



# 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, 8 NOVEMBER 2018

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

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

[2] Decisions published on 20 January 2017,<sup>1</sup> 20 March 2017,<sup>2</sup> 21 June 2017<sup>3</sup> and 3 September 2018<sup>4</sup> (the *September 2018 decision*) determined most of the issues arising from the plain language re-drafting of the Pharmacy Award. A revised plain language exposure draft (the revised PLED) was published on the 5 September 2018,<sup>5</sup> incorporating amendments arising from the *September 2018 decision*.

[3] In the *September 2018 decision* interested parties were invited to make final submissions about two proposed amendments to the PLED (see paragraphs [31] and [40] of the decision). Parties were also asked to make final submissions in relation to the revised PLED.

[4] Submissions on the proposed amendments were received from the Pharmacy Guild of Australia (Guild); Shop Distributive and Allied Employees Association (SDA), Professionals Australia (APESMA) and the Australian Business Industrial and NSW Business Chamber (ABI). We propose to deal with those matters first before turning to the submissions on the revised PLED. The proposed amendments concern clause 18.5 and Schedule B of the PLED.

### ***Clause 18.5—Moving expenses***

---

<sup>1</sup> [\[2017\] FWCFB 344](#).

<sup>2</sup> [\[2017\] FWCFB 1612](#).

<sup>3</sup> [\[2017\] FWCFB 3337](#).

<sup>4</sup> [\[2018\] FWCFB 5504](#).

<sup>5</sup> [Revised Pharmacy PLED](#), 5 September 2018.

[5] The *September 2018 decision* proposed an amendment to resolve the issue regarding the use of the term ‘family’ in clause 18.5 of the PLED. This issue was raised by the SDA, who submitted:

‘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.’<sup>6</sup>

[6] We expressed the provisional view that we take the approach we previously adopted in relation to the same issue during the plain language re-drafting process of the Retail award<sup>7</sup> and proposed the following amendments to the PLED:

‘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.~~<sup>8</sup>

[7] The Guild, SDA, APESMA, and ABI did not oppose the proposed amendments.<sup>9</sup> We will adopt the proposed amendment. This issue is now resolved.

### *Schedule B—Summary of hourly rates of pay*

[8] The *September 2018 decision* proposed an amendment to Schedule B—Summary of hourly rates of the PLED to resolve issues raised by the Guild and SDA.<sup>10</sup>

[9] A tracked version of the revised PLED was published on the 5 September 2018, illustrating the proposed amendments:<sup>11</sup>

#### **B.1 Full-time and part-time adult employees**

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

###### **Ordinary hours Monday to Friday**

<b>ORDINARY HOURS</b>	<b>Morning—<del>before</del></b>	<b>Evening—7.00 pm to</b>	<b>Evening—9.00 pm to</b>
<b>8.00 AM TO 7.00 PM</b>	<b>7.00 am to 8.00 am</b>	<b>9.00 pm</b>	<b>midnight</b>

#### **B.2 Casual adult employees**

##### **B.2.1 Casual adult employees—~~ordinary and~~ Monday to Friday penalty rates**

<sup>6</sup> [SDA submission](#), 10 December 2015, paragraph 78.

<sup>7</sup> [\[2018\] FWCFB 4046](#), at paras [36]-[40].

<sup>8</sup> [\[2018\] FWCFB 5504](#) at para 31.

<sup>9</sup> [Guild submission](#), 18 September 2018; [SDA submission](#), 20 September 2018; [APESMA submission](#), 18 September 2018.

<sup>10</sup> [\[2018\] FWCFB 5504](#), at para [40].

<sup>11</sup> [Revised Pharmacy PLED - tracked version](#), 5 September 2018.

**Ordinary hours Monday to Friday**

**Ordinary hours 8.00 am to 7.00 pm**

**Morning—before 7.00 am to 8.00 am**

**Evening—7.00 pm to 9.00 pm**

**Evening—9.00 pm to midnight**

[10] The Guild, SDA, APESMA and ABI did not oppose the proposed amendments.<sup>12</sup> We will adopt the proposed amendment. This issue is now resolved.

[11] We now turn to the revised PLED.

[12] Submissions on the revised PLED were received from the Guild, SDA and ABI. The submissions received related to the following submissions:

- Annualised salary;
- Casual conversion;
- Payment of wages on termination of employment; and
- Part-day public holidays

***Clause 17 Annualised salary***

[13] The Guild, SDA and ABI raised an issue relating to clause 17 (Annualised salary).

[14] The Guild submit that the information contained at clause 17 in the revised PLED is not as outlined in [2017] FWCFB 3540 of 5 July 2017.<sup>13</sup> SDA submitted that clause 17.3 does not reflect the wording contained in the current award which was amended following application by the Guild.<sup>14</sup> ABI supported these submissions.<sup>15</sup>

[15] Clause 17.3 in the revised PLED reads as follows:

17.3 An annualised salary must not result in a pharmacist being paid less over a year (or, if the employment is terminated before a year is completed, over the period of that employment) than would have been the case if an annualised salary had not been agreed.

[16] SDA submit that this clause should read as it does in the current award (at clause 27.3):

17.3 An annualised salary must not result in **an employee** being paid less over a year (or, if the employment is terminated before a year is completed, over the period of that employment) than would have been the case if an annualised salary had not been agreed.

---

<sup>12</sup> [Guild submission](#), 18 September 2018; [SDA submission](#), 20 September 2018; [APESMA submission](#), 18 September 2018.

<sup>13</sup> [Guild submission](#), 3 October 2018 at 4.1.

<sup>14</sup> [SDA submission](#), 4 October 2018.

<sup>15</sup> [ABI submission](#), 8 October 2018.

[17] The current award was amended to expand the annualised salary provision to include pharmacy assistant level 4 employees. This position was advanced by the Guild at a conference on 31 March 2017 and supported by other interested parties.<sup>16</sup> The provision was amended in accordance with consent draft variations sought by the interested parties set out at Annexure A of the Full Bench decision on 5 July 2017.<sup>17</sup> The Full Bench accepted this variation.<sup>18</sup>

[18] Clause 17 of the revised PLED broadly reflects these changes however the wording at clause 17.3 uses “a pharmacist” instead of “an employee”. This appears to have been a typographical error and the PLED will be updated in line with the agreed wording at clause 27 of the current award.

[19] Clause 17 of the revised PLED also differs from the agreed clause in the following ways:

- The cross references in clauses 17.2, 17.4 and 17.5 currently refer to clause 17 instead of 17.1.
- The cross reference in clause 17.6 currently refers to clause 17 instead of clause 17.5.

[20] These cross-references will be amended in the next version of the PLED.

### *Casual conversion*

[21] At paragraph [19] of the *September 2018 decision* we expressed our intention to insert the casual conversion model clause that arises out of the casual and part-time employment matter into the PLED at the time it is inserted into the current award.

[22] As noted in the *September 2018 decision*, a conference was held on 27 July 2017<sup>19</sup> to deal with the insertion of a casual conversion provision in the Pharmacy Award as a result of the July 2017 decision. At the conference it was decided that, as no party wished to raise Pharmacy award specific issues, the model clause that ultimately emerged from the Part-time and Casual Employment matters would be put into the Pharmacy Award.<sup>20</sup> The model clause was finalised by the Part-time and Casual Employment Full Bench in a decision issued on 9 August 2018.<sup>21</sup>

[23] The model clause will be inserted into the Pharmacy Award PLED as follows:

---

<sup>16</sup> [Transcript](#), 31 March 2017.

<sup>17</sup> [\[2017\] FWCFB 3540](#) [Annexure A].

<sup>18</sup> [\[2017\] FWCFB 3540](#) at [66].

<sup>19</sup> [Transcript](#), 27 July 2017.

<sup>20</sup> [Transcript](#), 27 July 2017 [see PN23-PN35].

<sup>21</sup> [2018] FWCFB 4695 at [31]

### 11.7 Right to request casual conversion

- (a) A person engaged by a particular employer as a regular casual employee may request that their employment be converted to full-time or part-time employment.
- (b) A **regular casual employee** is a casual employee who has in the preceding period of 12 months worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time employee or part-time employee under the provisions of this award.
- (c) A regular casual employee who has worked equivalent full-time hours over the preceding period of 12 months' casual employment may request to have their employment converted to full-time employment.
- (d) A regular casual employee who has worked less than equivalent full-time hours over the preceding period of 12 months' casual employment may request to have their employment converted to part-time employment consistent with the pattern of hours previously worked.
- (e) Any request under this subclause must be in writing and provided to the employer.
- (f) Where a regular casual employee seeks to convert to full-time or part-time employment, the employer may agree to or refuse the request, but the request may only be refused on reasonable grounds and after there has been consultation with the employee.
- (g) Reasonable grounds for refusal include that:
  - (i) it would require a significant adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time or part-time employee in accordance with the provisions of this award – that is, the casual employee is not truly a regular casual employee as defined in paragraph (b);
  - (ii) it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;
  - (iii) it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced in the next 12 months; or
  - (iv) it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work.
- (h) For any ground of refusal to be reasonable, it must be based on facts which are known or reasonably foreseeable.
- (i) Where the employer refuses a regular casual employee's request to convert, the employer must provide the casual employee with the employer's reasons for refusal in writing within 21 days of the request being made. If the employee does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the

dispute resolution procedure in clause 9. Under that procedure, the employee or the employer may refer the matter to the Fair Work Commission if the dispute cannot be resolved at the workplace level.

- (j) Where it is agreed that a casual employee will have their employment converted to full-time or part-time employment as provided for in this clause, the employer and employee must discuss and record in writing:
  - (i) the form of employment to which the employee will convert – that is, full-time or part-time employment; and
  - (ii) if it is agreed that the employee will become a part-time employee, the matters referred to in clause 10.4.
- (k) The conversion will take effect from the start of the next pay cycle following such agreement being reached unless otherwise agreed.
- (l) Once a casual employee has converted to full-time or part-time employment, the employee may only revert to casual employment with the written agreement of the employer.
- (m) A casual employee must not be engaged and re-engaged (which includes a refusal to re-engage), or have their hours reduced or varied, in order to avoid any right or obligation under this clause.
- (n) Nothing in this clause obliges a regular casual employee to convert to full-time or part-time employment, nor permits an employer to require a regular casual employee to so convert.
- (o) Nothing in this clause requires an employer to increase the hours of a regular casual employee seeking conversion to full-time or part-time employment.
- (p) An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of this subclause within the first 12 months of the employee's first engagement to perform work. In respect of casual employees already employed as at [date to be inserted], an employer must provide such employees with a copy of the provisions of this subclause by [date to be inserted].
- (q) A casual employee's right to request to convert is not affected if the employer fails to comply with the notice requirements in paragraph (p).

[24] A draft variation determination will be published shortly, varying the Pharmacy Award to insert the standard model clause.

***Payment of wages on termination of employment***

[25] The Guild made the following comment in relation to the payment of wages common issue:

‘4.3 Payment of wages on termination of employment is pending a decision as indicated in [2018] FWCFB 4735 of August 2018.’

[26] We note that the Guild has made submissions arguing that consideration should be given to altering the model payment of wages on termination clause for the Pharmacy Industry Award. In a statement on 1 October 2018 the Pharmacy Award was excluded from the list of awards varied to insert the model term. The Payment of Wages Full Bench indicated that a statement concerning the next steps for the Pharmacy Award, and other excluded awards, will be made shortly.<sup>22</sup> The revised PLED will be updated with any changes made to the Pharmacy Award arising from the payment of wages matter.

### *Part-day public holidays*

[27] The Guild also raised the public holiday common issue, concerning part day public holidays, as an area of concern, noting:

‘4.4 Clause 25.4 Part Day public holidays is pending a decision.’<sup>23</sup>

[28] The revised PLED will be updated to reflect any changes that are made to the Pharmacy Award in the course of the public holiday matter.

### *Next steps*

[29] This decision finalises the plain language re-drafting of the Pharmacy Award. An exposure draft incorporating the changes arising from this decision will issue shortly.

## PRESIDENT

Printed by authority of the Commonwealth Government Printer

<PR702039>

---

<sup>22</sup> [2018] FWCFB 4735 at para 14.

<sup>23</sup> [Guild submission](#), 3 October 2018.