AUSTRALIAN BUSINESS
Lawyers & Advisors

Fair Work Commission: 4 Yearly Review of Modern Awards

SUBMISSIONS IN REPLY

HEALTH PROFESSIONALS AND SUPPORT SERVICES AWARD 2010

(AM2014/204)

21 AUGUST 2015

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

1. BACKGROUND

1.1 These reply submissions are 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 ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and has some 3,900 members.

1.3 NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009* (Cth) and has some 18,000 members.

1.4 ABI and NSWBC have a material interest in the Four Yearly Review of the Award given that both entities represent numerous employers who operate in the health industry.

1.5 On 6 May 2015, the Fair Work Commission (**Commission**) published a Statement which outlined the revised programming for each of the Group 2 awards as part of the Four Yearly Review.[1]

1.6 Pursuant to the Amended Directions attached to that Statement, interested parties were directed to:

(a) file comprehensive written submissions on the technical and drafting issues related to the exposure draft, as well as an outline of submissions in relation to any substantive claims or variations being pursued, by 15 July 2015; and

(b) file comprehensive written submissions in reply to the technical and drafting issues related to exposure drafts, as well as an outline of submissions in reply to any substantive claims or variations by 21 August 2015.

1.7 ABI and NSWBC are not pursuing any substantive claims in the Award.

1.8 In respect of the exposure draft published on 8 December 2014 (**Exposure Draft**), ABI and NSWBC had previously filed submissions on 2 February 2015, and reply submissions on 5 March 2015, and we continue to rely on those submissions.

1.9 These reply submissions are filed in accordance with Direction 2 of the Amended Directions and respond to the submissions filed by the following parties:

(a) Pathology Australia (**PA**) filed on 6 August 2015;

(b) Tristar Medical Group (**TMG**) filed on 22 July 2015;

(c) Australian Physiotherapy Association (**APA**) filed on 16 July 2015;

(d) Health Services Union (**HSU**) filed on 16 July 2015;

(e) Australian Industry Group (**Ai Group**) filed on 15 July 2015;

(f) Business SA filed on 15 July 2015; and

(g) the Association of Professional Engineers, Scientists and Managers Australia (**APESMA**) filed on 15 July 2015;

(h) Australian Workers Union (**AWU**) filed on 15 July 2015;

(i) Chiropractors Association of Australia (**CAA**) filed on filed on 15 July 2015;

[1] [2015] FWC 3148.

(j) Private Hospitals Employers Group (**PHIEA**) filed on 15 July 2015;

(k) Medical Imaging Employment Relations Group (**MIERG**) filed on 15 July 2015;

(l) Aged Care Employers (**ACE**) on 15 July 2015; and

(m) the application to vary the award filed by Kids Matters Occupational Therapy Pty Ltd on 10 June 2015.

2. REPLY SUBMISSIONS ON TECHNICAL AND DRAFTING MATTERS

2.1 A number of parties have raised new or additional technical or drafting matters relating to the Exposure Draft. We address these matters as follows.

Schedule B - 'Common health professionals'

2.2 In relation to the question of whether the 'Common health professionals' list of occupations found in Schedule B of the Award is indicative or exhaustive, ABI and NSWBC rely on previous their submissions dated 2 February 2015.

2.3 ABI and NSWBC submit that the list is merely a guide of the types of health professionals who would be covered by the Award. The Schedule B list does not determine the Award's coverage. To determine if an employee is covered by the Award, proper regard should be had to clause 4.1 of the Award.

2.4 Relevantly, the clause 4 does not refer to or rely on the list of professions in Schedule B. 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.

2.5 ABI and NSWBC also submit that any attempt by a party in these proceedings to assert a particular understanding of the operation of Schedule B should not:

(a) result in a change in coverage of this Award; or

(b) be used in the future as an attempt to circumvent the process of making an application to the Commission to alter the coverage of the Award to either expand or reduce its coverage;

without proper regard to the statutory tests contained in the FW Act[2] and a proper consideration of the Award as a whole.

HSU Draft Determination

2.6 ABI and NSWBC submit that the proposed draft determination in respect of Schedule A.2 and Schedule B is unnecessary. The Award is already clear and unambiguous in relation to coverage (see paragraphs 2.3 - 2.5 of ABI's submissions).

[2] *Fair Work Act 2009* (Cth) sections 163 and 134.

Ai Group Submissions

2.7 ABI and NSWBC have understood that Ai Group is saying that Schedule B is exhaustive and that the decision which granted the Dental Hygienists Association[3] an exclusion from coverage from the Award supports this view.

2.8 However, ABI and NSWBC respectfully disagree with this view. Based on a proper construction of the Award, the test for determining coverage is not determined by reference to Schedule B, and previous decisions regarding the Award's coverage are not disturbed by this interpretation.

2.9 In light of the above submissions, ABI and NSWBC confirm their views that the list in Schedule B of the Exposure Draft is indicative rather than exhaustive.

Clause 6.4: Minimum Engagements (Casual Employees)

2.10 The Fair Work Ombudsman asked the question:

> *"Parties are asked to clarify whether the minimum engagements are daily minimums which can be worked in two or more occasions (i.e. in split shifts) or if these hours must be worked consecutively."*

2.11 ABI and NSWBC submit that there is nothing in the current Award which limits the hours worked by a casual as being limited to only one engagement or shift per day of work. The wording of the current Award supports this position and its expression of the casual minimum engagement.[4]

2.12 The HSU has argued that the wording of the Award does not permit a reading where the employee's work in a given day or shift is not continuous, that is, split shifts are not permitted. ABI and NSWBC submit that the Award's language does not limit the work of a given day to only ever being continuous or consecutive. In other modern awards where the work of the day is not intended to be split up then those instruments contain express wording to achieve that outcome. However, no such restrictive wording exists in this Award.

2.13 The AWU submits that no such interpretation of the Award is available and that split shifts would be a significant departure of the Award. ABI and NSWBC submit that the vague submissions of the AWU do not point to any such restrictive language in the Award.

2.14 In this regard the Award is not ambiguous and a plain reading of the language of the Award permits an interpretation where a split shift could occur and the hours are not to be worked consecutively.

Shiftworkers

<u>Definition of Shift Workers</u>

2.15 ABI and NSWBC note that a number of parties have raised concerns that the Award's shift work provision at clause 18.4 lacks clarity.[5]

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[3] [2009] AIRCFB 948

[4] *Health Professionals and Support Services Award 2010*, clause 10.4.

[5] AWU submissions paragraph 14 and HSU submissions paragraph

2.16 ABI and NSWBC submit that clause 18.4 of the proposed Award (which has been adopted from the current Award) defines shift work by reference to the parameters of the shift. That is, if a shift falls within the parameters set out by clause 18.4 then a shift loading is payable and that employee is performing shift work.

2.17 ABI and NSWBC submit that this is not anomalous and clearly defines the shifts which will attract the 15% shift loading.

Shift Workers and Weekend Penalties

2.18 It is not ambiguous or anomalous that shift workers do not presently receive weekend penalties under the Award. A plain reading of the Award's current wording clearly indicates that shift workers are excluded from the operation of the Award's weekend penalties.

2.19 ABI and NSWBC note the submissions of the Chiropractors Association of Australia, Private Hospitals Employers Group (PHIEA), the AWU and HSU.

2.20 The positions advanced by those parties represent a departure from the current Award and therefore represents a substantive change. Accordingly, any party seeking to agitate this issue would be required to advance merit based submissions accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.

2.21 If this change was introduced into the Award it would have a significant impact on employers in the health industry who correctly, over the last 5 years, paid shift workers only the shift loading proscribed in clause 29 to shift workers performing work on weekends.

2.22 ABI and NSWBC submit that the question of whether the Award ought to provide weekend penalties for shift workers proposes a significant change and, if pursued, should be the basis of an application and supporting probative evidence rather than a matter of only written submissions by the parties.

2.23 Given the significance of the applications and submissions in relation to both hours of work and the related issues of determining the proper identity of shift workers under this Award, ABI and NSWBC submit that this matter is properly characterised as a substantive claim and should be dealt with alongside the other substantive matters that require determination.

3. OUTLINE OF SUBMISSIONS IN REPLY ON SUBSTANTIVE CLAIMS

Initial comments

3.1 Given the numerous substantive claims being pursued in this Award, in our view it is appropriate for all substantive claims in this Award to be dealt with by a separately constituted Full Bench.

3.2 At this stage we anticipate that it would be appropriate to list the matter for a preliminary mention or directions hearing before a separately constituted Full Bench in order to determine the programming of the substantive claims for arbitration.

Legislative framework of the Four Yearly Review

3.3 The legislative framework applicable to the 4 Yearly Review has been considered in detail in the *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (**Preliminary Issues Decision**). The Preliminary Issues Decision addresses in detail the legislative framework applying to these proceedings.

3.4 The Preliminary Issues Decision confirms (at [23]) that the Commission remains at all times obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account the modern awards objective.

3.5 This means that, when considering any variation, the Commission should be focused upon ensuring that any new version of the safety net is consistent with the modern awards objective.

3.6 The purpose of section 134 of the Act is the creation of a 'fair and relevant minimum safety net of terms and conditions' that is constituted by the NES and modern awards. It should be uncontroversial that what section 134 is setting is the terms and conditions of employment that no employee in a given circumstance should fall below; such is clear from the words "minimum safety net".

3.7 In arriving at this fair and relevant minimum safety net, the Commission is to "take into account" those matters set out in section 134(1)(a)-(h) inclusive. This said, the ultimate outcome is the creation of a "fair and relevant minimum safety net" having taken into account and weighed up the matters set out in section 134 (1) (a)-(h).

3.8 The phrase "take into account" has a relationship with similar phrases such as "consider" and "have regard to". Such expressions are frequently used in legislation that vests a discretion in a decision making body to condition the scope of the discretion otherwise vested in the decision-maker.

3.9 Such phrases have been consistently interpreted to mean that the decision-maker must take into account the matter to which regard is to be had and give weight to it as an element in making the decision. However, the significance of the stated matters will depend upon their context.[6]

3.10 The authorities referred to also make it clear that the weight to be given the matter is for the decision-maker to determine, provided that the consideration of the matter is genuine. The fact that a decision-maker is directed to have regard to certain matters that are specified does not preclude consideration of other factors thought to be relevant[7].

3.11 While section 134 is not the section in the Act that vests discretion, it is however a section that conditions the exercise of 'modern award powers' which include for instance the discretion vested by section 139.

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[6] *Rathborne v Abel* (1964) 38 ALJR293 at 295 (per Barwick CJ).

[7] Ibid, at 301 (per Kitto J); *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 286; 25 ALR 497 at 504; *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 333; 44 ALR 63 at 67; *Haplin v Lumley General Insurance Ltd* (2009) 261 ALR 741 at 748; *Minister for Immigration and Citizenship v Khadgi* [2010] FCAFC 145 at [57]-[67].

3.12 The discretion conferred on the Commission to make determinations varying modern awards is expressed in general terms. However, the need for a 'stable' modern award system suggests that parties seeking to vary a modern award must advance a merit argument in support of the proposed variation.[8] In our submission, a merit based argument would no doubt be more persuasive if it was aligned with the matters outlined in subsection 134(1) of the Act.

3.13 When considering the merit basis to make variations, the Preliminary Issues Decision held that:

(a) there may be cases where the need for an award variation is self-evident. In such circumstances, proposed variations can be determined with little formality;[9] and

(b) where significant award changes are proposed, they must be supported by submissions which address the legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.[10]

3.14 The Union's application to vary clause 9.2 of the Award fits the characterisation in paragraph 3.13(b) above, and accordingly the Union is required to adduce merit based evidence of a probative nature to show that if its claims were granted the modern award in question at the conclusion of the 4 Yearly review (inclusive of the claim) achieves the modern awards objective (s.134).

3.15 The Commission should proceed on the basis that prima facie the modern award achieved the modern awards objective at the time that it was made.[11]

Claim by ACE to vary Rostering

3.16 ABI and NSWBC understand that ACE has applied to vary clause 8.3 of the Award. ABI and NSWBC support this application as it will ensure that the Award is better placed to meet the modern awards objective in section 134. In particular, the change:

(a) will permit the employer and employee flexibility to agree to changes to a roster with less than seven days' notice;

(b) similarly protects an employee's ability to not agree to these changes, in which case seven days' notice of a roster change would still be required; and

(c) in the case of an emergency or a fellow employee who is ill the employer is able to change the roster with less than seven days' notice.

3.17 ABI and NSWBC submit that the ACE application strikes a balance between the needs of employers in the health industry to meet the needs of its clients whilst still affording the employee flexibility to agree or not agree to roster changes. ABI and NSWBC submit that the ACE application better places the Award to meet the requirements of the modern awards objective.

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[8] *Preliminary Issues Decision* at [60].

[9] Ibid at [23] and [60].

[10] Ibid.

[11] Ibid at [24].

3.18 It is clear that the proposed variation falls within the characterisation in paragraph 3.13(b) above, and accordingly the parties will be required to adduce merit based arguments in support of the variations, along with evidence of a probative nature to show that if its claims were granted the modern award in question at the conclusion of the 4 Yearly review (inclusive of the claim) achieves the modern awards objective (s.134).

Claim by APESMA regarding Translators and Interpreters

3.19 APESMA has made an application in these proceedings to vary the Award so that the Award becomes the occupational award for all translators and interpreters not covered by any other award.

3.20 However, ABI and NSWBC strongly oppose APESMA's application on the basis that:

(a) making the Health Award the occupational award for all translators and interpreters not otherwise covered by another modern award would have the dysfunctional effect of covering employees working in other industries; and

(b) would become the award for businesses whose primary operation is to provide interpretation and translation services.

3.21 ABI and NSWBC submit that if the APESMA application was granted this would lead to the absurd outcome that employees working in any of the following industries or businesses would be covered under an award designed only for the health industry (noting the list is not exhaustive):

(a) businesses that primarily operate to contract out translators and interpreters to a range of other industries not necessarily in the health industry;

(b) the court system and/or legal work;

(c) immigration work;

(d) academic and or religious institutions;

(e) manufacturing (doing such work as translating product manuals, customer orders, technical specifications);

(f) in distribution and logistics (such as, for example, translating shipping dockets, customs documents, etc);

(g) social and community services including outreach programs and migrant/refugee integration type programs; and

(h) journalism (e.g. translating written or audio material from other different sources).

3.22 ABI and NSWBC understand that APESMA submits that section 134(1)(a) of the Act would be satisfied on the basis that translators/interpreters lack a safety net of terms and conditions. This seems also to be a reason underpinning APESMA's claim that the other legs of s 134(1) are satisfied.

3.23 However, ABI and NSWBC submit that the application, if granted, does not achieve the modern awards objective on the basis that:

(a) granting an application to make an award cover an occupation regardless of the industry the employee falls into fails to properly recognise the significance of the Award being an industry award; and

(b) it would mean the Award would no longer meet the modern awards objective of having a 'simple and easy to understand award system'.[12]

3.24 ABI and NSWBC do not oppose APESMA's ancillary application to include a definition of the NAATI so long as the grant of this application is limited to the Award's current coverage of translators and interpreters at levels 5 and 7 of the Award.[13]

3.25 ABI and NSWBC understand that some limited evidence will be filed regarding this application.

3.26 It is clear that the above proposed variations fit the characterisation in paragraph 3.13(b) above, and accordingly APESMA will be required to adduce merit based arguments in support of the variations, along with evidence of a probative nature to show that if its claims were granted the modern award in question at the conclusion of the 4 Yearly review (inclusive of the claim) achieves the modern awards objective (s.134).

3.27 ABI and NSWBC submit that the Award already meets the modern awards objective and that employees working in other industries should not be brought under the coverage of a health industry award, which is uncontroversially an industry with distinctive characteristics, when the work they perform is not within or linked to the provision of health services. If this application is pressed by APESMA it is submitted by ABI and NSWBC that this matter should be referred to a separate Full Bench to be determined.

Claims by various parties for variations to the span of hours of work

3.28 ABI and NSWBC note that a large number of parties in these proceedings have filed applications seeking industry sector specific variations to the span of hours.

3.29 ABI and NSWBC supports the applications of:

(a) the Chiropractors Association of Australia (CAA) which is seeking a variation specific to the chiropractic sector so that employees may work ordinary hours on weekends;

(b) the PHIEA which is seeking industry specific clauses to provide for 24/7 shift working arrangements to ensure that hospitals can roster health professionals around the clock in their institutions;

(c) Pathology Australia which is seeking a span of hours for pathology practices that would permit ordinary hours between the hours of 6am to 9pm Monday to Sunday;

(d) the Australian Physiotherapy Association which is seeking a span of hours for physiotherapy practices that would permit an extension to the span of hours on Saturdays; and

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[12] *Fair Work Act 2009* (Cth) section 134(1)(g).

[13] Schedule B.

(e) the Kids Matters Occupational Therapy Pty Ltd which is seeking a variation to the span of hours that would permit occupational therapy practices to be considered 'five and a half day' practices.

3.30 It is clear that all these proposed variations fall within the characterisation in paragraph 3.13(b) above, and accordingly the parties will be required to adduce merit based arguments in support of the variations, along with evidence of a probative nature to show that if its claims were granted the modern award in question at the conclusion of the 4 Yearly review (inclusive of the claim) achieves the modern awards objective (s.134).

3.31 The Award currently provides for spans of hours that are industry sector specific in relation to:

(a) physiotherapy;

(b) private medical imaging;

(c) private medical, dental and pathology practices; and

(d) a default provision to cover all other industry sectors.

3.32 ABI and NSWBC oppose the applications of the HSU and AWU.

AWU claim regarding span of hours

3.33 ABI and NSWBC submit that the AWU's proposal of a simplified span is unlikely to solve the issue of the diverse flexibility needs across the industry sectors that make up the health industry and it would diminish existing spans. The AWU's application is ambiguous and does not clarify what span of hours it is seeking, only that it requires 'simplification'.

HSU claim regarding span of hours

3.34 The HSU's application is opposed because it would operate to diminish the span of hours already contained in the current award. The health industry is diverse and has a large number of industry sectors which make up the greater whole. As an industry it arguably has greater flexibility requirements to ensure the demand for various medical and health services is met.

3.35 ABI and NSWBC note that the parties have indicated that they will be bringing witnesses to give evidence as well as documentary evidence. Once the evidence is filed ABI and NSWBC will be in a better position to reply to the parties' submissions.

Claim by HSU for Shift Work and Weekend Penalties for Shift Workers

3.36 ABI and NSWBC have understood that the HSU has applied for shift workers to receive both a shift loading and weekend penalty when they perform shift work on a weekend.

3.37 ABI and NSWBC relies on its submissions of 2 February 2015[14]and remains opposed to the HSU's application.

[14] ABI and NSWBC submissions on exposure drafts, paragraph 52 (2 February 2015).

3.38 This application, if granted, would be a significant departure from the current award's operation and is not necessary for the Award to meet the modern award objective.

3.39 As mentioned earlier in ABI and NSWBC's submissions at paragraph 2.18:

> *It is also not ambiguous or anomalous that shift workers do not presently receive weekend penalties under the Award. A plain reading of the Award's current wording clearly indicates that shift workers are excluded from the operation of the Award's weekend penalties.*

3.40 To then grant an application which would then require employers to pay not only weekend penalties but shift loadings as well would be an enormous cost increase for employers in this industry.

3.41 In support of their application the HSU refer to many enterprise agreements featuring clauses which provide both a shift loading and weekend penalty. However, the Award represents the minimum safety net applicable to employees in this industry and it is submitted that what may be happening in enterprise bargaining should not become the minimum standard in the Award.

3.42 It is clear that the proposed variations falls within the characterisation in paragraph 3.13(b) above, and accordingly the parties will be required to adduce merit based arguments in support of the variations, along with evidence of a probative nature to show that if its claims were granted the modern award in question at the conclusion of the 4 Yearly review (inclusive of the claim) achieves the modern awards objective (s.134).

Claim by HSU regarding Overtime

3.43 The HSU have applied for variations to the overtime provision in the Award.

3.44 The HSU's application for 200% overtime rates on weekends is opposed by ABI and NSWBC.

3.45 The HSU's application for a change to the wording of the overtime provision is also opposed on the basis that the Award is already sufficiently clear regarding when overtime is payable and that the application is not necessary for the Award to meet the modern awards objective.

3.46 It is clear that the proposed variations falls within the characterisation in paragraph 3.13(b) above, and accordingly the parties will be required to adduce merit based arguments in support of the variations, along with evidence of a probative nature to show that if its claims were granted the modern award in question at the conclusion of the 4 Yearly review (inclusive of the claim) achieves the modern awards objective (s.134).

Claim by HSU regarding Classifications

3.47 ABI and NSWBC understand that the HSU has applied for a variation to the classification structure to include 'interns' at level A.2.1 'Health Professional-Level 1'.

3.48 ABI and NSWBC submit that such a variation is not necessary for the Award to meet the modern award objective, in circumstances where the Award already clarifies that a Level 1 employee is an employee that has met the requirements to practice as a health

professional and is the appropriate level for an employee who is just starting out in their career as a health professional.

Claim by Ai Group regarding Meal Breaks

3.49 ABI and NSWBC support Ai Group's application to amend clause 27 of the Award. The insertion of the proposed amendment to clause 27.1(a) will enable the Award to meet the requirements of section 134, modern award objective, because it enables agreement between the employer and employee to be reached for an employee to forgo a meal break during a shorter shift of less than six hours duration. This may be desirable to employees who want to work a shorter shift without a meal break to attend to family or caring responsibilities for example.

3.50 It is clear that the proposed variation falls within the characterisation in paragraph 3.13(b) above, and accordingly the parties will be required to adduce merit based arguments in support of the variations, along with evidence of a probative nature to show that if its claims were granted the modern award in question at the conclusion of the 4 Yearly review (inclusive of the claim) achieves the modern awards objective (s.134).

Claim by Ai Group for insertion of Annualised Salary provision

3.51 ABI and NSWBC supports Ai Group's application to insert an annualised salary provision into the Award. Such an provision will enable the Award to meet the modern awards objective.

3.52 It is clear that the proposed variation falls within the characterisation in paragraph 3.13(b) above, and accordingly the parties will be required to adduce merit based arguments in support of the variations, along with evidence of a probative nature to show that if its claims were granted the modern award in question at the conclusion of the 4 Yearly review (inclusive of the claim) achieves the modern awards objective (s.134).

Claim by MIERG

3.53 MIERG has applied for various provisions from the *Medical Imaging Employment Relations Group and Health Services Union of Australia Consent Award* (**Consent Award**) to be inserted into the Award on a wholesale basis.

3.54 ABI and NSWBC understand that this would mean the insertion of the following provisions and variations:

(a) the insertion of a probationary period of three months;

(b) industry sector specific provisions for private medical imaging practices in relation to:

(i) ordinary hours and consultation;

(ii) rostering;

(iii) breaks;

(iv) payment of wages;

(v) overtime rates; and

(vi) dispute resolution.

3.55 The MIERG's application for a probationary period in the Award is opposed on the basis that:

(a) this is not an amendment which is necessary for the Award to meet the modern awards objective;

(b) it is also more appropriately a term that could form the subject of a contract between the employer and employee and is essentially an outdated term; and

(c) it could be a source of confusion for employers and employees alike regarding the operation and effect of the Minimum Employment Period in the FW Act.

3.56 The MIERG's application for a variation to the remaining variations sought by MIERG are opposed on the basis that they are not necessary for the Award to meet the modern awards objective.

3.57 It is also unclear why, outside of the span of hours issue, an industry sector would require further industry specific provisions and no justification is provided in the submissions. Also, if granted, the proposed changes are likely to make the Award significantly harder to read and understand.

3.58 If it is the case that MIERG wish to advance changes to the Award that would have application to the whole industry, then such an application should be filed with the Fair Work Commission.

3.59 It is clear that the above proposed variations of MIERG fit the characterisation in paragraph 3.13(b) above, and accordingly the parties will be required to adduce merit based arguments in support of the variations, along with evidence of a probative nature to show that if its claims were granted the modern award in question at the conclusion of the 4 Yearly review (inclusive of the claim) achieves the modern awards objective (s.134).

4. CONCLUSION

4.1 In putting these reply submissions, ABI and NSWBC seek to properly assist the Commission in the discharge of its discretion pursuant to section 156 of the *Fair Work Act 2009* (Cth) (**Act**).

4.2 If you have any questions in relation to these submissions, please contact Zoe McQuillan on (02) 9458 7537.

Nigel Ward
CEO + Director
Australian Business Lawyers & Advisors Pty Limited
(02) 9458 7286
nigel.ward@ablawyers.com.au

Zoe McQuillan
Lawyer
Australian Business Lawyers & Advisors Pty Limited
(02) 9458 7537
zoe.mcquillan@ablawyers.com.au

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