Fair Work Commission

Award Review 2014

Pharmacy Industry Award 2010

AM2014/209

Submissions on the Exposure Draft - Pharmacy Industry Award – Plain Language Draft – specific clauses

Shop Distributive and Allied Employees' Association

10 December 2015

1. The Shop Distributive and Allied Employees' Association (SDA) makes these submissions on the Exposure Draft – Pharmacy Industry Award – Plain Language Draft released by the Fair Work Commission on 26 November 2015, in accordance with the Statement issued by Justice Ross on 29 October 2015.

2. The SDA notes from the Statement of Justice Ross on 8 December 2014 and the notes preceding the Exposure Draft that the '*The exposure drafts do not incorporate any substantive changes and do not represent the concluded view of the Commission on any issue'* and '*This exposure draft does not seek to amend any entitlements under the Pharmacy award but has been prepared to address some of the structural issues identified in modern awards*.'

3. The SDA also notes from the Statement of Justice Ross on 29 October 2015 that Attachment B – Instructions for plain language re-drafting of the exposure draft based on the Exposure Draft Pharmacy Industry Award 2014 that *'The main service required is the production of a plain language draft of the Exposure Draft Pharmacy Industry Award 2014 which does not alter the legal effect of any clauses'.*

4. The SDA relies on our submissions made in relation to the exposure draft on 28 January 2015 and 15 July 2015, and submissions in reply on 18 February 2015 and 21 August 2015. The SDA also supports the submissions made by the HSUA and APESMA in relation to this award.

5. Our submission will only make comments in relation to clauses which we have identified an issue with regard to changes to the legal effect or ambiguities arising from the change in wording.

6. The submissions made by the SDA are agreed to by both APESMA and HSU and we make these submissions on their behalf also.

Clause 4 coverage

7. The use of the term ‘industry award’ refers to a specific type of modern award. The term ‘industry award’ should not be removed from the coverage clause. Removing the concept of ‘industry award’ from a modern award could lead to problems with other awards, especially as there are separate modern awards covering, for example, hospital based pharmacists, covered by an occupational/industry hybrid award, and retail workers, covered by another industry award.

8. The definition of ‘community pharmacy’ has been moved from the coverage clause to the Definitions Schedule. This should only occur if agreed by the parties.

9. While we generally support the idea that all definitions should be included in a single location, we submit that the need to be very clear about the coverage of a specific award, without requiring a person to search the award for further information, should be the primary consideration.

10. On this basis, the redrafted definition should reside in clause 4 and not Schedule G.

Clause 4.3

11. The drafters note at Clause 4.3 advises that the word ‘community’ has been included at 4.3(a) because if it were not a community pharmacy there would be no need for the exclusion as it would be within the coverage clause set out in 4.1 and 4.2.

12. The inclusion of the word ‘community’ in the exclusion changes the meaning of the exclusion. Pharmacies in /and owned by hospitals are not ‘community pharmacies’. The word ‘community’ needs to be removed from the exclusion clause and the clause should read:

4.3 However this award does not cover:

(a) employees working in a pharmacy that does not sell goods or services by retail and that is:

(i) owned by a hospital or other public institution; or

(ii) operated by government; or…"

Clause 7.2 Full-time employees – definition

13. The re-draft clause 7.2 states:

An employee who is engaged to work 38 ordinary hours per week (averaged over 2 consecutive weeks) is a full-time employee.

14. The comment provided by the Plain language drafter states that the Exposure Draft overlooks clause 8.2(e) which provides for fortnightly averaging. The SDA supports the inclusion of this in clause 7.2, however, we believe that it is ambiguous in how many hours are averaged over 2 weeks.

15. The SDA submits that the following alternative wording be applied to this clause:

*An employee who is engaged to work 38 ordinary hours per week (**or 76 hours** averaged over 2 consecutive weeks) is a full-time employee.*

Clause 7.5 Part-time employees – working arrangements

16. The re-draft clause 7.2 states:

On engaging an employee, the employer must inform the employee of the terms on which they are engaged, including whether they are engaged as a full-time, part-time or casual employee.

17. The Exposure Draft clause 6.2 states:

At the time of engagement, an employer will inform each employee of the terms of their engagement and, in particular, whether they are to be fulltime, part-time or casual.

18. The SDA submits that the clause should retain the words 'At the time of engagement' rather than 'On engaging'. We believe that this is a clearer prescription of when an employer needs to take the required action. Without the words 'At the time of engagement' employers may interpret this clause as being able to provide employees with their employment arrangements at any time.

19. In an industry where working arrangements are not always reduced to writing, this change in wording would compound the problem.

Clause 7.6(b) Part-time employees – working arrangements

20. The re-draft clause 7.2 states:

    On engaging a part-time employee, the employer must agree in writing with the employee:

    - the number of ordinary hours to be worked each day; and
    - the days of the week on which the employee will work; and
    - the times at which the employee will start and finish work each day; and
    - when meal breaks may be taken and their duration.

21. As per clause 7.5 the plain English draft replaces the words in clause 6.4(b) 'At the time of engagement' with 'On engagement'. The SDA submits, as previously submitted above, that the words 'At the time of engagement' should be retained as this more clearly defines when the agreement must be made.

Clause 7.6(b) part-time employees

22. Clause 7.6(b) sets out what must be agreed in writing between an employer and part-time employee at the time of engagement.

23. The redrafted clause fails to include 6.4(b)(iv) of the Exposure Draft that states 'that any variation will be in writing'. The reference to this in Exposure Draft clause has the intention of ensuring that the employee and employer agree that any variation to the initial agreement will be in writing.

24. The SDA submits that it is vital to retain this in the re-drafted clause 7.6(b) of the plain language draft as omitting this changes the legal effect of this clause.

25. The SDA understands that reference to variation of the agreement in writing is made at clause 7.6(c)(iv) however this is replacing 6.4(c). Removing it from clause 7.6(b) will have the effect that an employee will no longer be told at the time of engagement that any variation to the agreement will need to be in writing. It is important that an

employee knows that the only way their working arrangements can be varied is in writing.

26. The SDA submits that 6.4(b)(iv) should be included as a new 7.6(b)(v) in the plain English draft.

Clause 7.6 [6.4(d)] Payment for part-time employees

27. The re-draft has omitted Exposure Draft clause 6.4(d):

> *For each ordinary hour worked, a part-time employee will be paid the minimum hourly rate for the relevant classification in clause 10.1.*

28. The comment made be the Plain language drafter was that 'Paragraph (d) relates to wages and should only be dealt with in the clause titled "wages". It is not good practice to say the same thing twice'.

29. The SDA disagrees with these comments. The reference to wages and how they apply to an employee need to be prescribed within the clause which sets out the working arrangements for that type of employee. The clause may then make reference to the minimum wages clause for details regarding the applicable rates.

30. The SDA submits that this clause should be retained.

Clause 7.6(g) additional hours for part-time employees

31. The re-draft clause 7.6(g) states:

> *A part-time employee who has worked the agreed number of hours on any day or in any pay period may agree to work additional hours on the terms applicable to hours worked by a casual employee and up to any maximum applicable to those under the award.*

32. This is a re-draft of clause 6.4(i) of the Exposure Draft 'Additional hours as casual hours' which states that:

A part-time employee who has worked their agreed hours may agree to work additional hours which are not reasonably predictable up to the daily, weekly or fortnightly maximum ordinary hours as a casual employee. These extra hours will be subject to the casual employee provisions of this award.

33. The re-draft clause 7.6(g) fundamentally changes the intent of the clause by removing when the maximum ordinary hours occur, that is, daily, weekly and fortnightly.

34. Hours worked up to the maximum applicable should be expressed as per the Exposure Draft 'up to the daily, weekly or fortnightly maximum' to ensure that this clause does not exclude part-time employees receiving overtime when they work beyond the maximum hours in the award at clause 8.2 which part-time employees are entitled to.

35. The inclusion of this wording identifies that a casual rate is applicable for additional hours worked within the maximums of the award and where the overtime rate should be applied, that is, when the hours worked are beyond the maximum hours prescribed in the award.

36. The SDA submits that the original wording be retained.

Clause 7.6 [6.4(e)] Part-time employment

37. Clause 6.4(e) of the Exposure Draft states:

An employer is required to roster a part-time employee for a minimum of three consecutive hours on any shift.

38. This clause has been omitted from the plain language draft. The plain language drafter comments suggest that this clause overlaps with clause 6.4(b)(v) and that 'if the minimum shift is 3 hours then necessarily the minimum daily engagement must be 3 hours'.

39. The SDA submits that the two clauses are different and both need to be included in the Award.

40. Clause 6.4(b)(v) refers to a minimum daily engagement of 3 hours while 6.4(e) refers to a 3 hour minimum shift. Both need to be retained where an employee is rostered or asked to work an additional shift on one day. Where an employee works two shifts on one day both shifts need to be a minimum of 3 hours.

Clause 7.7 Casual employment

41. Re-draft clause 7.7 omits the casual loading clause 6.5(c) contained in the Exposure Draft.

42. The comments of the Plain language drafter suggest that 'Paragraph (c) deals with the wages to which a casual employee is entitled and should be located in clause 10.

43. As per our submission at paragraph 22 above, the SDA submits that the way in which employees are paid needs to be prescribed within the clause which sets out the working arrangements for that type of employee. The clause may then make reference to the minimum wages clause for details regarding the applicable rates.

44. The SDA strongly submits that this clause should be retained within the Casual employment clause 6.5, with reference to clause 10.

Clause 7.8(d) Moving between types of employment

45. The re-draft clause 7.8(d) states:

    An agreement mentioned in clause 7.8(c)(ii) must be recorded in writing.

46. This clause should reference 7.8(c) not just 7.8(c)(ii). 7.8(c) states:

    A full-time employee:

    (i) may request to be given part-time work; and

    (ii) may return to full-time employment at a date agreed with the employer.

47. All aspects of the agreement should be recorded in writing, including the date the agreement commences and the date the employee returns to full-time employment, not just the date the employee is returning to full-time employment.

48. Clause 6.4(h)(iii) contained in the Exposure Draft states:

    A full-time employee who requests part-time work and is given such work may revert to full-time employment on a specified future date by agreement with the employer. This agreement is to be recorded in writing.

49. The SDA submits that this clause requires all aspects to be recorded in writing and that the change proposed in the plain language draft creates a change to the legal intent of the clause.

50. The SDA submits that clause 7.8(d) should reference clause 7.8(c) to be consistent with the Exposure Draft.

Clause 8.2

51. The SDA submits that redrafted clause 8.2 applies an onus to the employer determining the skill levels required which is not contained in the current wording.

52. At current 7.2 the employer must classify the employee according to the skill level required to be exercised by the employee.

    7.2 The classification by the employer must be according to the skill level or levels required to be exercised by the employee…

53. The proposed new clause 8.2 provides that the employer determines the skill required to be exercised.

    8.2 The classification must be based on the skill level that the employer determines is required to be exercised….

54. The SDA submits this changes the onus in the clause. Rather than an objective test which could be judged by any person, the clause becomes a subjective test decided by the employer. The SDA submits the wording might be:

    8.2 The employee must be classified according to the skill level or levels they are required to exercise in order to carry out the principal functions of the employment required by the employer.

Clause 9 Hours of Work

55. The plain language re-draft has omitted 8.2(d)-(f). The comments of the Plain language drafter suggest that 'Paragraphs (d), (e) and (f) deal with matters dealt with, or that should be dealt with, in clause 6.'

56. The SDA disagrees with this comment. Excluding clauses 8.2(d) – (f) from the Ordinary Hours of Work clause in the Award has implications for the overtime provisions contained in the Award.

57. It is essential that the ordinary hours clause sets out all of the ordinary hours which can be worked to determine what hours then constitute overtime. The SDA has already made submissions regarding overtime for part-time and casuals, and again, as with the Exposure Draft, this draft also incorrectly interprets overtime entitlements under the award. For example, overtime for part-time employees working outside the spread of hours; more than 38 hours per week or 76 hours averaged over two weeks; or more than 12 hours per day.

58. Clause 8.2(d), 8.2(e) and 8.2(f) should be retained within the ordinary hours' clause 9 of the Plain language draft.

Clause 10.1(e) Rostering - Sundays

59. The re-draft clause 10.1(e) states:

> *employees may be rostered to work (whether ordinary hours or overtime) on up to 3 Sundays in a 4 week cycle if they are rostered to have 3 consecutive days off every 4 weeks, including a Saturday and Sunday.*

60. The Exposure Draft clause 8.3(a)(v) states:

> *An employee may be rostered to work on a maximum of three Sundays in any four week cycle and must have three consecutive days off every four weeks, including a Saturday and Sunday.*

61. The wording in the Exposure draft should read, '*employees rostered to work (**whether ordinary hours or overtime**) on up to 3 Sundays in a 4 week cycle **must be** rostered to have 3 consecutive days off every 4 weeks, including a Saturday and Sunday'.*

Clause 10.3

62. There is a typographical error in clause 10.3. The clause should read; *Clause 10.1 does not apply to the extent that the employer and employee agree **to** different arrangements at the written request of the employee.*

Clause 11.1 Breaks

63. The re-drafted clause 11.1 is not easy to understand. The SDA submits that the wording should be re-drafted and proposes the following alternative wording:

> *'The following table prescribes the entitlement to a break or breaks (Column 2) for employees, depending on the number of ordinary hours worked on any day (column 1)'.*

Clause 11.2 Breaks

64. Clause 11.2 in the plain language re-draft is not clear. The SDA is concerned that the re-draft could be interpreted that if the employee doesn't take the break in the first 5 hours they forfeit the entitlement to the break.

65. The SDA submits that either the wording contained in the Exposure draft be retained or the following alternative wording be adopted:

> 'A meal break must be taken within the first 5 hours of work, but not before the first 2.5 hours'.

Clause 12.3

66. Clause 12.3 provides that pharmacy students completing their Masters are to be paid at 3rd year rate. The SDA submits that the rate paid to a student completing their Masters should be at the Graduate Intern rate as this would apply to someone who has

completed a normal 4 year degree and has not proceeded to complete a Masters degree.

Clause 12.5 Wages

67. The re-draft clause 12.5 states that:

> *Wages must be paid for a pay period according to the number of hours worked by the employee in the period.*

68. The SDA submits that this clause should reference the averaging of hours over a two week period, which could be provided by the following alternative wording:

> *Wage must be paid for a pay period according to the number of hours worked by the employee in the period, **as provided in clause 7.2**.*

Clause 14.3 Special Clothing Allowance

69. The current Pharmacy Industry Award special clothing clause 19.3 states:

> ***19.3 Special clothing***
>
> *(a) Where the employer requires an employee to wear any protective or special clothing such as a uniform dress or other clothing then the employer will reimburse the employee for any cost of purchasing such clothing and the cost of replacement items, when replacement is due to normal wear and tear. This provision will not apply where the special clothing is supplied and/or paid for by the employer.*
>
> *[19.3(b) substituted by PR541862 ppc 01Oct13]*
>
> *(b) Where an employee is required to launder any special uniform, dress or other clothing, the employer who provided that special clothing will arrange for its cleaning or will pay the employee the following applicable allowance:*
>
> *(i) for a full-time employee - $6.25 per week;*
>
> *(ii) for a part-time or casual employee - $1.25 per shift.*

70. The Revised Exposure Draft clause 11.2(c) states:

> ***(c) Special clothing***
>
> **(i)** *Where the employer requires an employee to wear any protective or special clothing such as a uniform or other clothing the employer will reimburse the employee for the cost of purchasing the special clothing and the cost of replacement items, when replacement is*

due to normal wear and tear. This provision will not apply where the special clothing is supplied and/or paid for by the employer.

- *Where an employee is required to launder any special clothing, the employer who provided that clothing will arrange for its cleaning or will pay:*
  - ***$6.25** per week to a full-time employee; or*
  - ***$1.25** per shift to a part-time or casual employee.*

71. The plain language re-draft clause 14.3 states:

> ***14.3 Clothing allowance***
>
> **(a)** *This clause applies to an employee who is required to wear special clothing, such as a uniform or protective clothing, that is not supplied or paid for by the employer.*
>
> **(b)** *The employer must reimburse the employee for the cost of purchasing the clothing, including purchasing replacement clothing due to normal wear and tear.*
>
> **(c)** *The employer must, if the clothing needs to be laundered:*
>
> ***(i)*** *undertake the laundering at no cost to the employee; or*
>
> ***(ii)*** *pay the employee an allowance of:*
>
> - ***$6.25** each week for a full-time employee; or*
> - ***$1.25** each shift for a part-time or casual employee.*

72. The special clothing clause in the plain language draft changes the legal effect of the clause. Clause 14.3(a) limits the application of the clause to employees who are required to wear special clothing, such as a uniform or protective clothing not supplied or paid for by the employer. However, the laundry allowance in this clause is applicable to all employees required to wear special clothing, such as a uniform or protective clothing, including employees who have a uniform supplied or paid for by the company.

73. The only provision which the special clothing clause in the current and exposure draft award limits, is in relation to the reimbursement or replacement of special clothing which is not applicable if a uniform is supplied.

74. The effect of the re-draft clause is that the laundry allowance also only applies to an employee required to wear special clothing, such as a uniform or protective clothing, that is not supplied for by the employer. This changes the legal effect of this clause.

75. The wording in the current Pharmacy Industry Award 2010 or Revised Exposure Draft (9 October 2015) be retained to avoid changing the legal effect of this clause.

Clause 14.4 Moving Allowances

76. The Plain language drafter has questioned the scope of the clause, with particular reference to the term 'township'. The use of the term township is common to Awards that cover employees in the industries where the SDA has members. Other Awards such as the Manufacturing Award and the Cement and Lime Award refer to a transfer requiring 'change of residence' to identify the scope of the clause.

77. The SDA would agree that a transfer from one township to another which requires a change in the residence of the employee would trigger the payment of moving expenses.

78. In relation to the use of the term 'family'. The SDA submits that this should be in line with the NES, including a members of the employee's household.

Clause 16 – Reasonable overtime

79. The plain language re-draft has removed clause 13.1 reasonable overtime. The plain language drafter comments suggest that it should be removed because it is in the NES. The SDA strongly recommends this be retained for the purposes of the overtime clause.

80. The retention of this within the Award is essential to ensure that employees and employers are aware of an employees' right to refuse to work overtime and the circumstances around which overtime is unreasonable.

81. The SDA is also concerned that any future change to the NES with regard to reasonable overtime could lead to a substantive change to the current reasonable overtime provisions in the Award.

82. The reasonable overtime provisions are not commonly known, like the leave and public holiday provisions. In this circumstance it does not follow that because other clauses refer to the NES that the reasonable overtime clause should do the same.

83. The SDA strongly submits that removing the reasonable overtime provisions changes the legal effect of the Award and reduces the awareness of employers and employees about these provisions.

84. The SDA strongly submits that clause 13.1 be retained in the plain language draft. If any changes are made the SDA believes that the clause be retained and extended to include all of the circumstances referred to in the NES to be taken into account when considering whether working overtime is unreasonable.

Clause16.1 Overtime

85. Clause 16.1 in the plain language re-draft states:

> *An employer must pay a full-time employee at the overtime rate for any hours worked in excess of those mentioned in clauses 7.2, 9.1 and 9.3.*

86. The SDA submits that this clause should also reference clause 9.2. Clause 9.2 of the re-draft states:

> *Ordinary hours of work are continuous, except for rest breaks and meal breaks.*

87. Clause 9.2 needs to be referenced in clause 16.1 because overtime should be paid to an employee who works an additional shift in one day. Overtime is applicable for the second shift because the ordinary hours clause 9.2 requires that '*ordinary hours of work are continuous, except for rest breaks and meal breaks'.*

88. Clause 13.2 of the Exposure Draft was updated on 9 October 2015 to reflect the agreement between parties that the overtime clause should reference 8.2(a) –(e). This was amended and the clause 13.2 of the Exposure Draft states:

> *For a full-time employee, overtime is paid for additional hours worked at the direction of the employer in excess of the ordinary number of hours prescribed in clauses 8.2(a) to 8.2(e).*

89. The SDA submits that the re-draft clause needs to reference all of the provisions contained in 8.2(a) – (e), to ensure that the legal effect of the clause is not changed.

Clause 16.2 Overtime – Part-Time employees

90. Clause 16.2 of the re-draft award states that:

> *An employer must pay a part-time employee at the overtime rate for any hours worked in excess of the number of ordinary hours that the employee has agreed to work under clause 7.6(b).*

91. As per the submissions we made on 15 July 2015, and in particular paragraph 46-49, the SDA submits that in addition to clause 7.6(b), part-time employees are entitled to overtime for hours worked:

- outside the spread of hours (Clause 9.1 of plain language draft);
- in excess of 38 hours per week or 76 hours averaged over two consecutive weeks (Clause 8.2(d) and 8.2(e) of the Exposure Draft);
- in excess of the maximum daily hours, 12 hours per day (Clause 9.3 of the Plain language draft), and;
- Which are not continuous, that is, an additional shift on one day (Clause 9.2 of the Plain language draft

92. The SDA submits that the Overtime Clause, 26.2 in the current Pharmacy Industry Award does not exclude part-time employees. Clause 26.2(a)(i) and 26.2(a)(ii) should apply to part-time employees.

Clause 16 Overtime - Casuals

93. The SDA submits that casuals are entitled to overtime under the current Award and note that the issues pertaining to overtime for casual employees is currently before a Full Bench of the Commission.

Clause 16.6 Time off instead of overtime payment

94. Clause 16.6 of the plain language re-draft states that:

> *Time off must be taken:*
>
> **(a)** *within the period of 4 weeks after the overtime is worked; and*
>
> **(b)** *at a time within that period agreed by the employer and employee.*

95. The SDA submits that the clause should read '***Where an employee chooses*** *to take time off it must be taken'.* This makes it clear that the only circumstance where time off can be taken instead of payment for overtime is when an employee chooses this.

Clause 17.1 Penalty Rates

96. Clause 17.1, Table 4 has changed the current entitlement to penalties from **'before 7am'** to '**between 7.00am and 8.00am'** for both Monday to Friday, and Saturday. This changes the legal intent of the clause. The wording from the Exposure Draft should be retained.