Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission in Reply

Plain Language Drafting – Standard Clauses

(AM2016/15)

27 October 2016

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AM2016/15 PLAIN LANGUAGE DRAFTING – STANDARD CLAUSES

1. INTRODUCTION

1. On 17 August 2016, the Fair Work Commission (**Commission**) issued directions regarding the plain language drafting of 'standard' award clauses, those being:

    - the award flexibility term;
    - the consultation term;
    - the dispute resolution term;
    - provisions relating to the termination of employment; and
    - provisions relating to redundancies.

2. The directions require interested parties to file submissions in reply regarding the plain language draft clauses by 27 October 2016.

3. The Australian Industry Group (**Ai Group**) files this submission pursuant to the aforementioned directions in reply to submissions filed by:

    - The Australian Council of Trade Unions (**ACTU**);
    - The Australian Manufacturing Workers' Union (**AMWU**);
    - The Association of Professional Engineers, Scientists and Managers, Australia (**APESMA**);
    - The Shop, Distributive and Allied Employees' Association (**SDA**);
    - The Textile, Clothing and Footwear Union of Australia (**TCFUA**);
    - The Australian Chamber of Commerce and Industry (**ACCI**);
    - Australian Business Industrial and the NSW Business Chamber (**ABI**);
    - The National Farmers' Federation (**NFF**);
    - The Housing Industry Association (**HIA**);

- Business SA; and
- The Private Hospital Industry Employer Associations (**PHIEA**)

4. This submission should be read in conjunction with our submission dated 4 October 2016.

2. CLAUSE A: AWARD FLEXIBILITY FOR INDIVIDUAL ARRANGEMENTS

Current clause 4.3(a)

5. We accept that the redrafted clause does not contain an express limitation in the terms found at the current clause 4.3(a). We do not oppose its retention as proposed by the ACTU, APESMA and the SDA.

Clause A.1 – 'started employment'

6. We do not oppose the amendment suggested by ABI.

7. The change proposed by the ACTU, AMWU, APESMA and the SDA is unnecessary. We consider that the proposed clause makes sufficiently clear that an individual flexibility arrangement can only be entered into once an employee has commenced employment.

Clause A.1 – 'how terms of this award … applies to them'

8. We share the concern expressed by the NFF. We refer to paragraphs 12 – 18 of our submission dated 4 October 2016.

Clause A.1(a) and Note – hyperlinks

9. We share the concerns expressed by ACCI, the HIA and Business SA. We refer to paragraphs 24 – 25 of our submissions dated 4 October 2016.

Clause A.2 – 'may only be made'

10. Whilst we do not consider the variation proposed by ACCI necessary, we do not oppose it.

Clause A.3 – 'an agreement under this clause can only be entered into after the individual employee has commenced employment with the employer'

11. The limitation quoted above appears at clause A.1. APESMA and the SDA submit that it should be repeated at clause A.3. We consider that such repetition is entirely unnecessary and should not be adopted.

Clauses A.3 and A.4 – proposed deletion

12. Ai Group supports the deletion of clauses A.3 and A.4 as proposed by ACCI.

Clause A.5 – 'on its making'

13. We agree with the NFF, the ACTU and the SDA that the words 'at the time the agreement is made' as they appear in the current clause should be retained. We refer to paragraphs 26 – 32 of our submission dated 4 October 2016.

Clause A.6 – general submission by AMWU

14. The AMWU submits that the "more stringent and detailed requirements which have been watered down in A.6 should be changed back to the previous requirements". The specific requirements to which it refers or the amendments that ought to be made have not been identified. Accordingly, we are not in a position to here respond to the AMWU's submission.

Clause A.6 – individual flexibility agreement must be in writing

15. We do not oppose the submissions of the ACTU, APESMA and SDA that the requirement that an individual flexibility agreement be in writing should be contained in clause A.6 instead of clause A.1.

Clause A.6(c) – 'or each term'

16. The HIA submits that the words 'or each term' are not necessary and should be deleted. We respectfully disagree, given that an individual flexibility agreement may involve a variation to more than one award term.

Clause A.6(d) – 'in relation to the individual employee's terms and conditions of employment'

17. The current clause 4.3(b) requires that an individual flexibility agreement must "result in the employee being better off overall at the time the agreement is made than the employee would have been if no individual flexibility agreement had been agreed to". It does not place any limitations on the matters that can

be considered in making an assessment as to whether an agreement does in fact result in an employee being better off overall.

18. It is trite to observe that an assessment as to whether an employee will be better off overall is an inherently subjective one, that must be made having regard to all relevant circumstances, including the employee's personal circumstances and, in our view, the receipt of non-monetary benefits. The following extract from the Explanatory Memorandum for the *Fair Work Bill 2008* clarifies that non-monetary benefits can be taken into account: (emphasis added)

> Illustrative example
>
> Josh works as a membership consultant at a gymnasium. Under the enterprise agreement applying to his employment, the ordinary hours of work are 37 ½ hours each week to be performed in a span between 8am and 6pm each day. Hours worked outside this span attract penalty rates. Josh's employer usually requires membership consultants to work from 9am to 5.30pm.
>
> In his spare time, Josh coaches an under-12s footy team. To do this, he needs to be able to leave work at 4pm on Tuesdays and Thursdays each week. He wants to start work at 7.30am on these days, but usually this would attract a penalty under the terms of the agreement. The agreement allows the employer and an employee to make an individual flexibility arrangement that varies the terms of the agreement dealing with hours of work and penalty rates.
>
> Josh approaches his employer and asks whether the employer will make an individual flexibility arrangement with him under which the employer agrees that Josh can work from 7.30am to 4pm on Tuesdays and Thursdays. Josh agrees that he will not be paid a penalty on these days, even though he starts work at 7.30am. Josh is genuinely happy to agree to this arrangement because it enables him to balance his work and personal commitments. The employer agrees to this arrangement.
>
> The employer must ensure that Josh is better off overall under the individual flexibility arrangement than under the agreement. Often this will require the employer to make a comparison of the relevant financial benefits that the employee would receive under the agreement, and the agreement as varied by the individual flexibility arrangement. In Josh's case, however, he has agreed under the individual flexibility arrangement to give up a financial benefit (penalty rates) in return for a non-financial benefit (leaving work early). It is intended that, in appropriate circumstances, such an arrangement would pass the better off overall test. Because the better off overall test is being applied here to an individual arrangement, it is possible to take into account an employee's personal circumstances in assessing whether the employee is better off overall. Relevant factors in Josh's case that suggest the individual flexibility arrangement is likely to pass the better off overall test are:
>
> - Josh initiated the request for the individual flexibility arrangement, suggesting that he places significant value on being able to leave work early to coach the footy team;

- Josh genuinely agreed to the arrangement;
- the period of time falling outside the span of hours is relatively insignificant. It is only one hour out of the 37 ½ hour ordinary week that Josh works.

19. Clause 4.4 specifies the matters that must be contained in the written agreement reached by the employer and employee. The provision goes to the form of the agreement, rather than its substance. At subclause (d), it requires that the agreement must "detail how the agreement results in the individual employee being better off overall in relation to the individual employee's terms and conditions of employment".

20. The underlined words above have been removed in the redrafted clause A.6(d). The ACTU, APESMA and the SDA submit that this has the effect of altering the legal effect of the clause, as it increases the breadth of the types of "benefits that may be used to justify the trading away of safety net conditions"[1].

21. We do not agree that the current clause 4.4(d) has the effect of limiting the manner in which the "better off overall" assessment is to be made because, as we have earlier explained, it goes merely to the form of the written agreement between the parties rather than its substance. It is clause 4.3(b) that prescribes the relevant test to be applied and as set out above, it should be interpreted broadly to include, for example, non-monetary benefits.

22. To the extent that the contentious words give rise to any contrary suggestion, they in fact have the effect of raising a potential ambiguity and should accordingly be deleted. Indeed their removal makes the clause simpler and easier to understand.

23. The precise meaning of the relevant words is unclear and in our view, they add little meaning to the current clause. For these reasons, the proposal to reinsert them should be rejected.

Clause A.6(d) – 'show how the agreement results in the employee being better off overall'

[1] ACTU submissions dated 29 September 2016 at paragraph 7.

24. We agree with the NFF, HIA and Business SA's submissions. We refer to paragraph 33 of our submission dated 4 October 2016 in this regard.

Clause A.6(d) – 'on its making'

25. We agree with the NFF's submission. We refer to paragraph 34 of our submission dated 4 October 2016.

Clause A.6(d) – note or definition about "better off overall"

26. ACCI and HIA's position is consistent with Ai Group's view. We refer to paragraphs 35 – 40 of our submission dated 4 October 2016.

27. We note that the SDA also submits that the award clause should not define "better off overall". Similarly, the ACTU and APESMA are of the view that any such notes or examples should not be included in the award.

Clauses A.5 – A.7 – proposed consolidation

28. Ai Group supports the consolidation of clauses A.5 – A.7 proposed by ACCI, subject to the matter raised in our submission dated 4 October 2016 paragraphs 26 – 32. The issue relates to the use of the words 'on its making' in the proposed clause A.X(a).

Clause A.9 – 'the employer must keep a copy'

29. In response to the NFF's submissions, we do not oppose the retention of the wording in the current clause 4.5.

Clause A.10 – repositioning

30. Whilst we do not consider that the variation proposed by ABI is necessary, we do not oppose it.

Clause A.10 – general submission by NFF

31. We do not oppose the NFF's submission. We refer also to paragraphs 41 – 46 of our 4 October 2016 submission.

Clauses A.11 – A.12 – proposed consolidation

32. Ai Group supports the consolidation of clauses A.11 – A.12 proposed by ACCI. It would also address the issue raised by the NFF, Business SA, the ACTU, APESMA and the SDA.

Clause A.13 – 'or on the date of termination agreed in accordance with A.11'

33. We do not oppose the insertion of the above words in clause A.13, as proposed by the ACTU, APESMA and the SDA.

Clause A.14 – retention of current clause

34. For the reasons set out at paragraphs 47 – 58 of our submission dated 4 October 2016, we do not oppose the SDA's submission.

3. CLAUSE B: CONSULTATION REGARDING MAJOR WORKPLACE CHANGE

Clause B.1 – 'definite decision'

35. We agree with the AMWU and ABI's submissions. However, we note that that the term 'definite decision' has not actually been replaced with the term 'final decision' in the proposed clause B.1 and that these terms were merely a suggestion in the drafter comments.

Clause B.1(b) – 'at the earliest possible date'

36. We do not oppose the NFF's proposed variation. However, we submit that the additional concerns raised at paragraphs 59 – 65 and 69 – 72 of our submissions dated 4 October 2016 should be reflected in any variation to clause B.1(b) as well.

37. Given the concerns raised at paragraphs 59 – 65 and 69 – 72 of our submissions, we suggest clause B.1(b) could be varied as follows:

> **(b)** as early as practicable after the decision has been made, commence discussions with those employees affected and their representatives (if any) about:

Clause B.1(b)(i) - 'when the changes are to be made'

38. We submit that the wording proposed by ACCI should be adopted in preference to the proposed re-drafted clause.

Clause B.1(b)(iii) –' the measures that are to be taken'

39. In response to the NFF's submission, we contend that the proposed clause B.1(b)(iii) does not impose an obligation on employers to implement measures.

Clause B.2 – 'a written notice'

40. We have not identified any difficulties with the NFF's proposed variation.

Clause B.3 – 'reference to clause 27.1(b)'

41. We agree with the AMWU's submission.

Clauses B.3 & B.4 – proposed reordering

42. We do not oppose ABI's submission.

Clause B.5 – NFF's proposed variation

43. The NFF have identified a similar issue to that raised at paragraphs 73 – 74 of our submission dated 4 October 2016. We note that we propose an alternative solution (that clauses B.5 and B.6 be consolidated).

Clause B.5 – Business SA's proposed variation

44. Business SA has identified a similar issue to that raised at paragraphs 73 – 74 of our submission dated 4 October 2016. We note that we propose an alternative solution (that clauses B.5 and B.6 be consolidated).

Clauses B.5 & B.6 – proposed reordering/consolidation

45. We support ABI's submission. We refer to paragraphs 73 – 74 of our submission dated 4 October 2016.

Clause B.6(b) – 'size of the workforce'

46. We do not oppose the NFF's submission that the terms "size of the workforce" be amended to "size of the employer's workforce."

Clause B.6(b) – 'the skills required by employees'

47. We do not oppose ACCI, the NFF and Business SA's submissions. We submit that the terms "the skills required by employees" should be amended to "the skills required" to align with the current clause 22.1(a)(ii).

4. CLAUSE C: CONSULTATION ABOUT CHANGES TO ROSTERS OR HOURS OF WORK

Clause C.3(b) – the insertion of brackets

48. We support the change proposed by ACCI and the HIA.

Clause C.3(b) – 'its impact'

49. We support the variation proposed by the NFF.

Current clause 22.2(d)

50. As explained at paragraph 75 of our submission dated 4 October 2016, we agree with the ACTU, APESMA, the SDA, the AMWU, ACCI, ABI, the HIA, Business SA and PHIEA that the current clause 22.2(d) should be retained.

51. Contrary to the unions' submissions however, we consider that the current clause 22.2(d) need only be included as a new clause C.5. The basis for the proposition that it should also be included in clause B is unclear.

52. We do not agree with the AMWU's submissions that links should be included to other relevant award provisions. To our knowledge, the absence of such signposting has not given rise to any difficulty. Further, the matter is one that would necessarily require detailed award-by-award consideration. Any inclusion of specific references that has the effect of limiting the application of the current clause 22.2(d) would be problematic. The proposed addition of hyperlinks is unnecessary and should not be adopted.

5. CLAUSE D: DISPUTE RESOLUTION

Clause D.3 – 'National Employment Standards'

53. We agree do not oppose the NFF's submission.

Clause D.3 – 'as soon as practicable'

54. We agree with the NFF's submissions regarding clause D.3. We refer to paragraphs 85 – 92 of our submissions dated 4 October 2016.

55. Whilst we do not agree with the interpretation ACTU or SDA's interpretation of the current clause or the redrafted clause D.3, we do not oppose the retention of the current wording. Our interpretation of the relevant provisions is set out at paragraphs 85 – 92 of our submissions dated 4 October 2016.

Clause D.3 – 'as appropriate'

56. We do not oppose the reinstatement of the words "as appropriate" as sought by the ACTU, APESMA and the SDA.

Clause D.4 – 'the dispute is not resolved … through discussions as mentioned in clauses D.2 and D.3'

57. We agree with the NFF's submissions regarding clause D.4. We refer to paragraphs 93 – 102 of our submissions dated 4 October 2016.

Clause D.4 – 'in <u>both</u> clauses D.2 and D.3'

58. We do not oppose ABI's submission.

Clause D.6 – 'that it is' and 'to use and'

59. We do not oppose Business SA's submissions.

Clause D.7 – 'a party'

60. We do not oppose the submissions of ACCI, the NFF, the HIA or Business SA.

Clause D.7 – 'any person or body'

61. We do not oppose the submissions of the ACTU, APESMA, the SDA or the NFF. We refer to paragraph 109 of our submissions dated 4 October 2016.

Clause D.7 – 'support or represent'

62. We do not oppose the NFF's submissions.

Clause D.8(b) – 'who is a party to the dispute'

63. We agree with the NFF's submissions regarding clause D.8(b). We refer to paragraphs 110 – 111 of our submissions dated 4 October 2016.

Clause D.9 – 'occupational health and safety'

64. ABI and the NFF submit that the above term should be replaced with 'work health and safety' to ensure consistency with current legislation. We do not oppose this proposal.

6. CLAUSE E: TERMINATION OF EMPLOYMENT

Clause E – retention of current clause

65. We do not oppose the HIA's submission, although we are not convinced that there would be a major difficulty if the wording of the proposed re-drafted clause is retained.

Clause E.1 – retention of current clause

66. Given the concerns raised in Chapter 6 of our submission with respect to Clause E.1, we do not oppose the NFF's submission. However, we note that we have identified alternative remedies to address the issues.

7. CLAUSE F: REDUNDANCY

The First Note

67. We do not oppose the AMWU's submission.

The Second Note

68. We agree with the AMWU's submission.

The proposed retention of clauses F, G, H and I in a single clause

69. There is some force to the NFF's submission. However, we note that the proposed clause I deals with job search entitlements generally (not just for redundancy situations).

8. CLAUSE G: TRANSFER TO LOWER PAID JOB ON REDUNDANCY

Clause G – 'transfer to lower paid job'

70. In response to APESMA and SDA's submissions, we contend that we would not oppose the use of either 'transfer to lower paid duties' or 'transfer to lower paid job.'

Clause G.1(a) – 'the job'

71. We submit that the AMWU's proposed variation over-complicates the matter and should not be adopted.

Clause G.1(b) – 'wishes to transfer the employee'

72. We have identified the same issue as the NFF. We refer to paragraphs 137 – 139 of our submissions dated 4 October 2016.

Clause G.1(b) – 'a new job'

73. In response to the NFF's submission, we note that we do not consider the term 'new job' to mean a new job in the context of the proposed clause G.1(b). Nonetheless we have no major concern with the NFF's alternative approach.

Clause G.2 – 'for notice of termination'

74. We do not oppose the variation sought by ABI.

Clause G.3 – 'the employee is entitled to receive a payment from the employer'

75. We support the variation proposed by ACCI. We refer to paragraphs 144 – 146 of our submissions dated 4 October 2016.

Clause G.3 – 'a payment'

76. We do not oppose the variation proposed by ABI. However, we note that the problem is addressed in the first couple of lines of the proposed clause G.4. Given this, if ABI's variation is accepted, the wording at the beginning of clause

G.4 may need to be varied to ensure that the two clauses read coherently together.

Clause G.4 – 'full rate of pay'

77. The NFF and HIA have raised similar issues to those raised at paragraphs 148 – 162 of our submissions dated 4 October 2016. However, we do not agree with the NFF's proposal that the term 'base rate of pay' should be used instead of 'full rate of pay' as this may include over award payments. Rather, we submit that the words 'full rate of pay' should be generally be replaced with 'ordinary hourly rate' unless particular awards specify otherwise.

Clause G – retention of current clause

78. In the alternative to amending the term 'full rate of pay' to 'ordinary hourly rate,' we do not oppose the NFF's submission that the current clause should be retained. This approach is preferable to making a substantive change.

9. CLAUSE H: EMPLOYEE LEAVING DURING REDUNDANCY NOTICE PERIOD

Clause H.1 – 'given written notice of termination of employment by their employer'

79. We do not oppose the NFF's submission.

Clause H.1 – reference to section 119 of the Fair Work Act 2009

80. If the Commission forms the view that it is necessary to include statutory references to relevant provisions within Awards, then there is force to the NFF's claim that the reference in the proposed clause H.1 should include reference to all statutory provisions that are relevant.

81. Whilst we acknowledge that in this context, s.119 of the *Fair Work Act 2009* (**Act**) includes a note referring to the other relevant sections (ss.121 and 122 as well as s.123), on balance we submit that the proposed clause H.1 should include a reference to ss.121, 122 and 123 of the Act as well to make sure readers are not mislead that section 119 deals with matter comprehensively.

Clause H.3 – general submissions by ACCI, the NFF, HIA and Business SA

82. ACCI, the NFF, HIA and Business SA have raised similar concerns to those expressed at paragraphs 169 – 174 of our submissions dated 4 October 2016.

Clause H.3 – ACCI's proposed variation

83. We do not oppose ACCI's proposed variation.

Clause H.3 – 'full rate of pay'

84. In response to the ACTU, APESMA and SDA'S submissions, we refer to the concerns raised at paragraphs 169 – 174 of our submissions dated 4 October 2016. Replacing the term 'full rate of pay' with 'benefits and payments' would not address our concerns.

10. CLAUSE I: JOB SEARCH ENTITLEMENT

Clause I.1 – 'written notice of termination'

85. We do not oppose the ACTU and SDA's submissions.

Clause I.1 – 'over the period of notice for the purpose seeking other employment'

86. We do not oppose ABI's proposed variations to clause I.1.

Clause I.1 & I.3 – 'paid time off'

87. In response to the AMWU's submission, we acknowledge that the reference to 'paid time off' does not precisely identify the amount an employee is to be paid. Given this, it may be preferable to retain the current wording 'without loss of pay' in order to avoid implementing any unintended substantive change.

Clauses I.2 and I.3 – proposed consolidation

88. ABI have identified a similar issue to that raised at paragraph 178 of our submission dated 4 October 2016.

Clause I.2 and I.3 – notes

89. We appreciate the NFF's concerns. However, in this instance we do not think the notes are misplaced. For example, clause I.3 specifies that an employer must allow an employee paid time off of up to one day each week during the minimum period of notice. The clause then contains a note to s.117 of the Act which sets out minimum periods of notice. This note is useful in the sense that it assists readers to know what the minimum period of notice is.

Clause I.4 – 'more than one day per week'

90. We raised similar issues to those of ABI at paragraphs 179 – 182 of our submission dated 4 October 2016.

Clause I.6 – 'not entitled to be paid…in excess of one day per week'

91. We raised similar issues to those raised by ABI and the NFF at paragraphs 183 – 187 of our submission dated 4 October 2016.

Clause I.6 – deletion of the clause

92. We oppose the ACTU's submission that Clause I.6 is unnecessary and should be deleted. We submit that the clause is necessary (subject to the amendments referred to at paragraphs 183 – 187 of our submissions dated 4 October 2016) in order to reflect the existing provisions.