



9 December 2019

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The Associate to his Honour President Ross  
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Dear Associate

### APPLICATION TO INTRODUCE FLEXIBLE ONGOING EMPLOYMENT INTO THE SCHDS AWARD

We refer to our office's correspondence to the Commission:

- dated 24 September 2018, in which we identified numerous concerns arising from the decision of the Full Federal Court in *Workpac Pty Ltd v Skene* [2018] FCAFC 131 (**Workpac**); and
- dated 27 February 2019, in which we filed a draft determination on behalf of our clients, ABI and NSWBC, seeking to vary the *Social, Community Home Care and Disability Services Industry Award 2010 (SCHDS Award)* by inserting a new category of 'flexible ongoing' employment into the Award.

ABI and NSWBC, maintain the view that:

- the outcome in *Workpac* continues to expose large numbers of employers to the possibility of significant breaches of the *Fair Work Act 2009 (FW Act)* and modern awards for engaging in employment practices which have been customary and commonplace;
- if the ruling in *Workpac* stands, the existing forms of engagements in many modern awards (including the SCHDS Award) may not be consistent with the establishment of a fair and relevant safety net (as required by section 134 of the FW Act); and
- the proposal put forward by ABI and NSWBC on 27 February 2019 aligns with many engagements prevalent in the SCHDS Industry and re-establishes the fair and relevant modern award safety that was in existence in that industry before the outcome in *Workpac*.

### Progression of the ABI/NSWBC proposal

On 3 April 2019, our clients were instructed by President Ross to liaise with other interested parties in order to agree on a timetable for the determination of the proposals raised by ABI and NSWBC.

Our office engaged in exchanges with the ACTU, which has expressed a preference that the ABI and NSWBC's proposals be pursued outside of the 4 Yearly Review of Modern Awards.

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Since these initial exchanges, our office has also identified opportunities that exist to address the outcome of *Workpac* outside of the modern award system over the course of the next 6 months. Specifically, it appears that separate proceedings before the Full Federal Court or legislative changes might provide at least a partial solution to the concerns that have arisen from *Workpac*.

In particular, ABI and NSWBC are vigorously pursuing the case for legislative change and are hopeful that the Federal Government will respond to employer concerns by introducing appropriate legislation that will ensure that employers can continue to engage casuals on the basis that has historically been the case prior to *Workpac*.

Having regard to the alternate avenues available to promptly address the concerns identified in our correspondence dated 24 September 2018 and 27 February 2019, ABI and NSWBC respectfully seek to withdraw their proposal to vary the SCHDS Award. This withdrawal is on the basis that a legislative change is being advocated for by ABI and NSWBC and that such a change should and therefore will be implemented in the near term to address the impact of *Workpac*.

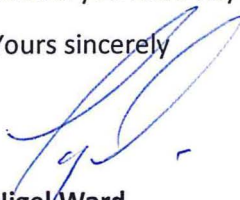
#### **Future application reserved**

For the sake of completeness, ABI and NSWBC wish to put all parties on notice that, if the impact of *Workpac* is not addressed by appropriate legislation or otherwise overturned in other judicial proceedings, ABI and NSWBC reserve their right to file an application outside of the 4 Yearly Review of Modern Awards in order to address the impact of *Workpac* in a manner consistent with our correspondence to the Commission dated 27 February 2019.

Such an application would likely be made with respect to the SCHDS Award as well as other awards impacted by the *Workpac* decision.

Should you have any questions in relation to the above, please do not hesitate to contact us.

Yours sincerely



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