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**Sent:** Thursday, 23 February 2017 5:11 PM

**To:** Chambers - Ross J

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**Subject:** AM2014/209 and AM2016/15 - Pharmacy Industry Award 2010 - Plain language re-drafting On Hire query

Dear President

Further to the Commission's request for further submissions regarding the on-hire matter raised in the Full Bench Decision [2017] FWCFB 344 and our emailed request for an extension of time yesterday, Business SA has conferred with other employer organisations, including ACCI, and we now attach our submissions.

Please contact either myself or Chris Klepper for further information.

regards



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# Business SA Submission

## 4 yearly review of modern awards – *Pharmacy Industry Award* – Further Submissions

23 February 2017

## Introduction

On 20 January 2017, the Full Bench of the Fair Work Commission (Commission) released a decision relating to the plain language drafting guidelines and award specific matters for the *Pharmacy Industry Award 2010*.<sup>1</sup> This decision provided a range of provisional views and highlighted issues regarding the *Pharmacy Industry Award*. Parties were invited to comment<sup>2</sup> on the provisional views, issues highlighted<sup>3</sup> and reply to submissions made.<sup>4</sup> Business SA's Submissions and Submissions in reply responded to an invitation in the Full Bench Decision<sup>5</sup> to make specific 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, or if some other outcome is intended." At a hearing before the Full Bench on 22 February 2017 Business SA was asked to provide further submissions regarding this matter within 24 hours. Business SA requested an extension of time to enable communication with other employer organisations which it has done and thanks the Commission for this opportunity to make further submissions on this issue.

## Why this matter is important to South Australian businesses

*As South Australia's Chamber of Commerce and Industry, Business SA is the peak business membership organisation in the State. Our members are affected by this matter in the following ways:*

- South Australian businesses are impacted by any changes in the award system.
- South Australian employers and employees will jointly benefit from well drafted and effective modern awards, better enabling both parties to understand their rights and responsibilities.
- Small business owners make up a large proportion of our membership, these businesses are often not able to devote the necessary resources to fully understand Australia's complex workplace regulations.
- The modern award objective is to provide a fair and relevant minimum safety net of terms and conditions.<sup>6</sup> Modern awards must be drafted such that those using the award are able to determine what they can expect and what is expected of them.
- The Plain Language re-drafting process must not simplify awards such that they lose legal clarity. Certainty must prevail over simplicity.
- Whilst the Pharmacy Industry Award 2010 was selected as the pilot award for this project, the parties are obliged to consider the impact on other Awards.

*For further information from Business SA's policy team, please contact Karen van Gorp, Senior Policy Adviser, or Chris Klepper, Policy Adviser, (08) 8300 0000 or at [karenv@business-sa.com](mailto:karenv@business-sa.com) or [chrisk@business-sa.com](mailto:chrisk@business-sa.com).*

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<sup>1</sup> [2017] FWCFB 344.

<sup>2</sup> [BSA Submissions 060217](#)

<sup>3</sup> [2017] FWCFB 344, [226].

<sup>4</sup> [BSA Sub in Reply 100217](#)

<sup>5</sup> [2017] FWCFB 344, [77].

<sup>6</sup> *Fair Work Act 2009* (Cth) s 134(1).

## Further Submissions

1. Having discussed this matter with other employer organisations, including ACCI, and having regard to other awards with similar provisions,<sup>7</sup> Business SA maintains its submissions to date - that “some other outcome is intended”.

Business SA submits that the “other outcome” is to determine the coverage of an on-hire business and its employees performing work in a community pharmacy business as opposed to determining the coverage of the community pharmacy business to which the labour is supplied.

2. Clause 4 of the Pharmacy Industry Award 2010 (Award) relates to coverage.

Clause 4.1 of the Award provides:

- 4.1 *This award covers employers throughout Australia in the community pharmacy industry, and their employees in the classifications listed in clause 16—Classifications of this award to the exclusion of any other modern award. The award does not cover employment in a pharmacy owned by a hospital or other public institution, or operated by government, where their goods or services are not sold by retail to the general public.*

Relevantly, clause 4.5 of the Award provides;

- 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.*

Clause 3.1 of the award currently defines “on-hire” as “*the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client*”.

3. Business SA submits the reading of these clauses together is that:

- if a labour hire employer supplies labour to the community pharmacy industry; and
- its employees are on-hired to a business in the community pharmacy industry

the labour hire employer and its employees will be covered by the Award while they are working in the community pharmacy business (host business) (subject to any exclusions in the Award).

4. The Full Bench in its 20 January 2017 decision<sup>8</sup> has stated:

*We would observe 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 the person to whom labour is supplied is also to be an employer covered by the award, or if some other outcome is intended.*

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<sup>7</sup> Attachment A

<sup>8</sup> [\[2017\] FWCFB 344](#)

5. Business SA submits that the current coverage clause is not intended to be concerned with the coverage of a “person to whom labour is supplied” (host business) but rather, would appear to be concerned with the coverage of “an employer which supplies labour on an on-hire basis” and its “on-hire employees”.

The person to whom labour is supplied (the host business) may, for example, not have any employees at all. To the extent that a business is in the community pharmacy industry and does directly employ employees, they are already captured by clause 4.1 of the Award (subject to any exclusions).

6. In response to the Commission’s question above (as underlined) Business SA does not hold the view that “the intention of the current provision [i.e. clause 4.5] is that the person to whom labour is supplied is also to be an employer covered by the award”. The coverage of the community pharmacy business is to be determined discretely according to clause 4.1 only if they are an employer employing employees in the classifications in clause 16 (subject to any exclusions).
7. Business SA respectfully submits that the fact that a host business engages labour through an on-hire arrangement is irrelevant to that assessment of coverage.
8. As such, Business SA maintains its submissions to date - that “some other outcome is intended”. Business SA submits that the “other outcome” is to determine the coverage of an on-hire business and its employees performing work in a community pharmacy business as opposed to determining the coverage of the community pharmacy business to which the labour is supplied.

## Attachment A

Award	Industry or Occupation
Timber Industry <i>Award 2010</i> .	Industry
Pastoral <i>Award 2010</i>	Industry
Educational Services (post-secondary education) Award 2010	Industry
Banking Finance and Insurance Award 2010	Industry
Aged Care Award 2010	Industry
Restaurant Industry Award 2010	Industry
Electrical, Electronic and Communications Contracting <i>Award 2010</i>	Industry
Travelling Shows Award 2010	Industry
Amusement Events and Recreation Award 2010	Industry
Mobile Crane Hiring Award 2010	Industry
Health Professionals and Support Services Award 2010	Industry & Occupation
Rail Industry Award 2010	Industry
Waste Management Award 2010	Industry
Hospitality Industry (General) Award 2010.	Industry
Higher Education Industry – General Staff- Award 2010	Industry
Registered and Licensed Clubs Award 2010	Industry
Cleaning Services Award 2010	Industry
Nurses Award 2010	Occupation
Clerks Private Sector Award 2010	Industry
Horticulture Award 2010	Industry
Building and Construction General Onsite Award 2010	Industry
Manufacturing and Associated Industries and Occupations award 2010	Industry & Occupation

Meat Industry Award 2010	Industry
Social, Community, Home Care and Disability Services Industry <b>Award 2010</b>	Industry
Wine Industry Award 2010	Industry
Security Services Industry Award 2010	Industry