DECISION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Plain language re-drafting
(AM2016/15)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER HUNT MELBOURNE, 21 MARCH 2017

4 yearly review of modern awards – Plain language project – Pharmacy Industry Award 2010 – plain language drafting issues.

1. Introduction

[1] This decision deals with the review of the *Pharmacy Industry Award 2010* (the Pharmacy Award) arising out of the plain language re-drafting process as part of the first 4 yearly review of modern awards. The plain language re-drafting project includes reviewing the standard clauses in modern awards generally, as well as reviewing award-specific clauses in certain awards that have been selected for re-drafting as part of the project.[1] The Pharmacy Awards has been selected for re-drafting as part of the plain language re-drafting project.

[2] In a decision issued on 20 January 2017[2] (the January Decision) we determined a number of contentious award-specific issues in relation to the revised Pharmacy Award and expressed a range of provisional views on other issues. The January Decision also amended the plain language drafting guidelines (the draft Guidelines).

[3] Revised draft Guidelines and a further revised exposure draft of the Pharmacy Award were published on 20 January 2017. Interested parties were invited to make submissions on the revised draft Guidelines, the provisional views on award-specific issues in the Pharmacy award expressed in the January Decision, and the further revised exposure draft generally. Submissions were received from Business SA, the Pharmacy Guild of Australia (the Pharmacy Guild) and a joint submission was filed by the Shop, Distributive and Allied Employees' Association (SDA), the Health Services Union (HSU) and the Association of Professional Engineers, Scientists and Managers, Australia (APESMA) (the Joint Union Submission).

[4] This decision deals with outstanding award-specific issues in the Pharmacy Award and is to be read in conjunction with the January Decision. No submissions were received in relation to the revised draft Guidelines and we will shortly publish the Guidelines in final form.

[5] In general, references in this decision to the revised exposure draft are a reference to the revised exposure draft published on the Commission's website on 20 January 2017 and references to the exposure draft are a reference to the exposure draft published on the Commission's website on 10 November 2016. References to transcript are a reference to the transcript of proceedings on 22 February 2017.

2. Award specific issues

Clause – 2 Definitions – 'on-hire'

[6] The exposure draft published on 10 November 2016 contained definitions of 'on-hire employee' and 'on-hire employer' at clause 2. In a Joint Submission the interested parties sought to remove these definitions and include the existing definition of 'on-hire'.

[7] At paragraph [76] of the January Decision we expressed the provisional view that the definitions of 'on-hire employer' and 'on-hire employee' be deleted from the further revised exposure draft and the definition of 'on-hire' from clause 3.1 of the current award be inserted.

[8] Submissions filed by the Pharmacy Guild,[3] Business SA[4] and the 'Joint Union submission'[5] supported the provisional view. We confirm our provisionally expressed view.

Clause 4 – Coverage – on-hire

[9] At paragraph [77] of the January decision, we noted 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 Industry Award, by virtue of employing other employees in the community pharmacy industry, or whether the person acquires that status by being supplied with labour. Parties were invited to make submissions regarding the intention of the current provision.

[10] The relevant clauses of the exposure draft are clauses 4.1 and 4.3(a) which state:

> 'In this industry award, **community pharmacy** means a business to which all of the following apply:
>
> **(a)** the business is established wholly or partly for compounding or dispensing prescriptions for, or selling medicines or drugs to, the general public from the premises on which the business is conducted, whether or not other goods are so sold from those premises; and
>
> **(b)** if required to be registered under legislation for the regulation of pharmacies in force in the place in which the premises on which the business is conducted are located, the business is so registered; and
>
> **(c)** the business is not owned by a hospital or other public institution, or operated by government…
>
> 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; and
>
> **(b)** trainees employed by a group training employer and hosted by an employer covered by this award to work in the community pharmacy industry (with a classification defined in Schedule A—Classification Definitions) and the group training employers of those trainees.'

[11] The relevant provisions of the current award are as clauses 4.1 and 4.5:

> '**4.1** This award covers employers throughout Australia in the community pharmacy industry, and their employees in the classifications listed in clause 16—Classifications of this award to the exclusion of any other modern award. 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…
>
> **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.'

[12] The Joint Union submission[6] contends that the intention of the current provisions is that employers provided with labour from a third party, such as a labour hire company, are covered by the Pharmacy Award. The submission provided an example of locum pharmacists employed through labour hire companies. The union parties noted that in most cases an employer supplied with labour is already covered by the award by virtue of employing other employees in the community pharmacy industry and submit that the intention is that an employer who is supplied labour acquires coverage by being supplied with the labour.

[13] The Pharmacy Guild[7] and Business SA[8] disagree with the Joint Union submission and at paragraph 8 of its submission the Pharmacy Guild states:[9]

> 'Clause 4.1 of the current award provides that the award covers employers in the community pharmacy industry and their employees. Coverage is restricted to employees of employers in the industry; it does not extend merely to an employee who performs work in the classification structure set out in the award. Further, on-hire employees are only covered whilst engaged in the performance of work for a business in that industry.'

[14] Business SA submits that the current provision does not require or intend that the client to whom labour is supplied is an employer covered by the award, and that the client does not become covered by the award through the on-hire arrangement.[10] It submits that where the host employer is part of the community pharmacy industry coverage could extend to the host, however, where an on-hire employee, such as a pharmacist, is on-hired to a host outside the community pharmacy industry, coverage does not extend to that host.[11] Business SA also submits that there is no employment relationship between the client/host and an on-hire employee for the purpose of clause 4.1 of the current award.

[15] In a further submission, Business SA maintains its earlier submissions[12] and submits that the reading of these clauses together is that:

> '• if a labour hire employer supplies labour to the community pharmacy industry; and

- its employees are on-hired to a business in the community pharmacy industry

the labour hire employer and its employees will be covered by the Award while they are working in the community pharmacy business (host business), subject to any exclusions in the Award.'[13]

[16] The South Australian Wine Industry Association (the SAWIA) made a submission on this issue on the basis that it had potential ramifications for all modern awards, including the *Wine Industry Award 2010*.[14] SAWIA submit that clauses 4.1 and 4.5 do not require or intend that the person to whom labour is supplied via a legitimate labour higher arrangement is an employer covered by the modern award. It submits that the mere fact that a business is supplied with labour through a labour hire agency does not make the business an employer under the modern award. SAWIA supports the submissions of Business SA.

[17] In response to the submission of Business SA, the unions jointly submit that clauses 4.1 and 4.5 of the current award should be read separately.[15] Clause 4.1 is said to be the critical coverage clause and applies to both on-hire employers, the employees they supply and the community pharmacies to which they are supplied. Clause 4.5 is said to cover any on-hire employer providing an on-hire employee to a community pharmacy as this is required by its reference to clause 4.1 and that community pharmacy would be covered by the Pharmacy Industry Award.[16]

[18] A conference will be convened by Vice President Hatcher to facilitate further discussions between the parties in respect of this issue.

Clause 4 – Coverage – 'definition of community pharmacy industry

[19] The January decision identified an ambiguity was identified in respect of the definition of community pharmacy industry in the exposure draft. Clause 4.1 of the exposure draft states:

'In this industry award **community pharmacy** means a business to which all of the following applies:

(a) the business is established wholly or partly for compounding or dispensing prescriptions or selling medicines or drugs by retail to the general public from the premises on which the business is conducted, whether or not other goods are so sold from those premises;

(b) if required to be registered under legislation for the regulation of pharmacies in force in the place in which the premises on which the business is conducted are located, the business is so registered;

(c) the business is not owned by a hospital or other public institution, or operated by government, unless medicines or drugs are sold by retail to the general public from the premises on which the business is conducted.'

[20] The current award 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'

[21] It is not clear whether the conditions set out in the 2 dot points in the definition apply to *both* paragraphs (a) and (b), or only to (b).

[22] The Pharmacy Guild submits that clause 4.1(a) of the exposure draft alters the legal effect of the current definition by introducing a requirement that medicines and drugs are sold by retail. The reference to 'by retail' in relation to the selling of medicines or drugs was inserted because the current award refers to sale 'by retail' in relation to goods other than medicines or drugs and simply uses 'vending' in relation to medicines or drugs. It submits that to leave 'by retail' out in relation to medicines or drugs and include it in relation to other goods may leave open the argument that the definition only covers wholesale selling of medicines or drugs.

[23] At paragraph [84] of the January Decision we proposed that the words 'by retail' in clause 4.1(a) of the exposure draft be deleted in both cases. Parties were invited to comment on the proposed changes.

[24] Business SA[17] and the Joint Union submission[18] support the provisional view to delete the words 'by retail' from clauses 4.1(a) and (c). The Pharmacy Guild did not make any further submissions in respect of this issue.[19]

[25] We confirm our provisionally expressed view and will adopt the proposed change to clause 4.1.

Clause 10 – Part-time employment

[26] At paragraph [124] of the January Decision we noted that there seemed to be a tension between clauses 10.5 (which provides that a variation of the matters in clause 10.4(a) to (d) must be agreed in writing), and 10.8 (now 10.9) of the exposure draft (which allows an employer to unilaterally change the matters mentioned in clause 10.4(b) to (d) upon the giving of the prescribed notice). Clauses 10.5 and 10.9 state:

> '**10.5** Any agreement under clause 10.4 must state that any variation agreed by the employer and the employee to any of the matters mentioned in clauses 10.4(a) to (d) must be in writing and may be of a temporary or permanent nature…
>
> **10.9** The roster of a part-time employee, but not the number of hours agreed under clause 10.4, may be changed by the employer giving the employee 7 days, or in an emergency 48 hours, written notice of the change.'

[27] Parties were invited to make submissions in respect of this issue.

[28] The Pharmacy Guild[20], the Joint Union submission[21] and Business SA[22] submit that there is no tension between clauses 10.5 and 10.9.

[29] At paragraphs 25 – 27 of their submission, the Pharmacy Guild submit:[23]

> 'Clause 10.4 requires that the employer and a part-time employee must agree at the *commencement* of the employment to those matters listed. Clause 10.5 merely provides this written agreement must provide for variations by agreement to any of those matters must be in writing. It does not provide that variations must be by agreement, merely stipulates that if there is an agreement between the employer and employee to vary those matters in clause 10.4 that this must be reduced to writing. Further there is no restriction contained in clause 10.5 as to which of those matters in clause 10.4 may be varied by agreement between the employer and employee.
>
> Clause 10.9 however affords an employer the positive capacity to alter only the roster of a part-time employee, but not the number of hours agreed under clause 10.4 by giving the required notice.
>
> The Guild submits that no variation to these provisions is necessary.'

[30] The Joint Union submission notes that clause 10.5 refers to 'any variation agreed by the employer and the employee' and stipulates that any agreement to vary must be in writing, whereas clause 10.9 refers to a unilateral change by the employer to the roster of a part-time employee and stipulates the amount of notice required to be given to the employee and that the notice must be in writing.[24]

[31] Business SA agrees with the submission of the Pharmacy Guild and Joint Union submission.[25]

[32] Based on the consensus position put by the interested parties we do not propose to take any further action in respect of this issue.

[33] At paragraph [125] of the January Decision the Commission invited interested parties to comment on whether the agreement referred to in clause 10.10 (now 10.12) should be in writing. Clause 10.12 of the revised exposure draft states:

> 'A part-time employee who has worked on any day the number of hours agreed under clause 10.4 may agree to work additional hours on that day on the terms applicable to a casual employee.'

[34] The Pharmacy Guild submits that it is preferable that a clause 10.12 agreement be made in writing as all other variations to hours of work of a part-time employee must be made in writing.[26]

[35] The Joint Union submission agrees with the position put by the Pharmacy Guild and states that as the agreed variation in clause 10.12 covers agreed variation to terms prescribed in clause 10.4(a) – (d), this agreed change would be subject to clause 10.5 which requires that an agreement to vary be in writing. For clarity, the unions submit clause 10.12 could cross-reference clause 10.5. The Pharmacy Guild submits that a cross-reference as proposed by the union parties is unnecessary.[27]

[36] Business SA agrees with the submissions of the Pharmacy Guild and the Joint Union submission that the agreement referred to in clause 10.12 should be in writing.[28]

[37] We will vary clause 10.12 to require that an agreement to work 'additional hours' must be in writing. We are not persuaded that it is necessary to insert a cross-reference to clause 10.5.

[38] At paragraph [126] of the January decision, we anticipated further issues in respect of part-time employment would also need to be determined, noting that:

> 'Given the range and complexity of the issues raised in respect of part-time employment we have not addressed all of the issues raised, at this stage. We expect that the revised clause will be the subject of further submissions and a hearing before it is finalised.'

[39] The union parties referred to their submission of 22 December 2016[29] in respect of clause 10.4. Clause 10.4 states:

> 'At the time of engaging a part-time employee, the employer must agree in writing with the employee to all of the following:
>
> **(a)** the number of hours to be worked each day; and
>
> **(b)** the days of the week on which the employee will work; and
>
> **(c)** the times at which the employee will start and finish work each day; and
>
> **(d)** when meal breaks may be taken and their duration.'

[40] The union parties seek to re-insert the words 'on a regular pattern of work' from clause 12.2 of the current award. The union parties submit that these words are important because it is the regular pattern of work which determines that an employee is in fact part-time and not casual.[30]

[41] The Pharmacy Guild submit that the words 'on a regular pattern of work' are not required in clause 10.4 in order to establish that the employee is part-time.[31] The Pharmacy Guild says that clause 10.4 establishes the hours, days and times of work, and therefore a regular pattern of work is established through the operation of these requirements.

[42] We agree with the submission advanced by the Pharmacy Guild and do not propose to adopt the amendment proposed by the union parties.

[43] The union parties also raised an issue regarding part-time employees working additional hours. The concern relates to the redraft of clause 12.11 of the current award. Clause 12.11 of the current award states:

> 'A part-time employee who has worked their agreed hours may agree to work additional hours which are not reasonably predictable up to the daily, weekly or fortnightly maximum ordinary hours of work provided by the award, as a casual employee and subject to the casual employee provisions of this award. Nothing in this clause prevents such agreement between the parties.'

[44] Clause 10.12 of the exposure draft states:

'A part-time employee who has worked on any day the number of hours agreed under clause 10.4 may agree to work additional hours on that day on the terms applicable to a casual employee.'

[45] The union parties made the following submissions regarding additional hours for part-time employees:[32]

'The union parties, at paragraph 16-22 [of the 22 December 2016 submissions], made submissions in relation to the complexities of the operation of additional hours in the part-time provisions. There was much discussion during the hearing on 15 December 2017 regarding additional hours for part-time employees and the possible ambiguities contained in the part-time provisions resulting from the ability of part-time employees to agree to work additional hours as a casual or if no agreement is reached to be paid additional hours at overtime rates.

The part-time provisions in the Pharmacy Industry Award 2010 were varied as a result of a joint application made by the Pharmacy Guild, the SDA and APESMA shortly following the modernisation of the Award. The application sought to enable part-time employees to agree to additional hours at the casual rate rather than the overtime rate to ensure employers were not discouraged to offer additional hours to part-time employees.

A decision ([2009] AIRCFB 978) of a Full Bench of the Commission granted this variation. This decision has impacted on some operational aspects of the Award which we hope will be clarified as part of the plain language drafting process.

The union parties also raised an issue with the change to the wording contained in clause 12.11 of the current award in the redraft of clause 10.10.

The wording has been altered from 'as a casual employee and subject to the casual provisions of this award' to 'on the terms applicable to a casual employee'. We submit that this may change the legal effect and to avoid this the current terminology should be retained.'

[46] Paragraphs 16 – 22 of the union parties' submission[33] of 22 December 2016 states:

'The union parties have also identified an issue with the redraft of clause 12.11 of the current award which states that:

> "A part time employee who has worked their agreed hours may agree to work additional hours…..as a casual employee and subject to the casual provisions of this award".

The plain language re-draft at clause 10.10 states that 'The additional hours may be worked on the terms applicable to a casual employee'.

The union parties submit that the change in wording from 'work additional hours…as a casual employee' to 'on the terms applicable to a casual employee' may change the legal effect and will cause confusion.

We submit that in order to retain the current legal effect the current wording should be retained. We have provided this wording in the draft at Attachment A.

These comments relate to maintaining what is in the current provision of the award, however, we note that there are significant complexities with the operation of the current provision. Under the current clause an employee is effectively working under two concurrent contracts of

> employment, a permanent part-time contract and a casual contract. This raises potential issues in relation to rostering, working more than one shift per day, and the interaction with the NES, particularly in relation to the accrual of leave for ordinary hours worked.
>
> In most other awards an employee working additional hours would be paid overtime and not accrue leave for those additional hours worked, or in the General Retail Award agreed additional hours are paid at the ordinary rate but accrue leave.
>
> While the draft we have provided seeks to maintain the current legal effect we do note the complexities of the current clause.'

[47] Contrary to the submission advanced by the unions, the plain language redraft of clause 10.12 – in particular the expression 'The additional hours may be worked on the terms applicable to a casual employee' – does not change the legal effect of the clause.

[48] The intent of the provision is clear. Part-time employees who agree to work 'additional hours' are to be paid the casual loading and they do not accrue any paid leave entitlements in respect of the 'additional hours' worked. The agreement to work 'additional hours' constitutes a variation to the existing employment contract (or, perhaps, a separate discrete contract) such that the employee is engaged as a casual employee in respect of the agreed 'additional hours'.

[49] This issue was also canvassed during the proceedings on 22 February 2017, during which the SDA acknowledged that the same issue may arise with the current award clause and that the unions had a broader, more substantive, concern with the provision. The SDA was invited to file correspondence identifying the variation it sought which may then become a substantive in the review of this award.[34] At this stage we do not propose to make any further amendments to clause 10.12.

Clause 11 – Casual employment

[50] At paragraph [130] of the January Decision we expressed a provisional view that clause 11.2 be deleted and a casual conversion clause be inserted. The form of the casual conversion clause will be determined after the decision of the Part-time and Casual Employment Full Bench. The Full Bench deferred consideration of the range of other issues raised by the parties until the determination of the substantive issues in respect of casual employment.

[51] This issue was canvassed during the course of the proceedings on 22 February 2017 and there was general agreement to the proposition that a casual conversion clause be inserted into the award but no agreement as to the form of that clause. It was also agreed that a telephone conference would be held after the decision in the Part-time/Casuals case has been issued (see Transcript at [742]–[747]).

Clause 13 – Hours of work

[52] Clause 13.4 of the November 2016 exposure draft contained a cross-reference to the clause 9 (full-time employment). The Joint Union submission contends that the cross reference is unnecessary. At paragraph [142] of the January Decision we indicated a provisional view that clause 13.4 of the exposure draft be amended as follows:

'The maximum number of ordinary hours of work per week for a full-time employee ~~per week~~ are 38 (or 76 ordinary hours over 2 consecutive weeks) ~~as set out in clause 9—Full-time employment~~.'

[53] The Joint Union submission, [35] the Pharmacy Guild[36] and Business SA[37] support the proposed amendment to clause 13.4. We confirm our provisional view and clause 13.4 will be amended accordingly.

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

[54] At paragraph [156] of the January Decision we expressed a provisional view that clause 14.1(e) of the exposure draft be amended to delete the words 'every four weeks' and insert 'in that four week cycle'.

[55] Clause 14.1of the revised exposure draft states:

'The following rostering arrangements apply to full-time and part-time employees:

(a) employees must be rostered to work ordinary hours in such a way that they have:

(i) 2 consecutive days off each week; or

(ii) 3 consecutive days off over 2 consecutive weeks;

(b) employees must not be rostered to work ordinary hours on more than 5 days in a week;

(c) despite paragraph (b), employees may be rostered to work ordinary hours on 6 days one week if they are rostered to work ordinary hours on no more than 4 days the following week;

(d) employees must not be rostered to work (whether ordinary hours or overtime) on more than 6 consecutive days;

(e) employees rostered to work (whether ordinary hours or overtime) on 3 Sundays in a 4 week cycle must be rostered to have 3 consecutive days off in that 4 week cycle, including a Saturday and Sunday.'

[56] Parties were invited to comment on the proposed amendment.

[57] Business SA[38] and the Joint Union Submission[39] support the provisional view but the Pharmacy Guild does not support the proposed amendment.[40]

[58] The Pharmacy Guild re-iterates its view that 'these words change 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 in circumstances if an employee is only rostered on three Sunday's in a four week period on a one off basis or for a short period of time.'[41] The Pharmacy Guild also submits that the proposed amendment removes flexibility in rostering currently available to employers under the current terms of the award. The Pharmacy Guild relied on an example of a one-off arrangement to cover a period of leave.

[59] The Pharmacy Guild submit that the phrase 'regularly rostered to work Sundays' is used frequently with respect to defining who is a shiftworker for the purpose of the additional week of annual leave provided for at s.87(b) of the Act. This phrase is also used at clause 22 of the further revised exposure draft. The Pharmacy Guild submit:[42]

> 'The meaning of this term has however developed as a result of cases including *Shift Workers case* 1972 AR (NSW) 275 and *Media, Entertainment and Arts Alliance [MEAA] and Theatrical Employees (Sydney Convention and Exhibition Centre) Award 1989* [1995] AIRC Print M7325. It is now understood to mean 34 Sunday shifts.'

[60] The Pharmacy Guild submit that the term 'regularly works Sundays' should be defined to clarify the award without altering the current legal obligation.

[61] The union parties disagree with the submission put by the Pharmacy Guild[43] and submit that the claim regarding clause 14.1(e) was discussed at a conference before Commissioner Bissett at which the parties agreed on the following wording:[44]

> 'An employee may be rostered to work a maximum of 3 Sundays in any 4 week cycle and must have three consecutive days off every four weeks, including a Saturday and Sunday.'

[62] The union parties submit the above wording was agreed because the understanding of the provision by the parties was that an employee would be entitled to 3 consecutive days off, including Saturday and Sunday if they work 3 Sundays in a 4 week period. The union parties submit that at no time during discussions did the Pharmacy Guild raise any contrary view as to how the provision applies. At no point prior to the 6 February 2017 submission, did the Pharmacy Guild make any reference to defining 'regularly works Sundays' as 34 Sundays.

[63] In opposition to paragraph 17 of the Pharmacy Guild's submission (set out above at [60], the union parties submit:[45]

> 'Firstly, shift work is not a feature of the Pharmacy Industry Award. The only circumstance shift work is mentioned in the Pharmacy Industry Award is in clause 29.2 which defines a shift worker for the purpose of providing an extra week of annual leave, when working *'in a business in which shifts are continuously rostered 24 hours a day for seven days a week'*.
>
> There is no other reference in the Award to a shift worker. In our strenuous view shift work has absolutely no connection to the rostering provision contained in clause 25.4 and for the PGA to suggest as such is completely misleading.
>
> The intention of the provision, which has previously been agreed by the parties is that the entitlement to three consecutive days off, including a Saturday and Sunday is enlivened when an employee works 3 Sundays in 4.
>
> Subsequently, we submit that reference to the *Shift Workers case 1972 AR (NSW) 275 and Media, Entertainment and Arts Alliance [MEAA] and Theatrical Employees (Sydney Convention and Exhibition Centre) Award 1989 [1995] AIRC Print M7325* has absolutely no relevance to the Pharmacy Industry Award as this is not an Award which contains provisions for shift workers, aside from the annual leave provision for a specific situation that is very rarely utilised within the industry. Applying precedent regarding shift work for the purpose of the rostering provisions contained in Clause 25.4 in this Award would be completely inappropriate.

> There would also be significant issues with the application of the clause if 'regularly works Sundays' is defined as 34 Sundays, as per the PGA's submission. The Pharmacy Industry Award only provides annualised salaries for Pharmacists. There would be no way for this provision to operate for other employees covered by this Award who work to a weekly or fortnightly roster.
>
> The PGA have changed their long held view regarding this provision in order to avoid the current obligation to pay an employee at overtime rates if they are rostered to work on the 4th Sunday. The example provided at PN 16 of the PGA submission demonstrates that they do not want to have to pay an employee who works 'each four week cycle three Sundays' if they are needed to cover leave taken by another employee on the fourth Sunday.'

[64] The union parties submit that the change suggested by the Pharmacy Guild would be a significant change to the legal effect of the Pharmacy Award. The union parties reiterate that the provisional view expressed by the Full Bench regarding the intended meaning of the current clause and the proposed re-draft accurately reflect clause 25.4 of the Pharmacy award and should be adopted by the Full Bench.[46]

[65] Business SA recognises the restriction identified in clause 14.1(e) by the Pharmacy Guild and indicates the possibility of further discussions with interested parties to achieve a consent position on alternate wording.[47]

[66] We do not propose to vary clause 14.1 of the revised exposure draft. Contrary to the Pharmacy Guild's submission, it is not appropriate to import definitions used in respect of shiftworkers. There is no evidence to suggest that shift work is a feature of the industry covered by this award and no provision is made for the payment of shift loadings.[48] We would also note that clause 14.1 of the revised exposure draft is broadly consistent with clauses 28.11 and 28.13 of the *General Retail Industry Award 2010.*

[67] It is also relevant to observe that clause 14.1 reflects the position agreed by the parties (including the Pharmacy Guild) at a conference before Commissioner Bissett. If the Pharmacy Guild seeks to resile from that agreement it will need to file an application to vary the award, once the plain language re-drafting process is completed.

Clause 16.2 – Junior wages

[68] In response to the submissions of the parties, the junior wages in clause 16.2 of the further revised exposure draft were formatted as a table. At paragraph [171] of the January Decision we invited parties to make submissions about the most appropriate format for junior wages.

[69] The union parties[49] and Business SA[50] support the proposed table format and the introductory wording proposed for the table. Based on the consensus position put by the interested parties, the table format will be adopted.

Clause 18 – Allowances

[70] In response to the Joint Union submission, at paragraph [176] of the January Decision we proposed an introductory clause at 18.1 to make clause 18 easier to understand. The introductory clause is in the following terms:

> 'Clause 18 gives employees an entitlement to monetary allowances of specified kinds in specified circumstances.'

[71] Parties were invited to comment on the introductory clause but no submissions were received. No submissions were received and we propose to adopt the introductory clause set out above.

[72] Clause 18.7 of the revised exposure draft (18.6 in the November 2016 exposure draft) deals with reimbursement for transport. Business SA and the Pharmacy Guild raised two issues regarding this clause. The outstanding issue concerns the expression 'and/or' in the modern award which had been replaced with 'or' in the November 2016 exposure draft. It was alleged that this narrowed the employee's entitlement to the reimbursement.

[73] Clause 18.6(a)(i) of the November 2016 exposure draft provided that the clause applies to an employee who 'starts work before 7.00 am or finishes work after 10.00 pm'. Clause 19.6 of the current Pharmacy Award applies where an employee 'commences and/or ceases work after 10.00 pm on any day or prior to 7.00 am on any day' (emphasis added). The point advanced by the employer organisations is that, contrary to the current entitlement, clause 18.7 does not apply where an employee starts work after 10.00 pm.

[74] We agreed with the proposition put and updated clause 18.7 to make it clear that the clause applies to the circumstances where an employee starts work after 10.00 pm.

[75] We also amended clause 18.7(b) to account for the emergence of other transport operators such as Uber. The words 'commercial passenger vehicle' were adopted instead of naming a specific operator to ensure that the provision applies to any future services that become available.

[76] Clause 18.7 of the further revised exposure draft states:

> **'(a)** Clause 18.7 applies to an employee to whom all of the following apply:
>
> **(i)** the employee starts work before 7.00 am or starts or finishes work after 10.00 pm; and
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> **(ii)** the employee's regular means of transport is not available; and
>
> **(iii)** the employee is unable to arrange their own alternative means of transport; and
>
> **(iv)** a proper means of transport to or from the employee's usual place of residence is not provided to, or arranged for, the employee by the employer at no cost to the employee.
>
> **(b)** The employer must reimburse the employee the cost they reasonably incurred in taking a commercial passenger vehicle from the employee's usual place of residence to the place of employment or from the place of employment to the employee's usual place of residence, whichever is applicable.'

[77] Parties were invited to comment on the proposed amendments to clause 18.7. The union parties[51] and the Pharmacy Guild support the proposed amendments. We will adopt the proposed amendments to clause 18.7.

Clause 20 – Overtime

[78] At paragraph [209] of the January Decision we noted that the interested parties had reached a consent position in relation to the SDA's substantive claim with respect to overtime and that clause 20 would be redrafted to take into account the consent position of the parties.

[79] On 17 February 2017 the SDA filed a draft determination in the following terms:[52]

'**20. Overtime**

NOTE: An employee may refuse to work additional hours if they are unreasonable as set out in section 62 of the Act.

20.1 Application of overtime

An employer must pay all employees at the overtime rate, as specified in clause 20.3, for any hours worked at the direction of the employer:

(a) in excess of 38 hours per week (or 76 ordinary hours over two consecutive weeks); or

(b) in excess of 12 hours per day as specified in clause 13.3 (maximum daily hours); or

(c) that are not continuous, except for rest breaks and meal breaks as specified in clause 15-Breaks; or

(d) between midnight and 7.00 am; or

(e) outside the rostering arrangements as specified in clause 14.

20.2 A part-time employee will be paid at the overtime rate for each hour worked in excess of the number of hours that the employee has agreed to work under clause 10.4 and 10.12.

20.3 Payment of overtime

(a) An employer must pay an employee for all overtime worked as prescribed in clause 20.1 and 20.2 the overtime rate specified in column 2 of Table 5 in accordance with when the overtime was worked as specified in column 1 of that table.

(b) The overtime rate specified in column 2 of Table 5 must be applied to the applicable minimum wage for the employee classification in accordance with clause 16 — Minimum wages.

Table 5—Overtime rates

Column 1 **For overtime worked on**	**Column 2** **Overtime rate**
Monday to Saturday—first 2 hours	150%
Monday to Saturday—after 2 hours	200%

Sunday—all day	200%
Public holiday—all day	250%

NOTE: Schedule B — Summary of Hourly Rates of Pay sets out the overtime rate hourly wage for all employee classifications according to when overtime is worked.

(c) Casual loading is not payable on overtime worked by a casual employee.'

[80] We have reviewed the SDA draft determination, in consultation with the plain language expert and propose the following amendments to the SDA draft determination (changes tracked):

'20. Overtime

NOTE: Under the National Employment Standards (see section 62 of the Act) an employee may refuse to work additional hours if they are unreasonable. Section 62 sets out factors to be taken into account in determining whether the additional hours are reasonable or unreasonable. ~~An employee may refuse to work additional hours if they are unreasonable as set out in section 62 of the Act.~~

20.1 Application of overtime

An employer must pay all employees~~s~~ at the overtime rate~~, as specified in clause 20.3,~~ for any hours worked at the direction of the employer:

(a) in excess of 38 hours per week (or 76 ordinary hours over 2 consecutive weeks); or

(b) in excess of 12 hours ~~per~~ on any day ~~as specified in clause 13.3 (maximum daily hours)~~; or

(c) that are not continuous, except for ~~rest~~ breaks ~~and meal breaks as specified in~~ to which the employee is entitled under clause 15—Breaks; or

(d) between midnight and 7.00 am; or

(e) outside the rostering arrangements ~~as~~ specified in clause 14.1.

20.2 An employer must pay a part-time employee ~~will be paid~~ at the overtime rate for each hour worked in excess of the number of hours that the employee has agreed to work under clauses 10.4 and 10.12.

20.3 Payment of overtime

(a) An employer must pay an employee for all overtime worked as prescribed in clause 20.1 and 20.2 the overtime rate specified in column 2 of Table 5 in accordance with when the overtime was worked as specified in column 1 of that table.

(b) The overtime rate specified in column 2 of Table 5 must be applied to the applicable minimum wage for the employee classification in accordance with clause 16 — Minimum wages.

Table 5—Overtime rates

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Public holiday—all day	250%

NOTE: Schedule B — Summary of Hourly Rates of Pay sets out the overtime rate hourly wage for all employee classifications according to when overtime is worked.

(c) Casual loading is not payable on overtime worked by a casual employee.'

[81] A conference will be held before Vice President Hatcher to provide interested parties with the opportunity to comment on the proposed overtime clause set out at paragraph [80].

Clause 21 – Penalty rates

[82] The most recent iteration of the exposure draft included two amendments in response to submissions of the parties. First, the words 'higher rates of pay (penalty rates)' were replaced with 'penalty rates' in clause 21.1. Second, clauses 21.3(a) and (b) were revised to include reference to Table 5—Penalty rates in response to submissions of the union parties. Parties were invited to comment on these changes.

[83] The union parties and Business SA[53] have noted that the word 'days' has been omitted from the end of the sentence at clause 21.1. The changes outlined in paragraph [79] above are confirmed and the word 'days' will be re-inserted at the end of clause 21.1.

Schedule A—Classification definitions

[84] The further revised exposure draft included provisional amendments to clause A.3 and the definition of Dispensary assistant. The amendments arose in response to the Pharmacy Guild's submission that the clause in the November 2016 exposure draft changed the legal operation of the clause. Clause A.3 was amended as follows:

'**A.3 Pharmacy assistant level 3** is an employee who has acquired the competencies required to be the holder of a Certificate III in Community Pharmacy, as determined by the National Quality Council or a successor body, and who is required by the employer to work at this level.

A pharmacy assistant level 3 may be required by the employer to ~~perform any of the following duties~~:
(a) supervise pharmacy assistants levels 1 or 2; or

~~**(b)** assist a pharmacist in the dispensing section of a community pharmacy; or~~

(b) work in a compounding lab or compounding section of a community pharmacy assisting with extemporaneous preparations as the major part of their duties~~.~~; or

(c) perform the duties of a dispensary assistant, that is, assist a pharmacist in:

(i) ordering, unpacking and repacking stock; or

(ii) preparing dispensing labels; or

(iii) attaching labels (whether of a dispensing, cautionary or advisory nature) to stock; or

(iv) gathering non-clinical information; or

(v) collating prescriptions; or

(vi) delivering professional services such as the preparation of dose administration aids, collating staged supply medicines or performing other administrative tasks.'

[85] The Pharmacy Guild submit that if the definition in its current form is retained at clause A.3, Level 3 is the only classification under the award which contains an indicative task list or definition.[54] The Pharmacy Guild submit:[55]

> 'In our view the inclusion of an indicative task list in the form proposed could lead to confusion as many of the tasks listed could be performed by both a dispensary assistant and a pharmacy assistant across a number of levels in the PIA. The primary distinction between a dispensary assistant and a pharmacy assistant is that the dispensary assistant undertakes these tasks in the dispensary section of the pharmacy whilst also assisting the pharmacist in the dispensing of pharmaceuticals under the direct supervision of the pharmacist. A pharmacy assistant of any classification level may also undertake the same tasks, however they will not do so in the dispensing section of the pharmacy.'

[86] The Pharmacy Guild proposed the following amendment to definition of Dispensary Assistant:[56]

> '**A.3 Pharmacy assistant / Dispensary assistant level 3** is an employee who has acquired the competencies required to be the holder of a Certificate III in Community Pharmacy, as determined by the National Quality Council or a successor body, and who is required by the employer to work at this level.
>
> A pharmacy assistant / dispensary assistant level 3 may be required by the employer to:
>
> (a) supervise pharmacy assistants levels 1 or 2; or
>
> (b) work in a compounding lab or compounding section of a community pharmacy assisting with extemporaneous preparations as the major part of their duties.'

[87] The Pharmacy Guild also noted that the parties discussed the potential to revisit the classification structure of the Pharmacy Award in a conference before Commissioner Bissett on 10 February 2015 following alterations to the competency standards and training packages in the community pharmacy industry. The Pharmacy Guild submits that if a definition of Dispensary Assistant is to be included in the Pharmacy Award, the matter could be reconsidered by the parties.

[88] A conference will be convened by Vice President Hatcher to facilitate further discussions between the parties in respect of this issue.

3. General issues regarding the Pharmacy Award

[89] Interested parties were invited at paragraph [226] to make submissions on any residual issues which have not yet been determined. No further issues were raised by parties.

4. Next steps

[90] We will issue a further revised exposure draft after the conferences to be convened by Vice President Hatcher have taken place. If there are outstanding issues after these conferences we will determine those matters on the papers.

PRESIDENT

Appearances:

K Biddlestone for the Shop, Distributive and Allied Employees' Association
R Liebhaber for the Health Services Union
K Thomson for New South Wales Business Chamber and Australian Business Industrial
J Light for the Pharmacy Guild of Australia
K van Gorp for Chamber of Commerce and Industry South Australia
C Klepper for Chamber of Commerce and Industry South Australia

Hearing details:

Melbourne.
2017.
22 February.

Final written submissions:

Business SA: 23 February 2017

SAWIA: 23 February 2017

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[1] See Statements: [2015] FWC 7467, [2016] FWC 4756, [2016] FWCFB 5621,

[2] [2017] FWCFB 344

[3] Pharmacy Guild submission, 7 February 2016 at para 5.

[4] Business SA submission, 6 February 2017 at para 1.

[5] Joint submission, 6 February 2017 at para 2.

[6] Joint submission, 6 February 2017 paras 3 - 5.
[7] Pharmacy Guild submission in reply, 13 February 2017 at para 6.
[8] Business SA submission in reply, 10 February 2017 paras 1.1 – 1.3.
[9] Pharmacy Guild submission in reply, 13 February 2017.
[10] Business SA submission, 6 February 2017.
[11] Business SA submission in reply, 10 February 2017 at para 2.
[12] Business SA, further submission, 23 February 2017.
[13]Ibid, 23 February 2017, para 3.
[14] South Australian Wine Industry Association, submission, 23 February 2017.
[15] Joint submission in reply, 10 February 2017.
[16] Ibid, 10 February 2017.
[17] Business SA submission, 6 February 2017.
[18] Joint submission, 6 February 2017.
[19] Pharmacy Guild submission, 7 February 2016.
[20]Ibid, 7 February 2016 at para 24.
[21] Joint submission, 6 February 2017 at para 8.
[22] Business SA submission in reply, 10 February 2017.
[23] Pharmacy Guild submission, 7 February 2016 at para 25 - 27.
[24] Joint submission, 6 February 2017 at paras 9 - 10.
[25] Business SA submission in reply, 10 February 2017 at para 3.
[26] Pharmacy Guild submission, 7 February 2016 at para 9.
[27] Pharmacy Guild submission in reply, 13 February 2017 at para 11.
[28] Business SA submission in reply, 10 February 2017 at para 3.
[29] Joint submission, 22 December 2016 at para 12.
[30] Ibid.
[31] Pharmacy Guild submission in reply, 13 February 2017 at para 12.
[32] Joint submission, 6 February 2017 at paras 12 - 16.
[33] Joint submission, 22 December 2016 at para 16 - 22.
[34] See generally Transcript at [702]–[731]
[35] Joint submission, 6 February 2017.
[36] Pharmacy Guild submission, 7 February 2016.
[37] Business SA submission, 6 February 2017.
[38] Ibid, 6 February 2017.
[39] Joint submission, 6 February 2017.
[40] Pharmacy Guild submission, 7 February 2016.
[41]Ibid, 7 February 2016 at para 15.
[42]Ibid, 7 February 2016 at para 17.
[43] Joint submission in reply, 10 February 2017 at para 22.
[44] Ibid at para 19.
[45] Pharmacy Guild submission in reply, 13 February 2017.
[46]Ibid, 13 February 2017 at paras 29 – 30.
[47] Business SA submission in reply, 10 February 2017 at para 5.
[48] There is, however, reference to shiftwork in clause 29.3(b) – Annual leave loading in the Pharmacy Award.
[49] Joint submission, 6 February 2017.
[50] Business SA submission in reply, 10 February 2017 at para 6.
[51] Joint submission, 6 February 2017

[52] SDA and others draft determination, 17 February 2017.

[53] Business SA submission in reply, 10 February 2017 at para 7.

[54] Pharmacy Guild submission, 7 February 2016 at para 30.

[55]Ibid, 7 February 2016 at para 31.

[56]Ibid, 7 February 2016 at para 32.