



DECISION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Plain language re-drafting—*Pharmacy Industry Award 2010*

(AM2016/15)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER HUNT

MELBOURNE, 21 JUNE 2017

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

[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] There were three outstanding issues arising from the amended plain language exposure draft of the *Pharmacy Industry Award* published on 20 January 2017 (January exposure draft) and the Full Bench decision of 21 March 2017 (March decision)²:

- (1) the coverage of on-hire employees as expressed in clause 4.3 of the January exposure draft³;
- (2) the drafting of the overtime provision in clause 20 of the January exposure draft (which represented a plain language redrafting by the Commission plain language expert of a proposed amended provision which was advanced by the SDA with the consent of other interested parties)⁴; and
- (3) the definition of ‘dispensary assistant’, which is referred to in the classification definition of ‘Pharmacy Assistant Level 3’ in clause B.3 of Schedule B *Classification Definitions* of the current Pharmacy Award but is not defined.⁵

[3] As contemplated in the March decision, a conference about these issues was conducted by Vice President Hatcher on 18 April 2017. Arising from that conference, agreement was reached concerning the second and third issues. In relation to the second issue, all interested parties agreed that the drafting of clause 20 in the January exposure draft was appropriate. Accordingly that draft provision will be adopted.

[4] In relation to the third issue, all interested parties agreed upon a modified form of a definition of classification of ‘Pharmacy assistant level 3/Dispensary assistant level 3’ proposed by the Pharmacy Guild which described the duties of a dispensary assistant. The agreed definition is as follows:

Pharmacy assistant level 3/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) perform the duties of a dispensary assistant, that is:
 - (i) work in the dispensary performing dispensing duties under the direct supervision of a pharmacist; or
 - (ii) work in a compounding lab or compounding section of a community pharmacy assisting with extemporaneous preparations as the major part of their duties.

[5] We consider the agreed definition to be appropriate and it will be adopted.

[6] In relation to the first issue, clause 4.3 of the January exposure draft provides:

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; 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.

[7] As discussed in the March decision, there had been a dispute between interested parties concerning whether clause 4.5 of the current Pharmacy Award, when read with clause 4.1, had the effect of bringing a pharmacy business which was supplied with on-hire labour by an on-hire employer within the coverage of the award. The SDA, APESMA and the HSU had jointly submitted that the provision had that effect, but most employer parties submitted to the contrary.

[8] All interested parties present at the 18 April 2017 conference indicated they were (broadly speaking) content with clause 4.3(a) of the January exposure draft. However Business SA, which did not attend the conference, lodged a further written submission on 27 April 2017 indicating that clause 4.5 of the current Pharmacy Award was clear in its meaning, in that it ‘does not in itself determine coverage for the community pharmacy

business that is using the services of the on-hire employer”, and that the proposed clause 4.3(a) had changed that meaning (in a way that was not identified). Business SA submitted that clause 4.3(b) also changed the meaning of the current clause 4.6 (again in a way that was not identified), and 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’. On 9 May 2017 ABI and the NSW Business Chamber lodged a further written submission supporting Business SA’s position about the meaning of the current clause 4.5. However that submission did not address clause 4.3(a) of the January exposure draft.

[9] We do not consider it to be a useful exercise to continue to debate the proper construction of the current clause 4.5. Notwithstanding the recent submissions of Business SA, ABI and the NSW Business Chamber, there is clearly a dispute about its meaning which strongly suggests that a plain language redraft of the provision is required. The focus should therefore be upon whether clause 4.3(a) of the January exposure draft is appropriate. In respect of clause 4.3(a), our provisional conclusion is that on no view does it bring a pharmacy business within the coverage of the Pharmacy Award merely by virtue of the fact that it is supplied with on-hire labour by an on-hire employer. Nor do we consider that there would be any proper basis for a modern award to be expressed to cover a business which did not actually employ anybody covered by that modern award.

[10] We invite further written submissions concerning whether clause 4.3(a) of the January exposure draft should be adopted having regard to these provisional views. Such submissions must be lodged in the Commission on or before **4pm Friday 7 July 2017**. Any party submitting that the proposed clause 4.3(a) would have a different effect should explain why that is the case. Additionally, any interested party may lodge a submission by the same date responding to the contention advanced by Business SA that clause 4.3(b) changes the effect of the current clause 4.6.

[11] There remain three issues which were not dealt with at the 18 April 2017 conference. The first issue concerns the use of the word ‘township’ in clause 19.4 of the current Pharmacy Award (which concerns reimbursement of moving expenses), and which has been retained in clause 18.5 of the January exposure draft (in a provision which had otherwise been subject to plain language redrafting). A note that the term ‘township’ required ‘a definition or replacement with a more precise expression to clarify the effect of the provision’ has appeared in all exposure drafts published to date. Submissions received from interested parties have indicated a consensus that the expression needs to be defined or replaced to clarify its meaning. The only party to have advanced an alternative however has been the SDA, which has proposed that ‘township’ be replaced by ‘where the employee has to move their residence’.

[12] We invite further written submissions concerning the meaning of the current term ‘township’ as it appears in clause 19.4 of the current Pharmacy Award, and the manner in which it might be defined or replaced in clause 18.5 of the January exposure draft. Such submissions must be lodged in the Commission on or before **4pm Friday 7 July 2017**.

[13] The second issue which has not yet been addressed concerns clause 19.7 of the current award, the Broken Hill allowance, which states:

‘The employer must pay an employee at a workplace within the County of Yancowinna in New South Wales (Broken Hill) an allowance of \$33.53 per week’.

[14] This clause was inadvertently omitted from the exposure draft and we propose to insert it at clause 18.8.

[15] The final issue concerns clause 23.3 of the January exposure draft, which deals with personal/carer’s leave for casual employees. We propose to make a minor amendment to the clause to provide greater consistency with the terms of the *Fair Work Act 2009* (Cth) (see ss.97, 102 and 103). The proposed changes to clause 18.8 (in mark-up) are shown below:

23. Personal/carer’s leave and compassionate leave

...

23.3 Casual employees

- (a) A casual employee is entitled to be unavailable for work or to leave work to care for a person who requires care or support because of:
 - (i) ~~is sick and requires care and support; or illness or an injury; or~~
 - (ii) ~~requires care due to an emergency.~~
- (b) 48 hours’ absence is allowed by right, with additional absence by agreement.
- (c) The employer must not fail to re-engage a casual employee because the employee has accessed the entitlement under clause 23.
- (d) Casual employees are not entitled to paid leave under clause 16.3(a) (Pharmacy students).

[16] Any written submissions in respect of the issues dealt with at paragraphs [13]-[15] above must be lodged in the Commission on or before **4pm Friday 7 July 2017**.

[17] We propose to determine the outstanding issues on the basis of the written submissions lodged, without a further hearing.

PRESIDENT

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¹ See Statements: [\[2015\] FWC 7467](#), [\[2016\] FWC 4756](#), [\[2016\] FWCFB 5621](#),

² [\[2017\] FWCFB 1612](#)

³ Discussed in [2017] FWCFB 1612 at paras [9]–[18]

⁴ Discussed in [2017] FWCFB 1612 at paras [78]–[81]

⁵ Discussed in [2017] FWCFB 1612 at paras [84]–[88]