
Fair Work Commission: 4 Yearly Review of Modern Awards

SUBMISSIONS IN REPLY

PHARMACY INDUSTRY AWARD 2010

APESMA SUBSTANTIVE CLAIM

(AM2016/28)

18 APRIL 2018

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

1. BACKGROUND

- 1.1 These reply submissions are filed on behalf of Australian Business Industrial (**ABI**) and the NSW Business Chamber Ltd (**NSWBC**). ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and has some 4,200 members. NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009* (Cth) and has some 18,000 members.
- 1.2 ABI and NSWBC have a material interest in the Four Yearly Review of the Award given that both entities represent numerous employers who operate in the community pharmacy industry.
- 1.3 These submissions are made in reply to:
- (a) The submissions of the Association of Professional Engineers, Scientists and Managers Australia (**APESMA**) dated 3 November 2016 (**APESMA Submissions**); and
 - (b) The submissions and outline of findings APESMA submit should be made based on expert evidence dated 5 April 2017 (**APESMA Expert Evidentiary Submissions**); and
 - (c) The submissions and outline of findings APESMA submit should be made based on lay evidence dated 21 December 2017 (**APESMA Lay Evidence Submissions**).
- 1.4 All three submissions relate to an application for the Fair Work Commission (**Commission**) to vary the minimum rates of pay for pharmacist employees covered by the Pharmacy Industry Award 2010 (**Award**), as well as the insertion of a new classification of 'Accredited Pharmacist'.
- 1.5 ABI and NSWBC oppose the variations sought by APESMA with respect to the variation of minimum rates of pay, and advance the following submissions in opposition to the changes sought by APESMA.
- 1.6 These submissions do not address the proposed insertion of a new classification for 'Accredited Pharmacists'.

2. LEGISLATIVE FRAMEWORK APPLICABLE TO 4 YEARLY REVIEW

2.1 The legislative framework applicable to the 4 Yearly Review has been considered in detail in *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (**Preliminary Issues Decision**).

2.2 Given the publication of the Preliminary Issues Decision, it is unnecessary to outline the legislative framework applicable to the present proceedings in detail. However, for the purposes of these submissions, there are three relevant categories of principles which arise from the Preliminary Issues Decision.

Modern awards objective must be considered

2.3 The Preliminary Issues Decision confirms (at [23]) that the Fair Work Commission (**Commission**) remains at all times obliged to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid;
- (b) the need to encourage collective bargaining;
- (c) the need to promote social inclusion through increased workforce participation;
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work;
- (e) the need to provide additional remuneration for:
 - (i) employees working overtime; or
 - (ii) employees working unsocial, irregular or unpredictable hours; or
 - (iii) employees working on weekends or public holidays; or
 - (iv) employees working shifts;
- (f) the principle of equal remuneration for work of equal or comparable value;
- (g) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;
- (h) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

- (i) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

(This is the modern awards objective).

2.4 This means that, when considering any variation, the Commission should be focused upon ensuring that any new version of the minimum safety net is consistent with the modern awards objective and that the award comprises terms only to the extent necessary to achieve the objective of a fair and relevant safety net.

Merit based evidence required

2.5 The discretion to make determinations varying modern awards is expressed in general terms. However, the need for a 'stable' modern award system suggests that parties seeking to vary a modern award must advance a merit argument in support of the proposed variation (Preliminary Issues Decision at [60]).

2.6 When considering the merit basis to make variations, the Commission held in the Preliminary Issues Decision that:

- (a) there may be cases where the need for an award variation is self-evident. In such circumstances, proposed variations can be determined with little formality (at [23] and [60]);
- (b) where significant award changes are proposed, they must be supported by submissions which address the legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation (at [23] and [60]); and
- (c) in conducting the Review, it is appropriate that the Commission take into account previous decisions relevant to any contested issue and the particular context in which those decisions were made (at [27]).

Provisions included in a modern award may only go so far as to meet the modern awards objective

2.7 Section 138 of the *Fair Work Act 2009* (**FW Act**) (which is relevant to the Review) does not require a party to prove that a variation is necessary for the award to meet the modern awards objective.

2.8 However, what section 138 of the FW Act does require is that the terms included in a modern award go only as far as is necessary so as to meet the modern awards objective:

In the Review, the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (at [36]).

3. LEGISLATIVE FRAMEWORK APPLICABLE TO MINIMUM WAGE VARIATIONS

3.1 When considering whether to vary modern award minimum wages, the Commission must have regard to the objective of establishing and maintaining a safety net of fair minimum wages found at section 284(1) of the FW Act, taking into account:

- (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
- (b) promoting social inclusion through increased workforce participation; and
- (c) relative living standards and the needs of the low paid; and
- (d) the principle of equal remuneration for work of equal or comparable value; and
- (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

(This is the minimum wages objective.)

3.2 The minimum wages objective applies to the exercise of the Commission's powers under Part 2-3 of the FW Act, as well as the modern awards objective.

3.3 Subsection 156(3) of the FW Act provides that, in a four yearly review of modern awards, the Commission may make a determination varying modern award minimum wages only if it is satisfied that the variation of modern award minimum wages is justified for work value reasons.

- 3.4 The phrase *'work value reasons'* is defined at subsection 156(4) as reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:
- (a) the nature of the work;
 - (b) the level of skill or responsibility involved in doing the work; or
 - (c) the conditions under which the work is done.
- 3.5 This definition employs language which is similar to that which has historically been used for work value assessments. The primary differences are that there is no longer any reference to an historical *'datum point'*; i.e. the last occasion on which the work was valued, nor any specific reference to the *'change'* which has occurred.. However, where the work value reasons advanced are that the work has changed, there would usually need to be a starting point.
- 3.6 As APESMA acknowledges at paragraph 33 of its first Submission, its proposed variations constitute a significant change to existing minimum Award wages and consequently it is required by the provisions of the FW Act and the Jurisdictional Issues Decision to advance a cogent merit argument accompanied by probative evidence demonstrating the alleged facts that are said to support the variation.
- 3.7 Furthermore, the variations sought must be consistent with both the modern awards objective and the minimum wages objective. It must also be determined according to the principles that have developed over time that are used to value work.

4. 'WORK VALUE' PRINCIPLES

- 4.1 Work has been valued by the forerunners of the Commission in a relatively consistent manner since the introduction of the total wage and the landmark 1968 decision of Senior Commissioner Taylor in *Vehicle Industry Award*.¹ Senior Commissioner Taylor summarised the criteria which have bearing on the calculation of value as follows:
- (a) *qualifications necessary for the job;*
 - (b) *training period required;*
 - (c) *attributes required for the performance of the work;*

¹ *Vehicle Industry Award* (1968) 213 CAR 146

- (d) *responsibilities for the work, material and equipment and for the safety of the plant and other employees;*
- (e) *conditions under which the work is performed such as heat, cold, dirt, wetness, noise, necessity to wear protective equipment etc;*
- (f) *quality of work attributable to, and required of, the employee;*
- (g) *versatility and adaptability: for example, performing a multiplicity of functions;*
- (h) *skill exercised;*
- (i) *acquired knowledge of plant and process;*
- (j) *supervision over others or necessity to work without supervision; and*
- (k) *importance of the work to the overall operations of the plant .*

4.2 Following this seminal case, *'the development of formal and binding wage-fixing principles in the 1980s resulted in a codification of the process for the assessment of work value in the Work Value Changes Principle'*.²

4.3 Since the 1980s it has been clear that changes in work, by themselves, may not lead to an increase in pay. In *State Electricity Commission of Victoria v The Federated Ironworkers' Association of Australia*³ a Full Bench of the AIRC expressed this limitation in the following way:

In all categories of work except perhaps the most simple, changes become evident with time. It is in the nature of things that new methods of doing the same thing evolve with time, and that skills which qualify a person for a particular category of work may become fully tested, or in some cases the work may thereby be made easier. However it is essential that such changes are not mistaken for genuine work value change.

4.4 By 2004, the method for assessing work value was distilled to an extent that it was included in the Statement of Principles set out in the *May 2004 Safety Net Review - Wages decision* (PR002004), which dealt more broadly with the setting of minimum wages. Principle 6 set out the test for the variation of wage rates for work value reasons:

² At [33] of the decision of the Full Bench in the application by United Voice and the Australian Education Union for an equal remuneration order ([2018] FWCFB 177).

³ Print G7498, 22 May 1987, per Coldham J, Cohen J and Griffin C

(a) Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.

In addition to meeting this test a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award structure but also against external classifications to which that structure is related. There must be no likelihood of wage leapfrogging arising out of changes in relative position.

These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this Principle. (emphasis added)

- 4.5 Principle 6 is generally understood to have codified the broad principles dealing with changes in work value which have emerged over time.⁴ The most important concept underpinning this Principle is the requirement that an increase in wages be justified by a ‘*significant net addition*’ to work requirements.

5. APPLICATION OF THE PRINCIPLES TO THE APESMA APPLICATION

- 5.1 The APESMA application is brought on the basis of changes to the work in question. It is not claimed that the work covered by the award was not properly valued when last assessed. Our clients respectfully submit that the Commission’s task in respect of this matter is as follows:

- (a) Consider whether pharmacists (and associated classifications) have experienced changes in work, skill, the level of responsibility required to be exercised and the conditions under which work is performed (if any);
- (b) Consider whether any such changes constitute a ‘*significant net addition to work requirements*’ in relation to the relevant classification; and
- (c) If the Commission is satisfied that the changes in work value do constitute a significant net addition to work requirements, undertake an assessment of how that change should be compensated in monetary terms.

⁴ See [187] of the decision of a Full Bench of the AIRC in the 2005 A.C.T. *Child Care Case*.

5.2 The modern awards objective and the minimum wages objective are also central considerations in this exercise.

6. HISTORY OF WAGE DETERMINATION IN THE COMMUNITY PHARMACY INDUSTRY

6.1 Before 1994, there was no federal instrument that covered pharmacists. Following the referral of the Victorian State Government's industrial relations powers to the Federal system, two interim awards were made in 1994 and 1995.⁵ The classification of 'community pharmacist' in these instruments was broadly aligned with professional scientists under Part IV of the *Metal Industry Award 1976* for the purpose of determining the applicable minimum rate of pay and the relevant relativities.

6.2 In 1996, the *Community Pharmacy Award 1996* was made by Commissioner O'Shea, and contained extended coverage provisions to cover pharmacists in places other than Victoria. The rates of pay in this Award reflected the classifications and rates applicable in each state and territory at the time it was made. Our clients support the submissions made by the Pharmacy Guild of Australia at [26] - [30] in respect of the relativities of these rates of pay to the *Metal Industry Award 1976* in its submission dated 13 June 2017.

6.3 This Award was reviewed in accordance with the *Workplace Relations and Other Legislation Amendment Act 1996 (WROLA Act)* upon application by APESMA. The *Community Pharmacy Award 1998* contained new minimum rates for pharmacists regardless of their working location (except for those in Western Australia). In his Decision⁶, Commissioner Hingley found as follows:

In respect of this application pursuant to Item 49 of Part 2 of Schedule 5 of the WROLA Act, I am satisfied as to the following matters.

1. The applicant has made reasonable attempts to reach agreement with the other parties to the award about how the award should be varied and about the treatment of matters that are not allowable matters.

2. Once varied in accordance with the application before me the award will deal with only allowable award matters.

3. The application is consistent with the criteria in sub-items 7 and 8 of Item 49 of Part 2 of Schedule 5 of the WROLA Act 1996.

⁵ *Community Pharmacy (Victorian) Interim Award 1994* and the *Community Pharmacy (Victoria) Award 1995*.

⁶ C1790 Dec 727/98 M Print [Q2258](#)

4. The application is consistent with the award simplification decision principles [Print P7500].

5. To the extent that the application adopts rates of pay in accordance with the decision in C No. 32994 of 1998 and the Safety Net Review - Wages decision [Print Q1998] it is consistent with those principles and the award simplification principles.

6. The facilitative provisions as set out in the draft order (APESMA2 as amended) are appropriate and reasonable in light of the Award Simplification decision of December 1997 [Print P7500].

7. In respect of the facilitative provisions proposed I am satisfied they are appropriate for workplace or enterprise needs.

6.4 APESMA asserts that there has been no real consideration of the value of work undertaken by pharmacists since that undertaken by Commissioner Hingley in 1998.

7. APESMA'S SUBMISSIONS RELATING TO NET INCREASE IN WORK VALUE

7.1 At paragraph 116 of its original Submissions, APESMA asserts that the changes relied upon as 'significant new increases in the work' undertaken by the relevant classifications since 1998 fall into five main categories:

- (a) An increase in various educational and registration requirements which are indicative of the increase in the skills, knowledge and responsibility required to perform the role of a pharmacist.
- (b) The introduction of additional training so a pharmacist can become and retain registration under the legislative requirements for registration of a pharmacist.
- (c) The introduction of new work that requires additional skills, knowledge and training.
- (d) The introduction of new work that has resulted in an increase in responsibility and accountability.
- (e) An increase in workload and an increase in pressure and on skills and the speed with which vital decisions need to be made

- 7.2 Our clients submit that these grounds do not satisfy the requisite *'significant net addition to work requirements'* to justify the increases sought by APESMA. In this regard, we support the submissions of the Pharmacy Guild of Australia dated 13 June 2017 at [33] - [40].
- 7.3 Furthermore, APESMA acknowledges that there were no work value variations made to pharmacist minimum rates of pay between 1998 and 2010 ([68] of the APESMA Submissions). APESMA asserts that the work value issue was not considered during the AMOD process [74]) and that only minor amendments made to rates for Student and Trainee Pharmacists as a result of a joint application of the Pharmacy Guild of Australia, SDA and APESMA in 2009.
- 7.4 Regardless of whether any explicit consideration was given to the value of the work, our clients submit that the Commission is entitled to conclude that the rates of pay for pharmacists satisfied the modern awards objective when the Award was made. It is now not clear why, seven years after this was accepted to be the case and following the increases which have been made to all modern award rates of pay, that the Commission should make increases of the quantum sought.
- 7.5 If the work value of pharmacists has increased in the manner alleged by APESMA, it is reasonable to conclude that there would have been previous applications to the Commission and its predecessors to increase minimum wages since 1998, or at the very least, since 2010. It is open to the Commission (in the absence of any evidence to the contrary) to conclude that the absence of such applications suggests that the work value changes have not been as significant as APESMA claims.

8. INCREASES SOUGHT BY APESMA

- 8.1 APESMA's failure to establish that there has been a *'significant net addition to work requirements'* means that a consideration of the sought quantum of increase is, strictly speaking, unnecessary.
- 8.2 The increases sought by APESMA represent a significant percentage increase across all classifications:

Classification	Award rate at the time the application was made	APESMA proposal	% increase
Pharmacy Interns			
First half of training	826.20	994.37	20.35%
Second half of training	854.40	1013.49	18.62%
Pharmacist	966.60	1032.61	6.83%
Experienced Pharmacist	1058.60	1147.35	8.38%
Pharmacist in charge	1083.40	1376.82	27.08%
Accredited pharmacist	N/A	1606.29	N/A
Pharmacist manager	1207.40	1606.29	33.04%

8.3 Wage increases which range from 6.83% to 33.04% cannot be said to be consistent with the principles which are required to be considered by the Commission in any exercise of its wage setting powers. The redistribution of relativities between pharmacists who cannot dispense and must be supervised and those who can work autonomously cannot be said to be a proper valuation of the work.

Modern awards objective

8.4 If justified on work value grounds, the wage increases sought by APESMA must only be to the extent necessary to achieve the modern awards objective. However, in our client's submission, the variations sought by APESMA are fundamentally inconsistent with the modern awards objective for the following reasons:

- (a) increases such as those sought will, in our clients' submission, decrease the inclination of employers to engage in collective bargaining, as the rates will already be so high as to preclude bargaining for further increases;
- (b) indeed, the increases are so significant it may actually discourage workforce participation, by reason of potentially decreasing the number of positions which are able to be supported by community pharmacy businesses;
- (c) employees engaged under the Award are already provided with additional remuneration for working the spread hours required in the pharmacy industry through penalty rates and loadings;

- (d) the likely impact on business is significant, due to the increase in labour costs; and
- (e) the likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy is uncertain, but the increases are likely to negatively impact the profitability of the sector.

8.5 The other limbs of the test are, in our clients' submission, neutral.

Minimum wages objective

8.6 For the same reasons, our clients submit that the increases sought by APESMA do not meet the minimum wages objective.

8.7 APESMA has not made submissions nor provided evidence with respect to how the increases sought:

- (a) affect the performance and competitiveness of the national economy, either positively or negatively;
- (b) promote social inclusion through increased workforce participation when the cost of labour will be significantly increased;
- (c) are necessary for this group of employees to ensure equitable relative living standards;
- (d) are necessary to ensure equal remuneration; or
- (e) with respect to intern pharmacists, why it is necessary to make the increases in the quantum sought to ensure fair minimum wages.

9. CONCLUSION

9.1 For the reasons advanced above, the substantive award changes sought by APESMA should not be made by the Commission.

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A handwritten signature in black ink, appearing to read 'K. Thomson', is centered on a light gray rectangular background.

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