

**SUBMISSION TO
FAIR WORK COMMISSION**

Matter No: AM2016/15

4 Yearly Review of Modern Awards - Plain Language

PLAIN LANGUAGE DRAFT STANDARD CLAUSES

September 2016

Submission in Response to Draft Standard Clauses

**SUBMISSION BY
PRIVATE HOSPITAL INDUSTRY EMPLOYER ASSOCIATIONS**

**Australian Private Hospitals Association
Australian Private Hospitals Association – South Australia
Australian Private Hospitals Association – Victoria
Australian Private Hospitals Association – Tasmania
Catholic Health Australia
Day Hospitals Australia (*formerly Australian Day Hospital Association*)
Private Hospitals Association of Queensland
Private Hospitals Association of New South Wales
Private Hospitals Association of Western Australia**

Contact: **Lucy Fisher – Executive Director**
Private Hospitals Association of Queensland
PO Box 370
Kenmore QLD 4069
Tel: (07) 3279 7600
Email: lucyf@phaq.org

PARTIES TO THIS SUBMISSION

- [1] This submission is being lodged on behalf of the Private Hospital Industry Employers' Associations (PHIEA) which includes: Australian Private Hospitals Association (APHA), the Private Hospitals Association of Queensland (PHAQ), APHA – South Australia; APHA – Victoria; APHA – Tasmania, Day Hospitals Australia (*formerly Australian Day Hospital Association*); Private Hospitals Association of New South Wales, Private Hospitals Association of Western Australia and Catholic Health Australia. These organisations collectively represent approximately 95% of licensed private hospital beds in Australia and in addition, represent approximately 90% of all Free Standing Day Hospitals.

The Modern Awards of most interest to our members are the Nurses Award 2010 and Health Professionals and Support Services Award 2010.

BACKGROUND

- [2] In follow up to a statement issued by Justice Ross, President [2016] FWCFB 5621 in relation to the *4 Yearly Review of Modern Awards – Plain Language Drafting*, PHIEA would make the following comments regarding some of the draft standard clauses contained within the comparison table dated 11 August 2016. The table presents the re-draft alongside the exposure draft of the Pharmacy Industry Award dated 25 September 2015 on which the re-draft is based.

PHIEA fully supports the intent of redrafting modern awards into plain language, however in doing so, it is imperative that it does change the underlying meaning or intent of any existing clauses. There is obviously potential for a reworded clause to either give rise to a different legal meaning, omit a prior provision or either confer a new, or diminish an existing, entitlement or flexibility for either employers or employees.

The draft plain language standard clauses relate to:

- Award Flexibility
- Consultation about Major Workplace Change & Changes to Rosters and Hours of Work
- Dispute Resolution
- Termination of Employment
- Redundancy

- [3] PHIEA has not identified any unintended consequences in respect of the draft standard clauses relating to Award Flexibility; Dispute Resolution, Termination of Employment or Redundancy and therefore the focus of this submission is on the provisions regarding *Consultation about Major Workplace Change & Changes to Rosters and Hours of Work*.

Consultation about Major Workplace Change & Changes to Rosters and Hours of Work

- [4] As noted by the drafters, Clause 22 of the *Exposure Draft - Pharmacy Industry Award 2014 (revised 25/9/15)* has been split into 2 clauses in the revised plain language draft – to deal separately with consultation about major workplace change and consultation about changes to rosters or hours of work. The drafters noted that to avoid long sentences and make them easier to understand, the provisions had been restructured.

However, in doing so one important provision has been omitted, which PHIEA considers will fundamentally restrict the flexibility of an employer to roster its employees to meet the changing needs of the business, particularly in circumstances where self-rostering is permitted.

- [5] The table on page 3 is an extract from the Exposure Draft / Plain Language Re-draft table dated 11 August 2016, highlighting the provision (22.2 (d)) which has been omitted in the redraft and is the subject of our concern.

EXPOSURE DRAFT – Pharmacy Industry Award (revised 25/9/16)	PLAIN LANGUAGE RE-DRAFT
<p>22. Consultation</p> <p>22.1 Consultation regarding major workplace change</p> <p>(a) Employer to notify</p> <p>(i) Where an employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must notify the employees who may be affected by the proposed changes and their representatives, if any.</p> <p>(ii) Significant effects include termination of employment; major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations; and the restructuring of jobs. Provided that where this award makes provision for alteration of any of these matters an alteration is deemed not to have significant effect.</p> <p>(b) Employer to discuss change</p> <p>(i) The employer must discuss with the employees affected and their representatives, if any, the introduction of the changes referred to in clause 22.1(a), the effects the changes are likely to have on employees and measures to avert or mitigate the adverse effects of such changes on employees and must give prompt consideration to matters raised by the employees and/or their representatives in relation to the changes.</p> <p>(ii) The discussions must commence as early as practicable after a definite decision has been made by the employer to make the changes referred to in clause 22.1(a).</p> <p>(iii) For the purposes of such discussion, the employer must provide in writing to the employees concerned and their representatives, if any, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees provided</p>	<p>B. Consultation about major workplace change</p> <p>B.1 If an employer makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must:</p> <p>(a) give notice of the changes to all employees who may be affected by them and their representatives (if any); and</p> <p>(b) at the earliest practicable date, discuss with those employees and their representatives (if any):</p> <p>(i) when the changes are to be made; and</p> <p>(ii) their likely effect on employees; and</p> <p>(iii) the measures that are to be taken to avoid or reduce the adverse effects of the changes on employees.</p> <p>B.2 For the purposes of the discussion under clause B.1(b), the employer must give a written notice to the employees and their representatives (if any) that:</p> <p>(a) contains all relevant information about the changes including:</p> <p>(i) their nature; and</p> <p>(ii) their expected effect on employees; and</p> <p>(b) sets out any other matters connected with the changes that are likely to affect employees.</p> <p>B.3 The employer must promptly consider any matters raised by the employees or their representatives about the changes in the course of the discussion under clause 27.1(b).</p>

that no employer is required to disclose confidential information the disclosure of which would be contrary to the employer's interests.

B.4 Clause B does not require an employer to disclose any confidential information if its disclosure would be contrary to the employer's interests.

B.5 For the purpose of clause B, a change that is provided for by this award (other than clause B) must be taken not to have a significant effect on employees.

B.6 In clause B:

significant effects, on employees, includes any of the following:

- (a) termination of employment;
- (b) major changes in the composition, operation or size of the workforce or in the skills required by employees;
- (d) loss of, or reduction in, job or promotion opportunities; loss of, or reduction in, job tenure;
- (e) alteration of hours of work;
- (f) the need for employees to be retrained or transferred to other work or locations;
- (g) job restructuring

EXPOSURE DRAFT – Pharmacy Industry Award (revised 25/9/16)

22.2 Consultation about changes to rosters or hours of work

- (a) Where an employer proposes to change an employee’s regular roster or ordinary hours of work, the employer must consult with the employee or employees affected and their representatives, if any, about the proposed change.
- (b) The employer must:
 - (i) provide to the employee or employees affected and their representatives, if any, information about the proposed change (for example, information about the nature of the change to the employee’s regular roster or ordinary hours of work and when that change is proposed to commence);
 - (ii) invite the employee or employees affected and their representatives, if any, to give their views about the impact of the proposed change (including any impact in relation to their family or caring responsibilities); and
 - (iii) give consideration to any views about the impact of the proposed change that are given by the employee or employees concerned and/or their representatives.
- (c) The requirement to consult under this clause does not apply where an employee has irregular, sporadic or unpredictable working hours.
- (d) These provisions are to be read in conjunction with other award provisions concerning the scheduling of work and notice requirements.

PLAIN LANGUAGE RE-DRAFT

C. Consultation about changes to rosters or hours of work

- C1** Clause C applies if an employer proposes to change the regular roster or ordinary hours of work of an employee, other than an employee whose working hours are irregular, sporadic or unpredictable.
- C2** The employer must consult with any employees affected by the proposed change and their representatives (if any).
- C3** For the purpose of the consultation, the employer must:
 - (a) provide to the employees and representatives mentioned in clause C.2 information about the proposed change (for example, information about the nature of the change and when the change is proposed to be made); and
 - (b) invite them to give their views about the impact of the proposed change on them, including its impact on their family or caring responsibilities.
- C.4** The employer must consider any views given under clause C.3(b).

Note: The highlighted clause 22.2 (d) in the exposure draft above has been entirely omitted from the plain language draft

- [6] Clause B in the plain language draft deals with Consultation About Major Workplace Change and at B.5 it states:

For the purposes of clause B, a change that is provided for by this award (other than clause B) must be taken not to have a significant effect on employees.

In effect, this states that if a clause such as rostering covers these issues, then this is not a major change.

Clause 22.2 (d) of the exposure draft – Consultation about changes to rosters or hours of work - clearly requires *'the provisions of the clause to be read in conjunction with other award provisions concerning the scheduling of work and notice requirements'* (i.e. such as rosters).

- [7] However, in separating & redrafting the clause in B & C – the highlighted clause 22.2 (d) of the exposure draft has been omitted, such that clause C – Consultation about changes to rosters or hours of work - in the plain language draft is silent on the requirement for the *provisions to be read in conjunction with other award provisions concerning the scheduling of work and notice requirements*.

PHIEA considers this to be a major omission and one which could give rise to an organisation being in breach of the requirement to consult about changes to rosters or hours of work despite them being permitted to make such changes under other award provisions relating to scheduling of work and notice requirements.

- [8] It is quite common for private hospitals to allow their nursing staff to self-roster amongst a pool of similarly competent and experienced nurses. For example, if a unit requires 2 skilled surgical RNs and there are 5 equally qualified and experienced RNs to choose from, a hospital manager may allow these nurses to work out between them who will be working which shift. This roster flexibility, which is valued by staff, can lead to work patterns developing, despite the employment contract confirming that full roster flexibility is required.

If, the needs of the business subsequently alter and a manager needs to cease offering staff the ability to self-roster for a period of time, this may disrupt the pattern the employee has become used to. In the absence of any mention in Clause C of the plain language draft, that the provisions are to be read in conjunction with other award provisions concerning the scheduling of work and notice requirements, it may give rise to a claim that proper consultation has not occurred in relation to changes to rosters and the employer is therefore in breach.

- [9] **PHIEA is strongly of the view that clause 22.2 (d) of the exposure draft as highlighted on page 3 must be included in Clause C as C.5**

[END OF SUBMISSION]