IN THE FAIR WORK COMMISSION

Matter No.: AM2016/15

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

4 yearly review of modern awards – plain language – standard clauses

WRITTEN SUBMISSIONS FOR THE ACTU REGARDING PLAIN LANGUAGE RE-DRAFTS OF STANDARD CLAUSES

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D No.: 102/2016

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A. Background

1. These submissions are filed in response to the Directions issued by President Ross on 17 August 2016 in the 4 yearly review of modern awards – Common issue – Plain language drafting – Standard Clauses proceedings (AM2016/15) ('the Proceedings'). They are filed in response to the document entitled Plain language draft standard clauses published by the Fair Work Commission ('the Commission') dated 11 August 2016 ('Clause Comparison Table') and the plain language re-drafts of standard clauses contained in column two of that document ('Plain Language Standard Clauses'). The Clause Comparison Table compares the Plain Language Standard Clauses to the standard clauses in the Pharmacy Industry Award 2014 Exposure Draft in column one of that document ('Exposure Draft Standard Clauses').

2. We note the Plain Language Standard Clauses, if implemented, would affect the *Pharmacy Industry Award* as well as a number of other awards that can contain the standard clauses.

3. As indicated in President Ross' Statement of 22 September 2015, [2015] FWC 6555, the motivation for the plain language re-drafting process includes the requirement in the modern awards objective that the Commission take into account "*the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards*" and the Commission's commitment to simplifying and standardising language across modern awards. However, as the brief Statement also indicates, "*The plain language draft is not intended to change the substantive legal effect of any award term*".[1]

4. The ACTU acknowledges the objectives of the plain-language re-drafting process and supports the majority of the changes in the Plain Language Standard Clauses. However, we submit a number of the proposed changes would alter the legal effect of the standard clauses and/or render them less simple and easy to understand as required by the modern awards objective. In those cases, we submit the Plain Language Standard Clauses should be further amended to avoid this consequence or, where appropriate, the existing language in the Exposure Draft Standard Clauses should be preferred.

[1] [2015] FWC 6555 at paragraphs 6 and 14.

B. Our concerns

5. Two substantive proposed amendments are explained in some detail below. A full list of our concerns regarding aspects of the Plain Language Re-draft Clauses are listed in the table in **Attachment 1**.

Award flexibility – better off overall test

6. Clause 4.4(d) of the Exposure Draft Standard Clauses requires that any award flexibility agreement between the employer and the individual employee 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*" (emphasis added). In the corresponding clause, A.6(d), in the Plain Language re-draft, the qualification "*in relation to the individual employee's terms and conditions of employment*" has been removed.

7. We submit the qualification that the better off overall assessment is '*in relation to the individual employee's terms and conditions of employment*' was intended to provide some constraint on the types of benefits that may be used to justify the trading away of safety net conditions; that is, safety net entitlements could not be reduced to provide benefits that were beyond the scope of the individual's terms and conditions of employment. For example, we submit employees of a video store could not be asked to trade away their entitlements to penalty rates in exchange for free movie rentals.

8. The model term was developed by the Australian Industrial Relations Commission ('AIRC') in the June 2008 award modernisation decision.[2] In that decision, the AIRC was minded for a number of reasons to ensure that the award flexibility clause could not be used to disadvantage an employee.[3] We submit the form of words goes some way toward providing that protection against disadvantage and that the imperative to do so remains under the modern awards objective.

9. The AIRC was also concerned, in circumscribing the range of award terms that can be traded off in an individual flexibility arrangement, to avoid "weakening the function of the award a safety net in an unacceptable way", a concern later confirmed by a Full

[2] [2008] AIRCFB 550.
[3] Ibid, para [162].

Bench of the Commission in the 2-yearly award review process, the *Award Flexibility Decision* [2013] FWCFB 2170.[4]

10. The drafter's comments in the Comparison Table include a suggested note from the Fair Work Ombudsman ('FWO') to the effect that the employee's personal circumstances and any non-financial benefits significant to the employee can also be considered in conducting the better off overall assessment. We respectfully submit, such a note should not be included.

11. In the *Award Flexibility Decision*, the Bench noted that the recommendations of the 2012 Fair Work Review panel's report (*Towards more productive and equitable workplaces - An evaluation of the Fair Work legislation* (2012)), included (at para. 48):

> **Recommendation 9**: The Panel recommends that the better off overall test in s. 144(4)(c) and s. 203(4) [of the *Fair Work Act 2009*] be amended to expressly permit an individual flexibility arrangement to confer a non-monetary benefit on an employee in exchange for a monetary benefit, *provided that the value of the monetary benefit foregone is specified in writing and is relatively insignificant, and the value of the non-monetary benefit is proportionate* (emphasis added).

12. The Fair Work Review report argues that the illustrative examples in the Explanatory Memorandum suggest an individual flexibility arrangement may contain a non-financial benefit but such an agreement would only pass the better off overall test ('BOOT') where the value of lost financial benefit is relatively insignificant and the non-monetary benefit is proportionate to the monetary benefits foregone.[5] The Bench indicated in the *Award Flexibility Decision* that these recommendations were "a matter for the Parliament"[6], and to date, the Parliament has not sought fit to implement them.

13. The above suggests the qualification that the better off overall assessment is '*in relation to the individual employee's terms and conditions of employment*' would appear to have some work to do in setting proper limits on the scope of the BOOT assessment. However, the extent of those limits has not been determined by a court or tribunal to date to our knowledge and is not within the scope of this submission or

[4] June 2008 AIRC Full Bench decision ([2008] AIRCFB 550 at paragraph 168; See *Award Flexibility Decision* [2013] FWCFB 2170 at [103].
[5] See Australian Government, *Towards more Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, August 2012: https://docs.employment.gov.au/system/files/doc/other/towards_more_productive_and_equitable_workplaces_an_evaluation_of_the_fair_work_legislation.pdf, p108.
[6] At paragraph 49.

these proceedings. In light of this uncertainty, removing these words may have unintended and unforseen consequences. Hence, it is submitted that the Plain Language Draft should retain the qualification present in the Exposure Draft Standard Clause. Further, the FWO's note does not reflect any of the safeguards intimated in the Fair Work Act review report and in effect excludes them, so with respect, we submit the note should not be included.

Dispute Resolution

14. In clause D.3 of the Plain Language Clause, based on 23.1 of the Exposure Draft Standard Clause, the words 'as appropriate' have been removed from the requirement that employee/s try to resolve the dispute with senior management. This would alter the legal effect of the provision to require employees to negotiate with management even where it is not appropriate, for example, where the grievance relates to the conduct of senior management. Hence, the qualification 'as appropriate' should remain.

29 September 2016

Attachment 1

Plain Language Standard Clauses
List of Concerns
ACTU
FWC - AM2016/15

Existing Standard Clause in Pharmacy Award Exposure Draft ('ESC')	**Notable Change to the ESC in Plain Language Re-draft ('PLR')**	**Comments/Concerns**
4. Award flexibility		
4.2	The explicit requirement in clause 4.2 of the ESC that an agreement cannot be made until after the employee has commenced employment has been removed and instead is written as a qualification to the right to make an award flexibility agreement. A.1 of the PLR states "… an employee who has started employment may agree in writing…"	It would make it clearer to separate the right and obligation to avoid the risk that the qualification on the right is overlooked and used by employers to trade off conditions at the time employment is offered and thereby undermine the intention of the clause that it only be made in order to meet the genuine needs of the employee and employer.
4.3(a)	The explicit requirement in clause 4.3(a) of the ESC that the award flexibility agreement must be limited to the list of matters in clause 4.1 in the PLR has been removed.	It is not as clear as it could be that the list of terms in A.1 of the PLR are exhaustive. It should be made clear that the agreement cannot be used to vary other terms of an award. We submit this caveat should be retained in the PLR.
4.3(b)	The requirement in 4.3(b) of the ESC that the agreement 'result in the employee being better off overall *at the time the agreement is made*' is expressed in the PLR as the 'agreement must result in the employee being better off overall *on its making…*'	The rewording uses an unusual expression that is unnecessary resulting in the applicable test being less clear. This is a substantial provision that should be as clear as possible, even if it means the clause is longer. The existing wording should instead be used.
4.4(a)	The explicit requirement in clause 4.4a of the ESC that an award flexibility agreement must be in	A.1 in the PLR provides a right to agree in writing to vary the application of an award. It would be clearer if the *right* to make

	writing has been removed.	the agreement and the *obligation* that it be in writing were separated instead of collapsing them as a qualified right.
4.4(d)	The existing standard clause 4.4.(d) requires that the agreement between the employer and the individual employee must detail how the agreement resulting the individual employee being better off overall '*in relation to the individual employee's terms and conditions of employment*'. The qualification italicised above has been removed in clause A.6 (d) of the PLR. The drafter's comments include a suggested note from the FWO to the effect that the employee's personal circumstances and any non-financial benefits significant to the employee can also be considered.	As discussed above, this change and the suggested note would alter the clause's legal effect and risk allowing for a broader range of non-financial benefits and matters ancilliary to the employee's terms and conditions to be used to trade away an employee's award entitlements than the current wording suggests. The qualification '*in relation to the individual employee's terms and conditions of employment*' should remain.
4.8	Clauses 4.8 and 4.9 of the ESC have been replaced by A.11-A.14 in the PLR	The revised clauses make it less clear that the flexibility arrangement may be terminated *unilaterally* by any party after giving the defined notice or at any time by *agreement*. The grammatical construction in clause 4.8 of the PLR makes this clearer. In the alternative, if clause A.13 is to remain in the PLR, it should state 'The agreement ceases to have effect at the end of the period of notice mentioned in clause A.12 or on the date of termination agreed to in accordance with A.11, to avoid confusion about a possible distinction between when notice is given of termination, the date of termination and the date it ceases to have effect (the latter two dates being equivalent).
20. Termination of employment		
20.3 Job Search Entitlement	Clause 20.3 of the ESC currently states that	Whilst it is understood that under the NES an employer is

	'*Where an employer had given notice of termination to an employee…*'. This has been changed in clause I.1 of the PLR to '*Where an employer has given <u>written</u> notice of termination to an employee..'* (emphasis added).	required to give written notice of termination, we are concerned about the effect of the provision when the employer does not. It would be a breach of the NES for an employer to give written notice but the unintended effect is that the job search clause would not be triggered because the 'written notice' wasn't provided. There is a potential anomaly here. We are advised that in the TCF industry it is common for employers not to give written notice but employees are simply told verbally that they have been made redundant. The PLR also includes a new term at I.6 '*An employee who fails to produce proof when required under the clause 1.4 is not entitled to be paid for the time off in excess of one day per week.'* The clause is unnecessary and should be deleted.
21. Redundancy		
21.3 Employee Leaving During Redundancy	Clause 21.3 of the ESC currently states, 'The employee is entitled to receive the *benefits and payments* they would have received under this clause had they remained in employment….' (emphasis added). The term 'benefits and payments' has been changed in clause H.3 of the PLR to 'full rate of pay'.	The term 'benefits and payments' is a broader term and was originally intended to make clear that redundancy/severance payments were not impacted by the employee given notice of termination during the notice period. The broader term should be retained.
22. Consultation		
22.1	Need new clause B.7 as discussed below.	
22.1(b)	Clause B.3 of the PLR states, "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)*" (emphasis added).	This change appears to limit the matters that may be raised by employees that an employer must promptly consider, by confining the matters raised to those "raised…in the course of the discussion under clause 22.1(b)" of the ESC, or otherwise confining the employer's consideration of any matters to the discussion which is had 'at the earliest practicable date'.

	We assume that '22.1(b)' of the ESC is intended to be equivalent to B.1(b) in the PLR: "at the earliest practicable date, discuss with those employees and their representatives (if any)…"	There is no such limitation in the existing model clause. Also the use of 'the discussion' in B.3 of the PLR as a singular expression, can be contrasted with the existing clause 22.1(b)(ii) which refers to "the discussions".
22.2	22.2 – clause 22.2(d) of the ESC has been removed (regarding reading the consultation provisions in conjunction with other award provisions concerning scheduling of work and notice requirements).	This clause should be included in a new clause C.5 and B.7 to ensure the consultation clauses are not read so as to override other rights and restrictions in the award.
23. Dispute Resolution		
23.1	In clause D.3 of the PLR, based on 23.1 of the ESC, the words 'as appropriate' have been removed from the requirement that employee/s try to resolve the dispute with senior management.	The qualification 'as appropriate' should be included to avoid requiring employees to negotiate with management in circumstances where it is not appropriate.
	Clause 23.1 of the ESC requires that 'parties will endeavour to resolve the dispute *in a timely manner'*. This has been changed in the PLR to '*as soon as practicable* '.	Arguably the current term 'in a timely manner' connotes a sense of urgency, and is a more objective test, rather than 'as soon as practicable'. There is a risk that employers could use the term 'as soon as practicable' to delay dealing with a dispute. Hence, we suggest that the current expression be retained.
23.5	23.5 'person, organisation or association' changed to 'body' in D.7	The existing terminology follows that used in the FW Act and should remain.