

Heads of Agreement

Australian Government and the Australian Services Union

Background

- Currently there are many employees in the social and community services sector (SACS sector) who are employed by entities that are not constitutional corporations and so remain within state workplace relations systems.
- The Australian Government has developed the proposal below to respond to certain concerns held by the Australian Services Union and its state based associated bodies (together, the ASU) relating to the possible transfer of those employers and employees into the federal system as a result of referral of powers by the states.
- The most significant of the ASU's concerns is how the recent pay equity decision that awarded significant pay increases for the SACS sector in Queensland (*Queensland Services, Industrial Union of Employees AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (A/2008/5)*) ('the Queensland Decision') will be dealt with in any transfer of the relevant employees into the federal system, both in terms of:
 - preserving the new rates for the Queensland employees; and
 - how the ASU may seek to achieve similar outcomes for employees in other states through pay equity and work value claims in state or federal tribunals.
- The Australian Government has been advised by the ASU that it intends to make an application for an equal remuneration order/work value wages review under the *Fair Work Act 2009* (Fair Work Act) for the SACS sector.
- The Australian Government and the ASU recognise the unique circumstances in which the ASU will make an application for equal remuneration. The claim will be the first under the *Fair Work Act 2009*, against the background of uncertainty as to jurisdictional coverage of SACS sector workers and the finalisation of negotiations between the Commonwealth and state governments in relation to the creation of a national workplace relations system for the private sector. Therefore the approach adopted in this Heads of Agreement does not constitute a precedent for future pay equity claims.

Heads of Agreement

1. The ASU and the Australian Government have agreed that the following package of measures will satisfy the ASU's concerns regarding a transfer of employees in the SACS sector into the federal system.
2. The ASU agrees that as a result of its concerns being substantially satisfied, it supports referrals of power covering workplace relations for the SACS sector from the states to the Commonwealth and the application of the Fair Work Act to those employees and will advocate to State Governments that they should make such referrals of powers.
3. In the event that the Commonwealth agrees with the States of Queensland, New South Wales, South Australia and Tasmania upon referral of workplace relations powers covering employees in the SACS sector, then the parties agree that they will undertake the actions set out at clauses 4 to 16 below.

Pay equity application

4. In the event that the ASU makes an application to set or vary rates of pay for the SACS sector based on the equal remuneration and /or work value provisions under the Fair Work Act, the Australian Government will seek leave from Fair Work Australia (FWA) to make a submission and to otherwise participate in those proceedings. This is consistent with:
 - a. the important public interest considerations in the hearing of the first major case under the new pay equity provisions of the Fair Work Act;
 - b. the Australian Government's desire to provide a view concerning the proper approach to the pay equity provisions of the new legislation;
 - c. recognition of the ongoing workforce issues in the SACS sector; and
 - d. recognition that any resulting pay rises will have significant financial implications for the Australian Government and the States.
5. The Australian Government acknowledges that, if an equal remuneration/work value application is made, the proceedings are likely to be complex, lengthy and resource intensive. Given these factors, and in order to assist FWA and the parties, the Australian Government:
 - a. will seek leave from FWA to make a submission and to participate in proceedings:
 - i. to support the development of an appropriate equal remuneration principle for the federal jurisdiction drawing on the Queensland Equal Remuneration Principle of 2002 and explanatory notes and relevant New South Wales jurisprudence;
 - ii. to assist Fair Work Australia and the parties by presenting evidence and research on matters including: the history of relevant awards; employee earnings and the economic and labour market features of the sector; changes in regulation and legal requirements of the sector; and data on bargaining in the sector; and
 - iii. propose the development of an Agreed Statement of Facts in advance in order to limit arguments before FWA.
 - b. reserves its position in respect of making a submission in relation to the appropriate quantum and funding arrangements of any pay increase until such time as the ASU's application has been made, evidence presented to FWA and further analysis on the impacts of any proposed increase is undertaken.
6. As a first step, the ASU will write to the President of the AIRC (copied to the Australian Government) indicating its intention to lodge a pay equity/work value claim for SACS sector workers and to request that the President convene a conference of interested parties, including the Australian Government as well as state and territory governments, to consider how the issue might be progressed given the current award modernisation proceedings and the scope for an agreed position. The Australian Government will support that proposal.
7. In that context, and assuming that an agreed position does not emerge from any conference convened by the President, the ASU and Australian Government will submit to the President of the AIRC that, given the following factors:
 - a. the pending application by the ASU for the determination of rates of pay for the SACS sector in accordance with the pay equity principles of the Fair Work Act and the proper setting of those rates based on work value considerations;

- b. the fact that the timeline for award modernisation does not permit sufficient time to allow a full examination of these issues before commencement of the modern award on 1 January 2010; and
- c. that there is currently uncertainty over whether employers in this sector who are not constitutional corporations will be referred from state systems to the federal system means that questions of wage rates and transitional arrangements will be difficult to determine at this time,

the modern award proceedings and the pending ASU application should be dealt with as follows:

- d. the AIRC should proceed to create a modern award for the SACS sector in accordance with the timetable set down for Stage 4 awards; and
 - e. the rates of pay for the modern award should be established initially on an interim basis and should reflect the rates that presently exist in relevant instruments, pending a full hearing of the ASU's application to properly fix the rates.
8. The ASU acknowledges that there would be very significant budgetary impacts to state, territory and Commonwealth governments in the event of any significant increase to the current rates of pay of SACS workers. The ASU acknowledges that in order to ensure the financial sustainability of the sector, it is therefore essential that there be a gradual phasing in of any such wage increase that takes into account the capacity of the Commonwealth, state and territory governments to meet a significant cost increase in the current economic and budgetary environment.
9. Accordingly, in the event that Fair Work Australia awards a significant increase to the current rates of pay of SACS workers, the ASU agrees to support the argument (which will be put in the Australian Government submission):
- a. that any increase awarded on pay equity or work value grounds should not take effect until at least 6 months after the date of any decision, in order to allow sufficient time for the necessary funding arrangements to be put in place; and
 - b. that any increase awarded on pay equity or work value grounds should be phased via instalments over not less than an additional four and a half year period (so that additional costs are imposed gradually over this period); and
 - c. assuming that any increase awarded by Fair Work Australia on pay equity grounds is based upon a pay equity comparison undertaken on or about the time of the decision, then annual minimum wage adjustments (as awarded each year by Fair Work Australia under section 166 of the *Fair Work Act 2009*) should also be applied throughout the phasing in period to ensure the comparative pay equity position of any increased rate so awarded is not eroded over the agreed phase in period.
10. Notwithstanding paragraph 9 above, the Australian Government and the ASU each reserve their positions in respect of advocating for appropriate phasing arrangements for those Queensland employers and employees who are subject to the Social and Community Services (Queensland) Award 2001 or the Crisis Assistance Supported Housing (Queensland) Award 1999¹ and, who but for the referral of power from the State of Queensland would, from 26 March 2011, have become subject to the Queensland Decision.

¹ These are Workplace Relations Act transitional awards that continue in operation until 26 March 2011 under Schedule 20 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* in reliance upon the conciliation and arbitration powers of the Constitution whereupon it lapses.

11. The Australian Government agrees to participate in discussions with the state governments, through an appropriate forum and both before and after any decision by FWA on the ASU's application, in order to work through the potential funding implications.
12. The Australian Government agrees, in consultation with the Queensland Government, to develop and seek to enact (or otherwise implement) referral arrangements that will preserve the obligations of employers currently bound by the Queensland decision to continue to pay, as a minimum, the rates determined by that decision to their employees (including the rates that are to apply at future dates in accordance with the decision).
13. The Australian Government agrees, in consultation with the ASU and the Queensland Government, to:
 - provide by an appropriate method, an enforceable legal obligation to pay the rates of pay provided in the Queensland decision; and
 - that this obligation will apply to such of those employers (or their successors) who are currently bound by the Social and Community Services (Queensland) Award 2001 or the Crisis Assistance Supported Housing (Queensland) Award 1999 who are also in receipt of budget supplementation from the Queensland Government provided for the purpose of paying all relevant staff the higher rates provided in the Queensland decision.

Unfair dismissal

14. The Australian Government recognises the particular difficulties faced by community sector employees who are vulnerable to having serious (and potentially unfounded) complaints made against them by dissatisfied clients, and the implications that this has for their job security and well being.
15. Accordingly, the Government will request the Fair Work Ombudsman to work with the ASU and other relevant stakeholders to develop a Best Practice Guide concerning possible unfair dismissals with a particular emphasis on the handling of allegations of misconduct and under-performance for the SACS sector.
16. The Guide will set out a model process and guidelines for dealing with unfair dismissals and allegations that takes into account the special needs of the sector, including the:
 - a. serious nature of allegations that are may be made and the need for such allegations to be fairly, competently and impartially investigated; and
 - b. fact that many organisations are small and may be administered by volunteer boards.

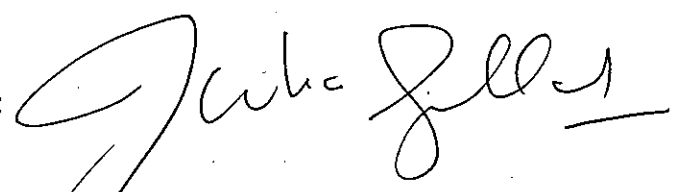
Resolution of Disputes

17. The ASU has conveyed to the Australian Government its view that disputes between employers and employees in the SACS sector should be able to be resolved through dispute resolution processes at the workplace level, and failing such resolution, by an independent industrial umpire.
18. Consistent with the Australian Government's policy position to support Australian employers who are complying with the Fair Work Act, the Australian Government agrees:
 - a. That as direct Australian Government funding arrangements in the SACS sector are scheduled for re-negotiation, the Government will, in order to foster best practice, require funding recipients to provide as a minimum genuine dispute resolution mechanisms, such as those set out in Schedule 6.1 of the Fair Work Regulations, which provides for the representation of employees and the settlement of the dispute

by Fair Work Australia if discussions at the workplace and mediation or conciliation by Fair Work Australia have failed to resolve the dispute; and

- b. that it will participate in discussions with the states through an appropriate forum and will seek to secure agreements to implement similar arrangements in respect of funding administered through state governments.

On behalf of the Australian Government:

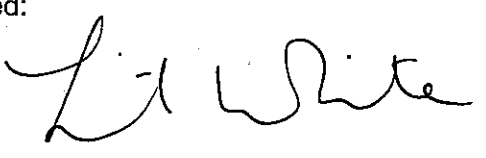
Signed: 

Date: 30/10/09

The Hon Julia Gillard MP
Deputy Prime Minister

Minister for Education
Minister for Employment and Workplace Relations
Minister for Social Inclusion

On behalf of the Australian Services Union:

Signed: 

Date: 30th October 2009

Linda White
Assistant National Secretary

Australian Services Union

Appendix:

Regulation 6.1 Fair Work Regulations

- (1) If a dispute relates to:
 - (a) a matter arising under the agreement; or
 - (b) the National Employment Standards;this term sets out procedures to settle the dispute.
 - (2) An employee who is a party to the dispute may appoint a representative for the purposes of the procedures in this term.
 - (3) In the first instance, the parties to the dispute must try to resolve the dispute at the workplace level, by discussions between the employee or employees and relevant supervisors and/or management.
 - (4) If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the matter to Fair Work Australia.
 - (5) Fair Work Australia may deal with the dispute in 2 stages:
 - (a) Fair Work Australia will first attempt to resolve the dispute as it considers appropriate, including by mediation, conciliation, expressing an opinion or making a recommendation; and
 - (b) if Fair Work Australia is unable to resolve the dispute at the first stage, Fair Work Australia may then:
 - (i) arbitrate the dispute; and
 - (ii) make a determination that is binding on the parties.
- Note* If Fair Work Australia arbitrates the dispute, it may also use the powers that are available to it under the Act. A decision that Fair Work Australia makes when arbitrating a dispute is a decision for the purpose of Div 3 of Part 5.1 of the Act. Therefore, an appeal may be made against the decision.
- (6) While the parties are trying to resolve the dispute using the procedures in this term:
 - (a) an employee must continue to perform his or her work as he or she would normally unless he or she has a reasonable concern about an imminent risk to his or her health or safety; and
 - (b) an employee must comply with a direction given by the employer to perform other available work at the same workplace, or at another workplace, unless:
 - (i) the work is not safe; or
 - (ii) applicable occupational health and safety legislation would not permit the work to be performed; or
 - (iii) the work is not appropriate for the employee to perform; or
 - (iv) there are other reasonable grounds for the employee to refuse to comply with the direction.
 - (7) The parties to the dispute agree to be bound by a decision made by Fair Work Australia in accordance with this term.

Extract from fair Work Principles for Procurement

To foster best practice, Commonwealth agencies and government contractors in the event of a workplace dispute, must provide as a minimum genuine dispute resolution mechanisms, such as those set out in Schedule 6.1 of the Fair Work Regulations, which provides for the representation of employees and the settlement of the dispute by Fair Work Australia if discussions at the workplace and mediation or conciliation by Fair Work Australia have failed to resolve the dispute.