

Fair Work Commission

Award Review 2014

AM2014/1

Submissions on Plain Language Drafts of
Awards



Shop Distributive and Allied Employees' Association

20 May 2016

1. The Shop Distributive and Allied Employees' Association (SDA) makes these submissions in response to the Statement issued by the President on 6 May 2016¹ regarding the outcome of the plain language modern awards pilot and further plain language activities.
2. The SDA makes these submissions in light of the experience it has had in the 'pilot' program with the Pharmacy Industry Award and the Vehicle, Manufacturing, Repair, Service and Retail Award (VMRS&R) drafting process.

GENERAL COMMENTS ON THE PLAIN LANGUAGE PILOT AND REDRAFTING PROCESS

User Testing

3. The SDA does not have any objections to the development of awards which are easier to understand. However, we do have concerns about the user testing process used in the pilot. The SDA envisaged that this process would test the understanding of how pharmacy specific clauses operated with a broad and representative group of employees and employers. Unfortunately, the user testing Plain Language Award Pilot conducted by the Wallis group (Wallis Report)² and the Supplementary Information³ on this Report indicate that the proposed clauses were tested on a very small group of people and tested for what words are preferred – not people's understanding of the clauses.
4. The primary reason for redrafting a plain language award should be to rewrite it into terms that are easier to understand – not necessarily terms that people prefer. If further user testing is conducted for other awards testing the understanding of users should be the primary objective while ensuring that the understanding of the plain language clause is not different to the legal intent of the current Award.

Redrafting

¹ [2016] FWC 2837, <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am20141-plainlanguagestatement-060516.pdf>

² <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM2014209-report-FWC-210416.pdf>

³ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM2014209-corr-fwc-070516.pdf>

5. We have serious concerns about the process undertaken in the review of the Pharmacy Industry Award which has been subject to this pilot. There have now been at least five drafts of the Pharmacy Industry Award released as part of the 4 yearly award review, in addition to the current Award. As a result, the legal effect of some clauses has changed and there has been a subsequent erosion of entitlements.
6. We note from the Statement⁴ of Justice Ross on 8 December 2014 and the notes preceding the Exposure Draft that:

'The exposure drafts do not incorporate any substantive changes and do not represent the concluded view of the Commission on any issue' and 'This exposure draft does not seek to amend any entitlements under the Pharmacy award but has been prepared to address some of the structural issues identified in modern awards.'

7. We also note that in the Statement⁵ of Justice Ross issued on 22 September 2015 that

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

(Emphasis added)

8. Despite this, we are concerned that the continual re-draft of the Award without proper consideration of the changed legal effect of clauses has resulted in a watering down of entitlements.
9. Any process established to Plain Language other modern awards needs to provide appropriate safeguards to ensure that this does not occur.
10. For example, interested parties to the Pharmacy Award were not provided with all of the clauses provided in the user testing, nor were parties given an opportunity to

⁴ [2014] FWC 8837, 8 December 2014

⁵ [2015] FWC 6555, 22 September 2015

comment on the report arising from the testing which lead to a further redraft conducted by the Fair Work Commission⁶.

11. These process issues have also been experienced in the review of the Vehicle, Manufacturing, Repair, Services and Retail Award.

Preparation of further plain language drafts

12. The Statement⁷ issued by President Ross on 6 May 2016 states that:

[7] Plain language drafting, supported by appropriate consultation processes, can make modern awards simpler and easier to understand, consistent with s.134(1)(g) of the Fair Work Act 2009 (Cth).

13. We agree that where the Commission makes a decision to redraft any award for plain language that an appropriate consultation process be established.
14. Noting the concerns we have expressed above, in relation to redrafting, we believe that greater consultation with the relevant unions and employer organisations is needed to prevent and minimise the potential for changes to the legal effect of a redraft of any award. Feedback and comments from relevant parties and action taken by the Commission to address them should also be recorded throughout the process and a clear and systematic process adopted for this.
15. Any change made to an award by the Commission or other interested party through this process should be highlighted and a full explanation of the change provided to interested parties in writing.
16. The FWC should also issue a statement that the redrafting to 'plain language' is not a mechanism to remove or diminish current award entitlements. Strong legal principles and legal understandings underpin many award provisions. The FWC should ensure that the 'simple english' does not impinge on these, and that the legal position remains unchanged unless there is a proper reasoned decision issued for any change.

⁶ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM2014209-report-plainlanguage-FWC-210416.pdf>

⁷ [2016] FWC 2837, <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am20141-plainlanguagestatement-060516.pdf>

17. To ensure that an appropriate best practice process is established for dealing with plain language drafting of modern awards we recommend that the Commission choose one award to begin with. Once this award is chosen, an evaluation of the process should be undertaken periodically throughout the process. This should then inform a best practice process for other awards.
18. Consideration should also be given to the resources required by parties to fully participate in the plain language draft process. When choosing awards which will be subject to the plain language drafting process we would ask that only one SDA award is dealt with at any one time. We have found that the process is resource intensive for all parties and the only way we would be able to effectively contribute to the process is if we are able to deal with one award at a time.
19. We have also encountered significant issues where the drafting process has intertwined with claims for substantive changes to the Pharmacy Award. The process for dealing with the plain language draft of modern awards should be separate to claims for substantive changes to the award and should not be dealt with at the same time.
20. Implementing these suggested processes will ensure that natural justice is afforded to all interested parties to the plain language drafting of awards.

GENERAL COMMENTS ON PART B CLAUSES

21. Clauses with broader applicability than the Pharmacy Industry Award were also redrafted as part of the plain language drafting. The 'Report from Plain language modern award pilot'⁸ refers to these clauses as *Part B* clauses.
22. The statement⁹ issued by President Ross makes the following comments in relation to Part B clauses:

⁸ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM2014209-report-plainlanguage-FWC-210416.pdf>

[4] In addition to plain language redrafting of award-specific provisions of the Pharmacy Industry Award, the Pilot also involved plain language redrafting of provisions that are common to most modern awards, including:

- *Award flexibility*
- *Consultation*
- *Dispute resolution; and*
- *Schedules dealing with the National Training Wage and Supported Wage System.*

[5] A statement will be issued shortly providing further information on these redrafted provisions and providing an opportunity for all interested parties to comment.

23. The SDA also notes that in the Full Bench decision¹⁰ issued on 24 April 2016 regarding award flexibility, the Commission has started using the plain language principles to redraft the TOIL model clause for impacted awards.

24. We also note that Part B clauses in addition to those provided in the statement issued on 6 May have also been redrafted as part of the plain language drafting for the Pharmacy Industry Award, such as:

- The National employment Standards and this award
- Effect of variations made by the FWC
- Facilitative provisions
- Annual Leave
- Personal/carer's leave and compassionate leave
- Parental Leave
- Public Holidays
- Community Services Leave

⁹ [2016] FWC 2837, <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am20141-plainlanguagestatement-060516.pdf>

¹⁰ [2016] FWCFB 2602, <https://www.fwc.gov.au/documents/decisionssigned/html/2016FWCFB2602.htm>

- Termination of employment and redundancy
 - Miscellaneous matters
25. The SDA is concerned about the Commission redrafting clauses which have already been subject to rigorous submissions and hearings, and subsequent Full Bench decisions.
 26. We are concerned that this process will lead to unintentional changes to the legal effect of award entitlements.
 27. We also believe that there should be a broader consultation regarding plain language drafting and the establishment of an appropriate process than just with the parties involved in the Pharmacy Industry Award and other chosen awards, as plain language drafting particularly of Part B clauses, will have consequences for all awards.
 28. The SDA agrees with the Commission and the need for separate proceedings to deal with Part B clauses.
 29. Given the broad applicability of all of the Part B clauses and the various parties which will have an interest, all interested parties should be provided with the opportunity to make comment about all of the Part B clauses, including those Part B clauses redrafted in the Pharmacy Industry Award.
 30. The SDA requests that a conference of interested parties should be called on to establish appropriate process and timelines for dealing with Part B clauses.