

7 December 2016

His Honour Justice Ross
President, Fair Work Commission
11 Exhibition Street
MELBOURNE 3000

Via e-mail: chambers.ross.j@fwc.gov.au

AM2014/209 – Pharmacy Industry Award
AM2016/15 – Plain Language Drafting Common Issue

We refer to the above matters and note that AM2014/209 is listed for a hearing on technical and drafting matters on 15 December.

We continue to hold significant concerns about the process of plain language re-drafting of modern awards.

Our most immediate concern relates the hearing referred to above and which issues will be considered therein.

We understand that a distinction has been drawn between award specific clauses, standard clauses and common clauses. The directions issued in AM2014/209 on 9 November 2016 suggest that the purpose of the hearing on 15 December is resolve drafting matters concerning only the *Pharmacy Industry Award* specific clauses in the “Summary of submissions – plain language award specific clauses” (the most recent version of which was released on 1 December 2016).

It is apparent that there is some divergence between commentary included in the 1 December 2016 “Summary of submissions – plain language award specific clauses” and the Statements of 30 October 2015 [2015] FWC 7467 and 15 July 2016 [2016] FWC 4756 as to which clauses, or types of clause, are “common” or “standard”. There are 19 such clauses identified in the 1 December 2016 “Summary of submissions – plain language award specific clauses” and only 8 clauses or types of clauses so identified in the Statement of 15 July 2016. In addition, it appears that a number of clauses that were listed as “standard” clauses in the appendix to Attachment C of the Commission’s Statement [2016] FWC 7467 of 30 October 2015 have been slightly altered during the plain language pilot of the *Pharmacy Industry Award*.

In our view, it is appropriate for the Commission to urgently express a concluded view on what the standard and common clauses are, and confirm that it will exclude those clauses from any consideration at the hearing on 15 December. If this is not done, as a peak body it is prudent for us to encourage all of our affiliate unions, some of whom may have no direct interest in the Pharmacy Industry Award, to attend the hearing with a view to ensuring any common or standard clauses drafted do not prejudice their interests at a later stage.

More generally, we are concerned that the starting point for consultation on the seemingly uncertain categories of standard and common clauses is the plain language drafting initially developed for the purposes of the *Pharmacy Industry Award* in consultation only with those parties who have an interest in that award, pursuant to drafting instructions again developed in consultation only with those parties who have an interest in that award. The concern is that a default or presumptive position will be reached on content impacting all awards without sufficient opportunity for interested parties to comment.

The initial conference on standard clauses this month bore out the difficulties associated with arguing against a presumed default proposition notwithstanding that no party was in attendance to advocate for that default position or articulate the reasons why it had been drafted in the way it had. We suggest it would be more desirable to have Mr Moran QC attend such conferences (and future award specific conferences for the remaining awards selected for plain language re-drafting) at the invitation of the Commission, perhaps in a role similar to that of an *amicus curiae*, rather than attempting to coordinate exchanges between one group of contributors during and hearings and conferences while other contributions are made separately and outside of this usual process. Such a process would, for example, enable submissions identifying an alteration of the legal meaning in award terms through the re-drafting process to be considered in a more efficient and transparent fashion.

In addition, the resource demands of the Award Review have made it difficult for all participants to keep track of the matters in which they may have an interest and it seems that the standard and common clauses processes as part of the Plain Language Common Issue proceedings may be particularly impacted by this. In those circumstances we invite the Commission to consider releasing a Statement on the status and scope of those proceedings and publishing it to the lists associated with *each* modern award. Our affiliates would be comforted if such a Statement identified how and when award specific tailoring of provisions reached through that process might be dealt with. Many are presently operating on the assumption that some opportunity for award specific tailoring will arise in future, perhaps based on the practice in other Common Issue matters to date or the fact that some clauses in some awards have been the subject of consent or determination, although we have not been able to identify a decision or Statement in the Plain Language matter to date that confirms this.

It is critically important that all interested parties are aware of the opportunity to contribute to matters which impact the awards in which they have an interest and we do not suggest that the Commission has sought to do otherwise. However, for a number of procedural reasons and admittedly some understandable fatigue, this particular and important Common Issue Proceeding is in our view not proceeding optimally and we make the above suggestions with the best of intentions in an effort to improve this.

Yours faithfully,



Trevor Clarke

Director – Industrial & Legal

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