**Fair Work Commission**

**Award Review 2014**

**Plain Language**

**AM2016/15**

# Submissions on the Plain Language – Standard Clauses


**Shop Distributive and Allied Employees' Association**

**9 August 2017**

1. The Shop Distributive and Allied Employees' Association (SDA) makes these submissions on the Plain Language Re-Drafting of Standard Clauses in accordance with the Statement issued by the Full Bench on 20 July 2017[1].

2. The SDA also supports and adopts the submissions made by the Australian Council of Trade Unions.

**Clause A – Award flexibility (renamed Individual flexibility arrangements)**

3. The SDA supports the provisional view of the Full Bench that the note at A.1 and hyperlinks should be deleted, as per PN [14] of the Statement.

4. The SDA is not opposed to the proposed changed wording in A.1 and subsequent deletion of A.4 at PN 26 of the Statement.

5. The SDA supports the retention of A.6, as per PN [36] of the Statement. This clause is important to ensure employees are properly informed when making any agreement to vary the terms of their employment.

6. The SDA agrees that the proposed wording for Clause A.8 found at PN 41 of the Statement reflects the agreed position of interested parties at conference.

7. The SDA does not oppose inserting a note in lieu of clause A.14, however, the wording in the Note below Clause 4.8 of the current Award is clearer than the proposed wording contained in PN 62 of the Statement.

   The note under the current clause X.8(b) is as follows:

> *'NOTE: If any of the requirements of s.144(4), which are reflected in the requirements of this clause, are not met then the agreement may be terminated by either the employee or the employer, giving written notice of not more than 28 days (see s.145 of the Act).'*

[1] [2017]FWCFB 3745

The proposed note is at paragraph 62:

> *Note: If an employer and employee agree to an arrangement that purports to be an individual flexibility arrangement under this award term and the arrangement does not meet a requirement set out in s. 144 then the employee or the employer may terminate the arrangement by giving written notice of not more than 28 days (see s.145 of the Act)'.*

8. The Note contained in the current Award makes reference to the requirements contained in the clause as reflective of the Act and that if these are not met then the agreement may be terminated with written notice of not more than 28 days.

9. The new proposed wording only refers to an arrangement not meeting the requirements of the Act, it does not reference the clause in the Award. If the Full Bench is minded to alter the wording contained in the current Award then the Note should reference the clause in the Award, as it does in the current Award.

10. Clause A.14 of the previous draft more appropriately reflects the note in the current Award:

> *'A.14 The period of notice required under clause A.13 is reduced to a period of not more than 28 days if an agreement made under this clause does not meet a requirement set out both in section 144(4) of the Act and in clause A.'*

**Clause B – Consultation about major workplace change**

11. The Statement, at PN 65, provides a revised standard clause B – Consultation about major workplace change which reflects the agreed position of the interested parties.

12. The plain language drafter, at PN 67, has proposed alternative wording for clause B.1.

13. The SDA submits that the amended B.1 proposed by the plain language, which introduces elements of both B.1(c) and B.6 is more ambiguous and does not reflect the agreed position of the parties in relation to concerns raised.

14. In transcript on 11 April 2017, PN 2544 – PN 2630, parties raised issues regarding when discussions should commence as part of the consultation process, and agreement was reached on wording to resolve the issue. There was also discussion at PN 2399 – PN 2480 of transcript regarding moving *'(excluding a change in any such matter that is provided for by the award)'* to a new B.6.

15. It was agreed that the obligation regarding when discussions are to commence should be separate from the general obligation to discuss. It was also agreed that 'excluding a change in any such matter that is provided for by the award' needs to be linked to B.5, that is, what is a significant effect rather than to B.1.

16. The revised standard clause B provided at PN 65 of the Statement accurately reflects the position agreed to by the parties to resolve these concerns.

17. The changes proposed by the plain language drafter at PN 67 of the Statement re-introduce these issues which were resolved at Conference.

18. The SDA also submits that the introduction of the term 'relevant change' in the proposed clause introduces a term which is unnecessary and potentially subjective, which could alter the application of the provision. The use of the term 'relevant' could lead to a decision being made about what changes are relevant to the effected employees, for the purpose of consultation. The English Oxford Living Dictionary defines the word 'relevant' as *'Closely connected or appropriate to what is being done or considered'*[2]. In the context of this clause who determines what is appropriate?

19. The 'change' is already characterised as a major change in production, program, organisation, structure or technology. If the Full Bench is minded to change the wording it could be made in clause B.1(a) to include 'give notice of the major change…' rather than 'give notice of the relevant change…'.

20. The SDA proposes the following wording which reflects the agreed wording discussed at conference and proposed in PN 65 of the Statement but includes reference to major change in B.1 (a):

[2] https://en.oxforddictionaries.com/definition/relevant

B.1 If an employer makes a definite decision to make a major change in production, program, organisation, structure or technology that is likely to have a significant effect on employees the employer must:

**(a)** give notice of the major change/s to all employees who may be affected by it and their representatives (if any); and

**(b)** discuss with affected employees and their representatives (if any):

**(i)** the introduction of the changes; and

**(ii)** their likely effect on employees; and

**(iii)** measures to avoid or reduce the adverse effects of the changes on employees; and

**(c)** commence discussions as soon as practicable after a definite decision has been made.

21. The SDA submits that clause B.6 be retained as per PN 65 of the statement, as it was agreed by the parties that it should not be linked to B.1, but rather it should be linked to B.5 and contained at the end as a separate clause.

**Clause C – Consultation about changes to the rosters or hours of work**

22. The SDA is not opposed to the proposed wording for C.3(b) contained at PN 78 of the Statement.

**Clause D – Dispute resolution**

23. The SDA has some concerns regarding the drafting of Clause D. While we agree that for consistency the use of the term 'employer and the employee or employees concerned' is more consistent, this may unintentionally result in the inability for a union representing an employee/s to initiate a dispute. For example, Clause 8 of the Pharmacy Industry Award 2010 (PIA) requires an employer to notify, discuss and provide information to the employee's representative. The redrafting of Clause D may

result in a union being unable to initiate a dispute if an employer has failed to notify, discuss or provide information as part of the consultation process.

24. The SDA also submits that clause D.7 has changed the legal effect of clause 23.5 of the current Award. Clause 23.5 of the current Award states that:

> *An employer or employee may appoint another person, organisation or association to accompany **and/or** represent them for the purposes of this clause.* [Emphasis added]

25. The redrafted D.7 provides that:

> *An employer or employee may appoint another person, organisation or association to support **or** represent them in any discussion or process under clause D.* [Emphasis added]

26. The SDA submits that ***'and/or'*** should be retained as the role the person, organisation or association may play throughout the process can be to support and/or represent the employee or employer, not one or the other.

27. The SDA is not opposed to the inclusion of the word 'process' in clause D.7.

**Clause E – Termination of employment**

28. The SDA supports the revised standard clause E contained at PN 93 of the Statement.

**Clause G – Transfer to lower paid job on redundancy**

29. The SDA submits that 'by reason of redundancy', which is used in the current Award clause 21.2, should be retained and used instead of the proposed wording in G.1(a) 'no longer requires the duties being performed by an employee in a role (the first role) to be performed by anyone'. This removes the contentious issues raised regarding the inclusion of an expanded definition of redundancy and what this should contain.

30. The approach taken in the current clause 15.1 of the Award which states, *Redundancy pay is provided for in the NES*, should be used in the drafting of the standard clause. This is done at clause F. Redundancy in the plain language exposure draft.

31. This would also remove the need to include ‘first role’ and ‘second role’ which does not make the clause simpler to read.

32. The SDA also submits that it is correct to use the word ‘duties’ rather than ‘job’ as this more closely reflects the current Award and will not lead to any unintentional change to the scope of the clause and is not ambiguous.

33. The SDA does not oppose the proposed wording for Clause G.2.

**Clause G.3 – Ordinary rate of pay**

34. The SDA makes submissions regarding ‘ordinary rate of pay’ where it relates to payment of notice for a transfer to lower paid duties by reason of redundancy, in relation to the Awards the SDA has an interest in, which do not provide an all purpose allowance:

- General Retail Industry Award 2010
- Pharmacy Industry Award 2010
- Hair and Beauty Award 2010
- Storage Services Award 2010
- Fast Food Industry Award 2010
- Vehicle, manufacturing, Repair Services and Retail Award 2010

35. The SDA submits that ‘ordinary rate of pay’ under clause 15.2 of the current Pharmacy Industry Award 2010, for the purpose of payment of a notice period in relation to a transfer to lower paid duties in the case of redundancy, means the rate of pay an employee would have received had they worked the period of notice in their existing position and roster. This amount would be inclusive of any penalty rates the employee would have received for ordinary hours they are rostered to work over that period.

36. The SDA submits that this is consistent with Section 117(2)(b) of the *Fair Work Act 2009* which prescribes the amount to be paid in lieu of notice:

> *(b) the employer has paid to the employee (or to another person on the employee's behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another*

*person on the employee's behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.*

37. Section 117(2)(b) provides that the employer must pay at least the amount the employer would have been liable to pay had the employee continued to work until the end of the notice period. The amount an employer is liable to pay includes penalty rates and shift allowances.

38. The SDA submits that this would also be the case for payment of notice when transferring an employee to lower duties in circumstances of redundancy.

39. The Termination, Change and Redundancy Test Case Decision[3] which determined this provision stated that:

> *However, consistent with the remainder of our decision, we are prepared to provide that where an employee is transferred to lower paid duties because the employer no longer wishes the job the employee has been doing, done by any one, then the employee should be entitled to the same period of notice of the change in employment as he would have been entitled to if his/her employment had been terminated.* ***Alternatively, the employer shall pay to the employee maintenance of income payments calculated to bring the rate up to the rate applicable to his/her former classification in lieu thereof.***
>
> [Emphasis added]

40. The decision provides for the maintenance of income payments to bring the rate up to the applicable rate. Maintenance of income payments would provide the employee their normal pay which would include penalties for ordinary hours worked.

**Clause H – Employee leaving during redundancy notice period.**

41. The SDA submits that the meaning of clause H.1, H.2 and H.3 of the revised standard clause contained at PN 123 of the Statement issued on 20 July 2017 is that:

- H.1 – An employee who has been provided with notice of termination in circumstances of redundancy is able to terminate their employment during the notice period

[3] *Termination, Change and Redundancy Case (1984),* Mis 250/84 MD Print F6230, p 41.

- H.2 – if the employee does terminate their employment during the notice period their entitlements are calculated on the basis of the original termination date given by the employer. This provision was included by the Full Bench in the Termination, Change and Redundancy Case (TCR Case) so employees would not be deterred from taking a new job by a loss in any redundancy payments or entitlements.
- H.3 – the employee is not entitled to payment for the period of notice which is not worked by the employee, again as provided in the TCR Case.

42. The SDA submits that this is an accurate reflection of the current clause 15.3 of the Pharmacy Industry Award 2010.

43. The SDA also submits that the decision of the Full Bench in the T*ermination, Change and Redundancy Case*[4] also supports this meaning:

> *The ACTU also made claims which relate to an employee under notice of termination who wishes to leave, for example, where an employee has found a suitable job and is required to take up that job early.*
>
> *It was claimed that such an employee should be granted the benefits of any redundancy provision because to restrict him/her would discourage workers from finding and taking up other employment opportunities and that the early departure of employees in a redundancy situation will often make little difference to employers. It was also claimed that this would be consistent with the tenor of a number of awards and agreements.*
>
> *Having regard to the reason for our grant of severance pay, subject to the right of an employer to seek a variation if appropriate circumstances exist, we are prepared to grant this part of the ACTU claim. We would emphasize, however, that such an employee would not be entitled to payment in lieu of notice in such circumstances.*

44. The SDA strongly submits that H.3 is the relevant provision which prescribes what happens to the notice period in a circumstance where an employee leaves during a period of notice in the case of a redundancy. The notice provisions contained at Clause E.1(c) do not apply under this circumstance and would not permit an employer deducting the period of notice not worked by the employee who leaves during the redundancy notice period.

[4] *Termination, Change and Redundancy Case (1984),* Mis 250/84 MD Print F6230, p 51

45. The SDA does not believe it is necessary to amend clause H.3 in the way described by the Ai Group at PN 134 of the Statement because the purpose of this clause is not to prescribe the amount of notice to be provided to an employee, rather the purpose is to remove the obligation for an employer to pay the employee for the period of notice not worked.