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Subject: AM2016/31 Nurses Award [ABLAW-ImanageDocs.FID135711]
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Dear Associate

AM2016/31 Nurses Award

We refer to the above and confirm we act on behalf of ABI and the NSW Business Chamber.

Attached by way of filing on behalf of our clients are further submissions in this matter. Our clients were granted an extension until 19 March 2018 for the filing of these submissions. Accordingly, we respectfully seek the leave of the Commission to file out of time.

We apologise for the delay in the provision of this document. If you require further information please do not hesitate to let me know.

Yours sincerely

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Fair Work Commission: 4 yearly Review of modern awards

SUBMISSION IN REPLY

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

**AUSTRALIAN BUSINESS INDUSTRIAL
- and -
THE NSW BUSINESS CHAMBER LTD**

20 MARCH 2018

1. INTRODUCTION

- 1.1 This submission in reply is made on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**) in accordance with Item [b] of the Directions of the Fair Work Commission (the **Commission**) issued on 28 November 2017 in respect of the *Nurses Award 2010* (the **Award**).
- 1.2 ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and has some 4,200 members.
- 1.3 NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009* (Cth) with more than 18,000 members.
- 1.4 Our clients rely on their reply submission dated 23 May 2017.
- 1.5 These closing submissions are confined to the variations sought by the Australian Nursing and Midwifery Federation (the **ANMF**).

2. LEGISLATIVE FRAMEWORK OF THE FOUR YEARLY REVIEW

- 2.1 Our submission of 23 May 2017 addressed the legislative framework applicable to the 4 Yearly Review at paragraphs 2.1-2.9. We continue to rely on those submissions.

3. THE VARIATIONS SOUGHT BY THE ANMF

- 3.1 The ANMF seeks the following variations to the Nurses Award:
 - (a) the insertion of an in-charge allowance;
 - (b) the insertion of a leading hand allowance;
 - (c) an extension to the application of the existing recall to work provisions (both when on call and when not on call);
 - (d) an entitlement to additional annual leave where an employee is required to be on call;
 - (e) a variation to clause 21.4, which deals with minimum period of time that employees must be free from duty;
 - (f) a variation to clause 23 to increase the minimum period of rest required between ordinary shifts; and
 - (g) a variation to clause 27 to impose prescription regarding the timing of meal breaks.

4. OUTLINE OF POSITION IN RELATION TO THE ANMF CLAIMS

4.1 Subject to paragraph 4.35 below, ABI and NSWBC remain opposed to each of the ANMF claims referred to above.

4.2 Having had the benefit of considering the ANMF witness evidence, and the further written submissions of the ANMF dated 12 February 2018 (**ANMF Submission**), our clients' position in respect to variations can be summarised as follows:

- (a) the variations sought by the ANMF are inconsistent with the modern awards objective and/or go beyond that which is necessary to meet the modern awards objective;
- (b) The ANMF has failed to advance persuasive merit based arguments for each of the variations sought; and
- (c) the variations have not been supported by probative evidence properly directed to demonstrating the facts supporting the proposed variations.

4.3 We deal with each of the four categories of proposed variations in turn below.

Allowances

In charge allowance

4.4 The ANMF proposes the inclusion of new allowance payable to nurses classified at registered nurse level 2 and below who are '*in charge*' of a facility, with the quantum of the allowance dependent on the number of beds in the relevant facility. An allowance would also be payable to a nurse '*in charge*' of a '*section*' of a facility, but the term '*section*' is not defined. This allowance is said to be required to compensate these employees for the additional duties they perform, such as maintenance tasks, responding to family enquiries, supervising kitchen staff and covering the shifts of employees on leave.

4.5 For the purpose of this Review, the Commission must proceed on the basis that the Award achieved the modern awards objective at the time that it was made.¹ In the case of this claim, the hurdle which must be overcome by the ANMF is even greater, as the Commission has twice considered and rejected applications for the insertion of an '*in charge*' allowance (both during Award Modernisation and the 2012 Review).

4.6 During the 2012 Review, Vice President Watson held that:

¹ 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 at [24].

In my view, in an award such as this with wide-ranging application, there are sound reasons for leaving matters of this nature to the agreement or overaward area where the precise circumstances can be considered and appropriate compensation can be given to the extent that it is agreed to be warranted.²

- 4.7 His Honour's comments are even more pertinent in the context of the current application, which is drafted in such a manner as to have more significant cost implications than those which would have flowed from the application pursued during the 2012 Review.
- 4.8 Specifically, the 2012 application related to an 'in charge' allowance payable only on Saturdays, Sundays, public holidays or between 6pm and 8pm, for nurses in charge of a 'worksite'. By contrast, the current application seeks the payment of an allowance for any time a nurse is in charge, not just of an entire facility but also for a vaguely described (and undefined) 'section' of a facility. It is conceivable this could even extend to a patient who is the sole occupant of a unit or sub-unit.
- 4.9 The ANMF asserts at [8] of its Submission that *'the amount that would be added to labour costs would not be high as the allowance would be applicable to (at most) one RN on each shift'*. Not only is this proposition unsupported by ANMF evidence, it cannot logically be sustained when considering the imprecision with which the proposed clause is drafted.
- 4.10 Indeed, our clients consider that not only is this aspect of the ANMF application unnecessary to ensure the Award meets the modern awards objective, it is actually likely to achieve the effect of inhibiting the objectives (especially in terms of increased employment costs).
- 4.11 Further, the evidence adduced by the ANMF in support of these claims was drawn from a very narrow part of the industry, and so must be viewed in that light. Specifically, the evidence was limited to:
- (a) witnesses who were all employees (or former employees) of two discrete employers, namely Gympie Private Hospital and Blue Care;
 - (b) witnesses who were all covered by an enterprise agreement; and
 - (c) witnesses who were receiving hourly rates of pay under those enterprise agreements that exceeded the applicable rates of pay under the Award.
- 4.12 It cannot therefore be assumed that the organisation and allocation of work, and the distribution of work tasks, at these two discrete businesses are representative of the working arrangements at other workplaces across Australia. The Commission is entitled to conclude

² See [23] of Application by Aged Care Association Australia Ltd & Ors [2012] FWA 9420.

that the enterprise agreements in place in these businesses have been negotiated to meet each party's needs both in terms of flexibility and adequate remuneration for the level of responsibility which is required to be exercised by the employees covered by the agreement.

- 4.13 On this basis, evidence relating to 'additional duties' which are allegedly required to be performed by ANMF witnesses Ms Mathews and Ms Fletcher³ cannot be relied upon to allege that the Award does not provide an adequate minimum safety net.

Leading hand allowance

- 4.14 Our clients are not aware of any historical basis in the precursor instruments to the Award for an allowance of this kind. The ANMF has failed to adduce a compelling merit based argument or indeed any evidence at all in support of this aspect of its claim. It should fail for the same reasons advanced in relation to the claim for an in charge allowance.

On call and recall to work provisions

- 4.15 The proposed variation in respect of the 'recall to work when on call' clause would trigger an entitlement to a minimum three hours' pay at overtime rates for employees who are required to answer telephone enquiries whilst on call.
- 4.16 The Award must reflect the realities of the sector in which it operates. Clause 16.4 of the Award already contemplates that nurses may be required to be on call and that they should be remunerated accordingly, even if they are not required to perform any work.
- 4.17 If an employee is required to return physically to work, clause 28.5 ensures they are appropriately remunerated (by being paid for a minimum of three hours). The combination of both clauses 16.4 and 28.5 results in the Award in its current form constituting a fair and relevant minimum safety net for the industry.
- 4.18 The evidence adduced by the ANMF in respect of this aspect of the claim also comes from employees covered by an enterprise agreement. If a particular business operates in such a manner that an on call employee is required to answer a large number of calls or provide complex and lengthy advice over the telephone, this is a matter which should be addressed as part of bargaining for the enterprise agreement or as an over-award entitlement. It does not follow, nor is there any evidence to support, the assertion that the Award in its current form is failing to provide a fair and relevant minimum safety net.

³ See [6] and [9] of Cherise Nicole Matthews' statement dated 23 February 2017 and PN182-183, 178-180, 186-189, 195-197 of the transcript. See [7] of Susan Elizabeth Fletcher's statement dated 27 February 2017 and PN340-345 of the transcript.

- 4.19 That said, if the Commission forms a view that the current Award, together with the NES, does not provide a fair and relevant minimum safety net of terms and conditions taking into account the considerations in section 134, the proposal advanced by the Aged Care Employers (**ACE**) for a 'Remote Communication Allowance' in its submission dated 17 March 2017 should be preferred.
- 4.20 The proposed 'Remote Communication Allowance' is intended to compensate employees who are required to provide clinical advice or assistance whilst on call, as distinct from employees who are required to be available to return to the workplace.
- 4.21 Our clients consider the ACE proposal to be preferable to that of the ANMF for the following reasons:
- (a) the employee receives a base level of remuneration for the entire period (50 percent of the on call allowance);
 - (b) the employee is remunerated for time spent providing advice or assistance, with a minimum payment of one hour at overtime rates; and
 - (c) an adequate safeguard is provided via a requirement that the employee keep adequate records relating to the type of advice/assistance provided and the duration of each instance.
- 4.22 As indicated by ACE at [5] of its submission dated 17 March 2017, similar remuneration models are found in other modern awards and ensure that employees are appropriately remunerated for advice and assistance provided while on call without rendering the practice excessively expensive. This would suggest that such a variation is far more likely to meet the modern awards objective than that advanced by the ANMF.

Excessive on call claim

- 4.23 The second aspect of the claim relates to an expansion of clause 16.4 to include a provision entitling employees who work on call to receive an additional amount of annual leave, depending on the number of occasions on which they work per year.
- 4.24 Our clients are not aware of any historical basis for this claim in any of the precursor instruments to the Award.
- 4.25 Again, the Commission must proceed on the basis that the Award met the modern awards objective at the time the Award was made. The Award has always contemplated that nurses may be required to work on call, as this is the industrial reality of the sector in which they work.

- 4.26 The ANMF has failed to acknowledge the reality that some employees may request to be rostered on-call more than other employees, which may explain discrepancies in the number of occasions worked by employees in a particular workplace.
- 4.27 In the absence of evidence and a merit-based argument from the ANMF about significant change in the industry since the Award was last reviewed (during the 2012 Review), such that the Award no longer provides a fair and relevant minimum safety net, a finding that this variation is required for this purpose cannot be sustained.

Free from duty and on call claim

- 4.28 The third part of the ANMF claim seeks to amend clause 21.4, which would prevent an employer from placing an employee on an on-call roster on the employee's day off.
- 4.29 Again, the arguments in support of this claim do not adequately consider the industrial realities of the sector.
- 4.30 It is self-evident that an employee cannot be both at work and on call. To require employers to factor additional rest days into rostering arrangements would have significant cost implications. The ANMF has failed to provide a merit-based argument in support of this claim, nor has it adduced persuasive evidence in support, and in so doing has not demonstrated why the variation would result in the Award meeting the modern awards objective. This aspect of the claim must fail.

Rest between rostered duty

- 4.31 This aspect of the ANMF claim relates to two variations to clause 23.1 of the Award, being:
- (a) an increase to the break between rostered shifts from 8 to 10 hours; and
 - (b) payment of penalty rates in circumstances where an employee has not had the required rest break between shifts.
- 4.32 The ANMF seeks to rely on evidence and submissions filed prior to the November 2017 hearing of this matter. This evidence is constituted by a body of academic research, the majority of which was not specifically commissioned in respect of these proceedings, and witness evidence in respect of the personal circumstances of the individuals concerned (such as the distance between home and work).⁴ This evidence is supported by bald assertions that the current break of eight hours found in the Award is '*insufficient*'.⁵

⁴ [6] of the statement of Sherrelle Fox dated 27 February 2017.

⁵ ANMF submission [86]

- 4.33 In our clients' submission, the ANMF has failed to adduce sufficient evidence or make a compelling merit-based argument in support of this application, the practical effects of which would be far-reaching. Nurses are required to be rostered in such a way as to balance patient care needs with the health and safety of employees and the cost considerations of employers. This is a delicate balance and has been fine-tuned over time.
- 4.34 The insertion of a penalty in the clause is justified by the ANMF on the basis that '*there is little incentive for employers to take clause 23.1 into account as no penalty exists*'.⁶ This argument is without basis. If an employer does not comply with a term of the Award, the appropriate recourse is via a prosecution for the breach relying on section 45 of the *Fair Work Act 2009* (Cth).

Meal breaks

- 4.35 The ANMF claim seeks to amend the existing clause 27, which provides the entitlement to meal breaks, to:
- (a) specify that the meal break should be taken between the 4th and 6th hour of a shift; and
 - (b) clarify employee entitlements when they are required to either be on duty during a meal break or to remain available but free from duty during a meal break.
- 4.36 Our clients consider that the formulation proposed by the ANMF is not appropriate, on the basis that it is overly prescriptive and does not take into account the practical realities of the rostering arrangements under which nurses work.
- 4.37 However, our clients are not opposed to:
- (a) the proposed introduction of a new clause 27.1(c), and support the submissions of Ai Group in this respect;⁷
 - (b) the alternative formulation in respect of clause 27.1(a), as set out in the Ai Group submission;⁸ or
 - (c) the alternative formulation in respect of clause 27.1, as set out in the PHIEA submission.⁹

⁶ ANMF submission [88]

⁷ See Ai Group submission filed 22 May 2017 at [361]-[362].

⁸ See Ai Group submission filed 22 May 2017 at [358]-[360].

⁹ See PHIEA submission filed 19 May 2017 at [41].

5. SUBMISSIONS OF OTHER PARTIES

5.1 ABI and NSWBC support the submissions of:

- (a) Blue Care filed 12 March 2018;
- (b) the Private Hospital Industry Employer Associations (PHIEA) filed 12 March 2018;
- (c) the Aged Care Employers (to the extent they respond to the ANMF claims) filed 19 March 2018.

5.2 ABI and NSWBC also support the comprehensive submissions of:

- (a) the Australian Industry Group filed 22 May 2017;
- (b) the Aged Care Employers filed 22 May 2017
- (c) PHIEA filed 19 May 2017; and
- (d) Blue Care filed 22 May 2017.

AUSTRALIAN BUSINESS LAWYERS & ADVISORS

On behalf of Australian Business Industrial and the New South Wales Business Chamber Ltd

20 March 2018

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