
Fair Work Commission: 4 yearly Review of modern awards

SUBMISSIONS IN REPLY

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

NURSES AWARD

HEALTH PROFESSIONALS AND SUPPORT SERVICES AWARD

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

23 MAY 2017

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PART ONE: INTRODUCTION

1. BACKGROUND

- 1.1 These reply submissions are made on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**) in accordance with item [2] of the Directions of the Commission issued on 23 November 2016, as varied by email dated 9 May 2017.
- 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 ABI and NSWBC represent a diverse group of businesses covered by the *Health Professionals and Support Services Award 2010* (the **Health Award**) and the *Nurses Award 2010* (the **Nurses Award**). ABI's and NSWBC's respective membership bases consist of employers operating in the health sector or otherwise employing nurses and/or health professionals, in fields including but not limited to:
 - (a) medical practices;
 - (b) physiotherapy practices;
 - (c) chiropractic practices;
 - (d) dental practices;
 - (e) psychological practices;
 - (f) pathology practices;
 - (g) medical imaging practices;
 - (h) natural medicine practices; and
 - (i) a variety of other allied health services.
- 1.5 ABI and NSWBC also represent businesses operating in the translation/interpreting field, as well as other businesses which employ (or might from time to time employ) translators and/or interpreters.
- 1.6 These reply submissions are made in the context of ABI and NSWBC's diverse membership base in the above sectors.

- 1.7 ABI and NSWBC do not wish to make submissions in response to every claim that is advanced by each party. Rather, these reply submissions are confined to dealing with:
- (a) the variations sought by APESMA to the Health Award in relation to translators and interpreters;
 - (b) the variation sought by the Health Services Union (the **HSU**) in relation to the span of hours provisions of the Health Award; and
 - (c) the variations sought by the Australian Nursing and Midwifery Federation (the **ANMF**) to the Nurses Award.
- 1.8 Each of the above claims is addressed in Parts 2 and 3 below.

2. LEGISLATIVE FRAMEWORK OF THE FOUR YEARLY REVIEW

- 2.1 The legislative framework applicable to the 4 Yearly Review has been considered in detail in *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.
- 2.2 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.
- 2.3 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.
- 2.4 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".
- 2.5 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).

- 2.6 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.
- 2.7 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.¹ 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.
- 2.8 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;² 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.³
- 2.9 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.⁴

¹ *Preliminary Issues Decision* at [60].

² *Ibid* at [23] and [60].

³ *Ibid*.

⁴ *Ibid* at [24].

PART TWO: SUBMISSIONS IN REPLY TO THE APESMA CLAIM

3. THE APESMA CLAIM

3.1 APESMA has made an application to vary the Health Award so as to:

- (a) remove the references to 'interpreter (unqualified)' and 'interpreter (qualified)' as indicative roles in Schedule B.1;
- (b) include 'interpreter' in the List of Common Health Professionals in Schedule C;
- (c) include 'translator' in the List of Common Health Professionals in Schedule C; and
- (d) include a definition of 'NAATI' into the definitions clause.

3.2 The effect of the APESMA claim would be to:

- (a) extend coverage of the Health Award to all employees in Australia who are employed in the occupations of interpreter or translator;
- (b) re-categorise the role of interpreter from that of 'support services' in the health industry to that of 'Health Professional'; and
- (c) designate all persons employed as interpreters and translators to be Health Professionals, regardless of whether there is any connection between:
 - (i) the work they perform and the health sector; or
 - (ii) their employer and the health industry.

4. SUMMARY OF ABI & NSWBC POSITION

4.1 ABI and NSWBC oppose the APESMA claim. By way of summary, the grounds for the opposition include that:

- (a) APESMA has not advanced a merit case for any change to the coverage of the Health Award. In this regard, there is no basis to support a finding that:
 - (i) translators and interpreters 'fall through the cracks' of award coverage; or
 - (ii) translators and/or interpreters experience 'relatively substandard working conditions'.
- (b) The Health Award is not the appropriate modern award to:
 - (i) cover all employees who work as translators or interpreters; or
 - (ii) cover employers across the country who do not have any connection to the health sector but who employ translators or interpreters.

- (c) The inclusion of translators and interpreters into the List of Common Health Professionals is illogical and should not be entertained. It should be uncontroversial that translators and interpreters are not 'health professionals'. Accordingly, they should not be designated as such.
- (d) The variation is inconsistent with the modern awards objective.
- (e) APESMA's claim is not supported by evidence of a probative nature that demonstrates the facts supporting the proposed variation.

4.2 The Health Award is a modern award that is designed specifically for the health industry and for health professionals. However, if the APESMA application was granted, it would lead to the absurd outcome that employees working in any of the following industries or businesses would be covered by the Health Award:

- (a) specialist translation and interpreting agencies that do not have any connection to the health industry;
- (b) businesses that primarily operate to contract out translators and interpreters to a range of other industries which might include, but is not limited to, the health industry;
- (c) the court system and/or legal work;
- (d) immigration work;
- (e) businesses operating in the field of international trade;
- (f) academic institutions;
- (g) religious institutions;
- (h) the manufacturing sector (doing such work as translating product manuals, customer orders, technical specifications);
- (i) distribution and logistics (such as, for example, translating shipping dockets, customs documents, etc.);
- (j) the social and community services industry, including outreach programs and migrant/refugee integration type programs; and
- (k) the broadcasting and journalism industry (e.g. translating written or audio material from other different sources).

5. THE EXISTING COVERAGE OF THE HEALTH AWARD

5.1 The Health Award is both an industry and occupational award. In terms of its industry coverage, the Health award is expressed to cover:

employers throughout Australia in the health industry and their employees in the classifications listed in clauses 14—Minimum weekly wages for Support Services employees and 15—Minimum weekly wages for Health Professional employees to the exclusion of any other modern award.⁵ [emphasis added]

5.2 The phrase ‘health industry’ is defined in clause 3.1 as follows:

health industry means employers whose business and/or activity is in the delivery of health care, medical services and dental services.

5.3 There is no dispute that the Health Award applies to employers in the health industry, and their employees who fall within the classifications listed in clauses 14 (support services employees) and 15 (health professionals).

5.4 The ‘Support services’ classifications are broad and include employees working performing a wide range of roles for ‘health industry’ employers. By way of example, the classification definitions in Schedule 2 refer to indicative roles that include (but are not limited to) gardeners, cleaners, clerks, drivers, handypersons, security officers, and interpreters (both qualified and unqualified).

5.5 In respect of its occupational coverage, clause 4.1(b) of the Health Award makes it clear that the Health Award applies to ‘employers engaging a **health professional employee** falling within the classification listed in clause 15’. [emphasis added]

5.6 Clause 15 then sets out the minimum weekly wages for ‘Health Professional employees’, although the clause does not define the term ‘Health Professional employee’ or provide any further guidance as to who the rates apply to.

5.7 Schedule B.2 sets out the classification definitions for health professional employees. The classification definitions are supplemented by a list of common health professionals at Schedule C.

5.8 The effect of clause 4.1(b) is to extend coverage of the Health Award to employers who do not operate in the health industry, but whom employ persons who are ‘health professional employees’ within the meaning of the Health Award.

⁵ See clause 4.1(a).

5.9 It is clear that interpreters and translators are not health professional employees within the meaning of the Health Award.

6. INTERPRETERS AND TRANSLATORS ARE NOT HEALTH PROFESSIONALS

6.1 APESMA seeks to have interpreters and translators included in the List of Common Health Professionals in Schedule C. This variation is founded on an assertion by APESMA that ‘translators and interpreters are health professionals and should be recognised as such’.⁶

6.2 With respect, such a submission defies commonsense and cannot rationally be accepted.

6.3 Interpreters are not ‘health professionals’ within the ordinary meaning of that phrase; or within the meaning of that phrase as it appears in the Award. Likewise, translators are not ‘health professionals’ within the ordinary meaning of that phrase; or within the meaning of that phrase as it appears in the Award.

6.4 Although the phrase ‘health professional’ is not specifically defined in the Award, its ordinary meaning is uncontroversial. A health professional is an individual who provides preventive, curative, promotional or rehabilitative health care services to people, families or communities.

6.5 The word ‘health’ is defined to mean:

1. soundness of body; freedom from disease or ailment.
 2. the general condition of the body or mind with reference to soundness and vigour: good health.
 3. a polite or complimentary wish for a person's health, happiness, etc., especially as a toast.
- phrase 4. to your health, (an expression of goodwill, especially as a toast.)⁷

6.6 The word ‘professional’ is defined to mean:

1. following an occupation as a means of livelihood or for gain: *a professional actor*.
2. relating or appropriate to a profession: *professional studies*.
3. engaged in one of the learned professions: *a professional man*.
4. following as a business an occupation ordinarily engaged in as a pastime: *a professional golfer*.

⁶ See APESMA submission at [56].

⁷ Macquarie Dictionary Online; <https://www.macquariedictionary.com.au/>

5. making a business of something not properly to be regarded as a business: *a professional politician*.

6. undertaken or engaged in as a means of livelihood or for gain: *professional football*.

7. as would be done by a professional; expert: the boys did a very professional job on their models.

–noun 8. someone belonging to one of the learned or skilled professions.

9. someone who makes a business of an occupation, etc., especially of an art or sport, in which amateurs engage for amusement or recreation.

10. an expert in a game or sport, hired by a sports club to instruct members.⁸

6.7 While it might be the case that translators and interpreters are ‘professionals’, in the sense that they belong to a profession, they are clearly not ‘health’ professionals. The role of translating or interpreting information does not involve, and has no obvious connection to, the provision of health care services.

6.8 The only connection between the occupations of translator/interpreter and the health sector arises when:

- (a) health-related information is being translated/interpreted; or
- (b) the translation/interpretation is being conducted to facilitate or assist with the delivery of health care services *by* a health professional.

6.9 Such a connection is patently insufficient to warrant a conclusion that all (or even any) translators/interpreters are ‘health professionals’. Such a submission must be rejected.

7. INTERPRETERS AND TRANSLATORS DO NOT FALL THROUGH THE CRACKS OF AWARD COVERAGE

7.1 There is no evidence to support the contention that translators and interpreters ‘fall through the cracks’ of award coverage.

7.2 The submission that translators and interpreters ‘fall through the cracks’ of award coverage is boldly advanced by APESMA without any detailed consideration of:

- (a) the types of businesses that employ translators and interpreters;

⁸ Ibid.

- (b) whether those businesses are covered by the Fair Work regime, or whether they are instead regulated by the applicable State or Territory industrial relations systems;
- (c) where the Fair Work regime applies, whether there are industry-based awards that apply to those employees;
- (d) where there are industry-based awards applying to those employers, whether those awards contain classifications that are capable of capturing translators and interpreters;
- (e) whether, in the absence of an industry award applying to the employer, the *Miscellaneous Award 2010* might apply to translators and interpreters.

7.3 In its submissions, APESMA appears to have proceeded on an assumption that translators and interpreters who perform work outside of the health industry are not covered by any modern award. That assumption is misplaced.

7.4 It is trite that translators and interpreters are likely to be employed in a range of different businesses across Australia, from specialist translation agencies to other public and private sector businesses where translation or interpreting services are required.

7.5 The starting point for determining whether or not an employee is governed by a modern award is to consider the character of the employer. Where an employer operates in a particular industry that is governed by a modern award, regard must be had to the terms of that industry award and the classifications in that award. It may be that the classifications of the relevant industry award are sufficiently broad so as to cover employees who work as translators or interpreters.

7.6 In the alternative, where the employer operates in an industry which is not governed by one of the industry-based awards, it is likely that the *Miscellaneous Award 2010* will apply to its employees who perform translation or interpreting services.

7.7 APESMA has not attempted, in any meaningful way, to grapple with any of the issues raised above. Notably, the APESMA submissions do not refer to the *Miscellaneous Award 2010* at all.

8. THE MODERN AWARDS OBJECTIVE

8.1 In considering the APESMA claim, the Commission is *obliged* to ensure that the Health Award, together with the NES, provides a '*fair and relevant*' minimum safety net of terms and conditions, taking into account the various elements of s.134(1)(a)-(h).

- 8.2 In our submission, the APESMA claim falls at the first hurdle. If the APESMA claim was to be granted, a diverse array of businesses that have absolutely no connection to the health industry would automatically become covered by the Health Award.
- 8.3 Such an outcome flies in the face of the primary objective of creating a ‘fair and relevant’ modern awards system. Put simply, the variation sought would:
- (a) lead to unnecessary overlap of modern awards where employers are already covered by awards other than the Health Award, and where the classifications in those awards encompass the work performed by translators and interpreters;
 - (b) lead to unnecessary overlap of modern awards where employers are already covered by the *Miscellaneous Award 2010* and employ translators or interpreters under that award;
 - (c) result in a complex, confusing and illogical modern award system;
 - (d) likely lead to inadvertent non-compliance by businesses which employ translators or interpreters, but which do not operate in the health sector and would therefore understandably never have cause to look at, or consider whether, the Health Award might apply to its workforce;
 - (e) impose an unfair and unnecessary regulatory burden on businesses that employ translators and interpreters but that do not operate in the health industry or have any real connection to it; and
 - (f) stymie the ability of employers to implement flexible modern work practices by reason of having an unnecessary overlap of modern award regulation.
- 8.4 On the other hand, there is no evidence to support any finding that the variation would improve the relative living standards of translators and interpreters or promote social inclusion through increased workforce participation, or provide additional remuneration for those employees.

9. CONCLUSION

- 9.1 For the reasons outlined above, the APESMA claim should be dismissed.

PART THREE: SUBMISSIONS IN REPLY TO THE HSU SPAN OF HOURS CLAIM

10. THE HSU CLAIM

- 10.1 The Health Award currently provides 'sector-specific' span of hours provisions for:
- (a) private medical dental and pathology practices;
 - (b) private medical imaging practices; and
 - (c) physiotherapy practices.
- 10.2 The HSU has sought the removal of clauses 24.2, 24.3 and 24.4 of the Health Award, such that there is a single, uniform span of hours provision applying to all aspects of the health industry.
- 10.3 The bases for this variation is said to be that:
- (a) clause 24 is 'unnecessarily convoluted in that it provides five separate spans of hours;
 - (b) the span of hours clause in the Health Award should not diverge so greatly from other health-related modern awards; and
 - (c) the sector-specific spans of hours discourages collective bargaining; and
 - (d) the variation will provide a simplified, single span of hours provision for all workers covered by the Health Award.
- 10.4 The HSU has not advanced any evidence in support of its proposal to remove the existing sector-specific spans of hours.

11. OUTLINE OF POSITION IN RELATION TO THE HSU CLAIM

- 11.1 ABI and NSWBC are opposed to the HSU claim, and make the following submissions in response to the HSU claim:
- (a) We disagree that the existing clause 24 is 'unnecessary convoluted'. The existing provisions are clear, unambiguous, and capable of being readily understood by readers of the award. No ambiguity arises.
 - (b) The fact that there are five separate spans of hours contained in clause 24 does not of itself form a basis for 'standardising' the provisions and replacing them with a single span. The primary objective of the Commission is to ensure that the Award provides a 'fair and relevant' minimum safety net of terms and conditions (together with the NES).

- (c) The health industry is a diverse industry which is made up of a large number of discrete sectors. It is entirely appropriate for the Health Award to recognise the diversity of the industry and provide terms and conditions (and spans of hours) that are tailored to, and relevant to, each of those sectors.
- (d) While the spans of hours in other health-related modern awards might be relevant in the context of the Commission's consideration of the issue, what is ultimately required is the determination of terms and conditions that are relevant to the applicable sectors.

11.2 The HSU claim should be dismissed on the basis that:

- (a) the variation is inconsistent with the modern awards objective;
- (b) the variation goes beyond that which is necessary to meet the modern awards objective;
- (c) a merit based argument for the change has not been advanced; and
- (d) the variation is not accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.

PART FOUR: SUBMISSIONS IN REPLY TO ANMF CLAIMS

12. THE ANMF CLAIMS

12.1 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.

13. OUTLINE OF POSITION IN RELATION TO THE ANMF CLAIMS

13.1 Subject to paragraph 13.3 below, ABI and NSWBC are opposed to each of the ANMF claims referred to above.

13.2 ABI and NSWBC support the comprehensive submissions of:

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

13.3 With respect to the proposed variation to clause 27 regarding the timing of meal breaks, ABI and NSWBC 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;⁹
- (b) the alternative formulation in respect of clause 27.1(a), as set out in the Ai Group submission;¹⁰ or

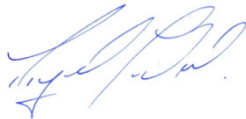
⁹ See Ai Group submission at [361]-[362].

- (c) the alternative formulation in respect of clause 27.1, as set out in the PHIEA submission.¹¹

AUSTRALIAN BUSINESS LAWYERS & ADVISORS

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

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Nigel Ward
CEO + Director

Australian Business Lawyers & Advisors Pty Limited
(02) 9458 7286
nigel.ward@ablawyers.com.au



Kyle Scott
Senior Associate

Australian Business Lawyers & Advisors Pty Limited
(02) 4989 1010
kyle.scott@ablawyers.com.au

¹⁰ See Ai Group submission at [358]-[360].

¹¹ See PHIEA submission at [41].