

Summary of Submissions – Plain Language Draft Guidelines

This document provides a summary of submissions from interested parties in relation to the plain language drafting guidelines.

A [statement](#) was issued by the Full Bench on 4 November 2016.

TABLE 1

Theme	Position
General	<p>SDA (submission of 17/11/2016, para 3): Difficult to comment in isolation; not until re-drafting occurs that issues arise in apply the Guidelines.</p> <p>Concerned about a one-size-fits-all model; not all principles will be appropriate for all clauses or all awards.</p> <p>Concerned that Guidelines will be adopted in preference to maintaining current legal effect and minimising ambiguity or potential interpretation issues.</p> <p>AiGroup (submission of 17/11/2016, p.1): The Draft Guidelines are not controversial and they include useful principles and approaches to drafting.</p>
Legal Effect	<p>ACTU (submission of 17/11/2016, p.1): Regarding Guideline 1.4, concerned that the goal of simplicity has taken precedence over retaining legal effect, even where parties have consented to retaining existing language due to the interpretation and legal effect issues presented by a proposed plain language re-draft. Further concerned that this could lead to a weakening of employee protections in awards (e.g. in relation to the definition of casual employment under the Pharmacy Industry Award 2010).</p> <p>ACTU submit that Guidelines should make clear that the object of preserving the legal effect must take absolute precedence over the goal of making awards simple and easy to understand.</p> <p>ACTU also submits that all substantive changes to legal effect of awards are put to a merits case and all affected parties be allowed to be heard.</p> <p>TCFUA (submission of 17/11/16): Support the submissions of ACTU.</p> <p>SDA (submission of 17/11/2016, paras 6–12): Regarding Guideline 1.4, concerned that continual redrafting without proper consideration of changed legal effect will result in watering down entitlements.</p> <p>SDA Submits that plain language principles should not take priority over legal effect or cause interpretation issues; simplicity must not come at the cost of current award entitlements and obligations.</p> <p>AiGroup (submission of 17/11/2016, p.1): A new Guideline should be added expressly stating that plain language drafting is not intended to change the legal effect.</p> <p>Business SA (submission of 17/11/2016, para 1.1): Guideline 1.4 is fundamental to the review of modern awards.</p>
Consultation	<p>ACTU (submission of 17/11/2016, p.2): Submits that all substantive changes to legal effect of awards are put to a merits case and all affected parties be allowed to be heard.</p> <p>SDA (submission of 17/11/2016, para 13): Submits that ambiguity and technical issues could arise against as a result of the PL re-drafting thus requiring a further technical review process; suggest that the views of interested parties be taken into account throughout the process.</p>

Theme	Position
Consent Positions	<p>SDA (submission of 17/11/2016, paras 14–24): Submits that parties have been encouraged in the PIA to work together to identify common concerns and to raise them in submissions. Recent consent submissions regarding minor and technical drafting issues were not taken into account in the more recent draft of the PL-PIA (10/11/16). In most cases the drafter adopted the PL Guidelines in preference to remedying issues which change legal effect or where interpretation issues arise.</p> <p>SDA also submits that there doesn't appear to be appropriate mechanism for drafter to properly consider and adopt consent positions.</p> <p>SDA also submits that interested parties have practical knowledge of application, history and interpretation of current provisions which is relevant, and are able to identify changes to legal effect or potential interpretation issues. The consent positions of parties should be taken into account and adopted throughout the process.</p> <p>SDA also submits that adoption of consent positions will avoid disputes which may arise in the future regarding interpretation of redrafted clauses. Potential dispute arising regarding interpretation, especially when potential problems have already been identified, is not consistent with the [objectives of the Act].</p> <p>SDA also submits that adoption of consent positions has historically been the standard approach of the Commission. It appears that PL drafting is treating this differently.</p> <p>SDA submits that there needs to be greater clarity regarding how the PL process deals with consent positions.</p> <p>AiGroup (submission of 17/11/2016, p.2): plain language drafting should not disturb consent provisions as this may lead to disputation.</p>
Substantive Claims	<p>SDA (submission of 17/11/2016, paras 25–27): the treatment of consent positions creates issues regarding agreed substantive claims involving agreed wording.</p> <p>SDA has concerns about the process established to deal with substantive claims which relate to clauses where issues have also arisen as a result of PL drafting.</p> <p>SDA submits that there needs to be clarity about the Commission's process for dealing with consent positions reached where a substantive claim and a technical drafting issue intersect.</p>
Common Issues	<p>SDA (submission of 17/11/2016, paras 28–30): concerned about the PL process impact on other proceedings in the review e.g. common issues, particularly the casual conversion issue raised by the ACTU in their common issues claim. SDA didn't pursue a casual conversion clause because the current wording of the clause in the Award provides this.</p> <p>SDA submits that PL drafting has resulted in a substantive change to the clause and removes the obligation to convert a casual to part-time if they do not meet the definition of a casual, as currently defined. The most recent drafter's comment makes a judgement about the industrial meaning of the current terminology without taking into account the parties' interpretation.</p> <p>SDA is concerned that if the PL wording is adopted by the Full Bench they will have missed the opportunity to pursue a casual conversion clause in the common issue proceeding</p>

TABLE 2

Submissions about specific guidelines	Position
1.5 Awards that are not as simple and easy to understand as they can be cost money by creating the need for employers and employees to seek advice from paid advocates.	Business SA (submission of 17/11/2016 , para 1.2–1.17): Guideline 1.5 should be replaced.
3.11 Schedules are used in modern awards for matters of detail and of a supplementary or ancillary nature to that covered in the main body of the award.	Business SA submits that Guideline 3.11, the word ‘and’ should be replaced with the word ‘or’.
3.14 Use “Notes” to provide factual information or point the reader to a relevant provision of the award. A Note should generally appear at the end of a provision (whether a clause, subclause or paragraph) but may appear after the heading in appropriate cases.	Business SA (submission of 17/11/2016 , para 1.4): In relation to Guideline 3.14 and 3.15 submit that notes and guides are better placed in annotated versions of the award.
3.15 “Guidelines” may be included to explain how a provision or set of provisions are to be used or what their function or role is. They are not themselves “legislative material” but are intended to help the reader to better understand the “legislative material” to which they relate.	
5.4 To indicate that a series of 3 or more paragraphs or subparagraphs are cumulative, consider using the expression “each of the following”, or similar.	Business SA, in relation to Guideline 5.4, 5.5 and 5.6, the words ‘and’ and ‘or’ should be reviewed.
5.5 To indicate that a series of 3 or more paragraphs or subparagraphs are exclusive, consider using the expression “any of the following”, or similar.	
5.6 Do not include both cumulative and exclusive provisions in the same series of paragraphs or subparagraphs. Do not use “and/or”.	
5.7 The use of a “sandwich clause” should be avoided. A sandwich clause is one in which a series of paragraphs or subparagraphs is enclosed or “sandwiched” by the opening and closing lines of a sentence.	
5.8 A sentence comprising 2 series of paragraphs or subparagraphs in one sentence should not be used.	Business SA submits that Guideline 5.7 and 5.8 should give examples of correct alternatives.

Submissions about specific guidelines	Position
7 Definitions	AMWU (submission of 17/11/2016 , para 6): Definitions should be included in Modern Awards rather than reference to external documents. If a definition is not included, a hyperlink should be included.
7.4 An expression used in an award that is defined in the National Employment Standards should be defined as having the same meaning as it has there.	AiGroup (submission of 17/11/2016 , p.1): proposes delete paragraph 7.4 because expressions in the NES often overlap with expressions in awards but may have different meanings in particular modern awards.
9.2 If a provision is reasonably short and self-contained, reproducing it instead of merely cross-referring to it is helpful to the reader as the reader does not then have to access another document or go to another part of the award. However, if a provision is frequently referred to in an award, it would be disruptive to the flow of the text to reproduce it each time.	Business SA, in relation to Guideline 9.2, submits that the guideline be re-worded to account for [2014] FWCFB 9412 which states that summaries of legislation would not be included in modern awards.
9.5 In all other cases when referring to a provision, refer to the provision by the highest unit in the reference (e.g. clause 19.3 rather than subclause 19.3).	AMWU (submission of 17/11/2016 , paras 18–20): submits that Guideline 9.5 does not make sense.