Productivity Commission Enquiry into the Workplace Relations Framework

SDA Response to Productivity Commission Draft Report

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INTRODUCTION

The Shop, Distributive and Allied Employee's Association (SDA) is Australia's largest trade union with approximately 216,000 members. The majority of these members are young people and women. Registered in 1908, the SDA has coverage of areas including retail, fast food, warehouse, drug and cosmetic manufacturing and distribution, hairdressing, pharmacies and modelling.

The SDA has not sought, in this reply submission to respond to all of the recommendations of the Commission. We have focussed on those which are of the greatest concern to us.

PENALTY RATES

The SDA totally opposes any change to the current penalty rate arrangements.

Why the HERCC?

There is little or no rationale for forming the grouping hospitality, entertainment, retailing, restaurants and café industries (so called HERRC industries).

The Productivity Commission admits HERRC is "a number of consumer service industries", which means not all consumer industries are identified or investigated. Consumers wanting "access to services which has expanded" equally applies to other industries i.e. banking.

The highlight of these industries appear to have been chosen because of the "complaints" of the employers in these industries. It seems a coincidence that the industries identified by the productivity commission neatly conform with the repeated applications and agitation by employers for penalty rate reductions before FWC. Such application and position of employers is nothing new. History shows that employers in retail have always sought

reductions in penalty rates especially on weekends. This can be traced back through many decades 70's, 80's 90's and 2000's…It is nothing new!

There is an absence of any analysis regarding gender and penalty rates. Nowhere is there a mention that the identified industries have a predominance of women.

Who deserves penalties?

Creating a system for penalty rates based on "deserving" industries and "undeserving" industries develops two distinct classes of employees in the community. Applying a broad brush and labelling in this way means a person's values on non-work matters such as family time, community contribution or social time is less valuable or important than the "deserving" industry.

Being forced to choose to work in retail because of economic reasons on a Sunday by a mother, does not mean the sacrifice for her of family time is any less than a police officer or fire fighter working on a Sunday.

It is wrong to deprive an industry of an appropriate penalty rate merely because there are younger employees in it. One of the reasons for younger employees i.e. students, is the low skilled nature of their work (and this is recognised by the low base rates). Young people can't go and be in the paid essential services or engineering or road construction or even the mines due to the required skill level. Industries with low skills shouldn't have a double-up of a bonus reduction in wages applying that is low wage due to the work and then lower penalty because of the work. A double dip for the same issue.

Also having this compounded by age is an extra reduction regularly applied. Retailers have always employed "juniors" as it is cheap. It also remains legal to explicitly advertise and recruit for a junior employee.

Skill level and penalty are separate matters

It is not appropriate to rely heavily upon a comparison of a skilled worker's ordinary time earnings and compare it with a low skilled worker penalty time rate. This is really comparing apples with oranges, creating a big raspberry.

Skill level is recognised through a classification system in each Award. The higher the skill, the higher the wage level. This forms a proper and regulated mechanism to judge and "reward" the skills and knowledge of a worker at the workplace. This does mean workers in an establishment can have different wage rates creating low and high paid workers but it generally has a proper foundation.

Comparing the dollar base rate of a skilled pharmacist with the penalty received by a lower level worker is not appropriate for any purposes. The penalty loadings are on top of ordinary rates for ALL employees in the Award. The skilled pharmacist who receives at least 30% more in ordinary time than a Pharmacy Assistant Level 1 also then has the penalty hour component paid when working at penalty times. It is in fact compounded penalty payment.

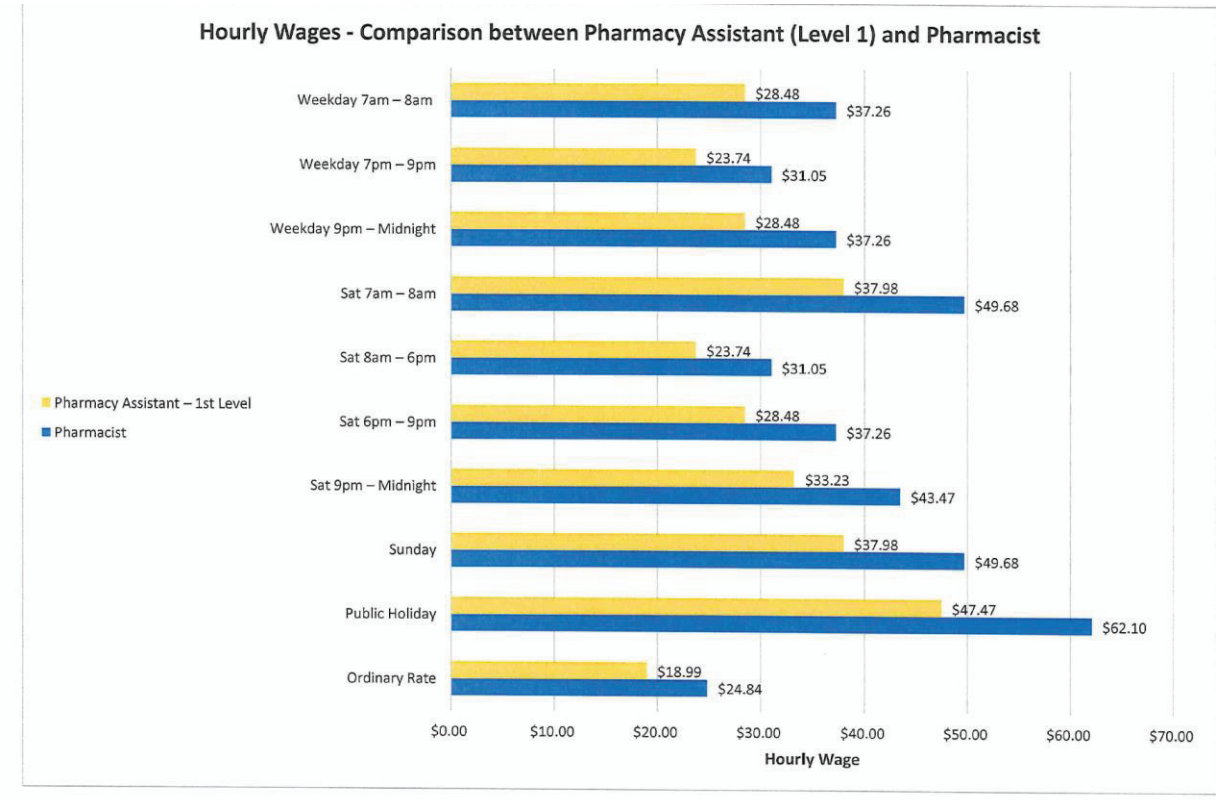
The penalty is paid according to the ordinary time earnings of that worker i.e.:

Pharmacist = 132% x 50% penalty loading

Pharmacy Assistant -= 100% x 50% penalty loading.

A true and correct comparison is to look at the actual rates paid to the pharmacist and the pharmacy sales assistant. When this is undertaken the pharmacist is paid significantly more at all times when compared to the lower skilled assistant.

❖ *Table 1 – Hourly Rate Comparison Pharmacist Vs Pharmacy Assistant*



In the APPENDIX (A) are further tables and calculations under the Pharmacy Award

Household Earnings

The use of AWALI Data to draw conclusions regarding earnings on Sunday (Table 14.13) are not reliable due to small sample size.

However points not noted by the Productivity Commission is that compared to all industries, household earnings for retail, accommodation and food services of Sunday employees are vastly below that of other industries. All industries show 58% have household incomes over $90,000 compared to approximately 47% for retail, accommodation and food services.

Strikingly, the top level earnings of $110,000 + shows that an enormous 41.6% of all industries households working on Sunday reach this high level but only 30.6% of retail, accommodation and food services households do.

A far more useful measure is to use ABS data. The SDA has undertaken such research and it shows:

> Employees in the retail and pharmacy industries are amongst the lowest paid workers in the nation. Together with the hospitality and food services industries, the retail and pharmacy industries have the largest proportion of low paid workers in the nation.
>
> Households in which there is at least one adult retail or pharmacy industry employee (retail/pharmacy households) have lower living standards than households in which there are no adult retail or pharmacy industry employees.
>
> Retail/pharmacy households have substantially lower financial resources for meeting cost of living needs even though the cost of living is broadly the same as for employees in other industries.
>
> Employees in the retail and pharmacy industries experience lower living standards at the household level compared to employees in households including employees from other industries.

This research also shows has been a deterioration in earnings of retail workers (and pharmacy workers (excluding pharmacists) relative to workers in other industries since 2010.

Technology

One issue not addressed by the Productivity Commission is vast changes in technology which have and continue to have a detrimental effect on employment numbers. The Retail Industry is at the forefront of new technology. The latest is self-service checkouts. This greatly reduces the need of staff to work registers. Instead one Supervisor can look after 12 registers at once. Adoption of technology will continue to see a reduction in actual hours worked and number of employees engaged.

Tax and transfer system

The SDA finds it alarming that the Productivity Commission adopts a view that any adverse income effects may be partially offset through the tax and transfer system (page 524). There is no discussion about this in the paper.

It seems highly inappropriate to suggest that the Government should be called on to make additional payments in lieu of a group of employers. This is really a drastic move towards encouraging the growth of a larger "working poor" cohort.

Suggesting that the "public purse" should be used to subsidize workers for some employers by transferring an employer obligation to pay fair amounts is problematic for a number of reasons, including the apparent difficulties the Government has in meeting current obligations and the various calls and pushes that have been made elsewhere to restrict and limit government payments.

Impact of Sunday Work

The SDA's concern that gender has been ignored in the Productivity Commission development of the propositions regarding penalty rates is further deepened when examining the way AWALI data was analysed and selectively used.

It is also noted that the Productivity Commission analysis of the AWALI data only use four of the five components of AWALI. The one that isn't considered is '*how often does your work affect your ability to develop or maintain connection and friendship in your local community*.' This is a puzzling exclusion given this measure would seem important when ascertaining 'work life interference'. Workers in retail are part of society and community but apparently that isn't relevant with respect to Sunday work.

The Productivity Commission control the data for gender, age and the presence of young children, which they conveniently label as personal traits.

This shows clearly that any gender issue has been removed by the Productivity Commission from their consideration. The industries under scrutiny are dominated by women. Further

'young children' are another factor which surprisingly are still in society related to females being the primary care giver.

So the data analysis is reflective of a genderless worker, with no caring for children responsibility and is ageless i.e. a perfect android worker. Somehow the retail workforce is not so characterised.

Even with these limitations and homogenisation of the data two conclusions still manage to surface relating to Sunday work:

1. More Sunday workers find that work interferes with outside activities
2. More Sunday workers find that work interferes with family/friends.

These findings go missing as the overview merely finds:

> 'Survey evidence shows that the overall social costs of daytime work on Sundays are similar to Saturdays'

The SDA has had the AWALI data investigated twice. Both of these show clearly that Sunday work creates work life interference for retail workers.

The 2014 analysis is no different to the 2012 analysis, showing that over time no decrease in the level of work life interference has occurred. This shows that even through the passage of time and Sunday trade in retail continuing no decrease in work life interference has occurred.

The SDA examination of AWALI shows:

1. Working on Sundays is associated with worse work-life interference for employees than working on Saturdays and not on Sundays.

2. There is no significant difference between retail and non-retail employees in the impact of working on Saturdays or on Sundays; retail employees have similar work-life interference patterns in respect of Saturday and Sunday work as non-retail employees.

3. Although perceptions of work-life interference vary and are influenced by the circumstances of each individual, the nature and extent of the work-life interference

experienced by retail workers who work on Sundays is generally reflective of the following views, experiences and perceptions:

(a) that Sunday is different to other days and not a regular work day;

(b) that Sunday is different from Saturday; and

(c) that working on Sundays is more negative in its effect on work-life interaction than working on Saturdays.

4. These views, experiences and perceptions are characteristic of retail employees across all age groups, including young people who are combining study and part-time employment.

5. The nature of the work-life interference generally experienced by employees, including retail employees, from Sunday work reflects the following:

(a) that, for most of the community, Sunday is a day off, a "free" day and/or a "family and friends" day; and

(b) that Sunday work is perceived by retail employees as interfering with relaxation and as isolating or excluding them from "life".

6. Work-life interference experienced by retail and other employees from working on Sundays has ripple effects beyond the employee concerned, impacting adversely on families and on relationships with friends.

These are clearly issues that show Sunday work is problematic for Retail workers that are no different to workers in other industries. Work life interference doesn't discriminate based on the industry you work in.

PUBLIC HOLIDAYS

The SDA opposes recommendation 4.2 that would see any additional declared holidays by a State or Territory Government not being paid as a public holiday.

The Federal Government does not have the power to make or declare a National Holiday only State and Territory Governments can make a holiday.

This recommendation would mean any future National day such as "Republican Day" or "Australia's 250th" or "Reconciliation Day" could not be flowed into the Australian wide community as a full Public Holiday. Only limited State or Territory government employees would receive the full benefit.

Such a recommendation would create greater divisions between the workforce.

State and Territory governments do declare additional days when they are warranted to the community. This also affects local or regional days which are particularly important for country towns or State days of significance i.e. Victoria's 150th birthday.

This provision would also mean that Public Holiday benefits would be frozen in time.

MINIMUM WAGE

The minimum wage has long been a feature of our society and economy. A minimum wage provides protection to the lowest paid workers in this country. It is a key element of a fair and reasonable safety net and a fair and reasonable society. It is worth noting that in the last 25 years Australia has experienced substantial and sustained economic growth and prosperity with regular increases to the minimum wage. In other words, the minimum wage has not hampered economic growth.

As stated in the draft report, the history of minimum wage increases have been 'modest and incremental 'and have not resulted in significant increases. Throughout the minimum wage chapter, continual reference is made to the contradictory nature of the available research

and the lack of robust and reliable empirical analysis on the issue of minimum wage impacts. Yet regardless of this, the draft report seeks to reshape the Fair Work Commission minimum wage system; allow carve outs for 'exceptional circumstances'; and spruiks the benefits of the tax transfer system as a way to circumvent a fair and just minimum wage.

Draft recommendation 8.1

Fair Work Commission- Annual Wage Review

This recommendation is surprising in light of the lack of any evidence provided to demonstrate that the Fair Work Commission (FWC) has failed to properly perform its role in determining the minimum wage. It would normally follow from statements such as "the evidence is not definitive" that the status quo remain, however the draft report instead recommends that changes to minimum wage determination should be made to reflect the impact on the unemployed. Yet, as the draft report states, the impact on the unemployed cannot be quantified due to the 'contradictory' nature of the research in this area, both nationally and internationally.

The position proffered by the Productivity Commission is perplexing at best; on one hand it recommends the FWC give significant weight to employment impacts while on the other, acknowledging the 'uncertainty about the responsiveness of employment and hours worked to changes in the current minimum wage.' Frequent references to unemployment impacts and the minimum wage are not, as clearly outlined in chapter 9 of the report, supported by the research in this area.

It must also be said that the recommendation to broaden the FWC's analytical framework in order to systematically consider the risks of unexpected variations in economic circumstances on employment and the living standards of the low paid, fails to comprehend the current statutory framework of the annual wage review.

Section 284 of the Fair Work Act sets out the annual wage review process and broad parameters of inquiry. S284 (1) (a) requires the FWC to take into account broad criterion such as the national economy, productivity, business competiveness and viability, inflation and unemployment. Further, s284 (1) (c) requires consideration of the relative living standards and the needs of the low paid. Again, 'unexpected variations in economic circumstances' is

catered for in the current statutory framework, under s285 (1), with the requirement that annual wage reviews are conducted and completed in each financial year. It is therefore unclear what purpose this recommendation serves as the inclusion of 'risks of unexpected variations in economic circumstances on employment and the living standards of the low paid' in light of the current statutory framework.

The current annual wage review system already provides for a broad level of inquiry with a broad statutory process. It is a process which allows individuals, business groups, unions, governments both state and federal, social and community groups and charity organisations to make submissions and/or submit evidence in regards to the annual wage review.

Indeed it should be said that the lack of real wage growth when compared to medium wages has led to greater income inequality and the real focus should be on ensuring the minimum wage is not eroded further.

Draft Recommendation 9.1

Minimum Wage- Temporary variation

The SDA does not support this recommendation and again questions the evidentiary basis used to support such a change.

The minimum wage should have application to the performance of work. The performance of work is the fundamental determinant for the payment of a minimum wage. The minimum wage should not be tied to other considerations such as geographical location or household income levels. The minimum wage is predicated on the concept of universality and equity. An employer in Queensland should not be given a market advantage because they are allowed to pay a lower minimum wage amount. This concept does not provide a level playing field and is anti-competitive.

The purpose of the minimum wage minimum is to provide a safety net. It is difficult to conceive of 'industry wide' temporary variations to the minimum wage in an industry such as retail, which is diverse, complex and large. It has been clearly articulated in the draft report of the difficulty in finding reliable research and evidence on the impact of minimum wage adjustments. It is therefore farcical that a recommendation is being made to carve out groups

of workers by industry, geography or other unknown grouping in 'exceptional circumstances' when there is no research or evidence to support such a contention.

Another concerning aspect of the draft report is the suggestion that low paid workers should bear the financial burden during cyclical downturns, while at the same time suggesting these workers should also take the hit when the economic cycle is at its strongest because of perceived wage blowouts. This is an inequitable and unjust approach which clearly targets the most vulnerable workers in this country. Such a suggestion fails to acknowledge the true impact this will have on those who lack any real bargaining power. The model proposed simply seeks to further create a 'working poor', at a time when other countries such as the United States are increasing minimum wage after realising the detrimental impact a sustained, low minimum wage can have on economic prosperity.

The use of complementary policies to minimum wages.

The SDA supports strong tax transfer system to ensure families have a basic standard of living. It should however be complementary to the wage system where the minimum wage does not provide for a basic standard of living. It should not be used as a justification for lowering the minimum wage and supplementing this reduction via social payments. This is burden shifting from employers to the tax payer.

It is apparent from the draft report that there is an attempt to re-characterise the minimum wage. The minimum wage is a minimum amount paid for the performance of work. It is irrelevant whether a minimum wage earner resides in a medium income household or indeed a higher earning household. It is about work being assigned a minimum value to ensure equity and a level playing field.

The draft report refers to the minimum wage and its impact on employability. The SDA submits that improving employability of less skilled people requires skills training and investment and not minimum wage reduction. Training and development is key to addressing skilled workforce participation.

JUNIOR PAY RATES

The SDA believes the structure of junior pay rates, as currently applied, is adequate and there is no established need to introduce a new model.

The SDA makes its comments in primarily in relation to retail and fast food workers, particularly those aged under 21. Furthermore, the SDA makes this submission as longstanding advocates for the low paid and long-term supporters of the principle of equal pay for equal work, regardless of age.

The SDA concurs with the observation made in the draft report that junior pay rates in enterprise agreements are determined through bargaining, and bear a resemblance to the structure of Federal Junior Pay rates. However, it is not clear what is to be deduced from the observation that McDonald's and Woolworths' junior pay rates exceed both federal junior rates and junior rates in the relevant Awards. The underpinning Awards, both the *Fast Food Award 2010* and the *General Retail Award 2010*, provide a 'fair and relevant minimum safety net of terms in conditions' as per the modern award objective . The outcome of enterprise bargaining should necessarily result in pay or conditions that exceed this minimum safety net, and must do so in order to pass the better of overall test under s193(1) of the Fair Work Act 2009.

Impacts on employment and education

The observations made in the report in support of the statement that "juniors' involvement with the labour market differs in some ways from that of adult workers" are generalisations, which are too broad and are presented with no supporting evidence.

The SDA rejects the general and broad characterisation of the experience of many juniors, specifically the comments in relation to those living at home and supported by their parents.

The SDA draws the Commission's attention to the comments of the Full Bench of the Fair Work Commission in regards to inappropriate assumptions about younger workers, their

financial responsibilities and the variety of household circumstances in which low paid employees are found:

> *First, despite a high number of 'contributory earners' among 15-24 year olds, the ABS evidence… establishes that a majority of working 15-24 year olds are not financially dependent upon their parents.*[1]
>
> *Second, it is not possible or appropriate to determine minimum wages or other terms and conditions of employment by reference to the variety of household circumstances in which employees are found or to make assumptions as to the meeting of the needs of the low paid workers within their households.*[2]

The SDA submits that young workers experience the same raft of living expenses and financial pressures as older employees, pressures which are exacerbated by discounted wage structures. There are many 'junior' adults in both full and part-time employment who are required to meet increasing costs of living, social and educational expenses, even if they are still residing at home.

A significant number of young workers also have family and domestic responsibilities, whether caring for their own children, their siblings, older parents or grandparents. In the 2006 Census, almost 120,000 young people between the ages of 15-24 identified as a carer; by the 2011 Census, that number had increased to over 135,000.[3]

For many young workers, these domestic responsibilities often carry a financial burden. Income from paid work forms a significant contribution to their household, and critically, keeps many families just above the poverty line.[4]

Many young workers are increasingly attaining higher levels of education, which in turn requires them to earn an income to defray the costs of remaining at school or continuing to further study.

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[1] [2013] FWCFB 1635 at [214]
[2] Ibid at [215]
[3] Data Source: 2011 Census of Population and Housing
[4] Commonwealth of Australia (2009) *State of Australia's Young People*, p.52

In regards to Youth Allowance student payments, the safety net ostensibly provided by both the modern award and social security system is failing to enable many young Australians to study, work and meet their minimum cost of living requirements.

The Bradley Report on higher education found that:

> *"The survey of student finances shows clearly that students believe that the current level of support provided to eligible students is insufficient to live on. This is also supported in a number of submissions to this review."*[5]

The Australian Council of Social Service further found that of the 400,000 people receiving student payments of $29 a day, many were living in poverty, "their living standards…still frozen at a point in time when the internet was still in its infancy."[6]

The Brotherhood of St Laurence cites a longitudinal research project with young people which found 33 per cent of participants named lack of money as one of the most important issues facing young Australians.[7]

Students or otherwise, young workers aged 18-20 are paid between 10% and 30% less than their 21 year old counterparts, yet there is no corresponding discount on the cost of living expenses for which they are responsible; rent or board, internet and phone usage, school/tertiary fees, public transport, gas, electricity and water bills, car insurance and registration, food or clothing.

With no equivalent subsidy on everyday cost of living expenses, many young workers are forced to seek more work to make ends meet, often at the detriment of study and other commitments; the most recent ABS data indicating that more than a quarter of workers aged 15-24 want to work more hours.[8]

Unsurprisingly, just over half of all young people in the 18-24 year old age bracket have some level of consumer debt, and about half of that group also have a credit card.[9] Alongside the

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[5] Australian Government 2008, *Review of Australian Higher Education, Final Report.*
[6] Boese and Scutella (2006) *The Brotherhood's Social Barometer: Challenges facing Australian youth,* p.6.
[7] Taylor and Gee (2010). *Turning 18 : Pathways and Plan Life Chances Study stage 9,* Brotherhood of St. Laurence, p.30
[8] ABS, *Underemployed Workers 6265.0* , September 2012
[9] Commonwealth of Australia (2009) *State of Australia's Young People*, p.14

points raised above, the reliance on credit by a 'small but substantial'[10] proportion of young people demonstrates the increasing gap between the needs and means of Australia's young workers.

Age-based rates of pay not only have a detrimental effect on the living standard and needs of low-paid young workers aged 18-20, they also perpetuate a number of discriminatory and anomalous assumptions:

i. While there are many more young people studying than working full-time, this is not true for all 18-20 year olds. In fact, many workers in this age bracket work full-time, supporting not only themselves but also their families.

ii. Many young people under 21 live away from the family home and earn lesser rates; while many over 21 may still be at home and studying yet in receipt of the full rate of pay merely by virtue of age.

The SDA submits that the removal of junior rates for workers aged 18 years and above, would promote greater equity and improved living conditions for young workers.

The SDA rejects the assertion made in the draft report that many juniors' "at least when they first start work can be expected to be less skilled, qualified and competent than adult workers…" There is no doubt that the retail and other service industries provide the first paid employment opportunity for thousands of young Australians. Equally the SDA accepts that there are cases where very young workers, usually those still enrolled in secondary school with little external work experience, may require additional supervision and training in their first foray of paid employment.

However, in many instances, young people engaged in casual or part time work in the retail industry do not receive any such structured or transferrable training which could be said to justify a reduced rate of pay.

[10] Ibid, p.13

Furthermore, where training is provided, it is usually extremely brief and for the very purpose of enabling these younger people to undertake the same role as older employees. Training that younger workers receive is not tailored to their age; it is the same introductory level training that an older, new employee is required to undertake. Therefore, employers have an equally productive but heavily discounted workforce, with many young people performing a broad range of job tasks and responsibilities for which older employees receive a higher rate of pay, based purely on age.

The draft report does not put forward any compelling and robust evidence to support the premise that 'a high enough junior pay rate may encourage juniors to leave education and venture into the job market.' The draft report does cite the Hyslop and Stillman studies which provide an analysis of the impact of changes made to junior pay scales in New Zealand between 2000[11] and 2011[12]. However, the conclusions that are drawn by the Commission from these studies; that the increasing rates paid to juniors 'had some disemployment effects' and, some juniors were enticed away from employment, are selective and do not present an accurate and balanced representation of the findings.

In the 2013 Regulation Impact Statement for Minimum Wage Review prepared for the New Zealand Government; data from 2013 New Zealand Income survey shows that 60 percent of minimum wage workers aged 16 -24 years are in study, compared with 11% of total wage workers.

> *The high proportion of young workers in part-time minimum wage jobs while studying suggests that they are likely to move into higher paying, full-time jobs in the future.*
>
> *Hyslop and Stillman's study also found that the policy change to abolish the youth minimum wage in 2008 increased the proportion of 16 and 17 year olds participating in study, but the proportion looking for work (unemployed) or inactive did not increase following the rise in minimum wages (inactivity actually fell).*[13]

[11] Hyslop, Dean and Stillman, Steven, Youth Minimum Wage Reform and the Labour Market (March 2004). IZA Discussion Paper No. 1091

[12] Hyslop, Dean and Stillman, Steven, The impact of the 2008 youth minimum wage reform (August 2011).

[13] New Zealand Government, Ministry of Business, Innovation and Employment, Regulation Impact Statement for Minimum Wage Review, (February 2013).

Youth Wages in New Zealand

The draft report comments on the effects of the wage changes on the share of New Zealand youth at the minimum wage, the SDA notes the following information provided in the New Zealand Government's 2014 Minimum Wage Review:

> *Youth employment dropped from 2008 to 2012, but has slightly recovered. The proportion of 15-19 year olds in employment fell from just under 50 per cent at the start of the recession, to just under 30 per cent at the end of 2012.*
>
> *Nearly eight out of ten 15-19 year olds are in education and training and the New Zealand youth (aged 15–24 years) who are not in employment, education, or training (NEET) rate has fallen to its lowest level since June 2008. Of those 15-19 year olds in education, 29 per cent are also employed. The labour force participation of 15-19 year olds in education dropped during the recession but has been relatively stable in recent years.*[14]

Many Australian retailers (Woolworths, Bunnings, Kmart and Just Jeans) not only operate in New Zealand, but continue to expand their operations across the country.

The ability of Australian retailers to pay the adult rate to 18 year old adults in New Zealand demonstrates the inequity of junior rates of pay for employees aged between 18 and 20 years. It also highlights retailers' acceptance that 18 denotes the age of adulthood.

Critically, the situation in New Zealand also demonstrates retailers' acceptance of the principle of equal pay for equal work. Hyslop and Stillman, when examining the impact of the 2008 reforms found that new entrants' minimum wage was largely not used by businesses and that firms generally pay the majority of 16 and 17 year olds the adult minimum wage 2011.[15]

The ability of retailers to pay the adult rate at 18 years of age in New Zealand further proves that there is minimal impediment to growth, inflation, sustainability, performance or competitiveness where adult rates at 18 are provided.

[14] New Zealand Government, Ministry of Business, Innovation and Employment, Minimum Wage Review, (2014).
[15] Hyslop, Dean and Stillman, Steven, The impact of the 2008 youth minimum wage reform (August 2011).

In fact, the consequences of paying the adult rate of pay to 18 year olds in New Zealand (and eventually to 16 and 17 year olds performing the same jobs as older employees) refutes the standard employer argument that increasing rates of pay for younger workers would result in job losses.

Research instead proves that there has been no adverse effects on youth employment as a result of the changes in New Zealand:

> *"We find no consistent and robust evidence of any adverse effects of the changes on teenage employment. In fact, in contrast to simple competitive model predictions of the effect of minimum wage increases, the only statistically significant point estimates imply possible positive employment responses to the changes."*[16]

The custom and practice of paying the adult rate at 18 years of age is long established in New Zealand, where many Australian retailers not only operate, but continue to expand their operations. Since the adult minimum wage was lowered, there has been strong evidence of 'positive employment responses, contrary to standard economic model predictions'[17]. This clearly demonstrates the anomaly in Australia and further proves that there is minimal impediment to growth, inflation, sustainability, performance or competitiveness in the retail industry where adult rates at 18 are provided.

Policy issues

The SDA refutes the Commission's comments that, with exceptions 'young workers are likely to be less productive that adults.' This traditional and unfortunate characterisation of young workers as unproductive and inexperienced has to a large extent, contributed to the justification to pay discounted wages based purely on age.

However, evidence and research demonstrates that many young Australians are active and productive citizens who combine education, work, domestic and caring activities, often from a very early age. The Brotherhood of St Laurence's research into youth transition and

[16] *Youth Minimum Wage Reform and the Labour Market* IZA Discussion Paper No. 1091, p. 22.
[17] *Youth Minimum Wage Reform and the Labour Market* IZA Discussion Paper No. 1091

wellbeing, The Brotherhood's Social Barometer: challenges facing Australian youth", noted that 'it has become increasingly common for young people to combine study and part time work from an earlier age',[18] a finding supported by the 2011 Census data which shows almost 140,000 15-16 year olds were in employment[19].

The Australian Government's report on the social, economic, health and family lives of young people, State of Australia's Young People, also found that:

> "*Working teenagers (15-19 years of age) average a fairly small part-time load of 10 hours per week… to be expected, given that on average they are spending 21 hours per week in education. In contrast, young adults (20-24 years of age) average 27 hours in paid work and only 8 hours in education-related activities.*[20] *On average, young people lead very productive lives. They spend many hours of their week undertaking productive activities – paid work, activities, education and/or domestic and care activities…. 15-19 year old males and females in paid work undertake 45 and 40 hours of productive activity per week respectively when their paid work and domestic activity is combined."*[21]

The retention of junior rates of pay for young people aged 18-19 is clearly inconsistent with the host of legal, social and economic factors which otherwise characterise and impact upon Australia's young adults.

Young people's employment status, work experience and productivity are frequently and detrimentally discredited and undermined by employers and the general public, yet there is a wealth of data and research which shows the opposite is true.

The Longitudinal Surveys of Australian Youth research program found in 2009 that over 60% of 17.7 year olds were permanently employed, had ongoing employment or were employed casually.[22]

The most recent Census of Population and Housing in 2011 further shows the extent to which young Australians make up the workforce; more than 565,000 young workers aged 15-19

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[18] Boese and Scutella (2006) *The Brotherhood's Social Barometer: Challenges facing Australian youth, , p.15*
[19] 2011 Census of Population and Housing
[20]Commonwealth of Australia (2009) *State of Australia's Young People*, p.43
[21]Ibid, pp.62-63.
[22] Commonwealth of Australia (2009) *State of Australia's Young People*, p.41, LSAY, 2009b.

were employed across all industries, while almost 975,000 young Australians aged between 20 and 24 were employed.[23]

As can be seen from ABS Labour Force data, the retail industry is the second largest employing industry in Australia, with the highest number of employees aged between 15 and 24. Employment in the retail industry is characterised by a younger, female and largely part time or casual workforce.[24]It is noteworthy that the Health Care and Social Assistance Industry, Australia's largest industry is underpinned by Awards which either do not have junior rates of pay, or provide the adult rate from 18 – 20 years of age.

The above data confirms that younger employees continue to constitute a significant portion of the working population. Consequently, it does not follow that paying adult rates at 18 will have a detrimental impact on employment of workers aged 18 or over.

Level of junior pay rates

In relation to the question the Commission poses about the appropriateness of the current level of the Federal Junior Pay rates, and the rates at which they approach with age, unlike the Commission, the SDA do not see this as a 'Goldilocks dilemma'.

The SDA is a long-standing advocate for reform of junior rates of pay. The SDA has long asserted that a thorough examination of skill and work value is fundamental to achieving fair and enduring reform of junior rates and ending wage-based discrimination for Australia's young workers.

The principles of equity and work value have long been a feature of the Australian industrial relations system, as evidenced by a number of significant reform processes to redress wage discrimination against groups of workers and provide equal pay for equal work e.g. for women, indigenous Australians and most recently, social and community services workers. However, these principles have not yet flowed on to younger workers, resulting in the

[23]2011Census of Population and Housing
[24] Ibid, pp.5-6.

enduring, illogical and out-dated age-based discrimination which stymies many young workers today.

The Human Rights and Equal Opportunity Commission (HREOC) advocates against junior rates on that very basis, stating:

> *"Junior rates cause hardship and poverty among young workers and place growing pressure on low income families. They… reinforce negative and inaccurate stereotypes about young workers."*[25]

For young workers balancing study, employment and family responsibilities, the negative impact of discounted wages is further exacerbated by paltry Youth Allowance student payments, which are arbitrarily determined and equally in need of reform.

Youth Allowance student payments, designed to support young people and their families as they transition through school and higher education, are set at a lower rate than the pension, reflecting the assumption that these payments are temporary until the recipient becomes employed in the near future.[26]

However, these payments have not been reviewed since the mid-1990s, with no increase in real terms in rates of youth payments since 1987.[27] The payments are far from enough to live on when combined with the low level of earnings allowed before the payment ceases.

This is the double-edged sword encountered by the many young workers in the retail industry who are paid less than the adult rate; they do not earn enough to meet their minimum cost of living needs, yet the current social security system restricts their capacity to bridge the gap.

In their submission to the Senate Employment Committee on the adequacy of allowance payments, the Australian Council of Social Services stated:

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[25] Human Rights and Equal Opportunity Commission (1999). *Age matters? A discussion paper on age discrimination, p.39*

[26] NATSEM,2012.*Going Without: Financial Hardship in Australia*, p.9

[27] Australian Council of Social Service, (2012). *'Surviving, not living'*, ACOS Submission to the Senate Employment Committee
on the adequacy of 'allowance' payments., pp.19-20

> *"There is a long-standing tension between the two policy objectives of post-secondary student payments – to alleviate poverty among students with limited means (the main goal of income support generally) and to supplement the incomes of a broader cohort of young students as a public investment in their education. We argue that priority should be given to the first of these goals."*[28]

The SDA supports this contention and submits that reforming junior rates of pay, thus increasing the income of young workers, would not only enable the social security system to better target and support Australia's most excluded and marginalised young people,[29] it would be a key step towards bridging the 'cost of living' gap experienced by many young workers.

The appropriate age cut-off for 'junior rates'

It is widely understood and accepted that a person is an adult when they reach the age of majority. Up until the early 1970s the age of majority was 21. During that time period the age of majority legislation in each jurisdiction was amended and the age of majority was reduced to 18. Put another way, across Australia, legislation decrees that a person is an adult on attaining the age of 18.

At common law, an adult is defined as a person who has attained the age of 18. The legal and societal acceptance of adulthood at 18 is reflected in the conferral of rights at that age to vote, drink, marry, access credit, execute a will, and drive.

The retail sector paradoxically recognises 18 year olds as adults in some ways; retail employees must be 18 to sell alcohol and cigarettes. However, for the purposes of remuneration, the same recognition does not apply.

It is clearly inconsistent and inequitable for 18 to be the legally recognised age of adulthood, yet for 21 to still be used as a measure for the purpose of full remuneration. This dichotomy

[28] Ibid, p.38.
[29] Commonwealth of Australia (2009) *State of Australia's Young People* , pp.54-55

enables employers to preserve a system that discriminates against employees aged 18-19 years. It is an exploitation that gives business a "cheap" adult.

This inconsistency and inequity is further demonstrated by the absence of junior rates of pay in the considerable number of awards which cover significant industry sectors, as noted in the draft report.

It is the SDA's longstanding experience and strong assertion that if an 18, 19 or 20 year old were working alongside a 20 or 21 year old (or older) employee on a register in a department store, serving customers in a delicatessen, managing a fitting room, supervising a layby counter or stacking shelves in a supermarket, there would be no difference in work, the same range and volume of tasks would be undertaken and the same conditions would apply.

It is also the SDA's experience that 18, 19 and 20 year olds are often the sole employee on their shifts in retail businesses, responsible for performing the gamut of tasks entrusted to them by the owner. A worker solely responsible for all elements of a store's operations must be remunerated accordingly; their age bears no consequence.

The "junior adult" does not wear a badge or have a sign warning customers that they should expect a lesser standard of service. However the "junior adult" is paid between 10% and 30% less than the adult aged 20 or older.

ABS historical data shows that retention rates at school are greater than for any past period of history. Today's retention rates to Year 12 and participation in higher education show a far larger proportion of people remaining in the education system for a longer time and to an older age. The 'norm' upon which junior rates might once have applied, whereby people finished school at 15-16 years of age unless going to University, no longer holds true in modern Australia. Further, there is now greater student engagement in vocational education and training while at school,[30] with the most recent ABS data revealing that 79.9% of students starting Year 7 now complete Year 12.[31] Many young people also commence outside-of-school hours' employment from the age of 15.[32]

[30] Ibid, PN 319.
[31] Australian Bureau of Statistics, cat. no. 4221, *Schools, Australia, 2012*
[32] 2011 Census of Population and Housing

The above demonstrates that for many 18 year olds, they are more qualified than ever before, and often hold two or three years relevant work experience which enables them to perform the tasks expected of 'adults' in the workplace.

Age, experience or competency?

The SDA concurs with the ACTU's view referenced in the draft report that 'wages should be based on skills, abilities and work value and not on the age of the worker'.

This SDA has observed a growing recognition in the retail industry of the merit in remunerating people based on work value rather than age.

Junior minimum pay scales already account for both age and experience, however it is the SDA's view that junior pay scales should have not application to adults, aged 18 and above.

The draft report has not provided any evidence to support the need for an alternative structure.

The 'Hypothetical hybrid junior minimum pay scale' tabled as part of the draft report proposes a potential reduction in the existing pay scale for those 18 years or less, when compared to the existing pay scale in the General Retail Industry Award.

The hybrid model is likely to adversely impact on employment for those 18 years or less as employers would have an incentive to employ cheaper 'inexperienced' labour.

With no access to unfair dismissal and limited rights as a casual it is easy to envisage a high turnover of labour prior to 6 months experience. Hypothetically, an employee at 17 years old may hold four jobs with different employers in the retail industry, yet their experience would not necessarily be recognised.

The SDA does not support or propose any changes to current structure of junior pay rates and the existing model should continue to be applied which is on a combination of age and experience or competency.

CASUAL EMPLOYMENT

Draft Recommendation 20.1

The SDA view is the application of industrial rights and regulations should not discriminate between forms of employment.

The SDA makes its comments primarily in relation to labour hire and casual workers in the retail and fast food and storage service industries, whose interests we represent.

The SDA seeks to clarity the contention made in the Commissions draft report, that labour hire or casual workers are alternative forms of employment, these forms of employment exist alongside both full time and part time employment, not as an alternative to them.

The SDA strongly rejects the proposal to make terms that restrict the engagement of independent contractors, labour hire and casual workers, or regulate the terms of their engagement, should constitute unlawful terms under the Fair Work Act 2009.

The draft report recommendation appears to have given disproportionate weight to the 'unease' of peak Employer organisations, including Australian Chamber of Commerce and Industry and Australian Industry Group, with the regulation of alternative forms of employment via enterprise agreements. Consideration of the cost to labour hire and casual workers, as a result of removal of terms that regulate their employment from these Agreements, has not been properly considered.

This draft recommendation appears to contradict the Commissions own statement in its report that 'underemployed', which the SDA would contends have a large casual component' should have a bigger voice in the system, where they 'have a marginal influence'. By proposing to relegate these employment forms to the category of 'unlawful terms' in the Act effectively silences the voices of casual and labour hire workers in the system.

The benefits of alternative employment forms

Workers value different employer forms

The SDA does not dispute the general contention that casual or labour hire may sometimes be an active choice made by employees who may perceive some benefits in choosing an 'alternative form of employment' over part time or full time work. However, the appeal of casual work, has not been considered in the report in the context of whether the individual worker has a genuine choice to engage in a permanent role over a casual role, which may offer the same flexibility of hours for example.

The SDA refutes that statement made in the draft report that;

> *' Indeed, nearly 59 per cent of casuals work the same hours every week, while 40 per cent of casual workers had been with the same employer for more than two years, indicating that there are a large number of casual workers who have the benefit of regular work as well as the higher wage rates associated with the loading. Moreover, casuals also have legal conversion rights that allow them to request a move from casual to ongoing work after a certain period of employment.*

This statement cannot be construed as evidence as it fails to address the preference and choices of workers. It is important to recognise that it is rarely the genuine preference of workers to stay in precarious forms of employment rather than a permanent job, with predictable and stable hours of work.

Employers benefit too, with implications for the wider community

The draft report provide no evidence or examples to support the statement;

> *'that tasks that requires substantial training or experience (and is not expected to occur frequently or on a continuous basis)… often be less costly for an employer to engage an independent contractor or labour hire worker with specialist skills on a short term agreement.*

In addition to the draft report's statement that 'Labour hire and subcontractors have low 'firing' costs, as they are only temporary workers.' Such a statement clearly highlights that these workers already have reduced rights and protections, in comparison to employees engaged in a full-time or part-time capacity. To remove or deregulate these workers further is unjust and inequitable.

The SDA rejects the statement that 'Where using alternative labour forms does lower costs then, in any workably competitive market, the wider community will typically capture most of the benefits through lower prices.' This statement is made without evidence and provides no characterisation or evidence of the kind of alleged benefits to the wider community as a result of lower costs. The additional observation that SDA makes in relation to a lower labour cost resulting from use of casual or labour hire workers, is that in real terms, it means lower wages paid to casual and labour hire workers, resulting in less financial support flowing through to the families and communities of these workers. This will ultimately be reflected in lower consumption spending.

Improving productivity and strengthening worker's rights can conflict

The draft report provides no evidence to support the broad and general proposition that there is a conflict between improving productivity and strengthening worker's rights.

The draft report provides no examples or research to illustrate how workplace regulation, in relation to casual conversion clauses, either dampens employers' motivation to hire casuals or disadvantage low skilled, inexperienced workers that may be seeking casual work.

Furthermore, the draft report has not provided any evidence to support the contention 'that alternative employment arrangements are unlikely to significantly reduce collective bargaining power'.

TRANSFER OF BUSINESS

The SDA submits that the current transfer of business provisions should remain.

Where a business is transferred from one employer to another employer the SDA generally observes that the new employer continues the employment of the transferring employees under the existing terms and conditions. That is, the new employer and transferring employees are covered by a transferable instrument which is usually an enterprise agreement. In many circumstances an employee would notice little change in their workplace.

The transfer of existing employees to the new employer is likely due to practicality. Existing employees are familiar with the business operations; existing employees have often received training (an investment made by the previous employer); some employees may be in management positions or hold positions of responsibility demonstrating a greater knowledge of the operations or functioning of the business; some employees may have the skills to undertake supervisory duties. Generally the SDA observes that such businesses continue in much the same way as prior to the transfer of business, mindful that new employers may wish to make changes that streamline the business to improve efficiency or profitability. Any such changes must be compliant with the transferrable instrument.

The SDA's primary concern regarding a transfer of business is that the accrued entitlements of transferring employees are recognised by the new employer. Employees, particularly long serving employees can accrue significant entitlements to annual leave, personal leave and long service leave.

The SDA encourages further consideration of the Object of Part 2-8 – Transfer of Business.

Section 309 OBJECT OF THIS PART reads:

> *309 The object of this part is to provide a balance between:*
>
> *The protection of employees' terms and conditions of employment under enterprise agreements, certain modern awards and certain other instruments; and*

(a) The interests of employers in running their enterprises efficiently;

if there is a transfer of business from one employer to another employer

The protection of employees' terms and conditions of employment is critical, especially for the SDA which represents hundreds of thousands of low paid workers, many of whom may be considered in vulnerable employment. For many of these employees their only recourse to addressing workplace issues, including loss of entitlements following a transfer of business, is engaging the services of their union. Many of these low paid workers do not have the resources, experience or knowledge to address such matters themselves. Therefore the SDA sees it as imperative that the legislation adequately protects these workers.

The SDA does not oppose a new employer addressing inefficiencies or poor workplace practices to increase the profitability and sustainability of a business. Indeed the SDA would support any attempt to improve the job security and working conditions of workers in the fast food and retail industries that may eventuate after a transfer of business. However, any such changes made must comply with the provisions of the transferring instrument especially in relation to consultation.

Draft recommendation 22.1

The SDA does not support this draft recommendation. Such a blanket recommendation fails to address the complexities and nuances potentially present in the situation whereby a transfer to new employment was at the instigation of the employee. The SDA regularly becomes involved in matters where members are coerced into making a particular decision by an employer and the employer subsequently argues that the decision was genuinely and freely made by the employee.

The SDA submits that the current transfer of business provisions should remain. For SDA members who are generally low paid and often in insecure employment it is critical that the legislation protects their entitlements and terms and conditions of employment.

INDIVIDUAL AGREEMENTS

Draft Recommendation 15.2

The SDA is totally opposed to any further liberalisation of individual flexibility arrangements.

Enterprise Agreements are negotiated as a package of terms of conditions where provisions may vary from the Award either in a positive or negative way but the Agreement overall must be better than the terms and conditions contained in the relevant Award.

As a result parties should have the ability to restrict the terms upon which individual flexibility agreements can be reached as this may have specific consequences for the terms which have been deliberately negotiated. The flexibility term within an Agreement and the clauses it pertains to should be left to the parties to negotiate.

There are also concerns that if there are no restrictions on terms subject to individual flexibility arrangements that it will be detrimental to employees, particularly those who are low-paid, young, casual, speak English as a second language, have low literacy levels or who simply understand that their employment is precarious. These employees will often accept conditions which disadvantage them out of ignorance or fear of losing their job.

Opening up the terms and conditions to be varied will place workers at greater risk of accepting inferior terms and conditions to those provided in their EA, in order to retain their employment.

The SDA believes that the flexibility terms in an Enterprise Agreement should be left to the parties to that Agreement to determine.

Draft Recommendation 16.1

As part of the 2012 Transitional review of modern awards, employers sought to extend the period of notice of termination of an individual flexibility arrangement. The FWC determined

that the appropriate period of notice for IFA's made under a modern award should be extended from 4 weeks to 13 weeks.

The FWC heard submissions in relation to the appropriate notice of termination for an IFA and made a determination based on this evidence. The FWC at that time extended the notice period from 4 weeks to 13 weeks providing the following reasons for this decision:

> *[174] For our part, we accept that the provision of a longer unilateral termination notice period would provide greater certainty to the employer and individual employee parties to IFAs. A longer notice period would also reduce an existing disincentive for employers entering into IFAs.*
>
> *[175] But these considerations need to be balanced against the factors cited by the 2008 AIRC Full Bench in support of their adoption of a four week notice period, that is:*
>
> - *unforeseen developments can render an IFA unacceptable to one of the parties and substantially unfair; and*
> - *it provides some protection for employees who through ignorance or for some other reason make an IFA which materially disadvantages them.*
>
> *[176] Hence, while a longer notice period provides greater certainty it also reduces the ability of parties to adapt to changing circumstances, such as those identified by the 2008 AIRC Full Bench. In other words a longer notice period increases certainty but reduces flexibility.*
>
> *[177] Nor is it any answer to say that an IFA can be terminated by consent at any time. A change in circumstances may not impact on each party in the same way. It may disadvantage one party but have a neutral effect on, or actually advantage, the other party. A change in circumstances will not always result in creating a mutual incentive to vary or terminate the IFA. In this context, it needs to be remembered that the survey data in the 2012 IFA Report suggests that reviews, modifications and terminations of modern award IFAs were initiated by employers as often as employees.*

The decision recognised, that although an extension of the notice of termination may provide greater certainty for employers, the benefit of that needed to be balanced against the need for protection for employees and the possibility of reduced flexibility as a result of the longer termination period.

This was despite the fact that the Full Bench found that:

> *[171] 'The 2012 IFA Report provides little support for the contention that the four weeks' notice period acts as a disincentive for employers to enter into to IFAs. As shown in Table 4.2 (see paragraph [60] above) less than one per cent of employers who were aware of, but did not report making IFAs, cited the four weeks' notice period as the reason why they had not entered into an IFA. The most common reason, reported by just over half of employers, was that there had been no identified need enter into an IFA'.*

The SDA opposed the extension of the notice of termination during the Transitional Review of Modern Awards and we oppose any extension of the notice of termination for an IFA in an Enterprise Agreement. Entrenching an employee in these circumstances into an agreement which would require a minimum of 13 weeks and up to 1 years' notice period to terminate the Agreement would be completely unmanageable for many employees, particularly where individual and family circumstances, such as the care of children, can change unexpectedly.

The SDA also has concerns that, although the recommendation is that the period be extended to up to 1 year by agreement between an employer and employee, vulnerable employees who are entering into an IFA, often because they have no other choice, will feel compelled to accept a longer notice period if their employer wants this. Such a proposal fails to recognise the inherent inequality of bargaining power which ensures that 'genuine choice' is not the reality for many workers.

Flexibility is inherently something which is fluid and moveable as circumstances change. If the flexibility provided for in an IFA is no longer of benefit to the employee or the employer then it serves no useful and constructive purpose. Increasing the notice period to terminate the IFA would lock both an employer and employee into the arrangement which could then only be changed if both parties agree. As stated by the FWC in the above decision a change in circumstances may not impact on each party in the same way therefore there will not be the same incentive to terminate the agreement.

Another important concern about this recommendation is that IFA's are not subject to the same scrutiny by external parties as Enterprise Agreements therefore an appropriate length of notice to terminate an IFA is an important protection for employees. One of the purposes

of an IFA is that it meets the 'genuine' needs of the employee and employer. This assessment is made at the time the flexibility agreement is made. As 'genuine' needs change over time there needs to be an appropriate way for employees and employers to terminate the agreement. The SDA considers that the appropriate length of time is 28 days and that the ability to extend that to up to 1 year by agreement would have a severe impact on employees in particular who may feel compelled to accept a longer notice period to maintain their employment. Providing 28 days written notice to terminate an individual flexibility arrangement is an important protection for employees to ensure that an employee is able to terminate the flexibility arrangement if and when their circumstances change.

Unilateral termination is an important safeguard that was designed to prevent abuse of IFAs. If an IFA is no longer meeting its objective, either party should be able to terminate the arrangement. This is particularly important given that the process by which agreement is reached and the content of such agreements are generally not subject to scrutiny.

It is also an essential protection for employees who unknowingly or due to other pressures, or fear of losing their job, enter into an agreement that leaves them financially worse off than under the EA. A lengthy notice period will have significant consequences for employees that are financially worse off under the terms of an IFA as they continue to be disadvantaged until the Agreement is terminated.

The Draft Report cites the main concern for employers regarding IFA's was that the capacity for an employee to unilaterally terminate the arrangements with 28 days' notice exposed business to financial and operational risks' [33] Notice periods under the NES that apply to termination of employment require either party to give 1-5 weeks' notice depending on years of service and age. The exposure to financial and operational risks would be no less under these circumstances. The SDA believes that 4 weeks is a sufficient period for employers to make any necessary changes to revert back to the terms and conditions provided by the EA.

Most EA's in retail provide employers with the ability to provide an employee with 2 weeks' notice of a change in their roster. This represents a significant change to an employees'

[33] Productivity Commission, *Workplace Relations Framework: Draft Report*, 2015

condition of employment with the potential result in a reduction if pay. A roster change can have a significant impact on an employees' ability to manage work and family responsibilities often requiring significant changes to their personal and family arrangements to accommodate this change. If EA's provide for these kinds of variations in an employee's conditions of employment with 2 weeks' notice it would be inappropriate to extend the notice of termination for an IFA beyond 28 days.

The SDA believe that the notice of termination for an IFA should not be altered.

Draft Recommendation 16.2

No Disadvantage Test

The SDA believes that any test, whether it is the BOOT or NDT, needs to genuinely test whether an EA or IFA meets the safety net provisions of the relevant award and NES. The SDA is concerned about any recommendation to alter the current test which would result in a downgrading of that test.

The SDA's primary concern in relation to the proposal to replace the better off overall test for assessment of individual flexibility arrangements is the manner in which non-monetary benefits will be treated as part of the new No Disadvantage Test (NDT). The Draft report suggests that, '*the BOOT for IFAs, unlike the BOOT applied to enterprise agreements, is not specifically compared to the relevant award and can (in theory) take into account intangible, non-monetary benefits*'[34]. The SDA is strongly of the view that non-monetary compensation as a trade-off for safety net and EA terms and conditions are not and should not be included in any assessment of a NDT.

Division 2 of the Fair Work Act provides that:

> *'The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by: (c) ensuring that the guaranteed safety net of fair, relevant and enforceable*

[34] Productivity Commission, *Workplace Relations Framework: Draft Report*, 2015. p 597-598.

minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system'.

Including non-monetary benefits in any BOOT or NDT would not be consistent with this objective of the Act.

The SDA does not support a workplace relations system that allows for workers to effectively be paid in pizza, which is exactly what is being proposed. We often come across examples of employers deliberately and knowingly flouting their legal obligations to pay minimum safety-net entitlements with the offer of payment in pizza, discount meals, gift-cards, discounts or other incentives. The provision of such things in replacement of wages and other legislative entitlements such as penalty rates and/ or allowances has a significant financial impact on workers. You cannot pay your mortgage, rent, utilities, clothe and feed yourself or your family when paid in kind.

The SDA is concerned about how non-monetary benefits would be valued as part of any test and the impact this will have on low paid workers. The value of a non-monetary benefit is often something which is not prescriptive and cannot be measured in dollar value. Even for some non-monetary benefits which may be measured the value of the benefit may differ for different individuals. Applying a subjective value to a non-monetary benefit to determine if someone is better off overall or not disadvantaged would almost always be an impossible task. Taking into account non-monetary benefits which would result in a financial loss will act to compound the already widening income inequality which exists in Australia. A test involving non-monetary benefits would be extremely difficult for workers to evaluate in terms of assessing whether the IFA offered to them is fair; meets the safety-net and/or will enable them to meet their financial commitments. Allowing non-monetary compensation to trade off other benefits such as wages and conditions undermines the existing safety-net of wages and conditions that the system rightly provides.

Recent figures from the Australian Bureau of Statistics regarding income and housing found that high income households did much better than those in lower income brackets, increasing 7% and 3% respectively over that last two years. The 2013-2014 Gini coefficient for income which measures the spread of income or wealth on the economy in Australia was the second

highest reading since 1994 and just above average for OECD countries.[35] This indicates that the distribution of income and wealth in Australia continues to widen. The draft report recommendation for the inclusion of non-monetary benefits in any test of IFA's will remove protections for low-paid workers with regard to their safety-net terms and conditions of employments and exacerbate income inequality in our economy.

Non-monetary compensation such as the ability to access flexible working arrangements in order to manage family responsibilities in exchange for penalty and overtime rates create an unfair financial penalty on employees who can least afford it. This can result in the exploitation of workers, particularly women, young, low-paid and uneducated workers.

Evidence regarding the use of IFA's demonstrates that the take up of IFA's is most prominent for women, low paid and young employees. For women in particular, the draft report found that:

> *'IFAs have also benefited at least one major group for whom flexible working arrangements are paramount – working mothers. Productivity Commission estimates based on Australian Workplace Relations Survey employee data suggest that whereas 9 per cent of all employees are female part-time employees aged between 25-44, 15 per cent of IFAs are made by this group. The conditions most likely to be varied in an IFA are arrangements about when work is performed, increases in penalty rates and overtime rates (O'Neill 2012b)'.*[36]

The SDA refutes the suggestion that IFA's have a positive impact on women. There has been important research undertaken regarding the real impact individual contracts have on women and the low paid, and it simply does not support this contention. The research did not show any 'benefits' to women, but rather showed significant detriment was experienced by women. The detrimental impact of individual contracts under Work Choices was most significantly felt by women in low-paid employment.

One study conducted regarding the impact of Work Choices on low-paid women found that 'Work Choices facilitated reductions in the income of study participants, including losses of

[35] The Age, *The rich are getting richer... again*, Saturday September 5 2015.
[36] Productivity Commission, *Workplace Relations Framework: Draft Report*, 2015 p 598-599

over AUS$100 a week for some. Many lost penalty rates, loadings, and allowances without any compensation in overall pay.'[37]

The study concluded that the effects of Work Choices have 'implications not only for pay and conditions but also more subtle changes in workplace climate and job security. A key change was a decline in bargaining power….In terms of future labour law, this study illustrates the absurdity of individual 'negotiation' as a basis for labour standards. Negotiation is an impossibility for most women in this study.'[38]

The draft report recommendation fails to recognise the power imbalance between employers and employees, particularly for low-paid, unskilled workers. If anything, more protection and scrutiny should be provided in the case of IFA's because they rely on the negotiation between an employer and an individual who has less bargaining power and ability on their own than in an EA negotiation. Adopting a lesser test for IFAs and opening them up to the trade-off of non-monetary benefits will only serve to exacerbate the potential for exploitation of workers.

As provided in our submission to the Australian Human Rights Commission Supporting Working Parents: Pregnancy and Return to Work Inquiry[39], the SDA already continually sees examples of women having to accept inferior conditions when they return to work from parental leave. Our members are forced to accept demotions, changes in status from full-time to part-time/casual or permanent to casual, and a reduction in hours. The inability and lack of power our members have in this situation results in a significant impact on our members financially in the short and long term. It also impacts on career progression and the ability to increase their earnings and superannuation over their life-time. This has a long lasting impact on the employee and their family.

Including non-monetary compensation in any BOOT or NDT would legitimise and perpetuate the already significant discriminatory behaviour already being experienced by employees (predominantly women) returning to work from parental leave. A workplace relations system

[37] Journal of Industrial Relations, *The impact of 'Work Choices' on Women in Low Paid Employment in Australia: A Qualitative Analysis*, Barbara Pocock et al, pg 480

[38] ibid, pg 487.

[39] Shop, Distributive and Allied Employees' Association, *SDA Submission to Australian Human Rights Commission: Supporting Working Parents: Pregnancy and Returning to Work National Review,* February 2014.

which fails to recognise the power imbalance and the disproportionate impact that this has on women, and does not offer the necessary protections in individual bargaining to redress this imbalance will perpetuate the existing issues in our economy with regard to the workplace participation of women and the widening gender pay gap.

At 18.8%, the gender pay gap is currently the largest it has been since the ABS started collecting data on it in 1994.[40] Given that there has been no improvement in the gender pay gap, despite the fact that it is widely recognised that improvements in female workforce participation and income are essential for economic growth, we need to ensure that the system provides a remedy and does not act to assist and perpetuate further gender inequality in our workforce.

Whilst the SDA values the ability for employees, particularly women who continue to carry the greatest responsibility for the care of children and elderly parents, to alter workplace arrangements this should not be done at the expense of trading-off wages and conditions of employment.

The SDA believes that the BOOT is a sufficient test for IFA's and that any recommendation should not seek to lessen the test for IFA's against the relevant award or enterprise agreement. We also believe that non-monetary benefits should not be included in any BOOT or NDT, in agreements or IFAs.

ENTERPRISE CONTRACTS

The SDA strongly opposes the introduction of Enterprise Contracts into the Workplace Relations system.

We believe that the result of such contracts which do not require negotiation and are only subject to an employer administered NDT with no external scrutiny will mirror the practical experience employees endured under AWA's. As referred to earlier in this submission, there

[40] ABS Cat No. 4125 – Gender Indicators, Australia, February 2015

is abundant evidence to demonstrate that AWA's resulted in significant disadvantage, exploitation and loss of terms and conditions of employment for the most vulnerable, women and low paid employees in Australia.

The model of Enterprise Contracts, as proposed in the draft report, will compromise the important safety-net of minimum wages and conditions of employment currently provided by the workplace relations system through the NES and Award system.

The SDA believes that the current system provides sufficient alternatives for businesses to achieve a suitable model of employment whilst providing an appropriate safety net for employees. Adding an additional statutory layer to the workplace relations system will erode the minimum safety net terms and conditions provided for in the NES and Award system and will promote individual bargaining over collective bargaining, which is contrary to the objectives of the Fair Work Act.

The SDA has successfully negotiated Enterprise Agreements in the fast food industry which predominately covers franchises which operate as small businesses. There are many similar models of business operating in retail and pharmacy however these businesses have been reluctant to enter into negotiations for an enterprise agreement.

Recently, the South Australian Branch of the SDA negotiated a model agreement with Business SA which could be used by members of the employer group. The agreement involved a higher base rate of pay with some reduction in penalty rates on weekends and evenings as businesses expressed that they needed to minimise penalty rates. No businesses have taken up the model agreement because although they want to minimise penalty rates the reality is that they don't want to have to pay for it in other ways to do that.

The SDA believes that employers will use enterprise contracts as a basis to undercut the minimum wages and conditions of their employees. This is also more likely to occur due to the fact that the proposal:

- does not require negotiation with an individual or group of employees,
- can be offered to prospective employees as a condition of accepting employment,

- provides for the assessment of the NDT to be made only by employers,
- the contract is lodged with the Fair Work Commission but it would not be scrutinised and approved by any regulatory agency
- compliance provides for prospective variation of the contract but not recompense or penalty for loss of wages or entitlements.
- Employees are only able to opt out after a minimum period rather than being able to opt out at any time if the contract undercuts their minimum entitlements.

The draft report makes this proposal to fill a perceived gap in the system for small business. However, it also states that 'there would be no restriction on the size of a firm able to use them'.[41] The SDA believes that enterprise contracts are simply designed to undermine the current workplace relations system and collective bargaining, which will further exacerbate the power imbalance which already exists between employers and employees, particularly the low paid, unskilled, women, young and migrant workers.

This power imbalance impacts those already in employment and the unemployed. The draft report discusses the fact that the workplace relations system also impacts not only on those in employment but also on the job prospects of those unemployed who have a marginal voice in it[42]. The draft report states 'the premise of any WR system is that, absent workplace legislation and oversight, employees would particularly suffer from unequal bargaining power'[43]. The SDA believes that in this case legislating to allow Enterprise Contracts will compound the unequal power suffered by those already employed and those looking for employment. Unemployed people would be forced to accept inferior wages and conditions, as a condition of employment, than those afforded by the NES and Award safety net.

Similar to the points raised in the above sections regarding IFAs the evidence regarding AWAs demonstrated that the most vulnerable in our society were most severely impacted by Work Choices and AWAs, that is, young workers, women, workers with a disability, older workers,

[41] Productivity Commission, *Workplace Relations Framework: Draft Report*, 2015, p 623
[42] Productivity Commission, *Workplace Relations Framework: Draft Report*, 2015, p 8
[43] Productivity Commission, *Workplace Relations Framework: Draft Report*, 2015,6

workers with caring responsibilities, indigenous, workers whose first language is not English and those in rural and remote communities.

The recent example of workers employed in 7-11 franchises and subsequent media around other employers with a similar business model highlights the level of exploitation of vulnerable workers which is already occurring within the current workplace relations system. The proposed new 'enterprise contracts' will be welcomed by franchisees of businesses such as 7-Eleven. What better than a document that is drafted by the employer with no union or employee input, which must meet a no disadvantage test but is not subject to any process of approval by the Fair Work Commission and all new employees can be required to sign up as a condition of employment. Given the vulnerability of the employees which has been conveyed by the recent media around this issue, these employees would not be in a position to seek to opt out of the contract and revert to the award. Even if they were inclined to do this they can only opt out after a minimum period, most likely 12 months with no recourse for wages lost as a result of the contract. These new 'enterprise contracts' will get unanimous support from businesses such as 7-Eleven franchisees. They will be delighted with the ability to legitimise the exploitation of employees within the system.

The SDA strongly opposes the introduction of enterprise contracts as a statutory arrangement within the workplace relations system as this will purely act to replace AWAs which had a severe impact on the most vulnerable employees, those who are in low-paid, unskilled, insecure employment and women, young, disabled, aged and migrant workers. Enterprise contracts provide even less protection than AWAs which will invariably lead to workers' safety net wages and conditions being undercut.

Enterprise Contracts represent a return to Work Choices and AWAs, yet with the capacity for even greater exploitation of workers. It is appalling to think that feedback is being sought on a proposal for a system which has unlimited application to an enterprise, a class or group of employees or an individual employee; which fails to recognise collective bargaining rights; which is a condition of employment; which is not subject to any scrutiny; and which ultimately seeks to undercut the minimum safety of wages and conditions of employment of the most vulnerable.

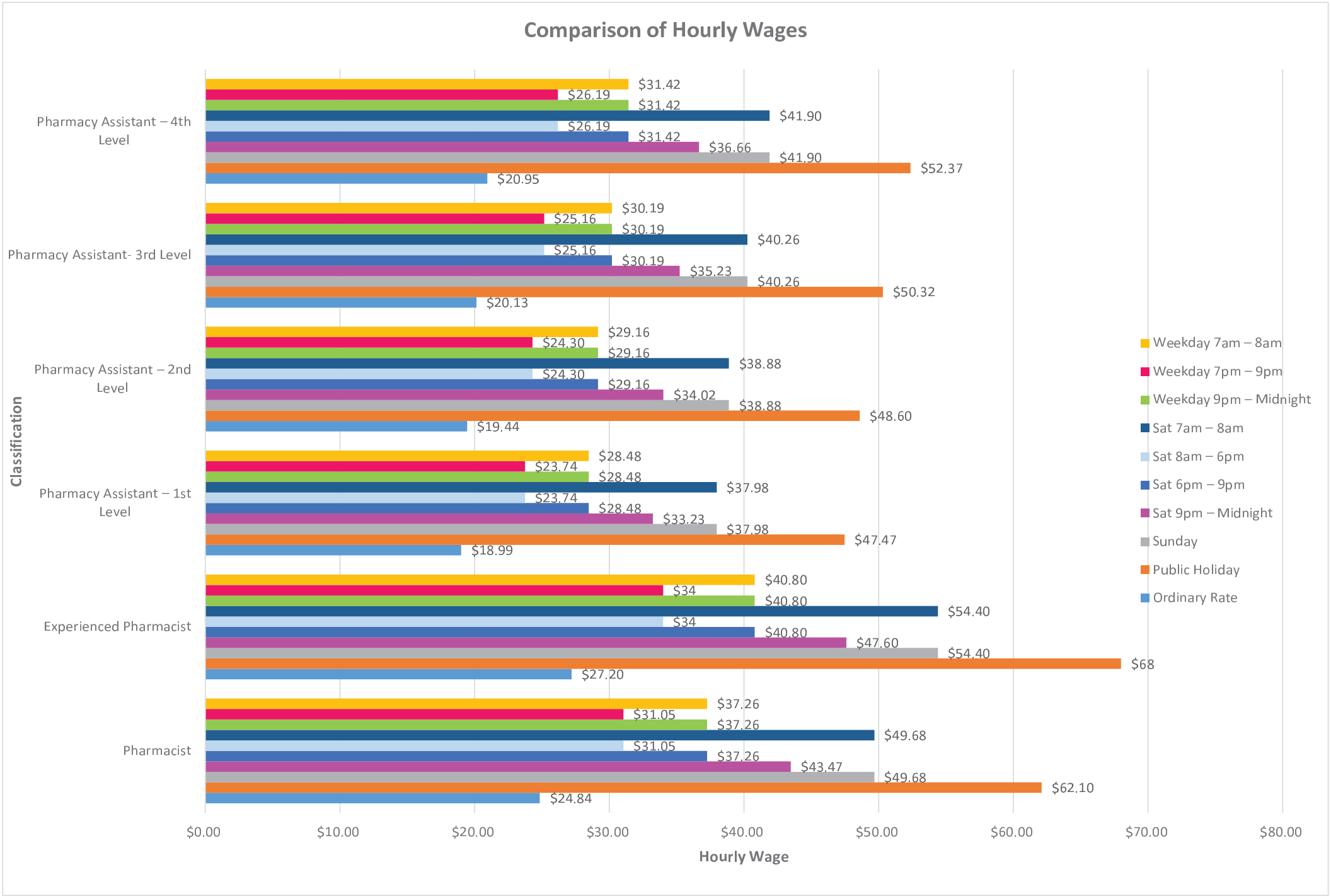
APPENDIX A: **Wages and Penalties – Pharmacy Industry Award 2010**

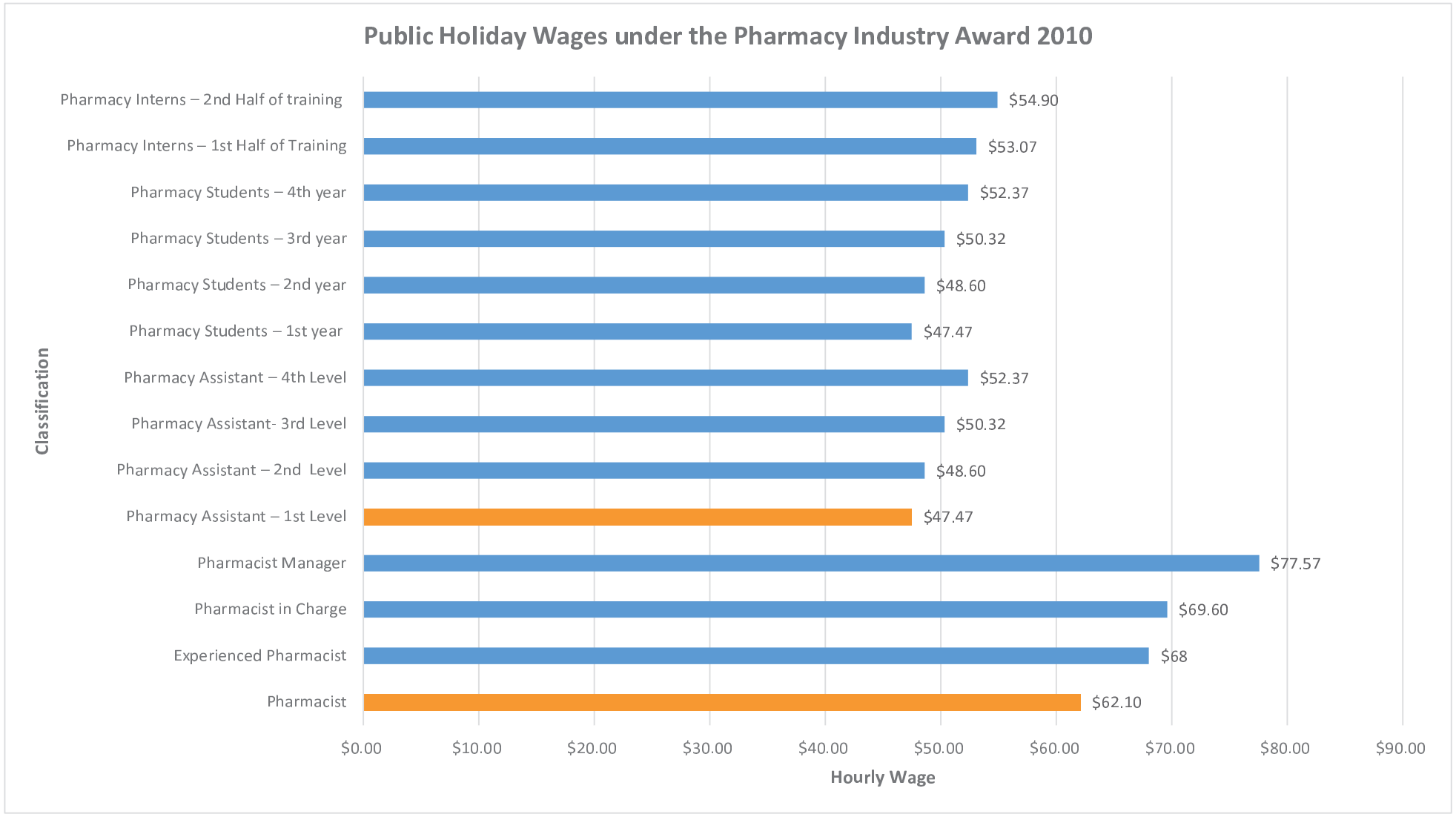
		Wages (Hourly)													
	Penalty Rate	**Pharmacist**	Experienced Pharmacist	Pharmacist in Charge	Pharmacist Manager	**Pharmacy Assistant – 1st Level**	Pharmacy Assistant – 2nd Level	Pharmacy Assistant- 3rd Level	Pharmacy Assistant – 4th Level	Pharmacy Students – 1st year	Pharmacy Students – 2nd year	Pharmacy Students – 3rd year	Pharmacy Students – 4th year	Pharmacy Interns – 1st Half of Training	Pharmacy Interns – 2nd Half of training
Ordinary Rate (Weekly)	0%	**$24.84**	**$27.20**	**$27.84**	**$31.03**	**$18.99**	**$19.44**	**$20.13**	**$20.95**	**$18.99**	**$19.44**	**$20.13**	**$20.95**	**$21.23**	**$21.96**
Public Holiday	250%	**$62.10**	$68	$69.60	$77.57	**$47.47**	$48.60	$50.32	$52.37	$47.47	$48.60	$50.32	$52.37	$53.07	$54.90
Sunday	200%	**$49.68**	$54.40	$55.68	$62.06	**$37.98**	$38.88	$40.26	$41.90	$37.98	$38.88	$40.26	$41.90	$42.46	$43.92
Sat 9pm – Midnight	175%	**$43.47**	$47.60	$48.72	$54.30	**$33.23**	$34.02	$35.23	$36.66	$33.23	$34.02	$35.23	$36.66	$37.15	$38.43
Sat 6pm – 9pm	150%	**$37.26**	$40.80	$41.76	$46.55	**$28.48**	$29.16	$30.19	$31.42	$28.48	$29.16	$30.19	$31.42	$31.84	$32.94
Sat 8am – 6pm	125%	**$31.05**	$34	$34.80	$38.79	**$23.74**	$24.30	$25.16	$26.19	$23.74	$24.30	$25.16	$26.19	$26.54	$27.45
Sat 7am – 8am	200%	**$49.68**	$54.40	$55.68	$62.06	**$37.98**	$38.88	$40.26	$41.90	$37.98	$38.88	$40.26	$41.90	$42.46	$43.92
Weekday 9pm – Midnight	150%	**$37.26**	$40.80	$41.76	$46.55	**$28.48**	$29.16	$30.19	$31.42	$28.48	$29.16	$30.19	$31.42	$31.84	$32.94
Weekday 7pm – 9pm	125%	**$31.05**	$34	$34.80	$38.79	**$23.74**	$24.30	$25.16	$26.19	$23.74	$24.30	$25.16	$26.19	$26.54	$27.45

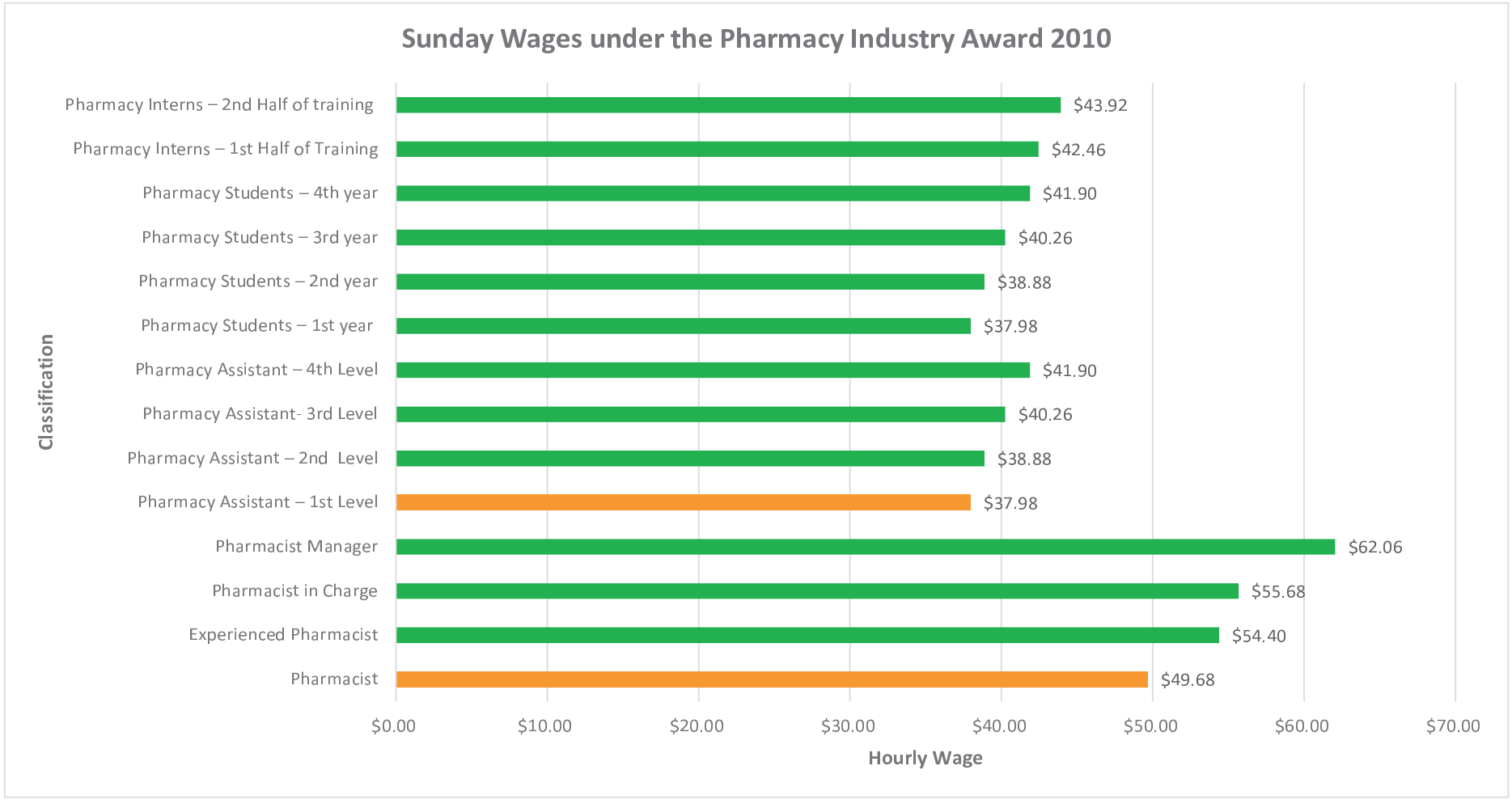
Weekday 7am – 8am	150%	**$37.26**	$40.80	$41.76	$46.55	**$28.48**	$29.16	$30.19	$31.42	$28.48	$29.16	$30.19	$31.42	$31.84	$32.94

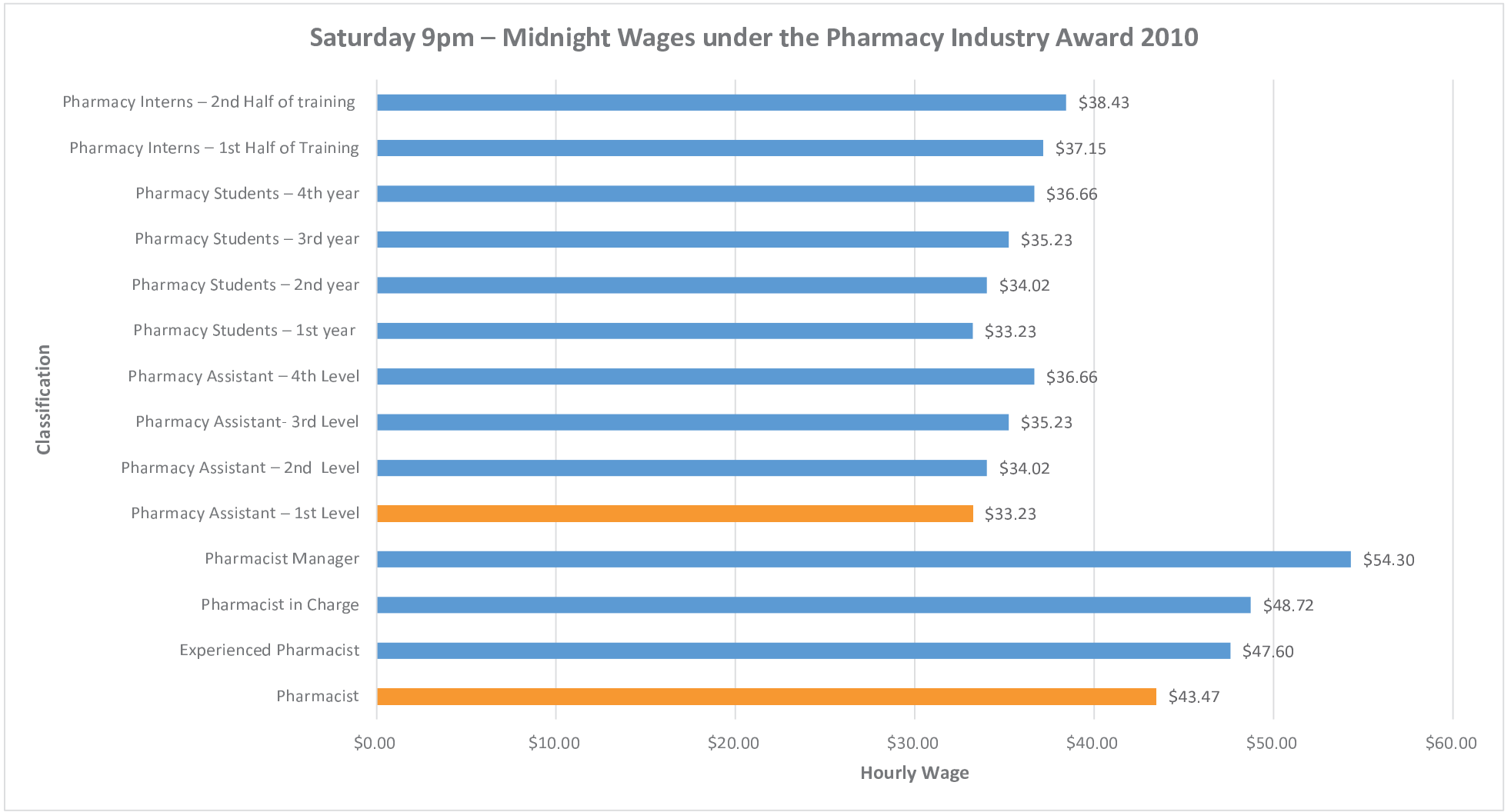
The ordinary rate of a Pharmacist is 31% greater than a Pharmacy Assistant (1st Level)

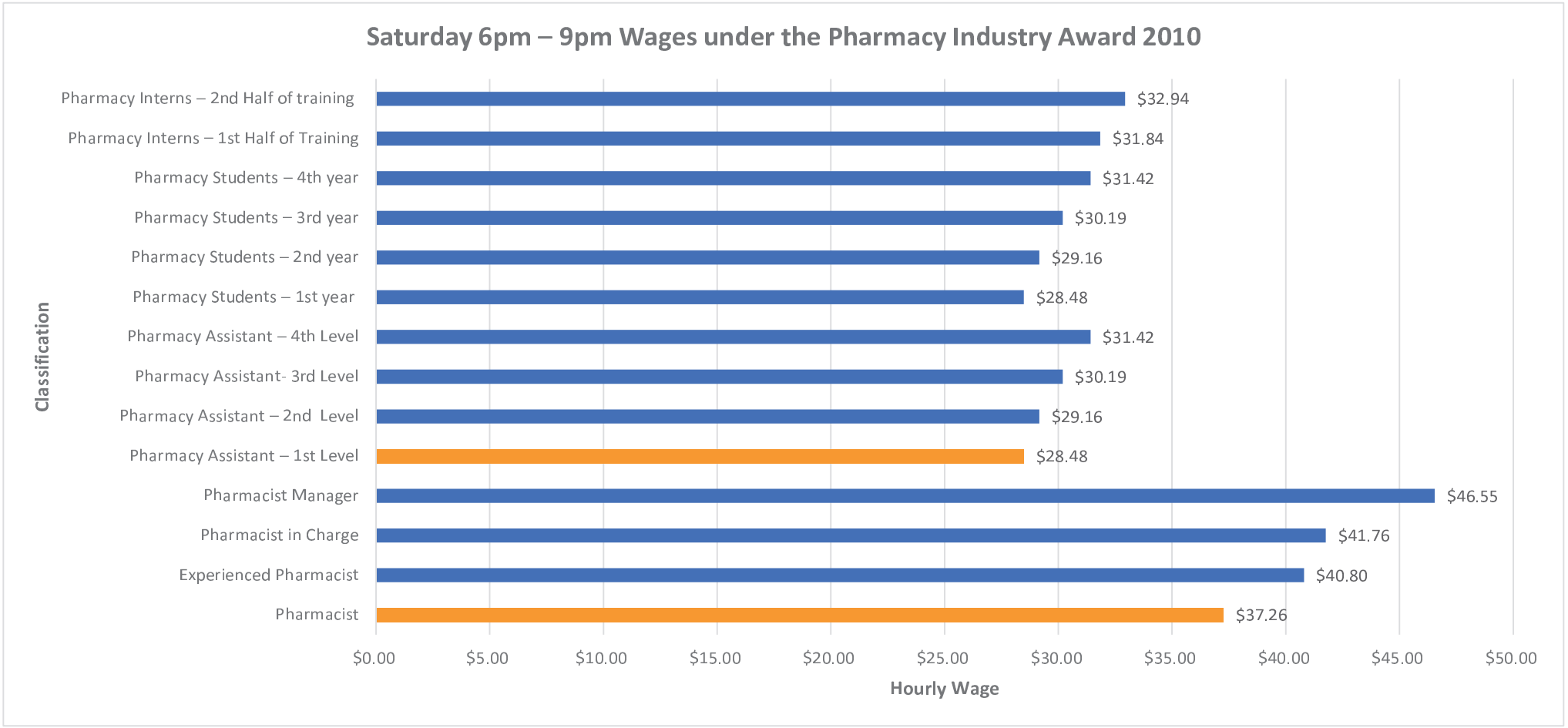
NB: Hourly wages were calculated by dividing the weekly wage by 38 (to reflect a 38 hour working week). All numbers were rounded to 2 decimal points.

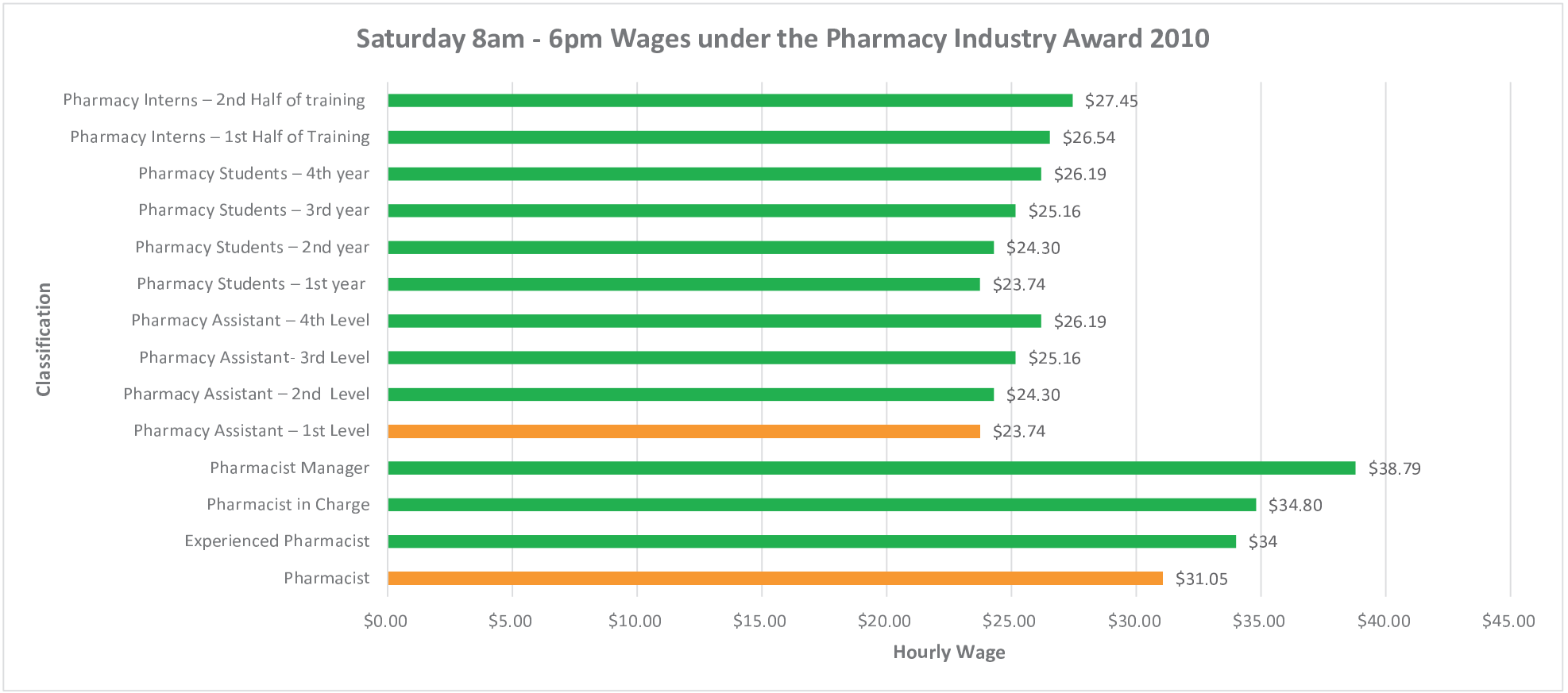

Comparison of Hourly Wages
Classification
Pharmacy Assistant – 4th Level
$31.42
$26.19
$31.42
$41.90
$26.19
$31.42
$36.66
$41.90
$52.37
$20.95
Pharmacy Assistant- 3rd Level
$30.19
$25.16
$30.19
$40.26
$25.16
$30.19
$35.23
$40.26
$50.32
$20.13
Pharmacy Assistant – 2nd Level
$29.16
$24.30
$29.16
$38.88
$24.30
$29.16
$34.02
$38.88
$48.60
$19.44
Pharmacy Assistant – 1st Level
$28.48
$23.74
$28.48
$37.98
$23.74
$28.48
$33.23
$37.98
$47.47
$18.99
Experienced Pharmacist
$40.80
$34
$40.80
$54.40
$34
$40.80
$47.60
$54.40
$68
$27.20
Pharmacist
$37.26
$31.05
$37.26
$49.68
$31.05
$37.26
$43.47
$49.68
$62.10
$24.84
$0.00
$10.00
$20.00
$30.00
$40.00
$50.00
$60.00
$70.00
$80.00
Hourly Wage
Weekday 7am – 8am
Weekday 7pm – 9pm
Weekday 9pm – Midnight
Sat 7am – 8am
Sat 8am – 6pm
Sat 6pm – 9pm
Sat 9pm – Midnight
Sunday
Public Holiday
Ordinary Rate

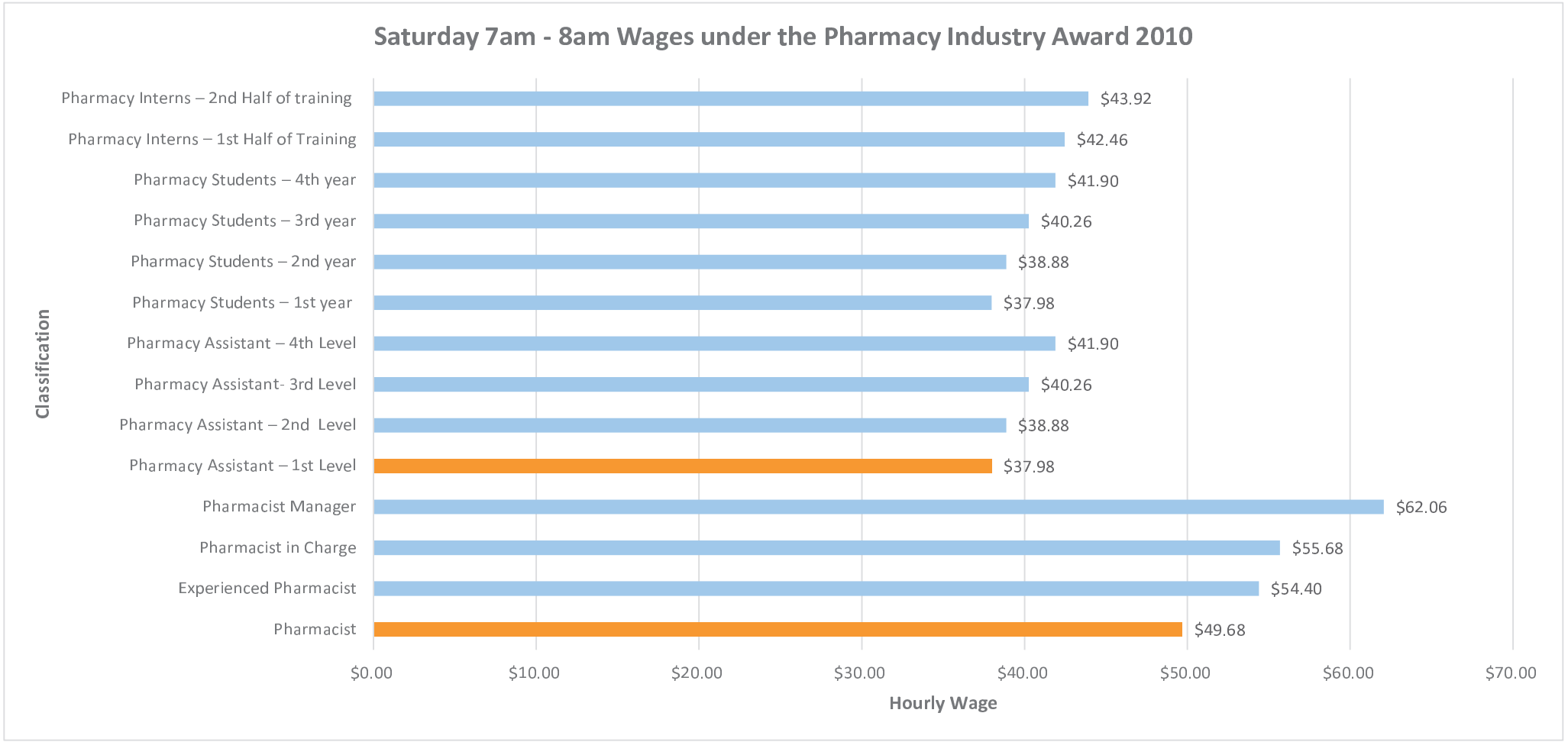

Public Holiday Wages under the Pharmacy Industry Award 2010
Classification
Pharmacy Interns – 2nd Half of training
Pharmacy Interns – 1st Half of Training
Pharmacy Students – 4th year
Pharmacy Students – 3rd year
Pharmacy Students – 2nd year
Pharmacy Students – 1st year
Pharmacy Assistant – 4th Level
Pharmacy Assistant- 3rd Level
Pharmacy Assistant – 2nd Level
Pharmacy Assistant – 1st Level
Pharmacist Manager
Pharmacist in Charge
Experienced Pharmacist
Pharmacist
$54.90
$53.07
$52.37
$50.32
$48.60
$47.47
$52.37
$50.32
$48.60
$47.47
$77.57
$69.60
$68
$62.10
$0.00
$10.00
$20.00
$30.00
$40.00
$50.00
$60.00
$70.00
$80.00
$90.00
Hourly Wage

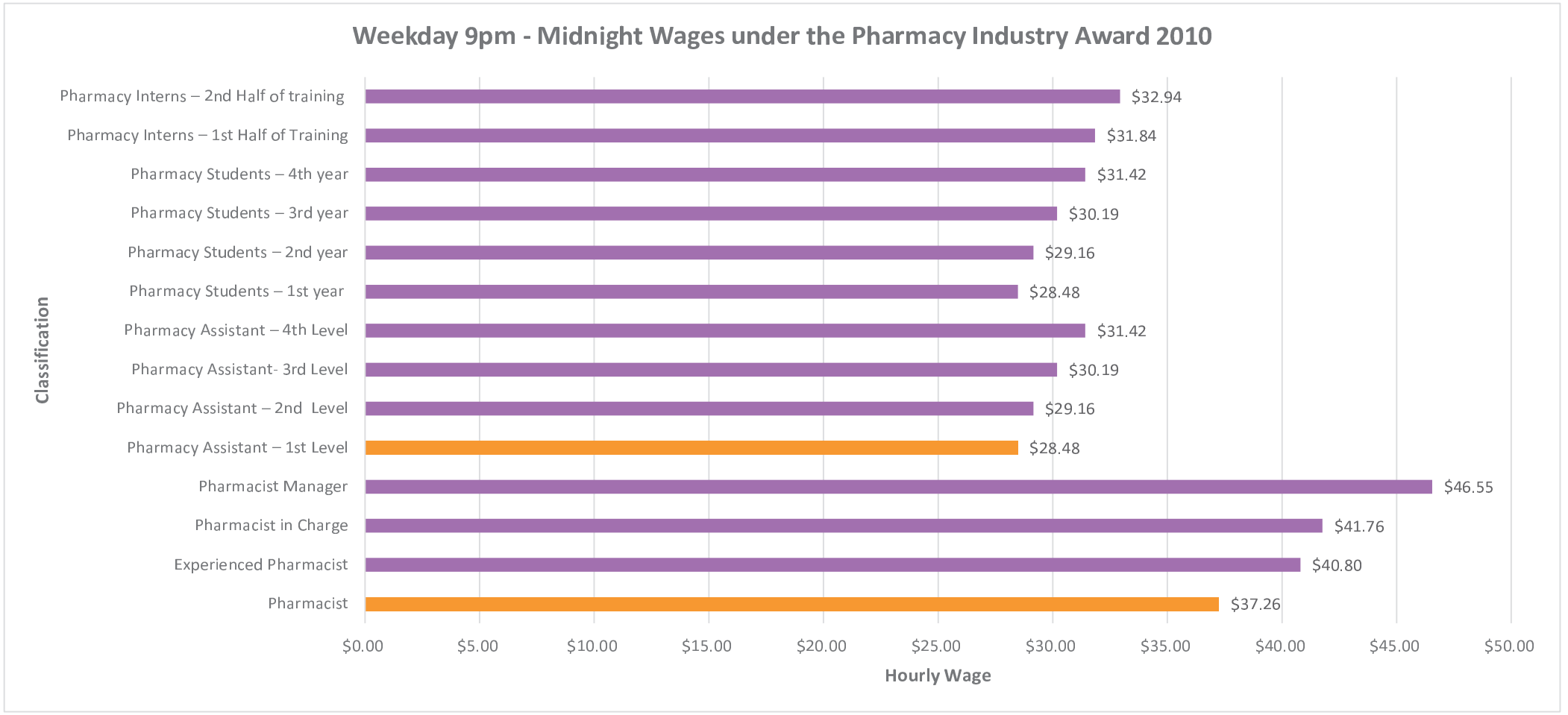

Sunday Wages under the Pharmacy Industry Award 2010
Classification
Pharmacy Interns – 2nd Half of training
Pharmacy Interns – 1st Half of Training
Pharmacy Students – 4th year
Pharmacy Students – 3rd year
Pharmacy Students – 2nd year
Pharmacy Students – 1st year
Pharmacy Assistant – 4th Level
Pharmacy Assistant- 3rd Level
Pharmacy Assistant – 2nd Level
Pharmacy Assistant – 1st Level
Pharmacist Manager
Pharmacist in Charge
Experienced Pharmacist
Pharmacist
$43.92
$42.46
$41.90
$40.26
$38.88
$37.98
$41.90
$40.26
$38.88
$37.98
$62.06
$55.68
$54.40
$49.68
$0.00
$10.00
$20.00
$30.00
$40.00
$50.00
$60.00
$70.00
Hourly Wage


Saturday 9pm – Midnight Wages under the Pharmacy Industry Award 2010
Classification
Pharmacy Interns – 2nd Half of training
$38.43
Pharmacy Interns – 1st Half of Training
$37.15
Pharmacy Students – 4th year
$36.66
Pharmacy Students – 3rd year
$35.23
Pharmacy Students – 2nd year
$34.02
Pharmacy Students – 1st year
$33.23
Pharmacy Assistant – 4th Level
$36.66
Pharmacy Assistant- 3rd Level
$35.23
Pharmacy Assistant – 2nd Level
$34.02
Pharmacy Assistant – 1st Level
$33.23
Pharmacist Manager
$54.30
Pharmacist in Charge
$48.72
Experienced Pharmacist
$47.60
Pharmacist
$43.47
$0.00
$10.00
$20.00
$30.00
$40.00
$50.00
$60.00
Hourly Wage


Saturday 6pm – 9pm Wages under the Pharmacy Industry Award 2010
Classification
Pharmacy Interns – 2nd Half of training
Pharmacy Interns – 1st Half of Training
Pharmacy Students – 4th year
Pharmacy Students – 3rd year
Pharmacy Students – 2nd year
Pharmacy Students – 1st year
Pharmacy Assistant – 4th Level
Pharmacy Assistant- 3rd Level
Pharmacy Assistant – 2nd Level
Pharmacy Assistant – 1st Level
Pharmacist Manager
Pharmacist in Charge
Experienced Pharmacist
Pharmacist
$32.94
$31.84
$31.42
$30.19
$29.16
$28.48
$31.42
$30.19
$29.16
$28.48
$46.55
$41.76
$40.80
$37.26
$0.00
$5.00
$10.00
$15.00
$20.00
$25.00
$30.00
$35.00
$40.00
$45.00
$50.00
Hourly Wage


Saturday 8am - 6pm Wages under the Pharmacy Industry Award 2010
Classification
Pharmacy Interns – 2nd Half of training
Pharmacy Interns – 1st Half of Training
Pharmacy Students – 4th year
Pharmacy Students – 3rd year
Pharmacy Students – 2nd year
Pharmacy Students – 1st year
Pharmacy Assistant – 4th Level
Pharmacy Assistant- 3rd Level
Pharmacy Assistant – 2nd Level
Pharmacy Assistant – 1st Level
Pharmacist Manager
Pharmacist in Charge
Experienced Pharmacist
Pharmacist
$27.45
$26.54
$26.19
$25.16
$24.30
$23.74
$26.19
$25.16
$24.30
$23.74
$38.79
$34.80
$34
$31.05
$0.00
$5.00
$10.00
$15.00
$20.00
$25.00
$30.00
$35.00
$40.00
$45.00
Hourly Wage


Saturday 7am - 8am Wages under the Pharmacy Industry Award 2010
Classification
Pharmacy Interns – 2nd Half of training
Pharmacy Interns – 1st Half of Training
Pharmacy Students – 4th year
Pharmacy Students – 3rd year
Pharmacy Students – 2nd year
Pharmacy Students – 1st year
Pharmacy Assistant – 4th Level
Pharmacy Assistant- 3rd Level
Pharmacy Assistant – 2nd Level
Pharmacy Assistant – 1st Level
Pharmacist Manager
Pharmacist in Charge
Experienced Pharmacist
Pharmacist
$43.92
$42.46
$41.90
$40.26
$38.88
$37.98
$41.90
$40.26
$38.88
$37.98
$62.06
$55.68
$54.40
$49.68
$0.00
$10.00
$20.00
$30.00
$40.00
$50.00
$60.00
$70.00
Hourly Wage


Weekday 9pm - Midnight Wages under the Pharmacy Industry Award 2010
Classification
Pharmacy Interns – 2nd Half of training
Pharmacy Interns – 1st Half of Training
Pharmacy Students – 4th year
Pharmacy Students – 3rd year
Pharmacy Students – 2nd year
Pharmacy Students – 1st year
Pharmacy Assistant – 4th Level
Pharmacy Assistant- 3rd Level
Pharmacy Assistant – 2nd Level
Pharmacy Assistant – 1st Level
Pharmacist Manager
Pharmacist in Charge
Experienced Pharmacist
Pharmacist
$32.94
$31.84
$31.42
$30.19
$29.16
$28.48
$31.42
$30.19
$29.16
$28.48
$46.55
$41.76
$40.80
$37.26
$0.00
$5.00
$10.00
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$35.00
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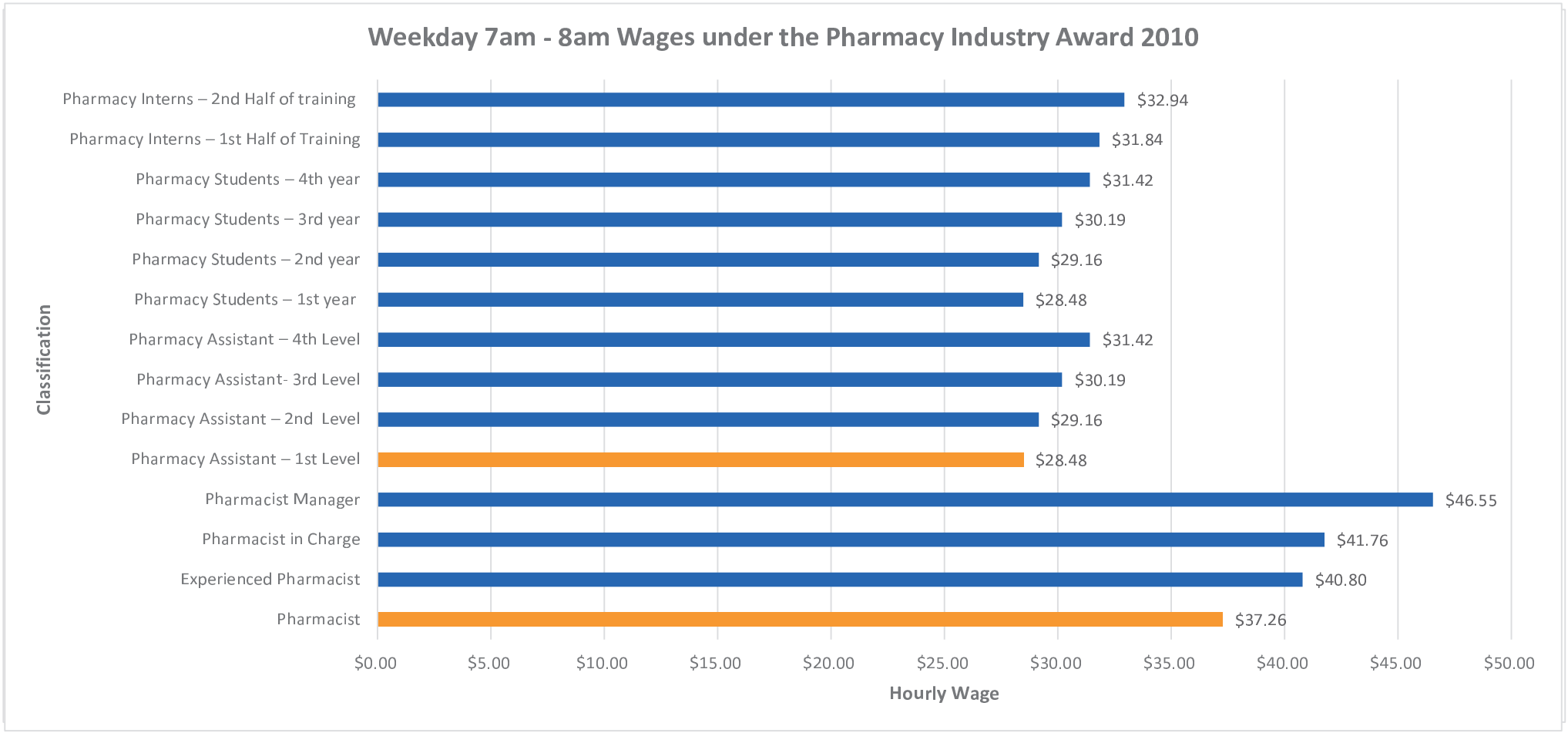
$45.00
$50.00
Hourly Wage


Weekday 7am - 8am Wages under the Pharmacy Industry Award 2010
Classification
Pharmacy Interns – 2nd Half of training
Pharmacy Interns – 1st Half of Training
Pharmacy Students – 4th year
Pharmacy Students – 3rd year
Pharmacy Students – 2nd year
Pharmacy Students – 1st year
Pharmacy Assistant – 4th Level
Pharmacy Assistant- 3rd Level
Pharmacy Assistant – 2nd Level
Pharmacy Assistant – 1st Level
Pharmacist Manager
Pharmacist in Charge
Experienced Pharmacist
Pharmacist
$32.94
$31.84
$31.42
$30.19
$29.16
$28.48
$31.42
$30.19
$29.16
$28.48
$46.55
$41.76
$40.80
$37.26
$0.00
$5.00
$10.00
$15.00
$20.00
$25.00
$30.00
$35.00
$40.00
$45.00
$50.00
Hourly Wage

APPENDIX (B) HAS BEEN INCLUDED AS A SEPARATE ATTACHMENT, AND INCLUDES:

1. Expert report from Professor Sara Charlesworth & Dr Fiona McDonald
2. Report from Ian Watson, Freelance Researcher & visiting Senior Research Fellow