Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Health Professionals and Support Services Award 2010

(AM2016/31)

8 June 2017

4 YEARLY REVIEW OF MODERN AWARDS

AM2016/31 *HEALTH PROFESSIONALS AND SUPPORT SERVICES AWARD 2010*

1. INTRODUCTION

1. This submission is filed by the Australian Industry Group (**Ai Group**) in response to certain substantive variations sought by the Health Services Union (**HSU**) and the Association of Professional Engineers, Scientists and Managers, Australia (**APESMA**) in the context of the 4 yearly review (**Review**) of the *Health Professionals and Support Services Award 2010* (**Health Professionals Award** or **Award**) in accordance with the directions issued by Vice President Catanzariti on 23 November 2016 and a subsequent extension of time granted on 23 May 2017.

2. Specifically, the submissions relate to:

   - The HSU's claim in relation to Schedule C to the Award (List of Common Health Professionals); and

   - APESMA's claim in relation to translators and interpreters.

2. THE STATUTORY FRAMEWORK

3. The various claims here before the Commission are being pursued in the context of the Review, which is being conducted by the Commission pursuant to s.156 of the *Fair Work Act 2009* (**Act**).

4. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).

5. The modern awards objective is set out at s.134(1) of the Act. It requires the Commission to ensure that modern awards, together with the National Employment Standards (**NES**), provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at s.134(1)(a) – (h).

6. The modern awards objective applies to any exercise of the Commission's powers under Part 2-3 of the Act, which includes s.156.

7. We later address each element of the modern awards objective with reference to the numerous claims for the purposes of establishing that the provisions sought by the HSU and APESMA are not necessary in the sense contemplated by s.138 of the Act.

3. THE COMMISSION'S GENERAL APPROACH TO THE REVIEW

THE PRELIMINARY JURISDICTIONAL ISSUES DECISION

8. At the commencement of the Review, a Full Bench dealt with various preliminary issues. The Commission's *Preliminary Jurisdictional Issues Decision*[1] provides the framework within which the Review is to proceed.

9. The Full Bench emphasised the need for a party to mount a merit based case in support of its claim, accompanied by probative evidence (emphasis added):

> **[23]** The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.[2]

10. The Commission indicated that the Review will proceed on the basis that the relevant modern award achieved the modern awards objective at the time that it was made (emphasis added):

> **[24]** In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.[3]

[1] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

[2] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [23].

[3] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24].

11. The decision confirms that the Commission should generally follow previous Full Bench decisions that are relevant to a contested issue unless there are cogent reasons for not doing so: (emphasis added)

> **[25]** Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in Nguyen v Nguyen:
>
> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq."
>
> **[26]** While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin):
>
> > "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."
>
> **[27]** These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.[4]

12. In addressing the modern awards objective, the Commission recognised that each of the matters identified at s.134(1)(a) – (h) are to be treated "as a matter of significance" and that "no particular primacy is attached to any of the s.134 considerations". The Commission identified its task as needing to "balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net": (emphasis added)

> **[36]** … Relevantly, s.138 provides that such terms only be included in a modern award 'to the extent necessary to achieve the modern awards objective'. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms 'necessary to

[4] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24] – [27].

achieve the modern awards objective'. What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.[5]

13. The frequently cited passage from Justice Tracey's decision in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* was adopted by the Full Bench. It was thus accepted that:

> … a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action.

14. Accordingly, the Preliminary Jurisdictional Issues decision establishes the following key threshold principles:

- A proposal to significantly vary a modern award must be accompanied by submissions addressing the relevant statutory requirements and probative evidence demonstrating any factual propositions advanced in support of the claim;
- The Commission will proceed on the basis that a modern award achieved the modern awards objective at the time that it was made;
- An award must only include terms to the extent necessary to achieve the modern awards objective. A variation sought must not be one that is merely desirable; and
- Each of the matters identified under s.134(1) are to be treated as a matter of significance and no particular primacy is attached to any of the considerations arising from it.

[5] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [36].

15. In a subsequent decision considering multiple claims made to vary the *Security Services Industry Award 2010*, the Commission made the following comments, which we respectfully commend to the Full Bench (emphasis added):

> **[8]** While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.[6]

16. The claims mounted by the HSU and APESMA conflict with the principles in the Preliminary Jurisdictional Issues Decision. Further, they have not discharged the evidentiary burden described in the above decision. Accordingly, their claims should be rejected.

CONSIDERATIONS ASSOCIATED WITH PROCEDURAL FAIRNESS

17. We are of course mindful of the nature of the Review and the Commission's repeated observation that it is not bound by the terms of a proponent's claim. It is relevant to note, however, that a respondent party at this stage of the proceedings can deal only with that which has been put before us. That is, these submissions only relate to the variations sought and the material filed by the relevant interested parties in support of them. It is not incumbent upon us to provide a response (or a hypothetical response) to any potential derivative of the clauses sought. Such an approach would render the task here before us virtually impossible to undertake, particularly within the timeframes

[6] *Re Security Services Industry Award 2010* [2015] FWCFB 620 at [8].

imposed upon us by the Commission and the resource constraints we face due to the conduct of the Review generally.

18. Should the relevant parties or the Commission, during these proceedings, propose that the relevant award be varied in terms that differ to those which have been proposed as at the time of drafting these submissions, notions of fairness dictate that respondent parties such as Ai Group be afforded an opportunity to address the Full Bench in relation to whether such a course of action should be permitted or taken in the context of the proceedings. If such a course is to be adopted, there should also be a further opportunity to make submissions and/or call evidence in response to any such new proposal. Absent such a process, it may be argued that procedural fairness has not been afforded to those who oppose the claim. Such a concern may arise for reasons including such parties having not been granted a chance to be properly heard in relation to the variations ultimately sought to be made, which may well have implications that have not otherwise been put before the Full Bench.

4. HSU CLAIM: LIST OF COMMON HEALTH PROFESSIONALS

19. The submissions that follow relate to the HSU's claim regarding the list of common health professionals found at Schedule C to the Award.

THE CLAIM

20. Schedule C to the Health Professionals Award is titled 'List of Common Health Professionals'. The schedule identifies a broad range of health professionals.

21. Schedule B to the Award contains classification definitions. Specifically, B.2 sets out the classification definitions for employees classified as 'health professionals'. Before so doing, the following statement appears immediately following the heading of B.2:

> A list of common health professionals which are covered by the definitions is contained in Schedule C—List of Common Health Professionals.

22. The same statement appears at A.2 of the *Exposure Draft – Health Professionals and Support Services Award 2015* (**Exposure Draft**):

> A list of common health professionals which are covered by the definitions is contained in Schedule B—List of Common Health Professionals.

23. The HSU is seeking to replace the above with the following (with reference to the Exposure Draft): (emphasis added)

> An <u>indicative list</u> of common health professionals which are covered by the definitions is contained in Schedule B – <u>Indicative List of Common Practice Areas and Titles</u>.

24. The provision proposed would expand the potential coverage of the Award by rendering the list of common health professionals at Schedule B to the Exposure Draft a merely 'indicative' list, thus clearly leaving open the prospect that other health professionals may also be covered by the Award.

THE HSU'S CASE

25. The HSU's case is summarised in the paragraphs that follow:

> 10. A logical approach requires the list of health professions in Schedule B to be treated as indicative. To treat it as exhaustive would lead to confusion, uncertainty and inconsistency. As the statement of *Leszczynski* suggests,

> treating the list as exhaustive could potentially lead to an overly literal, and erroneous, approach which makes illogical distinctions between professional classifications.
>
> …
>
> 25. It is our strong view that, given this evolving nature of health professional terminology, the list in the Schedule must be indicative, and should be clarified as such. Otherwise, the [Award] would be stuck with the health professional nomenclature of a particular point in time, and would become quickly out of date, not adequately reflecting contemporary terminology and health and medical advances.[7]

26. It appears that the HSU considers that the proper interpretation of the Award, as it is presently drafted, is that the list of common health professionals is not an exhaustive one and that the Award should be 'clarified' so as to make this explicit. The union expresses two primary concerns with the alternate approach; that is, to read the list as an exhaustive one:

- That such an interpretation would lead to anomalous outcomes to the extent that certain professionals are excluded from the coverage of the Award because their "job" is "termed" using nomenclature that does not appear in the list, even in circumstances where another employee performing the very same work would be covered if their "job" was "termed" using language that appears in the list at Schedule C to the Award.[8]

- Such an interpretation would exclude "emerging health professionals" which are not listed in the schedule.[9]

27. Ai Group does not agree with the HSU's interpretation of the current Award, nor does it accept that the variation proposed should, as a matter of merit, be made.

[7] HSU submission dated 17 March 2017 at paragraphs 10 and 25.

[8] HSU submission dated 17 March 2017 at, for example, paragraph 11.

[9] HSU submission dated 17 March 2017 at paragraphs 20 – 21.

A PROPER INTERPRETATION OF THE AWARD

28. Clause 4.1 of the Award describes its coverage as follows:

> **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.

29. Pursuant to clause 4.1, the Award covers 'health professional' employees falling within the classifications listed at clause 15 on an industry and occupational basis.

30. Clause 15 of the Award prescribes the minimum weekly wages for 'health professional' employees by reference to the various classification definitions. Clause 15 does not of itself purport to define or describe the various classification levels or the meaning of the term 'health professional'.

31. Schedule B.2 to the Award contains the 'classification definitions' for 'health professional employees'. It first states as follows:

> A list of common health professionals which are covered by the definitions is contained in Schedule C—List of Common Health Professionals.

32. The classification definitions that follow use the term 'health professional' repeatedly, however the term itself is not defined in Schedule B or elsewhere in the Award. The various classification levels are differentiated by reference to an employee's level of experience, skills, competencies and possible duties. For instance, the classification definition for 'Health Professional – level 2' is in the following terms:

> **B.2.2 Health Professional—level 2**
>
> A health professional at this level works independently and is required to exercise independent judgment on routine matters. They may require professional supervision from more senior members of the profession or health team when performing novel, complex, or critical tasks. They have demonstrated a commitment to continuing

professional development and may have contributed to workplace education through provision of seminars, lectures or in-services. At this level the health professional may be actively involved in quality improvement activities or research.

At this level the health professional contributes to the evaluation and analysis of guidelines, policies and procedures applicable to their clinical/professional work and may be required to contribute to the supervision of discipline specific students.

33. As we have earlier mentioned, the term 'health professional' is, as such, undefined by the Award. We consider, however, that it must be read in conjunction with the statement appearing at B.2 (replicated above) and by extension, Schedule C. That is, the term 'health professional' takes its meaning from the aforementioned and must necessarily be read to include the professions listed at Schedule C.

34. It is relevant to note that the statement at B.2 is definitive in its terms. It refers to the list as identifying those health professionals that "are covered" by the definitions and does not, expressly or otherwise, state or suggest that the Award covers 'health professionals' generally. Rather, we read the statement at B.2 to make clear that it is the health professionals in Schedule C, and *only* those professionals that are covered by the Award.

35. Ai Group relies also upon a decision[10] made by the AIRC to vary the Health Professionals Award shortly after it was made as support for the view that the list contained in Schedule C is an exhaustive list of occupations covered by the Award. If the list of common health professionals contained in Schedule C was not exhaustive, then the effect of the AIRC's decision to remove dental hygienists from the list would be superfluous.

36. It is crucial to understand that any interpretation of the Award that suggests that the list is indicative rather than exhaustive, would give rise to considerable uncertainty. It would subsequently be impossible to ascertain precisely where the coverage of the instrument starts and finishes; an outcome that is quite clearly undesirable from the perspective of employers and employees. We return to this issue later in our submission.

[10] Re Health Professionals and Support Services Award 2010 [2009] AIRCFB 948.

THE POTENTIAL CONSEQUENCES ALLEGED BY THE HSU

37. We here propose to respond to the HSU's submissions regarding the potential consequences that it considers would arise from the proposition that the list at Schedule C is an exhaustive one.

38. **Firstly**, the HSU provides the following example of an instance in which it says that the application of the Award in the manner that we propose would be "nonsensical":

> 11. If the list is exhaustive, then at least arguably, an employee whose job was termed 'Remedial Masseur' would be covered by the Award, but an employee performing the same job with the same qualifications, but termed a 'Massage Therapist' would not be, and could arguably be award free. …[11]

39. We do not consider that the in-house job titles adopted by an employer necessarily affect award coverage in the manner alleged by the HSU. In order to ascertain whether a health professional is covered by the Award, regard must be had to whether they perform the work of any one of the 'health professionals' listed at Schedule C to the Award, irrespective of whether their employer elects to label their role using some other terminology. In the scenario described above, we do not consider that the employee would necessarily fall outside the ambit of the Award's coverage, although of course to reach a concluded view about this, further information about the employee's qualifications and duties would be required.

40. It is very common for employers to use different job titles to those used in an award. For example, employees in the manufacturing industry commonly use the job titles of fitter, boilermaker and electrician rather than the equivalent classifications used in the *Manufacturing and Associated Industries and Occupations Award 2010* of Engineering Tradesperson – Mechanical, Engineering Tradesperson – Fabrication, and Engineering Tradesperson – Electrical / Electronic respectively. The use of different job titles within an enterprise to those used in an award does not impact upon award coverage.

[11] HSU submission dated 17 March 2017 at paragraph 11.

41. **Secondly,** the HSU submits that:

> 12. The list includes a 'Child Psychotherapist', but does not list the more general term of 'Psychotherapist'. It seems illogical that a specialised Child Psychotherapist, but not another Psychotherapist, would be covered.[12]

42. To the extent that the HSU considers the above situation "illogical", it is of course open to it to make an application (in the context of the Review, pursuant to s.157 of the FW Act or, if relevant, s.160 which grants the Commission power to make a determination varying an award "to remove an ambiguity or uncertainty or to correct an error") in order to seek a remedy. The absence of a reference to a 'Psychotherapist' is a consequence of the formulation of the list at Schedule C during the Part 10A Award Modernisation process and the absence of a subsequent application being made by any interested party to vary the schedule in this regard. This does not in any way advance the HSU's case in the current proceedings.

43. **Thirdly**, the HSU[13] and its witness[14] make certain criticisms regarding the subset of professionals identified in conjunction with a 'Medical Imaging Technologist' in the current Schedule C. These issues too could simply be addressed by the HSU if it made an application to the Commission seeking the necessary amendments. Existing 'anomalies' (as characterised by the HSU) do not warrant a determination by the Commission that Schedule C is (or should be) an indicative list rather than an exhaustive one. Rather, the more appropriate course would be to consider any isolated instances of issues such as the one here raised by the union with a view to assessing whether a variation to the Award is necessary and if so, the terms of such a variation.

[12] HSU submission dated 17 March 2017 at paragraph 12.

[13] HSU submission dated 17 March 2017 at paragraph 14.

[14] Statement of Alex Leszczynksi dated 17 March 2017 at paragraphs 17 – 21.

44. **Fourthly**, the HSU's submissions and evidence identify examples of health professions that "evolve, diverge or simply change their names":[15]

- At paragraph 17 of its submissions, the HSU deals with 'art therapy'. We note that Schedule C includes a reference to 'Art Therapist'. Indeed this serves to establish that despite the allegedly evolutionary nature of health professions, the list of health professionals can and does reflect contemporary health professions.

- At paragraph 19 of its submissions, the HSU deals with 'clinical coders' who are *not* identified in the list at Schedule C. The proposition in response to these submissions is a simple one: should the HSU take the view that Clinical Coders should be included in the list, it is of course open to the union to make an application to the Commission, seeking an appropriate amendment to the list. Such an amendment might either take the form of an additional reference in the list or the insertion of a descriptor in relation to 'Health Information Manager' (which does appear on the list) such that 'Clinical Coders' are included in that category. We note that notwithstanding its concerns, the HSU has not made such a claim in this Review, nor has it made any prior application in this regard.

- Similar observations can be made about 'Child Life Therapist', 'Health Promotion Officer' and 'Oral Health Therapist'.[16] These examples of "emerging" and/or evolving health professions do not of themselves render the variation here sought by the HSU necessary to achieve the modern awards objective. To fundamentally alter the manner in which the list presently applies (and has done since the Award's creation) is not warranted simply because the HSU takes the view that there are certain additional professions that should be listed at Schedule C. As we have articulated above, the FW Act presents the union with multiple

[15] HSU submission dated 17 March 2017 at paragraph 18.

[16] HSU submission dated 17 March 2017 at paragraphs 20 – 22.

avenues that it may pursue in order to address the issues it has raised. If such an application were made, the Commission would have a proper opportunity to consider, in the context of a specific profession, whether it should as a matter of merit be included within the coverage of the Award. Such proceedings would enable the Commission to consider submissions and evidence that pertain specifically to the relevant profession, the necessary qualifications that such an employee must possess, such an employee's duties, whether the employees are currently covered by another modern award, whether s.143(7) of the Act is relevant and so on. This would be a far more sound, desirable and appropriate approach than that which is here proposed by the HSU, which would leave the parameters of the Award's coverage entirely unclear.

- It is common within industries for changes to occur in particular occupations. In respect of numerous other awards, proposals have been brought before the Commission by union and/or employer parties to update classification titles and definitions to reflect particular changes that have occurred. Such matters are dealt with by the Commission on their merits. This is the appropriate course; not the inappropriate approach proposed by the HSU in the current proceedings.

THE POTENTIAL CONSEQUENCES OF THE HSU'S CLAIM

45. The difficulties associated with the HSU's interpretation of the current clause and the implications of the variation it seeks to the Award are self-evident.

46. Fundamentally, the precise application of the Award would become entirely unclear. This is because any number of 'health professionals' might thereafter be covered by the Award, regardless of whether they are in fact identified in Schedule C. This issue would be exacerbated in circumstances where the term 'health professional' is not expressly defined by the Award *and* the coverage of the instrument is not constrained by a definition of the industry in which it applies, given that it is occupational in nature.

47. For example, as we shortly turn to, APESMA asserts in the written submissions it has filed in the context of these proceedings that "translators and interpreters are [h]ealth [p]rofessionals"[17]. It appears that this assertion is made regardless of the industry in which they are engaged to perform work.

48. We do not consider that translators and interpreters are "health professionals" when they are performing work in the health industry (as defined by the Award) or in any other. Translators transfer "a source of text from one language to another"[18] and interpreters transfer "a spoken or signed language into another spoken or signed language"[19]. Such an employee is self-evidently not trained or qualified to provide health care services and therefore, in our view, cannot properly be considered a "health professional" by any stretch of the imagination.

49. If the Award were varied as sought by the HSU, APESMA's submissions in this matter provide just one example of the types of arguments that might arise in circumstances where an interested party seeks to assert that a particular group of employees is covered by the Award. It seems that such argument would likely turn, at least in part, on a proper interpretation of the term 'health professional', which is not defined by the Award.

50. The potential uncertainty that would result from the variation sought by the HSU is quite clearly undesirable. It would render it extremely difficult to identify precisely where the coverage of the Award starts and finishes; an outcome that is obviously inconsistent with the need to ensure that the modern awards system is simple and easy to understand (s.134(1)(g)). The Commission would effectively be expanding the coverage of the Award in an indefinite manner, without proper consideration being given to the additional health professionals that would subsequently be covered by it and whether such an outcome would in fact be appropriate.

[17] APESMA submission dated 17 March 2017 at paragraph 28.

[18] APESMA submission dated 17 March 2017 at paragraph 30.

[19] APESMA submission dated 17 March 2017 at paragraph 29.

51. It is trite to observe that ordinarily, a proposed variation to award coverage is the subject of careful and detailed consideration by interested parties and the Commission, often in the context of hotly contested proceedings. Regard would be had to whether the relevant group of employees:

- Are presently covered by another modern award or award free;

- If they are presently covered by a modern award, which award that might be; and

- Whether it is *necessary*, in the sense contemplated by s.138 of the FW Act, that the proposed provision be included in the relevant award, which would necessarily involve a consideration as to whether the terms and conditions it prescribes are appropriate having regard to the work performed by the relevant employees and their employers' operations.

52. In the current context, the Commission is not able to make a determination as to the above issues because the necessary material has not been put before it. Crucially, due to the very nature of the variation sought, the Full Bench cannot identify precisely which additional employees would subsequently be covered by the Award.

SECTION 138 AND THE MODERN AWARDS OBJECTIVE

53. In exercising its modern award powers, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions taking into account each of the matters listed at ss.134(1)(a) – (h).

54. Additionally, the critical principle to flow from the operation of s.138 is that a modern award can only include such terms as are necessary to achieve the modern awards objective. The requirement imposed by s.138 is an ongoing one. That is, at any time, an award must only include terms that are necessary

in the relevant sense. It is not a legislative precondition that arises only at the time that a variation to an award is sought.

55. The employer parties in these proceedings do not bear any onus to demonstrate that the claim will result in adverse consequences for business. No adverse inference can or should be drawn from the absence of evidence called by employer parties or from the absence of evidence that establishes that the claim will affect all or most employers in an industry.

56. The conduct of the Review differs from an inter-party dispute. Those responding to a claim do not bear an onus. Rather, it is for the proponent of a claim to establish that the variation proposed is necessary in order to ensure that the Award is achieving the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions. In determining whether a proponent has in fact established as much, the Commission will have regard to material before it that addresses the various elements of the modern awards objective, including those that go to employment costs, the regulatory burden, flexible work practices and productivity. These considerations are both microeconomic and macroeconomic; they require evaluation with respect to the practices of different types of businesses as well as industry at large.

57. As the Full Bench stated in the Preliminary Jurisdictional Issues Decision: (emphasis added)

> The proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations[20]

58. It is therefore for the HSU to overcome the legislative threshold established by ss.138 and 134(1). For all the reasons we have here set out, the HSU has *not* overcome that threshold. It has failed to mount a case that establishes that

[20] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60].

the provision proposed is necessary to ensure that the Award achieves the modern awards objective.

A 'Fair' Safety Net

59. The notion of 'fairness' in s.134(1) is not confined in its application to employees. Consideration should also be given to the fairness or otherwise of an award obligation on employers. So much was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues:

> **[109]** … It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide 'a *fair* and relevant minimum safety set of terms and conditions'. Fairness is to be assessed from the perspective of both employers and employees.[21]

60. Similarly, when considering the appropriate penalty rate for the performance of ordinary hours of work on Sundays by employees covered by the *Shop, Distributive and Allied Employees' Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, Justice Giudice observed that in making safety net awards, the AIRC was to be guided by s.88B of the WR Act. That provision stated that in performing its functions under Part VI of the WR Act, the AIRC was to ensure that a safety net of fair minimum wages and conditions of employment is established and maintained having regard to, amongst other factors, the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community. Having referred to s.88B, His Honour stated:

> In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. …[22]

61. The grant of the claim would be *unfair* to employers to the extent that they may then saddled with terms and conditions in relation to employees that are

[21] *4 yearly review of modern awards* [2015] FWCFB 3177 at [109]. See also *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [117] – [118].

[22] *Re Shop, Distributive and Allied Employees' Association* (2003) 135 IR 1 at [11].

costly, inflexible and inappropriate having proper regard to the nature of the work performed by those employees.

62. The uncertainty that would result in relation to the Award's coverage would also be unfair to employers and employees.

A 'Relevant' Safety Net

63. The union's claim does not establish that the Health Professionals Award would provide a *relevant* safety net for the undefined group of employees that may be covered by it if the HSU's claim were granted.

The Relative Living Standards and Needs of the Low Paid (s.134(1)(a))

64. The Annual Wage Review 2014 – 2015 decision dealt with the interpretation of s.134(1)(a): (emphasis added)

> **[310]** The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant.
>
> **[311]** The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms.[23]

65. The term "low paid" has a particular meaning, as recognised by the Commission in its Annual Wage Review decisions:

> **[362]** There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach.[24]

[23] *Annual Wage Review 2014 – 2015* [2015] FWCFB 3500 at [310] – [311].

[24] *Annual Wage Review 2012 – 2013* [2013] FWCFB 4000. See also *Annual Wage Review 2013 - 2014* [2014] FWCFB 3500 at [310].

66. The Commission's Penalty Rates Decision provides the most recent data for in relation to 'two-thirds of medium full-time earnings':[25]

Two-thirds of median full-time earnings	*$/week*
Characteristics of Employment survey (Aug. 2015)	818.67
Employee Earnings and Hours survey (May 2016)	917.33

67. The C10 rate in the *Manufacturing and Associated Industries and Occupations Award 2010* as at the time of drafting this submission is $783.30.

68. Section 134(1)(a) requires the Commission to take into account relative living standards and the needs of the "low paid". The HSU has not, however, presented to the Commission the information that is necessary in order for it to do so. Specifically, the union has not:

- Established that the relevant group of employees that it seeks to have covered by the Award are "low paid" in the sense contemplated by the above decisions and data.
- Demonstrated the extent to which such any employees are able (or not able) to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms.
- Undertaken a comparison of the relevant group of employees that it seeks to have covered by the Award with other groups of employees that are deemed relevant.
- Established the effect that the proposed clause would have on relative living standards and the needs of the low paid.

69. As a consequence, the Commission cannot be satisfied that s.134(1)(a) lends support to the union's claim. The HSU's simplistic assertion that a finding that the list of common health professionals is exhaustive would be "in

[25] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [168].

contradiction of protecting the relative living standards and needs of the low paid"[26], does not so much as seek to grapple with

The Need to Encourage Collective Bargaining (s.134(1)(b))

70. There is no material before the Commission to suggest that the grant of the claim would encourage collective bargaining or that Award in its present form is disincentivising employers and employees from engaging in enterprise bargaining.

71. Accordingly, the Commission cannot be satisfied that s.134(1)(b) supports the HSU's claim.

The Need to Promote Social Inclusion through Increased Workforce Participation (s.134(1)(c))

72. A Full Bench of the Commission, in the context of the 'award flexibility' common issues, considered the proper interpretation of s.134(1)(c). It stated: (emphasis added)

> **[166]** The first point is not relevant to the consideration identified in s.134(1)(c), namely the promotion of 'social inclusion *through* increased workforce participation'. The social inclusion referred to in this context is employment. In other words, s.134(1)(c) requires the Commission to take into account the need to promote increased employment.[27]

73. There is no material before the Commission to suggest that the proposed clause would promote increased employment. Similarly, the Commission cannot be satisfied that its absence is having an adverse effect on the need to increase workforce participation.

74. Accordingly, s.134(1)(c) cannot be relied upon in support of the HSU's claim.

[26] HSU submission dated 17 March 2017 at paragraph 32.

[27] *4 yearly review of modern awards – Common issue – Award Flexibility* [2015] FWCFB 4466 at [166].

The Need to Promote Flexible Modern Work Practices and the Efficient and Productive Performance of Work (s.134(1)(d))

75. The variations proposed are potentially contrary to the needs to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)). It would result in the imposition of restrictive ordinary hours of work provisions, shiftwork clauses, minimum engagement periods and so on, which are not necessarily sufficiently flexible to accommodate the work performed by translators and interpreters in a very wide range of circumstances.

The Need to Provide Additional Remuneration for Working at Certain Specified Times or under Certain Specified Circumstances (s.134(1)(da))

76. This is a neutral consideration in this matter.

The Principle of Equal Remuneration for Work of Equal or Comparable Value (s.134(1)(e))

77. Section 134(1)(e) involves a comparison by reference to gender, as explained in the recent Penalty Rates Decision:

> **[204]** Section 134(1)(e) requires that we take into account 'the principle of equal remuneration for work of equal or comparable value'.
>
> **[205]** The 'Dictionary' in s.12 of the FW Act states, relevantly:
>
> > 'In this Act:
> >
> > ***equal remuneration for work of equal of comparable value:*** see subsection 302(2).'
>
> **[206]** The expression 'equal remuneration for work of equal or comparable value' is defined in s.302(2) to mean 'equal remuneration for men and women workers for work of equal or comparable value'.
>
> **[207]** The appropriate approach to the construction of s.134(1)(e) is to read the words of the definition into the substantive provision such that in giving effect to the modern awards objective the Commission must take into account the principle of 'equal remuneration for men and women workers for work of equal or comparable value'. [28]

[28] *4 yearly review of modern awards: Penalty Rates* [2016] FWCFB 1001 at paragraphs [204] – [207].

78. This is a matter that has not been addressed in the case mounted by the HSU. Whilst it makes passing reference to s.134(1)(e) in its written submissions[29], it has not made out a proper basis for the contention that it there expersses.

79. Accordingly, on the material before the Commission, it cannot be satisfied that s.134(1)(e) lends support to the union's case.

The Likely Impact on Business, including on Productivity, Employment Costs and the Regulatory Burden (s.134(1)(f))

80. The variations proposed are likely to have an adverse impact on business including productivity, employment costs and the regulatory burden given that little thought has been given by the HSU to the appropriateness of the terms and conditions prescribed by the Award to the work performed by the relevant group of employees that may be covered by the Award if its coverage were expanded in the manner proposed.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s.134(1)(g))

81. The need to ensure a stable and sustainable modern awards system tells against the grant of a claim that is not properly supported by cogent submissions or probative evidence, as is here the case.

82. Further, and importantly, as we have earlier explained, the grant of the claim would result in serious complexities and potential confusion as to the parameters of the Award's coverage. This is quite clearly inconsistent with s.134(1)(g) of the Award.

[29] HSU submission dated 17 March 2017 at paragraph 30.

The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h))

83. To the extent that the claim is contrary to ss.134(1)(b), (c), (d), (f) and (g), the it may also adverse impact employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

CONCLUSION

84. For the reasons here stated, the HSU's claim should not be granted.

5. APESMA CLAIM: TRANSLATORS AND INTERPRETERS

85. The submissions that follow relate to APESMA's claim to extend the coverage of the Award to include translators and interpreters on an occupational basis.

THE CLAIM

86. The Health Professionals Award is an industry and occupational award. That is, it is expressed to cover employers in the health industry (as defined) and their employees, as well as employers that employ a health professional who falls within the classification structure contained in the Award (see clause 4.1).

87. The Award contains two classification streams: health professionals and support service employees. The classification definitions can be found at Schedule B to the Award. Relevantly, the classification definitions for support services employees contemplates interpreters, qualified and unqualified. They are identified as indicative roles performed at level 5 and level 7 respectively.

88. By virtue of clause 4.1(a) of the Award, an interpreter or translator employed in the health industry is covered by the Health Professionals Award. However, given that they are not classified as 'health professionals', if the employee is employed by an employer that is not in the health industry, they would not be covered by the Award.

89. APESMA seeks to vary the Award such that interpreters and translators are covered by it, pursuant to clause 4.1(b). It proposes that this can be achieved by:

- Deleting the references to interpreters currently found in the classification definitions for support services employees levels 5 and 7;
- Inserting 'interpreter' in Schedule C to the Award, which lists common health professionals; and
- Inserting a definition of 'NAATI' in clause 3.1, to mean the National Accreditation Authority for Translators and Interpreters Ltd.

90. Whilst an earlier iteration of APESMA's claim also sought to vary Schedule B to the Award by inserting a reference to 'NAATI accredited paraprofessional translators and interpreters' and 'NAATI accredited professional interpreters and translators' at 'health professional employee – level 1', the proposal that the union now advances does not seek any such express reference to translators or interpreters in the classification structure. It appears therefore that if the variations sought were made, interpreters and translators would be classified under the 'health professionals' stream, and their classification level would need to be determined in each instance by reference to the classification descriptions in Schedule B.

THE APPROPRIATENESS OF THE HEALTH PROFESSIONALS AWARD

91. Whilst APESMA's submissions simplistically assert that "translators and interpreters are [h]ealth [p]rofessionals"[30], they do not explain the basis for this proposition, nor do they address the reasons why the union considers that the Health Professionals Award provides an appropriate safety net for interpreters and translators in such a broad range of industries.

92. The terms and conditions contained in the Award are tailored to apply to employers in the health industry, and employees that are traditionally considered health professionals. This includes the hours of work provisions, the rates of pay, overtime rates, penalty rates, shiftwork provisions, entitlements to breaks and rostering provisions. The basis upon which APESMA submits that these terms and conditions should be extended to work performed by interpreters and translators in any business that forms part of any industry, is not clear.

93. Translators and interpreters are engaged to perform work in a very wide range of circumstances. Whilst they are undoubtedly engaged by employers in the health industry, they are also relevant to legal services, the public sector, educational services, the social, home care and disability services industry, broadcasting and journalism, the airlines sector, the hospitality industry, and

[30] APESMA submission dated 17 March 2017 at paragraph 28.

many others. The imposition of obligations contained in the Health Professionals Award upon employers operating in any of the aforementioned industries is inappropriate. This is particularly so when regard is had to the fact that the work performed by the employee is not akin to that undertaken by 'health professionals' otherwise listed at Schedule C to the Award.

WORK VALUE CONSIDERATIONS

94. The reclassifying of interpreters currently covered by the Health Professionals Award such that they would be classified as 'health professional employees' would likely result in a variation to their minimum wage.

95. For instance, an employee currently engaged in the health industry as an 'interpreter (unqualified)' would be classified as 'support services employee – level 5'. The minimum weekly rate for such an employee is $809.70. If they were reclassified as a 'health professional', and assuming momentarily that it was determined that they would be classified at 'level 1', the Award would require that they be paid a minimum weekly rate of at least $821.60.

96. By virtue of s.156(3) of the Act, the Commission may only make a determination varying modern award minimum wages if it is satisfied that the variation of modern award minimum wages is justified by work value reasons, which are set out at s.156(4).

97. APESMA's submissions do not address whether s.156(3) is relevant to these proceedings and if so, the basis upon which it says there are work value reasons for granting the claim. On the material before it, the Commission cannot be satisfied that "the variation of modern award minimum wages is justified by work value reasons".

98. Further and in any event, even if s.156(3) were found to not here apply (a matter we do not concede), it is appropriate that the Commission turn its mind to the issue of whether any work value considerations exist for reclassifying the relevant group of employees such that would be entitled to a higher rate of pay. As a Full Bench of the Commission observed in its decision regarding

two applications for equal remuneration orders that are presently on foot: (emphasis added)

> **[272]** … We consider, in the context of modern awards establishing minimum rates for various classifications differentiated by occupation, trade, calling, skill and/or experience, that a necessary element of the statutory requirement for 'fair minimum wages' is that the level of those wages bears a proper relationship to the value of the work performed by the workers in question.[31]

99. It is trite to observe in that context that APESMA has not made out a case in support of the proposition that the nature of the work performed by the relevant employees (s.156(4)(a)), the level of skill or responsibility involved in doing the work (s.156(4)(b)) or the conditions under which the work is done (s.156(4)(c)) is such that it would warrant the reclassification of the employees and a resulting entitlement to a higher minimum rate of pay.

SECTION 138 AND THE MODERN AWARDS OBJECTIVE

100. In exercising its modern award powers, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions taking into account each of the matters listed at ss.134(1)(a) – (h).

101. Additionally, the critical principle to flow from the operation of s.138 is that a modern award can only include such terms as are necessary to achieve the modern awards objective. The requirement imposed by s.138 is an ongoing one. That is, at any time, an award must only include terms that are necessary in the relevant sense. It is not a legislative precondition that arises only at the time that a variation to an award is sought.

102. The employer parties in these proceedings do not bear any onus to demonstrate that the claim will result in adverse consequences for business. No adverse inference can or should be drawn from the absence of evidence called by employer parties or from the absence of evidence that establishes that the claim will affect all or most employers in an industry.

[31] *Equal Remuneration Decision 2015* [2015] FWCFB 8200 at [272].

103. The conduct of the Review differs from an inter-party dispute. Those responding to a claim do not bear an onus. Rather, it is for the proponent of a claim to establish that the variation proposed is necessary in order to ensure that the Award is achieving the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions. In determining whether a proponent has in fact established as much, the Commission will have regard to material before it that addresses the various elements of the modern awards objective, including those that go to employment costs, the regulatory burden, flexible work practices and productivity. These considerations are both microeconomic and macroeconomic; they require evaluation with respect to the practices of different types of businesses as well as industry at large.

104. As the Full Bench stated in the Preliminary Jurisdictional Issues Decision: (emphasis added)

> The proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations[32]

105. It is therefore for APESMA to overcome the legislative threshold established by ss.138 and 134(1). For all the reasons we have here set out, APESMA has *not* overcome that threshold. It has failed to mount a case that establishes that the provision proposed is necessary to ensure that the Award achieves the modern awards objective.

106. Specifically, we note that:

- The grant of the claim would be *unfair* to employers to the extent that they are then saddled with terms and conditions in relation to any interpreters or translators that are costly, inflexible and inappropriate having proper regard to the nature of the work performed by those employees.

[32] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60].

- The union's claim does not establish that the Health Professionals Award would provide a *relevant* safety net for translators and interpreters regardless of the industry in which they are engaged.

- The material before the Commission cannot satisfy it that the relevant group of employees are 'low paid' in the sense contemplated by the Commission's previous Annual Wage Review decisions [33] (s.134(1)(a)).

- The material before the Commission does not establish that the grant of the claim would encourage collective bargaining or that its refusal will have an adverse impact on collective bargaining (s.134(1)(b)).

- There is no material before the Commission to suggest that the proposed clause would promote increased employment. Similarly, the Commission cannot be satisfied that its absence is having an adverse effect on workforce participation. (s.134(1)(c)).

- The variations proposed are potentially contrary to the needs to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)). It would result in the imposition of restrictive ordinary hours of work provisions, shiftwork clauses, minimum engagement periods and so on, which are not necessarily sufficiently flexible to accommodate the work performed by translators and interpreters in a very wide range of circumstances.

- Section 134(1)(e) involves a comparison by reference to gender[34]; a matter that is not addressed in the case mounted by APESMA.

[33] *Annual Wage Review 2012 – 2013* [2013] FWCFB 4000. See also *Annual Wage Review 2013 - 2014* [2014] FWCFB 3500 at [310].

[34] *4 yearly review of modern awards: Penalty Rates* [2016] FWCFB 1001 at paragraphs [204] – [207].

Accordingly, on the material before the Commission, it cannot be satisfied that s.134(1)(e) lends support to the union's case.

- The variations proposed are likely to have an adverse impact on business including productivity, employment costs and the regulatory burden given that little thought has been given by APESMA to the appropriateness of the terms and conditions prescribed by the Award to the work performed by translators and interpreters in a very wide range of industries (s.134(1)(f)).

- The need to ensure a stable and sustainable modern awards system tells against the grant of a claim that is not properly supported by cogent submissions or probative evidence, as is here the case (s.134(1)(g)).

CONCLUSION

107. Ai Group is concerned that the inclusion of interpreters and translators in the Health Professionals Award is not appropriate for the reasons we have here set out. The Award should not be varied so as to cover such employees on an occupational basis.