MERIDIAN LAWYERS

Meridian Lawyers Limited
ACN 108 546 774
Level 6, 20 Bond Street, Sydney NSW 2000
GPO Box 3549, Sydney NSW 2001
T +61 2 9018 9999
F +61 2 9018 9900
W meridianlawyers.com.au

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REVIEW OF THE PHARMACY INDUSTRY AWARD 2010
AM2014/209, AM2016/15
SUBMISSIONS ON REVISED EXPOSURE DRAFT

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

2 These submissions are made in accordance with the Directions of his Honour Justice Ross of 17 August 2016 ("**Directions**").

3 In accordance in the Directions, parties are invited to provide submissions in relation to the *Pharmacy Industry Award 2016* ("**Revised Exposure Draft**") of the *Pharmacy Industry Award 2010* ("**PIA**")

4 Where an interested party asserts that a clause in the Revised Exposure Draft has a different legal effect to the corresponding clause in the PIA or the initial exposure draft issued on 9 October 2016 ("**9 October Exposure Draft**"), they are also to have regard to and are to make submissions as to how the legal effect of the clauses differ. Further, we an interested person asserts that a clause in the Revised Exposure draft does not meet the modern awards objective, submissions should specify why this is the case.

5 The Guild also intends to make submissions concerning those clauses referred to the Plain Language Redrafting Full Bench.

Background:

6 The review of the PIA commenced with publication of the 9 October Exposure Draft by the Fair Work Commission ("**Commission**"). Subsequently, the Commission published a revised exposure draft of the PIA which had been drafted in plain language on 30 November 2015 ("**Plain Language Draft**").

7 Interested parties, including the Guild were invited to make submissions in relation to the aforementioned exposure draft and plain language draft. The Guild made submissions on these previous drafts dated 15 July 2015, 28 August 2015, 10 December 2015 and 23 May 2016. To the extent that these submissions raise technical and drafting issues which are not canvassed in these submissions, the Guild continues to press those matters. Futher, the Guild relies upon the relevant Background and consideration of the principles for plain language drafting contained in our previous submissions.

8 The Commission then embarked on a process of user testing of the Plain Language Draft. Following user-testing of the plain language draft, the Commission published two reports on 21 April 2016 concerning the outcomes of the user testing and further revising the Plain Langauge Draft taking into account those outcomes.

9 The Commission has, taking into account the outcomes of the user testing, issued the Revised Exposure Draft. Unless otherwise stipulated, clause references in these submissions are to the Revised Exposure Draft.

Clause 4 - Coverage

10 Clause 4 of the Revised Exposure Draft significantly alters the current coverage of the PIA.

11 In accordance with clause 3 of the PIA, community pharmacy is defined as follows:

community pharmacy means any business conducted by the employer in premises:

(a) that are registered under the relevant State or Territory legislation for the regulation of pharmacies; or

(b) are located in a State or Territory where no legislation operates to provide for the registration of pharmacies;

and

- *that are established either in whole or in part for the compounding or dispensing of prescriptions or vending any medicines or drugs; and*
- *where other goods may be sold by retail.*

12 Clause 4.1(a) of the Revised Exposure Draft has altered the legal effect of the coverage provisions by introducing the requirement that medicines and drugs are sold by retail in a business is established for compounding or dispensing presctipions. The drafting of this clause fails to recognise the distinction in clause 3 of the PIA that a community pharmacy is

a business established either in whole or in part for the compounding or dispensing of prescriptions or vending any medicines and drugs;

*where **other goods may** be sold by retail* (emphasis added).

13 The PIA does not require medicine and drugs to be sold by retail, it simply recognises that goods other than medicine and drugs may be sold by retail.

14 The Community Pharmacy industry is subject to significant regulation and has functions including delivering health services to the community as a result of government funding and also administering medication on behalf of the Commonwealth which is covered by the pharmaceutical benefits scheme. The administration of these medications is not by way of retail, though it is a significant function undertaken by community pharmacy.

15 We also note that clause 4.1(c) has amended clause 4.1 of the PIA which provides:

"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."

16 Similarly to those matters rasied above, clause 4.1(c) alters the legal effect of clause 4.1 of the PIA by only excluding a pharmacy owned by a hospital or other public institution only where their medicines or drugs are sold by way of retail, the reference to 'services' at clause 4.1 of the PIA has also been excluded from clause 4.1(c). The exclusion in the PIA currently operates unless a pharmacy owned by a hospital or public institution sells goods or services to the general public.

17 The amendments to these provisions have the legal effect of narrowing the coverage of and exclusions from coverage of the PIA. The is presently no evidence before the Commission that such a variation is necessary to meet the modern awards objective or in order to provide a fair and relevant safety net.

18 The Guild is concerned at the alteration of the PIA"s coverage as this is a fundamental term of the award and submits that:

(a) clause 4.1 should be replaced with the definition of Community Pharmacy from clause 3 of the PIA; and

(b) the wording at clause 4.1 of the PIA be included as a new clause 4.5;

(c) clause 4.5 be renumbered as clause 4.6.

Clause 10 – Part-time employment:

19 The Guild is of the view that the inclusion of a number of provisions in clause 10 denote a significant departure from the provisions relating to part time employment at clause 12 of the PIA.

20 Clause 12.5 of the PIA which provides for the minimum engagement has been removed from the Revised Exposure Draft. This clause should be inserted into the Revised Exposure Draft.

21 The redrafting of clause 10.1 results in the inclusion of an unnecessary cross-reference. The clause should be reworded to say "*An employee who is engaged to work less than 38 hours per week… is a part-time employee"*. In the alternative, the Guild submits clause 12.1 of the PIA is easier to understand than the redrafted clause and the current wording should be retained.

22 Clause 10.2 provides that *"this award applies to a part-time employee in the same way that it applies to a full-time employee except as otherwise expressly provided by this award"*. This provision redrafts clause 12.9 of the PIA which relevantly provides *"Subject to the provisions contained in this clause all other provisions of the award relevant to full-time employees will apply to part-time employees"*. The new drafting is unclear and confusing. The award does not apply to part time employees in the same way as a full-time employees generally, rather clause 10 provides for matters specific to part-time employment and, subject to those provisions the remainder of the award (unless specifically displaced by part-time specific provisison) otherwise applies to part-time employees. The wording at clause 12.9 of the PIA should be retained.

23 The use of the word *"only"* at clause 10.3 is unnecessary and may have the unintended effect of restricting a part-time employees entitlements under the NES.

24 Clause 10.4 sets out those matters to which and employer and employee must agree in writing at the time of engagement. Clauses 10.5 and 10.6 stipulate those matters which must be specified in an agreement made under clause 10.4. Clause 10.6(b) however is a new obligation on the employer and should be removed.

25 The separation of the other items which are required to be included in the agreement is confusing and unnecessary. It could lead employers or employees to fail to include necessary items in such an agreement. The Guild submits clauses 10.5 and 10.6 should be combined as follows:

> *An agreement under clause 10.4 must state that:*
>
> *(a) any variation agreed by the employer and the employee must be in writing; and*
>
> *(b) the minimum period for which the employee may be rostered to work on any shift is 3 consecutive hours;*
>
> *(c) any time worked in excess of the agreed hours is paid at the overtime rate.*

26 Clause 12.3 of the PIA provides *"any agreement to vary the agreed hours may also be either a permanent agreed variation to the pattern of work or may be a temporary agreed variation, e.g. a single shift or roster period. Such a variation will be agreed hours for the purposes of clause 12(f)"*, clause 12.2(f) of the PIA provides that all time worked in excess of the agreed hours is paid at the overtime rate. This clause has not been included in the Revised Exposure Draft. The Guild submits this provision is a necessary and useful signpost to those using the award that the hours or a part-time employee may be varied by agreement and can be varied subjet to a time limit. This provides certainty to employers and employees as to the length of time for which any agreed variation would apply and serves to minimise disputes about the length of such a variation. These words, and the appropriate reference to the overtime provision should be included at the end of clause 10.4.

27 Clause 10.8 alters the legal obligations of the PIA with respect to roster changes by stipulating that the number of hours agreed in accordance with clause 10.4 cannot be varied by agreement between the employer and the employee. Clause 12.8(a) of the PIA says that a part-time employee's roster, but not the agreed hours, may be varied by notice or in some other constrained circumstances but then states the rostered hours of part-time employees may also be altered at any time by mutual agreement between the employer and employee. Clause 10.8 by comparison restricts the capacity for a variation to the agreed hours, even where there is mutual agreement between an employer and an employee. Clause 10.8 should be reworded to preserve the capacity for agreement to alter the number of hours worked by a part time employee.

Clause 11- Casual employment

28 Clause 12.6 of the PIA provides that an employee who does not meet the definition of a part-time employee and who is not a full-time employee 'will' be paid as a casual employee. Clause 11.1 stipulates they 'may', The word *'may'* should be altered to *'must'*.

12- Classifications:

29 Clause 12.2 requires that a classification must be based on the skill level that the employee is required to exercise in order to carry out the principal functions of the employment. By comparison, clause 16.2 of the PIA makes reference to *"classification by the employer"* we submit clause 12.2 should be varied to say *"The classfiation by the employer…"* to ensure there is no ambiguity as to who bears the obligation to classify employees.

13 Ordinary hours of work:

30 Subclause 13.4 repeats clauses 9, this is unnecessary and one should be deleted.

31 Clause 13.5 alters the legal meaning of the PIA. In accordance with clause 10.10, a. part-time employee may agree to work additional hours that are not reasonably predictable, but which are in excess of their agreed hours under clause 10.4 on the terms applicable to a casual employee. Any such additional hours under clause 10.10 are not necessarily overtime, unless in accordance with clause 10.11 they exceed the maximum daily hours or full-time employment hours provided for in the award. Clause 13.5, when read in isolation fails to account for this capacity for a part-time employee to agree to work additional hours, which may not be overtime hours. This clause could change the legal effect of the award, is not contained in the PIA and should be deleted.

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

32 Clause 14.1(e) has omitted the words *"regularly works Sundays*", found at clause 25.4 of the PIA. The omission of these words has changed the legal effect of the award, by requiring an employer to roster an employee for three consectuvie days off each four weeks including a Saturday and Sunday, even if an employee is only rostered on a Sunday once, in circumstances where such an obligation does not presently exist.

Clause 15 - Breaks:

33 Clauses 15.3 and 15.4 alter the legal effect of clause 28 of the PIA by introducing restrictions on when meal and rest breaks must be taken for shifts of less than 7.6 hours. Clause 28.1 of the PIA provides for a 10 minute paid rest pause for all employees working four or more hours on any day and clause 28.2 of the PIA prescribes an unpaid lunch break and a paid 10 minute rest pause for employees working more than 5 hours on any day. There are no restrictions in either clause on when these breaks may be taken or how far apart they must be. By comparison, clause 28.3 of the PIA provides for an unpaid meal break and two paid 10 minute rest pauses for employees working 7.6 or more hours and subsequently provides restrictions on when those breaks must be taken. The restrictions at clause 15.3 and 15.4 only apply to shifts of 7.6 hours or more, they should not apply to shifts of less than 7.6 hours as they may restrict the flexibility currently available with respect of rostering breaks. The words *"For a shift of 7.6 hours or more"* should be added at the commencement of clauses 15.3 and 15.4 to preserve the current legal meaning of the PIA.

Clause 18 - Allowances:

33.1 The Guild submits clauses 18.2(b) and (c) have unnecessarily complicated the operation of clause 19.2 of the PIA and has included references to payments and allowances not otherwise referred to in the PIA. On this basis, the Guild submits clause 18.2(c) should be deleted and clause 18.2(b) reworded as follows:

"The employer must pay the pharmacists at a penalty rate of 150% for the period of the meal break, regardless of any other penalty rates to which the pharmacist is entitled".

33.2 The Guild has had the opportunity to review the submissions of Business SA dated 2 September 2016 concerning the redrating of clause 18.6 relating to taxi fare reimbursement and supports those submissions.

Clause 20 –Overtime:

34 The Guild submits the note should be removed from Clause 20. The Commission considered the inclusion of NES summaries in [2014] FWCFB 9412 and ultimately determined that any summaries of NES entitlements or links to various legislation would not be included in the legal instrument, rather the Commission foreshadowed an intention to publish an annotated version of the modern awards which may include such summaries or links[1]. The inclusion of the note is contrary to this Decision.

35 The Guild notes the ovetime provisions at clause 20 of the PIA are subject to claim for variation sought by the Shop, Distributive and Allied Employees Association ("**SDA**"). Interested parties have been engaging in consultation concerning this claim and it appears there may be capacity for this matter to be resolved by consent. If this is the case, the provisions at clause 20 would be able to be simplified significantly. The Guild submits these matters should be further explored at the Conference before his Honour President Ross presently listed for 26 September 2016.

Clause 21 - Penalty Rates:

36 The Guild submits that the use of the term *"higher rates of pay (penalty rates)"* at clause 21.1 should be removed and replaced with *"penalty rates"*. Clause 21 does not deal with rates of pay, it prescribes penalty rates applicable to the minimum rates of pay prescribed by the PIA for work at particular times.

37 There appears to be a typographical error at clause 21.3(b), the word *"applies"* should be replaced with *"applied"*.

Clause 25 – Public Holidays:

38 There appears to be an incorrect reference to clause 21.1 at clause 25.2. The cross-reference should be to Table 5 in clause 21.3.

Schedule A- Classification Definitions:

39 The Guild submits clause A.3 has amended the legal operation of clause B.3 of the PIA. Clause B.3 of the PIA refers to a person who is engaged as a 'Dispensary Assistant' being paid as a 'Pharmacy Assitant Compentency Level 3, by comparison A.3 refers to an employee *"required by the employer to… assist a pharmacist in the dispensing section of a community pharmacy"* . The term 'Dispensary Assistant' is one commonly used in the industry to refer to an employee engaged solely to perform dispensary related taks including dispensing medicines, preparing dose administration aids and assisting in the administration requirements of the dispensary. Whilst these are tasks an employee at Levels 1 and 2 could undertake from time to time on a supervised and adhoc basis, an

[1] [2014] FWCFB 9412 at [35]-[36].

employee would not be classified at a Level 3 until they have been engaged in the role of 'Dispensary Assistant'. We also refer to the Guild's prior submissions and those of the SDA both dated 15 July 2015, which record the agreement reached between the interested parties with respect of the classification definition for a 'Pharmacy Assistant Level 3'.

40 We are instructed that the reference to section 5 of the Health Practioner Regulation National Law contained in the definition of 'pharmacy student' and 'pharmacy intern' is incorrect. There is no uniform Health Practioner Regulation National Law, though each state has legislation modelled on the Queensland legislation. Whilst each state has legislation defning 'pharmacy student' and 'pharmacy intern', these definitions may not be contained at section 5 of the legislation. The Guild submits the removal of the words *"section 5 of"* from each of these definitions would ameliourate this error..

Solicitor: Jessica Light
Direct line: (02) 9018 9940
Email: jlight@meridianlawyers.com.au

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