

FAIR WORK COMMISSION

4 Yearly Review of Modern Awards

Matter No.: AM2014/209

Pharmacy Industry Award 2010

**Submission in reply to submissions made regarding the Pharmacy
Industry Award Exposure Draft**



**Association of Professional Engineers, Scientists and Managers, Australia
(APESMA)**

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1. This submission by APESMA is made in response to the submissions made regarding the exposure draft released by the Fair Work Commission for the *Pharmacy Industry Award 2010* (Award), and in accordance with the Statement issued by President Ross on 8 December 2014.
2. APESMA supports the submissions made by SDA and HSUA.

Submissions by Pharmacy Guild of Australia (PGA)

3. APESMA would like to make specific submissions in reply to a number of issues raised by PGA in their submission of 28 January 2015 on the exposure draft of the Award.

Separate Draft of the Award

4. In their submission on the exposure draft the PGA indicates that in order to achieve an award that is clear and easy to understand they have engaged the services of the Plain English Drafting Association to provide a new draft of the Award. In their submissions the PGA say that this draft will be available by the end of March 2015.
5. APESMA is particularly concerned with the PGA proposal to arrange for another organisation to develop another draft of the Award and that this draft will not be available until late March.
6. The Fair Work Commission is developing exposure drafts of all modern awards and these are being developed in a consistent manner across all modern awards. In the Guide to the Award Stage issued by the Commission on 16 June 2014 the Commission outlines the process to be utilised in reviewing modern awards and indicates that staff of the Commission will prepare exposure drafts of all modern awards and these exposure drafts will be prepared with the view to ensure that modern awards:
 - *be structured in a logical way*
 - *avoid technical jargon and use simple language while ensuring provisions are precise and legally enforceable*
 - *use consistent terms both within and between awards*
 - *contain all relevant information in one clause (e.g. while all allowances generally appear in one clause, there should be a link to meal allowance within the overtime clause where appropriate)*
 - *provide examples to explain more complex entitlements such as calculating overtime rates (draft awards will contain examples of more complex provisions; parties will be given an opportunity to make submissions at the Award stage if they feel the example does not accurately reflect the provisions in the award)*
 - *not contain redundant terms or provisions*¹

¹ FWC 4 yearly review of modern awards 16 June 2014 Guide to Award Stage [32]

7. The Commission provided an exposure draft of the Pharmacy Industry Award, as it is doing for other awards, so interested parties could comment on the proposal with the intention of rectifying structural, drafting and technical issues and to ensure that the proposed exposure draft does not substantially change any of the existing award provisions.
8. APESMA is firmly of the view that the process of development of exposure drafts by the Commission and then for interested parties to review these exposure drafts and comment on them is the most efficient way of reviewing modern awards during the four yearly modern award review process.
9. We believe that it is particularly important to ensure that modern awards contain terms that are consistent with other modern awards wherever possible; that the terms of modern awards comply with the provisions of the Fair Work Act 2009 and that they also conform with case law wherever appropriate.. Because of the need to ensure conformity with legislative requirements and case law the wording and structure of awards may, from time to time, be less simple than the wording that would normally be desirable.
10. We believe that obtaining the services of another organisation to develop a new draft of the Award, no matter how skilled they are, is likely to result in significant errors and omissions and problems for the parties in attempting to develop a new, simpler and more efficient award. As a result the process of finalising the review of this Award will be extended unnecessarily.
11. APESMA believes that the Exposure Draft of the Award developed by the Fair Work Commission as part of the process to review all awards is the most appropriate document to use in order to ensure the Award is clear and easy to understand. We believe the proposal by PGA to use the services of the Plain English Drafting Association to draft another version of the Award will unnecessarily complicate the process.
12. We strongly oppose the Guild's proposal to develop another version of the Award and seek to have it made as the appropriate Award for the community pharmacy industry. We believe this new draft of the Award being prepared for the PGA will in itself result in serious issues and that it will also severely delay the process of finalising the new award.

Illustrative Examples

13. The PGA in their submission on the exposure draft for the Award indicates that they are strongly in favour of examples appearing in the 'formal' Award. APESMA does not support this approach. We believe the inclusion of examples could lead to unintended consequences, particularly in relation to enforcement of award entitlements. However, we do agree that it would be possible to provide examples in an annotated version of the Award

14. APESMA notes the decision of the Full Bench of the FWC on 23 December 2014², in relation to the exposure drafts for Group 1A and Group 1B Awards, stating that:

In our view the inclusion of relevant and accurate examples will make modern awards easier to understand and for that reason will be included where appropriate.

15. We believe that the Commission should adopt a cautious approach when considering the inclusion of examples in the Award as Awards are a legal instrument and this could lead to unintended award enforcement problems. However, we believe it would be more appropriate if such examples form part of an annotated version of the Award.

Clause 6.4(d)

16. Clause 6.4(d) of the Exposure Draft states:

For each ordinary hour worked, a part-time employee will be paid no less than the minimum hourly rate of pay for the relevant Classification in clause 6.5(d).

17. The PGA in their submission deletes the words *no less than*. This clause refers to the Minimum Rates of Pay clause which specifically says these rates of pay are ‘minimum rates’ so we believe there is no need to delete these words.

18. Such a variation could lead to disputes in relation to overaward payments.

19. We do not support the variation proposed by the PGA for these reasons.

Clause 6.4(f)

20. We do not oppose the PGA proposal to vary the exposure draft to clarify that a variation to rosters must be by notice given by the employer.

21. However, we note that the PGA does not have the same concerns we have previously expressed in submissions on the exposure draft that the current requirement for the employer to give written notice of a variation whether it be seven day notice or twenty four hours’ notice must be retained.

² [2014] FWCFB 9412 [63]

Clause 11.2(a) (iii)

22. APESMA notes the proposal by PGA to vary the exposure draft to read :
- (iii) 11.2(a) (i) and (ii) will not apply when the employer has advised the employee of the requirement to work overtime on the previous day.*
23. We agree with them that this is the way the existing Award operates.

Clause 13.2

24. We agree with the PGA suggestion that the word ‘discretion’ should be replaced with ‘direction’ to clarify that overtime must be hours worked at the direction of the employer.

Clause 13.4(d)

25. PGA is proposing to amend the clause to remove the entitlement to overtime being ‘for each hour worked’.
26. We believe this particular wording is necessary to describe the rate at which an employee will receive time off.
27. The PGA has also removed the option for an employee to elect to take time off instead of payment for overtime. The wording proposed by the PGA leaves it with the employer to decide if an employee takes time off in lieu or is paid for overtime worked. This is a significant difference to the existing Award.
28. APESMA believes it is essential to retain the option for employees to elect to take time off instead of being paid for overtime worked. The removal of these words remove the decision to elect from the employee to the employer and that is not consistent with the current Award.

Clause 11.2(a) (iii)

29. APESMA notes that PGA in its submissions is proposing an amendment to clause 11.2(a) (iii). We agree with their proposed amendment because it is consistent with the current Award provisions.

Inclusion of Tables

30. We note that PGA has proposed the inclusion of Tables in some provisions of the award. We particularly agree with his proposal in relation to clause 9.3(b) and 20.2. However, we note there are some inaccuracies in these proposed Tables. These need to be rectified before they can be included in the Award.

Submissions of Australian Business Industrial and the NSW Business Chamber (ABI)

31. APESMA generally agrees with the submissions of ABI in their submission of 2 February 2015.
32. The only problem we have with their submissions is in relation to their proposals for clause 13.2 of the exposure draft. In these submissions ABI indicate that they do not believe that casual employees are currently able to access overtime payments.
33. We disagree with hem and rely on our previous submissions on the Exposure draft dated 28 January 2015.



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APESMA