

From: Kate Thomson [mailto:Kate.Thomson@Ablawyers.com.au]
Sent: Wednesday, 21 March 2018 3:21 PM
To: Chambers - Catanzariti VP
Cc: AMOD
Subject: AM2016/31 Health Professionals and Support Services Award 2010 [ABLAW-ImanageDocs.FID135704]

Dear Associate

AM2016/31 Health Professionals and Support Services 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

REPLY SUBMISSION

**4 YEARLY REVIEW OF MODERN AWARDS: (AM2016/31)
HEALTH PROFESSIONALS AND SUPPORT SERVICES AWARD**

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

21 MARCH 2018

1. BACKGROUND

- 1.1 This reply submission is made on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**) in accordance with the Directions of the Fair Work Commission (**Commission**) issued on 21 December 2017.
- 1.2 ABI and NSWBC represent a diverse group of businesses covered by the *Health Professionals and Support Services Award 2010* (the **Award**), which consists of employers operating in fields including (but not limited to) medical practices, private hospitals, physiotherapy practices, chiropractic practices, dental practices, psychological practices, pathology practices, medical imaging practices, natural medicine practices, and a variety of other allied health services. The Award covers a diverse range of services with different usual patterns of work.
- 1.3 This submission is made in the context of ABI and NSWBC's diverse membership base in the above sectors.

2. SCOPE OF THIS SUBMISSION

- 2.1 This submission does not address every claim that has been advanced in these proceedings. Rather, this submission confines itself to the following claims:
- (a) the various claims to vary clause 24 of the Award (the span of hours provision);
 - (b) the claim by Ai Group to vary clause 27.1 of the Award dealing with meal breaks; and
 - (c) the claim by the Aged Care Employers (**ACE**) to vary clause 25(b) of the Award to permit rosters to be changed with less than 7 days' notice by agreement between an employer and an employee.

3. LEGISLATIVE FRAMEWORK OF THE FOUR YEARLY REVIEW

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

4. PROPOSED VARIATIONS TO THE SPAN OF HOURS PROVISIONS

- 4.1 A number of parties have sought variations to clause 24 of the Award, including:
- (a) the Health Services Union of Australia (the **HSU**), which has sought to consolidate the various spans of hours into one uniform span of hours, or alternatively has proposed two separate spans which would cover, firstly, most health sector workplaces such as hospitals, and secondly, private practices of all types;

- (b) the Chiropractic Association of Australia (the **CAA**), which has sought the inclusion of a sector-specific span of hours for chiropractic practices, or alternatively a consolidated span of hours for private medical, dental, pathology and health practices; and
- (c) the Medical Imaging Employment Relations Group (the **MIERG**), which has sought to consolidate the multiple spans of hours into a single span of hours applying to all sectors covered by the Award.

4.2 At the outset, it must be acknowledged that each of the variations proposed by the abovementioned parties in respect of clause 24 is a significant change. This is so because the patterns of existing standard hours, derived from the usual patterns of work applying to the parts of the industry covered by the Award at modernisation, were diverse. Any variation to the existing span of hours provisions will have wide-ranging consequences for the employers and employees affected.

4.3 By way of example, a variation to clause 24 will impact such things as:

- (a) the times at which an employee is able to work their ordinary hours;
- (b) whether an employee is designated as a shiftworker under the Award;
- (c) the applicable rate of pay for work performed at particular times;
- (d) when overtime rates are triggered;
- (e) when entitlements to rest breaks arise;
- (f) when the ability to take time off in lieu of payment for overtime arises;
- (g) whether an employee is entitled to an additional week of annual leave; and
- (h) the monetary amounts owing to employees in respect of a particular sequence of work.

4.4 The Preliminary Issues Decision makes it clear that 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.

4.5 Accordingly, each proponent of a variation to clause 24 is required to adduce merit based evidence of a probative nature to show that if its claim was granted the modern award in question at the conclusion of the 4 Yearly review (inclusive of the claim) achieves the modern awards objective.

- 4.6 Importantly, when considering the proposed variations to clause 24, the Commission must proceed on the basis that the Award met the modern awards objective at the time it was made.
- 4.7 As a starting point, it is recognised that clause 24 of the Award contains a variety of different spans of hours for different categories of employers. The fact that the Award contains multiple spans of hours is reflective of the very wide coverage of the Award, and the different patterns of working hours which are worked in the different sectors which are covered by the Award.
- 4.8 The health industry is a diverse industry which is made up of a large number of discrete sectors (and businesses). In this regard, there is nothing inherently problematic with the notion of the Award recognising the diversity of the industry and providing terms and conditions (and spans of hours) that are tailored to, and relevant to, each of those sectors.
- 4.9 The fact that there are five separate spans of hours contained in clause 24 does not of itself necessitate or justify the standardisation of the provisions through the insertion of a single span. It is arguably a natural consequence of the Award's occupational character. It would be surprising if an occupational award which covers work in a range of service based industry subsectors did not have more than one span of hours.
- 4.10 Our clients also dispute the HSU's characterisation of clause 24 as being '*unnecessarily convoluted*' or '*ambiguous*', simply because it includes five separate spans of hours. The existing provisions are clearly expressed in terms of the groups of businesses to which they apply, and are capable of being readily understood by readers of the award.
- 4.11 The primary objective of the Commission in this Review is to ensure that the Award provides a 'fair and relevant' minimum safety net of terms and conditions (together with the NES). In considering the various claims, the Commission should consider:
- (a) the stated reasons for the proposed change, and whether those reasons amount to a merit basis for such a change;
 - (b) whether the proposal is supported by probative evidence which supports the findings which are said to be relied upon in support of the change;
 - (c) whether the proposal is consistent with sections 134 and 138 of the FW Act;
 - (d) what impacts the change is likely to have on the terms and conditions of employment applying to employees and employers; and

(e) to the extent that the change results in increased or decreased employment costs, whether those additional or reduced costs should be phased in over time through transitional arrangements.

4.12 The notion of a 'fair and relevant' minimum safety net suggests that any span of hours should reflect the period/s during which normal working hours in a particular sector actually take place, such that the span is relevant to the sector.

4.13 In respect of the HSU claim, the HSU has not advanced any evidence in support of its proposed variation.

5. THE AI GROUP PROPOSAL

5.1 The Ai Group has sought a variation to clause 27.1 of the Award, which deals with meal breaks. Specifically, the Ai Group has proposed a new clause 27.1(c) which would allow an employee to forgo his or her entitlement to an unpaid meal break of between 30-60 minutes in circumstances where the employee is working a shift of not more than 6 hours, conditional on the consent of the employer.

5.2 This is a sensible proposal, and one which is supported by ABI and NSWBC.

5.3 Our clients anticipate that there would be many employees who would prefer not to take an unpaid meal break where they are working a six hour shift, but rather would prefer to work without a break and complete their shift earlier. For this reason, and for the reasons outlined in the written submissions of Ai Group, our clients submit that the proposed variation should be granted.

6. THE ACE PROPOSAL

6.1 ACE proposes to vary clause 25(b) of the Award to permit rosters to be changed with less than 7 days' notice by agreement between an employer and an employee.

6.2 Like the Ai Group proposal dealt with above, this is a sensible proposal which is supported by ABI and NSWBC.

6.3 The Award currently only permits rosters to be altered:

(a) on 7 days' notice; or

(b) at any time to enable the functions of the hospital, facility or organisation to be carried on where another employee is absent from duty on account of illness or in an emergency.

6.4 As ACE correctly points out in its submission of 19 February 2018, the Award does not allow for roster changes on less than 7 days' notice for other reasons beyond illness or an emergency, including where an employer and an employee agree to such changes. In that sense, the current Award is unreasonably restrictive.

6.5 We consider that there is a sound merit basis for this variation.

AUSTRALIAN BUSINESS LAWYERS & ADVISORS

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

21 March 2018



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