

23 May 2016

**REVIEW OF THE PHARMACY INDUSTRY AWARD 2010
AM2014/209
SUBMISSIONS ON PLAIN LANGUAGE EXPOSURE DRAFT (PART A CLAUSES)**

- 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 27 April 2016 in relation to the revised plain language draft and those substantive claims pressed in relation to the review of the *Pharmacy Industry Award 2010* ("**PIA**").

Background:

- 3 On 9 October 2015, the Commission published an exposure draft ("**Exposure Draft**") of the PIA.
- 4 On 30 November 2015, the Fair Work Commission ("**Commission**") published a revised exposure draft of the PIA which had been drafted in plain language ("**Plain Language Draft**"). Interested parties were invited to make submissions in relation to the Plain Language Draft. The Guild made preliminary submissions on the Plain Language Draft dated 10 December 2015. We rely upon the relevant Background and consideration of the principles for plain language drafting contained therein.
- 5 A summary of the parties' submissions on the plain language draft was published on 15 December 2016 ("**Summary of Submissions**").
- 6 The Plain Language Draft was provided to a group of employers and employees in the community pharmacy industry for user testing during the period January 2016 to March 2016. We understand the variations to the Plain Language Draft sought by the Guild in its submissions of 10 December 2015 have been incorporated into the Revised Plain Language Draft.
- 7 On 21 April 2016, the Commission published two reports concerning the outcomes of the user testing of the Plain Language Draft. A revised version of the Plain Language Draft ("**Revised Plain Language Draft**") was published as Annexure B to the Report from the Commission on the plain language pilot. The Guild understands the Revised Plain Language Draft includes significant departures from the wording of the Plain Language Draft and was not subject to user testing.
- 8 Unless otherwise stipulated, clause references are to the Revised Plain Language Draft.

Part A Clauses:

Clause 4 - Coverage

- 9 Clause 4.4(b) uses the word “enterprise instrument” which has not been defined in the FW Act and should be reworded as “enterprise agreement”.
- 10 The amendment to clause 4.1(c) with the insertion of complete new sentence and content has the potential to disturb the coverage of the award and should be retained as:

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."

Clause 7 – Facilitative provisions for flexible working arrangements

- 11 As determined during the user testing phase and contained in the drafter comments, the naming convention for the clause is difficult to relate to and understand by employers and employees.
- 12 Clause content should be directly linked to Flexible Working Arrangements provisions instead of a standalone clause.

Clause 8.3 – Moving between types of employment

- 13 Clause 8.3(c) should contain a reference to s65 of the FW Act to assist in the process of assessing an employee’s request for part time arrangements.
- 14 Clause 8.3(c) needs to be reworded to remove any potential issue where an employee request for part time work is requested or no agreement is achieved to return to full time employment.
- 15 The introduction of multiple hyperlinks to external documents or clauses will cause confusion and ambiguity to employers and employees of this Award, as it is normally available in a paper based version in the workplace. Therefore sufficient content should be retained in this Award to removal any potential issues from arising.

Clause 9 – Full Time Employment

- 16 The definition and interpretation of a full time employee could cause potential issues regarding employment classifications and entitlements, eg casual employee has worked 76 hours in a fortnight is converted to a full time employee.
- 17 Definition of the full time employee should be retained from the Exposure Draft, clause 6.3.

Clause 10 – Part time employment

- 18 Clause 10.2 should be reworded to provide more concise in the explanation to say “Subject to this Award, a part time employee’s pay and conditions are a pro rata amount of which a full time employee receives when engaged to the same kind of work”.
- 19 Clause 10.5 provides additional points that do not enhance the understanding or application of the entitlement which are covered by other clauses within this Award.

- Clause 10.5(a) should be retained as a single explanation for the minimum shift length for a part time employee.
 - Clause 10.5(b) should be deleted as not necessary as the content is contained within Clause 16.
 - Clause 10.5(c) should be deleted and inserted as a new subparagraph at Clause 10.3(e).
- 20 Clause 10.9 should have a full stop inserted after word “predictable”. Insert last sentence from the Exposure Draft (revised 25 September 2015) Clause 6.4(i) into clause 10.9 that do not enhance the understanding or application of the entitlement which are covered by other clauses within this Award.

Clause 11 – Casual employment

- 21 Clause 11.2 should be reworded to include “..... have an entitlement or expectation” will remove any potential issues or concerns about its interpretation (John Perry v Nardy House Inc. (2016) FWC 73).
- 22 Clause 11.3 should be reworded to say “*The minimum number of hours for which a casual employee can be rostered to work on any day is 3 consecutive hours*”. This will provide guidance to employers and employees on the rostering arrangements and minimum shift lengths for casual employees.

Clause 13 – Hours of Work

- 23 Clause 13.5 could provide a misconception on how the 12 hours timeframe is calculated for the maximum ordinary hours per day. Clause 13.5 should be reworded to say “*The maximum number of hours an employee can work consecutive or in a split shift per day is 12*”.

Clause 16.5 – Pay Day

- 24 Clause 16.5(b) needs to be defined in its application – is the provision required to be undertaken for every single pay day or is it a once off provision that is only applied where the regular pay day has been altered due to circumstances belong the employer’s direct control.

Clause 18.2 – On-meal premise meal allowance

- 25 Clause 18.2(b) should be reworded to say “*The employee must pay the pharmacist at the enhanced hourly rate for the period of the meal break, notwithstanding clause 17.1 – Annualised Salary of this Award, regardless of other payments, penalty rates or allowances to which the pharmacists is entitled*”. This will provide more guidance to employers and employees on when the allowance is paid and calculation method for an annualised salary.

Clause 18.4 – Moving Expenses

- 26 The term of “township” has been retained from the Exposure Draft of the PIA 2014 (revised 25 September 2015) and the Plain language draft (revised 21 April 2016) without a detailed explanation content in the document. This lack of definition could result in confusion and ambiguity as to whether this entitlement is applicable including the amount payable.

Clause 20.3 – Payment of overtime

- 27 Incorrect terminology used in contained in clause 20.3 to explain the application of the overtime rates.
- 28 Clause 20.3 should be reworded to say “*The overtime penalty percentage rates specified in column 2 of Table 4 – Overtime Rates (depending upon when the overtime was worked as specified in column 1) are applicable to the provisions of clauses 20.1 and 20.2 on the minimum hourly rate of the employee, under clause 16 – Wages*”.

Clause 23 – Personal/carers Leave and Compassionate Leave

- 29 Incorrect link to clause provisions contained in clauses 23.4, 23.5 and 23.6. Clause numbers needs to be reworded to say “23.3” instead of “23.1”.

Schedule A – Classification Definitions

- 30 Clause A.2, A.7 and A.8 needs to include the words “who is required to work at this level and employed in such a position” to remove any potential conflict or issues on when an employee is entitled to the correct remuneration level.

Part B Clauses:

- 31 We note a number of the 'Part B' clauses have been redrafted in plain language. The Guild is broadly supportive of the inclusion of plain language versions of the Part B clauses in the PIA.
- 32 Due to the commonality of the Part B clauses and the likely inclusions of these provisions in any other awards to be redrafted in plain language, the Guild intends to make submissions concerning the Part B clauses in accordance with the timetable foreshadowed by the Statement of His Honour, Justice Ross issued 6 May 2016.
- 33 The Guild submits that following consultation with interested parties it would be appropriate to conduct employee and employer user testing of the Part B provisions as has occurred with the Part A provisions of the PIA.

Substantive Claims

- 34 In submission of 15 July 2015, the Guild provided an outline of the substantive claims sought to the PIA. Specifically, the Guild indicated its intention to pursue changes to:
- (a) include a provision allowing for employees to be directed to take annual leave in the case of a close down;
 - (b) include an annualised salary for pharmacy assistants;
 - (c) reduce the minimum shift length for part-time and casual school students to 90 minutes per shift; and
 - (d) reduce penalty rates.
- 35 The Guild has or is currently pursuing variations (a), (c) and (d) in other matters presently before the Commission in the 4 yearly review of modern awards. The Guild continues to press its variation to include an annualised salary provision for pharmacy assistants in these award specific proceedings. Please see a Draft Determination of the variation sought by the Guild at **Annexure A** to our submission.

- 36 The Guild submits that clause 10.4 of the Exposure Draft relating to Annualised Salary for Pharmacists should also apply to pharmacy assistants. The clause provides that the employee must not receive less under the annualised salary arrangement than under award generally. This is an adequate safe guard to ensure the employee would not be worse off than if an employee was paid on an hourly basis in accordance with the PIA.
- 37 The Preliminary Jurisdictional Issues Decision [2014] FWCFB 1788 provided that parties seeking a variation to vary a modern award must advance a merit argument supported by probative evidence. The Full Bench went on to recognise that the extent of the argument is dependent on the circumstances and there may be changes proposed which are self-evident and therefore capable of being decided with relatively little formality. Specifically, probative evidence in support of a merit based argument is necessary where the variation moved by a party is a significant variation. In those circumstances the evidence must be accompanied by submissions which properly address the relevant legislative provisions in the review.
- 38 The Guild submits the extension of the application of an annualised salary clause to pharmacy assistants is best characterised as a change which is self-evident and there is merit in granting the proposed variation on the basis that:
- (a) would ease the administrative burden on community pharmacist operators, who are predominantly small businesses; and
 - (b) the Guild's proposal would allow employees who are not pharmacists, to access the flexible annualised salary arrangements.
- 39 The Guild intends to provide more fulsome submissions in relation to the variation accompanied by witness evidence in accordance with any relevant directions of the Commission.



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FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009

Part 2-3, Div 4 – 4 Yearly reviews of modern awards

Pharmacy Industry Award 2010

[MA000012]

Pharmacy industry

JUSTICE ROSS, PRESIDENT

SYDNEY, XX YYY 2015

Review of modern awards to be conducted.

Further to the Decision and Reasons for Decision <<DecisionRef>> in AM2014/209, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the *Pharmacy Industry Award 2010* be varied as follows:

[1] By deleting clause 10.4 (a) and inserting:

"An annualised salary for all community pharmacy employees may be developed. The annual salary may be in satisfaction of any or all of the following provisions of the award:

- (i) overtime;
- (ii) penalty rates;
- (iii) payments for public holidays, if worked or taken;
- (iv) annual leave, when taken;
- (v) annual leave loading;
- (vi) meal allowance; and
- (vii) meal break on call entitlements."

[2] The determination shall operate on and from XX YYY 2016

PRESIDENT