



7 April 2017

The Hon. Justice Ross AO, President
Fair Work Commission
11 Exhibition Street
Melbourne VIC 3000

Dear Justice Ross,

Re. AM2016/15 Plain Language Re-drafting – Manufacturing and Associated Industries and Occupations Award 2010

We refer to the above matter and a statement issued by the Fair Work Commission on 27 March 2017 ([2017] FWCFB 1638). At paragraph [21] of the Statement, the Commission provisionally proposed that the *Manufacturing and Associated Industries and Occupations Award 2010 (Manufacturing Award)* be included in the second tranche of awards to be re-drafted in plain language.

In accordance with paragraph [25] of the Statement, we write to provide comment on behalf of the following organisations (the **Major Parties**):

- The Australian Industry Group;
- The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers Union;
- The Australian Workers' Union;
- The Construction, Forestry, Mining and Energy Union;
- The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia;
- The National Union of Workers; and
- United Voice.

The Major Parties oppose the proposed re-drafting of the Manufacturing Award in plain language at this time, for the following reasons:

1. The disturbance that would result to the very extensive and constructive negotiations that are taking place to implement the FWC Full Bench decision to incorporate the vehicle manufacturing coverage of the *Vehicle Manufacturing, Repair, Services and Retail Award 2010 (Vehicle Award)* into the Manufacturing Award.

2. The significant number of clauses in the Manufacturing Award that have been the subject of contested 4 Yearly Review proceedings, with several significant decisions on these matters still reserved;
3. The serious strain that a plain language re-drafting exercise for the Manufacturing Award would impose on our resources at a time when the parties are already involved in a very large number of other 4 Yearly Review proceedings;
4. The potential changes to the legal effect of the Award that may result;
5. The need to ensure a stable awards system; and
6. The absence of evidence establishing widespread award non-compliance in the Manufacturing Industry.

These issues are discussed below.

The vehicle industry manufacturing negotiations and proceedings

On 16 August 2016, a Full Bench of the Commission handed down a decision which determined that Section 2 of the Vehicle Industry Award will be incorporated within the Manufacturing Award ([2016] FWCFB 4418), despite opposition from all of the employer and union parties involved in the proceedings. Coverage of vehicle and component manufacturing is currently split between the Manufacturing Award and the Vehicle Award based largely on pre-modern award coverage. This approach of splitting coverage between the two modern awards was determined by the Award Modernisation Full Bench after significant consideration of all of the relevant issues.

Given the 2016 Full Bench decision, the parties are currently involved in very extensive and constructive negotiations to implement the decision. The parties have had numerous meetings to discuss the coverage and substantive provisions in each award. The discussions have been complex and difficult because of significant differences in the entitlements in each award, and the need to avoid unduly disturbing the current arrangements in place for employers and employees. The parties are reporting back regularly to Commissioner Bissett. It would be very disruptive and unproductive for a plain language re-drafting exercise to be imposed on the parties at this time.

Numerous contested and unresolved exposure draft issues, substantive claims and common issues

Numerous provisions in the Manufacturing Award have been contested during the 4 Yearly Review, either as part of the exposure draft process, as substantive claims, or as common issues. In some of these matters the parties had extensive negotiations and placed an agreed position to the Commission for its endorsement. Several Full Bench decisions are still outstanding which will deal with the wording of numerous clauses in the Award.

Again, it would be very disruptive and unproductive for a plain language re-drafting exercise to be imposed on the parties at this time.

Significant strain on the parties' resources

The current 4 yearly Review is placing a very significant strain on the resources of the Major Parties.

The Major Parties are dealing with a large number of common issue cases, a large number of technical and drafting matters, a large number of substantive claims, and the plain language re-drafting of common award clauses.

A decision to re-draft the Manufacturing Award in plain language will further exacerbate the resource strains that the Major Parties are under, and would make it even more difficult for us to represent the interests of our members in the 4 Yearly Review process. It would also make it more difficult for the Commission to achieve its objectives, given that the Commission relies heavily on the submissions and evidence presented by parties in order to make fair and informed decisions.

The plain language re-drafting of the Manufacturing Award would necessarily involve the Major Parties analysing all of the re-drafted clauses in each version of the draft award that is published, the filing of multiple detailed submissions, attendance at Commission proceedings, and participation in discussions independent of the Commission.

We urge the Commission not to proceed with a process which will necessarily require the dedication of significant resources of the Major Parties in circumstances where we are presently under significant strain due to the 4 Yearly Review.

Potential changes to the legal effect of award clauses

While we acknowledge that the Commission has stated that the re-drafting process is not intended to result in changes to the legal effect of any award provisions, we are concerned that this may nonetheless eventuate, based on our experiences to date with the plain language re-drafting process. Numerous examples have arisen to date of clauses which have been re-drafted in plain language that would have a very different legal effect to the original clause, to the detriment of employees, employers, or both. Numerous concerns have been raised by various parties about particular re-drafted clauses and most of these matters have not yet been resolved by the Commission.

At the start of the 4 Yearly Review process, the Fair Work Ombudsman identified those clauses in modern awards that had, in its experience, led to some interpretation difficulties. Very few Manufacturing Award provisions were identified and, those that were, have been addressed during the exposure draft process.

The need to ensure a stable modern awards system

The Manufacturing Award came into effect in January 2010, after two years of extensive negotiations and Commission proceedings. Since that time, it has been the subject of numerous proceedings before the Commission and its predecessors:

- It was the subject of 10 variation applications shortly after it was made, which were dealt with during 2010 – 2011.
- During 2012 – 2013, several applications to vary the Award were made in the context of the two year review of modern awards. This included issues specific to the Manufacturing Award and common issues.
- The current Review is into its 4th year, with proceedings undoubtedly set to continue into next year. Negotiations and Commission proceedings associated with the Manufacturing Award have been continuing throughout the entire Review.

Accordingly, the Manufacturing Award has been the subject of ongoing development and review for the past nine years, since 2008.

In the circumstances of the Manufacturing Award, the plain language re-drafting of the Award at this time would be contrary to the need to ensure a stable award system (s.134(1)(g)).

To undertake a process that results in the Award being in a further state of flux would be undesirable for employers and employees. A plain language re-drafting process would give rise to uncertainty for those covered by the Award as well as those covered by enterprise agreements linked to the Award.

The extent of non-compliance

At paragraph [20] of the Commission's Statement of 27 March 2017, the Full Bench states that the second tranche of awards have been selected having regard to "industries or subsectors identified by the Fair Work Ombudsman as having high levels of non-compliance". It refers to page 5 of the Fair Work Ombudsman's (FWO) Annual Report of 2015 – 2016 in this regard.

We note that the industries or subsectors covered by the Manufacturing Award are not identified in the FWO's annual report as "having high levels of non-compliance". The industries that are identified are "hospitality, retail, cleaning, security and trolley collecting".

To our knowledge, there is no other material before the Commission in the context of these proceedings that establishes high levels of non-compliance in the industries or subsectors covered by the Manufacturing Award. Nor is there any material to establish the extent to which non-compliance is caused by any alleged ambiguity or uncertainty arising from the Manufacturing Award.

Accordingly, the Major Parties urge the Commission to remove the Manufacturing Award from the second tranche list of awards to be re-drafted in plain language.

Yours sincerely,



Stephen Smith

Head of National Workplace Relations
Policy
Australian Industry Group



Metal Trades Federation of Unions
National Secretary