

s. 156 - Four Yearly Review of Modern Awards

Pharmacy Industry Award 2010

AM2014/209

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Joint Submission

Revised Plain Language Draft of 20 January 2017

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By



**Shop Distributive and Allied Employees' Association (SDA)**

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

**Health Services Union (HSU)**

**Dated:** 6 February 2017

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1. The Shop Distributive and Allied Employees' Association (SDA), the Association of Professional Engineers, Scientists and Managers Australia (APESMA) and the Health Services Union (HSU) makes these submissions on the – Pharmacy Industry Award – Plain Language Draft (20 January 2017) in accordance with the decision issued by the Full Bench on 20 January 2017<sup>1</sup>.

### **Clause 2 Definitions – on-hire**

2. The union parties support the decision of the Full Bench to delete the definitions of 'on-hire employer' and 'on-hire employee' and to insert the definition of 'on-hire' from clause 3.1 of the current award.
3. The decision invites submissions as to whether 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.
4. We submit that the intention of the current provision is that employers provided with labour from a third party, such as a labour hire company, is an employer covered by the Pharmacy Industry Award. An example of this in practice is the use of locum pharmacists. Locums are usually hired for short periods to cover absences due to other pharmacists taking leave of various types. They can be hired directly by the employer or can be sourced through an agency or labour hire company. They do the same work of the pharmacist they are replacing in the community pharmacy.
5. Whilst an employer who is supplied labour is most likely to be an employer covered by the award by virtue of employing other employees working in the community pharmacy we submit that the intention is that they acquire the status by being supplied with the labour.

### **Clause 4 Coverage**

6. The union parties agree that the deletion of the words 'by retail' in clause 4.1 and the provisional view of the Full Bench to delete all of the words after 'government' in clause 4.1(c) satisfies the issues raised in submissions and during the hearing on 15 December.

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<sup>1</sup> [2017] FWC FB344

7. We submit that this redraft resolves any outstanding issues in relation to the coverage clause.

### **Clause 10 Part-time employment**

8. Paragraph [124] of the decision invites submissions in respect of a possible tension between clause 10.5 and clause 10.8 of the Exposure Draft (10 November 2016). The union parties submit that there is no tension between clause 10.5 and clause 10.8 of the Exposure Draft.
9. Clause 10.5 is referring to 'any variation agreed by the employer and the employee' and stipulates that any agreement to vary must be in writing. Clause 10.8(a) refers to a unilateral change by the employer to the roster of a part-time employee and stipulates the amount of notice required to be given to the employee and that the notice must be in writing. Clause 10.8(b) refers to an agreed change to the roster of a part-time employee. As this is an agreed variation to terms prescribed in clause 10.4(a) to 10.4(d) this agreed change would be subject to clause 10.5 which requires that an agreement to vary be in writing.
10. For clarity we suggest that clause 10.8(b) could reference clause 10.5. This would then require an amendment to the proposed redrafted clause 10.10 with the inclusion of the reference to clause 10.5.
11. The decision has also asked that the parties identify any residual issues which have been raised but not yet addressed. In the union submission filed on 22 December 2016 we made submissions at paragraph 12 regarding the removal of the words 'on a regular pattern of work' from clause 10.4. We submit that these words should be retained as it is the regular pattern of work which determines the employee is in fact a part-time employee.

12. The union parties, at paragraph 16-22, made submissions in relation to the complexities of the operation of additional hours in the part-time provisions. There was much discussion during the hearing on 15 December 2017 regarding additional hours for part-time employees and the possible ambiguities contained in the part-time provisions resulting from the ability of part-time employees to agree to work additional hours as a casual or if no agreement is reached to be paid additional hours at overtime rates.
13. The part-time provisions in the Pharmacy Industry Award 2010 were varied as a result of a joint application made by the Pharmacy Guild, the SDA and APESMA shortly following the modernisation of the Award. The application sought to enable part-time employees to agree to additional hours at the casual rate rather than the overtime rate to ensure employers were not discouraged to offer additional hours to part-time employees.
14. A decision<sup>2</sup> of a Full Bench of the Commission granted this variation. This decision has impacted on some operational aspects of the Award which we hope will be clarified as part of the plain language drafting process.
15. The union parties also raised an issue with the change to the wording contained in clause 12.11 of the current award in the redraft of clause 10.10.
16. The wording has been altered from 'as a casual employee and subject to the casual provisions of this award' to 'on the terms applicable to a casual employee'. We submit that this may change the legal effect and to avoid this the current terminology should be retained.

## **Clause 11 - Casual Employment**

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<sup>2</sup>[2009]AIRC FB 978

17. As per paragraph [130] of the decision the Full Bench have expressed a provisional view that clause 11.2 be deleted and a casual conversion clause be inserted. The union parties strongly support this provisional view. We rely on our previous submissions<sup>3</sup> in relation to this issue.
18. Whilst the union parties are satisfied with the provisional view of the Full Bench that the form of the casual conversion clause will be determined after the decision of the Part-time and Casual Employment Full Bench we would be supportive of the adoption of a casual conversion clause which is consistent with the clause contained in the Pharmacy Industry Award Transitional Provision at Appendix A9 as this is what has been applied and is well understood within the community pharmacy industry.

### **Clause 13 – Hours of Work**

19. Paragraph [142] of the decision provides a provisional view that clause 13.4 be amended in the following way to delete the cross-reference to clause 9:  

*'The maximum number of ordinary hours of work per week for a full-time employee ~~per week~~ are 38 (or 76 ordinary hours over 2 consecutive weeks) ~~as set out in clause 9 – Full time employment.~~*
20. The union parties agree that the proposed wording resolves the issues raised.
21. In paragraph [144] of the decision the Full Bench proposes not to vary clause 13.5 in response to the Pharmacy Guild submissions. The union parties agree with the Guild that this provision is additional to the current Hours of Work clause. While we are not opposed to clarifying in the clause what the maximum number of hours of work we are not convinced that clause 13.5 does that appropriately.
22. Given the complexities that have arisen in relation to the terms which apply to additional hours worked by a part time employee, simply referencing clause 10 may compound any confusion about when overtime may apply.

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<sup>3</sup> SDA and others Submission to FWC, 5 September 2016, paragraphs 23-31 and SDA and others Submission to FWC, 21 November 2016, paragraphs 44-45.

#### **Clause 14 – Rostering Arrangements – full-time and part-time employees**

23. The union parties agree with the provisional view of the Full Bench in paragraphs [154] to [156] that clause 14.1(e) be amended as follows:

*employees rostered to work (whether ordinary hours or overtime) on ~~up to~~  
3 Sundays in a 4 week cycle must be rostered to have 3 consecutive days off  
~~every 4 weeks~~ in that 4 week cycle, including a Saturday and Sunday.*

24. We submit that the proposed wording resolves the issues raised by interested parties.

#### **Clause 16.2 Junior wages**

25. The redraft of clause 16.2 contains a table instead of a list. The union parties submit that a table is the most appropriate format as it is clear and easy to understand. We also agree with the introductory wording proposed for the table.

#### **Clause 18 – Allowances**

26. The union parties support the proposed amendment to clause 18.6 Transport Reimbursement contained in the decision at paragraph [202].
27. We submit that this resolves the anomaly identified in the current clause during the Full Bench hearing on 15 December 2016. As per the discussion at the hearing, the union parties submit that the intention of the opening words of the current clause is to provide an entitlement for reimbursement of transport taken outside of the specified work hours in both directions; from the place of employment to the usual place of residence and from the usual place of residence to the place of employment.
28. The opening words of the current clause provide that:

*'Where an employee commences and/or ceases work after 10.00pm on any day or prior to 7.00am on any day and the employee's regular means of transportation....'*

29. If the intention of the entitlement is to provide transportation for work which commences and/or ceases outside of the specified hours then travel is required in both directions; from place of residence to place of employment to commence work and from place of employment to place of residence when ceasing work.
30. We submit that the intention of the entitlement is confused by the last line of the current clause only referencing 'from place of employment to the employee's usual place of residence' and that the amendment proposed in the decision will clarify this anomaly.
31. The union parties also support the change of 'taxi fare' to 'commercial vehicle' as this allows for the greater variety of transport available since the making of this Award.

#### **Clause 21 Penalty Rates**

32. The union parties have identified an unintentional drafting error in clause 21.1. The last word of the clause 'days' appears to have been deleted in both the track changed and clean version of the Exposure Draft published on 20 January 2017.