
Fair Work Commission: 4 Yearly Review of Modern Awards

SUBMISSIONS IN REPLY

**PHARMACY INDUSTRY AWARD 2010
(AM2014/209)**

21 AUGUST 2015

**AUSTRALIAN BUSINESS INDUSTRIAL
- and -
THE NSW BUSINESS CHAMBER LTD**

1. BACKGROUND

- 1.1 These reply submissions are filed by Australian Business Industrial (**ABI**) and the NSW Business Chamber Ltd (**NSWBC**) and relate to the Four Yearly Review of the *Pharmacy Industry Award 2010 (Award)*.
- 1.2 ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and has some 3,900 members.
- 1.3 NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009* (Cth) and has some 18,000 members.
- 1.4 ABI and NSWBC have a material interest in the Four Yearly Review of the Award given that both entities represent numerous employers who operate in the pharmacy industry.
- 1.5 On 6 May 2015, the Fair Work Commission (**Commission**) published a Statement which outlined the revised programming for each of the Group 2 awards as part of the Four Yearly Review.¹
- 1.6 Pursuant to the Amended Directions attached to that Statement, interested parties were directed to:
 - (a) file comprehensive written submissions on the technical and drafting issues related to the exposure draft, as well as an outline of submissions in relation to any substantive claims or variations being pursued, by 15 July 2015; and
 - (b) file comprehensive written submissions in reply to the technical and drafting issues related to exposure drafts, as well as an outline of submissions in reply to any substantive claims or variations by 21 August 2015.
- 1.7 ABI and NSWBC are not pursuing any substantive claims in this Award.
- 1.8 In respect of the exposure draft published on 8 December 2014 (**Exposure Draft**), ABI and NSWBC had previously filed submissions on 2 February 2015, and reply submissions on 5 March 2015, and we continue to rely on those submissions.
- 1.9 These reply submissions are filed in accordance with Direction 2 of the Amended Directions and respond to the submissions filed by the following parties:
 - (a) the Association of Professional Engineers, Scientists and Managers Australia (**APESMA**) filed on 15 July 2015 (**APESMA Submission**);
 - (b) Business SA on 15 July 2015 (**Business SA Submission**);
 - (c) the Pharmacy Guild of Australia (**Guild**) filed on 15 July 2015 (**Guild Submission**);
 - (d) the Shop Distributive and Allied Employees' Association (**SDA**) filed on 15 July 2015 (**SDA Submission**); and
 - (e) the Health Services Union (**HSU**) filed on 16 July 2015 (**HSU Submission**).

¹ [2015] FWC 3148.

2. REPLY SUBMISSIONS ON TECHNICAL AND DRAFTING MATTERS

- 2.1 We note that the APESMA, Business SA, SDA and HSU Submissions all attach an ‘agreed matters’ table which details various technical and drafting matters that have previously been raised by interested parties and for which the parties have now agreed to resolve in a particular way.
- 2.2 ABI and NSWBC endorse the ‘agreed matters’ table and consider that the Exposure Draft should be amended to reflect the proposals advanced by the interested parties on a consent basis. We consider each of the matters recorded in the ‘agreed matters’ table to be uncontroversial.
- 2.3 The legislative framework applicable to the 4 Yearly Review has been considered in detail in the *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (**Preliminary Issues Decision**). The Preliminary Issues Decision confirms that there may be cases where the need for an award variation is self-evident, and that in such circumstances, proposed variations can be determined with little formality.²
- 2.4 In our submission, each of the matters recorded in the ‘agreed matters’ table fit the characterisation outlined above, and accordingly the Commission is able to deal with these matters without the need for a formal hearing or evidence.

Submissions of SDA

- 2.5 **Clause 14.1(b):** At paragraph [18] of the SDA Submission, it is proposed to include a new clause 14.1(b) to reflect the note currently contained in the exposure draft. We do not oppose that submission.
- 2.6 **Definitions:** We do not support the SDA’s proposal at paragraphs [19]-[22] to introduce definitions for the terms ‘minimum hourly rate’ and ‘ordinary hours’ on the basis that it would eliminate any ambiguities. We consider such changes to be unnecessary.
- 2.7 Through the exposure draft process, the Commission has adopted an approach of using the terms ‘minimum hourly rate’ and ‘ordinary hourly rate’ depending on whether all purpose allowances apply. We consider such an approach to be sensible and support a consistent approach. As the SDA point out, this Award is not an ‘affected award’ in the sense that it does not contain industry or all purpose allowances, and hence the phrase ‘minimum hourly rate’ should be used throughout the Award (and the phrase ‘ordinary hourly rate’ should not be used). We do not consider there to be any need to define the phrase ‘minimum hourly rate’. It is self-evident on the face of clause 10.1 what the minimum hourly rates are.
- 2.8 As to the proposal to insert a definition of ‘ordinary hours’, again we consider such an inclusion to be unnecessary. Clause 8.2, and in particular clause 8.2(a), sets out clearly what the ordinary hours are for employees covered by the Award.
- 2.9 **Clause 6.5(c):** We oppose the SDA Submission at paragraphs [19]-[27]. The terminology used in the current Award, and particularly the use of the phrase ‘actual’, is problematic and potentially ambiguous. For example, the phrase ‘actual’ is open to being misinterpreted to require an employer to match ‘actual’ payments to full-time employees in circumstances where ‘actual’ payments to full-time employees include

²Ibid at [23] and [60].

overaward payments. We support the current drafting contained in clause 6.5(c) of the Exposure Draft and consider that it represents a material improvement to the equivalent drafting in the current Award. We do not consider that the clarifying words proposed by the SDA at [27] are necessary.

- 2.10 **Clause 13.2:** In response to the SDA Submission at paragraphs [28]-[35], we agree that clause 13.2(a) should reference clauses 8.2(a)-(e).
- 2.11 **Definition of overtime:** We do not agree with the SDA Submission at [36]-[39]. The current Award clause 26.2(a) does not reference the current clause 25.4 and we do not see any necessity to alter the current status quo.
- 2.12 **Clause 13.2(a) and 13.2(b):** In response to the SDA Submission at paragraphs [40]-[49], we disagree that the Exposure Draft has made substantive changes to the existing entitlements under the current Award. The current Award entitles casual employees to overtime payments where they work additional hours outside the period of 7am to midnight, or where hours worked exceed 12 hours per day. On reviewing the Exposure Draft, we cannot identify any alteration to that existing entitlement.
- 2.13 While we are not necessarily opposed to the exposure draft containing an additional clause that specifically addresses casual employees' entitlements to overtime payments, we note that the SDA intends to pursue a substantive claim dealing with this matter as part of the common issues 'Part-time/Casual' Full Bench proceedings (AM 196/2014 and 197/2014). Accordingly, we submit that it would be appropriate to consider this issue as part of those 'common' matters proceedings.

3. OUTLINE OF SUBMISSIONS IN REPLY ON SUBSTANTIVE CLAIMS

Initial comments

- 3.1 Given the numerous substantive claims being pursued in this Award, including certain work value claims, it is appropriate for all substantive claims in this Award to be dealt with by a separately constituted Full Bench.
- 3.2 At this stage we anticipate that it would be appropriate to list the matter for a preliminary mention or directions hearing before a separately constituted Full Bench to determine the programming of the substantive claims for arbitration.

Legislative framework of the Four Yearly Review

- 3.3 Notwithstanding our comments at paragraphs 2.3-2.4 above, the Preliminary Issues Decision confirms (at [23]) that the Commission remains at all times obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account the modern awards objective.
- 3.4 This means that, when considering any variation, the Commission should be focused upon ensuring that any new version of the minimum safety net is consistent with the modern awards objective.
- 3.5 The purpose of section 134 of the Act is the creation of a 'fair and relevant minimum safety net of terms and conditions' that is constituted by the NES and modern awards. It should be uncontroversial that what section 134 is setting is the terms and conditions of

employment that no employee in a given circumstance should fall below; such is clear from the words “minimum safety net”.

- 3.6 In arriving at this fair and relevant minimum safety net, the Commission is to “take into account” those matters set out in section 134(1)(a)-(h) inclusive. This said, the ultimate outcome is the creation of a “fair and relevant minimum safety net” having taken into account and weighed up the matters set out in section 134 (1) (a)-(h).
- 3.7 The phrase “take into account” has a relationship with similar phrases such as “consider” and “have regard to”. Such expressions are frequently used in legislation that vests a discretion in a decision making body to condition the scope of the discretion otherwise vested in the decision-maker.
- 3.8 Such phrases have been consistently interpreted to mean that the decision-maker must take into account the matter to which regard is to be had and give weight to it as an element in making the decision. However, the significance of the stated matters will depend upon their context³.
- 3.9 The authorities referred to also make it clear that the weight to be given the matter is for the decision-maker to determine, provided that the consideration of the matter is genuine. The fact that a decision-maker is directed to have regard to certain matters that are specified does not preclude consideration of other factors thought to be relevant⁴.
- 3.10 While section 134 is not the section in the Act that vests discretion, it is however a section that conditions the exercise of ‘modern award powers’ which include for instance the discretion vested by section 139.
- 3.11 The discretion conferred on the Commission to make determinations varying modern awards is expressed in general terms. However, the need for a ‘stable’ modern award system suggests that parties seeking to vary a modern award must advance a merit argument in support of the proposed variation.⁵ In our submission, a merit based argument would no doubt be more persuasive if it was aligned with the matters outlined in subsection 134(1) of the Act.
- 3.12 When considering the merit basis to make variations, the Preliminary Issues Decision held that:
- (a) there may be cases where the need for an award variation is self-evident. In such circumstances, proposed variations can be determined with little formality;⁶ and
 - (b) where significant award changes are proposed, they must be supported by submissions which address the legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.⁷

³ *Rathborne v Abel* (1964) 38 ALJR293 at 295 (per Barwick CJ)

⁴ *Ibid*, at 301 (per Kitto J); *R v Hunt*; *Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 286; 25 ALR 497 at 504; *R v Toohey*; *Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 333; 44 ALR 63 at 67; *Haplin v Lumley General Insurance Ltd* (2009) 261 ALR 741 at 748; *Minister for Immigration and Citizenship v Khadgi* [2010] FCAFC 145 at [57]-[67].

⁵ *Preliminary Issues Decision* at [60].

⁶ *Ibid* at [23] and [60].

⁷ *Ibid*.

Claims by APESMA

- 3.13 We note that APESMA are seeking a number of substantive changes to the Award, including:
- (a) increases to the pay rates for pharmacists and pharmacy students in clause 17 in response to alleged changes in the value of work performed by those classes of employees;
 - (b) the inclusion of a new allowance (a ‘professional services allowance’) to compensate employees for the additional duties that APESMA allege are now performed by *some* pharmacists;
 - (c) the inclusion of a provision providing for reimbursement of work-related expenses; and
 - (d) the inclusion of a provision providing for financial and time assistance for CPD training and study leave.
- 3.14 At this stage, noting the lack of detail provided in support of these claims, ABI and NSWBC anticipate opposing the above claims.
- 3.15 It is clear that the above proposed variations fit the characterisation in paragraph 3.12(b) above, and accordingly APESMA will be required to adduce merit based arguments in support of the variations, along with evidence of a probative nature to show that if its claims were granted the modern award in question at the conclusion of the 4 Yearly review (inclusive of the claim) achieves the modern awards objective (s.134).
- 3.16 It is also clear that at least some of APESMA’s claims constitute ‘work value’ claims. Accordingly, subsections 156(3) and (4) will apply to those claims and APESMA will be required to demonstrate that the variations are justified by work value reasons having regard to changes in the nature of the work, the level of skill or responsibility involved in doing the work, and the conditions under which the work is done.

SDA’s claim regarding Overtime

- 3.17 We note that the SDA intends to seek a variation to clause 26.2(a) to allegedly resolve ambiguities regarding the payment of overtime. Based on the SDA Submission at [50]-[51], it appears that what is sought by the SDA might extend beyond merely resolving alleged ambiguities, and might indeed extend to substantively changing the existing entitlements relating to when overtime rates are paid.
- 3.18 We further note the SDA’s submission that this claim should be dealt with as part of the ‘casual/part-time’ Full Bench proceedings. We consider such an approach to be sensible.

SDA’s claim regarding Clause 11 - Full-time employees

- 3.19 The SDA have sought the following two variations in relation to full-time employees:
- (a) a requirement for the parties to agree in writing at the time of engagement on a regular pattern of work (and requirements for variation to that pattern of work); and
 - (b) the inclusion of a 4 hour minimum engagement for full-time employees.

- 3.20 While the SDA consider the lack of such provisions in the current Award to be anomalous, and on that basis do not intend to lead any evidence in relation to these claims, in our submission they are in fact substantive claims which fit the characterisation in paragraph 3.12(b) above, and accordingly the SDA will need to adduce merit based arguments in support of the variations, along with evidence of a probative nature to show that if its claims were granted the modern award in question at the conclusion of the 4 Yearly review (inclusive of the claim) achieves the modern awards objective (s.134).
- 3.21 In our view it would be appropriate for this claim to also be referred to a separately constituted Full Bench and be dealt with at the same time as the other substantive claims.

SDA's claim regarding Clause 18 - Junior Rates

- 3.22 At this stage we are opposed to the SDA claim to restrict the application of junior rates to Level 1 pharmacy assistants only. It is clear that this proposed variation fits the characterisation in paragraph 3.12(b) above, and accordingly the SDA will be required to adduce merit based arguments in support of the variations, along with evidence of a probative nature to show that if its claims were granted the modern award in question at the conclusion of the 4 Yearly review (inclusive of the claim) achieves the modern awards objective (s.134).
- 3.23 It is also clear that the claim constitutes a 'work value' claim, and accordingly subsections 156(3) and (4) will apply to those claims and the SDA will be required to demonstrate that the variation is justified by work value reasons having regard to changes in the nature of the work, the level of skill or responsibility involved in doing the work, and the conditions under which the work is done.
- 3.24 Again, this is a claim that should be referred to a separately constituted Full Bench for determination along with the other substantive claims in this Award.

SDA's claim regarding Blood and Bone Marrow Donor leave

- 3.25 Given the lack of detail in the SDA's submissions in regard to this claim, at this stage we anticipate ABI and NSWBC opposing the inclusion of blood donor leave and bone marrow donor leave into the Award.
- 3.26 Again, it is clear that this proposed variation fits the characterisation in paragraph 3.12(b) above, and accordingly the SDA will be required to adduce merit based arguments in support of the variations, along with evidence of a probative nature to show that if its claims were granted the modern award in question at the conclusion of the 4 Yearly review (inclusive of the claim) achieves the modern awards objective (s.134).
- 3.27 Given the substantive nature of the claim, and the fact that the SDA intend to bring evidence in support (although at this stage it is unclear what the scope of such evidence will be), we disagree with the SDA's submissions that the matter need not go to a separate Full Bench. In our view it is sensible to refer this claim to a separately constituted Full Bench for determination along with the other substantive claims in this Award.

Pharmacy Guild's proposal for a 'plain English' Award

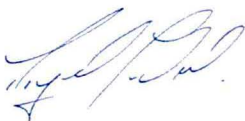
- 3.28 We note that the Pharmacy Guild has developed a 'plain English' version of the Award, and the interested parties in these proceedings have agreed to consider the plain English version once the technical and drafting issues with the Exposure Draft are finalised.
- 3.29 ABI and NSWBC will continue to participate in discussions with a view to ensuring that the Award continues to meet the modern awards objective. If no consensus can be reached between the parties, it may be appropriate for the Guild to put forward the 'plain English' version as a substantive claim which can be dealt with by the separately constituted Full Bench.

Pharmacy Guild's other substantive claims

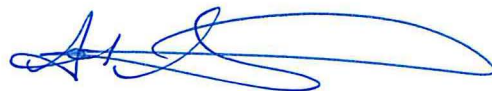
- 3.30 In addition to the proposal for a 'plain English' version of the Award (and other matters being pursued as part of the 'common matters' stage of the 4 Yearly Review⁸), the Guild has advanced the following two substantive claims:
- (a) a provision permitting employers to direct employees to take annual leave as part of an annual close down; and
 - (b) an extension of the annualised salary provision to apply to pharmacy assistants.
- 3.31 ABI and NSWBC support the above two variations advanced by the Guild. Consistent with the submissions outlined above, ABI and NSWBC acknowledge that the Guild will be required to establish a sufficient case in accordance with the requirements of the Act and Preliminary Issues Decision in order for these variations to be made.

4. CONCLUSION

- 4.1 In putting these reply submissions, ABI and NSWBC seek to properly assist the Commission in the discharge of its discretion pursuant to section 156 of the *Fair Work Act 2009* (Cth).
- 4.2 If you have any questions in relation to these submissions, please contact Aoife Gallagher-Watson on (02) 9458 7346.



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On behalf of Australian Business Industrial and the NSW Business Chamber Ltd

⁸ We note that the Guild have advanced claims in the 'casual/part-time' Full Bench proceedings (AM 196 and 197 /2014), the 'penalty rates' Full Bench proceedings (AM2014/301), and the 'public holiday' Full Bench proceedings (2014/305).