Fair Work Commission

Award Review 2014

Pharmacy Industry Award 2010

AM2014/209

Shop Distributive and Allied Employees' Association

Submission in response to the Pharmacy Industry Award Exposure Draft

28 January 2015

1. The Shop Distributive and Allied Employees' Association (SDA) makes these submissions in response to 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 Justice Ross on 8 December 2014.

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*.'

Definitions and interpretation

3. In the exposure draft the Definitions and interpretations section has been moved from clause 3.1 to Schedule G and the word interpretation has been deleted. The exposure draft places this section at the back of the Award.

4. The Definitions are necessary to have at the beginning of the Award as they determine and frame the context of the proceeding clauses. Given the importance of the definitions in the way in which the provisions of the Award are interpreted the SDA believes that the Definitions should remain at Clause 3 and should precede the substantive provisions contained in the Award.

5. The SDA believes that having the definitions at the front of the Award is a more logical and a more user friendly tool. Moving the definitions to the back may also lead users to miss the definitions and incorrectly apply provisions contained in the Award.

6. The SDA notes that "**default fund employee**" has been deleted from the exposure draft.

Relationship between the Award and the National Employment Standards

7. The Exposure Draft combines the current clause 5 & 6 of the Award and removes the word 'Access' from the title of the clause.

8. The SDA submits that this changes the substantive provisions contained in clause 5 of the Award. The current clause in the Award prescribes the variety of ways in which employers must make the Award available to employees, including the provision of a physical copy of the award and NES.

9. While the intended change appears to allow for the Award and National Employment Standards to be available to employees electronically, it appears to remove the necessity to provide a physical copy, where this would be more accessible.

10. For our members, the use of notice boards in staff rooms/staff areas as a means of communication is still widely used and we believe the reference to the use of noticeboards for this purpose should remain.

11. The SDA also submits that the title of the provision should not be changed, as proposed in the exposure draft, to remove the words 'Access to'. Including the words 'Access to' in the title prompts employers that they must ensure employees have access to copies of the Award and National Employment Standards and also prompts employees that they have a right to be able to access this information from their employer.

12. In a decision of the Full Bench of the FWC on 23 December 2014[1], in relation to the exposure drafts for Group 1A and Group 1B Awards, the Full Bench stated that:

> *[29] We agree with the submissions of the AMWU and the existing clause will be retained. Further we propose to delete the words 'whichever makes them more accessible' from the current formulation. It seems to us that these words give rise to an obligation which would be difficult to meet in practice and that the primary obligation under the clause is clear, that is: 'The employer must ensure that copies of the award and the NES are available to all employees to whom they apply...'. We will also add the word 'accessible' before 'electronic means' in the current clause to make it clear that if the award and the NES are provided by electronic means then the means provided must be accessible to all employees. The amended clause will be as follows:*
>
> *'The employer must ensure that copies of the award and the NES are available to all employees to whom they apply, either on a notice board which is conveniently located at or near the workplace or through accessible electronic means.'*

13. The SDA supports the wording adopted by the Full Bench in the abovementioned decision in preference to that being currently proposed in the Pharmacy Industry Award exposure draft.

[1] [2014] FWCFB 9412

Inclusion of Facilitative Provisions

14. The SDA does not object to the inclusion of a new clause in the Award that identifies existing facilitative provisions in the Award.

15. However, the SDA supports the written submissions made by the ACTU on 15 October 2014 in response to the Exposure Drafts released for Group 1A and 1B Awards[2], that the Commission use the facilitative provision contained in the Manufacturing and Associated industries and Occupations Award 2010 (Manufacturing Award) and Exposure draft as the model for modern awards, as this clause clarifies the distinction between when a facilitative provision can be used between an employer and an individual, and an employer and the majority of employees.

16. The provisions in the Manufacturing Award are also more prescriptive about the process necessary for reaching and implementing any agreement with regard to the provisions contained in the clause, including how the agreement is to be recorded.

17. The SDA supports the use of Clause 8.1 of the Manufacturing Award as the introductory paragraph as this is a clearer introductory paragraph than the one provided in the Exposure Draft.

18. The SDA also notes that this wording has been used in the Exposure Drafts for other Awards, such as the *Storage Services Award*.

19. The SDA also supports the use of Clause 8.2 and 8.3 of the Manufacturing Award. In particular, Clause 8.3 clarifies that where agreement is reached with the majority of employees, the employer must not implement the agreement unless agreement is also reached between the employer and each individual employee. The SDA believes that this is an essential safeguard to ensure fairness to each employee.

20. Clause 8.2 and 8.3 of the Manufacturing Award also provides that the agreement reached must be kept by the employer as a time and wages record; which is a common feature in the Facilitative Provisions in many Awards. The SDA strongly supports the inclusion of this provision in the Pharmacy Award.

[2] (AM2014/64 & Ors) ACTU Submission: Stage 1 Exposure Drafts (15 October 2014)

Inclusion of summary wages tables

21. The SDA is not opposed to the concept of including tables of rates into the wage provisions. However, there needs to be a distinction drawn between the minimum wages table at clause 10 of the exposure draft and how this interacts with the penalty rates table at clause 14, particularly in relation to the use of the term Ordinary Hours.

22. Clause 10 of the exposure draft includes a new sentence at 10.1:

    'An employer must pay adult employees the following minimum wages for ordinary hours worked by the employee:'

23. Clause 14 Penalties also includes a new table of rates and includes a new sentence at 14.1:

    'The employer will pay to an employee the following rates for all ordinary hours worked during the specified periods:'

24. The use of the term 'ordinary hours' to describe payment for hours worked in both tables is confusing and misleading as ordinary hours worked can include hours worked at the minimum rate and hours worked at times which attract a penalty rate.

25. It is the view of the SDA that 10.1 should be expressed as follows:

    10.1 An employer must pay adult employees the following minimum wages for hours worked by the employee:'

26. The exposure draft makes a note in the box below the wages table to see 'Schedule B for a summary of hourly rates of pay including overtime and penalties'.

27. The SDA submits that this should be included in the Award at a new clause 10.2, which should precede the minimum wages table to avoid confusion about the hourly rate of pay an employee would be entitled to.

28. The SDA also submits that the tables provided in Schedule B are not consistent in the use of the term 'minimum hourly rate' and 'ordinary hours'.

29. The SDA submits that the heading in column 2 of tables B.1.1 and B.2.1 should read 'Ordinary hours worked where the minimum hourly rate applies'.

30. This is consistent with the use of '% of minimum hourly rate' used below in the same tables and it is this rate which the ordinary rates worked during hours which attract a penalty are calculated on.

Inclusion of NES summaries and a payslips provision.

31. The inclusion of NES summaries and a new provision in relation to payslips was referred to in the decision of the FWC on 23 December 2014[3] at paragraphs 30 – 36. At paragraph 35 the Full Bench stated:

> *At the hearing on 18 November 2014 the Commission foreshadowed an approach whereby it would publish two documents – the legal instrument, being the modern award as reviewed, and an annotated version of each modern award. The legal instrument would not contain summaries of NES entitlements or links to various legislation, such as the proposal in relation to pay slips. The second document will be an annotated version of each award, published by the administrative arm of the Commission and will contain summaries of NES entitlements and links to various legislative provisions. Interested parties will be consulted as to the terms of annotated awards to be published by the Commission.*

32. We note the recent decision of the Fair Work Commission and while the SDA supports the above approach, the SDA urges a cautious and consultative approach to the drafting of annotated versions of each modern award. The task of creating summaries of various provisions can be complex. Care must be taken to ensure a balanced and accurate summary of any NES provision. Summaries must not be seen as a substitute for referencing the NES provisions in the Act.

33. In order to illustrate the complexity of creating accurate summaries the SDA would like to make submissions in regard to the way in which some of these entitlements have been summarised in the Exposure Draft.

<u>Redundancy</u>

34. The SDA submits that the proposed new clause 21.2 which provides a definition of a small business employer is unnecessary as this is already contained in the Definitions clause.

<u>Public Holidays</u>

35. The Public Holiday NES provision contained in Clause 18 (PIA Exposure Draft) states:

> *'18.1 Public holiday entitlements are provided for in the NES. The NES provides a paid day off on each public holiday, except where reasonably requested to work. For the full NES public holiday entitlement see ss114-116of the Act.'*

36. The SDA submits that this summary is an oversimplification of the provisions under the NES (Public Holidays), and does not provide sufficient information for an employer or employee covered by the award to determine their right and obligations.

[3] [2014] FWCFB 9412

37. The SDA considers that it is the right of an employee under the NES to refuse work on a public holiday and receive the benefit of the day off with pay.

38. The Award should express this right as it is written in the *Fair Work Act,* as follows:

> 'An employee is entitled to be absent from his or her employment on a day or part-day that is a public holiday in the place where the employee is based for work purposes. However, an employer may request an employee to work on a public holiday if the request is reasonable.'

39. The summary should then contain an employee's right to reasonably refuse the request and the grounds on which they are able to do this under the Act.

40. Reference should also be made to s114(4) of the Act and the contents of that section replicated in the Award to ensure employers and employees know what must be taken into account when determining whether a request to work or refusal of a request to work a public holiday is reasonable.

Inclusion of payslips provision

41. The SDA strongly supports the inclusion of the payslips provision in the annotated version of the Pharmacy Award

42. The provision of pay slips is essential to encourage compliance with the Award, in relation to wages and entitlements, and for employees to check that they are receiving what they are entitled to under the Award.

43. The Fair Work Ombudsman presented the Commission with a paper 'FWO – Key Operational Statistics' on 11 April 2014, to assist with the Review. This paper revealed that as part of a National Campaign in Pharmacy in 2012-2013 it was found that 14% of contraventions of the Act were in relation to the provision of payslips. [4]

44. Including this legislative obligation into the Award will raise awareness for employers regarding this obligation and should lead to greater compliance with Fair Work Act in relation to the provision of payslips and should also have the flow on benefit of greater compliance with the provisions of the Award.

Part-time employees

45. The current Award at clause 12 defines part-time employees as:

> 12.1 A part-time employee is an employee who:
>
> (a) works less than 38 hours per week; **and**
>
> (b) has reasonably predictable hours of work.

[4] FWO – Key Operational Statistics, April 2014, pg 8.

46. The exposure draft has deleted the word 'and' which is in bold above for ease of identification.

47. The SDA submits that this should not be removed as both (a) *and* (b) must be met for an employee to satisfy the definition of a part-time employee. The removal of the word 'and' substantively changes the part time definition under the award. Substantive changes are contrary to the Statement of Justice Ross issued on 8 December 2014.

48. Clause 6.4(d) in the exposure draft refers to clause 6.5(d) as the minimum hourly rate of pay for the relevant classification. This is not the correct clause. It should refer to clause 10.1.

Rosters

49. The proposed changes to the current clause 12.8 contained in the new clause 6.4(f) of the exposure draft changes the substantive provisions of this clause.

50. The current award clause 12.8 provides that:

> *12.8 Rosters*
>
> *(a) A part-time employee's roster, but not the agreed number of hours, may be altered by the giving of notice in writing of seven days or in the case of an emergency, 48 hours, by the employer to the employee. The rostered hours of part-time employees may also be altered at any time by mutual agreement between the employer and the employee.*

51. The proposed clause in the exposure draft provides that:

> 6.4 (f) Rosters
>
> (i) A part-time employees roster, but not the agreed number of hours, may be altered:
>
> - by giving seven days' written notice; or
> - in the case of an emergency, by giving 48 hours notice; or
> - at any time by mutual agreement between the employer and the employee.

52. The current clause provides that written notice must be given for both instances of altering a part-time employee's roster; whether its seven days notice or 48 hours notice in the case of an emergency, written notice must be given according to the current provisions.

53. The effect of the change is that written notice is no longer required when 48 hours notice is given in the case of an emergency.

54. The SDA submits that 'written' notice should be included in the second dot point of clause 6.4(f)(i) to ensure that the substantive provisions of the award are not changed.

Casual Employment

55. Clause 6.5 of the Exposure Draft has reformulated the casual employment clause.

56. The SDA has no objection to 6.5(a) and 6.5(b) which sets out the definition of a casual employee. However, we have concerns in relation to the new casual loading provision 6.5(c).

57. The current award 13.2 provides that:

> 13.2 A casual will be paid both the **actual** hourly rate paid to a full-time employee and an additional 25% of the **ordinary** hourly rate for a full-time employee.

58. The exposure draft clause 6.5(c) provides that:

> 6.5(c) Casual Loading
>
> (i) For each ordinary hour worked, a casual employee must be paid:
>
> - the **minimum** hourly rate; and
> - a loading of 25% of the **minimum** hourly rate
>
> for the classification in which they are employed.

59. The change in the use of the term 'actual' to 'minimum' provides a different entitlement to wages under the award. Although it is not the intention the new clause could be interpreted to mean that a casual is only entitled to the minimum hourly rate plus the additional 25% casual loading and not the penalty rate which applies to ordinary hours worked which attract a penalty as per clause 14 (of the PIA exposure draft).

60. The SDA submits that the clause should reflect the existing terminology and entitlements of the current award, that is, the first dot point in clause 6.5(c)(i) should be retained as 'the actual hourly rate' as this would include penalty rates which form part of a casual employee's ordinary hourly rate.

61. Clause 6.5(c) of the exposure draft also includes two new sub-clauses which have not previously been in the Award. These sub-clauses provide a list of entitlements that the casual loading is paid in lieu of:

Clause 6.5(c)

(ii) The casual loading is paid instead of annual leave, paid personal leave, paid personal/carer's leave, notice of termination, redundancy benefits and other entitlements of full-time and part-time employment.

(iii) The following provisions of the award do not apply to casual employees: (Parties are asked to provide a list of provisions that do not apply to casual employees).

62. The SDA does not support the inclusion of a model award provision of the nature prescribed in clause 6.5(c)(ii) and (iii) in the Pharmacy Industry Award.

63. Traditionally all provisions of an award apply to a casual employee, other than where there is express exclusion or a particular clause is not able to be applied to a casual employee.

64. The Pharmacy Industry Award adequately identifies which award provisions apply to casual employees.

65. Clause 6.5(c)(ii) is very broad as it refers to 'other entitlements of full-time and part-time employment'. This may be interpreted to include any award entitlement which does not specifically refer to casual employees.

66. To avoid this interpretation the Award should not be amended to include these provisions and the issue of what does and does not apply to casuals should continue to be specified within the Award as it currently does now.

67. The SDA also supports the submissions of the ACTU on this issue, made on 15 October 2014 in response to the Exposure Drafts released for Group 1A and 1B Awards[5].

68. In a decision of the FWC on 23 December 2014[6], the FWC stated that:

> *[68] An issue that has arisen that is common to all awards in group 1, relates to a note that was inserted by the Commission into all exposure drafts in relation to casual employees. Parties were asked to identify provisions in the award that do not apply to casuals. The current clause in the exposure draft and the note are set out as follows: The following provisions of this award do not apply to casual employees: Parties are asked to provide a list of provisions that do not apply to casual employees.*

[5] (AM2014/64 & Ors) ACTU Submission: Stage 1 Exposure Drafts (15 October 2014)

[6] [2014] FWCFB 9412

[69] This proposal generated significant controversy among interested parties to many of the Group 1 modern awards. We have decided that the above sub-clause and note will be removed from all the exposure drafts. If any party wishes to pursue the insertion of this provision into a particular award, then this can be raised by parties at the award stage.

69. The SDA submits that this decision should be applied to this exposure draft.

Definition of overtime

70. The exposure draft has made significant changes to the overtime provisions in the Pharmacy Award which the SDA strongly opposes.

71. Clause 13.2(a) provides for overtime for a full-time employee and clause 13.2(b) provides overtime for a part-time employee. However, the clause does not provide a definition of when overtime applies to casual employees.

72. The exposure draft contains a note below Clause 13.2, *'Should the award state when a casual employee is entitled to overtime?*' The SDA strongly submits that the award needs to state that a casual employee is entitled to overtime, as evidenced by current clause *26.2(a)(iii) For casual employees the casual loading is not payable on overtime.*

73. The SDA, in its Outline of Variations made on 25 November 2014, has sought to 'vary clause 26.2 (a)(i) Overtime, to ensure that there is no ambiguity as to the payment of overtime for all permanent and casual employees performing work which goes beyond the times and patterns considered 'ordinary' as per the award.'[7]

74. The SDA submits that overtime in the Pharmacy Award applies to all employees performing work beyond the times and patterns considered 'ordinary', including casuals. As such, we strongly oppose the change in the definition of overtime included in the exposure draft.

75. Any definition of overtime provided in the Award should define when overtime is paid for both permanent **and** casual employees as overtime provisions apply to all employees.

76. The issue of overtime may more appropriately be dealt with as part of the common issues dealing with casual and part-time employment.

[7] AM2014/209, SDA Outline of Variations, 25 November 2014.

Annualised Salaries

77. The current Clause 27.1 and 27.2 which provide for 'Annualised salaries' has been substantively changed in the Exposure Draft at Clause 10.4(a) and 10.4(b).

78. The current provision states that:

> *27.1 An annualised salary for pharmacist employees may be developed. Such salary may be inclusive of overtime, penalty rates, payments for public holidays taken, annual leave taken, annual leave loading, meal allowance and meal break on call entitlements. Provided that the annual salary paid over a year was sufficient to cover what the employee would have been entitled to if all award entitlements had been complied with when calculated on an individual basis according to the hours worked.*
>
> *27.2 Provided that in the event of termination of employment prior to completion of a year the salary paid during such period of employment will be sufficient to cover what the employee would have been entitled to if all award entitlements had been complied with.*

79. The proposed clause states that:

10.4(a) An annualised salary for pharmacist employees may be developed. The annual salary may be in satisfaction of **any or all** of the following provisions of the award: (emphasis added)

(i) overtime;

(ii) penalty rates;

(iii) payments for public holidays taken;

(iv) annual leave taken;

(v) annual leave loading;

(vi) meal allowance; and

(vii) meal break on call entitlements.

10.4(b) The annual salary paid over a year must be no less than the amount the employee would have received under this award for the work performed over the year (or if the employment ceases before the completion of a year over such lesser period as has been worked).

80. The change to the wording of the clause to 'annual salary may be in satisfaction of any or all of the provisions' substantively changes the current provision. The annual salary must be in satisfaction of **all** of the provisions, not **any**.

81. The SDA does not oppose the change in the format of the clause so that the provisions are set out as a list, however we strongly oppose the proposed changes to the wording provided in the current clause 27.1 and 27.2 of the Award.

82. The exposure draft proposes to delete the second sentence of clause 27.1 and the entire clause 27.2 and replace these with 10.4(b).

83. The SDA submits that the proposed clause 10.4(a) and 10.4(b) creates a substantive change to the provisions contained in the current Award.

84. The SDA strongly argues that the existing provisions should be retained as they provide a more appropriate safety-net for employees who may enter into an arrangement for an annualised salary, as the current provision ensures that the annual salary an employee receives is sufficient to cover the award entitlements they would have received when calculated on an individual basis according to the hours worked.

85. The existing provisions are a much clearer prescription than that provided in the exposure draft and should be retained.

Meal Allowances

86. The Fair Work Commission has requested clarification, in the Exposure Draft, in relation to Meal Allowances.

87. The first point of clarification relates to clause 11.2(a)(iii) and whether this clause applies to both clause 11.2(a)(i) and clause 11.2(a)(ii), or just clause 11.2(a)(i).

88. The SDA submits that clause 11.2(a)(iii) applies to both clause 11.2(a)(i) and 11.2(a)(ii).

89. Where an employee has been advised of the requirement to work overtime on the previous day then no meal allowance is payable.

90. The second point of clarification relates to the interaction between clause 11.2(a)(v) and 6.4(b)(vi), in light of Clause 6.4(c) which permits a permanent change to a part-time employee's regular hours.

91. The SDA does not believe that there is any interaction between clause 11.2(a)(v) and 6.4(b)(vi).

92. Clause 6.4(b)(vi) relates to the rate of payment for work in excess of agreed hours.

93. Clause 11.2(a)(v) states that no meal allowance will be payable where the additional hours are agreed hours as per clause 6.4(c).

94. Clause 6.4(c) relates to agreed variation to regular pattern of work.

95. Clause 11.2 refers to when a meal allowance would be payable and this does not relate to variations of agreed hours as described in clause 6.4(c), rather it is for when, on the day of the shift, employees are asked to work additional hours, beyond their ordinary time of ending work.

Inconsistencies

96. The SDA would also like to highlight an error at Clause 6.4(d). The clause refers to 'the minimum hourly rate of pay for the relevant classification in clause 6.5(d)'.

97. The reference to clause 6.5(d) is incorrect. The reference should be to clause 10.1.