

## **IN THE FAIR WORK COMMISSION**

**Title:** s 156 of the *Fair Work Act* 2009 - 4 yearly review of modern awards  
**Award:** Pharmacy Industry Award 2010 and Hospitality Industry (General) Award 2010  
**Matter No.:** AM2014/305  
**Subject:** Penalty rates

### **OUTLINE OF SUBMISSIONS FOR THE PHARMACY GUILD OF AUSTRALIA IN RELATION TO ADMISSIBILITY TO THE PEZZULLO REPORT**

#### **A. Introduction**

1. These submissions are made on behalf of the Pharmacy Guild of Australia (the **Guild**), the Australia Hotels Association (**AHA**) and the Accommodation Association of Australia (**AAA**) (together the **Employer Parties**). The submissions address the objections made by the Shop Distributive and Allied Employees' Association and United Voice (together the **Unions**) dated 15 September 2015 to the report of Lynne Pezzullo entitled "The modern face of weekend work: survey results and analysis" dated 25 June 2015 (the **Pezzullo Report**).

#### **B. Objection**

2. The Unions have objected to the whole of the Pezullo Report on the basis it is opinion evidence contrary to s 76(1) of the *Evidence Act* 1995 (Cth) and not within the exception in s 79(1) of the *Evidence Act*.
3. The Employer Parties opposes the Unions' objections and submits that the Pezzullo Report represents relevant and probative evidence that the Commission should be admitted into evidence.

### C. Nature of the Commission's role in relation to expert evidence

4. United Voice sets out the general principles for the application to rules of evidence to Commission proceedings in paragraphs 4 to 14 of its submissions. In general terms, the Employer Parties accept the principles set out in those paragraphs save to observe the following:
  - (a) the Commission has an unfettered discretion to inform itself in relation to any matter before it in such manner as it consider appropriate under s 590(1) of the *Fair Work Act 2009 (Cth) (FW Act)*;
  - (b) the Commission's general approach is to admit evidence, which is not otherwise admissible in a court of law under the *Evidence Act*, where that evidence has a "rational probative force": *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and another v Abigroup Contractors Pty Ltd* [2013] FWCFB 453 at [37]; see also *Re Pochi & Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247 at 256 - 257.
5. Some caution must be exercised to applying the *Evidence Act* to certain matters before the Commission. Courts of law and arbitral tribunals, such as the Commission have a fundamentally different roles and purposes. Generally speaking, courts determine disputes about past events. The *Evidence Act* applies to determining the admissibility of evidence about things that have already taken place. Section 79 of the *Evidence Act* is directed to expert evidence about these kind of matters. e.g. a cause of a motor vehicle accident.
6. On the other hand, in the proceedings, the Commission is required to determine whether to vary the relevant modern awards thereby creating obligations that will apply in the future. Necessarily, in determining the potential impact of the variations sought, the expert evidence does not seek to ascertain what has already taken place but seeks to predict what may happen in the event that the modern awards are varied as sought. Expert evidence as to what may happen in the future by its nature involves a

degree of informed speculation based on the application of accepted methods to incomplete and imperfect data.

7. The key issue is whether the expert evidence is probative in nature. This is consistent with the observations of the Full Bench in *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60] where it was said “*where a significant change is proposed it must be supported by submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation*” (underlining added).
8. The Employer Groups submit that the Commission should be prepared to admit expert evidence relevant to the issues in dispute so long as the following criteria are satisfied:
  - (a) the expert opinion is relevant to the matters in the proceedings;
  - (b) the expert has set out the reasons for the making of his or her opinion;
  - (c) the nature of the expert opinion appears to have a “rational probative force”; and
  - (d) the parties are given procedural fairness by having an opportunity to:
    - (i) cross-examine the relevant expert giving the opinion;
    - (ii) respond to the expert with their own expert evidence; and
    - (iii) make submissions as to the appropriate weight (if any) to be given to such opinions.

#### **D. Ms Pezzullo’s expertise**

9. Ms Pezzullo is the Lead Partner of Health Economics and Social Policy and a Director of Deloitte Access Economics Pty Ltd (**Deloitte**). She states that she supervised the research project and finalised the Pezzullo Report. The affidavit of Sharlene Wellard sworn on 17 September 2015 annexes the letter from Deloitte setting out the terms of

engagement to prepare the Pezzullo Report. The letter includes short profiles of her team members including their qualifications and expertise.

10. Ms Pezzullo's experience and expertise is set out in her curriculum vitae which forms part of the Pezzullo Report. Her professional qualifications include a Bachelor of Economics (First Class Honours) from the University of Adelaide. She also has extensive employment experience in the field of economics including as a Senior Research Officer at the International Economy Branch and as a Senior Economist, Associate Director and Director at Access Economics.
11. Even though Ms Pezzullo's skills and expertise are centred on the health, social policy and pharmaceutical sectors, she has lead a number of projects outside those areas including on the economic and social benefits of civil chaplaincies, on the ending of world hunger and a review of the economic case to end slavery. It is clear that Ms Pezzullo has wide-ranging expertise and experience in a wide range of economic disciplines. The Employer Parties submit that she has specialised knowledge in the field of economics as it applies to a wide range of policy areas and subject matters that qualifies her to give the opinions set out in the Pezzullo Report.

#### **E. Nature of the Pezzullo Report**

12. The Pezzullo Report contains three principal parts:
  - (a) Part 2 - A general overview of industry awards and penalty rates in Australia;
  - (b) Part 3 - Evidence from the literature; and
  - (c) Part 4 - Survey results and analysis.
13. The Unions have not identified clearly and precisely the parts of the Pezzullo Report contain impermissible opinion. Each part of the Pezzullo Report must be properly characterised before determining whether it is admissible or not as evidence.

**(a) Part 2 - A general overview of industry awards and penalty rates in Australia**

14. Part 2 of the Pezzullo Report does not contain opinion evidence. It contains a summary of the award modernisation process and a high level of description of the relevant industries and modern awards.
15. Accordingly, the Unions' objection to Part 2 of the Report should be rejected.

**(b) Part 3 - Evidence from the literature**

16. Part 3 is a review of evidence contained in relevant literature on the following topics:
- (a) consumer activity during atypical hours across different section to assess whether there is a societal shift towards commercial activity at these times; and
  - (b) workplace composition and employment characteristics of the services sector and whether additional remuneration for employees working atypical hours is required based on evidence collected during consumer trends.
17. Under the common law, an expert's study and training permits them to undertake a literature review and to assist the court to understand the significance of what is contained in it: *Trevorrow v State of South Australia (No 5)* [2007] SASC 285; 98 SASR 136 at 283 [690] – 285 [705]); *BI (Contracting) Pty Limited v University of Adelaide* [2008] NSWCA 210 at [23] - [26]; *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)* (2010) 204 FCR 1 at [127]; *MA v The Queen* [2013] VSCA 20 at [63] - [73]; *BHP Billiton Limited v Van Soelst* [2014] SASCFC 135 at [90].
18. In *BI (Contracting) Pty Limited*, the NSW Court of Appeal cited with approval (at [23]) the following extract contained in Sir Richard Eggleston in *Evidence, Proof and Probability* (Weidenfeld and Nicholson: London, 2nd ed 1983):

*The second function of the expert to which we referred above was that of acting as librarian. In many cases the expert does not himself know the answer to the problem from his own study or experience. But being trained in the relevant*

*discipline, he is able to refer to works of authority in which the answer is given. In such a case the expert himself is not generalising, but is making available the fruits of generalisations by other people, either from their own experience or from the experience of others whose writings form part of the literature. The expert witness here is not giving evidence of his own opinion, except to say that in his expert opinion the books to which he is making reference are of sufficient standing to be accepted by the court.*

19. In the present case, Ms Pezzullo acted in the function of a librarian and not an expert. She is not expressing her own opinions but merely summarising the evidence of other experts so as to be accepted by the Commission. To the extent she is acting as an expert, Ms Pezzullo is applying her study and training to undertake the literature review and to assist the Commission in understanding the material.
20. Accordingly, the Unions' objection to Part 3 of the Report should be rejected.

**(c) Part 4 - Survey results and analysis**

21. Part 4 of the Pezzullo Report sets out:
  - (a) the survey parameters and methodology conducted of weekend and non-weekend workers to ascertain their time use patterns, the frequency and duration of weekend work, their attitudes to weekend work and their use of businesses in the services sector;
  - (b) the approach to validating the response to surveys and mitigating the potential for bias of the survey results; and
  - (c) a summary of the outcome of the survey results organised under the following subject areas:
    - (i) sample demographics;
    - (ii) the willingness of the participants to work on the weekend;

- (iii) the importance of Sunday relative to Saturday to keep free from work;
- (iv) the effect of weekend work on time use of the participants;
- (v) the degree to which weekend work prevents normal weekend activities;
- (vi) the demand for weekend services by the participants;
- (vii) the preference for the use of weekend services relative to weekday services by the participants; and
- (viii) the reasons that the participants worked on the weekend;

(d) an interpretation of the survey results.

22. The accepted legal position is that survey evidence is admissible if the survey was direct evidence of an issue in the case, namely the state of public perception: *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313 at 360 - 361; *Ritz Hotel Ltd v Charles of the Ritz Ltd* (1988) 15 NSWLR 158 at 178; *Samsung Electronics Australia Pty Limited v LG Electronics Australia Pty Limited* [2015] FCA 227 at [310] - [317].
23. In the case law, there are two grounds for admissibility of the survey evidence:
- (a) the survey evidence represents out-of-court statements made by persons made in the course of a survey as to their impressions or opinions which are hearsay in nature but the admission of such statements as evidence of the existence of those impressions or opinions falls within an exception to the hearsay rule in s 66A of the *Evidence Act* allowing such evidence “*if the representation was a contemporaneous representation about the person’s health, feelings, sensations, intention, knowledge or state of mind*”; and
  - (b) it is original data providing a foundation for expert evidence as to the state of public opinion on the matter in question under s 79(1) of the *Evidence Act*.
24. The general approach of the Courts has been to admit into evidence a report of a professionally conducted survey, so long as it has been proven to have been

satisfactorily conducted using relevant and unambiguous questions and has been undertaken by experienced, professional people: *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313 at 360 - 361; *Samsung Electronics Australia Pty Limited v LG Electronics Australia Pty Limited* [2015] FCA 227 at [314].

25. Once the survey evidence and its interpretation have been admitted, the Commission may determine the weight such evidence should be given having regard to the purposes of the survey, the methods of data collection and analysis employed, whether the respondents to the survey are sufficiently representative of the population under investigation to enable the drawing of reliable inferences, the relevance of the answers given in the survey, and whether they were elicited, recorded and analysed in an accurate, reliable and unbiased manner: see *Samsung Electronics Australia Pty Limited v LG Electronics Australia Pty Limited* [2015] FCA 227 at [316] - [317].
26. Contrary to the Unions' submissions, Ms Pezzullo does not require any specialised knowledge in the 10 identified areas to interpret the survey results. As a highly experienced economist, she has the specialised knowledge to examine the survey results and seek to draw inferences and conclusions from the data.

## **F. Conclusion**

27. The Unions' objections to the Pezzullo Report should be rejected. The Pezzullo Report should be admitted into evidence.

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**17 September 2015**