

2 August 2016

**4 Yearly Review of Modern Awards
CASUAL AND PART-TIME EMPLOYMENT
AM2014/196 and AM2014/197**

**SUBMISSIONS REGARDING MINIMUM SHIFTS FOR PART-TIME AND CASUAL SCHOOL
STUDENTS EMPLOYED UNDER THE PHARMACY INDUSTRY AWARD 2010**

We refer to the above matter in which we act for The Pharmacy Guild of Australia (**the Guild**) the registered employer association for employers in the community pharmacy industry.

BACKGROUND

- 1 These submissions are made following the Directions of His Honour Vice President Hatcher issued on 15 July 2016.
- 2 The Guild seeks a variation to the *Pharmacy Industry Award 2010 (PIA)*, to reduce the minimum shift for secondary school students on school days, being Monday to Friday, from 3 hours to 90 minutes in accordance with the Draft Determination filed on 26 October 2015 and annexed to these submissions (**Annexure A**).
- 3 We note the Australian Council of Trade Unions (**ACTU**) has sought a variation to increase the minimum shift for part-time and casual employees, including school students, to four hours across a number of awards including the PIA. The Guild is strongly opposed to the ACTU claim.

THE CLAIM

- 4 In accordance with clauses 12.5 and 13.4 of the PIA, the current minimum shift for part-time and casual employees (including secondary school students), is three hours.
- 5 The Guild's proposed variation would only reduce the minimum engaged from 3 hours to 90 minutes in the following circumstances:
 - (a) the employee is a full-time secondary school student;
 - (b) the employee is rostered to work between 3:00pm and 6:30pm on a day on which they are required to attend school being Monday to Friday;

SYDNEY MELBOURNE NEWCASTLE BRISBANE

- (c) the employee agrees to work, in conjunction with agreement by their parent of guardian, for a period of 90 minutes; and
 - (d) employment for a period of longer than 90 minutes is not possible due to the operational requirements of the pharmacy or some unavailability on the part of the employee.
- 6 By virtue of the formal education and qualifications required for registration as a Pharmacist, the reduction to the minimum engagement can only affect employees classified as pharmacy assistants under the PIA.
- 6.1 Minimum engagement terms for school children are provided for in other modern awards including clause 10.5(c) of the *Animal Care and Veterinary Services Award 2010* and clause 13.4 of the *General Retail Industry Award 2010*

THE 2012 MODERN AWARD REVIEW

- 7 Many of the awards/NAPSAs which covered the employment classification of pharmacy assistants prior to the commencement of the PIA provided for a minimum engagement of 2 hours; or by agreement between the employer and employee a shift of less than 3 hours. In this context, the introduction of a 3 hour minimum engagement for all part time and casual employees, including school children, was a significant change for many employers in the community pharmacy industry.
- 8 The Guild sought for a variation to the minimum engagement for school children from 3 hours to 90 minutes in the 2012 modern award review.
- 9 The scope of the 2012 review was significantly more confined than that of the 4 yearly review and in accordance with Schedule 5, Item 6 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, the review required the Fair Work Commission (**Commission**) to consider whether the modern awards achieve the modern awards objective and are operating efficiently without anomalies or technical problems arising from the part 10A modernisation process.
- 10 In the conduct of the 2012 review, the Commission was restricted to varying a modern award only to remedy any issues identified in the review and the awards were deemed as prima facie meeting the modern awards objective for the purpose of this review. Where the substance of a variation sought in the 2012 review was already dealt with by the Tribunal in the Part 10A process, the applicant was required to identify cogent reasons for departing from the previous Full Bench decision such as a significant change in circumstances which warrant a different outcome¹.
- 11 In this context, the Commission was ultimately not minded to grant the variation sought by the Guild in the 2012 Modern Award review. The decision not to vary the PIA in that circumstance however, does not bear on the Commissions obligation to consider the modern awards objective in the context of this variation, at this time, in the four year review.

¹ 2012 FWAFB 5600 at [85] to [89].

THE CONTEXT OF THE FOUR YEARLY REVIEW

- 12 In accordance with section 156 of the *Fair Work Act 2009* (Cth), the Commission is required to undertake a 4 yearly review of modern awards. Relevant to this matter, in its conduct of the review, the Commission may make one or more determinations varying modern awards.
- 13 A Full Bench of the Fair Work Commission considered the statutory framework for the conduct of the 4 yearly review of modern awards in *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.
- 14 At [34] and [60], the Full Bench indicated that in undertaking the 4 Yearly Review of Modern Awards, the Commission is not limited to examining a single provision or set of provisions contained in a modern award in order to determine whether there is a fair and relevant safety net of terms and conditions but may have regard to different combination of provisions in the same award in meeting the modern awards objective.
- 15 The Full Bench observes at paragraph [60] of this Decision, that any proposed changes must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence directed to proving the facts to support the proposed variation.
- 16 The Full Bench also observes at paragraph [23] of this Decision that:
- “[23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a ‘stable’ modern award system (s.134(1)(g)). The need for a ‘stable’ modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI’s submission that some proposed changes may be self-evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation” (our emphasis).*
- 17 The Guild submits that the variation sought is not significant and ought to be construed as self-evident and one capable of determination with little formality.

OPENING HOURS/ SCHOOL HOURS

- 18 In that part of the review of the PIA dealing with penalty rates (AM2014/305), 23 pharmacy employers gave evidence. It was the evidence of twelve of those employers that their pharmacy closed before 6pm on school days (many of those in regional towns, many closing at 5.30pm and one of those opening later on Thursday nights). The opening and closing times on Mondays to Fridays for those businesses and reference to the exhibit numbers is attached (**Annexure B**).

- 19 The school day ends somewhere between 3pm and 3.30pm most days. Making the assumption that it would take a student at least half an hour to leave school and present for work, the earliest likely time a school student would start work is at or between 3.30pm and 4pm.
- 20 The maximum amount of work available where a pharmacy closes at 6pm would be two and a half hours. Where the pharmacy closes at 5.30pm, the maximum shift period would be 90 minutes to 2 hours. It is self-evident that operating hours of many pharmacy businesses do not support a three hour shift for secondary school students and that many pharmacies could support a 90 minute minimum shift (noting that the Guild Draft Determination provides for a 90 minute shift *only* where a longer shift is not possible due to the operational requirements of the business or the availability of the student).
- 21 Of the 23 witnesses in that part of the PIA four yearly review dealing with penalty rates, there were only seven whose businesses closed at or after 7.30 on school days (four hours after a 3.30 start time for a school student – not including the odd exception for later trading hours on Thursday nights). The four hour minimum engagement sought by the ACTU would prevent even more pharmacies from engaging secondary school students.

THE MODERN AWARDS OBJECTIVES

- 22 In exercising its powers in conducting the 4 yearly review, to ensure that the PIA provides fair and relevant minimum safety net, the Commission must take into account the Modern Awards Objective:
- (a) the relative living standards and the needs of the low paid (s 134(1)(a));
 - (b) the need to encourage collective bargaining (s134(1)(b));
 - (c) the need to promote social inclusion through increased workforce participation (s 134(1)(c));
 - (d) the need to promote flexible work practices and the efficient and productive performance of work (s 134(1)(d));
 - (e) the need to provide additional remuneration for employees working overtime; employees working unsocial, irregular or unpredictable hours; employees working on weekends or public holidays; and employees working shifts (s 134(1)(da));
 - (f) The principle of equal remuneration for work of equal or comparable value (s123(1)(e));
 - (g) the likely impact on business, including productivity, employment costs and the regulatory burden (s 134(1)(f));
 - (h) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s 134(1)(g)); and

- (i) the likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s134(1)(h).

(emphasis added)

- 23 In assessing whether to vary an award, the Commission is obliged to consider and have regard to each of those factors above, but not required to give more or less weight to any one factor. A Modern Award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the Modern Awards Objective (s138) (emphasis added)
- 24 The Guild submits that the existing three hour minimum shift provisions in the PIA go further than the extent necessary to provide a far and relevant security net for full time secondary school students working in community pharmacy. The ACTU claim, for a four hour minimum shift, goes even further than necessary
- 25 The Guild submits its claim would (within the other boundaries set out in the Guild's Draft Determination) goes no further than necessary and would:
 - (a) promote social inclusion through increased workforce participation (s134(1)(c));
 - (b) promote flexible work practices and the efficient and productive performance of work (s 134(1)(d));
 - (c) favourably impact on business, including productivity, employment costs and the regulatory burden (s 134(1)(f)); and
 - (d) have a favourable impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s 134(1)(h)).
- 26 Employment can provide valuable experience for students. It teaches responsibility, develops organisational and time management skills and can help the students save money. Jobs can also help students form good work habits, gain valuable work experiences, and become financially independent.
- 27 The community pharmacy industry provides an important employment opportunity for school students including those considering a career in health and medical services, customer service, merchandising, sales or those aspiring to become small business owners.
- 28 The community pharmacy industry provides skills and networks to assist in obtaining and succeeding in employment in the future and career direction. It would be advantageous for school students considering tertiary studies in the pharmacy industry if the opportunities for work experience were increased.
- 29 Community pharmacy businesses operate across Australia. They provide an opportunity for youth employment in cities and regional towns.
- 30 The Guild submits taking into account the above the Commission should determine that at the variation sought is a permitted term that goes no further than necessary

to achieve the Modern Award Objective and vary the PIA in accordance with the Guild's Draft Determination.



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Annexure A

FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009

Four Yearly Review of Modern Awards

(AM2014/197) Casual Employment (AM2014/196) Part-time Employment

PHARMACY INDUSTRY AWARD 2010

MA000012

The Pharmacy Industry Award 2010 is varied as follows:

1 By inserting a new subclause 12.12 as follows

12.12 School students

The minimum engagement period for a part-time employee will be one hour and 30 minutes if all of the following circumstances apply:

- (a) the employee is a full-time secondary school student; and
- (b) the employee is engaged to work between the hours of 3.00pm and 6.30pm on a day which they are required to attend school; and
- (c) the employee agrees to work, and a parent or guardian of the employee agrees to allow the employee to work, a shorter period than three hours; and
- (d) employment for a longer period than the period of the engagement is not possible either because of the operational requirements of the employer or the unavailability of the employee.

2 By inserting a new subclause 13.5 as follows

13.5 School Students

The minimum engagement period for an employee engaged on a casual basis will be one hour and 30 minutes if all of the following circumstances apply:

- (a) the employee is a full-time secondary school student; and
- (b) the employee is engaged to work between the hours of 3.00pm and 6.30pm on a day which they are required to attend school; and
- (c) the employee agrees to work, and a parent or guardian of the employee agrees to allow the employee to work, a shorter period than three hours; and
- (d) employment for a longer period than the period of the engagement is not possible either because of the operational requirements of the employer or the unavailability of the employee.

Annexure B

Close at or before 6pm

	Exhibit No.	Name	Location	Opening hours
1.	PG 3	Paul Thomas Keane	Barmera, SA	Mon – Fri 9am-5.30pm
2.	PG 6	David Martin Heffernan	Culburra Beach, NSW	Mon – Fri 9am-5.30pm
3.	PG 9	Kin Chong	Kerang, VIC	Mon – Fri 9am-6pm
4.	PG 13	Trent Gregory Playford	West Gosford, NSW	Mon – Fri 8.30am-6pm
5.	PG 14	Craig Francis Bird	Frenchs Forest	Mon – Fri 9am-6pm
6.	PG 16	Peter Williams Ashley Crothers	Bourke, NSW	Mon – Fri 9am-5pm
7.	PG 17	John Francis Cagney	Whyalla, SA	Mon – Fri 9am-6pm
8.	PG 18	Dean Pollock	Atherton, QLD	Mon – Fri 8am-6pm
9.	PG 19	Timothy John Logan	Nambour, QLD	Mon – Fri 8am-5.30pm
10.	PG 20	Patrick Gerard Costigan	Maryborough, QLD Gympie, QLD	Mon – Fri 8.30am-5.30pm
11.	PG 22	Maria Michelle Xynias	Chermside, QLD Mt Gravatt, QLD Stones Corner, QLD Ipswich, QLD	Mon –Wed, Fri 8.30am-5.30pm Thurs 8.30am-9pm
12.	PG 23	Ian David Lewellin	Currimundi, QLD	Mon – Fri 8am-6pm