Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Plain Language Drafting – Standard Clauses

(AM2016/15)

9 August 2017

4 YEARLY REVIEW OF MODERN AWARDS

AM2016/15 PLAIN LANGUAGE DRAFTING – STANDARD CLAUSES

1. INTRODUCTION

1. This submission of the Australian Industry Group (**Ai Group**) is made in response to the Statement issued by the Fair Work Commission (**Commission**) on 20 July 2017 [1] (**Statement**) 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. This submission should be read in conjunction with the following submissions of Ai Group:

    - Ai Group's submission of 4 October 2016; and
    - Ai Group's reply submission of 28 October 2016.

[1] [2017] FWCFB 3745

2. CLAUSE A – AWARD FLEXIBILITY (RENAMED INDIVIDUAL FLEXIBILITY ARRANGEMENTS)

2.1 Note at A.1

3. Ai Group maintains the position that the Note under clause A.1 is unnecessary. Accordingly, we support the Commission's provisional view expressed at paragraph [14] of the Statement, that the Note should be deleted.

2.1 Word 'only' in clause A.4

4. Ai Group supports the amended wording for clause A.4 proposed by the Commission at paragraph [26] of the Statement.

2.2 Deletion of clauses A.5 and A.6

5. Ai Group supports the Commission's provisional view expressed at paragraph [31] of the Statement, that clause A.5 should be deleted.

6. In light of the issues raised at paragraphs [28] to [36] of the Statement, Ai Group is no longer pursuing the deletion of clause A.6.

2.3 Amalgamation of clauses A.7 to A.9

7. Ai Group supports the Commission's proposed wording for clauses A.7 to A.9 as set out in the Statement. We are not seeking the amalgamation of clauses A.7 to A.9.

2.4 Note at clause A.8(d)

8. We note that the Commission has decided not to include a Note under clause A.8(d) explaining the "better off overall test" (paragraph [48] of the Statement). We agree with the Commission's decision.

2.5 Inclusion of clause A.14 as a note or clause

9. Ai Group agrees with the provisional view expressed at clause [62] of the Statement that proposed clause A.14 be deleted, and a Note inserted in the terms set out in paragraph [62].

3. CLAUSE B – CONSULTATION ABOUT MAJOR WORKPLACE CHANGE

3.1 Clause B.1

10. The agreed position referred to in paragraph 65 of the Full Bench Statement provides that an employer is only required to commence discussions 'as soon as practicable'.[2] It does not require that the discussions be completed with the same degree of urgency. This is consistent with the substantive obligation flowing from the current standard clause contained within awards. The significance of this issue is addressed at paragraphs 58 to 65 of the Ai Group submission of 4 October 2016.

11. Although we agree with the expert's observation[3] that there is no need to refer to when to begin a discussion if the requirement is that you discuss as soon as practicable, this misses the point that was intended to be addressed by the parties through the agreed position.

12. By including the words "as soon as possible" in the first paragraph of B.1 the expert's redrafted clause also now creates a new temporal obligation relating to the giving of notice pursuant to B.1(a). This would give rise to a change in the substantive requirements of the current standard clause.

13. The agreed position should be adopted.

14. The expert's proposed change to the definition of 'relevant change' in B.1 is also problematic. We do not oppose the intention to define the term "relevant

[2] [2017] FWCFB 3745

[3] At paragraph 67 of [2017] FWCFB 3745

change" within the provision. However, the proposed inclusion of the words "*…excluding a change in any such matter that is provided for by the award*" in the first paragraph of B.1 should not be adopted. Such words should instead be connected to the definition of significant effect. We note that these words have been struck out from B.1 in the agreed clause and instead included in B.6.

15. The current award clause provides:

> 9(a) Employer to notify
>
> (i) Where an employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must notify the employees who may be affected by the proposed changes and their representatives, if any.
>
> (ii) Significant effects include termination of employment; major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations; and the restructuring of jobs. Provided that where this award makes provision for alteration of any of these matters an alteration is deemed not to have significant effect.

16. The current approach provides that, if an award enables the alteration of any of the matters identified in 9(a)(ii), the change is deemed not to have significant effect and the obligation identified in 9(a)(i) does not arise. The current award clause does not provide that if the changes referred to in 9(a)(i) are provided for in the award they are excluded from giving rise to an obligation under the award. Most awards do not provide for changes in production, program, organisation, structure or technology, as contemplated by the expert's drafting.

17. The expert's proposed changes would alter the operation of the current clause and ought not be adopted.

3.2 Clause B.5 and deletion of clause B.6

18. Ai Group has not identified any difficulties with the amendments that the Plain Language Expert has proposed to clauses B.5 and B.6, as set out in paragraph [71] of the Statement.

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

19. Ai Group has not identified any difficulties with the amendments that the Plain Language Expert has proposed to clause C.3(b), as set out in paragraph [78] of the Statement.

5. CLAUSE D – DISPUTE RESOLUTION

5.1 Terminology: 'party/parties' or 'employer/employee' in clauses D.2, D.3, D.4, D.5 and D.7

20. Ai Group has not identified any difficulties with the amendments that the Plain Language Expert has proposed to clause D, as set out in paragraph [87] of the Statement.

5.2 Word 'process' in clause D.7

21. Ai Group does not oppose the word 'process' being included in clause D.7, as drafted in paragraph [87] of the Statement.

6. CLAUSE E – TERMINATION OF EMPLOYMENT

22. Ai Group does not agree with the Plain Language Drafting Experts proposed wording for clause E.1(c).

23. The wording agreed between the parties is:

> **(c)** If an employee fails to give the period of notice required under paragraph (a), the employer may deduct from any money due to the employee on termination (under this award or the ~~National Employment Standards~~ NES), an amount not exceeding the

amount that the employee would have been paid in respect of the period of notice not given.

24. Often there will be insufficient monies owing on termination to deduct the full amount of notice not given. Also, sometimes an employer may decide to deduct an amount that is less than the full amount of the notice not given.

25. The Expert has proposed that the words 'an amount not exceeding' be deleted from the agreed wording. In Ai Group's view, such wording fails to adequately clarify that the employer may deduct less than the full amount of the notice not given.

26. We propose that the wording agreed between the parties be retained.

7. CLAUSE F – REDUNDANCY

27. We note that there are no outstanding issues regarding clause F – Redundancy.

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

8.1 Change in terminology from 'duties' to 'job' in clause G.1

28. Ai Group does not raise any objection to the wording of clause G.1, as set out in paragraph [101] of the Statement.

8.2 Proposed amendment to wording of clause G.2

29. Ai Group has not identified any difficulties with the amendments that the Plain Language Expert has proposed to clause G.2(a), as set out in paragraph [114] of the Statement.

8.3 'Ordinary rate of pay' in clause G.3

30. Ai Group continues to rely upon its earlier submissions (as referred to in the Statement at paragraph [121], in maintaining that the words 'ordinary rate of pay' should be substituted with 'ordinary hourly rate of pay'.

9. CLAUSE H – EMPLOYEE LEAVING DURING REDUNDANCY NOTICE PERIOD

9.1 Meaning of clause H.2

31. The existing entitlement for an employee who leaves during the notice period is to receive the entitlements that they would have received under the redundancy clause of the award, had they remained in employment until the expiry of the notice. This is a very longstanding entitlement that was inserted into awards following the 1984 *Termination, Change and Redundancy Decision*[4] *and Supplementary Decision.*[5]

32. The entitlement was retained in awards after the 2004 *Redundancy Case Decision*[6]

33. For example, clause 23.4 of the Manufacturing Award specifies as follows:

> An employee given notice of termination in circumstances of redundancy may terminate their employment during the period of notice. The employee is entitled to receive the benefits and payments they would have received under clause 23—Redundancy had they remained in employment until the expiry of the notice, but is not entitled to payment instead of notice.

34. The redrafted wording obviously results in a substantial increase in the entitlements of employees who are made redundant, and a substantial increase in employer costs. It is not uncommon for an employee to leave during the notice period when the employee's position becomes redundant. In such circumstances, employees receive their redundancy entitlements and not, for example, the annual leave that would have accrued if the full period of the notice had been worked out.

> **H.2** The employee is entitled to receive the benefits and payments they would have received under Clause H of this award or sections 119-122 of the NES had they remained in employment until the expiry of the notice.

[4] (1984) 8 IR 34, Print F6230

[5] (1984) 9 IR 115, Print F7262

[6] PR032004

9.2 Period of notice in clause H.3 and H.4

35. With regard to the issue raised as paragraphs [133] to [135] of the Statement, the period of notice referred to in clauses H.1, H.3 and H.4(a) is the period of notice in s.117 of the Act. This is consistent with the existing entitlements.

36. Ai Group would prefer that this issue is clarified within the wording of the clause.