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

11 MAY 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 15 March 2018.

1.2 This reply submission addresses the APESMA claim to expand the coverage of the *Health Professionals and Support Services Award 2010* (the **Award**) to capture all employees performing work as an interpreter or translator, regardless of the industry in which those employees work or the character of their employer.

1.3 Our clients are opposed to the APESMA claim, principally for the following reasons:

(a) firstly, the variation sought by APESMA is inconsistent with the structure of the modern awards system;

(b) secondly, the variation is unnecessary, because there already exists an adequate (albeit complex) safety net for interpreters and translators; and

(c) finally, the variation is inconsistent with the modern awards objective in that it will result in the application of a potentially unfair and certainly irrelevant safety net of terms and conditions to these employees.

2. SCOPE OF THIS SUBMISSION

2.1 This submission is divided into the following sections:

(a) Section 1, which deals with:

(i) the structure of the Modern Award system;

(ii) an historical analysis of the industrial regulation of translators and interpreters; and

(iii) the current position with respect to the award coverage of translators and interpreters (including the relevance of on-hire provisions and the *Miscellaneous Award 2010* (**Miscellaneous Award**)); and

(b) Section 2, which deals in detail with the APESMA proposal and the draft clause and provides a summary of our clients' position with respect to the claim.

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 that submission.

SECTION 1

4. INTRODUCTION

4.1 A fundamental issue in these proceedings is the current status of employees who perform work as interpreters or translators. APESMA has asserted that a large number of interpreters and translators are not covered by the existing regime of modern awards, and are effectively "award free".

4.2 The difficulty with this general proposition is that award coverage is, for the most part, determined by the character of the employer. This means that it is not possible to generalise about a class of employees made up of individuals employed by employers with different characteristics.

5. THE STRUCTURE OF THE MODERN AWARDS SYSTEM

5.1 A fundamental feature of the modern awards system is that modern awards operate primarily along industry lines.

5.2 The award modernisation process was governed by sections 576C(1) and 576E of the *Workplace Relations Act 1996* (Cth) (**WR Act**), as well as by the accompanying award modernisation requests. The modernisation request required modern awards to be made "primarily along industry lines".[1]

5.3 This requirement reflected an important and well established principle of award coverage: that award coverage is determined by the "substantial character" of the employer.[2]

5.4 The primacy of the requirement was acknowledged by the Australian Industrial Relations Commission (**AIRC**) in its decision of 20 June 2008, in which it held that:

> *[12] Clause 9 of the Minister's request provides that the Commission should have regard to the desirability of avoiding the overlap of awards and minimising the*

[1] See [4] of the *Request Under Section 57C(1) - Award Modernisation - Consolidated Version* issued 26 August 2009.

[2] See *R v Central Reference Board; Ex parte Thiess (Repairs) Pty Ltd* [1948] HCA 9; (1948) 77 CLR 123 at 135; *Re Federated Liquor and Allied Industries Employees' Union of Australia; Ex parte Australian Workers' Union* [1985] HCA 80; (1976) 51 ALJR 266 at 268; *R v Moore; Ex parte Federated Miscellaneous Workers' Union of Australia* [1978] HCA 51; (1978) 140 CLR 470 at 484-5; *Dyno Nobel Asia Pacific Limited v Construction, Forestry, Mining and Energy Union* (AIRCFB, PR956868, 14 July 2005) at [51].

number of awards that may apply to a particular employee or employer. Clause 3(d) of the request and s.576B(2) of the WR Act require the Commission to have regard to the desirability of reducing the number of awards operating in the workplace relations system. While these are considerations relevant to the scope of particular modern awards and to the award modernisation process overall, we have borne them in mind also in selecting the priority industries and occupations from the large number proposed by those who have participated in the consultations. In a general sense we consider that these considerations require the Commission to make awards primarily on broad industry lines and, as far as practical, to make those awards applicable to all award-covered employees in the relevant industry.[3] [emphasis added]

5.5 The reference to modern awards being made primarily along industry lines is a reference to awards being made "based on the industry of employers".[4]

5.6 There were sound reasons for creating modern awards along industry lines. Some of these reasons were alluded to in the modernisation request itself, which stated that:

(a) the modern awards system "must be simple to understand and easy to apply, and must reduce the regulatory burden on business";[5] and

(b) it was desirable to reduce the number of awards operating in the workplace relations system.[6]

5.7 Given the desirability of reducing the number of awards in operation, it made sense that modern awards be made along industry lines rather than on an occupational basis, as there are considerably fewer industries in Australia than there are occupations. It is also the case that key conditions, such as patterns of working time, are more likely derived from an employee's industry than his or her occupation.

5.8 It is trite that an employer operating in a single industry may engage employees working in a range of different occupations. Making awards based on the industry of the employer, as opposed to making awards based on the occupation of employees, was evidently going to result in a fewer number of awards applying to individual employers.

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[3] [2008] AIRCFB 550.
[4] See [2008] AIRCFB 550 at [11].
[5] See [1a] of the *Request Under Section 57C(1) - Award Modernisation - Consolidated Version* issued 26 August 2009.
[6] See [3d] of ibid.

5.9 In the context of attempts to reduce the regulatory burden on business, an outcome whereby an employer is more likely to find itself covered by a single modern award rather than multiple separate awards for each occupation of employee it employs (potentially with very different terms and conditions of employment) is desirable.

5.10 Indeed, the Fair Work Commission has itself, in the context of the 4 yearly review, acknowledged that "multiple award coverage has the potential to create complexity for businesses".[7] To this end, the Commission engaged an external research provider to conduct research into the issues faced by employers who are subject to coverage by multiple modern awards and the utility of majority clauses,[8] and the report was provided in May 2016.[9]

5.11 While the AIRC was of course able to make occupation-based modern awards, this power was ultimately used sparingly and generally only in occupations performed by large numbers of employees. Further, some awards such as the Award were formulated along both industry and occupational lines, to ensure award coverage which is as harmonious as possible.

5.12 The AIRC published the pre-cursor exposure draft of the Award on 23 January 2009. At that time, the AIRC described the exposure draft as:

> *a generic exposure draft to cover professional and technical classifications together with clerical and administrative classifications. We have sought, in the salary structure and level of salaries, to accommodate all health professionals (except doctors and nurses) employed in both the health industry and industry generally*.[10]

5.13 Accordingly, it is submitted that the APESMA claim will result in an outcome which is not only fundamentally inconsistent with the framework the Award was originally intended to provide, but also with the very structure of the modern awards system. This system has been established to limit the number of awards which apply to a particular employer, a sentiment which was recently echoed by this Commission in exploring the potential of inserting majority clauses into modern awards.

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[7] [2015] FWC 6958.
[8] [2015] FWC 6958.
[9] Report by EY Sweeney Ref. No 25732 - 'Fair Work Commission - Multiple modern award coverage and the utility of majority clauses'
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/report.pdf
[10] [2009] AIRCFB 50 at [78].

5.14 An outcome whereby translators and interpreters are covered by the Award on an occupational basis (as opposed to an industry basis, as is the case now) will impact countless employers who employ translators and interpreters wholly or predominantly outside the health industry.

6. HISTORICAL REGULATION OF TRANSLATORS AND INTERPRETERS

6.1 It is accepted that translators and interpreters are covered by the Award by virtue of clause 4.1 and their inclusion in the Schedule B classification definitions when they are engaged in the performance of work for an employer in the health industry.

6.2 An analysis of these instruments shows that there are two pre-modern instruments which contained classifications covering translators/interpreters:

(a) the *Health and Allied Services - Private Sector - Victoria Consolidated Award 1998*; and

(b) the *Health and Allied Services - Public Sector - Victoria Consolidated Award 1998*.

6.3 By APESMA's own admission, there does not appear to have been any express consideration of modern award coverage for these employees at the time of modernisation, either in respect of this Award or more generally.

6.4 It follows that classifications covering translators and interpreters are now found in the Award primarily (or even solely) because the classifications contained in the precursor instruments were adopted by the AIRC for the purpose of the new Award, rather than as result of any direct consideration of the appropriateness of the Award as a safety net for translators and interpreters generally.

7. CURRENT POSITION WITH RESPECT TO AWARD COVERAGE

7.1 Coverage of translators and interpreters performing work for employers in the health industry by the Award is an appropriate outcome of the original approach to the organisation of modern awards; that is, along industry lines.

7.2 The submission advanced by APESMA that translators and interpreters performing work outside the health industry are falling through the cracks of award coverage is not supported by an analysis of the range of instruments which are applicable to these employees. We will firstly deal with the other modern and enterprise awards which cover these employees.

7.3 We have undertaken an analysis of the current list of modern awards and enterprise awards to determine the other instruments which cover translators and/or interpreters. It may also

be that there are other industry or enterprise awards that contain broad classifications that can cover translators and interpreters, but we do not propose to engage in any speculative exercise without the benefit of evidence from those industries (other than the consideration given to the operation of the on-hire provisions in modern awards).

7.4 Firstly, in addition to the Award, we have identified the following instruments as containing classifications which expressly cover employees performing the role of translator and/or interpreter:

(a) *Aged Care Award 2010*;[11] and

(b) *Amusement, Events and Recreation Award 2010*.[12]

7.5 The *Broadcasting, Recorded Entertainment and Cinemas Award 2010* contains classifications for Subtitlers (B.1.1(g)) and Subtitling Editors (B.1.1(h)). The role of Subtitler requires an employee to possess "qualifications and accreditation in translation". The role of Subtitling Editor does not specifically require these same qualifications but involves the supervision of the work produced by Subtitlers. Accordingly, the definition specifies that "a graduate degree may be required".

7.6 The *Australian Capital Territory Public Sector Enterprise Award 2016* (**ACT Enterprise Award**) contains both:

(a) broad-banded classifications at Schedule A which deal with classes of roles, rather than particular job titles; and

(b) a "community language allowance" at clause 12.18 for employees who are required by the Director-General to utilise their particular language skills, the amount of which is dependent on the employee's level of accreditation from the National Accreditation Authority for Translators and Interpreters (**NAATI**) or other approved body.

7.7 While there is no express classification for translators/interpreters in the ACT Enterprise Award, clause 12.18 specifically excludes payment of the allowance to those engaged in these roles. This suggests that the translators/interpreters are covered by one of the generic classifications contained in Schedule A.

7.8 Similarly, clause 11.15 of the *Parliamentary Departments Staff Enterprise Award 2016* provides for the payment of a "community language allowance" to employees who are

[11] B.6 and B.7 of Schedule B.
[12] B.5 of Schedule B.

required by the Departmental Secretary to use their particular language skills to provide client or employee services. The amount of the allowance is determined based on the employee's language competence, being either "adequate language skills...for simple communication" or certification by NAATI or other approved body.

7.9 Further, clause 14.8 of the *Nurses and Midwives (Victoria) State Reference Public Sector Award 2015* provides for an Enrolled Nurse to be paid an additional payment "when employed as an interpreter (qualified)", if they are NAATI-accredited.

7.10 From this analysis, it is apparent that:

(a) other industry and enterprise awards are applicable to translators and interpreters, reflecting the original intention of how the modern award system was to operate; and

(b) there will be significant and potentially very negative ramifications for employers in other industries and enterprises who engage translators and interpreters if the APESMA claim is successful.

8. ON-HIRE EMPLOYMENT AND THE ON-HIRE PROVISIONS IN MODERN AWARDS

8.1 Although there is limited evidence before the Commission about the nature of the translation/interpreting sector, the evidence tends to suggest that the vast majority of work undertaken in this field is by "agency" employees. That is, employees are employed by specialist translation businesses and then perform work for businesses that require translation/interpreting services.

8.2 These employees may have the character of an "on-hire" employee, within the meaning of that phrase as used in the modern awards system and which was set out at Attachment B of a Full Bench decision of 4 December 2009:[13]

Industry Awards	Insert in definitions clause: "**on-hire** means the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client."

[13] [2009] AIRCFB 945.

	Insert in coverage clause: "This award covers any employer who supplies labour on an on-hire basis in the industry (or industries) set out in clause (clauses) xxx in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry (those industries). This sub-clause operates subject to the exclusions from coverage in this award."
Occupational Awards	Insert in definitions clause: "**on-hire** means the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client." Insert in coverage clause: "This award covers any employer who supplies on-hire employees in classifications set out in clause (clauses) xxx and those on-hire employees, if the employer is not covered by another modern award containing a classification which is more appropriate to the work performed by the employee. This sub-clause operates subject to the exclusions from coverage in this award."
Industry and occupational Awards	Insert in definitions clause: "**on-hire** means the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client." Insert in coverage clause: "(a) This award covers any employer who supplies labour on an on-hire basis in the industry (or industries) set out in clause (clauses) xxx in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry (those

	industries)." This sub-clause operates subject to the exclusions from coverage in this award." (b) This award covers any employer who supplies on-hire employees in classifications set out in clause (clauses) xxx and those on-hire employees, if the employer is not covered by another modern award containing a classification which is more appropriate to the work performed by the employee. This sub-clause operates subject to the exclusions from coverage in this award."

8.3 Although there does not appear to be any clear definition of an 'on-hire employee', the Fair Work Ombudsman describes the 'on-hire employee services industry' in the following terms:

> *The on-hire employee services industry includes businesses that employ workers and provide a service to other organisations (host organisations) by assigning those workers to perform work for that host organisation. The host organisation pays the on-hire business a fee for providing on-hire employees to work for them. On-hire employees are employed by the on-hire business; they are not employees of the host organisation.*[14]

Consideration of the labour hire services industry during Award modernisation

8.4 To advance the argument in support of award coverage which is determined by the operation of the on-hire coverage provisions, it is useful to have regard to the history of the provisions.

8.5 During the Award Modernisation process, the AIRC considered whether a standalone modern award should be made for the labour hire services industry. In its decision of 19 December 2008, the Commission noted:

> *[25] A number of issues have arisen concerning the operation of modern industry awards in relation to employees of contractors and labour hire firms. While the coverage clause in a number of the priority awards deals specifically with these employees, it is not possible to foresee all of the issues that might arise or to have a full appreciation of them. It is likely that it will be necessary to give special consideration to labour hire firms and their employees, at least, at a convenient time during 2009. Questions which require discussion include whether there should be a*

[14] See Fair Work Ombudsman guidance document **attached** to this submission.

separate award for the labour hire industry to cover employment not covered by other modern awards with either industry or occupational coverage and the basis upon which such employment might be covered by one award rather than another.[15]

8.6 On 29 June 2009, the AIRC added 'Labour hire services' to the list of industries to be dealt with during stage 4 of the modernisation process. In doing so, the AIRC noted that:

> *[4] We draw attention to the fact that the Stage 4 list includes some industries and occupations in relation to which the question of award coverage remains to be determined. To take an example, while labour hire services now appears on the list, whether an award should be made to cover that area and if so the terms the award should contain are matters for decision. Generally the options include a separate modern award for the area in question, no award, coverage under the general award or an alteration to the coverage of an existing modern award.*[16]

8.7 Following a consultation process, on 25 September 2009 the AIRC indicated that it did not intend to make a separate award for the on-hire industry.[17] The AIRC held that:

> *[138]…The general view is that the variation of modern awards to extend their coverage to employees of labour hire firms should be considered on an award by award basis, where the particular circumstances of each industry can be properly considered.*
>
> *[139] We have decided not to make a modern award for the labour hire industry, consistent with the general view of representatives of employers and employees. We think it is preferable that modern awards should be varied, where necessary, to extend their coverage to labour hire firms and their employees. This will result in a more consistent safety net as between direct and labour hire employees in the relevant industry.*

8.8 In a Statement on 17 November 2009, the AIRC published draft model on-hire provisions that were proposed to be inserted into each modern award where relevant. In so doing, the AIRC noted that most parties in the award modernisation process:

> *... [took] the view that labour hire or on-hire employers and their employees should be covered by the award covering the host employer to whom the employees are on-*

[15] [2008] AIRCFB 1000.
[16] [2009] AIRCFB 641
[17] [2009] AIRCFB 865 at [139].

hired and that most modern awards should have a provision in the coverage clause to that effect.[18]

8.9 In its decision of 4 December 2009[19], the Full Bench, in addition to considering various award-specific matters:

(a) accepted the submission that wording should be inserted into the draft clause to make it clear that coverage of the relevant award to on-hire employers and employees did not extend beyond the general coverage of the award ([106]); and

(b) rejected the submission that the expression "general guidance and instruction" be replaced with "direction and control" so as to maintain the distinction between an employee of a contractor and a labour hire employee ([110]).

8.10 As the above analysis demonstrates, the AIRC gave detailed consideration to the most appropriate way of regulating on-hire employees under the modern awards system. In simple terms, the AIRC determined that it was most appropriate that on-hire employers and their employees be covered by the award covering the host employer to whom the employees are on-hired.[20]

8.11 There are sound reasons for this. The AIRC accepted that on-hire employees are:

> [136] *more appropriately dealt with by the industry award which covers the industry in which such employees are placed, because such awards already contain terms and conditions which take into account the circumstances of the employment and are likely to reflect the terms and conditions of employment applicable to the host organisations' own employees. Similar considerations arise in relation to awards with occupational coverage.*[21]

8.12 Applying this analysis to the translators and interpreters, it is apparent there may be some circumstances in which these employers (and their agency employers) will be covered by the modern award (if any) which covers the industry in which the host business is performing work. Namely, when:

(a) a translator/interpreter is employed by an agency;

(b) the agency places the translator/interpreter with a host business;

(c) the host business is covered by a award with industry coverage; and

[18] [2009] AIRCFB 925 at [2].
[19] [2009] AIRCFB 945.
[20] [2009] AIRCFB 925 at [2].
[21] [2009] AIRCFB 865.

(d) that award contains a classification applicable to the translator/interpreter;

then the award covering the host will also cover the translator/interpreter for the duration of his or her engagement.

8.13 It is conceded that this may not be the case in all circumstances, as it will depend on:

(a) the contractual relationship between the agency and the host;

(b) whether the translator/interpreter is subject to the "general guidance and instruction" of the host business; and

(c) accordingly whether the arrangement has the required character of an on-hire relationship.

8.14 However, this is another important mechanism by which translators and interpreters may be currently subject to a modern award to which APESMA has failed to have regard.

9. MISCELLANEOUS AWARD

9.1 In circumstances where there is no modern or enterprise award which <u>currently</u> applies to a translator or interpreter, and where these employees would have <u>traditionally</u> been covered by an award, the Miscellaneous Award may apply.

9.2 Clause 4.1 of the Miscellaneous Award provides that:

> *4.1 Subject to clauses* 4.2*,* 4.3*,* 4.4*,* 4.5 *and* 4.6 *this award covers employers throughout Australia and their employees in the classifications listed in clause* 14— Minimum wages *who are not covered by any other modern award.*

9.3 The first proposition advanced by APESMA in support of the view that translators/interpreters cannot be covered by the Miscellaneous Award is by virtue of the fact they are covered by the Award.

9.4 This argument is entirely circular. Translators and interpreters are caught by the industry coverage provisions of the Award and are accordingly only covered when they are performing work for an employer "in the health industry". These employees are not covered by the Award when performing work for any other employer. If the Award already applied generally to translators and interpreters (such as through occupational coverage), this application would be unnecessary.

9.5 Further, APESMA submits that the Miscellaneous Award is only intended to cover employees who cannot be classified as "professional employees".

9.6 The classification levels contained at Schedule B are described in terms which are broad and generic. This is consistent with paragraph 8A of the Request. It is also evident that the highest Level (Level 4) is intended to apply to employees who possess advanced trade qualifications or who are "sub-professional". The first of the exclusions from coverage at clause 4.2 provides that:

> *The award does not cover those classes of employees who, because of the nature or seniority of their role, have not traditionally been covered by awards including managerial employees and professional employees such as accountants and finance, marketing, legal, human resources, public relations and information technology specialists.* [emphasis added]

9.7 A Full Bench of the Commission recently considered the coverage of the Miscellaneous Award in *United Voice v Gold Coast Kennels Discretionary Trust t/a AAA Pet Resort.*[22] In its decision, the Full Bench indicated that its classifications were drawn in a "broad and generic way" and "do not refer in terms to any specific industry, occupation or work function"[23].

9.8 Evidently, the Miscellaneous Award will not apply to a translator/interpreter who does not fall under one of the classifications in Schedule B. However, translators/interpreters also do not fall into one of the categories of professional employees excluded from coverage by virtue of clause 4.2. As the Full Bench indicated, these classes of employees are "specialist white collar professionals" traditionally not covered by awards because of the nature of the role.[24]

9.9 In fact, translators and interpreters are currently covered by awards and historically this has been the case, at least when working in particular industries.

9.10 APESMA has also not advanced any evidence to support the proposition that a translator or interpreter must possess a tertiary qualification. While it is true that a degree may not be strictly necessary for someone to be a "professional", it is also true that possession of a degree alone does not automatically make a person a "professional".

9.11 For these reasons, the Miscellaneous Award may therefore be a final safety net for translators and interpreters who are not covered by any other modern industry or enterprise award but who have traditionally been subject to Award coverage.

[22] [2018] FWCFB 128
[23] [2018] FWCFB 128 at [53].
[24] [2018] FWCFB 128 at [39.

SECTION 2

10. THE PROPOSED CLAUSE

10.1 APESMA has failed to demonstrate that there exists an issue requiring redress in the manner sought in its application, both in an evidentiary capacity, and by failing to grapple with the current state of award coverage for translators and interpreters.

10.2 Even if this were not the case, it is not appropriate to extend the industry coverage of the Award in the manner proposed by APESMA in its most recent variation (first provided to the parties and the Commission on 23 January 2018).

10.3 The proposal is in the following terms:

> *4.1 This industry and occupational award covers:*
>
> *(a) 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;*
>
> *(b) employers engaging a health professional employee falling within the classification listed in clause 15.*
>
> *(c) employers throughout Australia engaging employees performing the indicative roles NAATI credentialed Interpreter or NAATI credentialed Translator, falling within the classification B.1.5. Support Services employee – level 5 listed in Schedule B.*
>
> *(d) employers throughout Australia engaging employees performing the indicative roles non NAATI credentialed Interpreter or non NAATI credentialed Translator, falling within the classification B.1.5. Support Services employee – level 5 listed in Schedule B.* [proposed variation emphasised]

10.4 The effects of this variation would be quite extraordinary and likely without precedent. Essentially, APESMA seeks to extend the occupational coverage of this award beyond "the health industry" to any employer in any industry.

10.5 APESMA's previous variation in the context of this application (see its Submission dated 17 March 2017)[25] was to include Translators and Interpreters in the list of Common Health Professionals.

10.6 This proposal was, with respect, entirely misguided and was met with strong opposition, based mainly on the farcical outcome which would have resulted if a group of employees who are not necessarily even professionals, but certainly not health professionals, had been included on this list.

10.7 Evidently, after abandoning this proposal, APESMA has sought to find another mechanism by which to achieve coverage of the Award for all translators and interpreters, without having regard to the appropriateness of this outcome.

10.8 As it stands, the APESMA proposal would extend coverage of an Award which was specifically drafted "to accommodate all health professionals (except doctors and nurses) employed in both the health industry and industry generally"[26] to a business operating in <u>any industry</u>, just because they might happy to engage a translator or interpreter.

10.9 Not only will this disturb the current state of affairs for an untold number of employers (who may be currently and correctly applying another modern or enterprise award to these employees), it will mean that a business with no connection to the health industry will have to start applying an instrument designed with the particular requirements of that industry in mind in an entirely unrelated business. This outcome is patently absurd.

10.10 Any outcome whereby an employer might have more than one industry award applicable to its business is one which should be considered very carefully. In the context of this Review, a Full Bench of the Commission (in considering an application to vary the coverage of the *Security Industry Award 2010*), found that:

> *[16] The considerations that led to the conclusions of the Award Modernisation Full Bench remain relevant because they concern aspects of the modern awards objective, especially the objective of a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards. <u>Requiring employers in a separate industry to comply with an additional award, for what will usually be a small proportion of its employees, conflicts with this objective.</u>*[27] [emphasis added]

[25] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201631-204-sub-apesma-170317.pdf
[26] [2009] AIRCFB 50 at [78].
[27] Security Services Industry Award 2010 [2015] FWCFB 620

10.11 This variation cannot possibly be said to be consistent with the principles which comprise the modern awards objective generally, but in particular "the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards."

11. SUMMARY OF OUR CLIENTS' POSITION

11.1 Our clients' position can be summarised as follows:

(a) there is insufficient probative evidence currently before the Commission to support the proposition that translators and interpreters who are not covered by the Award are without a safety net;

(b) as shown, in addition to the Award, there are currently in existence other relevant modern or enterprise awards which may either expressly or indirectly cover translators and interpreters;

(c) APESMA has failed to grapple with the coverage of translators and interpreters by these instruments in any real way;

(d) even if there are groups of employees who may fall outside award coverage in certain circumstances (which is not conceded), APESMA has not advanced a cogent merit argument in support of its proposed variation;

(e) the variation sought does not fit within the framework upon which the modern award system was created, as it potentially extends the coverage of the Award to every industry just by virtue of the fact a business may employ a translator or interpreter; and

(f) the proposed variation fails to meet the modern awards objective.

11.2 For these reasons, the application must fail.

AUSTRALIAN BUSINESS LAWYERS & ADVISORS

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

11 May 2018

Luis Izzo

Director

Australian Business Lawyers & Advisors Pty Limited

(02) 9458 7640

luis.izzo@ablawyers.com.au

Kate Thomson

Associate

Australian Business Lawyers & Advisors Pty Limited

(02) 4989 1003

kate.thomson@ablawyers.com.au

On-hire employee services - workplace obligations

On-hire employee services and the national system

Most private sector employers throughout Australia (excluding sole traders, partnerships and other unincorporated entities in Western Australia) fall under the national workplace relations system and are covered by the *Fair Work Act 2009*. This affects employer and employee rights and obligations.

This guide has been prepared to assist employers of on-hire employees (also known as labour hire or agency employees) and their clients to understand minimum obligations under the *Fair Work Act 2009* and modern awards and how they apply to on-hire employees and their employers.

This guide does not provide information about on-hire workers that are engaged as independent contractors. Further information for contractors is available at www.fairwork.gov.au/contractors.

The on-hire employee services industry includes businesses that employ workers and provide a service to other organisations (host organisations) by assigning those workers to perform work for that host organisation. The host organisation pays the on-hire business a fee for providing on-hire employees to work for them. On-hire employees are employed by the on-hire business; they are not employees of the host organisation.

As the employer, the on-hire business is responsible for ensuring employees receive their minimum employment entitlements at all times.

How do modern awards and agreements apply to on-hire workers?

On-hire employees will be covered by the relevant modern award and the National Employment Standards (NES) regardless of the employment arrangements that are in place at the host organisation. On-hire employees will not be covered by an enterprise agreement made between a host organisation and its own direct employees unless the on-hire business itself is a party to the agreement.

An on-hire business may have its own enterprise agreement which will apply to an on-hire employee if it covers the work they perform. Depending on the provisions of the enterprise agreement, it may replace the provisions of the modern award.

On-hire businesses may provide similar terms and conditions as those contained in a host organisation's enterprise agreement. However the on-hire business must still ensure the on-hire employees receive at least the minimum entitlements in the relevant modern award and NES or, where the on-hire business has its own enterprise agreement, that agreement. Put simply, an on-hire business cannot legally apply a host organisation's enterprise agreement in all circumstances.

Example 1

Alice runs an on-hire business supplying employees to the manufacturing and construction industries. Previously, Alice's employees were award free, and she paid them based on the employment arrangements in place at the host organisation.

From 1 January 2010, Alice's employees became covered by the NES and the relevant modern award that applies to the work they perform. Alice checks the rates of pay and entitlements of all her on-hire employees to ensure they are receiving their minimum entitlements under the NES and modern awards. Alice finds that her current employment arrangements meet all the minimum requirements and she decides to continue paying her employees based on the host organisation's arrangements. Alice should review her employment arrangements regularly to ensure they continue to meet the minimum requirements in the modern awards and NES.

Obligations of host organisations to on-hire workers

The on-hire business, as the employer, is responsible for meeting all of the employment entitlements of the employee. However, both the on-hire business and host organisations have obligations in relation to workplace health and safety. Workplace health and safety is regulated by state and territory workplace health and safety authorities. For further information about workplace health and safety, please contact your state or territory workplace health and safety authority.

Similarly, host organisations have obligations under State and Commonwealth equal opportunity legislation to ensure that on-hire employees working in their workplaces are not subjected to discrimination or sexual harassment.

Host organisations also have obligations under the *Fair Work Act 2009* in relation to general workplace protections, including unlawful workplace discrimination.

Host organisations should be aware that they may be liable for contraventions of the *Fair Work Act 2009* (such as an on-hire

employee not receiving their entitlements under the NES or modern award) if they are involved in the contravention. Involvement in a contravention can include inducing the contravention through threats or promises, being knowingly concerned in or party to the contravention, or conspiring with others to bring about the contravention.

Example 2

Alex owns an on-hire business supplying staff to a wide range of service industries. Alex assigns workers to a new client and pays them in accordance with the applicable modern award. The client discovers that the overtime rates being paid to Alex's on-hire employees are more beneficial than those being paid to the host organisation's employees under the host organisation's enterprise agreement. The host organisation threatens to terminate the contract for supply of on-hire services unless Alex agrees to pay his on-hire employees the rate contained in their own enterprise agreement, despite this being a contravention of the modern award.

The host organisation may be contravening the *Fair Work Act 2009* for coercing Alex to pay his on-hire employees less than the modern award, and could be subject to civil penalties.

Minimum entitlements for on-hire workers

The *Fair Work Act 2009* establishes a safety net of employee entitlements with the NES and modern awards. Employees in the on-hire industry who are covered by the national workplace relations system are entitled to the minimum conditions in the NES and the relevant modern award or enterprise agreement.

Employees must receive at least the minimum entitlements in the NES at all times. The minimum entitlements in the NES prevail over any instrument (including an award, agreement, former state award or state agreement or contract of employment) that is less beneficial than the entitlements under the NES.

Most industries are also subject to a modern award. Modern awards are industry or occupation-based, and apply to employers and employees who perform work covered by the award.

Most modern awards introduced coverage for on-hire workers. In general, on-hire workers will be covered by the modern award that applies to the type of work that they perform.

Example 3

Jim is employed by an on-hire business. Jim's employer assigns him to a supermarket to perform general retail duties such as serving customers and replenishing stock on the shelves. While working at the supermarket, Jim would be entitled to the minimum rates of pay and conditions in the General Retail Industry Award 2010. If Jim's employer later assigned him to a hospitality business, such as a hotel, Jim would be entitled to the minimum rates of pay and conditions in the Hospitality Industry (General) Award 2010.

Currently, transitional arrangements in most modern awards mean that rates of pay and certain other conditions may be phased in over a period of 5 years to assist employers and employees to move to the modern award system.

Employers in the on-hire industry should ensure they are keeping appropriate written records, such as pay slips and time and wage records. The records must be legible, in English and be kept for seven years.

Further information

The Fair Work Ombudsman has a number of tools available to automatically calculate base rates of pay for most modern awards. These tools, along with some information provided by you, can quickly and easily help you find the right pay. Visit www.fairwork.gov.au/pay for further information, or contact the Fair Work Infoline on 13 13 94.

The Australian Building & Construction Commission (ABCC) can provide information and advice to building industry participants and investigate contraventions of relevant workplace laws in the building and construction industry. On-hire businesses and employers in the building and construction industry can contact ABCC on 1800 003 338 or visit www.abcc.gov.au.

Contact us

Fair Work Online: www.fairwork.gov.au

Fair Work Infoline: **13 13 94**

Need language help?

Contact the Translating and Interpreting Service (TIS) on **13 14 50**

Hearing & speech assistance

Call through the National Relay Service (NRS):

For TTY: **13 36 77**. Ask for the Fair Work Infoline **13 13 94**

Speak & Listen: **1300 555 727**. Ask for the Fair Work Infoline **13 13 94**

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