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Business SA Submissions in reply

4 yearly review of
modern awards – Plain
Language – Standard
clauses

27 October 2016

Introduction

As part of the modern award plain language re-drafting process, the Fair Work Commission (FWC) released a plain language draft and comparison table for standard clauses. The standard clauses of an award relate to award flexibility, consultation, dispute resolution, termination of employment, and redundancy.¹ This draft document was released on 9 August 2016.² On 17 August 2016 the FWC gave directions for interested persons to provide submissions on the plain language re-drafted standard clauses by 4:00pm Thursday 29 September 2016 and submissions in reply by 4pm Thursday 27 October 2016.³ Business SA is pleased to provide this submission in reply.

Why this matter is important to South Australian businesses

As South Australia's Chamber of Commerce and Industry, Business SA is the peak business membership organisation in the State. Our members are affected by this matter in the following ways:

- South Australian businesses are impacted by any changes in the award system.
- South Australian employers and employees will jointly benefit from well drafted and effective modern awards, better enabling both parties to understand their rights and responsibilities.
- Small business owners make up a large proportion of our membership, these businesses are often **not able to devote the necessary resources to fully understand Australia's complex workplace regulations.**
- The modern award objective is to provide a fair and relevant minimum safety net of terms and conditions.⁴ Modern awards must be drafted such that those using the award are able to determine what they can expect and what is expected of them.
- The re-drafting process must not simplify awards such that they lose legal clarity. Certainty must prevail over simplicity.

For further information from Business SA's policy team, please contact Karen van Gorp, Senior Policy Adviser, or Chris Klepper, Policy Adviser, (08) 8300 0000 or at karenv@business-sa.com or chrisk@business-sa.com.

¹ [Directions](#) [1].

² [Plain language draft standard clauses](#), 9 August 2016.

³ [Directions](#) [2].

⁴ *Fair Work Act 2009* (Cth) s 134(1).

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1. Party Submissions

1.1 Table of Contents

1.1.1 ACCI

Business SA supports ACCI and supports the new table of contents structure.

1.2 Award flexibility for individual arrangements (Clause A)

1.2.1 Clause A.1:

Business SA supports **ABI's submission** (para 1.1) that **'commenced employment' should replace 'started employment'**. Business SA does not support the arguments put by SDA (para 4-13), ACTU (Attach 1, p.1), APESMA [6]-[11] and AMWU (para 4) that this provision is less clear than current provisions at 4.2.

1.2.2 Clause A.1: AIG [17]-[18] NFF [16]

Business SA supports **AIG's and NFF's** submission. The words **'how' and 'applies to them'** in clause A.1 of the plain language re-draft should be removed. Alternatively, the wording proposed by NFF is acceptable.

1.2.3 Clause A.1 (a)

Business SA supports the arguments put by HIA, ACCI and AiG that the note attempting to clarify A.1(a) could narrow the scope of the clause and lead to confusion.

1.2.4 Clause A.2: ACCI

Business SA supports **ACCI's proposed amendment to clause A.2. The Act's enabling** style of language⁵ should be reflected in this clause.

1.2.5 Clauses A.2 and A.10: ABI [1.3]

Business SA supports this submission that clause A.10 is more relevant to the subject matter dealt with earlier in the clause and should be moved up to become clause A.3.

1.2.6 Clause A.5: AIG [30]-[32]

Business SA supports **AIG's submission and supports** their proposed wording.

1.2.7 Clause A.6: ACTU [re 4.4(a)]

Business SA dissupports **the ACTU's submission** that the provisions of 4.4(a) are no longer clear.

Clause A.1 is sufficiently clear that an agreement to vary the award's application must be in writing by explicitly stating 'an employee ... may agree in writing'. This need for written agreement is further demonstrated by clause A.7, which requires an agreement be signed by the employer and the employee.

1.2.8 Clause A.6: ABI [1.4]

Business SA supports **ABI, ACCI, NFF, SDA, APESMA, HIA and AiG's** submissions regarding the need for a note to clarify **meaning of 'better off overall'**.

⁵ *Fair Work Act 2009* (Cth) s 144(1).

- 1.2.9 Clause A.6(d): HIA [2.3.19]-[2.3.22] NFF [17]-[19]
Business SA supports the NFF and **HIA's submission** regarding retention of the existing term 'detail'.
- 1.2.10 Clauses A.11 and A.12: ACCI
Business SA supports **ACCI's proposed alternative wording to combine these clauses**.
- 1.2.11 Clause A.14: NFF(para 23) AiG (para 47-58)

Business SA supports the NFF and AiG's **submissions**; the current wording "converts a note into a substantive award term which may affect interpretation and at the very least duplicates a legal requirement of the FW Act. The note form should be retained".
- 1.3 Consultation about major workplace change (Clause B)
- 1.3.1 Clause B.1: ABI [2.1] NFF [24 -28]
Business SA supports ABI's submission regarding inclusion of 'definite decision' rather than 'final decision' and the arguments put by both AiG and NFF regarding this clause.
- 1.3.2 Clause B.2(b): AiG [68]
Business SA supports AiG's submission; the re-drafted clause appears to impose an additional burden upon employers.
- 1.3.3 Clauses B.3 and B.4: ABI [2.2]
This submission to reorder clauses B.3 and B.4 is agreed by Business SA.
- 1.3.4 Clause B.5: NFF [34]-[39]
Business SA supports **the NFF's submission and proposed wording at [39]**.
- 1.3.5 Clause B.6: AiG [73]-[74]
Business SA supports AiG's submission to incorporate clause B.5 into clause B.6.
- 1.3.6 Clause B.6(b): NFF [40]-[41]
Business SA supports **the NFF's submission and proposed wording**.
- 1.4 Consultation about changes to rosters or hours of work (Clause C)
- 1.4.1 Clause C: ABI [3.1], ACCI, AiG [75], PHIEA [9], HIA [2.5.5]

Business SA supports these submissions to retain clause 22.2(d) of the exposure draft. Business SA notes the union's responses to this matter and submits the clause need only be included as clause C.5.
- 1.4.2 Clause C.3(b): ACCI, HIA [2.5.11]
Business SA supports **ACCI's** and other parties submissions to retain the brackets around the text '**including any impact in relation to their family or caring responsibilities**'.

1.4.3 Clause C.3(b): NFF [44]
Business SA supports **the NFF’s submission**. The word ‘any’ should be used instead of the word ‘its’ in clause C.3(b).

1.5 Dispute resolution (Clause D)

1.5.1 Clause D.1: AIG [84]
Business SA supports **AIG’s submission and proposed wording**.

1.5.2 Clause D.3: AIG [92]
Business SA supports **this submission; the words ‘in a timely manner’ should be retained**.

1.5.3 Clause D.4: AiG [102] ABI[4.1] ACCI, HIA [2.6.1]-[2.6.6]

Business SA supports submissions that “the verbiage that presently appears in clause 23.2 should be retained” and “that clause D.4 (a re-draft of exposure draft cl 23.2) broadens the range of people who can refer disputes to the Commission”.

1.5.4 Clause D.7: NFF [50]-[54], AIG [109]
Business SA supports the submissions made by the NFF and AiG in these paragraphs.

1.5.5 Clause D.8(b): NFF [55]
Business SA supports **the NFF’s submission**.

1.5.6 Clause D.9: ABI [4.2]
Business SA supports this submission.

1.6 Termination of employment and Redundancy (Clause E)

1.6.1 Clause E.1(b): AIG [129]
Business SA supports the various submissions put by AiG regarding this clause. Business SA notes **the term ‘any amounts’ is preferable to ‘the amount’**.

1.7 Transfer to lower paid job on redundancy (Clause G)

1.7.1 Clause G.1: SDA [49]
Business SA does not support **the SDA’s submission**; we argue the legal effect of the clause has not **been changed**. Further, use of the term ‘job’ as opposed to the term ‘duties’ is more consistent with the language of the Act regarding redundancy.⁶

1.7.2 Clause G.1: AMWU [16]-[19]
Business SA agrees in part with the AWMU’s submission. We agree with the principle that the award term should reflect the Act’s language regarding redundancy.

However, we oppose the AMWU’s proposed wording. The proposed wording places a burden on the reader to consult the Act, a daunting task for someone unfamiliar with navigating legislation, to determine whether they are eligible for redundancy entitlements. Business SA supports the re-drafted wording of clause G.1.

⁶ *Fair Work Act 2009* (Cth) s 119(1).

- 1.7.3 Clause G.2: ABI [5.1]
Business SA supports **ABI's submission and proposed wording**.
- 1.7.4 Clause G.3: ABI [5.2]
While Business SA does not believe the connection between clauses G.3 and G.4 is unclear, we **do not oppose ABI's submission on these clauses**.
- 1.7.5 Clause G.4: NFF [59]-[63]
Business SA supports **the NFF's submission**. Payment at the full rate of pay when transferring to a lower paid job on redundancy is inconsistent with the Act. The Act states an employee is paid at their base rate of pay for his or her ordinary hours of work when calculating the amount of redundancy pay.⁷
- 1.8 Employee leaving during redundancy notice period (Clause H)
- 1.8.1 Clause H.1: NFF [65]
Business SA supports **the NFF's submission, clause H.1 should also refer to sections 121 and 122 of the Act**.
- 1.8.2 Clauses H.2 and H.3: NFF [66], ACCI
Business SA supports the submissions of NFF and ACCI regarding clause 21.3 of the exposure draft. We support the proposed clause provided by ACCI.
- 1.8.3 Clause H.3: SDA [50]-[51], ACTU and APESMA[37]-[38]
Business SA opposes the SDA and ACTU's submissions.
- 1.9 Job search entitlement (Clause I)
- 1.9.1 Clause I.1: ABI [6.1]
Business SA supports the amendments suggested by ABI.
- 1.9.2 Clause I.1: ACTU [re cl 20.3], SDA [52]

Business SA does not support **the ACTU's and SDA's submissions regarding the phrase 'employer has given written notice of termination' (emphasis added)**. Business SA submits the wording should reflect the Act, rather than differ or diverge from the Act.
- 1.9.3 Clauses I.2 and I.3: ABI [6.2] AiG [178]
Business SA supports ABI's argument that the interaction between clauses I.1 and I.2 is unclear **and supports ABI's proposed wording to combine the two**. Failing that, the AiG has proposed merging I.1 and I.2 which we would otherwise support.
- 1.9.4 Clause I.4: ABI [6.3]
Business SA supports ABI's argument that this clause has been subject to a substantive change.

⁷ Ibid s 119(2).

1.9.5 Clause I.6: ABI [6.4]
Business SA supports this submission.

2. **Conclusion**

Business SA would like to thank the Fair Work Commission for the opportunity to comment on the plain language re-drafted standard clauses.

3. **Additional Information**

Business SA's 25 May 2016 plain language submission can be found [here](#). Our 2 September 2016 submission on the plain language re-draft of the *Pharmacy Industry Award* can be found [here](#).