009

s.156—4 yearly review of modern awards

(AM2016/31)

**HEALTH PROFESSIONALS AND
SUPPORT SERVICES AWARD 2010**

SUBMISSIONS IN REPLY

**ASSOCIATION OF PROFESSIONAL ENGINEERS, SCIENTISTS
AND MANAGERS, AUSTRALIA (APESMA)**

Introduction

1. These Submissions are filed in reply to the submissions of Australian Business Industrial and The NSW Business Chamber Ltd filed 11 May 2018. These Submissions in Reply are filed in accordance with the Directions of Vice President Catanzariti, made on 15 March 2018.

Review of the Opposition to APESMA's Application

2. The parties opposing APESMA's original application to vary the Health Professionals and Support Services Award 2010 (the Award), and their submissions, were listed and summarized by the Fair Work Commission in the document titled 'AM2016/31 – summary of submissions – substantive issues' dated 27 November 2017. The following parties were listed as having filed submissions opposing the claim:
 - a. Private Hospital Industry Employers Association;
 - b. Australian Business Industrial and The New South Wales Business Chamber Ltd;
 - c. Australian Industry Group;
 - d. Aged Care Employers.

3. The Award was listed for hearing before the Full Bench on 11 December 2017.
4. At the hearing before the Full Bench on 11 December 2017 APESMA tendered into evidence the following five witness statements in support of our application for a variation to the Award:
 - a) Exhibit APESMA – 1;
 - b) Exhibit APESMA – 2;
 - c) Exhibit APESMA – 3;
 - d) Michael Morgan;
 - e) Niki Baras
5. When listed for hearing on 11 December 2017 no opposing party sought to rely upon witness evidence in support of their opposition to APESMA’s application and no opposing party sought to cross-examine any of APESMA’s witnesses.
6. On the opening day of the hearing on December 2017 and following the Applicant’s opening statement, Vice President Catanzariti and Deputy President Booth requested that relevant parties consider resolution of APESMA’s application on the basis the occupations of Translator and Interpreter continue to sit in the support services stream but continue to have award coverage if individuals performing those occupations move around to other industries. (Please see PN669 to PN717 of the Transcript for Monday 11 December 2017). On that occasion Deputy President Booth directed the following question to Ms Hepworth appearing on behalf of the Private Hospital Industry Employers Association:

“Ms Hepworth, if the applicant agreed that the occupation was to sit in the support services stream but still sought to have a coverage provision that meant that that particular classification would, as it were, travel with those translators and interpreters if they moved around other industries, would you be opposed to that?”

Ms Hepworth responded:

“No, that would be fine, thank you.”(PN705)

7. Vice President Catanzariti issued Directions on 15 March 2018 that provided (among other things) that:
 - a. the Applicant is to file an amended draft clause in relation to Translators and Interpreters by Friday 30 March 2018; and
 - b. any party opposing the variation is to file detailed written submissions in reply in relation to the draft clause and whether or not any other modern award more appropriately deals with Translators and Interpreters by 11 May 2018.

The Draft Clause

8. APESMA filed an amended draft clause in the Fair Work Commission on 29 March 2018 which proposed the following variation to the Award:

Further to the Decision and Reasons for Decision in AM2016/31, it is determined pursuant to section 156(2)(b)(i) of the Fair Work Act 2009, that the Health Professionals and Support Services Award 2010 be varied as follows:

[A] Clause 4 – by inserting new subclauses (c) and (d) at the end of Clause 4.1 as set out below:

4. Coverage

4.1 This industry and occupational award covers:

(a) employers throughout Australia in the health industry and their employees in the classifications listed in clauses 14—Minimum weekly wages for Support Services employees and 15—Minimum weekly wages for Health Professional employees to the exclusion of any other modern award;

(b) employers engaging a health professional employee falling within the classification listed in clause 15.

(c) employers throughout Australia engaging employees performing the indicative roles NAATI credentialed Interpreter or NAATI credentialed Translator, falling within the classification B.1.5. Support Services employee – level 5 listed in Schedule B.

(d) employers throughout Australia engaging employees performing the indicative roles non NAATI credentialed Interpreter or non NAATI credentialed Translator, falling within the classification B.1.5. Support Services employee – level 5 listed in Schedule B.

[B] Schedule B—Classification Definitions; B.1.5 Support Services employee—level 5 – by deleting “Interpreter (unqualified)” and inserting “non NAATI credentialed Interpreter” and also inserting “non NAATI credentialed Translator”;

[C] Schedule B—Classification Definitions; B.1.7 Support Services employee—level 7 – by deleting “Interpreter (qualified)” and inserting “NAATI credentialed Interpreter” and also inserting “NAATI credentialed Translator”.

[D] Clause 3. Definitions and interpretation – Insert “NAATI means National Accreditation Authority for Translators and Interpreters Ltd” after the definition of “My Super product” and before the definition of “NES”.

9. To date no parties have filed submissions opposing the form of the draft clause or suggesting alternative drafting.

10. Australian Business Industrial (ABI) and The NSW Business Chamber Ltd (NSW BC) are the sole party who have filed submissions opposing the proposed variation. ABI and NSW BC’s opposing submissions dated 11 May 2018 are

made on the basis that the proposed variation (a) is inconsistent with the structure of the modern awards system; (b) is unnecessary as an adequate safety net already exists and (c) is inconsistent with the modern awards objective as it will result in the application of a potentially unfair and certainly irrelevant safety net of terms and conditions to these employees. (Please see paragraphs 18 to 23 of these submissions for our response to ABI and NSW BC's submissions dated 11 May 2008 generally).

Whether or not any other modern award more appropriately deals with Translators and Interpreters

11. ABI and NSW BC undertook an analysis of the current list of modern awards and identified two instruments containing classifications which expressly cover employees performing the role of translator and / or interpreter. These awards were:
 - a. Aged Care Award 2010; and
 - b. Amusement, Events and Recreation Award 2010

12. APESMA agrees that Schedule B (Classifications Definitions) to the Aged Care Award 2010 includes references to the indicative roles 'Secretary Interpreter (unqualified)' (see **B.5 Aged care employee—level 5**) and 'Interpreter (qualified)' (see **B.7 Aged care employee—level 7**), and as such the classifications appear to mirror the manner in which the roles are classified within the Classifications clause of the Health Professionals and Support Services Award 2010.

13. APESMA also agrees that the Amusement Events and Recreation Award 2010 contains an indicative role "Interpreter" in Schedule B (Classification Structure) (see **B.5 Grade 4**).

14. In APESMA's submission, the Health Professionals and Support Services Award 2010 is the more appropriate modern award to provide safety net coverage to all

translators and interpreters not covered by another award, (as opposed to the Aged Care or Amusement, Events and Recreation Awards). All five of APESMA's witnesses estimated (in uncontested evidence tendered to the Full Bench) that at least 70% (and in one case up to 85%) of jobs the interpreters perform are within the health industry. Further, one of APESMA's witnesses, Mr Michael Morgan, is the Director of an interpreting and translating agency that employs approximately 210 interpreters. Mr Morgan gave uncontested evidence that 70-80% of the interpreting work his agency's employees performed was within the health industry.

15. If APESMA's application is successful, and translators and interpreters gain occupational coverage by the Health Professionals and Support Services Award 2010, any interpreter employed by an employer in the Aged Care industry will continue to be covered by the Aged Care Award 2010. This will be because of the operation of subclause 4.7 of that award which states as follows:

AGED CARE AWARD 2010 [MA000018]

4.7 Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

The Amusement, Events and Recreation Award 2010 contains an identical provision at subclause 4.6.

16. ABI and NSW BC also identified four awards where the role interpreter and / or translator are not expressly covered by the Award but where some interpreting or translating tasks may be performed as part of or supplementary to an employee's substantive role. (Please see paragraphs 7.4 to 7.9 of the submissions of ABI and NSW BC dated 11 May 2018.) It is APESMA's submission that none of these awards will be more appropriate to deal with Translators and Interpreters (than the Health Professional and Support Services Award 2010) as each provides only for

an extra allowance for employees performing a different role to interpreters and translators (for example an Enrolled Nurse) when the employee utilizes language skills in the performance of their specific substantive role.

17. Should the coverage clause of the Health Professionals and Support Services Award 2010 be extended in accordance with APESMA's submission, there will be no effect on the employers and employees covered by the four awards referred to in paragraph 16 above. The employees eligible to receive the additional payments referred to in those four awards are not employed as interpreters or translators. In each case, the employee's substantive role (and that role's principal purpose or primary function) will determine their award coverage which will remain unchanged.

Reply to ABI and NSW BC's submissions

18. We refer to paragraph 5 above and confirm that ABI and NSW BC have called no witness evidence or probative evidence in support of their opposition to APESMA's application. As such we object to the assertions and statements of opinion advanced in the following paragraphs of ABI and NSW BC's submissions dated 11 May 2018:

- a. 1.3 c);
- b. 5.14;
- c. 7.10 b); and
- d. 10.9.

19. All of the assertions and statements of opinion referred to in paragraph 18 above describe a negative impact upon employers should the coverage provision of the Award be extended in accordance with APESMA's application. It should be noted that the only evidence relating to the likely impact upon employers of the draft clause that is before the Fair Work Commission has been provided by APESMA and in the form of the witness statement of Mr Michael Morgan, Director of an

interpreting and translating agency that employs approximately 210 interpreters. Mr Morgan's (uncontested) evidence was that "if there was one award which governed the minimum conditions of employment covering all employed NAATI accredited / recognized interpreters regardless of the industry in which they were working, it would be a positive for our business This is because we would be able to operate as a business in the confidence that there was one legal instrument dictating the minimum terms under which we must employ our interpreters and translators regardless of the industry, while having the certainty that our competitors would also be bound to employ in accordance with the same instrument. Also, it would be easier administratively, only having to keep track of the one award in ensuring the business is complying with its obligations under employment laws."

20. APESMA agrees largely with the statements made by ABI and NSW BC in the following paragraphs of its submissions dated 11 May 2018:

- a. 5.9;
- b. 8.1 to 8.12 (both inclusive)

21. With respect to paragraph 5.9 of ABI and NSW BC's submissions dated 11 May 2018, Mr Morgan's evidence as referred to in paragraph 19 above is consistent with the assertion that "an outcome whereby an employer is more likely to find itself covered by a single modern award rather than multiple separate awards for each occupation of employee it employees (potentially with different terms and conditions of employment) is desirable". It is APESMA's submission that if our application is granted, employers of interpreters and translators will have the certainty of knowing there is one modern award with which they must comply, regardless of whether their employee is performing work in a health care setting or in another environment (which will occur in approximately 30% of jobs).

22. With respect to paragraph 8 of ABI and NSW BC's submissions dated 11 May, APESMA submits that our translator and interpreter members are very often

employed by agencies as casual employees. All four of the witnesses who gave evidence in support of APESMA's application were employed by agencies in circumstances where subclauses 4.5 and 4.6 of Clause 4 of the Health Professionals and Support Services Award 2010 apply. As a result of the application of subclauses 4.5 and 4.6, translators and interpreters who are currently employed by employers supplying labour on an on-hire basis to host organisations in the health care industry are covered by the Award (but only when they perform interpreting / translating jobs in a health industry setting). APESMA's application seeks to ensure that coverage is extended to the remaining 30% of translating / interpreting jobs that are performed outside the health industry.

23. We refer to Clause 5 (5.1 to 5.14 inclusive) of the ABI and NSW BC's submissions dated 11 May and say in response that the modern awards made as a consequence of the award modernization process under part 10A of the Workplace Relations Act 1996 fall into three categories:

- a) awards that cover an industry or industries;
- b) awards that cover an occupation or occupations; and
- c) hybrid awards that have both an industry coverage and also an occupational coverage.

Examples of awards that fall under the third category include the Professional Employees Award 2010, the Manufacturing and Associated Industries and Occupations Award 2010 and the Health Professionals and Support Services Award 2010. As such, varying the coverage clause of the Health Professionals and Support Services Award 2010 in order to grant a group of employees occupational coverage under the Award (that they are already covered by for 70% of the work they perform), is not in APESMA's submission, "inconsistent with the structure of the modern awards system".

Association of Professional Engineers Scientists Managers Australia (APESMA)

13 June 2018