

7 February 2017

**REVIEW OF THE PHARMACY INDUSTRY AWARD 2010
AM2014/209, AM2016/15
SUBMISSION ON REVISED EXPOSURE DRAFT AND [2017] FWCFC 344**

Background:

- 1 We refer to the above matter in which we act for the Pharmacy Guild of Australia ("**the Guild**").
- 2 This submission is made in response to matters raised in [2017] FWCFC 344 of 20 January 2017 ("**Decision**").
- 3 In accordance in the Decision, parties are invited to make submissions in relation to a number of preliminary views expressed by the Full Bench and to make any further comments on the revised exposure draft dated 20 January 2017 ("**Revised Exposure Draft**") of the *Pharmacy Industry Award 2010* ("**PIA**").
- 4 Unless otherwise stated, clause references throughout our submissions are to the Revised Exposure Draft.

Provisional views of the Full Bench:

Clause 2 - Definitions

- 5 The Guild supports the deletion of the definition of 'on-hire employee' and 'on-hire employer' from the Revised Exposure Draft and the insertion of the definition of 'on-hire' from clause 3.1 of the PIA.

Clause 4 - Coverage

- 6 We note the Commission has proposed an amendment to the coverage of the PIA at paragraph [85] of the Decision. As the Guild's rules do not allow it to represent pharmacies that are owned by public hospitals or institutions, the Guild's membership would not be affected by the proposed variation to coverage. On that basis the Guild does not propose to make further submission on this proposed change.

Clause 11- Casual employment:

- 7 At paragraphs [130] and [131] of the Decision, the Commission has indicated its provisional view that clause 11.2 be removed and a casual conversion clause be inserted into the Revised Exposure Draft. Further, consideration of the form of such a clause is to be deferred until after the decision of the Part-time and Casual Employment Full Bench.
- 8 We note that in the context of the proceedings before the Part time and Casual Employment Full Bench, the Australian Council of Trade Unions proposed variations to a number of awards for the inclusion of 'casual conversion' provisions. The ACTU did not seek a variation to the PIA, nor was any evidence advanced which specifically address whether the inclusion of a casual conversion clause was necessary to provide a fair and relevant safety for those covered by the PIA.
- 9 We note the Commission has previously made it clear that the characterisation of an application to vary provisions in substantially similar terms across a number of awards as "common issue" merely relates to the process by which the claims will be heard and determining. Allocation of a claim as a "common issue" does not mean that the variation sought will apply across all or most awards (see [15] and [19] [2014] FWC 8583 1 December 2014).
- 10 Furthermore, the framework of the review was considered in *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (the Preliminary Jurisdictional Issues Decision). The Preliminary Jurisdictional Issues Decision determined that parties seeking to vary a modern award in the context of the 4 yearly review must advance a merit based argument in support of the variation and that 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. Where a modern award is varied in the context of the Review, it must only be varied to the extent necessary to achieve the modern awards objective.
- 11 Whilst we appreciate that presently there is no application by a party to vary the PIA to include a casual conversion clause and that the proposed variation is one advanced by the Commission itself, the Guild submits that any variation should still be one supported by a merits based argument on the basis of probative evidence demonstrating the need for the variation in order to provide a fair and relevant safety net. In our submission, there is presently no such material before the Commission warranting the variation proposed.
- 12 The Guild respectfully requests the opportunity to advance submissions and if necessary to adduce evidence concerning any variation to the PIA to include a casual conversion clause and the form of such a provision.

Clause 13- Ordinary hours of work:

- 13 The Guild supports the variation to clause 13.4 of the Revised Exposure Draft proposed at paragraph [142] of the Decision.

Clause 14- Rostering arrangements – full and part time employees:

- 14 Whilst the Guild appreciates the concerns of the Commission raised at paragraph [153] of the Decision that the meaning of 'rostered to regularly work Sunday's' is imprecise, the Guild does not support to proposed variation to the Revised Exposure Draft set out at clause [156] of the Decision nor the removal of the words "regularly works Sundays' from clause 14.1 of the Revised Exposure Draft.

- 15 We reiterate that the omission of these words has changed the legal effect of the award, by requiring an employer to roster an employee for three consecutive days off each four weeks including a Saturday and Sunday, even in circumstances if an employee is only rostered on three Sunday's in a four week period on a one of basis or for a short period of time. Furthermore, this obligation removes flexibility in rostering currently available to employers under the current terms of the PIA.
- 16 The problems which could arise from this variation are best illustrated by way of an example. Assume a Pharmacy employs two Pharmacists who work three Sundays and a single Sunday respectively each four week cycle, we note that at all times the Pharmacy is open; there must be at least one Pharmacist on duty. Further, assume the Pharmacist who works a single Sunday in each four week cycle has requested a period of leave of two weeks. On the basis of clause 14.1(e), it would be a breach of the Award for the employer to roster their current Pharmacist to cover the period of leave, despite this being a one off arrangement.
- 17 We note that the concept of an employee being "regularly rostered to work Sundays" is used frequently with respect to defining who is a shift worker for the purpose of the additional week of annual leave provided for at section 87(b) of the *Fair Work Act 2009*, including at clause 22.2 of the Revised Exposure Draft. Neither the award, the Act itself, nor the explanatory memorandum defines this term. The meaning of this term has however developed as a result of cases including *Shift Workers case 1972 AR (NSW) 275* and *Media, Entertainment and Arts Alliance [MEAA] and Theatrical Employees (Sydney Convention and Exhibition Centre) Award 1989 [1995] AIRC Print M7325*. It is now understood to mean 34 Sunday shifts.
- 18 If the Commission is concerned that the term 'regularly works Sundays' is ambiguous or lacks specificity in the context of clause 14.1(d), in our submission it would be more appropriate to define what 'regularly works Sundays' means with more clarify as an alternative to altering the existing legal obligation.

Issues for comment raised by the Full Bench:

Clause 4 – Coverage:

- 19 At paragraph [77] of the Decision, the Commission has observed that it is difficult to determine from the terms of the current award whether the person to whom labour is supplied needs to be an employer covered by the PIA by virtue of employing other employees in the community pharmacy industry or acquires that status by being supplied with the labour.
- 20 Clause 4.5 of the PIA provides as follows:
- 4.5 This award covers any employer which supplies labour on an on-hire basis in the industry set out in clause 4.1 in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry. This subclause operates subject to the exclusions from coverage in this award (emphasis added).***
- 21 The Guild submits that the intention of the current provision is that the person to whom labour is supplied is also to be an employer covered by the award.
- 22 As the PIA is not an occupational award, rather it is an industry award, it is foreseeable that Pharmacists could be supplied on an on-hire basis to host employers in various industries. For example a Pharmacist in a community pharmacy, or a Pharmacist in a public hospital or a Pharmacist engaged in community services in an educational capacity, in each case the

employee remains the same though the industry and therefore awards coverage of the host employer would be different.

Clause 10 – Part-time employment:

- 23 The Commission has observed at paragraph [124] of the Decision that there is a tension between clause 10.5 (which provides that a variation of the matters in clause 10.4(a) to (d) must be *agreed*, in writing) and clause 10.8 (which allows an employer to *unilaterally* change the matters mentioned in clause 10.4(b) to (d) upon the giving of the prescribed notice). Due to renumbering of clause numbers in the Revised Exposure Draft, we take the reference to clause 10.8 to be 10.9 of the Revised Exposure Draft.
- 24 The Guild submits that there is not an inherent tension between clauses 10.5 and 10.9.
- 25 Clause 10.4 requires that the employer and a part-time employee must agree at the *commencement* of the employment to those matters listed. Clause 10.5 merely provides this written agreement must provide for variations by agreement to any of those matters must be in writing. It does not provide that variations must be by agreement, merely stipulates that if there is an agreement between the employer and employee to vary those matters in clause 10.4 that this must be reduced to writing. Further there is no restriction contained in clause 10.5 as to which of those matters in clause 10.4 may be varied by agreement between the employer and employee.
- 26 Clause 10.9 however affords an employer the positive capacity to alter only the roster of a part-time employee, but not the number of hours agreed under clause 10.4 by giving the required notice.
- 27 The Guild submits that no variation to these provisions is necessary.
- 28 Further at paragraph [125] of the Decision, the Commission has invited the Interested parties to comment on whether the agreement referred to in clause 10.10 should be in writing. As all other variations to the hours of work of a part-time employee must be made in writing, it is preferable that this also be in writing.

Schedule A – Classification Definition:

- 29 The Commission has provisionally decided to include a definition of Dispensary Assistant at clause A.3 of the Revised Exposure Draft based on the definition proposed by the parties.
- 30 The Guild has considered the amendments to the proposed definition and the appropriateness of a definition in the context of the classification structure generally. We note that if the definition in its current form is retained at clause A.3, Level 3 is the only classification under the award which contains an indicative task list or definition. By comparison, the remaining classification descriptors are linked to the relevant competencies and qualifications of the role.
- 31 In our view the inclusion of an indicative task list in the form proposed could lead to confusion as many of the tasks listed could be performed by both a dispensary assistant and a pharmacy assistant across a number of levels in the PIA. The primary distinction between a dispensary assistant and a pharmacy assistant is that the dispensary assistant undertakes these tasks in the dispensary section of the pharmacy whilst also assisting the pharmacist in the dispensing of pharmaceuticals under the direct supervision of the pharmacist. A pharmacy assistant of any classification level may also undertake the same tasks, however they will not do so in the dispensing section of the pharmacy.
- 32 On this basis, the Guild proposes the following amended definition of Dispensary Assistant:

A.3 Pharmacy assistant / Dispensary assistant level 3 is an employee who has acquired the competencies required to be the holder of a Certificate III in Community Pharmacy, as determined by the National Quality Council or a successor body, and who is required by the employer to work at this level.

A pharmacy assistant / dispensary assistant level 3 may be required by the employer to

(a) supervise pharmacy assistants levels 1 or 2; or

-(b) work in a compounding lab or compounding section of a community pharmacy assisting with extemporaneous preparations as the major part of their duties.

- 33 Further, the parties discussed the potential to revisit the classification structure of the PIA in a conference before Commissioner Bissett on 10 February 2015¹ following alterations to competency standards and training packages in the community pharmacy industry. The Guild submits that, were a definition of Dispensary Assistant to be included in the PIA, this could be a matter considered by the parties in the context of those discussions.

Clause 18 – Transport Reimbursement:

- 34 The Guild supports the amended to clause 18.6 proposed by the Commission at paragraphs [202] to [204] of the Decision.

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¹ Transcript PN332 to PN342.