APESMA

SENATE STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

INQUIRY INTO THE FAIR WORK AMENDMENT (SMALL BUSINESS – PENALTY RATES EXEMPTION) BILL 2012

SUBMISSION OF THE ASSOCIATION OF PROFESSIONAL ENGINEERS, SCIENTISTS AND MANAGERS, AUSTRALIA

INTRODUCTION

1. The Association of Professional Engineers, Scientists and Managers, Australia ("APESMA") is an organisation registered under the Fair Work Registered Organisations Act 2009 ("the Act") representing over 25,000 professional engineers, scientists, veterinarians, surveyors, architects, pharmacists, information technology professionals, managers and transport professionals throughout Australia. We are the only industrial association representing exclusively the industrial and professional interests of these groups.

BACKGROUND – OVERVIEW OF THE LEGISLATION

2. The effect of the proposed *Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012* would, if enacted by parliament, prohibit modern awards from containing provisions requiring an *"excluded small business employer"* to pay penalty rates for work performed for the employer unless the work performed consists of more than:
   (a) 38 hours of work in total during a week; or
   (b) 10 hours of work during a 24 hour period.

   For the purposes of the legislation an *"excluded small business employer"* is defined as an employer who employs fewer than 20 employees in:
   (a) The Restaurant and Catering industry; or

(b) The Retail industry.

For the purpose of calculating the number of employees employed by the employer in an industry at a particular time 20 employees may be taken to mean all full-time and full-time equivalent employees. In addition "associated entities" within the industry are to taken to be one entity.

Explanatory Memorandum

3. The Explanatory Memorandum whilst clarifying a number of issues relating to the intention of the legislation does not define the parameters of what constitutes the Retail Industry.

Definition of "Retail" – Community Pharmacy Industry

4. If the definition of Retail Industry is to be interpreted broadly to include almost any retail operation then the Association's interest in the draft legislation is in respect of those of its members who are employed in the Community Pharmacy Industry whose terms and conditions of employment are regulated by the Pharmacy Industry Modern Award 2010.[1]

5. This Award defines a Community Pharmacy in the following terms;

   *"**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."*

APESMA POSITION

6. As a matter of fundamental principle APESMA totally opposes the draft legislation and strongly supports the payment of penalty rates to compensate employees for hours worked outside the standard Monday to Friday working week and for work generally performed during what could be termed "unsociable hours". In this regard APESMA considers that the maintenance of penalty rates is an extremely important national community standard.

[1] Fair Work Australia *Pharmacy Industry Modern Award*, MA000012

However, penalty rates are just one component of an employee's remuneration. Other components include the minimum pay rates; various allowances; availability and on-call provisions; payment for work on public holidays and so on. These provisions are contained in the modern award and along with the NES (National Employment Standards) constitute in their totality the minimum safety net. APESMA submits that if it is proposed that penalty rates be abolished in any industry then this should a matter that is determined on the merits of the case by Fair Work Australia ("FWA") in accordance with the processes established through the Fair Work Act for the review of modern awards.

RETAIL INDUSTRY AND COMMUNITY PHARMACY

7. The issue of whether the Community Pharmacy Industry should be included within the Retail Industry for the purpose of industrial regulation has been previously considered by the Australian Industrial Relations Commission most recently during what was known as the Award Modernisation process. In this regard the Association submits that the Community Pharmacy Industry, while having retail elements is significantly different from the general retail industry.

   Accordingly the Association requests that that the Committee recognises the unique character of Community Pharmacy and recommends its exclusion from the purview of the proposed legislation.

Award Modernisation – Exclusion from Retail Industry

8. As mentioned above the question as to whether the Community Pharmacy Industry should be treated as part of the retail Industry was considered as part of proceedings in respect of *s.576E – Procedure for carrying out award modernisation process Request from the Minister for Employment and Workplace Relations – 28 March 2008* which led to the establishment of the current Modern Award System.

   During this process which was known as "Award Modernisation" the Full Bench of the then Australian Industrial Relations Commission initially determined that the Community Pharmacy Industry should fall within the coverage of what eventually became known as the General Retail Industry Award 2010.

Joint Industry Submission

9. In response to the proposal to subsume Community Pharmacy within the broader Retail Industry the Pharmacy Guild as the representative of Community Pharmacy employers and

APESMA as the representative of employee pharmacists made a joint submission to the Commission proposing that the Community Pharmacy Industry should be covered by a separate award. The submission primarily addressed the fundamental differences between the nature of the Community Pharmacy Industry and the broader Retail Industry. Some of the information that was contained in the joint submission particularly regarding the regulatory framework governing the Community Pharmacy Industry is relevant to the consideration of the draft legislation. Ultimately the Full Bench of The Australian Industrial Relations Commission (AM2008/1-12) at paragraph 284[2] determined that the Community Pharmacy Industry should be regulated by a separate modern award.

Community Pharmacy Industry

10. It is estimated that the Community Pharmacy industry in Australia comprises almost 5000 independently-owned pharmacies, which are highly regulated by both Commonwealth and State Governments. As a frontline healthcare provider to all Australians, regulation affecting pharmacy is necessary for two key reasons:
    - **Public safety**: Pharmacists dispense drugs, many of which are dangerous and all of which must be handled with detailed knowledge and care; and
    - **Government subsidy**: many of these drugs are highly subsidised through the Pharmaceutical Benefits Scheme (PBS), and therefore, must be controlled.

11. The particular role of the pharmacist is to ensure that medicines are provided to patients in a safe and timely manner. This is given legislative effect by restricting – to pharmacists – the sale or supply of medicines regarded as:
    - pharmacy only medicines;
    - medicines that are to be provided to patients only under prescription; or
    - controlled drugs

12. As well as exercising the skill necessary to ensure that a prescription is properly dispensed, a pharmacist is also required to follow specific statutory requirements, including:
    - verifying the provenance of prescriptions;
    - ensuring medicines are labelled according to law; and
    - recording how medicines have been dispensed.

[2] Australian Industrial Relations Commission, Decision [2008] AIRCFB 1000

13. In addition to statutory requirements cited above, pharmacists have professional standards to maintain associated with ensuring that the patient gets the best out of their medication. They also have the right to refuse the sale or supply of medications if they believe that such an action is not in the best interests of the patient. The requirement for registration, compliance with professional standards and the ability to refuse sales separates pharmacy from the common Retail Industry.

14. Legislation also permits pharmacists to manufacture (generally through the compounding of ingredients) medicines for patients. In some jurisdictions, pharmacists must be satisfied that a patient has a clinical need for pharmacy only (that is, non-prescription) medicines. There is also an expectation that pharmacist will be available to counsel patients as to the use of medicines, as well as to be, in many circumstances, the 'first port of call' for the advice of patients.

Commonwealth Regulation

15. At the Commonwealth level, pharmacy remuneration is governed by the PBS and by five year Agreements (the most recent concluded in 2011) between the Commonwealth Government and the Pharmacy Guild which decide:
    - remuneration for pharmacy owners;
    - the number of pharmacies licensed to operate by means of location rules and approval numbers;
    - influence the location of pharmacies to reflect the government's intention of maintaining a well-distributed network of pharmacies so that members of the public enjoy easy access wherever they live;
    - encourage and subsidise adherence to the Quality Use of Medicines (QUM) and the Quality Care Pharmacy Program (QCPP).

16. Additionally, Commonwealth legislation imposes a number of other duties. They include:
    - imposing a duty on pharmacy owners and employee pharmacists who are in control of pharmacies to supervise the pharmacy, so as to ensure that medicines remain under control, and that consumers have access to appropriate advice and prescriptions filled.
    - ensuring infection control standards in a pharmacy remain at a high level;

- being permitted in certain circumstances to distribute syringes to patients with a clinical need;
- issuing, for the purposes of the pharmaceutical benefits scheme a safety net concession card to those who are eligible; and
- being responsible for the supply and safe keeping of drugs of dependence.

Pharmacists are also given the responsibility to perform other tasks for the community including witnessing statutory declarations and issuing medical certificates.

State Regulation

17. At the State level, pharmacies are governed by Pharmacy and Drugs and Poisons Legislation which place strict constraints on the way drugs and poisons are handled and can also mandate the physical layout of pharmacies.

Registration of Pharmacists

18. The professional standards of pharmacists are regulated by the Pharmacy Board of Australia which is responsible for the registration of pharmacists, the monitoring of professional standards. At the moment pharmacists are required to complete 30 hours of continuing professional development each year, which will increase to 40 in 2013, to maintain registration.

19. Community pharmacies also operate within a legislative framework which governs both the handling and storage of potentially dangerous drugs and which sets standards for the behaviour of pharmacy staff. Among the stringent legislative requirements is one which mandates that no pharmacy may operate without the presence of a qualified pharmacist. There are no other examples in the retail environment where the business cannot trade if a certain class of employee is not present.

20. Legislation also directs how different schedules of drugs should be stored in the pharmacy and the criteria to be met for consumers to gain access to medicines. For example schedule 3 medicines are provided to consumers after questioning and a professional pharmacist's direct supervision. Schedule 4 medicines require a prescription to be obtained from a medical practitioner and can be dispensed by a currently registered professional pharmacist. The sale of no other 'retail' products is subject to such rigorous retractions.

21. Legislation requires that there must always be a qualified professional pharmacist in the 'shop' when it is open. This means that unlike other retail environments the professional pharmacist is not able to take a meal break or leave the premises if there is no other professional pharmacist working in the 'shop'.

22. In addition a pharmacy is obliged to supply pharmaceutical benefits at the pharmacy at any hour if a PBS prescription is marked 'urgent' and initialled by the prescriber; This can result in the need for employee pharmacists to be required to be 'on call' even when the pharmacy is closed so urgent prescriptions can be dispensed. For example pharmacists who service aged care facilities may be required to be 'on call' when the pharmacy is closed so they can be recalled to the pharmacy to provide and urgently required medication for an aged care resident and deliver the medication to the aged care facility. There are no other examples in a retail environment where the retailer is required by legislation to open up their shop to service a customer when it is closed.

PHARMACY INDUSTRY AWARD 2010 - PENALTY RATES

23. The Pharmacy Industry Award contains a range of penalties designed to compensate pharmacists who are required to work unsociable hours. These include provisions in respect of Overtime; Morning and Evening Work Monday to Friday; Saturday and Sunday work; Payment for Work on Public Holidays etc. Further the Award contains pharmacy specific rostering provisions which provide for employees who work "unsociable" hours a guarantee of being able take consecutive days off. In addition the Award also provides for an allowance to be paid to qualified pharmacists who are unable to take a meal break because of the legislative requirement for a qualified pharmacist to always be on duty when the pharmacy is open.

24. Due to the various legislative requirements that make it obligatory for most Pharmacies to be staffed during unsociable hours the inclusion in the Award of penalties provide an incentive for employee pharmacists to make themselves available to work. APESMA believes that if penalty payments were withdrawn from pharmacists then it will be more difficult for pharmacy owners to find staff, in particular experienced pharmacists who would be prepared to make themselves available to work these unsociable hours.

Pharmacist Salary Trends

25. In general the rates that are paid to pharmacists have in recent times been compressed. By way of clarification APESMA conducts an annual remuneration survey of employee pharmacists and produces a survey report. The latest edition the APESMA *Community & Hospital Pharmacists Remuneration Survey Report 2011* [3]shows that the average base rate across all classifications and locations shows a decrease of 0.8% in the overall average. This is less than the average increases achieved by other science and technical professional groups, which were most commonly in the range of 3-4%. This is contrasted with the Consumer Price Index which rose by 3.5% to 30 September, and the change in Average Weekly earnings, which rose in the 12 months to 31 August 2011.

Annualised Salaries

26. Any move towards the abolition of penalty rates for pharmacists also ignores the current provision in the Award which provides for the negotiation of an Annualised Salary. Clause 27 allows the employer and employee to negotiate an annualised salary that may be inclusive of overtime, penalty rates, payments for public holidays taken, annual leave taken, annual leave loading, meal allowance, and meal break on call entitlements. Such a provision provides for considerable flexibility but requires that the annualised salary is sufficient to cover what the employee would have been entitled to if all award entitlements had been complied with when calculated on an individual basis according to the hours worked. *The Community & Hospital Pharmacists Remuneration Survey Report* reports that overall 36% of pharmacists worked for a flat hourly rate.

MODERN AWARD SYSTEM – FAIR WORK ACT 2009

27. The Modern Award system came into operation on 1 January 2010. Item 6 *of Schedule 5 of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* provides that Fair Work Australia must conduct a review of all modern awards as soon as practicable after 1 January 2012. In subsequent years modern awards will be subject to a compulsory review at 4 yearly intervals in accordance with s. 156 of the Fair Work Act.

28. The parameters of the 2012 review require FWA to consider whether the modern awards achieve the modern awards objective and are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process. Every modern

[3] APESMA, *Community & Hospital Pharmacists Remuneration Survey Report 2011,* P.6

award is required to be individually reviewed. In a decision issued by the Full Bench of FWA on 29 June 2012 [2012] FWAB 5600 it was reported that 283 applications had been received. The Full bench stated that

"These applications include a number directed at common issues as well as a number of applications which are limited to one modern award. The statement of 27 April 2102 identified the following common issues; penalty rates; apprentices, trainees and junior rate; award flexibility; annual leave; and public holidays. These common issues are to be dealt with by Full Benches. The Tribunal as presently constituted is dealing with the various penalty rates applications."

29. The Pharmacy Industry Modern Award 2010 is one of the modern awards that will be the focus of the current review. Whilst the Pharmacy Industry Modern Award is not part of the Full Bench proceedings regarding penalty rates applications there have been a number of proposed variations to the Award lodged by the Pharmacy Guild on behalf of pharmacy employers. These applications cover a range of topics including the definition of Full Time Employee; Minimum Engagement of Casual Employees; Meal Allowances; Rostering Provisions; Authorised Overtime. If these applications were to be granted they would in the view of APESMA adversely impact on the remuneration of Pharmacists. However under the current legislation that will be a matter under the for FWA to determine in accordance with its parameters in particular the Modern Awards Objective as set out s. 134 of the Act

30. APESMA submits that the legislative framework by which FWA is able to consider remuneration matters in their totality provides an independent, efficient and fair system which should be maintained.

31. Finally APESMA is available to appear before the Standing Committee to elaborate on aspects of this submission and answer any questions.

MICHAEL BUTLER

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September 20th 2012