

IN THE FAIR WORK COMMISSION

MATTER NO.: AM2018/26

S 156 – 4 YEARLY REVIEW OF MODERN AWARDS – SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010

SUBMISSION OF THE AUSTRALIAN SERVICES UNION

1. This submission is made in response to the Directions issued by the Fair Work Commission on 1 May 2019 in relation to *Social, Community, Home Care and Disability Services Industry Award 2010* ('SCHDS Award').

Community language skills and classification structure

2. The Fair Work Commission directed any interested part party to file submissions on whether community language skills are contemplated within the existing classification structure. These submissions address only the classifications covered by the ASU: Social and Community Services ('SACS') and Crisis Accommodation employees.
3. These classifications are found in *Schedule B – Classification Definitions – Social and Community Services Employees* and *Schedule C – Classification Definitions – Crisis Accommodation Employees*. The Crisis Accommodation classification descriptors replicate the classification descriptors for SACS employee Levels 3 through 6 almost word for word.
4. The classification descriptors for SACS and Crisis Accommodation employees do not reference community language skills, bilingual workers, interpreters or translators. The only specific to references to any language skills are in the classification descriptors for SACS Employee Level 1 and SACS Employee Level 2. Both classifications list 'basic numeracy, written and verbal communication skills relevant to the work area' as requirements for the position.¹ It is unlikely that community language skills could be characterised as 'basic' skills, given the prevalence of English in Australia. More importantly, 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.

Award history

5. The award history also suggests that community language skills are not contemplated in the SACS and Crisis Accommodation classifications. It appears that the use of community languages was not considered in the making of the SCHDS Award or in the making of the pre-modern awards from which the classification structure is derived.
6. The classification structure in the SCHDS Award for SACS and Crisis Accommodation employees (Schedules B and C) is derived from *Social and Community Services (Queensland)*

¹ SCHDS Award, Schedule B.1.3(a)(ii),

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Award 2001 (**‘the QLD SACS Award’**)² and the and the *Crisis Assistance Supported Housing (Queensland) Award 1999* (**‘QLD CASH Award’**).³ Initially, a different classification structure, based on a Victorian federal award, applied to disability services employees.⁴ However, the AIRC varied the SCHDS Award so that Disability Services would also be covered by the SACS classification definitions in Schedule B.⁵ At Award Modernisation, the ASU claimed an ‘Occasional Interpreting Allowance’ for the SCHDS Award.⁶ However, this allowance was not included in the final version of the SCHDS Award. No reasoning was given for this decision.

7. The classification structures in the QLD SACS Award and the QLD CASH Award were based on the *Queensland Local Government Officer’s Award 1992* ‘Community and Environment Stream’ with some adaptations to the SACS and CASH sectors. The classifications in the QLD SACS Award and the QLD Cash Award are basically identical to the current SCHDS Award SACS and Crisis Accommodation employee classifications.
8. It appears that both the QLD SACS Award and QLD CASH Awards were made by consent.⁷

Equal remuneration decisions

9. However, the wages of most employees covered by the Schedules B and C are not set solely by the SCHDS Award. Wages for most award-dependent SACS and Crisis Accommodation workers are set by the Transitional Pay Equity Order (**‘TPEO’**) or the 2012 SACS Equal Remuneration Order (**‘ERO’**). Neither of these instruments contemplated the use of community language skills in setting wage rates.
10. The TPEO applies to employees of non-constitutional corporations in Queensland who were covered by the *Queensland Community Services and Crisis Assistance – State 2008* (**‘QLD State Award’**) immediately before 1 January 2010.⁸ The TPEO preserves the wage rates set by the equal remuneration and work value decision of the Queensland Industrial Relations Commission in *QSI v QCCI*.⁹
11. The QLD State Award was made to ensure award coverage for SACS services previously covered by the federal industrial jurisdiction after the Work Choices amendments to the *Workplace Relations Act 1996*.¹⁰ Previously, employers and employees would have been covered by the federal QLD SACS Award and QLD CASH Award. The QLD State Award was made by consent, operative from 3 November 2008.
12. The classifications from the QLD SACS Award and the QLD CASH Award were imported into the QLD State Award with. Consequently, the SACS and Crisis Accommodation classifications of the SCHDS Award are almost identical to the classifications in the QLD State Award.

² [2009] AIRCFB 865, [101].

³ [2009] AIRCFB 865, [102].

⁴ [2009] AIRCFB 865, [104].

⁵ [2010] FWAFB 2024.

⁶ Australian Services Union, *‘Parties Draft Awards – Social, Community and Employment Services Industry Award 2010’*, submission in AM2008/13, dated 24 July 2009, clause 17.9.

⁷ *N4670; QCU v QCCI* [4.4.4].

⁸ It is a statutory instrument, see regulation 3.03B of the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* as a Transitional Pay Equity Order under Part 8 of Schedule 3 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

⁹ *QCU v QCCI & Other* [2009] QIRC comm. 33: 191 QGIG 19 (**‘QCU v QCCI’**).

¹⁰ *QCU v QCCI*, [1.1].

13. Wage rates in the QLD State Award were set by Commissioner Fisher in *QCU v QCCI*. These rates reflected work value changes and equal remuneration principles. Work value and equal remuneration issues were considered in great detail. This included detailed discussion of the ‘soft skills’ used by SACS and Crisis Accommodation workers that needed valuation. However, this did not include discussion of the use of community languages in work.¹¹ However, the decision did not consider the use of language skills by SACS or Crisis Accommodation Employees.
14. The ERO Decision considered the skills and qualifications of SACS and Crisis Accommodation employees in detail.¹² However, this did not involve the consideration of role of bilingual workers in the sector or the use of community language skills.

Industry data and equal remuneration order

15. As per the email from AFEI to the Fair Work Commission dated 17 May 2019, the ASU, AFEI and NDS will intend to file a joint position on this matter early next week.

Modern Awards containing reference to translators and interpreters

16. The Commission asked the parties if the Background Document listing of modern awards¹³ containing references to translators and/or interpreters and/or language allowances was (a) correct and (b) the relevance of this information to the matter.
17. The ASU believes that the information in the Background Document is correct.
18. The ASU’s application does not concern translators or interpreters. This is because employees will usually be specifically engaged and classified as interpreters or translators. The ASU’s application relates to employees who use their community language in the course of their duties but are not engaged as translators or interpreters.
19. For instance, the *Aged Care Award 2010* lists ‘interpreter (unqualified)’ as an indicative task for Aged Care Employee Level 5¹⁴ and ‘Interpreter (qualified)’ as an indicative task for Aged Care Employee Level 7.¹⁵ The *Broadcasting, Recorded Entertainment and Cinemas Award 2010* is another good example, because it provides for classifications for accredited translators working as ‘subtitlers’ and ‘subtitling editors’.¹⁶ However, the BREC Award also provides for a Language Allowance at clause 18.6 where the 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 duties’ [emphasis added].¹⁷ This allowance is not necessarily paid because an employee is working as a translator or interpreter.
20. However, a number of Award provide for a number of ways of remunerating employees for the use of language skills. These provisions are relevant to the ASU’s application because they show that:

¹¹ *QCU v QCCI*, [4.2.2], [4.4.5], [6.5].

¹² See [2011] FWAFB 2700, [35]-[41], [146]-[165].

¹³ [Fair Work Commission, Background Document, Dated 26 April 2019.](#)

¹⁴ *Aged Care Award 2010*, Schedule B.5.

¹⁵ *Aged Care Award 2010*, Schedule B.7.

¹⁶ *Broadcasting, Recorded Entertainment and Cinemas Award 2010* (‘BREC Award’), Schedule b.1.

¹⁷ BREC Award, clause 18.6(a).

- a. many awards in the community, local government, public services, and private sectors provide for language skill related allowances; but
 - b. there is no standard rate of remuneration for the with the use of language skills in Modern Awards;
 - c. there is no standard way of describing the use of language skills in Modern Awards;
 - d. many awards provide allowances for language skills without requiring accreditation as a condition of payment.
21. For instance, the *Health Professionals and Support Services Award 2010* provides for an ‘Occasional interpreting allowance’ at clause 18.9. This 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. This allowance is 0.11% of the standard rate per occasion, capped at 1.27% of the standard rate per week.
22. In another example, the *Aboriginal Community Controlled Health Services Award 2010* (‘**ABCCCHS Award**’) provides for an annual ‘Bilingual qualification allowance’ at clause 15.1. This allowance 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’¹⁸ who is ‘regularly required in the course of their duties to use one or more of those languages’.¹⁹ However, employees are required to provide proof of bilingual proficiency and accreditation before being paid the allowance.
23. Additionally, the *Airline Operations – Ground Staff Award 2010* provides for a ‘Foreign Language Allowance’ at clause 21.14. This allowance is paid when an employee ‘is required by the employer to speak a foreign language’. There is no requirement for accreditation.

Other industrial instruments that contain community language allowances

24. The Commission directed the ASU and AIG to file agreed material regarding other industrial instruments that contain community language allowances. An agreed list of 39 industrial instruments was filed on 17 May 2019.

Community language allowance scheme and accreditation process

Community Language Allowance Scheme

25. The ‘Community Language Allowance Scheme Handbook 2018’ appears to be an administrative document describing the New South Wales state government’s community language allowance scheme. This appears to operationalised community language allowances provided by several NSW State awards, including the *Crown Employees (Public Sector – Salaries 2018) Award* (NSW), the *Services NSW (Salaries and Conditions) Employees Award 2016* (NSW), *Crown Employees (Administrative and Clerical Officers – Salaries) Award 2007*.
26. 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.

¹⁸ ABCCCHS Award, cl 15.1(a).

¹⁹ ABCCCHS Award, cl 15.1(b).

Accreditation process

27. The leading body for the accreditation of interpreters and translators is the National Accreditation Authority for Translators and Interpreters ('NAATI'). NAATI is a company jointly owned by the nine governments of Australia. NAATI is responsible for setting, maintain and promoting professional standards for translating and interpreting. It offers professional accreditation for interpreters and translators.²⁰ The ASU's application does not concern interpreters and translators, so these accreditations are not relevant to the application.
28. NAATI also offers testing for community language skills, through Community Language Aide testing. NAATI describes this testing as being 'used by public and private sectors to determine eligibility for language allowances'.²¹ NAATI says 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'.²² The NAATI website describes this testing as assessing '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'.²³ At present, the fee for Community Language Aide testing is \$385.00.²⁴
29. The evidence before the Commission shows that the SACS sector has relied on the community language skills of its employees without requiring accreditation for a significant period of time.²⁵ It would be unfair to require accreditation as a condition for the payment of the allowance, since employers have actively sought out accredited employees. Additionally, any requirement for accreditation would add an undue administrative burden on the employer.

Part-time employment and casual employment Full Bench

30. The Commission directed the parties to comment on the description of the operation of the NDIS by the *Part-time employment and casual employment Full Bench (AM2014/196 and AM2014/197)* at [554] and [630]-[632] of [2017] FWCFB 3541.
31. The ASU believes that the information is generally correct, except for the following comments.

Australian Business Industrial ('ABI') Submissions at [554]

32. Paragraph [554] includes a summary of submissions made by ABI:

[554] The NDIS, broadly speaking, funds persons with disability directly, rather than via disability services organisations, and thereby allows persons with disability and their carers to purchase the support services they need in accordance with individualised NDIS plans. This has meant that persons with disability are able to exercise a far greater level of choice and control over how, when, where and by whom their disability support services are delivered. ABI contends that the NDIS is radically changing the disability support services sector, in that employers have lost a large degree of control over when work is required to be performed, and accordingly require much greater flexibility in the allocation of working hours to part-time employees so that they can operate in a way which is responsive to client demand. Absent such flexibility, ABI contends that there is a substantial risk that the workforce in the sector, which will need to expand significantly in order to

²⁰ NAATI [Who We Are](#).

²¹ NAATI [CLA Testing](#).

²² Ibid.

²³ Ibid.

²⁴ NAATI, [NAATI Forms and Fees 2018/2019](#).

²⁵ See Statement of Nadia Saleh; Statement of Ruchita, [4], [9]-[13]; Statement of Lou Bacchiella, [10].

meet the demand for individualised services generated by the NDIS, will become casualised. The ABI claim was supported by Jobs Australia, which is a national peak body of non-profit organisations that assist disadvantaged people into work. [Emphasis Added]

33. The Full Bench ultimately disagreed with these submissions, finding that:

[639] *Third, we do not consider that the evidence establishes that changes to the scheduling of attendances or cancellations at short notice have become such a major feature of the operation of the NDIS that it is necessary at this time for the SCHCDSI Award to be altered to allow for the employer to be able to impose unilaterally short notice roster changes on employees. The basic elements of the NDIS lend themselves to reasonably predictable workforce planning. Many of the forms of support that are funded in individualised NDIS plans are (as Mr Bowden said) regular and predictable. The service agreement between the participant and the provider of a support service allows for providers to deal with participants in a structured and consistent way, with requirements for cooperation and communication as to when services are provided, notice periods for cancellations, payment where insufficient notice of a cancellation is provided, and notification to the NDIA for a review of the plan if cancellations become excessive. Ultimately an agreement may be terminated by the provider if it becomes impracticable and financially unviable. There are some support services, such as accompanying participants to social events, which are necessarily irregular and may arise at relatively short notice, but they may be accommodated by part-time employees working additional hours as well as by the use of casual employees.*

[640] *Fourth, we consider it unlikely that the market for disability support services which the NDIS is establishing will give participants the degree of market power that some of the employer witnesses implicitly suggested it would. It is clear that for many types of supports, participants value support workers who provide a high quality and amenable service, and they also value having continuity in the personnel who provide the service. In that context, we cannot envisage that participants will be in a position to demand from providers as a matter of course the disability service worker they prefer at whatever time they may choose to nominate from week to week. The massive expansion in the number of participants which will occur as the NDIS is rolled out, and the concomitant expansion in the workforce which will be required in order to service these participants, tend to indicate that providers will need to, and will be in a position to, limit the extent to which participants can demand the provision of services on a discretionary and unplanned basis. Further, because the workforce will be almost entirely award-dependent as a result of the NDIA's control over prices for services, it is unlikely that providers will be able to attract the part-time workers they need to service participants without being able to offer a compensating degree of stability in the hours required to be worked. The evidence does not suggest that part-time disability work will, for example, be attractive to or suitable for the high numbers of students and other young people who work in the retail and hospitality sectors, and stability of hours is likely to have greater value to a more mature workforce.*

34. The findings in [639] and [640] are relevant to the present proceedings.

Client cancellations

35. At [631], the Part-time employment and casual employment Full Bench found:

in relation to cancellations of supports by the participant, "We understand that situations may occur that mean participants need to change or cancel support. When this happens, it is appreciated if participants provide at least 24 hours notice to reduce any impact on business... Should the Participant not provide 48 hours notice of his or her inability to participate in the service, [the provider] will be entitled to claim from NDIA for payment of such Service... When cancellations or 'no shows' exceed 8 times per year, [the provider] must notify the NDIA so that consideration can be made to review the plan"; and

36. The NDIS price guide states that NDIS providers may charge up to 90% of the agreed price for cancelled appointments for personal care and community access up to 12 times per year without notifying the department. For other supports, an NDIS provider may only charge for cancelled appointments if they received notice of the cancellation later than 3.00pm the day before.²⁶

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²⁶ National Disability Insurance Agency, *'NDIS Price Guide New South Wales, Queensland, Victoria and Tasmania 2018/2019'*, p 18.