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17 November 2016

The Hon Justice IJK Ross AO
President
Fair Work Commission
11 Exhibition Street
Melbourne Victoria 3000

Dear Justice Ross,

Re. AM2016/15 - 4 yearly review of modern awards – Draft Guidelines for plain language drafting of modern awards

We refer to the Draft Guidelines for plain language drafting of modern awards published on 9 November.

The Draft Guidelines are not controversial and they include useful principles and approaches to drafting.

The only Draft Guideline that we have identified as being problematic is paragraph 7.4 which states:

"An expression used in an award that is defined in the National Employment Standards should be defined as having the same meaning as it has there."

There are many expressions used in awards that overlap with expressions used in the National Employment Standards (**NES**). For example, the expressions “*base rate of pay*”, “*full rate of pay*”, “*service*”, “*continuous service*”, “*year of service*”, “*ordinary hours of work*”, “*working arrangements*” and numerous others appear in the NES. These expressions may have different meanings in particular modern awards and attempting to align the definitions with the NES is likely to disturb the existing award entitlements. Also, the NES does not typically define terms; it uses various terms that are defined in other sections of the *Fair Work Act*, including ss.12, 16 and 18. We propose that paragraph 7.4 be deleted from the Guidelines.

A new Guideline should be added to expressly state that plain language drafting is not intended to change the legal effect of award clauses.

Whilst we support the proposition that awards should be simple and easy to understand, the desire for consistency and simplicity should not override the preservation of the legal effect of award terms.



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It is important that the plain language drafting exercise does not lead to disputation over award provisions that are currently settled and well-understood. There is significant risk of this unless great care is taken by the Commission.

Many award clauses have resulted from major test cases. With test case provisions, there are often Court and/or Full Bench Commission decisions of relevance to the interpretation of the provisions. These include the initial relevant Commission test case decisions as well as decisions concerning disputes that have arisen about the interpretation of the provisions. In many cases, such decisions over the years have ultimately led to employers and employees gaining a good understanding of the meaning of the test case provisions, including how the provisions are to be applied in particular (usual and unusual) circumstances.

Also, some award clauses are the outcome of extensive negotiations between employer and union representatives, and ultimately were reached by consent. It is important that the plain language drafting exercise does not unnecessarily disturb these consent provisions and lead to disputation.

Yours sincerely

Stephen Smith
Head of National Workplace Relations Policy