

[2018] FWCFB 5504

The attached document replaces the document previously issued with the above code on 3 September 2018.

First sentence of paragraph [31] amended to read ‘...it was dealt with...’.

Details inserted at footnote 18.

The words ‘and correct the cross-referencing error’ in the last sentence of paragraph [33] have been deleted.

Casey Sutton

Associate to Justice Ross, President

Dated 4 September 2018



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, 3 SEPTEMBER 2018

4 yearly review of modern awards – plain language re-drafting – Pharmacy Industry Award 2010.

[1] This decision concerns the plain language re-drafting of the *Pharmacy Industry Award 2010* (the Pharmacy Award).

[2] Decisions published on 20 January 2017¹, 21 March 2017² and 21 June 2017³ (the *June 2017 decision*) determined most of the issues arising from the plain language re-drafting of the *Pharmacy Award*.⁴ A Statement issued on 5 July 2017 set out the remaining issues in the plain language exposure draft (the PLED) and invited submissions. A revised PLED was published on 5 July 2017⁵ incorporating amendments arising from the *June 2017 decision*.

[3] Submissions and reply submissions were received from:

- Shop, Distributive and Allied Employees Association (SDA); The Association of Professional Engineers, Scientists and Managers, Australia; and the Health Services Union of Australia (the Union Parties);
- Pharmacy Guild of Australia (Guild);
- Australian Business Industrial and New South Wales Business Chamber (ABI);
- Business SA

¹ [\[2017\] FWCFB 344](#)

² [\[2017\] FWCFB 1612](#)

³ [\[2017\] FWCFB 3337](#)

⁴ [Pharmacy Industry Award 2010](#)

⁵ [Revised PLED](#), published 5 July 2017 – tracked version

[4] Submissions were received in relation to the following issues:

- (1) the coverage of on-hire employees, as expressed in clause 4.3 of the PLED published on 20 January 2017⁶ (the January 2017 PLED); and whether the January 2017 PLED clause 4.3(b) changes the effect of current award clause 4.6;
- (2) casual employment and the casual conversion clause;
- (3) the meaning of the term ‘township’ in clause 18.5 of the January 2017 PLED;
- (4) the re-insertion of a clause relating to the Broken Hill allowance;
- (5) amended wording of clause 23.3, personal/carer’s leave and compassionate leave for casual employees; and
- (6) amendments to Schedule B—Summary of Hourly Rates

[5] This decision deals with the remaining outstanding plain language re-drafting issues.

(1) Clause 4—Coverage—on-hire

[6] In the June 2017 decision we expressed our *provisional* view in respect of clause 4.3(a):

‘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’.⁷

[7] We further concluded that there would not 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’.

[8] Clause 4.3(a) of the January 2017 PLED reads as follows:

‘4.3 This industry award also covers:

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

[9] We invited submissions about whether clause 4.3(a) of the January 2017 PLED should be adopted having regard to these *provisional* views.⁸

[10] All parties support the *provisional* view that clause 4.3(a) of the January 2017 PLED should be adopted. We will adopt clause 4.3(a) as it appeared in the January 2017 PLED.

[11] We also invited submissions in response to the contention advanced by Business SA⁹ that the proposed clause 4.3(b) changes the effect of the current award clause 4.6.¹⁰

⁶ [PLED](#), published 20 January 2017 – tracked version

⁷ [\[2017\] FWCFB 3337](#), paragraph [9]

⁸ [\[2017\] FWCFB 3337](#), paragraph [10]

[12] Business SA objected to the change of the words used to refer to the company hosting the trainee from ‘hosted by a company to perform work’ in the current award, to ‘hosted by an employer covered by this award’ in the PLED.¹¹ They submit that the host is not required to be an employer and may not be an employer.

[13] Clause 4.3(b) of the July 2017 PLED reads as follows:

‘4.3 This industry award also covers:

...

(b) trainees employed by a group training employer and *hosted by an employer covered by this award* to work in the community pharmacy industry (within a classification defined in Schedule A—Classification Definitions) and the group training employers of those trainees.’ (emphasis added)

[14] Clause 4.6 of the current award reads as follows:

‘4.6 This award covers employers which provide group training services for trainees engaged in the industry and/or parts of industry set out at clause 4.1 and those trainees engaged by a group training service *hosted by a company to perform work* at a location where the activities described herein are being performed. This subclause operates subject to the exclusions from coverage in this award.’ (emphasis added)

[15] No other party made submissions in relation to the wording of clause 4.3(b) of the PLED.

[16] We agree that there is no reason to exclude from the coverage of the award a trainee who is hosted to work in a community pharmacy business where that business is not itself an employer under this award. Clause 4.3(b) will be modified to read:

(b) trainees employed by a group training employer and hosted by a community pharmacy to work in the community pharmacy industry (within a classification defined in Schedule A—Classification Definitions) and the group training employers of those trainees.

[17] Additionally, we note that clauses 4.2(b), 4.3(a) and 4.3(b) of the July 2017 PLED refer to employees ‘with a classification defined in Schedule A’. These references will be amended to read ‘within a classification’.

(2) Clause 11—Casual employment

[18] A conference was held on 27 July 2017¹² to deal with the insertion of a casual conversion provision in to the Pharmacy Award as a result of a decision handed down by the

⁹ [Business SA submission](#), 27 April 2017

¹⁰ [\[2017\] FWCFB 3337](#), paragraph [10]

¹¹ [Business SA submission](#), 13 July 2017.

¹² [Transcript 27 July 2017](#) conference

Full Bench in the Part-time and Casuals common issue on 5 July 2017.¹³ The parties agreed that there was no difficulty with the model clause proposed at paragraph [381] of that decision. We note that the model clause has been slightly modified as a result of the further Full Bench decision in the Part-time and Casuals common issue on 9 August 2018 ([2018] FWCFB 4695 at [31]).

[19] The model clause relating to a casual conversion provision will be inserted into the PLED at the time it is inserted into the current award.

(3) Clause 18—Allowances

(i) clause 18.5—Moving expenses

[20] The term ‘township’ was used in the current award clause 19.4 and retained in clause 18.5 of the PLED. Parties have reached a consensus that the term ‘township’ in clause 18.5 needs to be defined or replaced to clarify the meaning of the clause. Clause 18.5 of the PLED is as follows:

‘18.5 Moving expenses

(a) Clause 18.5 applies if an employer transfers an employee from one township to another.

(b) The employer is responsible for, and must pay, the total cost of moving the employee and the employee’s family, including fares and other transport charges.’

[21] The SDA proposed that ‘township’ be replaced with ‘where the employee has to move their residence’.

[22] In the June 2017 decision we invited submissions concerning the meaning of the current term ‘township’ and the manner in which clause 18.5 of the PLED may be varied to clarify the meaning.

[23] The Union Parties relied on previous submissions made by the SDA.¹⁴

‘The Plain language drafter has questioned the scope of the clause, with particular reference to the term ‘township’. The use of the term ‘township’ is common to Awards that cover employees in the industries where the SDA has members. Other Awards such as the Manufacturing Award and the Cement and Lime Award refer to a transfer requiring ‘change of residence’ to identify the scope of the clause.

The SDA would agree that a transfer from one township to another which requires a change in the residence of the employee would trigger the payment of moving expenses.’

[24] The Guild agreed with the SDA’s submission that the allowance will only be payable in circumstances where an employee is required, at the direction of the employer, to transfer from one township to another.

¹³ [2017] FWCFB 3541, paragraph [381]

¹⁴ [SDA submission](#), 10 December 2015, paragraphs 76 – 77

[25] In response to SDA's proposed replacement, the Guild submitted that the Oxford Dictionary defines 'township' in the Australian designation as a small town and defines 'town' as a built up area with a name, defined boundaries and local government that is larger than a village and generally smaller than a city. The Guild submitted that 'township' should be given its ordinary meaning of a small town in a rural district, as this would maintain the original intent of the allowance applying to the transfer of employees between towns in a regional or rural setting.

[26] ABI did not wish to make a submission on the definition and Business SA did not make a submission on the issue.

[27] The issue was also raised in the plain language re-drafting process of the *General Retail Industry Award 2010*. In a Statement issued on 23 July 2018,¹⁵ the Full Bench stated:

'Item 62 relates to clause 23.6 of the revised PLED and relates to the meaning of 'township'. At the June 2018 conference the Commission stated that it does not intend to take the matter any further in these proceedings and suggested that if any party wants to pursue a definition of 'township' they may make an application to vary the modern award.'¹⁶

[28] We propose to adopt the same approach for the plain language re-drafting process of any award containing the term 'township'. If any party wants to pursue a definition of 'township' they may make an application to vary the relevant modern award.

[29] We have decided to amend clause 18.5(a) to reflect the extent of the parties' agreement namely that clause 18.5 applies in circumstances where the employer transfers the employee to another township and requires the employee to change residence:

(a) Clause 18.5 applies if an employer transfers an employee from one township to another and, as a consequence, the employee moves residence.

[30] The SDA also raised an issue regarding the use of the term 'family' in clause 18.5 of the PLED:¹⁷

'In relation to the use of the term 'family', the SDA submits that this should be in line with the NES, including a member of the employee's household.'

[31] The SDA raised this issue in the plain language re-drafting process of the Retail award and it was dealt with in the statement issued on 23 July 2018.¹⁸ In the Retail award proceedings, we proposed adding a definition of 'immediate family' to clause 2—Definitions and updating the Moving expenses clause. It is our *provisional* view that the same approach be adopted in the Pharmacy award by adding definition of 'immediate family' at clause 2, and updating clause 18.5(b) as follows:

¹⁵ [2018] FWCFB 4046, paragraph [35]

¹⁶ Transcript [Retail Award June 2018 conference](#), paragraphs 209 – 224

¹⁷ [SDA submission](#), 10 December 2015, paragraph 78

¹⁸ [2018] FWCFB 4046

‘2. Definitions

Immediate family means a family member as defined by section 12 of the Act.’

‘18.5(b) The employer ~~is responsible for, and~~ must pay, the total cost (including fares and other transport charges) of moving the employee and member(s) of the employee’s immediate family who reside in the employee’s household. ~~including fares and other transport charges.~~’

[32] Interested parties are invited to make submissions about the proposed amendments at paragraph [31] and make any final submissions by **4.00 pm, Wednesday 19 September 2018**. Any submissions in reply are to be filed by no later than **4.00 pm, Wednesday 3 October 2018**.

(4) Clause 18.8—Broken Hill allowance

[33] In the June 2017 decision we expressed our intention to insert a clause relating to the Broken Hill allowance at clause 18.8 of the PLED and invited submissions on the matter.¹⁹ No party opposed the inclusion of the clause.²⁰

(5) Clause 23—Personal carer’s leave and compassionate leave

[34] In the June 2017 decision we proposed to make an amendment to clause 23.3—Casual employees to provide greater consistency with the terms of the *Fair Work Act 2009* (ss 97,102 and 103) and invited submissions on the matter.²¹ No party opposed the amendments; however, the Union Parties noted a cross-referencing error in paragraph (d).²² We will adopt the clause as amended in the July 2017 PLED and correct the cross-referencing error.

(6) Schedule B—Summary of hourly rates of pay

[35] Additional issues relating to Schedule B—Summary of hourly rates of pay have been raised by the Guild and the SDA.

[36] The Guild notes that the Schedule is missing a column for the applicable Sunday penalty rate for hours before 7.00 am and after 9.00 pm. They also noted that, in accordance with paragraph [1884] of the Penalty Rates Decision [2017] FWCFB 1001, the Sunday penalty rate reduction is effective only between the hours of 7.00 am and 9.00 pm.²³

[37] We agree. Clauses B.1.2 and B.2.2 are missing a column for the applicable Sunday penalty for hours before 7.00 am and 9.00 pm. The applicable column will be inserted into the

¹⁹ [2017] FWCFB 3337, paragraphs [13], [14], [16]

²⁰ [Union Parties submission](#), 4 July 2017, paragraph 7; [Guild submission](#), 14 July 2017, paragraph 12; [ABI submission](#), 17 July 2017; [Business SA submission](#), 13 July 2017

²¹ [2017] FWCFB 3337, paragraph [15]

²² [Union Parties submission](#), 4 July 2017, paragraphs 8 – 10; [Guild submission](#), 14 July 2017, paragraphs 13 – 14; [ABI submission](#), 17 July 2017; [Business SA submission](#), 13 July 2017

²³ [Guild submission](#), 14 July 2017, paragraph 15; [Penalty Rates decision \[2017\] FWCFB 1001](#), paragraph 1884

Schedule B of the PLED and the rates and percentages will be amended to reflect the determinations issued on 1 July 2017 and 20 June 2018.²⁴

[38] The SDA submits that there is a potential issue with the draft of Schedule B, particularly the inconsistency with the Ordinary Hours of Work clause.

[39] The SDA submits:

‘Clause 13.1 of the plain language exposure draft published on 5 July 2017 states that *‘Ordinary hours may be worked on any day between 7.00 am and midnight’*. Schedule B, clause B.1.1 then states that Full-time and part-time employees – ordinary and Monday to Friday penalty rates. The headings in the table also distinguish between ordinary hours and Monday to Friday penalties. The separation of the two is incorrect. The hours referred to in the table as Monday to Friday penalty rates are ordinary hours as they fall within the ordinary hours of work as prescribed in clause 13.1.

The SDA is concerned that unless the wording contained in B.1.1 and the headings in the table are changed, Schedule B will be inconsistent with other Award provisions such as 13.1 and clause 21 – Penalty Rates, and may have an impact on the entitlements to ordinary rates of pay which other provisions in the Award may provide.

The SDA recommends the proposed changes in RED:

B.1.1 Full-time and part-time employees—~~ordinary and~~ Monday to Friday penalty rates

Ordinary hours Monday to Friday			
8.00 am to 7.00 pm	Morning—7.00 am to before 8.00 am	Evening—7.00 pm to 9.00 pm	Evening—9.00 pm to midnight
% of minimum hourly rate			
100%	150%	125%	150%

The overlap of different Full Bench’s dealing with plain language drafting has meant that some drafting issues become evident when working through clauses in different proceedings. Given that a final decision has not yet been issued regarding the plain language drafting of the Pharmacy Award, the SDA would like this issue to be considered prior to the Full Bench issuing a decision.’

[40] We agree with the amendments proposed by the SDA. We have also amended ‘Morning hours’ in column 2 of the table to 7.00 am to 8.00 am to reflect that ordinary hours can only be worked between 7.00 am and midnight in the Pharmacy award.²⁵ We will also

²⁴ [PR593955](#) and [PR606336](#)

²⁵ See clause 13.1 of the PLED and clause 25.2(a) of the current award.

make the amendments tracked at [39] to the title and table at B.2.1, the equivalent table for casual employees, for consistency within Schedule B.

[41] Interested parties are invited to make submission about the amendments proposed at paragraph [40] by **4.00 pm, Wednesday 19 September 2018**. Any submissions in reply are to be filed by no later than **4.00 pm, Wednesday 3 October 2018**.

Other matters

[42] Clause 1.2—Title and commencement has been amended in accordance with a decision issued on 6 July 2017²⁶ (Group 3 decision) relating to the 4 yearly review of modern awards and the structure and content of exposure drafts.

[43] Clauses 5 and 10.3 have been amended to reflect the wording in other PLEDs.

[44] Clause 25.4 —Part-day public holidays has been inserted. Schedule G to the PLED relates to part-day public holidays; however there is no reference to that subject matter in the body of the award.

Next steps

[45] A further revised exposure draft reflecting this decision will be published on **Wednesday, 5 September 2018**.

[46] Interested parties are invited to make final submissions in accordance with paragraphs [32] and [41] by **4.00 pm, Wednesday, 19 September 2018**. Parties are also to make any final submissions in relation to the PLED by **4.00 pm, Wednesday, 3 October 2018**.

[47] Reply submissions are due by **4.00 pm, Wednesday, 3 October 2018**.

[48] All outstanding items will then be determined on the papers.

[49] All material should be sent to amod@fwc.gov.au.

[50] Liberty to apply.

PRESIDENT

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²⁶ [\[2017\] FWCFB 3433](#), paragraphs 321 – 328