

s. 156 - Four Yearly Review of Modern Awards

Pharmacy Industry Award 2010

AM2014/209

Joint Submission

Revised Exposure Draft of 10 November 2016

By



Shop Distributive and Allied Employees' Association (SDA)

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

Health Services Union (HSU)

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1. The Shop Distributive and Allied Employees' Association (SDA), the Association of Professional Engineers and Scientists Australia (APESMA) and the Health Services Union (HSU) makes these submissions on the – Pharmacy Industry Award – Plain Language Draft (10 November 2016) in accordance with the Amended Directions issued by the President on 9 November 2016¹.
2. This submission provides comments in relation to award specific provisions only and not to those clauses which have been identified as standard or common which will be subject to broader consultation as per the Statement issued on 15 July 2016².
3. The Pharmacy Industry Award has been subject to numerous redrafting, both in relation to the initial Exposure Draft and the subsequent Plain Language Pilot. The union parties have filed submissions and reply submissions following the publication of all drafts including those published on 8 December 2014, 25 September 2015, 9 October 2015, 27 November 2015, 21 April 2016 and 22 July 2016. We rely on all of our submissions filed in this matter.
4. The union parties have also been working constructively with the relevant employer organisations, as directed by the Commission, to identify issues with the plain language draft including where it has changed the legal effect and where there may be potential interpretation issues. Following ongoing discussions, the parties provided joint submissions on 18 October 2016 which identified some of the more straight forward issues which we agreed had changed the legal effect, contained potential interpretation issues or were more difficult to understand. We also provided agreed wording which could resolve these issues. For those agreed matters, we rely on the submissions of the 18 October 2016 and given the consent nature urge the Full Bench to adopt these submissions.
5. We note that some of the concerns raised in our previous joint union submission³ filed on 5 September 2016 and in the joint submission of all interested parties filed on 18 October 2016 regarding the plain language draft released on 22 July 2016 still remain in this draft.

¹ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-dirs-amended-091116.pdf>

² [2016] FWC 4756

³ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-sub-sdahsuapesma-050916.pdf>

6. We also note that the plain language draft has changed the legal effect of some clauses of the current award, which is not the intention of the plain language drafting process. The parties note, in the Statement⁴ of Justice Ross issued on 22 September 2015, that:

*[3] The Pilot will involve the Commission engaging the services of a plain language expert to redraft the Pharmacy Award. **The expert will be instructed to redraft clauses without altering their legal effect.** The plain language draft will then be user-tested by individuals covered by the award.*

(Emphasis added)

7. The union parties submit that the plain language re-drafting process should never introduce interpretation issues or result in a change to the legal effect of the award. The SDA supports the objective of creating awards that are simple and easy to understand but this must not be done at the cost of current award entitlements and obligations.
8. The 2012 interim review was conducted to address ambiguities and technical issues arising from the award modernisation process. Ambiguity and technical issues could arise again as a result of the plain language process, requiring a further technical review process. The parties have tried to address this in our submissions to eliminate the possibility of this. We believe that these concerns should be considered by the Full Bench to minimise the potential for future disputes arising as a result of the redrafting of the award.

COMMENTS ON PROPOSED CLAUSES FROM EXPOSURE DRAFT – 10 NOVEMBER 2016

Clause 2 Definitions

9. We note that in the summary of submissions published on 10 November 2016 the drafter has stated that this matter is to be decided with the common clauses. We are unsure if the issues we have raised in relation to the definition of on-hire and on-hire employer will

⁴ <https://www.fwc.gov.au/documents/decisionsigned/html/2015fwc6555.htm>

be relevant to other awards or specific to the Pharmacy Industry Award so we make our submissions in relation to this matter here.

10. As per our previous submission, we note that there is no definition of 'on-hire' in the plain language exposure draft. The exposure draft has removed the definition of 'on-hire' from the current Award. It only contains a definition of 'on-hire employer' and 'on-hire employee' which do not define what is meant by 'on-hire'. This lack of definition appears to go against the intention of the plain language drafting process to make the Award easier for users to understand.
11. We also note that the definition of 'on-hire employer' should also conclude with the words '*covered by this award*', as is included in the definition of 'on-hire employee'.
12. This issue was also raised in consent submissions filed by all parties on 18 October 2016. The Interested Parties made submissions that 'a definition of 'on-hire' should be included in the Exposure Draft and the definition of on-hire employer should be amended. We rely on those submissions.
13. The joint submission provided the following agreed wording for the definition of 'on-hire' and 'on-hire employer':

***on-hire** means the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client*

***on-hire employer** means a person who carries on a business of employing individuals for the purpose of on-hiring them to an end-user employer covered by this award.*

[emphasis added]

4.1 Coverage

14. All interested parties have made submissions outlining concerns regarding the redraft of the coverage clause. The union parties provide the following submissions below, as per

our submissions filed on 5 September 2016. We also support the concerns raised by other parties in relation to this clause and agree that the plain language draft of this clause has resulted in a change from the current Award and it requires further consideration.

15. The union parties are concerned that Clause 4.1 (c) of the Exposure draft may change the intent of the coverage provisions of the current Community Pharmacy Industry Award 2010. The proposed provision of concern reads as follows:
 - a the business is not owned by a hospital or other public institution, or operated by government, unless medicines or drugs are sold by retail to the general public from the premises on which the business is conducted.
16. The area of concern we have is to ensure that it is clear when the Pharmacy Industry Award 2010 applies and when the Health Professionals and Support Services Award 2010 applies to pharmacist classifications.
17. The majority of employee pharmacists are currently working in community pharmacies. These people are covered by the Pharmacy Industry Award 2010. There are also a large number of pharmacists employed in public and private hospitals around the country. These pharmacists are covered by the Health Professionals and Support Services Award 2010.
18. However, the Pharmacy Industry Award 2010 does cover pharmacists who are employed in pharmacies situated in hospitals that dispense to the hospital and they also dispense retail medicines and other retail products to the general public. A good example of this is Slade pharmacies who dispense medicines to the various Epworth hospital sites in Melbourne. They also operate community pharmacies on these sites and dispense and retail prescription and other medicines as well as other retail products to the general public. It is the intent that the Pharmacy Industry Award 2010 covers pharmacist employed by the Slade group.
19. Many pharmacies situated in public and other hospitals retail to the general public, but they do not dispense and retail prescription medicines to the general public. It is the

intent that Pharmacists employed in these type of pharmacies are covered by the Health Professionals and Support Services Award 2010.

20. In order to ensure maintenance of the current intention of the Pharmacy Industry Award 2010 and the Health Professionals and Support Services Award 2010 and to ensure clarity as to which award employee pharmacists are covered by we would suggest that the proposed clause 4.1 (c) of the Pharmacy Industry Award Exposure draft be varied to as follows:

a the business is not owned by a hospital or other public institution, or operated by government, unless medicines or drugs are **dispensed and** sold by retail to the general public from premises on which the business is conducted.

(Proposed additions highlighted in bold)

Clause 8 Types of employment

Clause 8.3 Moving between types of employment

21. As per our previous submissions, while we don't have concerns in relation to the changed wording of this clause we have significant concerns about the inclusion of the note at the end of Clause 8 that states:

'NOTE: See Section 65 of the Act for information about requests for flexible working arrangements.'

22. The current provision in the Pharmacy Industry Award 2010 refers to conversion of employees between types of employment and the way this occurs within this award. This clause does not relate to Section 65 of the Act which provides for requests for flexible working arrangements under a prescribed set of circumstances. To link this clause with Section 65 of the Act would suggest that an employee would need to meet the eligibility and procedural requirements determined by that section of the Act for them to be able to make a request.

23. The SDA submits that the 'Note' should be removed as it will create a substantive legal change to the entitlement in the current award and at the very least will cause confusion and ambiguity about access to this entitlement.

Clause 10 Part-time employment

24. We have significant concerns that the redraft of the part-time clause of the Award has changed the legal effect and resulted in potential interpretation issues. We submit that this clause in its entirety be reviewed by the Full Bench with respect to the current provisions contained in the Award and also in light of the submissions made by the parties.

Clause 10.2 and 10.3

25. We note the drafters comment that clause 10.2 and 10.3 of the plain language draft looks to replace clause 12.9 of the current Award. Despite this, our concerns raised in the union submissions filed on 5 September 2016 and the joint submissions of interested parties filed on 18 October still remain.
26. In joint submissions filed on 18 October 2016 the parties submitted that clause 10.3 is worded so as to restrict the entitlements of part-time employees and may be in contravention of the NES. We believe that at the very least the suggestion by the drafter to remove the word 'only' should occur.

Clause 10.4 to 10.6

27. We rely on paragraph 12 of the joint submissions filed by all interested parties on 18 October

Clause 12.3 of the Current Pharmacy Industry Award 2010

28. The provisions in Clause 12.3 of the current award have not been appropriately reflected in the most recent redraft of the Award. Clause 12.3 of the current award states that:

*Any agreement to vary the regular pattern of work will be made in writing **before the variation occurs**. Any agreement to vary the agreed hours may also be **either a permanent agreed variation to the pattern of work or may be a temporary agreed variation, e.g. a single shift or roster period. Such a variation will be agreed hours for the purposes of clause** Error! Reference source not found..*

[emphasis added]

29. The plain language draft of the Award does not provide that the agreement be made in writing **before** the variation occurs nor does it make clear that variations may be **permanent or temporary**. Both of these provisions are necessary and omitting them changes the legal effect of the award.
30. Retaining the provision that agreements must be made in writing **before** the variation occurs provides clear obligations and entitlements and ensures that the agreement has been properly considered and agreed to prior to the employee working the variation.
31. The wording in clause 12.3 in relation to the length of the variation provides a useful signpost to those using the award that the hours of a part-time employee may be varied by agreement and can be varied for different lengths of time. This provides certainty to employers and employees as to the length of time for which any agreed variation would apply and serves to minimise disputes about the length of such a variation.
32. We submit that Clause 12.3 of the current award should be included, as it is written, in the plain language draft following clause 10.4.

Clause 12.5 of the current Pharmacy Industry Award 2010

33. We rely on paragraph 13 of the joint submissions of all interested parties filed on 18 October 2016. We do not agree with the comments of the drafter in response to our concerns regarding this clause.

34. Simply including clause 12.5 of the current award into clause 10.6 which sets out what an agreement must state does not provide the legal requirement to provide a three-hour minimum shift for part-time employees.
35. As per the joint submissions, we submit that clause 12.5 of the current award must be included in the plain language draft.

Clause 12.6 of the current Pharmacy Industry Award 2010

36. Clause 12.6 of the current award does not appear to be reflected in the exposure draft of the Award. Clause 12.6 provides that:

An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 13 – Casual employment.

37. This clause is important as it establishes that if an employee meets the definition of a fulltime or part-time employee then they are engaged as such and if they do not meet the definition they should be classified and paid as a casual. This is particularly relevant where a 'casual' is working or expects to work reasonably predictable hours. In this case they should be paid and have access to the entitlements provided to part-time or full-time employees.
38. We submit that the omission of clause 12.6 will create a substantive change and the clause should be included in the exposure draft.

Clause 11 Casual Employment

39. As with the part-time clause we have significant concerns that the redraft of the casual employment clause of the Award has changed the legal effect and resulted in potential interpretation issues. We submit that this clause in its entirety be reviewed by the Full Bench with respect to the current provisions contained in the Award and also in light of the submissions made by the parties.

40. We rely on the joint submissions filed on 18 October 2016 and union submissions filed on 5 September, and make some additional comments in response to the drafter comments provided on 10 November 2016.

Clause 11.2

41. Clause 13.1 of the current Pharmacy Industry Award 2010 states that:

*A casual employee is an employee engaged as such and who does not have an **expectation or entitlement** to reasonably predictable hours of work.*

[emphasis added]

42. Clause 11.2 of the exposure draft states that:

A casual employee does not have an entitlement to reasonably predictable hours of work.

43. Clause 11.1 of the exposure draft states that:

*An employee who is not covered by clause 9 – Full-time employment or clause 10- Part-time employment **may** be engaged and paid as a casual employee (our emphasis)*

44. The exposure draft has replaced the word 'is' in clause 13.1 of the current Award with the word 'may' in clause 11.1 of the exposure draft. We submit that this substantially alters the meaning of the clause.

45. The legal effect of the current clause provides that when an employee is engaged as a casual they do not have an expectation or entitlement to reasonably predictable hours of work. Therefore, this also means that once an employee does work reasonably predictable hours and expect to, they are deemed to be a part-time or full-time employee.

46. Prior to award modernisation and the creation of the modern Pharmacy Industry Award 2010 the various pharmacy industry awards contained provisions that provided for

'permanent casuals'. This provision was not carried forward into the modern Pharmacy Industry Award 2010. After modernisation of the Award in 2010 employers, on the advice of the Guild, converted regular casuals to part-time as a result of the casual employee clause in the Award. Changing the wording alters the legal effect of the clause as it relates to how an employee is engaged to work depending on the predictability of the hours they work.

47. The SDA made a deliberate decision not to seek a casual conversion clause as part of the ACTU common claim in the 4 yearly review of modern awards because all of the interested parties had a common interpretation of the casual clause and that it provided a conversion to part-time if a casual no longer met the definition the casual employee clause provides.
48. The SDA is concerned that if the clause contained in the plain language draft is adopted by the Full Bench it will remove the casual conversion provision and we will be unable to pursue this further in the current review.
49. The Guild, in its oral submission to the Casual and Part-time Full Bench, regarding the ACTU claim for casual conversion stated:

*PN279 MS WELLARD: Your Honours, Commissioner, I'll also be brief because I think a lot of it has been canvassed already. With respect to the pharmacy industry award, the position of the Pharmacy Guild is that – and this has already been mentioned by most of my friends - that there is no probative evidence, in fact, there is no evidence at all led with respect to the pharmacy industry. **The ACTU does not seek to insert a casual conversion clause in the pharmacy industry award.***

PN280 The current clause in the pharmacy industry award - and I presume this is upon which the basis - the basis upon which the ACTU doesn't seek to insert the casual conversion clause, defines a casual employee as an employee engaged as such and who does not have an

expectation or entitlement to reasonably predictable hours of work. That ends the argument with respect to the pharmacy award and that current clause being fair and relevant and appropriate for the pharmacy industry. The ACTU does seek to advance changes with respect to all of the other elements of its claim to the pharmacy award: the minimum engagement for casuals and part-time employees of four hours. But, as I said, there is absolutely no evidence filed to date that supports that, let alone probative evidence that would support the change required as part of the review.

50. This demonstrates that the Guild interprets the current clause 13.1 as a casual conversion clause. Omitting wording which prescribes the engagement of the employee as casual because they do not have an **expectation or entitlement** to reasonably predictable hours changes the legal effect of this clause.
51. The joint submissions of all interested parties sought to retain the existing wording '**expectation or..**' We submit that the current wording be retained to ensure the legal effect remains unchanged.

Clause 13 – Ordinary Hours of Work

52. We rely on the joint submissions filed on 18 October 2016.

Clause 15 Breaks

53. We rely on our previous submissions in relation to Clause 15.1. We do not agree with the comments provided by the drafter that explaining how the table works in the manner it is drafted in the plain language draft adds certainty and clarity or that approaching this in the same way as it is in legislative drafting is necessarily plain language.

Clause 16 Wages

54. We rely on our previous submissions in relation to Clause 16.1, the order of columns in Table 3 and Clause 16.2

Clause 17 Annualised salary (Pharmacists only)

55. We rely on the union submissions filed on 5 September and the joint submission filed on 18 October in relation to clause 17.3. Although the drafter has provided an alternative clause to rectify our concerns the proposed use of brackets within the sentence creates a long and more complex sentence than providing this in its current form. We submit that the words in the brackets be included as a separate sentence.

Clause 18 Allowances

56. We rely on our previous submissions regarding the introductory note contained in Clause 18 and the use of 'and' in clause 18.1 and clause 18.6.
57. The drafter has retained use of the expression 'enhanced hourly rate' in clause 18.2 and we don't think the changes the drafter has made addresses our concerns. We rely on our previous submissions.

Clause 20 Overtime

58. The interested parties have had ongoing discussions regarding the overtime clause in relation to both the SDA substantive claim and the issues we have raised in relation to the plain language drafting. The parties have reached a consent position on the overtime clause which we advised the Commission in correspondence filed on 24 October 2016.
59. The agreed position takes into account the previous submissions made by the union parties and also the submissions made to the casual and part-time Full Bench in relation to the SDA substantive claim regarding overtime for casual employees.
60. For your reference, we rely on paragraph 53 – 67 of our previous submission filed on 5 September 2016 as to the changes to legal effect contained in the re-draft of the overtime clause.

61. The parties have agreed that overtime must be paid to **all** employees at the overtime rate for any hours worked at the direction of the employer:
- (a) in excess of 38 hours per week (or 76 ordinary hours over two consecutive weeks); or
 - (b) in excess of 12 hours per day as specified in clause 13.3 (maximum daily hours); or
 - (c) that are not continuous, except for rest breaks and meal breaks as specified in clause 15-Breaks; or
 - (d) between midnight and 7.00 am; or
 - (e) outside the rostering arrangements as specified in clause 14.1
62. The overtime provision also provides overtime for part-time employees for each hour worked in excess of the number of hours that the employee has agreed to work under clause 10.4 and 10.10.
63. We submit that the draft be amended to reflect the consent position of the parties. An agreed draft determination can be provided on direction by the Commission.

Clause 21 Penalty Rates

64. We rely on our previous submissions.