

BEFORE THE FAIR WORK COMMISSION

Fair Work Act 2009 (Cth)

Title of matter: 4 yearly review of modern awards – *Social, Community, Home Care and Disability Services Industry Award 2010* – Substantive Issues

Matter Number: AM2018/26

Section:

Document: Submission

Filed: Pursuant to Directions issued 1 May 2019

Lodged by: Australian Federation of Employers and Industries	Telephone: (02) 9264 2000
Address for: Australian Federation of Employers and Industries	Facsimile: (02) 9264 5699
Service: PO Box A233, Sydney South NSW 1235	Email: nicola.shaw@afei.org.au

Background

On 1 May 2019, the Full Bench of the Commission in matter AM2018/26 issued Directions concerning a further opportunity to file material or provide submissions on specified topics.

AFEI has filed an agreed position with the ASU and NDS concerning Question D. Industry data and the Equal Remuneration Order.

The Australian Federation of Employers and Industries now makes the following submission concerning:

1. A. Modern Awards containing reference to translators and interpreters
2. E. Community language skills and the classification structure
3. F. Part-time employment and Casual employment full bench

A. *Modern Awards containing reference to translators and interpreters*

1. On 26 April 2019, the Commission published a Background Document (**the Document**) which set out details of Modern Awards and Modern Enterprise Awards containing references to translators and/or interpreters and/or language allowance.
2. The Background Document has been published in the context that the ASU has made an application for a community language skills allowance to be inserted into the SCHADS Award. A draft determination outlining the terms of the ASU's proposed variation was filed by the ASU on 15 April 2019 (**ASU proposed allowance**).
3. Parties have been asked to comment on the accuracy and the relevance of the Background Document.

Accuracy of the Document

4. We have identified some minor inconsistencies between the Document and two Awards.
5. On page 14 of the Document refers to O.12.79(a) in the Australian Government Industry Award 2010 [MA000153]. We note there is no provision O.12.79(a) in that Award.
6. Page 14 of the Document refers to Clause 11.15(b) of the Parliamentary Departments Staff Enterprise Award 2016 [MA000145]. We note there is no Clause 11.15(b) in that Award.

Relevance of the Document

7. For the following reasons, the inclusion of interpreter/ translator/ language provisions in the Awards listed in the Background Document does not support the ASU's proposed allowance being included in the SCHADS Award:
 - a. **Firstly**, more than half the Awards in the Document are not private-sector industry awards, and are therefore irrelevant to the ASU's proposed allowance;
 - b. **Secondly**, of the private-sector industry awards, none contain a 'community language skills allowance.'
 - c. **Thirdly**, the ASU's proposed allowance is excessive compared to other Awards;
 - d. **Fourthly**, all private-sector industry award allowances for interpreter/ translator/ language skills require verification of the skill as a condition for eligibility to the allowance.
 - e. **Fifthly**, none of the other Awards in the Document require the employer to source verification/accreditation of the required interpreter/ translator/ language skills.

A. Majority of Awards with interpreter/translator/language provisions are not private-sector industry awards

8. The Document has identified 13 Modern Awards containing references to translators and/or interpreters and/or language allowance. Of the 13 identified, less than half (6) are private-sector industry awards. Others are enterprise awards, state reference public sector awards, or government staff awards.
9. The existence of terms in enterprise awards, state reference public sector awards, and government staff awards should not be treated as having any weight in favour of the ASU proposed allowance. In particular:
 - a. **Terms in modern enterprise awards** must be recognised as being tailored to reflect employment arrangements specific to the enterprise (in accordance with the modern enterprise awards objective)¹. There is no detailed evidence before the Commission about the specific needs/operations/objectives of those enterprises subject to the enterprise awards, and as such no conclusions can be drawn about whether the rationale for translator/ interpreter/ language provisions in those awards also applies to the SCHADS Award.

¹ S168A

- b. **Terms in state reference public sector awards** must be recognised as being adapted to the effective administration of a state², and tailored to reflect employment arrangements that have developed in relation to state reference public sector employers and state reference public sector employees.³ As the SCHADS Industry Award applies largely to private-sector employers and employees, and is specific to the SCHADS industries, it is not appropriate to draw any conclusions about the inclusion of the translator/ interpreter/ language provisions in those awards, for the purpose of the ASU proposed allowance.
- c. **Government staff awards** relate to employment that is also in the public sector. Factors affecting the terms and conditions of employment relationships will therefore be vastly different for those covered by these awards. As the SCHADS Industry Award applies largely to private-sector employers and employees, and is specific to the SCHADS industries, it is not appropriate to draw any conclusions about the inclusion of the translator/ interpreter/ language provisions in those awards, for the purpose of the ASU proposed allowance.

B. Of the private-sector industry awards, none contain a ‘community language skills allowance’

- 10. Of the 6 private-sector industry awards included in the Document, none contain a ‘community language skills allowance.’ Rather, there are provisions for:
 - a. Bilingual qualification (in the Aboriginal Community Controlled Health Services Award 2010);
 - b. Interpreter (in the Aged Care Award 2010);
 - c. Foreign language use (in the Airline Operations Ground Staff Award 2010);
 - d. International host required to speak a second language (in the Amusement, Events and Recreation Award 2010);
 - e. 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
 - f. Interpreting duties (in the Health Professionals and Support Services Award 2010)

² s168F(1)(a)

³ s168F(1)(b)

11. The ASU's proposed allowance is for use of 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...' The ASU's proposed allowance does not however include a definition of 'community language skill.' The undefined nature of a 'community language skill' and the breadth of circumstances in which a person may qualify for the allowance, means that it involves an allowance for circumstances that go beyond what is contemplated in the other private-sector industry awards listed in the Document.
12. The ASU's proposed allowance should be distinguished from the abovementioned private-sector industry award provisions for the following reasons:
 - a. A person who has a 'community language skill' may not necessarily be 'bilingual.' There is no requirement in the ASU's proposed allowance that an individual be proficient in oral and/or written communication in a second language.
 - b. A person who has a 'community language skill' may not necessarily be capable of, or required to, or even perform work in, 'interpreting'. It would appear from the ASU's proposed allowance, that it could apply in circumstances where an employee who only speaks their native language (other than English), communicates in their native language with a client. This does not necessitate being bilingual or providing interpretation services.
 - c. Provision for an 'international host required to speak a second language' in the Amusement, Events and Recreation Award 2010 is not an allowance, but instead refers to an individual in very distinct circumstances, where the requirement to speak a second language would appear to cause them to be classified at a Grade 3 in the Award. As outlined above, there is no requirement in the ASU's proposed allowance that a person be proficient in oral and/or written communication skills in a second language.

The ASU's proposed allowance is excessive compared to other Awards

13. The allowances claimed by the ASU are significantly higher than, and disproportionate to, the majority of interpreter/language/translator allowances in other Modern Awards/Modern Enterprise Awards included in the Document.
14. The table below shows a summary of lowest and maximum translator/ language/ interpreter allowances in each Modern Award and Modern Enterprise Award identified in the Document⁴, as compared to the 'occasional demand' and 'regular demand' Community Language Skills allowances sought to be included in the SCHADSI Award by the ASU.

⁴ Excluding Aboriginal Community Controlled Health Services Award 2010, see [17] for comments concerning this Award.

Award	Lowest Allowance Weekly	Difference \$ difference pw % difference compared to \$47.04	Maximum Allowance Weekly	Difference \$ difference pw % difference Compared to \$70.56
ASU proposed allowance	\$47.04		\$70.56	
Airline Operations Ground staff Award 2010	\$5.53	\$41.51 750.63%	\$10.80	\$59.76 553.33%
Australian Capital Territory Public Sector Enterprise Award 2016	\$20.51	\$26.53 129.35%	\$41.04	\$29.52 71.93%
Australian Government Industry Award 2016	\$19.82* Annual \$1033.96	\$27.22 137.34%	\$39.65* Annual \$2067.89	\$30.91 77.96%
Australian Public Service Enterprise Award 2015	\$20.51	\$26.53 129.35%	\$41.04	\$29.52 71.93%
Broadcasting, Recorded Entertainment and Cinemas Award 2010	\$25.62* Annual \$1336.99	\$21.42 83.61%	\$51.32* Annual \$2676.67	\$19.24 37.49%
Christmas Island Administration Enterprise Award 2016	\$16.57* Annual \$864.04	\$30.47 183.89%		
Health Professionals and Support Services Award 2010	\$11.59	\$35.45 305.87%		
Nurses and Midwives (Victoria) State Reference Public Sector Award 2015	\$11.13	\$35.91 322.64%	\$11.13	\$59.43 533.96%
Parliamentary Department s Staff Enterprise Award 2016	\$20.51	\$26.53 129.35%	\$41.04	\$29.52 71.93%

*Annual rate divided by 52.16

15. The table above shows the community language skills allowance sought by the ASU for 'occasional demand' is 83% - 750% higher than the lowest interpreter/ translator/ language allowance provided in each of the other Awards.⁵

⁵ Excluding Aboriginal Community Controlled Health Services Award 2010, see [17] for comments concerning this Award.

16. The table above shows the community language skills allowance sought by the ASU for 'regular demand' is 71.9% – 553.3% higher than the maximum interpreter/ translator/ language allowance provided in each of the other Modern Awards/Modern Enterprise Awards.⁶
17. While the Aboriginal Community Controlled Health Service Award 2010 has a 'bilingual qualification allowance' of between \$36.95 and \$73.96 per week, these rates do not support the ASU's claim in respect to a Community Language Skills Allowance. This is for the following reasons:
- a. **Firstly**, the SCHADS Award rates of pay, inclusive of the ERO, are substantially higher than the rates of pay in the ACCHE Award.⁷ For example:
 - i. a SCHADSI Level 2.1 would have an ERO rate of at least \$987.20pw, which is \$111.10pw higher than the ACCHE Award weekly rate for a Level 2.1 (\$876.10).
 - ii. a SCHADSI Level 3.1 would have an ERO rate of at least \$1,098.47pw, which is \$162.27pw higher than the ACCHE Award weekly rate for a Grade 3.1 (\$936.20).

This is consistent with AFEI's submission that the classifications and rates of pay in the SCHADS Award already compensate employees for any use of community language skills.

- b. **Secondly**, eligibility for the allowance in the Aboriginal Community Controlled Health Service Award 2010 is conditional upon the employee providing proof of bilingual proficiency and accreditation, whereas the ASU's claim does not make receipt of the allowance conditional upon evidence of proficiency/accreditation. Given the lack of clear definition for 'community language skills' in the ASU's draft determination, there is no certainty that such skills are capable of accreditation.
- c. **Thirdly**, 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. The fact that the industry differs materially from the SCHADS Industry is evidenced by the existence of a separate modern award.

⁶ See above.

⁷ Notably, each of the ASU witnesses in support of the claim gave evidence in relation to employees who would have been covered by the ERO.

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

18. All private-sector industry awards with interpreter/ translator/ language allowances require the employee to have a qualification or provide proof they are proficient in that language, in order to be eligible for the allowance, which is not a feature of the ASU's proposed allowance.
19. While under the ASU's proposed allowance an employee who is 'required by the employer to use community language skills in the performance of their duties' is to be provided accreditation by their employer, a person may still be eligible for the allowance under proposed Cl. 20.10.3 even where the employer has not required the person to use community language skills. This feature is not supported by any of the other Awards listed in the Document.

None of the other Awards in the Document require the employer to source verification

20. None of the Awards in the 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 Awards in the Document which provide an allowance for interpreter/ translator/ language skills, verification is to be provided to the employee.

E. Community Language skills and the classification structure

21. During the course of proceedings on 16 April 2019, the Full Bench asked parties to consider whether community language skills are contemplated within the existing classification structure.
22. As outlined in our oral submissions, speaking a second language is common, and is not a new skill that has only developed since the introduction of the SCHADS Award. The need for communication skills whether that be in English or another language, is an important aspect of all roles, and could even be an inherent requirement depending on the circumstances.
23. As a threshold issue, the Commission may not find that there is any basis for awarding an allowance at all, if employees are already compensated for the use community language skills in their ordinary weekly pay⁸.
24. The classifications in the SCHADSI Award already compensate a person for using written and oral communication skills, and acquired skills and knowledge in the discharge of their duties.
25. Outlined below are examples of where these skills are already contemplated in the Award classifications (emphasis added):

Level 2

B.2.1(b)may contribute specific knowledge and/or specific skills to the work of the organisation

B.2.3 (a)(i) basic skills in oral and written communication with clients and other members of the public;

Level 3

B.3.1 (b) General features of this level involve solving problems of limited difficulty using knowledge, judgement and work organisational skills acquired through qualifications and/or previous work experience.

B.3.2(n)(ii) perform duties of a specialised nature

B3.3. (a)(iii) may utilise limited professional or specialised knowledge;

Level 4

B.4.1.(a) A person employed as a Social and community services employee level 4 will work under general direction in functions that require the application of skills and knowledge appropriate to the work....

⁸ S139(1)(g)(ii) The Fair Work Act 2009 Cth

B.4.1 (b) General feature of this level require the application of knowledge and skills which are gained through qualifications and/or previous experience in a discipline.....

B.4.2 (a) undertake activities which may require the employee to exercise judgement and/or contribute critical knowledge and skills where procedures are not clearly defined;

B.4.2 (b) perform duties of a specialised nature requiring the development of expertise over time or previous knowledge

B.4.2 (a)(iii) sound discipline knowledge gained through experiences, training or education

Level 5

B.5.1 (a)Employees undertake a range of functions requiring the application of a high level of knowledge and skills to achieve results in line with the organisation's goals

B.5.1 (d) Positions at this level demand the application of knowledge which is gained through qualifications and/or previous experience

B.5.2 (a)(v) exercise a high level of interpersonal skills in dealing with the public and other organisations;

Level 6

B.6.3 (a) (ii) specialist skills...

B.6.3 (a) (iii) specialist knowledge gained through experience, training or education.

Level 7

B.7.2 (h) develop appropriate methodology and apply proven techniques in providing specialised services

B.7.2 (i)(ii) provides a consultancy services to a wide range of clients

Level 8

B.8.3 (b) (iii) lesser formal qualifications and the acquisitions of considerable skills and extensive and diverse experience relative to an equivalent standard; or

B.8.3 (b) (iv) attained through previous experience, expertise and competence sufficient to perform the duties of the position

F. Part-time employment and casual employment Full Bench (AM2014/196 and AM2014/197)

26. The Commission asks whether the parties take issue with any of the observations made at paragraphs [554] and [630]-[633] in the Part-time employment and casual employment Full Bench Decision on 5 July 2017 ('July 2017 Decision').⁹
27. The written submissions, witness statements, and other documentary evidence produced to the Commission for the purpose of the relevant aspect of the Part-time employment and Casual employment proceedings, were filed in mid-late 2016.
28. Since that time, there have been several developments in the composition of the disability services industry and its workforce. To provide a comprehensive account of the operation and nature of the NDIS more recently, would be a substantial exercise. For the purpose of addressing the Commissions question in its Directions of 1 May 2019, AFEI provides preliminary comments below. AFEI expects to be filing (more detailed) materials and evidence about relevant nuances of the SCHADS industry in our reply to union claims in tranche two of these proceedings.

Participants

29. In the July 2017 Decision, the Full Bench observes the following, concerning the number of NDIS participants:

At [632] 'it is expected that the total number of participants in the NDIS will increase to about 460,000 by 2019, about 20 times the number of participants in July 2016'

At [633] 'it was estimated in 2011 that the workforce would have to double by the time of full implementation of the NDIS.'
30. As at 31 March 2019, NDIS indicated a total of 259,071 participants with an approved plan,¹⁰ with bilateral estimates across the states and territories during Transition (excluding Trial) at approximately 377,000 to 30 June 2019.¹¹
31. The rate at which participants are being approved into the NDIS has also been increasing significantly, with monthly approvals up from 5,474 in April 2018, to 12,222 in March 2019.¹²

⁹ AM2014/196 and AM2014/197 [2017] FWCFB 3541

¹⁰ NDIS National Dashboard as at 31 March 2019 - <https://www.ndis.gov.au/media/1359/download>

¹¹ NDIS COAG Disability Reform Council Quarterly Report 31 March 2019

¹² NDIS National Dashboard as at 31 March 2019 - <https://www.ndis.gov.au/media/1359/download>

Providers

32. At [632] of the July 2017 Decision, the Full Bench observes that in 2016 there were over 2,000 registered providers, and that the number of registered providers was expected to increase significantly.

The NDIS National Dashboard as at 31 March 2019 indicates that there are now 20,208 registered providers, comprised of 11,091 organisations (55%), and 9,117 sole traders (45%).¹³ Over the last 2 years there has been a notable increase in sole trader providers, which only accounted for 40% of registered providers as at 30 June 2017 (now accounting for 45%).¹⁴

Complexity, diversity, and evolution of the labour market

33. Other factors contributing to the complexity and diversity of the labour market for disability services include the introduction and growth of entity platforms (including internet-based) that connect in a number of ways individual NDIS-funded clients with individual or group support workers. While such entities do not provide the care, they are a notable feature and participant-type in the NDIS service delivery market (which do not appear to have been identified in the July 2017 Decision). In this category, there are various models which include:
- a. entities which provide the platform to connect service users and independent contractor support workers, arrange insurance for the independent contractors, and arrange invoicing on behalf of the independent contractors.
 - b. entities which connect service users with individual support workers, and assist the service users to directly employ the support workers.
 - c. entities which provide the platform for service users to advertise for support workers, connect with new/known support workers, and make bookings with individual support workers, who are paid as employees.
34. It should also be noted that there are considerable variations in supply and demand for services across Australia, as can be seen on the NDIS demand map (which can be reviewed region by region), and there is uncertainty surrounding forecasts on the number of workers that will be needed in the NDIS in the future.¹⁵

¹³ NDIS National Dashboard as at 31 March 2019 - <https://www.ndis.gov.au/media/1359/download>

¹⁴ NDIA Annual Report 2017-2018

¹⁵ <https://blcw.dss.gov.au/ndis-demand-map>

Thin Markets Project

35. The Department of Social Services (DSS) and the NDIA has recently commissioned the 'NDIS Thin Markets Project' 'to develop a structured approach to responding to thin market challenges in the NDIS.' 'Thin Markets' are defined for the purpose of the project, as 'a gap between the needs of participants and the services available in the market.' A discussion paper for the Thin Markets Project was released in April 2019. One of the identified thin market challenges is higher operating costs, summarised as involving:

'Low client numbers (or difficulty finding/connecting with clients that are in a region), and/or highly dispersed clients result in higher per-client costs than can be supported under existing NDIS staff utilisation.'

36. The Thin Markets Project discussion paper also acknowledges there are areas where 'providers have said there is not enough participant demand to support them to maintain a trained, skilled workforce' and that thin market challenges 'not only present barriers to new providers entering the NDIS, they may also constrain the ability of current providers to deliver services.'

Potential responses to thin markets are identified in the Thin Markets Project discussion paper as including 'market facilitation, market deepening, regulation, and alternative commissioning models.'¹⁶ Irrespective of the approach taken by the Department, it is apparent that the market will continue to evolve (with an unknown degree of intervention) at least in the next few years, and is far from 'settled.'

¹⁶ <https://engage.dss.gov.au/wp-content/uploads/2019/04/Thin-Markets-Project-Discussion-Paper-2019-04-05.pdf>