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Dear Associate

#### **AM2016/15 PLAIN LANGUAGE REDRAFTING - PHARMACY INDUSTRY AWARD 2010**

We refer to the above proceedings and confirm that we act on behalf of Australian Business Industrial and the New South Wales Business Chamber.

During the conferences on 22 February and 18 April 2017 there was a discussion regarding clause 4.3(a) of the plain language Exposure Draft, which deals with the application of the award to on-hire employers.

As foreshadowed by Ms Thomson of our office by email dated 26 April 2017, our clients wish to make the following submissions in relation to this issue.

#### **Background**

By way of background, we note that this issue has its genesis in the Full Bench decision of 20 January 2017(citation), in which the Full Bench, at [77], 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 Pharmacy Award by virtue of employing other employees in the community pharmacy industry or acquires that status by being supplied with the labour. The definition of on-hire does not provide any assistance in that regard. We invite submissions as to whether the intention of the current provision is that*

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*the person to whom labour is supplied is also to be an employer covered by the award, or if some other outcome is intended.* (emphasis added)

A number of parties subsequently filed submissions in respect of this issue, and we have had the benefit of reviewing those submissions.

Our clients support the submission of Business SA, as filed on 27 April 2017. In further support of the Business SA submissions, our clients make the following submissions.

#### **Clause 4.5 is clear and unambiguous**

Our clients submit that the meaning of clause 4.5 of the Award is clear and unambiguous. When read in conjunction with clause 4.1, clause 4.5 operates to extend application of the Award to on-hire employers who supply employees 'in the industry' (as defined in clause 4.1), where those employees are covered by classifications set out in the Award. The Award also covers on-hire employees while they are engaged in the performance of work for a business 'in that industry'.

An ordinary reading of clause 4.5 demonstrates that the provision is focussed on on-hire employers, along with the employees of those on-hire employers. The clause does not deal with the businesses to whom labour is supplied (i.e. the host businesses) at all.

#### **Intention of the provision**

Notwithstanding the clear and unambiguous meaning of clause 4.5, the Commission has sought the views of the parties as to whether the intention of the provision was to somehow capture or endeavour to regulate the 'person to whom labour is supplied' (i.e. the host business).

This answer to this question, in our clients' submission, is no.

This is reinforced when one considers the circumstances leading to the development of the provision during the Award Modernisation process. During Award Modernisation, the AIRC considered whether a separate modern award should be made for the labour hire industry. However, it ultimately decided not to do so. In a Statement issued on 17 November 2009, a Full Bench of the AIRC observed that:

*[2] 'During the consultations which followed the statement of 25 September 2009, it became apparent that most of those participating take the view that labour hire or on-hire employers and their employees should be covered by the award covering the host employer to whom the employees are on-hired and that most modern awards should have a provision in the coverage clause to that effect.*<sup>1</sup> (emphasis added)

The AIRC released draft model provisions to give effect to this approach, and parties were invited to make submissions on those provisions. In its subsequent Decision of 4 December 2009 ([2009] AIRCFB 945), the Full Bench considered the parties' submissions with respect to the model on-hire provisions, and made some minor amendments to the draft model provisions. However, none of the Bench's findings or observations in their decision suggested any deviation or departure from the original intention of the Bench with respect to the provisions; that is, the provision was intended to

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<sup>1</sup> [2009] AIRCFB 925





regulate the on-hire employers and their employees - it was not intended to deal with the host businesses.

In light of the above, our clients respectfully submit that:

1. a plain reading of the clause makes clear that the provision does not extend coverage of the Award to a host business, by reason of it hosting on-hire employees who are (and whose employer is) covered by the Award; and
2. the contextual indicators referred to above support the conclusion that the provision was never intended to have any impact on host businesses.

If you have any questions, please contact Kate Thomson on (02) 4989 1003.

Yours sincerely

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