

27 April 2017

Vice President Hatcher
Fair Work Commission

Via Email Chambers.Hatcher.VP@fwc.gov.au

Dear Vice President

**Re: 2016/15 Plain Language Redrafting –
Pharmacy Industry Award 2010**

Further to our email of 26 April 2017 Business SA advises that, with regard to point 1 of the Commission's directions issued 18 April 2017¹, we do have concerns regarding the interpretation of the on-hire provisions following the question of the Full Bench at [77] of the 20th January 2017 Full Bench decision².

These concerns were referred to in our submissions of 6 February 2017,³ 10 February 2017⁴ and, in response to the 22 February 2017 Full Bench request on transcript for further submissions, in our 23 February submissions⁵ (subsequent to discussions with other employer bodies). We note the SA Wine Industry Association⁶ also made similar submissions on 23 February 2017.

In relation to the matter raised by the Commission in their question at [77] of the 20 January 2017 decision in which it was stated:

[77] The proposed change [retaining the current award on hire definition] will achieve the objective of ensuring that the legal effect has not changed. However, we would observe that it is difficult to determine from the terms of the current award whether the person to whom labour is supplied needs to be an employer covered by the Pharmacy Award by virtue of employing other employees in the community pharmacy industry or acquires that status by being supplied with the labour. The definition of on-hire does not provide any assistance in that regard. We invite submissions as to whether the intention of the current provision is that the person to whom labour is supplied is also to be an employer covered by the award, or if some other outcome is intended.

Business SA submits there is an outstanding issue about coverage of the award in relation to on-hire employees at clause 4.3(a) of the Exposure Draft.

At the time of the release of the plain language exposure draft the definitions of on hire were so significantly changed that the parties did not focus on the provisions of the new clause 4.3 (a). However, as a result of the Commission's question and further discussion with a range of employer



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¹ [Directions 18 April 2017](#)

² [\[2017\] FWCFB 344 Pharmacy Industry Award 2010 – plain language drafting issues \[77\]](#)

³ [BSA Plain Language Submission 6/2/17](#)

⁴ [BSA Submissions in reply 10/02/17](#)

⁵ [BSA further submissions 23/02/2017](#)

⁶ [SAWIA submission 23/02/2017](#)





organisations it is clear that the changes made to the current award provision 4.5 (now 4.3(a) in the exposure draft) have had unintended consequences. The current clause states:

4.5 This award covers any employer which supplies labour on an on-hire basis in the industry set out in clause 4.1 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. This subclause operates subject to the exclusions from coverage in this award. This award covers any employer which supplies labour on an on-hire basis in the industry set out in clause 4.1 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. This subclause operates subject to the exclusions from coverage in this award.⁷

The corresponding provisions of the exposure draft are:

4.3 This industry award also covers:

(a) on-hire employees working in the community pharmacy industry (with a classification defined in Schedule A—Classification Definitions) and the on-hire employers of those employees; and⁸

It is Business SA's submission that the changes are such that the coverage of on hire employers, employees and the client may be unclear, leading to the question asked by the Commission.

SDA et al in their joint submissions of 10 February 2017⁹ state, at 7:

The first sentence of the coverage clause 4.1 is clear and unambiguous, that is, an employer in the Community Pharmacy Industry is covered by this award. Clause 4.5 is to be read in conjunction with Clause 4.1. Clause 4.1 is the critical clause defining coverage. This clause applies to both on-hire employers, the employees they supply and the Community Pharmacies to which they are supplied. (emphasis added).

Business SA agrees with this argument with the exception of the addition of the words “and the Community Pharmacies to which they are supplied.”

Business SA respectfully submits that the wording of the current clause is clear. Clause 4.5:

- provides coverage for the on-hire employer and the on-hire employee but does not in itself determine coverage for the community pharmacy business that is using the services of the on-hire employer (host business). If the host business is in the community pharmacy industry and has employees in its own right that are covered within the Pharmacy Industry Award 2010 classifications it will fall within award coverage as set out in clause 4.1 however this is a separate consideration;
- determines coverage for the on-hire employer with reference to the host's operations and not from the perspective of the employee;
- determines the on-hire employer's coverage with reference to the industry referred to in clause 4.1 with the intended effect that if an on-hire business employs employees who are placed to perform work within the community pharmacy industry and who would meet one of the classification definitions in the award (except where employed in a pharmacy owned by a hospital or other public institution, or operated by government, where goods or services are not sold by retail to the general public), while they are engaged in that work placement they

⁷ [Pharmacy Industry Award 2010](#)

⁸ Pharmacy Industry Award exposure draft <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-209-ed-pharmacy-revised-markedup-200117.pdf>

⁹ [Joint Union Submission in Reply 20/01/2017](#)



will covered by the Pharmacy Industry Award 2010. In other words, the on-hire employer would have to observe the terms of the Pharmacy Industry Award 2010 when paying the employee for their work at the Community pharmacy business that is the host business.

In the event that the Community Pharmacy business also employs people under the classification definitions in Schedule A then, under clause 4.1 that community pharmacy business is '[an **employer**] in the **community pharmacy industry**' and is therefore, covered by the award.

Further, and for similar reasons as outlined above, Business SA, having considered the wording, submits clause 4.3(b) also changes the meaning of current clause 4.6.

Business SA respectfully submits that resolution of this issue (which may have unintended legal consequences well beyond the Pharmacy Industry Award, given that a significant number of awards have similar wording) is of utmost importance.

Business SA submits that resolution as suggested by the Pharmacy Guild in their submissions in reply of 10 March 2017¹⁰ may be as simple as retaining the content and intent of current clauses 4.5 and 4.6. Business SA is drafting alternative provisions in the hope of resolving this issue.

Further we request a conference be held regarding this matter as advised at [18] of [2017] FWCFB 1612¹¹ or that further submissions to be called for to assist in resolution of this matter.

Should you require any further information or have questions, please contact Karen van Gorp, Senior Policy Adviser, on (08) 8300 0040 or karenv@business-sa.com or Chris Klepper, Policy Adviser, on 03 83000062 chrisk@business-sa.com.

Yours sincerely

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¹⁰ [PGA 100317](#)

¹¹ [\[2017\] FWCFB 1612](#)