

24 May 2016

**4 Yearly Review of Modern Awards - Transitional Provisions  
AM2014/303**

1 We refer to the above matter in which we act for the Pharmacy Guild of Australia ("**the Guild**").

**Background**

2 These submissions are made in accordance with the Directions of his Honour Vice President Watson of Friday 6 May 2016.

3 We note the Guild's interest in these proceedings is confined to the variation to the *Pharmacy Industry Award 2010* ("**PIA**") sought by the Shop, Distributive and Allied Employee's Association ("**SDA**"). The proposed variation seeks to insert a provision into the PIA which compensates employees for "disabilities with the performance of work in remote locations".

4 The Guild relies upon its earlier submissions dated 17 April 2015 and continues to oppose the variation to the PIA sought by the SDA.

**The SDA Application**

5 The SDA filed a draft determination in these proceedings on 6 March 2014 seeking to include a new District Allowance in the PIA. An amended Draft Determination was filed 11 April 2016 seeking to include a new District Allowances clauses into the PIA as follows:

**Clause 19.7 - District Allowances**

**[2]** *Replace sub-clause 19.7 with:*

- (a) *An employee in a location more than 450km but less than 900km by geodesic distance from any state or capital territory will in addition to all other payment be paid an allowance per week of [X]% of the standard rate for the disadvantages of working in that location.*
- (b) *An employee in a location more than 900km by geodesic distance from any state or capital territory will in addition to all other payment be paid an*

*allowance per week of [X]% of the standard rate for the disadvantages of working in that location.*

(c) *Clauses 19.7(a) and (b) above do not apply to employees located in Cairns or Townsville in the State of Queensland (First Model).*

- 6 The SDA proposes an alternative model to that of geodesic distance being a schedule of locations in which the District Allowance would apply (**Second Model**).
- 7 Neither the First Model nor Second Model specify the quantum of the allowance sought by the SDA. The Second Model has not been sufficiently developed so as to identify which locations may be subject to a District Allowance. The SDA submissions request that the Commission establishes a working party to determine the appropriate quantum of a District Allowance should the Commission be minded to grant the variation sought.
- 8 The failure to quantify or provide any specificity of the locations to which the variation would apply is a fundamental flaw with the SDA Application. In circumstances where there is no certainty of the quantum or potential impact of the proposed variation, the Commission cannot be satisfied that the variation is necessary to achieve the modern awards objective under section 138 of the *Fair Work Act 2009* (Cth) (**the Act**). Should the SDA press its variation to the PIA, it should do so having sourced sufficient evidence to quantify, properly identify and provide justification for the necessity of the inclusion of a new District Allowance.
- 9 In its submissions dated 17 April 2016, the Guild noted at paragraphs [13] to [14] what were assumed to be drafting errors in the proposed clause, namely our assumption that the clause was intended to apply to employees in a location of a certain "geodesic distance from any state or capital territory capital city". As the amended determination replicates the wording of the previous determination, the Guild has concluded that the ambiguous and arguably meaningless wording is intentional, or in the alternative the SDA has not read the submissions of the parties in this matter and rectified the technical deficiencies noted therein with respect to their clause.

#### **Legal basis for the inclusion of District Allowances**

- 10 In its Preliminary Jurisdictional Issues Decision [2014] FWSFB 7767, the Full Bench stated:
- “[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).*
- 11 The SDA has filed one witness statement specific to the community pharmacy industry being the unsigned and undated statutory declaration of Ms Mandie Miller.

12 Ms Miller's evidence goes to the living expenses she incurs as a result of her own personal circumstances. The SDA has failed to lead evidence in relation to the PIA which could assist the Commission in determining the impact of Ms Miller's location on her personal expenditure and the differences in her expenditure which could arise by reference to location.

13 We note also that Ms Miller resides in Broken Hill. The PIA already contains a district allowance to compensate employees for the exigencies associated with working in the county of Yancowinna (which includes Broken Hill) at clause 19.7. Clause 19.7 provides as follows:

*"An employee in the County of Yancowinna in NSW (Broken Hill) will in addition to all other payments be paid an allowance for the exigencies of working in Broken Hill of 4.28% of the standard rate."*

The inclusion of an additional District Allowance as sought by the SDA would have the result of employees in Broken Hill 'double dipping' for a benefit we assume is associated with the same disability.

14 On a proper assessment of the evidence led by the SDA in relation to the PIA, the Guild submits that the SDA has failed to adduce evidence of a probative nature capable of satisfying the Commission that the variation sought to the PIA is necessary to meet the modern awards objective. We note that the evidence of a single employee in a location already subject to a District Allowance falls well short of the threshold required.

15 We also note the SDA appears to have advanced a difference construction of the relevant legislative framework in the context of this application to vary the PIA when compared to other matters presently before the Commission in the 4 yearly review, specifically the Penalty Rates Case (AM2014/305).

16 At paragraph 11 of its submissions with respect to this matter, dated 11 April 2016, the SDA submits that the Full Bench is not required to make a finding that a modern award is not achieving the modern awards objective in order to make a variation. By way of comparison, in the Penalty Rates Case the SDA has argued that in order to enliven the discretion of the Full Bench to vary a modern award in the context of the 4 yearly review, the Commission must first be satisfied that, since the making of the modern award, there has been a material change in circumstances relating to the operation or effect of the modern award with the consequence that, having regard to the considerations in s 134(1) of the Act, the award is no longer meeting the modern award objective.<sup>1</sup>

17 Whilst the Guild submits the SDA's narrow characterisation in the Penalty Rates Case of the Commissions powers to vary awards in the context of the 4 yearly review is erroneous, it remains that on its own interpretation of the relevant legislative framework in the context of the 4 yearly review, the SDA has failed to demonstrate what material change in the circumstances relating to the operation or effect of the PIA, having regard to the modern awards objective has resulted in the PIA no longer meeting the modern awards objective

18 The SDA appears to be advancing a lower threshold for the variation sought in circumstances where the SDA is the moving party.

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<sup>1</sup> SDA Submissions in AM2014/305 dated 21 March 2016 at paragraph [12].

## **Factual basis for the inclusion of District Allowances**

19 The SDA has had regard to the modern awards objectives contained at section 134 of the Act as the factual basis supporting the inclusion of District Allowances in the PIA. The Guild relies upon its submissions dated 17 April 2016 with respect to these matters and makes the following supplementary submissions.

### *s 134(1)(f) The likely Impact of Exercising Modern Award Powers on Business Including on Productivity, Employment Costs and the Regulatory Burden*

20 At paragraph 47 of its submissions dated 17 April 2016, the Guild provided a series of examples of the uncertainty for employers in particular locations arising from the current wording of the SDA Draft Determination. Those examples remain relevant.

21 By way of further example of the regulatory burden and additional employment costs which could arise from the variation to the PIA sought by the SDA, the Guild notes the following, which is illustrative of the practical effect of the SDA Claim:

- (a) Gladstone, Queensland is 440km from Brisbane, Gladstone has a moderately sized population and a significant industrial economy including a port.
- (b) The town of Targinnie is located 452 km from Brisbane and 23 km from Gladstone.
- (c) The town of West Stowe is located 442km from Brisbane and 22km from Gladstone.

22 In the above example, presumably the residents of both Targinnie and West Stowe would treat Gladstone as the nearest regional centre. The distance of both towns from Gladstone, being approximately 22 km is certainly significantly less than the distance from each town to Brisbane. Although both towns are of almost identical distance to the nearest regional centre, if the variation to the PIA sought by the SDA is made, the residents of Targinnie who are employed in the community pharmacy industry would receive a District Allowance, however their counterparts in West Stowe would not. This outcome is absurd.

## **Conclusion**

23 The Guild submits that the variation to the PIA sought by the SDA to include a location based allowance should be rejected. The SDA application lacks merit and is not accompanied by supporting probative evidence.



Solicitor: Jessica Light  
Direct line: (02) 9018 9940  
Email: [jligh@meridianlawyers.com.au](mailto:jligh@meridianlawyers.com.au)



Principal: Sharlene Wellard  
Direct line: (02) 9018 9939  
Email: [swellard@meridianlawyers.com.au](mailto:swellard@meridianlawyers.com.au)