

From: Michelle Anthony [<mailto:mAnthony@professionalsaustralia.org.au>]
Sent: Tuesday, 3 April 2018 4:42 PM
To: Chambers - Catanzariti VP
Subject: Health Professionals and Support Services Award 2010 (AM2016/31)

**To: The Associate to Vice President Catanzariti AM
Fair Work Commission**

Dear Associate

We refer to your email dated 29 March 2018 and now attach for the purposes of filing, APESMA's Submissions in support of the amended draft clause in relation to Translators and Interpreters, (filed on 29 March 2018 in accordance with the Directions of Vice President Catanzariti of 15 March 2018).

Regards,

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Fair Work Act 2009

s.156—4 yearly review of modern awards

(AM2016/31)

**HEALTH PROFESSIONALS AND
SUPPORT SERVICES AWARD 2010**

OUTLINE OF SUBMISSIONS

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

Introduction

1. This Outline of Submissions and the Amended Draft clause in relation to Translators and Interpreters (filed 29 March 2018) are filed in accordance with the Directions of Vice President Catanzariti, made at the Conciliation Conference of this matter on 15 March 2018.
2. On 15 July 2015, and as part of the current 4 yearly review process, APESMA filed an Outline of Submissions seeking a variation to the Health Professionals and Support Services Award 2010 (the Award), such that the occupations ‘Translator’ and ‘Interpreter’ would be included in the ‘List of Common Health Professionals’ which comprises Schedule C to the current Award. It was APESMA’s contention that the occupations Translator and Interpreter are professions as demonstrated by the requirement that their members are regulated by a national credentialing body (NAATI), are required to complete Compulsory Professional Development activities to retain credentials and comply with a Code of Ethics, among other factors. APESMA filed submissions on 17 March 2017 in support of our original application and we seek to rely on those submissions in support of this alternative application regarding the amended draft Clause in relation to Translators and Interpreters filed 29 March 2018 in accordance with

Direction 1 of the Vice President Catanzariti's Directions made 15 March 2018 (the amended draft Clause).

3. Apart from seeking recognition for our members of their status as professionals, the primary objective of APESMA's application to vary the Award was to achieve occupational coverage of the Award for Translators and Interpreters. It was APESMA's submission that Translators and Interpreters should have coverage by the Award as an occupational award so that individual practitioners could work under a common set of consistently applied minimum conditions, regardless of whether the practitioner works in an environment outside the health industry from time to time.
4. The Award was listed for hearing before the Full Bench on 11 December 2017 as part of the 4 yearly review of modern awards process. On that date and following the Applicant's opening statement, Vice President Catanzariti and Deputy President Booth requested that relevant parties consider resolution of APESMA's application on the basis the occupations of Translator and Interpreter continue to sit in the support services stream but continue to have award coverage if individuals performing those occupations move around to other industries. (Please see PN669 to PN717 of the Transcript for Monday 11 December 2017).
5. In January 2018 APESMA circulated the amended draft Clause to the Parties to the 4 yearly review of the Award and requested that the matter be listed for Conciliation to provide the parties with the opportunity to explore resolution on the basis raised by members of the Full Bench (as described in paragraph 4 above). The matter was listed for Conciliation before Vice President Catanzariti on 15 March 2018 however resolution by agreement of the parties did not occur on that date and Vice President Catanzariti made his Directions of the same date.

The Amended Draft Clause

6. APESMA now seeks a variation to the Coverage clause of the Award by inserting new subclauses (c) and (d) at the end of Clause 4, the effect of which will extend

occupational coverage of the Award to Translators and Interpreters, without moving the occupations into the List of Common Health Professionals in Schedule C to the current Award.

7. Variation is also proposed to the Classification Definitions found in Schedule B to:
 - a) Insert the occupation of translator into the Award as it previously did not appear as an indicative role in schedule B;
 - b) Use the descriptors “NAATI credentialed” and “non NAATI credentialed” rather than “Interpreter (unqualified)” and “Interpreter (qualified)”. In APESMA’s submission the proposed titles are more accurate and appropriate descriptors which will be widely understood within the Language Services industry.

Why is the Health Professionals and Support Services Award the most appropriate Award to provide occupational coverage for Translators and Interpreters?

8. APESMA commenced as the primary industrial organization providing representation for Translators and Interpreters in 2011 when an informal group of translators and interpreters approached APESMA seeking industrial representation for members of their profession. It was established that qualified translators and interpreters were eligible for APESMA membership in accordance with the rules of the association. APESMA surveyed its Translator and Interpreter members and conducted research into the language industry. APESMA came to the view that translators and interpreters experienced relatively substandard working conditions and this situation had serious implications for our society, given the critical role translators and interpreters play in all areas of our community but particularly in the health sector. (Please see paragraphs 47 to 51 of APESMA’s submissions dated 17 March 2017).

9. APESMA identified a lack of coverage or regulation of the industry by industrial instruments. APESMA reviewed the existing award coverage situation and confirmed that the Health Professionals and Support Services Award 2010 covered interpreters but only as an industry award as interpreters appeared as indicative roles in the classifications in Schedule B to the current award (which Schedule provides classification definitions for Support Services employees).
10. Clause 4.1 (a) of the Award provides that the Award covers employers in the health industry and their Support Services employees and Health Professional employees to the Exclusion of any other modern award. Clause 4.1 (b) of the Award extends occupational coverage to employers engaging a health professional employee “falling within the classification listed in clause 15”.
11. Clause 4.1 of the Award is set out below:

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.

12. In APESMA’s submission the existing coverage provided by the award is inadequate as the way interpreters work means that an interpreter can often perform interpreting work in a health industry setting in the morning, but then provide interpreting services in a different industry (for example a law court) in the afternoon. The same interpreter will be award covered for his or her work in the morning but not covered when performing the same work in the afternoon.
13. With a view to addressing the gap in award coverage, APESMA considered whether translators and interpreters might be covered by the Professional

Employees Award 2010, a modern award that provides occupational award coverage for many of APESMA's members. Clause 4, the coverage clause of that award states as follows:

4. Coverage

[Varied by PR992791, PR994537]

4.1 This award covers employers throughout Australia with respect to their employees performing professional engineering and professional scientific duties who are covered by the classifications in Schedule B—Classification Structure and Definitions of the award and those employees.

4.2 This award covers employers throughout Australia principally engaged in the information technology industry, the quality auditing industry or the telecommunications services industry and their employees who are covered by the classifications in Schedule B.

Coverage by the Professional Employees Award 2010 is therefore limited to employees performing professional engineering and professional scientific duties or employees in the IT industry, quality auditing industry or the telecommunications services industry.

14. APESMA considered whether the most appropriate course to achieving occupational award coverage would have been making an application as part of the 4 yearly award review process to vary the coverage clause of the Professional Employees Award 2010 to include translators and interpreters. In light of the fact that translators and interpreters were already covered by a modern award that provided occupational coverage to professional employees, and that an estimated 70 to 80% of the work of translators and interpreters was performed within the health care industry, APESMA determined the most appropriate application would be to vary the Health Professionals and Support Services Award 2010 to provide occupational coverage for translators and interpreters.

15. Prior to issuing the current application APESMA also considered whether the Miscellaneous Award 2010 provided coverage to this group of employees. Clause 4.1 of the Miscellaneous Award 2010 states as follows:

4. Coverage

4.1 Subject to clauses 4.2, 4.3, 4.4, 4.5 and 4.6 this award covers employers throughout Australia and their employees in the classifications listed in clause 14—Minimum wages who are not covered by any other modern award.

16. APESMA concluded that translators and interpreters were not covered by the Miscellaneous Award 2010 as:

- a) They are covered by another award (the Health Professional and Support Services Award) and clause 4.1 specifically restricts coverage to employers and employees “who are not covered by any other modern award”; and
- b) A review of the classifications clause (Schedule B) of the Miscellaneous Award 2010 reveals the Award is clearly intended to provide coverage of employees who are not considered to be professional employees. Schedule B to the Miscellaneous Award states as follows:

Schedule B—Classification Structure and Definitions

Level 1

An employee at this level has been employed for a period of less than three months and is not carrying out the duties of a level 3 or level 4 employee.

Level 2

An employee at this level has been employed for more than three months and is not carrying out the duties of a level 3 or level 4 employee.

Level 3

An employee at this level has a trade qualification or equivalent and is carrying out duties requiring such qualifications.

Level 4

An employee at this level has advanced trade qualifications and is carrying out duties requiring such qualifications or is a sub-professional employee.

17. APESMA then considered whether it would be appropriate to seek to have a new modern award made providing award coverage of all employees in the language services industry. APESMA declined to make such an application in view of the operation of section 163(2) of the Act which states as follows:

FAIR WORK ACT 2009 - SECT 163

Special criteria relating to changing coverage of modern awards

Special rule about making a modern award

.....

(2) The FWC must not make a modern award covering certain employers or employees unless the FWC has considered whether it should, instead, make a determination varying an existing modern award to cover them.

In light of the fact that translators and interpreters are currently covered by the Health Professionals and Support Services Award 2010, and that award provides for occupational coverage of professionals that work in the health care industry, APESMA formed the view the most appropriate application to make in light of

section 163(2) of the Act was an application to vary the Award to achieve occupational coverage for translators and interpreters.

The Evidence in Support of APESMA'S Application

18. APESMA tendered into evidence the following five witness statements in support of our application for a variation to the Award:

- a) Exhibit APESMA – 1;
- b) Exhibit APESMA – 2;
- c) Exhibit APESMA – 3;
- d) Michael Morgan;
- e) Niki Baras

19. Exhibits APESMA 1, 2 and 3 are the subject of Confidentiality Orders made by his Honour Vice President Catanzariti pursuant to section 594 of the Act on 20 March 2017. Exhibits APESMA 1, 2 and 3 and Niki Baras are all interpreters who are employed within the health care industry. The evidence (uncontested) of all four interpreters is that:

- a) Interpreters and translators belong to a profession;
- b) Each wishes to be covered by an occupational award for the certainty of having the same award conditions for all work they perform (regardless of industry);
- c) All four witnesses estimate that at least 70% (and in one case up to 85%) of jobs the interpreters perform are within the health industry;

20. Michael Morgan is the Director of an interpreting and translating agency that employs approximately 210 interpreters. Mr Morgan gave uncontested evidence that 70-80% of the interpreting work his agency's employees performed was within the health industry. Mr Morgan's evidence was that "if there was one award which governed the minimum conditions of employment covering all employed NAATI accredited / recognized interpreters regardless of the industry

in which they were working, it would be a positive for our business This is because we would be able to operate as a business in the confidence that there was one legal instrument dictating the minimum terms under which we must employ our interpreters and translators regardless of the industry, while having the certainty that our competitors would also be bound to employ in accordance with the same instrument. Also, it would be easier administratively, only having to keep track of the one award in ensuring the business is complying with its obligations under employment laws.”

How the variation sought meets the ‘modern awards objective’

21. Section 134 (1) of the Act sets out the considerations the Fair Work Commission must take into account when ensuring that the Award, together with the National Employment Standards, provides a “fair and relevant minimum safety net of terms and conditions”. Please see paragraphs 46 to 61 of APESMA’s submissions dated 17 March 2017 for a discussion of how the proposed variation will meet the considerations. In our submission, our submissions dated 17 March 2017 apply equally well to support the Amended Draft Clause as they are drafted with a view to expounding the effects and benefits of occupational coverage, which will be achieved if the Award is varied to incorporate the Amended Draft Clause.

Association of Professional Engineers Scientists Managers Australia (APESMA)

03 April 2017