

s. 156 - Four Yearly Review of Modern Awards

Pharmacy Industry Award 2010

AM2014/305

Submission

Penalty Rates- Change in Terminology

By



Association of Professional Engineers, Scientists and Managers, Australia (APESMA)

Dated: 8 May 2017

Lodged by:

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1. This submission is lodged by the Association of Professional Engineers, Scientists and Managers Australia (**APESMA**) in accordance with the Statement and Directions issued by Justice Ross, President on 18 April 2017¹.
2. This submission provides comments in relation to the Pharmacy Guild of Australia (**PGA**) application to vary the Pharmacy Industry Award 2010 (**PIA**) to remove the references to 'penalty' and 'penalty rates' in the PIA and to replace them with references to 'additional remuneration'.
3. APESMA opposes this application by the PGA.
4. APESMA has had the opportunity to consider the submission the ACTU will be lodging in relation to this matter and wishes to advise that we concur with this submission and that we incorporate it into this submission.
5. APESMA assumes that the PGA have sought this change on the basis of the provisions contained in s. 134(1)(da) of the Fair Work Act (**the Act**).
6. We oppose the proposal to remove the terms 'penalty' and 'penalty rates' from the PIA and replace them with the term 'additional remuneration' because we believe such a change is not necessary to meet the modern awards objective and that this proposed change if it is implemented will create significant confusion within the community pharmacy industry. We believe the terms 'penalty' and 'penalty rates' are well understood by employees and employers within the community pharmacy industry and that any change would result in significant confusion and possibly a reduction in award and Act compliance.
7. In Re Four Yearly Review of Modern Awards – Preliminary Jurisdictional Issues² (**Preliminary Jurisdictional Issues Decision**), the Full Bench confirmed that they are required to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account the modern awards objective³.

¹ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/2017fwcfb1933.pdf>

² [2014] FWCFB 1788

³ Ibid [23]

8. When considering the relevance of s. 134 the Full Bench in the Preliminary Jurisdictional Issues Decision stated that:

‘the Commission’s task is to balance the various considerations and ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.’⁴

9. Section 134 of the FW Act provides for modern awards, together with the National Employment Standards, to provide a fair and relevant minimum safety net of terms and conditions but this is tempered by Section 138 which indicates that modern awards may only include terms that are required to achieve the modern awards objective. It is expressed as follows:

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 and (to the extent applicable) the minimum wages objective.

10. Tracey J⁵ Tracey J in *Shop Distributive and Allied Employees Association v National Retail Association No.2*) when considering s 138 of the Act observed that:

“.. a distinction must be drawn between what is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action.”

11. In the Preliminary Jurisdictional Issues Decision, the Full Bench confirm the relevance of s 138 in the four yearly review of modern awards and they indicate that any variations made to modern awards during this process must be necessary to achieve the modern awards objective. In this Decision they say:⁶

[39] We are satisfied that s.138 is relevant to the Review. We also accept that the observations of Tracey J in *SDA v NRA (No.2)*, as to the distinction between that

⁴ Ibid [33]

⁵ [\[2012\] FCA 480](#)

⁶ [2014] FWCFB 1788

which is “necessary” and that which is merely desirable, albeit in a different context, are apposite to any consideration of s.138.

12. APESMA believe that the proposed change by the PGA is not only not necessary but that it will cause confusion and possibly lack of compliance with provisions of the Award and the Act.
13. A search of the Act and the Fair Work Regulations 2009 (**Regulations**) shows that there are a number of references made to penalties and penalty rates. These references include:
 - From the Act:
 - S. 16 Meaning of ‘base rate of pay’
 - S. 18 Meaning of ‘full rate of pay’
 - S. 62 Maximum weekly hours
 - S. 139 Terms that may be included in modern awards—general
 - S. 323 Method and frequency of payment
 - From the Regulations:
 - 3.33 Records—pay
 - 3.34 Records—overtime
14. APESMA contends that, if the terminology of penalty rates was changed to that proposed by the PGA it would cause confusion in relation to the application of the other provisions in the Act and the Regulations that refer to penalties.
15. If the terms the terms ‘penalty and ‘penalty rates’ were removed and replaced with the term ‘additional remuneration’ it would be easy foresee a situation where a person who is covered by the Award does not understand that the other provisions in the Act and Regulations that refer to penalty rates also apply to their situation. For example, employees and employers alike may not understand that there is a requirement for penalty payments, or additional remuneration, as proposed by the PGA, be included for the purposes of determining an employee’s full rate of pay or that there is a requirement for these payments to be included in pay records.

16. Community pharmacies operate under strict rules governing ownership and the dispensing and supply of medicines. The various Federal, State and Territory legislation regulating pharmacies requires that all pharmacies must be owned by a registered pharmacist. The various state and territory pharmacy acts restrict the number of pharmacies any one pharmacist can own from between four to six pharmacies depending on the state/territory.
17. As a result of the legislation relating to who can own a community pharmacy and how many pharmacies that person can own the majority of community pharmacies operate as small businesses. Most community pharmacies do not employ specialised human resources or industrial relations specialists and many do not have access to such advice.
18. APESMA believes that any change to a well understood term such as 'penalty rates' is not necessary and that it will cause confusion and uncertainty within the small business environment that exists in the community pharmacy industry.
19. We believe that this proposal does not meet the requirements as detailed in S. 134 and S. 138 of the Act because it is not necessary to meet the modern awards objective and that such a change would cause confusion and uncertainty.
20. Further, it should also be noted that this Award is one of the awards currently the subject of the 'plain language drafting process'. We understand that this process was initiated to enable awards to be written in terms that are clear and easy to understand by everyone.
21. The Full Bench in its Decision of 20 January 2017 on plain language drafting issues⁷ said:

The objective of the plain language project is to remove ambiguity, promote certainty and make awards simpler and easier to understand, consistent with the statutory direction to take into account the 'need to ensure a simple, easy to understand, stable and sustainable modern award system' (s.134(1)(g) of the FW Act). An objective of the plain language project is to avoid future disputation by providing clarity about the rights and responsibilities of those covered by modern awards.

⁷ [2017] FWCFB 344

22. APESMA is strongly of the view that removing the terms 'penalty' and 'penalty rates' from the PIA and replacing them with the term 'additional remuneration' will defeat the purpose of the plain language drafting process. We believe that such a change would only result in the Award being less easily understood and that this could lead to confusion and a lack of compliance.
23. We also note that this current proposal before the Commission relates to two awards only. Such a change to these two awards only would result in a lack of consistency with other modern awards containing penalties.
24. In conclusion, APESMA respectfully requests that the Commission determines not to vary the Award in the terms sought by the PGA because it is not necessary to meet the modern awards objective and that this proposed change, if implemented would result in significant confusion and uncertainty within the community pharmacy industry.
25. APESMA reserves the right to file further submissions in response to the submissions provided by the PGA in relation to this matter if they are necessary.



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