

## BEFORE THE FAIR WORK COMMISSION

*Fair Work Act 2009 (Cth)*

**Title of matter:** 4 yearly review of modern awards – *Aboriginal Community Controlled Health Services Award 2010* – Substantive Issues

**Section:** s.156 *Fair Work Act 2009 (Cth)*

**Matter Number:** AM2018/12

**Document:** Submission in relation to proposed substantive variations to the *Aboriginal Community Controlled Health Services Award 2010*

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## Background

- 1.1 These submissions are made by the Australian Federation of Employers and Industries (“**AFEI**”) pursuant to the amended directions of Deputy President Gostencnik issued on 8 July 2019. These submissions are in response to the substantive claims by National Aboriginal and Torres Strait Islander Health Worker Association (“**NATSIHWA**”) in respect of the *Aboriginal Community Controlled Health Services Award 2010* (“**the ACCHS Award**”) arising from the 4 Yearly Review of Modern Awards (“**4 Yearly review**”).
- 1.2 AFEI has an interest in the Aboriginal community controlled health services industry and was involved in and supported the making of the ACCHS Award before the Australian Industrial Relations Commission (“**AIRC**”) in the award modernisation process.<sup>1</sup>
- 1.3 In addition to these submissions, AFEI relies on its earlier submissions in these proceedings dated 24 April 2017.<sup>2</sup>
- 1.4 AFEI acknowledges National Aboriginal Community Controlled Health Organisation’s (“**NACCHO**”) significant involvement in the making of the ACCHS Award, noting paragraphs 18 – 20 of NATSIHWA’s submissions dated 18 June 2019. NACCHO’s submissions before the AIRC in the award modernisation process<sup>3</sup> are relevant to these current proceedings, which sets out the basis on which Aboriginal community controlled health services constitute a distinct and unique industry.
- 1.5 Due to resource constraints associated with AFEI’s involvement in multiple award review proceedings, these submissions are confined to the substantive claims outlined below.

## Overview of AFEI’s submissions

- 1.6 AFEI make these submissions in response to the following substantive changes proposed by NATSIHWA:
  - Variations to the coverage clauses 4.1 and 4.2 of the ACCHS award to provide occupational award coverage for Aboriginal and/or Torres Strait Islander health workers and health practitioners (“**A&TSIHWs and A&TSIHPs**”), so as to provide award coverage for A&TSIHWs and A&TSIHPs in private practice;

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<sup>1</sup> Submission on behalf of the Australian Federation of Employers and Industries Award Modernisation (AM2008/64) dated 24 July 2009.

<sup>2</sup> AFEI Amended Submissions re matter AM2014/250 dated 24 April 2017.

<sup>3</sup> Submissions on behalf of National Aboriginal Community Controlled Health Organisation before the Australian Industrial Relations Commission (Matter Number: AM2008/64) dated 24 July 2009 (“NACCHO submissions”).

- Variations to the classification structure for Aboriginal Health Workers from the current number of four grades to six grades. NATSIHWA proposes the introduction of a 'new' classification grade 6 to provide for A&TSIHWs and A&TSIHPs in senior management roles;
- Along with the amended classification structure for Aboriginal Health Workers, a proposed increase in rates of pay for Aboriginal Health Worker grade 3 by moving these workers to the new grade 5, and, an increase in rates of pay for employees currently grade 4 who would meet the classifications requirements of the new grade 6.
- Introduction of new allowances:
  - Telephone allowance for persons required to be on call;
  - Disability related nauseous work allowance;
  - Disability related blood check allowance;
  - Expense related damaged clothing allowance;
  - Disability based heat allowance;
  - Disability based isolation allowance;
  - Skill-based occupational interpreting allowance; and
  - Skill-based medication administration allowance for persons required to administer medications as part of their duties.

## Framework for Award Variation

- 1.7 Section 156 *Fair Work Act 2009* (Cth) ("**Fair Work Act**") provides that the Commission must conduct a 4 yearly review of modern awards.
- 1.8 The Commission's task in the 4 Yearly review is to decide whether the ACCHS Award achieves the modern awards objective.<sup>4</sup> That is, the Commission is required to consider "*whether the ACCHS Award, together with the National Employment Standards<sup>5</sup>, provide a fair and relevant<sup>6</sup> minimum safety net of terms and conditions taking into account the particular considerations in sections 134(1)(a) to (h)*".

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<sup>4</sup> Section 134(1) *Fair Work Act*.

<sup>5</sup> Part 2-2 *Fair Work Act*.

<sup>6</sup> Fairness is to be assessed from the perspective of the employees and employers covered by the award in question. 'Relevant' is intended to convey that the award should be suited to contemporary circumstances - *Four yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [37] ('Penalties Rates Case').

- 1.9 It is particularly relevant to note the following provisions contained in section 134(1) *Fair Work Act* setting out the objectives the Commission is required to take into consideration:
- The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and regulatory burden (section 134(1)(f));
  - The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (section 134(1)(g)).
- 1.10 If the Commission decide that the ACCHS Award does not achieve the modern awards objective then the award is to be varied such that it only includes terms *that are necessary* to achieve the modern awards objective.<sup>7</sup>
- 1.11 The 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues decision made before the Full Bench on 17 March 2014 provides:
- '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. Some proposed changes may be self-evident and can be determined with little formality. However, where a significant change is proposed it must be 1) supported by a submission which addresses the relevant legislative provisions and 2) be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.*
- In conducting the Review the Commission will also have regard to the historical context applicable to each modern award.'*<sup>8</sup>
- 1.12 In the 4 Yearly review, the Commission may make a determination varying modern award minimum wages *only if* the Commission is satisfied that the variation is justified by work value reasons.<sup>9</sup>

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<sup>7</sup> Section 138 *Fair Work Act*.

<sup>8</sup> *Re Four Yearly review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [23] – [24] ('Jurisdictional Issues Decision').

<sup>9</sup> Section 135(1)(a) *Fair Work Act* and section 156(3) *Fair Work Act*.

## Occupational Coverage

1.13 NATSIHWA proposes to vary clauses 4.1 and 4.2 of the ACCHS Award to provide occupational award coverage for A&TSHWs and A&TSHPs in private practice.<sup>10</sup>

1.14 AFEI make the following observations:

**(a) Historical context applicable to the ACCHS Award**

- i. The Commission will have regard to the historical context applicable to the ACCHS Award.<sup>11</sup> In the making of the ACCHS Award, the AIRC award modernisation recognised the unique operation of health services provided within Aboriginal community health organisations and thus was satisfied that Aboriginal community controlled health services (“ACCHS”) are a distinct sector of the health industry. We note that no focus was made by the AIRC on occupation: -

*[124] Subject to an exception we deal with later, on the basis of the material before us, including our consultation with the Commissioner, we have decided not to make a separate award covering indigenous organisations or services. We are conscious of many of the difficulties faced by such bodies including as to isolation and climate. Additionally, we were told that many of these organisations by necessity provide a range of services including varied commercial undertakings. It was said that a single award that caters to these unique circumstances is desirable. In our view, many of the features described apply equally in many non-indigenous areas where certain commercial and community organisations face the same difficulties. We believe that the modern awards that we are establishing for a range of industries will be equally appropriate to indigenous organisations and services.*

*[125] We are satisfied that the nature of health services that are delivered in a culturally appropriate way is sufficiently different to justify a separate award. The difference is not only about the way the services are established and controlled but is critically seen in the way that employees of the services operate. We accept that the aboriginal health worker within aboriginal community controlled health services is critical. No equivalent health care worker operates in what we might describe as mainstream services”.<sup>12</sup>*

- ii. In making the ACCHS Award, the AIRC accepted that it would relate only to ACCHS and that other awards would provide ‘equally appropriate’ coverage for

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<sup>10</sup> Outline of submissions concerning the Aboriginal Controlled Community Health Services Award 2010 prepared by Kennedys (Australasia) on behalf of NATSIHWA dated 18 June 2019 at paragraph 23 (“NATSIHWA submissions”).

<sup>11</sup> [2014]FWCFB 1788 at [23] – [24].

<sup>12</sup> [2009] AIRCFB 865 at [124] - [125].

a number of employee classifications, including nurses, medical practitioners and other health practitioners in ACCHS.

- iii. NATSIHWA proposes that the occupational award coverage would be unique, relating only to A&TSHWs and A&TSHPs. Other classification of employees covered by the ACCHS Award, such as Dental Assistants, Dental Therapists, and administrative employees, in private medical practice would remain covered by the 'other modern award', that is the *Health Professional and Support Services Award 2010* ("HPSS Award").

**(b) Evidence relied on by NATSIHWA**

- NATSIHWA submit that most A&TSHWs and A&TSHPs work *predominantly* in ACCHS and that "some" A&TSHWs and A&TSHPs also work in private practice.<sup>13</sup> NATSIHWA do not elaborate on the meaning of "some". Instead, in support of this claim, NATSIHWA rely on two witness statements being the statements of Dr Stephanie Trust and Haysie Penola.
- In its submissions, NATSIHWA also acknowledge that A&TSHWs and A&TSHPs working in private practice may be limited in numbers.<sup>14</sup>
- NATSIHWA has provided witness evidence, for example, Dr Stephanie Trust indicating that currently it is unclear how to pay A&TSHW within private practice.
- In the light of the above, questions arise as to whether the NATSIHWA has put forward an argument of merit and adduced probative evidence demonstrating facts supporting the proposed variation.
- To the extent that there may be uncertainty concerning the rates of pay for Aboriginal Health Workers under the HPSS Award, the better course may be variations to the HPSS Award to remove any doubt.

1.15 In the event that the Commission is persuaded by submissions and evidence made by NATSIHWA to vary the award, the rates of pay applicable to A&TSHWs and A&TSHPs working in private practice ought to be in sync with the rates of pay with other award covered health professionals.

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<sup>13</sup> NATSIHWA submissions – paragraph 13.

<sup>14</sup> NATSIHWA submissions – paragraph 52.

## Classification structure for Aboriginal Health Workers

- 1.16 NATSIHWA proposes to revise the classification structure for Aboriginal Health Workers from the current number of four grades to six grades. In doing so, NATSIHWA proposes:
- the introduction of a “new classification” grade 6 to provide for A&TSHWs and A&TSHPs in senior management roles; and
  - an uplift in rates of pay for Aboriginal Health Worker grade 3 by moving these workers to grade 5 (grade 5 is a proposed classification which does not currently exist).
- 1.17 If the Commission is satisfied that the evidence in this matter supports changes to *minimum* wage rates in the ACCHS Award, there are significant questions about the substantial quantum’s of the proposed wage increases, and their relativity with other award rates of pay.

### Proposed new grade 6 management classification

- 1.18 AFEI note the following:
- (a) The proposed grade 6 rates of pay are substantially the same, and based on, the rates of pay at the highest classification (grade 8) in the *Social, Community, Home Care and Disability Services Industry Award 2010 (“SCHCDSI Award”)*, which typically applies to Chief Executive Officers of SCHCDSI organisations, including those providing first nation people’s services.<sup>15</sup> They are also, notably, the same rates of pay for the Chief Executive of an ACCHS who is typically responsible for all health professionals and other employees within such an organisation. The ACCHS Award specifies that the Administration grade 8 classification “*will be the Chief Executive Officer of an Aboriginal community controlled health service*”.<sup>16</sup>
  - (b) The proposed grade 6 rates of pay are substantially higher than Dental Therapist grade 2 by \$99.20 per week to \$202.00 per week. The Dental Therapist grade 2 position appears to be similar to the new grade 6 classification in that they are both senior roles.<sup>17</sup>

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<sup>15</sup> See the Commission’s June 2019 Survey Analysis of the Social, Community, Home Care, and Disability Services Award 2010.

<sup>16</sup> Aboriginal Community Controlled Health Service Award 2010 – Schedule B.

<sup>17</sup> The award specifies that a dental therapist at grade 2 “*works as a professional practitioner...and may perform novel, complex or critical professional work...requirement to exercise independent professional judgement...and may include professional supervision of dental therapists...and provide an advisory role*”.

- (c) Duties of the grade 6 classification appear to be similar to existing roles under the ACCHS Award. The elements of the proposed grade 6 classification (Senior Aboriginal and/or Torres Strait Islander Health Practitioner/Aboriginal and/or Torres Strait Islander Health Worker Co-Ordinator) appear to consist of existing elements in the role of an Aboriginal Health Worker at grade 4 within the award as it currently stands. The common elements are:
- The qualification required for the grade 6 role is the same as the current grade 4 role – Diploma of Aboriginal and/or Torres Strait Islander Primary Health Care and or other equivalent qualification; and
  - Grade 6 role and current grade 4 role are both senior roles and involve coordination management.
- (d) There is uncertainty how the proposed grade 6 is intended to operate. While it is proposed that it “*may report to the Board of Directors or Board of Management*” it is unclear as to what matters this might include and whether the grade 8 CEO would continue to be responsible for Aboriginal Health Workers. If it is intended that the new grade 6 role would operate parallel to and independent of the CEO, it is unlikely that the work value dimensions of the grade 6 would be comparable with the CEO, responsible for all other medical, dental and other health services and the operation of the whole service.

## **Advanced Health Worker – Practice and Health Practitioner**

- 1.19 The proposal to move the role of “Advanced Health Worker – Practice and Health Practitioner” currently classified as grade 3 (termed ‘Senior Aboriginal Health Worker’) to be classified as grade 5 in the proposed new structure, would result in a significant increases in award minimum wages, at *Level 1* – an increase of \$82.30 per week, at *Level 2* an increase of \$80.50 per week, and at *Level 3* an increase of \$83.80 per week.
- 1.20 The proposed new rates of pay are similar to the rates of pay for Dental Therapist grade 2, although the roles are dissimilar in nature it appears that the Dental Therapist grade 2 role carries significantly more duties and responsibilities than the Senior Aboriginal Health Worker. By way of example:
- Senior Aboriginal Health Worker (grade 3)** is required to:
- Perform their duties with little supervision and may be required to work as a sole practitioner remote from the health service.



**Dental therapist (grade 2)** is required to:

- Work as a professional practitioner
- Perform normal professional work under general professional guidance
- Perform novel, complex or critical professional work under professional supervision
- Perform normal professional work of an organisational unit or of a specialised professional field encompassed by the work of the unit and accept technical responsibility for those tasks
- Work in isolation at times
- Exercise of independent professional judgement
- Carry out research
- Professional supervision of dental therapists
- Advisory role
- Advise on interpretation of regulations or standards

1.21 AFEI notes also that wage rates for Dental Assistants and Dental Therapists within the ACCHS Award are comparable to the rates provided in the HPSS Award. If the Commission is persuaded that the award should be varied as proposed, including providing occupational coverage, it is likely that wages for health workers would significantly misalign with health workers in other awards.

## Allowances

1.22 NATSIHWA proposes to introduce a range of new allowances into the award (see paragraph 1.6 above).

1.23 NATSIHWA submits that the telephone allowance for persons required to be on call, disability related nauseous work allowance, disability related blood check allowance and expense related damaged clothing allowance are “agreed allowances” to which there is no opposition.<sup>18</sup>

1.24 AFEI also refer to its earlier submissions dated 24 April 2017 and reiterates its concerns as to whether some of the proposed allowances would be appropriately transposed directly from one award to another, such as the interpreting allowance and skill based medication administration allowance. Submissions by NACCHO in the award modernisation process identifies the unique nature of ACCHS being a model of culturally appropriate care and clarifies that care provided by an ACCHS can involve interpreting services and the provision of medication.<sup>19</sup>

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<sup>18</sup> NATSIHWA submissions – paragraph 33.

<sup>19</sup> NACCHO submissions at [13].

- 1.25 It is also clear that the role of Aboriginal Health Worker under the ACCHS Award requires the administration of medication. For example, Aboriginal Health Worker grade 1 provides “*primary health services*”. Aboriginal Health Worker grade 2 assists in the provision of “*comprehensive primary health care*”, “*standard medical treatments*”, “*management of common medical problems and medical emergencies*”.
- 1.26 In addition, of relevance is the rates of pay under the *Health Services Union of Australia (Aboriginal Health Services) Award 1992*, replaced by the ACCHS Award, were reached by consent before the AIRC.<sup>20</sup> Generally the current wage rates for Aboriginal Health Workers are higher than wage rates for employees with comparable health worker qualifications in other modern awards, no doubt reflecting the uniqueness of the roles and the conditions under which the work is performed, including isolation.

**Australian Federation Employers & Industries**

19 July 2019

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<sup>20</sup> PR931571.