FAIR WORK COMMISSION

4 Yearly Review of Modern Awards

Matter No.: AM2014/209 and AM2016/15

Pharmacy Industry Award 2010

Submissions

on

Plain Language – Standard Clauses

Association of Professional Engineers, Scientists and Managers, Australia (APESMA)

DATE: **29 September 2016**

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1. The Association of Professional Engineers, Scientists and Managers Australia (**APESMA**) is an interested party to the Pharmacy Industry Award 2010 and these submissions are made in accordance with the Directions issued by the President on 17 August 2106[1].

2. These submissions relate to the Pharmacy Industry Award Plain Language Re-Draft Standard Clauses published by the Commission on 9 August 2016[2].

3. We note in the Statement[3] of Justice Ross issued on 22 September 2015 that:

> *[3] The Pilot will involve the Commission engaging the services of a plain language expert to redraft the Pharmacy Award.* ***The expert will be instructed to redraft clauses without altering their legal effect.*** *The plain language draft will then be user-tested by individuals covered by the award.*
>
> (Emphasis added)

4. APESMA is very supportive of any attempts to make this Award easier for users to understand and apply. However, we are keen to ensure that in doing so the legal intent of the current award provisions are not changed. In this submission APESMA will refer to issues where we believe the plain language redrafting has resulted in changes to the legal effect of the standard clauses contained in the Plain Language redraft of the Pharmacy Industry Award published on 9 August 2016. **(Exposure Draft or ED)**

5. APESMA has had the opportunity to collaborate with the SDA in preparation of these submissions. We wholly support eh submissions of the SDA and also incorporate their submissions into these submissions.

[1] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-directions-170816.pdf
[2] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-standardclauses-comp-revised-09082016.pdf
[3] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/2016fwc6916.pdf

Award Flexibility

Clause 7.2 (Clause 4.2 of the Exposure Draft)

6. Clause 7.2 of the current Pharmacy Industry Award 2010 (Clause 4.2 of the ED) provides that:

> *The employer and the individual employee must have genuinely made the agreement without coercion or duress. An agreement under this clause can only be entered into after the individual employee has commenced employment with the employer.*

7. The current clause has been split up in the plain language re-draft and we believe this makes this very important provision more difficult to understand We believe this change could lead to significant lack of adherence to this current requirement. The first part of the current clause has been contained in clause A.10 of the draft:

> *The employer and the employee must genuinely agree, without duress or coercion of any kind, to the variation of the term, or each variation of a term, provided for by an agreement.*

8. This is an accurate reflection of the legal intent of the current clause.

9. The second part of the current clause which provides an explicit requirement that an agreement cannot be made until after the employee has commenced employment has been removed to clause A.1 of the plain language draft as a qualification to the right to make an award flexibility agreement. A.1 provides that*:*

> *Despite anything else in this award, an employee who has started employment may agree in writing with the employer to vary how terms of this award relating to any one or more of the following applies to them:*
>
> *(a) Arrangements for when work is performed;*
>
> *(b) allowances;*
>
> *(c) overtime rates;*
>
> *(d) penalty rates;*

(e) annual leave loading.

(emphasis added)

10. Whilst this change does not technically alter the legal effect of the clause it does not provide the same level of clarity as the current award about when a term of an award may be varied by agreement. The current award is clearer because it separates the right to make an agreement and the obligations which need to be fulfilled when an agreement is made.

11. This element is of particular importance to the working of this clause because the intent is to ensure that an employee is not compelled to agree to a variation of a term of the award as a condition of obtaining employment. It is of particular concern to us in this Award because there are many award reliant employees covered by this Award and there are many IFAs operating within community pharmacies across the country. We believe that if these two requirements are separated some users will not be aware that there is a requirement to comply with both requirements.

12. The plain language re-draft of the standard clause also includes a new term at A.3 which is not set out in the current award clause:

> *Either the employer or the employee may initiate the making the making of an agreement.*

13. Whilst we don't have any significant concerns with this element being set out we believe that, for consistency, the clause should include both elements of the current clause 7.2, including the sentence *'An agreement under this clause can only be entered into after the individual employee has commenced employment with the employer'*.

Clause 7.3 (Clause 4.3 of the ED)

14. Clause 7.3 of the current Award provides that:

> *The agreement between the employer and the individual employee must:*
>
> *(a) be confined to a variation in the application of one or more of the terms listed in clause 4.1; and*

(b) result in the employee being better off overall at the time the agreement is made than the employee would have been if no individual flexibility agreement had been agreed to.

15. This Clause has been re-drafted at A.5 to read as follows:

> *An agreement must result in the employee being better off overall on its making than if the agreement had not been made.*

16. The plain language draft omits 4.3(a) and this is not replicated in any other sub-clauses apart from A.1 where it states that:

> *Despite anything else in this award, an employee who has started employment may agree in writing with the employer to vary how terms of this award relating <u>to any one or more of the following applies to them.</u>*
>
> (emphasis added)

17. It is not clear in A.1 that this list of terms is exhaustive and we believe so as to avoid any doubt that the new provision should make clear that an award flexibility agreement cannot be used to vary other terms in the award, therefore, the wording in 4.3(a) should be retained.

> *An agreement must result in the employee being better off overall <u>on its making</u> than if the agreement had not been made.*
>
> (emphasis added)

Clause 4.4(a)

18. The explicit requirement in clause 4.4(a) that an award flexibility agreement must be in writing has been removed. Instead clause A.1 of the plain language re-draft provides a right to agree in writing to vary a term of the award.

19. The obligation that the agreement be in writing should be contained in clause A.6 along with the other requirements of making an agreement as it is constructed in the current award. This is particularly relevant in this Award because of the large number of award reliant employees; the large number of individual flexibility agreements in

use; and the reporting by users that they only read the clause of the award they are interested in at the time.

Clause 4.4(d)

20. Clause 4.4(d) of the exposure draft requires that the agreement 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; and*
>
> (emphasis added)

21. The re-draft has removed *'in relation to the individual employee's terms and conditions of employment'*. The drafter, in the comments, has also suggested a note from the FWO be included to define better off overall and that this term may include non-financial benefits.

22. APESMA believes that is important to retain the current provision of *'in relation to the individual employee's terms and conditions of employment'* and the inclusion of a note of this nature would alter the legal effect of the clause and allow for a broader range of benefits to be used than the terms and conditions the current award provides.

23. To ensure that there is no change to the legal effect of the how an agreement results in an employee being better off overall the wording in the current award should be retained.

24. The drafter makes the following comment in relation A.6(d), how an agreement results in an employee being better off overall:

> *A NOTE or definition about 'better off overall' would be beneficial if this could be agreed. The FWO offer the following guidance: It is the employer's responsibility to ensure that the employee is better off overall than if there was no IFA. The employer's 'better off overall' assessment will usually involve comparing the employee's financial benefits under the IFA with the financial benefits under the applicable award or enterprise*

agreement. The employee's personal circumstances and any non-financial benefits which are significant to the employee can also be considered.

25. As provided in previous submissions regarding plain language drafting APESMA is concerned about the enforceability of examples and notes and our preference is that 'Examples' and 'Notes' are not included in the 'legally' enforceable document but we agree that they could be included in an 'annotated' version of the Award.

Drafter comment Clause 6.3 and 6.4

26. The drafter has made the following comment in relation to Clause 4.3 and 4.4:

> *Cl.6.3 and 6.4: It is unclear what the requirements are for employees to request/propose an individual agreement. AIRC Full Bench decision [2008] AIRCFB 1000 requires that an employer provide a written proposal (see para [38]). This decision has been interpreted that the intention was not to impose any procedural requirements on an employee seeking to enter into an agreement. If that is not the case, then clause A should be amended to include an additional provision stating how an employee may initiate the making of an agreement.*

27. APESMA agrees with these comments that the current award clause was not intended to impose any procedural requirement on an employee seeking to enter into an agreement. Consequentially we do not believe that the clause should be amended to include an additional provision stating how an employee may initiate the making of an agreement as this would result in a change to the legal effect of the current clause.

Clause 4.8 and 4.9

28. Clause 4.8 and 4.9 and the Exposure Draft have been replaced by A.11-A.14 of the re-draft. The re-drafted clause makes it less clear that the agreement may be terminated unilaterally by any party after giving the required notice or at any time by agreement, that is, without a period of notice. Clause 4.8 of the Exposure Draft makes this much clearer and this wording should be retained.

29. If A.13 is retained 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.*
>
> (Emphasis added)

Clause 7.8 Note (Clause 4.8 Note of ED)

30. APESMA agrees that the inclusion of the note in the current clause 4.8 should be included as a sub-clause as it appears at A.14.

Consultation

22.2 Consultation about changes to rosters or hours of work

31. Clause 22.2 (d) of the current award has been omitted from the draft standard clause. This clause provides that:

> *These provisions are to be read in conjunction with other award provisions concerning the scheduling of work and notice requirements.*

32. This clause should be included in a new clause B.7 and C.5 to ensure that the consultation clauses are not read so as to override other rights and obligations accrued in the current Award.

Dispute Resolution

Clause 23.1

33. The plain language re-draft of clause 23.1, at D.3 has removed the words *'as appropriate'* from the requirement that employees try to resolve the dispute with senior management.

34. The qualification 'as appropriate' should be included to avoid requiring employees to negotiate with management where this is not appropriate. A change of this nature may result in an additional requirement for employees as part of the dispute resolution

process and may result in an inappropriate and burdensome process being required in order to facilitate resolution of a grievance or dispute.

Clause 23.5

35. Clause 23.5 has been re-drafted at D.7 of the plain language re-draft. The re-drafted clause has changed the words 'organisation or association' to 'body'. The terms 'organisation and association' should be retained as this is terminology is consistent with the Act and the Award. The use of the word 'body' is not used in the Fair Work Act to define an association or organisation and it is used to refer to a completely different type of organisation, for example the Fair Work Ombudsman or the Fair Work Commission itself. The use of the word 'body' should not be used in this way in this clause of the Award because it is inconsistent with the provisions of the Fair Work Act and it is likely to cause significant confusion as to who it refers to.

Redundancy

Clause 21.2 Transfer to lower paid duties

36. The plain language re-draft has changed the words *'transferred to lower paid duties'* to *'transfer to lower paid job'* on redundancy. The re-drafted clause also goes on to refer to *'old job'* and *'new job'*. The change in terminology from 'duties' to 'job' changes the legal effect of the clause. The use of the word *'job'* creates a broader applicability than the use of the term *'duties'*.

Clause 21.3 Employee leaving during notice period

37. Clause 21.3 of the Exposure Draft states that '*The employee is entitled to receive the benefits and payments they would have received under this clause had they remained in employment….'*. The plain language re-draft, at H.3 to *'pay the employee at the full rate of pay for the hours the employee would have worked…'*.

38. The terms *'benefits and payments'* is a broader term and was originally intended to make clear that redundancy/severance payments were not impacted by the employee when given notice of termination during the notice period. The term *'benefits and payments'* should be retained.

Submitted by:

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