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Working for business.
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29 September 2016

BY EMAIL: amod@fwc.gov.au

Associate to Hon Justice Iain Ross AO
Level 4, 11 Exhibition St
MELBOURNE VIC 3000

Dear Associate,

RE: AM 2016/15 – Plain language re-drafting – standard clauses

The Australian Chamber provides this correspondence in response to the Fair Work Commission's Statement [2016] FWCFB 5621 of 11 August 2016 which published draft plain language standard clauses based on the plain language redraft of the Pharmacy Industry Award 2010 together with the list of modern awards that contain each of those standard clauses.

We understand that the 11 August 2016 statement is to be read in the context of earlier statements, particularly the Commission's 15 July Statement, [2016] FWC 4756. The 15 July Statement advised how the Commission was identifying its treatment of different types of provision in its plain language rewrite project. We have understood the words "provisions" and "clauses" to be read interchangeably.

The 15 July Statement identified "standard provisions" as "…provisions that have arisen from previous test cases and are generally replicated in the same form across most modern awards". These are:

- award flexibility;
- consultation;
- dispute resolution;
- termination of employment; and
- redundancy.

The timetable attached to the 11 August Statement called for written submissions for plain language drafts of standard clauses in awards by 29 September and as such, the Australian Chamber comments on the above clauses are set out in the attached table.

Yours sincerely,

Australian Chamber of Commerce and Industry

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Clause/Provision	Australian Chamber Comments
Table of Contents	While adding to the length of the award the Australian Chamber does not have any objection to the amendments to the Table of Contents to reflect an updated award structure. It is noted that the consultation and redundancy clauses within the exposure draft deals with multiple topics and locating these topics within distinct clauses within distinct headings is likely to improve ease of navigation. The Australian Chamber notes the drafter's comments that user testing identified the end of the award as a more logical place to locate termination and redundancy provisions and has no objection to the relocation of the provisions on that basis.
Award flexibility	Section 144 of the *Fair Work Act 2009* (Act) provides that a modern award must include a flexibility term enabling and employee and employer to agree on an arrangement varying the effect of the award in order to meet the genuine needs of the employee and employer. Subsection 144(4) sets out the requirements for these terms which underpin the making of individual flexibility arrangements. In the Australian Chamber's submission the clause should reflect the wording of the Act as closely as possible in terms of addressing the requirements applying to individual flexibility arrangements. In this regard, the Australian Chamber has some concern with the inclusion of the note in the draft clause which provides: *NOTE: Arrangements for when work is performed include such matters as hours of work, rostering arrangements and breaks.* The drafter comments suggest that "A NOTE or other mechanism could be used to alert readers to the clauses to which clause A.1(a) applies with hyperlinks inserted in the consolidated online document". The Australian Chamber is generally concerned with the inclusion of notes in awards, particularly where they represent attempts to interpret the Act. In the case of the re-draft clause, the Australian Chamber has concerns that the inclusion of the above note may have the practical effect of limiting the matters about which individual flexibility arrangements can be agreed and clauses that can be varied, or at the very least, may create a perception that the matters that can be agreed upon are confined to the hyperlinked clauses. As such, we submit that the note should be deleted. Noting the Australian Chamber's earlier comment that the clause should reflect the wording of the Act as closely as possible, we would suggest a revision to draft sub-clause A.2 which states:

	A.2 An agreement may only be made in order to meet the genuine needs of the employer and employee. Our preferred wording is provided below and more closely reflects the text of subsection 144(1) of the Act by adopting wording that is enabling as opposed to limiting *A.2 An agreement may be made in order to meet the genuine needs of the employer and employee.* An agreement, by its nature, involves a process of parties arriving at a consensual arrangement and in the interests of streamlining and simplifying award content the Australian Chamber considers the inclusion of prescription around the agreement making process as unnecessary to the extent that it is not a legislative requirement for the term. In particular, we submit that sub-clauses A.3 and A.4 should be deleted. Further simplification and streamlining of the clause could also be achieved through consolidation of sub-clauses A.5 to A.7, as follows, which enables the clause to be more easily translated to a checklist: *A.X An agreement must:* *(a) result in the employee being better off overall on its making than if the agreement had not been made ;* *(b) state the names of the employer and the employee;* *(c) identify the award terms to be varied;* *(d) set out how the award term, or each term, is varied;* *(e) set out how the award term, or each term, is varied,* *(f) state the date on which the agreement is to start;* *(g) be signed by the employer and the employee and, if the employee is under 18 years of age, by the employee's parent or guardian.* It should be noted that the consolidated sub-clause above removes the requirement in draft sub-clause A.6(d) to "show how the agreement results in the employee being better off overall on its making than if the agreement had not been made". This is not a requirement set out in section 144 of the Act and adds prescription and complexity to the provision to the clause and agreements that would be made pursuant to

	it. If a provision of this nature is to remain, alternative wording is preferred to reflect the written nature of the agreement, e.g. replacing "show how" with "state". A consolidation of sub-clauses A.11 and A.12 may better clarify the way in which an agreement can be terminated without altering the effect of the clause. Possible alternative wording could include: *A.X An agreement may be terminated:* *(a) at any time by written agreement between the employer and employee; or* *(b) by the employer or employee giving:* *(i) 13 weeks' written notice to the other party; or* *(ii) 4 weeks' written notice to the other party if the agreement was entered into before the first full pay period starting on or after 4 December 2013*. The drafter's comments suggest that "A NOTE or definition about 'better off overall' would be beneficial if this could be agreed. As noted above, the Australian Chamber is concerned with the inclusion of notes in awards, particularly where they represent attempts to interpret the Act and does not support this approach.
Consultation about major workplace change	It is likely that the proposed structure of the draft clause will improve user experience by more clearly setting out employer responsibilities in a form that could be translated to a checklist. It is noted that the draft clause includes a requirement to discuss "when the changes are to be made". It is recommended that an amendment be made to the requirement to include the word "likely" prior to the words "to be made". There appears to be a typographical error in clause B.6(b) and we recommend that this be corrected by substituting the term "employees" with "the employer".
Consultation about changes to rosters or hours of work	It is likely that the proposed structure of the draft clause will improve user experience by identifying up front when the clause applies and when it does not. The draft clause also achieves greater consistency with the wording in section 145A of the Act.

	The draft clause does however remove the text of clause 22.2(d) of the exposure draft which stated: *These provisions are to be read in conjunction with other award provisions concerning the scheduling of work and notice requirements*. The Australian Chamber submits that this wording should be retained to ensure that the user is aware that the clause is to be read in the context of the award provisions more broadly. The absence of this provision risks changing the effect of the clause and presents a risk that an employer could be found to have been in breach of their consultation obligations despite other provisions within the award enabling changes to the scheduling of work and rostering arrangements to be made. The Australian Chamber also submits that the parentheses appearing in clause 22.2(b)(ii) around the text "including any impact in relation to their family or caring responsibilities" should be retained to more closely reflect the wording in section 145A(2)(b) of the Act and so as not to unintentionally disturb the effect of this provision.
Dispute resolution	The draft clause is more methodically structured and is likely to improve user experience by describing the graduated process for resolving a dispute. Clause 23.2 of the Exposure Draft enables a "party to the dispute" to refer the dispute to the Fair Work Commission. The plain language re-draft at clause D.4 departs from this language, stating that "a party may refer the dispute to the Fair Work Commission". This may broaden the persons who can refer disputes to the Commission and as such the former wording is preferred and the Australian Chamber submits that clause D.4 should be amended accordingly.
Termination of employment	The Australian Chamber has no objections to re-drafted clause E.1 which more closely reflects the table included at section 117 of the Act. However the Australian Chamber does not consider it necessary to reference to the specific parts of the Act in clause E which adds to the length and complexity of the provision.
Redundancy	The Australian Chamber does not consider it necessary to reference to the specific parts of the Act which add to the length and complexity of the provision.

Transfer to lower paid duties	The Australian Chamber does not consider it necessary to reference to the specific parts of the Act which adds to the length and complexity of the provision. It is noted that the redrafted clause is expressed more as an entitlement rather than an obligation when compared to the drafting of clause 21.2 and in this regard appears to be written more from the perspective of the employee. From the perspective of an employer required to implement the award, a more practical focus would clearly describe what the employer is required to do if they transfer an employee to another job in the circumstances described by sub-clause G.1. For example, wording such as "the employee is entitled to receive a payment from the employer" could be better expressed as "the employer must pay the employee…"
Employee leaving during notice period	The Australian Chamber is concerned that the re-draft may create confusion and may have unintentionally altered the effect of the clause. In particular, clause 21.3 of the Exposure Draft provides that an employee who leaves during their notice period **is not entitled to payment instead of notice**. Clause H does not make clear that this is the case. As such, it is recommended that sub-clause H3 be deleted and replaced with a new clause providing that: *If the employee terminates their employment during the period of notice* ***the employee is not entitled to payment in lieu of the notice period that would otherwise have been worked.***
Job search entitlement	As a general proposition, the Australian Chamber supports an approach that results in provisions dealing with the same subject matter contained within the same clause.

The Australian Chamber acknowledges that award specific differences will require the plain language standard clauses to be amended to suit those awards. Australian Chamber may make specific submissions regarding modern awards of interest to them and these comments are provided without prejudice to their interests.