**IN THE FAIR WORK COMMISSION**

*Fair Work Act 2009*

*s. 156 – 4 yearly review of modern awards*

**AM2016/28 - Pharmacy Industry Award 2010**

## APESMA Submissions in Reply

There is no order for submissions in reply. But to save time on Monday we consider it sensible to make the Applicant's position about two matters clear.

### The claim

A criticism is made by the Respondents about the quantum sought and relativities. First, the current claim seeks the restoration of the relativities established in 1998. Those relativities have been altered by some flat increases since then.

There is an alternative option available to the FWC. It is to retain the current relativities and increase all of the rates for the classifications by the same percentage. If the FWC adopts this course, APESMA seeks that all rates should be increased by 25%. Of course it is open to the FWC to set any other minimum wage so long as it meets the statutory criteria.

When the claim was made, the claim did not include the 3.3% variation to the Pharmacy Industry Award 2010 made to reflect the Annual Wage Order made from 1 July 2017 ([2017] FWCFB 3500 and PR592107). The current claim should be read as a claim for the amounts sought, plus 3.3% to reflect those variations. Similarly the alternative basis is sought was an increase of 25% on the wage after the 3.3% has been granted.

Second, it has been suggested that an allowance is more appropriate to recognise the skills for accredited pharmacists rather than creating a new classification. The primary claim is for the classification. Alternatively, the FWC may grant an allowance to pharmacists who are the holders of an Accredited Pharmacist qualification. If so, the amount sought (reflecting the current claim) is a weekly allowance equal to the difference between the Pharmacist in Charge rate granted and the rate granted for a Pharmacist Manager.

### The statutory foundation of the claim

This application is being dealt with under s 156(2). The modern award objective applies to this exercise of power: ss 134(2). That objective is to provide a fair and relevant minimum safety net, taking into account certain matters: ss 134(1). As the FWC is setting or varying a modern award minimum wage, the minimum wages objective applies to the exercise of power, taking into account certain objectives: ss 284(2). As it is a variation to wages under the 4 year review, it must be 'justified by work value reasons': ss 156(3). Those reasons are set out in ss 156 (4).

The submissions of the PGA and ABI suggest that it is necessary to apply a 'strict test', that work value 'changes' are being measured, and that there must be a 'requisite significant net addition': see e.g. submissions of the PGA paragraphs 8, 14, 27, 31, 38, 45, 60; ABI submissions paragraphs 4.5, 5.1, 7.1, 7.2, 8.4. They argue these three elements must all be satisfied before concluding an order can be 'justified by work value reasons'. The Applicant says if these high bars need to be cleared, then the evidence justifies a finding in the Applicant's favour.

However, for the following reasons the FWC would be led into error if it required the satisfaction of a 'strict test', focused exclusively on work value 'changes', or required a 'significant net addition' before concluding an order was 'justified by work value reasons' under ss 156(3). First, start with the text of ss 156 (3) and 156 (4). The three additional elements relied on by PGA and ABI are not expressly mentioned in the provisions. There would need to be a compelling reason to construe the provision as subject to any of the implicit conditions. Second, even if there were sufficient ambiguity in the Act, there is nothing in the Explanatory Memorandum that supports the implication. There is no mention there of a strict test or significant net additions: see paragraphs 105, 520, 605-6, 613. Third, the Act adopts part, but not all, of the language of the former wages principles. Take a classic statement from Principle 4 of 1986 principles (other formulations are similar):

> '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 work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification.'*

It is clear ss 156 (4) is based on the first sentence (other than the fact the section does not mention 'change'). But the Act is silent about a 'strict test', 'changes', and a 'significant net addition'. Fourth, the old principles governing work value served the purpose of ensuring wage stability in a society in which there was centralised wage fixation. When construing the meaning of ss 156 (4) its purpose is relevant. But that purpose is derived from the text of the Act, not by imputing to the legislature a purpose that might be considered (or might historically have been considered) to be industrially desirable: see e.g. *Deal v Father Pius Kodakkathanath* (2016) 258 CLR 281 at [37], *Miller v Miller* (2011) 242 CLR 446 at [29] , *AEU v Department of Education and Children's Services* (2012) 248 CLR 1 at [28], *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [26].

All of the above is not to say that change in work value, and the extent of the change, will not be relevant under ss 156. Unless there is a change it may be hard to 'justify' a variation in award rates, and the extent of the change is relevant in assessing the quantum of the change. But s 156 should not be construed as importing unnecessary conditions not mentioned in its terms.