

**Fair Work Commission**

**Award Review 2014**

**Pharmacy Industry Award 2010**

**AM2014/209**



**Shop Distributive and Allied Employees' Association**

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

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**18 February 2015**

1. The Shop Distributive and Allied Employees' Association (SDA) makes these submissions in response to the submissions made regarding the exposure draft released by the Fair Work Commission for the *Pharmacy Industry Award 2010* (Pharmacy Award), and in accordance with the Statement issued by President Ross on 8 December 2014.
2. The SDA supports the submissions made by APESMA and HSUA.

### **The Pharmacy Guild of Australia (The Guild)**

3. The SDA would like to make submissions in reply to the submission made by The Guild on 28 January 2015.
4. The Guild makes reference in their submission to the importance of an award which is clear and easy to understand and have engaged the Plain English Drafter's Association to provide a plain English draft of the Award that includes illustrative examples.
5. The Guild then makes suggested changes and comments in response to the Exposure Draft.

### **The Guild's proposed plain English Award.**

6. The SDA is greatly concerned about the appropriateness, during this Award Review, of a party providing a completely revised draft of the Award. The Fair Work Commission has provided Exposure Drafts of the Award with the intention of rectifying structural, drafting and technical issues, which it has done for all awards.
7. The Fair Work Commission has directed parties to make submissions in relation to the Exposure Draft, not directions to re-draft the Award.
8. The FWC determined a process and a timeline for dealing with matters under this review. In a statement issued by President Ross on 13 August 2014<sup>1</sup>, the following process was determined for the Group 2 Award Stage:

#### ***Award stage***

*[11] The award stage for Groups 2, 3 and 4 will be run in a similar way to the process undertaken in Group 1 (as set out in the Guide to the Award Stage). The steps are as follows:*

*(i) An initial conference will be held to discuss the scheduling of the group.*

*(ii) Following the initial conference the Commission will publish a briefing note, setting out any issues identified by Commission staff for each award.*

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<sup>1</sup> [2014] FWCFB 5537

*(iii) Each award will be referred to a single member for conference to identify issues and the extent of any agreement, this change in process from Group 1 is in response to feedback received that interested parties were required to attend the Commission on too many occasions. The transcript of this conference will be published on the Commission's website.*

*(iv) The single member will report back to the Full Bench and the reports will be published.*

*(v) The Commission will publish an exposure draft of the new award together with directions for submissions. This exposure draft will incorporate any technical and drafting changes proposed by the Commission and highlight any provisions to be further reviewed. The exposure draft will not incorporate any substantive changes.*

*(vi) Interested parties will be given the opportunity to make submissions in relation to the exposure draft and any disputed issues.*

*(vii) Interested parties will be given the opportunity to make submissions in reply in relation to the exposure draft and any disputed issues.*

*(viii) The matter will be called on for mention. The mention will be before the Presiding Member of the Full Bench only.*

*(ix) Further consultation will occur with either a single member or the Full Bench, or alternatively a hearing may be listed before the Full Bench. Any outstanding issues will be determined at this stage and the parties may be required to adduce evidence of any claims.*

*(x) A decision or statement will be issued by the Full Bench with a determination varying each modern award to give effect to any changes required. Feedback may be sought on the form of the final order however this will not be an opportunity to re-agitate claims.(own emphasis added)*

9. This process sets out that the Commission will publish the exposure draft and parties will be given the opportunity to make submissions in relation to the exposure draft and submissions in reply.
10. The statement above refers to the *Guide to the Award Stage*<sup>2</sup>. This also sets out the process to be undertaken during the Award Stage.
11. At paragraph 20 the Guide sets out the steps to be taken for each group of awards. This includes '*the Full Bench issuing Exposure Drafts of modern awards including changes arising from the submissions and hearings, along with any technical and drafting changes proposed by the Commission*' and '*parties will be given the opportunity to make submissions on the Exposure Drafts*'.
12. The Guide also states the role of the Commission and the role of parties in the 4 yearly review. This clearly states that the role of the Commission is to prepare material to assist the parties, including a number of draft awards. The Guide states that:

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<sup>2</sup> FWC, 4 yearly review of modern awards – Guide to Award Stage, 16 June 2014.

*27. The draft awards prepared by staff of the Commission are intended to be a starting point for consideration and will not propose changes to any entitlement under a modern award. Suggested changes will only be to the form and structure of the modern awards.*

*30. During the award stage, the Commission will seek the views of parties on any research material produced such as draft awards or model clauses. Feedback will generally be sought in written form to be emailed to amod@fwc.gov.au.*

13. In its submission regarding the *Draft Guide to Award Stage* made on 1 May 2014<sup>3</sup> the Guild stated that it *'broadly supports the proposed approach by the Commission to the structure of the Four Yearly Review'* and *'had no comments to make in relation to the draft exemplar award. The PGA supports attempts made by the Commission to create a plain language, easy to understand modern award system that addresses structural issues identified in modern awards'*.
14. At no point throughout the submission did the Guild make any suggestions for an alternative process to that provided in the Draft Guide nor did they suggest that parties should re-draft the Award.
15. It is therefore surprising that the Guild has chosen to take it upon themselves to redraft the Pharmacy Award, thereby ignoring the statements, directions and processes determined by the FWC in this Review.
16. The Guild is proposing to circumvent the process of this review by putting up a redraft of the Award which does not meet the timeline determined by the Statement issued by President Ross on 8 December 2014. The redraft is outside the scope of this review as evidenced by the decision of the Full Bench of the Fair Work Commission on 17 March 2014<sup>4</sup> which states that:

[23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.

[24] In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations

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<sup>3</sup> Pharmacy Guild of Australia, *Comments: Draft Guide to Award Stage*, 1 May 2014

<sup>4</sup> [2014] FWCFB 1788

Commission (the AIRC) under Part 10A of the *Workplace Relations Act* 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. [14](#) In the Review the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time that it was made.

[25] Although the Commission is not bound by principles of *stare decisis* it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in *Nguyen v Nguyen*:

“When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see *Queensland v The Commonwealth* (1977) 139 CLR 585 per Aickin J at 620 et seq.” [15](#)

[26] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. [16](#) As a Full Bench of the Australian Industrial Relations Commission observed in *Cetin v Ripon Pty Ltd (T/as Parkview Hotel)* (*Cetin*)[17](#):

“Although the Commission is not, as a non-judicial body, bound by principles of *stare decisis*, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so.” [18](#)

[27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.

17. The SDA is very concerned with the direction and approach adopted by the Guild and its flagrant disregard for the directions and processes of the FWC.
18. The SDA 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 appropriate document to use in order to ensure the Award is clear and easy to understand.
19. The Fair Work Commission has the industrial expertise, knowledge and history of the Award, and therefore is the only appropriate organisation to produce a proposed redraft of the Pharmacy Award. This is especially given the parameters which have been set by the above decision of the Full Bench regarding the nature and scope of this review.
20. The Guild has stated the draft produced by the Plain English Drafter’s Association will be ready by the end of March 2015 and it will discuss this with the relevant unions and provide a proposed award to the Commission. The SDA strongly opposes the attempt by

the Guild to circumvent the established process set out by the Fair Work Commission in the 2014 Award review.

21. The SDA also opposes the use of illustrative examples as suggested throughout the Guild's submission.
22. The SDA notes the decision of the Full Bench of the FWC on 23 December 2014<sup>5</sup>, in relation to the exposure drafts for Group 1A and Group 1B Awards, stating that:

*[63] 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.*

23. The SDA would recommend a cautious approach to the inclusion of examples in the Award as Awards are a legal instrument and believe that the inclusion of any examples may be more appropriate in an annotated version of the Award, as proposed by the Commission in the above decision, rather than the Award itself.

#### **The Guild's comments in response to the Exposure Draft**

24. The Guild has made the following suggested changes in response to the Exposure Draft.

##### Clause 6.4(d)

25. 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).*

26. The Guild has amended the clause to remove the words *no less than* so no argument is created about the current over-award amount becoming the award rate.

27. The use of the words 'no less than' should not should create an argument in relation to over-award payments. The clause specifically refers to the minimum hourly rate contained in the award and that no payment should be less than that.

28. The SDA does not support the amended wording proposed by the Guild.

##### Clause 6.4(f)

29. The Guild has proposed to amend clause 6.4(f) to reinstate the existing provisions that a part-time employee's roster can be altered by the *employer giving the employee notice*.

30. The SDA has made submissions in relation to this clause regarding the need to maintain that written notice is required for a variation to a roster whether it is with 7 days or 48

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<sup>5</sup> [2014] FWCFB 9412

hours notice. However, we are not opposed to the inclusion of the proposed wording of The Guild, which is consistent with the current award provision, to include *'the employer giving the employee'* notice providing it is written notice.

#### Clause 13.2

31. The SDA does not oppose The Guild's submission to replace the word 'discretion' with the word 'direction' in relation to when overtime is worked.
32. This was an issue raised by The Guild during the 2012 Award Review and the Award was varied by consent to state that:

'Overtime means *authorised* additional hours performed at the *direction* of the employer'

#### Clause 13.4(d)

33. The Guild is seeking to amend the clause to remove the entitlement to overtime being *'for each hour worked'*. The Guild submits that this will avoid argument that overtime is not payable for less than an hour's work.
34. The SDA opposes the removal the wording 'for each hour worked'. Clause 13.4(d) sets out the rate at which an employee is able to take time off instead of receiving payment for overtime. The use of the wording 'for each hour worked' is necessary to describe the rate at which they will receive the time off.
35. The Guild has also removed the words 'elects to'. Although this wording is used in clause 13.4(a) it is important that this wording is also included in 13.4(d) to ensure that this provision is only applied where an employee elect time off instead of payment.
36. The SDA opposes variation from the wording contained in clause 13.4(d) of the Exposure Draft.

#### Clause 9.3(b)

37. The Guild has included a table at 9.3(b) to summarise when breaks occur and the length of the break. While the SDA does not oppose the inclusion of a table, the table needs to accurately reflect the entitlements as per clause 9.3(b).
38. The second line of the table should read 'More than 5 and up to ***less than 7.6'***.

#### Clause 20.2

39. The Guild has included a table at clause 20.2 which sets out the notice an employee is required to provide on termination.
40. The SDA does not oppose the inclusion of a table at clause 20.2.

#### Clause 10.4

41. In Attachment A of The Guild's submission clause 10.4 has been amended to remove the words 'Pharmacists only'. The effect of this change is substantial in that the Annualised salary clause would then apply to all employees including pharmacy assistants.
42. The SDA notes that The Guild, in its brief outline of submissions made on 25 November 2014, included a claim for annualised salaries for pharmacy assistants.
43. The SDA strongly opposes any variation to extend annualised salaries to pharmacy assistants and believes that this issue needs to be addressed at conference and hearing and not in relation to the Exposure Draft.
44. The SDA notes from the Statement of President 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.'*
45. The deletion of *'(Pharmacists only)'* is a substantive change to the Award which the SDA strongly opposes and it should not be altered in the Exposure Draft.

#### Clause 11.2(a)(iii)

46. The SDA notes that The Guild has made an amendment in Attachment A of its submission to clause 11.2(a)(iii) to include the provisions to which the clause applies.
47. The SDA does not oppose this amendment.

#### **Submissions of Australian Business Industrial and the NSW Business Chamber**

48. The SDA would like to make submissions in reply to the submission made by Australian Business Industrial and the NSW Business Chamber on 2 February 2015.

#### Clause 6.5(c)(ii)

49. The SDA does not oppose the deletion of 'paid personal Leave' in clause 6.5(c)(ii) as suggested by the ABI and NSWBC

#### Clause 8.2(f)

50. The SDA agrees that this sub-clause may suggest that the other provisions of clause 8.2 do not apply to part-time and casual employees. This sub-clause should be reviewed to ensure that both the provisions contained in clause 8.2 and clause 6 apply to part-time and casual employees.

#### Clause 8.3(a)



51. The SDA agrees that the existing clause 25.4(a)(iii) should be retained in preference to the new clause 8.3(a)(iii) and 8.3(a)(iv).

Clause 11.2(a)(ii)

52. The SDA does not oppose the amended wording provided by the ABI and NSWBC in relation to meal allowances.

Clause 13.2

53. The ABI and NSWBC argue that casual employees are not entitled to overtime. The SDA strongly opposes the submission of the ABI and NSWBC in relation to casual employees and overtime.

54. The SDA would like to rely on the submissions it has made in relation to casual employees and overtime in response to the Exposure Draft on 28 January 2015.

Schedule G: Definition of default fund employee

55. The SDA supports the submission of the ABI and NSWBC to consider retaining the definition of a default fund employee.