



26 April 2017

**Our Ref:** 20150516

**Your Ref:** AM2014/250

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The Associate  
Commissioner Cirkovic  
Fair Work Commission  
80 William Street  
Sydney NSW 2000

Dear Associate

**4 YEARLY REVIEW OF MODERN AWARDS - ABORIGINAL COMMUNITY CONTROLLED HEALTH SERVICES AWARD 2010 (AM2014/250)**

On behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber (**NSWBC**), we refer to the conferences on 28 March 2017 in the above proceedings related to the *Aboriginal Community Controlled Health Services Award 2010 (Award)*.

We write to clarify our clients' position on a number of substantive matters as requested.

We apologise for the delay in providing these submissions.

The item numbers below are in reference to the Summary of Proposed Substantive Variations updated to 19 April 2017.

**1. ITEM S3**

- 1.1 National Aboriginal and Torres Strait Islander Health Workers Association (**NATSIHWA**) has proposed that the scope of Award be extended to all Aboriginal and Torres Strait Islander Health Workers (**ATSIHW**) beyond the definition of *Aboriginal community controlled health services* in the Award.
- 1.2 In support of this proposal, NATSIHWA's submissions dated 6 March 2015 (**March 2015 Submissions**) state that ATSIHWs have "fragmented modern award coverage" which means

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- there are “significant inconsistencies between pay, position classifications, required skills, and employment conditions nationally.”<sup>1</sup>
- 1.3 NATSIHWA proposes that this “problem of inconsistency”<sup>2</sup> be addressed by extending the coverage of the Award from the defined Aboriginal community controlled health services, to all ATSIHWs within Australia’s national workplace relations system.
- 1.4 We note there has been no further information provided by NATSIHWA which:
- (a) details the alleged fragmented award coverage;
  - (b) explains how this contributes to any inconsistencies;
  - (c) details the inconsistencies;
  - (d) clarifies how these inconsistencies affect ATSIHWs currently in the system;
  - (e) explains how extending the coverage of the Award will remedy these inconsistencies; and
  - (f) explains how the potential issue of overlapping coverage will be dealt with if this change to the Award’s coverage is made.
- 1.5 In the absence of this information, our clients are unable to support this proposal. NATSIHWA has not established a proper basis as to why this change is needed and why the current Award is not meeting the modern award objectives, beyond simply stating that there are currently “inconsistencies”.
- 1.6 Furthermore, as a general proposition, our clients do not support an expansion of coverage to include employees who are not working in Aboriginal controlled community health organisations, as defined.
- 1.7 In this regard, we note the Statement of the Full Bench of the Australian Industrial Relations Commission (AIRC) during the award modernisation process, in relation to the Award:

*We have decided ... that **the operation of Aboriginal community controlled health organisations should be regulated by a separate modern award**. We are satisfied that **the nature of health services that are delivered in a culturally appropriate way is sufficiently different to justify a separate award**. The difference is not only about the way the services are established and controlled but is critically seen in the way that employees of the services operate. We accept that the Aboriginal health worker*

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<sup>1</sup> HWL Ebsworth on behalf of National Aboriginal and Torres Strait Islander Health Worker Association , *Outline submission on proposed changes to the Aboriginal Community Controlled Health Services Award 2010*, 6 March 2015, [7].

<sup>2</sup> *Ibid*, [8].

*within Aboriginal community controlled health services is critical. No equivalent health care worker operates in what we might describe as mainstream services.*<sup>3</sup>

[Our emphasis added]

## 2. ITEM S6

- 2.1 NATSIHWA has proposed an improvement to minimum wages for Award-covered ATSIHWs.
- 2.2 Based on NATSIHWA's March 2015 Submissions and further submissions dated 9 March 2017, this proposal appears to be based on a disparity between minimum wages for ATSIHWs under the Award, compared with nurses under the *Nurses Award 2010 (Nurses Award)*.
- 2.3 Our clients are concerned about this proposal.
- 2.4 Where changes to modern award minimum wages are proposed (in the context of this 4 yearly review) the Fair Work Commission (**Commission**) requires the party proposing the change to "advance a merit argument in support of the proposed variation."<sup>4</sup>
- 2.5 In addition, section 156(3) of the *Fair Work Act 2009* (Cth) (**FW Act**) requires the Commission to be satisfied that any variation of award minimum wages is justified by work value reasons (as defined in the FW Act).
- 2.6 Accordingly, this significant change proposed by NATSIHWA must be supported by "a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation."<sup>5</sup>
- 2.7 In the absence of such evidence and submissions addressing the work value reasons in support of the proposed variation, our clients are unable to support this proposal.

## 3. ITEM S7

- 3.1 Our clients do not support the introduction of a whole new range of allowances based on the allowances in the *Health Professionals and Support Services Award 2010 (Health Professionals Award)*, a different modern award with different coverage.
- 3.2 Once again, NATSIHWA has not provided proper reasoning supporting its submission in this regard. It appears to be simply a comparison exercise.

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<sup>3</sup> Statement of the Full Bench, *Award Modernisation (AM2008/24, 35, 41, 64-92 and AM2009/10)* [2009] AIRCFB 865, per Justice Guidice, Vice President Watson, Senior Deputy Presidents Watson, Harrison and Acton, and Commissioner Smith, [125].

<sup>4</sup> *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788, per Justice Ross, Vice President Hatcher, Senior Deputy Presidents Acton and Hamberger, Commissioner Hampton [60].

<sup>5</sup> *Ibid.*

3.3 NATSIHWA merely states that the ATSIHWs do not have the benefit of allowances that are included in the Health Professionals Award. However, during the creation of the Award, the Full Bench of the AIRC stated that it was not easy to make a ready comparison with the Health Professionals Award, given the health services provided by Aboriginal controlled community health organisations are markedly different to mainstream health services.<sup>6</sup>

3.4 It is not clear to our clients why the allowances in the Health Professionals Award should be cut and paste into the Award in circumstances where each award has a different scope, coverage and purpose.

#### **4. ITEM S11B**

4.1 United Voice (**UV**) has submitted that progression between levels within a grade should be time based.

4.2 Our clients do not support automatic time based progressions, even within a single grade, in circumstances where flexibility afforded to the employer is reduced.

4.3 In the event that an employee's time based progression is not appropriate taking into consideration that employee's skills development and ability, an employer should retain the discretion to only approve a progression when the employee has achieved the requisite skill and ability.

#### **5. ITEM S15**

5.1 The Health Services Union (**HSU**) has proposed the following changes to rostering in the Award:

- (a) a minimum 4 hour engagement for all rostered shifts;
- (b) provisions for sleepovers and broken shifts; and
- (c) an extension of the change of notice to 14 days.

5.2 Notwithstanding there has been no reasoning presented in support of the need for the proposed changes, our clients do not support the HSU's proposal.

5.3 These changes represent reduced flexibility for employers, which has the potential to adversely impact an employer's ability to respond to changes in the provision of health services to the Aboriginal and Torres Strait Islander community.

5.4 In the absence of information demonstrating that these changes are required because the Award is no longer achieving the modern awards objective, our clients are unable to support the HSU's proposal.

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<sup>6</sup> See Decision of the Full Bench, *Award Modernisation (AM2008/24, 35, 41, 64-92 and AM2009/10)*, [2009] AIRCFB 945, per Justice Guidice, Vice President Watson, Senior Deputy Presidents Watson, Harrison and Acton, and Commissioner Smith, [98].

**6. ITEM S16**

- 6.1 The HSU has sought to include tea breaks in the Award.
- 6.2 Again, our clients are unable to support this proposal as it currently stands.
- 6.3 There is no specific information from the HSU concerning these tea breaks, including:
- (a) whether they will be paid or unpaid;
  - (b) the proposed length of the tea breaks; and
  - (c) the frequency of the tea breaks during a shift.

**7. ITEM S17A AND S18**

- 7.1 Our clients do not oppose the amendments to clause 30 sought by NATSIHWA, which confirm that leave for ceremonial purposes, includes for bereavement related ceremonies and obligations.

If you have any questions, please contact Luis Izzo on (02) 9458 7640 or Sina Mostafavi on (02) 9458 7802.

Yours sincerely,



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