MERIDIAN LAWYERS

Meridian Lawyers Limited
ACN 108 546 774
Level 6, 20 Bond Street, Sydney NSW 2000
GPO Box 3549, Sydney NSW 2001
T +61 2 9018 9999
F +61 2 9018 9900
W meridianlawyers.com.au

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REVIEW OF THE PHARMACY INDUSTRY AWARD 2010
AM2014/209, AM2016/15
SUBMISSIONS ON REVISED EXPOSURE DRAFT

1 We refer to the above matter in which we act for the Pharmacy Guild of Australia (**"the Guild"**).

2 These submissions are made in accordance with the Directions of his Honour Justice Ross of 9 November 2016 ("**Directions**").

3 In accordance in the Directions, parties are invited to provide submissions in relation to the further revised *Pharmacy Industry Award 2016* ("**Revised Exposure Draft**") of the *Pharmacy Industry Award 2010* (**"PIA"**) dated.

4 The Guild may supplement these submissions at the hearing of this matter on 15 December 2016.

Background:

5 The review of the PIA commenced with publication of the 9 October Exposure Draft by the Fair Work Commission ("**Commission**"). Subsequently, the Commission published a revised exposure draft of the PIA which had been drafted in plain language on 30 November 2015 ("**Plain Language Draft**").

6 Interested parties, including the Guild were invited to make submissions in relation to the aforementioned exposure draft and plain language draft. The Guild made submissions on these previous drafts dated 15 July 2015, 28 August 2015, 10 December 2015, 23 May 2016 and 22 July 2016. To the extent that these submissions raise technical and drafting issues which are not canvassed in these submissions, the Guild continues to press those matters. Further, the Guild relies upon the relevant Background and consideration of the principles for plain language drafting contained in our previous submissions.

7 Following submissions made by the interested parties on 5 September and 18 November 2016, the drafter of the Revised Exposure Draft made further amendments to the plain language version of the PIA and has provide comments in relation to those changes.

Clause 4 - Coverage

8 The Guild has made a number of previous submissions to the effect that Clause 4 of the Revised Exposure Draft significantly alters the current coverage of the PIA. Despite these submissions, the drafter has not made any amendments to correct the alteration of the coverage provisions.

9 Clause 3 of the PIA defines community pharmacy as follows:

"community pharmacy means any business conducted by the employer in premises:

(a) that are registered under the relevant State or Territory legislation for the regulation of pharmacies; or

(b) are located in a State or Territory where no legislation operates to provide for the registration of pharmacies;

and

- *that are established either in whole or in part for the compounding or dispensing of prescriptions or vending any medicines or drugs; and*
- *where other goods may be sold by retail."*

10 We reiterate our concern that Clause 4.1(a) of the Revised Exposure Draft has altered the legal effect of the coverage provisions by introducing the requirement that medicines and drugs are sold by retail in a business that is established for compounding or dispensing of prescriptions. The PIA does not currently require that all goods and medicines are sold by retail, rather clause 3 of the PIA provides that a community pharmacy is:

a business established either in whole or in part for the compounding or dispensing of prescriptions or vending any medicines and drugs;

*where **other goods may** be sold by retail* (emphasis added).

11 In our submission the legal effect of the PIA has been changed as the PIA does not require medicine and drugs to be sold by retail, it simply recognises that goods other than medicine and drugs may be sold by retail.

12 The Guild has made previous submissions to the effect that the Community Pharmacy industry is subject to significant regulation and has functions including the delivery of health services to the community as a result of government funding and also administering medication on behalf of the Commonwealth which is covered under the pharmaceutical benefits scheme. The administration of these medications is not by the way of retail, though it is a significant function undertaken by a community pharmacy.

13 The legal effect of clause 4.1 of the PIA has been further amended by clause 4.1(c) of the Revised Exposure Draft which provides:

"The award does not cover employment in a pharmacy owned by a hospital or other public institution, or operated by government, where their goods or services are not sold by retail to the general public."

14 Furthermore, clause 4.1(c) of the Revised Exposure Draft alters the legal effect of clause 4.1 of the PIA by only excluding a pharmacy owned by a hospital or other public institution only where their medicines or drugs are sold by way of retail, the reference to 'services' at clause 4.1 of the PIA has also been excluded from clause 4.1(c). The exclusion in the PIA currently is broader and operates unless a pharmacy owned by a hospital or public institution sells goods or services to the general public.

15 These amendments have the legal effect of narrowing the coverage of and exclusions from coverage of the PIA. We reiterate our previous submissions that there is presently no evidence before the Commission to justify that such a variation is necessary to meet the modern awards objective or in order to provide a fair and relevant safety net.

16 The Guild submits that:

(a) clause 4.1 of the Revised Exposure Draft should be replaced with the definition of Community Pharmacy from clause 3 of the PIA; and

(b) the wording at clause 4.1 of the PIA be included as a new clause 4.5 of the Revised Exposure Draft;

(c) clause 4.5 be renumbered as clause 4.6.

Clause 10 – Part-time employment:

17 The Guild appreciates that the Drafter has sought to address some of the concerns raised in relation to part time employment. However, with respect the drafter has failed to remedy some significant alterations to the legal effect of the provisions relating to part time employment at clause 12 of the PIA.

18 Clause 12.5 of the PIA which provides for the minimum engagement has been removed from the Revised Exposure Draft. The drafter indicates that the reference to a requirement to notify the employee in writing at the commencement of their engagement that the minimum engagement is 3 hours provides for a minimum engagement of three hours. Respectfully this is incorrect and an employer could comply with the obligation to notify an employee that the minimum engagement is three hours but not actually roster an employee for a period of three hours as the Revised Exposure Draft contains no express obligation to do so. In this example, there would be no technical breach of the award, and outcome which is nonsensical in our submission. Clause 12.5 of the PIA should be inserted into the Revised Exposure Draft.

19 There have also been amendments to the legal effect of clause 12.3 of the PIA which provides *"any agreement to vary the agreed hours may also be either a permanent agreed variation to the pattern of work or may be a temporary agreed variation, e.g. a single shift or roster period. Such a variation will be agreed hours for the purposes of clause 12(f)"*, clause 12.2(f) of the PIA provides that all time worked in excess of the agreed hours is paid at the overtime rate. The drafter indicates that this is dealt with at clause 10.4(d). We respectfully disagree, clause 10.4 merely requires that an amendment to an agreement must be in writing, but it does not provide for a variation to the agreed ordinary hours at ordinary rates. The Guild submits this provision is a necessary and useful signpost to those using the award that the hours or a part-time employee may be varied by agreement and can be varied subject to a time limit. This provides certainty to employers and employees as to the length of time for which any agreed variation would apply and serves to minimise disputes about the length of such a variation. These words, and the appropriate reference to the overtime provision should be included at the end of clause 10.4.

13 Ordinary hours of work:

20 As we have noted above, clause 13.5 alters the legal meaning of the PIA as consistent with clause 10.10. A part-time employee may agree to work additional hours that are not

reasonably predictable, but which are in excess of their agreed hours under clause 10.4 on the terms applicable to a casual employee. Any such additional hours under clause 10.10 are not necessarily overtime, unless in accordance with clause 10.11 they exceed the maximum daily hours or full-time employment hours provided for in the award. Clause 13.5, when read in isolation fails to account for this capacity for a part-time employee to agree to work additional hours, which may not be overtime hours. This clause could change the legal effect of the award, is not contained in the PIA and should be deleted.

Clause 14 - Rostering arrangements – full-time and part-time employees:

21 Clause 14.1(e) has omitted the words *"regularly works Sundays*", found at clause 25.4 of the PIA. The omission of these words has changed the legal effect of the award, by requiring an employer to roster an employee for three consecutive days off each four weeks including a Saturday and Sunday, even if an employee is only rostered on a Sunday once, in circumstances where such an obligation does not presently exist.

Clause 20 –Overtime:

22 The Guild again notes the overtime provisions at clause 20 of the PIA are subject to claim for variation sought by the Shop, Distributive and Allied Employees Association ("**SDA**"). Interested parties have been engaging in consultation concerning this claim and this matter has been resolved by consent. The Guild will make submissions on these provisions in the proceedings before the substantive issues Full Bench led his Honour Vice President Hatcher.

Schedule A- Classification Definitions:

23 In the Guild's submission, clause A.3 has amended the legal operation of clause B.3 of the PIA. Clause B.3 of the PIA refers to a person who is engaged as a 'Dispensary Assistant' being paid as a 'Pharmacy Assistant Competency Level 3, by comparison A.3 refers to an employee *"required by the employer to… assist a pharmacist in the dispensing section of a community pharmacy"*. As the Guild has previously raised, the term 'Dispensary Assistant' is one commonly used in the industry to refer to an employee engaged solely to perform dispensary related tasks including dispensing medicines, preparing dose administration aids and assisting in the administration requirements of the dispensary. Whilst these are tasks an employee at Levels 1 and 2 could undertake from time to time on a supervised and adhoc basis, an employee would not be classified at a Level 3 until they have been engaged in the role of 'Dispensary Assistant'. We also refer to the Guild's prior submissions and those of the SDA both dated 15 July 2015, which record the agreement reached between the interested parties with respect of the classification definition for a 'Pharmacy Assistant Level 3'. There is no evidence before the Commission to justify such a significant change to the classification structure of the PIA.

24 The drafter has failed to remedy that the reference to section 5 of the Health Practitioner Regulation National Law contained in the definition of 'pharmacy student' and 'pharmacy intern' is incorrect. We reiterate the Guild's earlier submission that there is no uniform Health Practitioner Regulation National Law, though each state has legislation modelled on the Queensland legislation. Whilst each state has legislation defining 'pharmacy student' and 'pharmacy intern', these definitions may not be contained at section 5 of the legislation. The Guild submits the removal of the words *"section 5 of"* from each of these definitions would ameliorate this error.

Solicitor: Jessica Light
Direct line: (02) 9018 9940
Email: jlight@meridianlawyers.com.au

Principal: Sharlene Wellard
Direct line: (02) 9018 9939
Email: swellard@meridianlawyers.com.au