

s. 156 - Four Yearly Review of Modern Awards

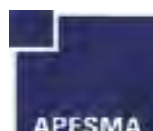
Pharmacy Industry Award 2010

AM2014/209

Joint Submission

Revised Exposure Draft of 22 July 2016

By



Shop Distributive and Allied Employees' Association (SDA)

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

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Dated: 5 September 2016

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1. The Shop Distributive and Allied Employees' Association (SDA), the Association of Professional Engineers, Scientists and Managers Australia (APESMA) and the Health Services Union (HSU) makes these submissions on the – Pharmacy Industry Award – Exposure Draft (22 July 2016) in accordance with the Statement issued by the President on 11 August 2016¹ in relation to plain language drafting of this Award.
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.

GENERAL COMMENTS ON PLAIN LANGUAGE EXPOSURE DRAFT – 22 JULY 2016

3. We note that some of the general concerns raised in our previous joint submission³ filed on 23 May 2016 regarding the plain language draft released on 21 April 2016 still remain in this later exposure draft. In particular paragraph 10-12 of our submission which relates to the use of 'Examples' and 'Notes'.
4. We have received feedback from users that they find the cross referencing to clause numbers without the inclusion of clause titles difficult to understand what is being referenced. We believe it would be much easier if the Exposure draft contained a reference to what the cross reference was about as well as the cross reference clause number. This would make it easier for users to understand what is being cross referenced.
5. We also note that the exposure 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 SDA notes that 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***

¹ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-dirs-110816.pdf>

² <https://www.fwc.gov.au/documents/decisionssigned/html/2016fwc4770.htm>

³ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014209-jointsub-sdaandors-240516.pdf>

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

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)

COMMENTS ON PROPOSED CLAUSES FROM EXPOSURE DRAFT – 22 JULY 2016

Clause 2 Definitions

6. 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.
7. 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'.

4.1 Coverage

8. We 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:

(c) 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.

9. 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.
10. 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.

11. However, the Pharmacy Industry Award 2010 does cover pharmacists who are employed in pharmacies who are situated in hospitals that dispense to the hospital where they are situated and they also dispense medicines and retail them 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.
12. 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.
13. 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:

(c) 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

14. While we don't have concerns in relation to the changed wording of this clause we do have 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.'

15. 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.
16. The SDA submits that this 'Note' should be removed as it may create a substantive legal change to the entitlement in the current award and at the very least cause confusion and ambiguity about access to this entitlement.

Clause 10 Part-time employment

Clause 10.2 and 10.3

17. We believe that Clause 10.2 and 10.3 of the exposure draft may have changed the legal intent of the existing Pharmacy Industry Award 2010 provisions and the proposed provisions are more ambiguous than the existing clause 12.9 of the current Award. Clause 12.9 of the current Award states that:

A part-time employee will be entitled to payments in respect of annual leave, public holidays, personal/carer's leave and compassionate leave arising under the NES, or this award, on a proportionate basis. Subject to the provisions contained in this clause all other provisions of the award relevant to full-time employees will apply to part-time employees.

18. The exposure draft provides that:

Clause 10.2 This award applies to a part-time employee in the same way that it applies to a full-time employee except as otherwise provided by this award.

Clause 10.3 A part-time employee is only entitled to payments in respect of annual leave, personal/carer's leave, compassionate leave or public holidays on a proportionate basis.

19. We believe that 10.3 should use the same wording 'will be entitled' rather than 'is only entitled' as this is more consistent with the current award clause 12.9 which states '*all other provisions of the award relevant to full-time employees will apply to part-time employees*'.

Clause 12.6 of the Current Pharmacy Industry Award 2010

20. 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.

21. This clause is important as it establishes that if an employee meets the definition of a full-time 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.

22. 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

Clause 11.2

23. 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.

24. Clause 11.2 of the exposure draft states that:

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

25. 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)*

26. 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.

27. 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 they are deemed to be a part-time or full-time employee.

28. 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 many employers, on the advice of the Guild, converted regular casuals to part-time as a result of this 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.

29. 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.*

30. 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.

31. We submit that the current wording be retained to ensure the legal effect remains unchanged.

Clause 11.3

32. We support the previous submission of the Guild on 23 May 2016 that clause 11.3 should be reworded to say '*The minimum number of hours for which a casual employee can be rostered to work on any day is 3 **consecutive** hours.*'

33. Clause 13.4 of the current Award states that:

The minimum daily engagement of a casual is three hours.

34. The ordinary hours clause 25.2 provides that '*Hours on any will be continuous*'. Therefore, the legal effect of clause 13.4 is that the minimum daily engagement of a casual is three continuous or consecutive hours.

35. Clause 11.3 of the exposure draft states that:

The minimum number of hours for which a casual employee may be rostered to work on any day is 3.

36. The ordinary hours clause 13.2 provides that '*Ordinary hours of work are continuous*'. Again, the legal effect of the clause is that the minimum daily engagement is 3 continuous or consecutive hours. The Exposure draft needs to retain the word 'continuous' to maintain the existing legal effect of this provision.

37. The proposed wording in clause 11.3 could be interpreted to mean that an employee can be rostered to work 3 separate hours rostered at different times across an entire day. Including the term 'consecutive' in the clause is consistent with other provisions in the award and will avoid ambiguity regarding the minimum shift requirements.

38. This will also meet the modern awards objectives provided in Section 134 of the *Fair Work Act 2009*, in particular S134(1)(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards. *(Emphasis added)*

Clause 13 – Ordinary Hours of Work

39. Clause 13.4 would be clearer if it contained the maximums, that is, 38 hours per week or 76 hours averaged over 2 consecutive weeks, rather than referencing the relevant clause.

Clause 14 Rostering arrangements

40. Clause 25.4(c) of the current Award states:

An employee can terminate the agreement by giving four weeks' notice to the employer. The notice need not be given where the agreement terminates on an agreed date or at the end of an agreed period. For the avoidance of doubt this provision does not apply to part-time employees' agreed pattern of work under clause 12.2.

41. Clause 14.5 provides that:

The employee may end an agreement under clause 14.3 at any time by giving the employer 4 weeks written notice unless the agreement was made under clause 10.4 (part-time arrangements agreed in writing on engagement).

42. There is no requirement for notice to be provided in writing in the current award. The exposure draft has a different legal effect and would represent a substantive change.

Clause 15 Breaks

43. The currently proposed Clause 15.1 and 15.2 are more complicated than previous exposure drafts. Clause 15.1 and 15.2 should be deleted and replaced with:

An employee is entitled to breaks in accordance with the table below.

44. Then the words 'column 1' and 'column 2' should be deleted from the table so that just the titles remain.

Clause 16 Wages

Clause 16.1

45. Clause 10.1 of the Exposure Draft released on 9 October is much simpler and easier to understand than the currently proposed redrafted exposure draft clause 16.1. We believe that the 9 October exposure draft wording should be retained with the exception that the word 'ordinary' be deleted from 10.1.

Clause 16.2

46. The Exposure Draft clause 10.2 from the 9 October version is preferable to the currently proposed exposure draft clause 16.2 because it is expressed more simply and is easier to understand, particularly the use of the table.

Clause 17 Annualised salary (Pharmacists only)

47. Clause 27.2 in the current Award appears to be absent from the exposure draft. We believe this represents a diminution of an entitlement and a substantive change. The purpose of the clause appears to provide that any annualised salary arrangement cannot leave an employee worse off in the event that their employment is terminated before the period of a year. However, there is no corresponding clause in the exposure draft, which only provides that '*An annualised salary must not result in a pharmacist being paid less **over a year** than would have been the case if an annualised salary had not been agreed*' (our emphasis). We submit that clause 27.2 in the current Award should be retained in the exposure draft.

Clause 18 Allowances

48. We believe the note under Clause 18 should be removed and replaced with the wording in Clause 11.1 of the 9 October 2015 exposure draft.

49. The exposure re-draft of this clause is not consistent with the modern awards objective of being simple and easy to understand, and does not follow a logical sequence. We propose the following alternative wording:

18 Allowances

18.1 Employers must pay to an employee the allowances the employee is entitled to under this clause. See schedule C for a summary of monetary allowances and method of adjustment.

18.2 Meal allowances

*The employer must pay the employee a meal allowance of **\$17.46** or supply the employee with an adequate meal when:*

- (a) the employee has worked 6 or more ordinary hours on any day; **and***
- (b) the employee is required to work on that day overtime, or more than 1.5 hours beyond the time at which the employee ordinarily finishes work for the day, unless the hours worked were agreed under clause 10—Part-time employment; **and***
- (c) the employee was not advised of the requirement mentioned in subparagraph (ii) on or before the previous day; **and***
- (d) the employee cannot reasonably return home for a meal within the period of the meal break.*
- (e) Where overtime referred to in clause 18.2(ii) exceeds 4 hours a further meal allowance of \$15.64 must be paid.*

Clause 18.2

50. Clause 18.2 should be rewritten to make it simpler to understand. The following provides some suggested wording:

18.2 On premise Meal Allowance.

A pharmacist who is required to take a meal break on the premises so as to attend to urgent matters requiring the attention of a pharmacist must be paid an enhanced allowance of 150% of the minimum hourly rate of the pharmacist for the period of the break.

Clause 18.4

51. Clause 18.4 should remove the word 'township' and replace it with:

'where the employee has to move their residence'.

52. There are examples of other Awards such as the Manufacturing Award and the Cement and Lime Award which refer to a transfer requiring 'change of residence' to identify the scope of the clause. This would be a more appropriate measure of when the entitlement should be provided.

Clause 20 Overtime

53. The Overtime provisions in the exposure draft have rectified some of the previous issues raised by the union interested parties in previous submissions, however, some elements of the current award provision are still not reflected in the exposure draft which results in a different legal effect.

54. Clause 26.2 of the current Award provides that:

Overtime means authorised additional hours performed at the direction of the employer:

- (i) Hours worked in excess of the ordinary number of hours of work prescribed in clauses 25.2 and 25.3 are to be paid at time and half for the first two hours and double time thereafter. Overtime worked on a Sunday is to be paid at the Sunday rate of double time, and*

overtime worked on a public holiday is to be paid at the public holiday rate of double time and half.

55. The Clause provides overtime for hours worked in excess of the ordinary hours prescribed in clauses 25.2 and 25.3 which state that:

25.2 Ordinary hours

(a) *Ordinary hours may be worked, within the following spread of hours:*

Days	Spread of Hours
<i>Monday to Sunday</i>	<i>7.00 am – midnight</i>

(b) *Hours of work on any day will be continuous, except for rest pauses and meal breaks and must not be more than 12 hours per day.*

[Emphasis added]

25.3 38 hour week rosters

A full-time employee will be rostered for an average of 38 hours per week, worked in any of the following forms:

- (a) *38 hours in one week; or*
- (b) *76 hours in two consecutive weeks.*

56. The current Award provides overtime for **all** employees when they work:

- in excess of 38 hours per week or an average of 76 over two weeks
- in excess of 12 hours per day
- outside the spread of hours, that is, hours worked between midnight and 7am
- where hours worked are not continuous, except for meal breaks, that is, a split shift

57. The latest exposure draft overtime clause is as follows:

Overtime

NOTE: Under the National Employment Standards (see section 62 of the Act) an employee may refuse to work additional hours if they are unreasonable. Section 62 sets out factors to be taken into account in determining whether the additional hours are reasonable or unreasonable.

20.1 Application of overtime for full-time employees

An employer must pay a full-time employee at the overtime rate for any hours worked at the direction of the employer:

- (a) in excess of the number of hours specified in clause 9—Full-time employment or 13.3 (maximum daily hours); or*
- (b) between midnight and 7.00 am.*

20.2 Application of overtime for part-time employees

An employer must pay a part-time employee at the overtime rate for any hours worked at the direction of the employer:

- (a) in excess of the number of hours that the employee has agreed to work under clause 10.4 and 10.10 (part-time employment); or*
- (b) between midnight and 7.00 am.*

NOTE: A part-time employee can agree to work additional ordinary hours under clause 10.10 on the terms applicable to hours worked by a casual employee up to the maximum hours set out in clause 13.3 (maximum daily hours) and clause 9— Full-time employment.

20.3 Application of overtime for casual employees

- (a) An employer must pay a casual employee at the overtime rate for any hours worked at the direction of the employer:*

(i) *in excess of the number of hours specified in 13.3 (maximum daily hours);*

(ii) *between midnight and 7.00 am.*

(b) *The casual loading prescribed in clause 11—Casual employment is not payable on overtime worked by a casual employee.*

58. The currently proposed exposure draft has a different legal effect from the current Award because it does not reference clause 13.2, *'Ordinary hours of work are continuous, except for rest breaks and meal breaks as specified in clause 15—Breaks'*.

59. This creates a substantive change to the entitlement in the current award. Without reference to clause 13.2 employees would be able to be rostered for more than one shift on any day without an entitlement to overtime. We submit that this is a substantial variation from the provisions contained in the current award.

60. We submit that Clauses 20.1, 20.2 and 20.3 should all reference clause 13.2, that overtime is paid where hours worked are not continuous, except for rest breaks and meal breaks.

61. We also submit that Clause 20.2 of the exposure draft should reference the currently proposed Clause 10.11 rather than provide a reference to maximum daily and weekly hours being contained in a note, which may not have legal effect.

62. Clause 10.11 provides that:

However, the total number of hours agreed under clauses 10.4 and 10.10 must not exceed the maximum daily hours specified in clause 13.3 or full-time employment hours specified in 9—Full-time employment.

63. This would be consistent with the current Award clauses 25.2 and 25.3.

64. We also submit that overtime is payable for all employees who work beyond 38 hours per week or 76 hours over two consecutive weeks, including casuals. This issue is currently

before the Casual and Part-time Full Bench which the SDA made full written submissions⁵ on 29 July 2016. We rely on those submissions in relation to this issue.

65. Consistent with previous submissions⁶ regarding the exposure draft, we submit that the overtime provision should also reference the 9 October 2015 Exposure draft clause 8.3(a) because payment of overtime also occurs when an employee works outside the “ordinary” parameters set by the rostering provisions contained in 8.3(a). Hours worked outside of these rostering parameters should attract overtime and this is what is currently being paid when employees work outside of these rostering provisions.
66. To address this anomaly clause 14 should also be included in the overtime clause 20.1 and 20.2 of the exposure draft as this provision applies to all permanent employees.
67. We submit that addressing this anomaly meets the modern awards objective.

Clause 20.4

68. The payment of overtime clause in the 9 October Exposure Draft, Clause 13.3 is clearer and easier to understand than Clause 20.4 of the currently proposed exposure draft. The 9 October 2015 exposure draft clause should be retained.

Clause 21 Penalty Rates

69. Clause 21 of the Exposure draft is much more complicated to navigate than clause 14 of the 9 October 2015 Exposure Draft. That Exposure draft clause should be retained. If the wording in clause 21.3 is retained reference to column 3 casual penalty rate needs to be included. Clause 21.3 of the exposure draft currently makes no reference to the casual penalty rate contained in table 5.
70. We also note that there appears to be a typographical error at 21.3(b). The word ‘applies’ should read ‘applied’.

⁵ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014196-197-sub-sda-290716.pdf>

⁶ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM2014209-sub-SDA-150715.pdf>, paragraph 36-39.