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**Fair Work Commission: 4 Yearly Review of Modern Awards**

**SUBMISSION**

**4 YEARLY REVIEW OF MODERN AWARDS: (AM2016/31)**

**HEALTH PROFESSIONALS AND SUPPORT SERVICES AWARD**

**14 OCTOBER 2019**

**AUSTRALIAN BUSINESS INDUSTRIAL**

**- and -**

**THE NSW BUSINESS CHAMBER LTD**

**1. BACKGROUND**

- 1.1 This submission is filed by Australian Business Industrial (**ABI**) and the NSW Business Chamber Ltd (**NSWBC**) and relate to the Four Yearly Review of the Health Professionals and Support Services Award 2010 (**Award**).
- 1.2 These submissions are filed in accordance with Direction 1 of the Amended Directions issued 17 September 2019 and address the issue of whether the List of Common Health Professionals contained in Schedule C of the Award (the **List**) should be indicative or exhaustive.

**2. THE CURRENT STATUS OF SCHEDULE C**

- 2.1 ABI and NSWBC do not seek to depart from the position advanced in previous submissions dated 2 February and 21 August 2015 in respect of the *current* status of the List found in Schedule C; that is, it is a non-exhaustive guide of the types of health professionals who would be covered by the Award.
- 2.2 However, the fact that our clients consider a proper construction of the Award to be that the list is indicative does not mean that this *should* be the case, and it is in answer to this question that the Full Bench have invited submissions.
- 2.3 In answering this question, we note the view expressed by the Full Bench in its Decision dated 3 December 2018 at [113]:

*Our preliminary view is that it is undesirable to constrain the coverage by reference to an inflexible list of occupations, the names of which and/or work performed may change over time as advances in the health profession occur.*

- 2.4 Our clients respectfully disagree that it is undesirable that the list *should* be exhaustive, rather than indicative.

*The current coverage provisions*

- 2.5 To determine if an employee is covered by the Award, proper regard should be had to clause 4.1 of the Award. Clause 4 does not refer to or rely on List. To determine if an employer's employees are covered by the Award the employer must consider:
- (a) whether as an employer they operate in the 'health industry' (as defined); and
  - (b) whether their employees fall within the class of employees listed in clauses 14 or 15 of the Award.

- 2.6 Schedule B is the only provision of the Award which provides context to the list found in Schedule C. Clause B.2 provides that:

*B.2 Health Professional employees—definitions*

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

- 2.7 Reference in this clause to ‘a list’ (as opposed to more conclusive wording such as ‘the list’) is not helpful to users to trying to determine whether an occupation must be included in the List to be covered in the award. Similarly, use of the word ‘common’ introduces additional confusion by suggesting that there might be other, less common professions which are included in the List, but are not identified by name.
- 2.8 Regardless of the status of the List, requiring a user to have regard to each of clauses 4, 15 and Schedules B and C to determine whether or not an employee is covered by the Award introduces additional complexity into the already complex question of award coverage.

**3. SECTION 143 OF THE FW ACT**

- 3.1 Our clients consider that an exhaustive List is not only desirable, but is required for the Award to be compliant with the *Fair Work Act 2009* (Cth) (the **Act**) in a number of respects.
- 3.2 Section 143(2) of the Act requires that an award must be expressed to cover “specified employers” and “specified employees of employers covered by the modern award”.
- 3.3 This clause reflects the intention of the legislature to ensure that users of modern awards have clarity as to the coverage of those awards. If the List found in Schedule C is indeed indicative, then users are left without an appropriate level of clarity as to which “specified employees” are covered by the Award.
- 3.4 Furthermore, section 143(7) provides that modern awards must not be expressed to cover classes of employees who:
- (a) *because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States); or*
  - (b) *perform work that is not of a similar nature to work that has traditionally been regulated by such awards.*

3.5 Interpreting the list in Schedule C as indicative could result in some health professionals who have not traditionally been covered by awards being included within the scope of the Award, merely due to the fact that they are health professionals who perform similar work to one or more of the professionals included in the List.

3.6 The importance of avoiding this outcome would appear to be supported by the decision of the Full Bench to remove dental hygienists from the List prior to its commencement - see *Re Health Professionals and Support Services Award 2010* [2009] AIRCFB 948.

#### **4. SECTION 134 OF THE FW ACT**

4.1 The foremost guiding principle of the Commission's exercise of its powers is the modern awards objective found at section 134 of the Act.

4.2 Relevantly for current purposes, the Commission must ensure that the Award provides a fair and relevant safety net of terms and conditions, and subsection (g) provides that it must do so with reference to "the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards".

4.3 Inserting wording to the effect clarifying that the List is indicative will not aid in achieving this objective. Indeed, our clients consider it will increase complexity, introduce uncertainty about coverage where currently none exists and increase industrial disputation.

4.4 The List contains no guidance as to the necessary criteria for similarity between a job title which is not included in the List and one that is currently in the List, for employees occupying the former to be included in coverage of the Award. Requiring individual employers and employees to engage in a matching exercise of duties, qualifications and skills without any guidance as to the necessary threshold for similarity represents a potentially significant departure from the Commission's aim of achieving the modern awards objective.

4.5 Our clients also respectfully disagree with the proposition that an indicative list is necessary to ensure ongoing compliance with the modern awards objective by facilitating the Award's responsiveness to ongoing changes in the industry (such as the creation of new occupations and changes to existing occupations, such as with respect to titles). This proposition is based on the assumption that the Award *should* cover all employees in the health industry, which is an improper starting point when assessing award coverage.

4.6 Relevantly:

- (a) it may not be appropriate for the Award to cover new or emerging professions within the industry, having particular regard to section 143(7);
- (b) the employees occupying those roles may not want to be covered by the Award, as was the case for dental hygienists; and
- (c) in the event there do emerge professions which *should* be covered by the Award and which are not included in the List, an application pursuant to section 157 of the Act is the appropriate vehicle to achieve such an amendment.

## 5. CONCLUSION

5.1 In putting these submissions, ABI and NSWBC seek to properly assist the Commission in the discharge of its discretion pursuant to section 156 of the Act.

5.2 If you have any questions in relation to these submissions, please contact Kate Thomson on (02) 4989 1003.



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**On behalf of Australian Business Industrial and the NSW Business Chamber Ltd**