



Business SA Submission

4 yearly review of modern awards – Plain Language – Standard clauses

29 September 2016

Introduction

As part of the modern award plain language re-drafting process, the Fair Work Commission (FWC) released a plain language draft and comparison table for standard clauses. The standard clauses of an award relate to award flexibility, consultation, dispute resolution, termination of employment, and redundancy.¹ This draft document was released on 9 August 2016.² On 17 August 2016 the FWC gave directions for interested persons to provide submissions on these plain language re-drafted standard clauses by 4:00pm Thursday 29 September 2016.³ Business SA is pleased to provide this submission on the plain language re-drafted standard clauses.

Why this matter is important to South Australian businesses

As South Australia's Chamber of Commerce and Industry, Business SA is the peak business membership organisation in the State. Our members are affected by this matter in the following ways:

- South Australian businesses are impacted by any changes in the award system.
- South Australian employers and employees will jointly benefit from well drafted and effective modern awards, better enabling both parties to understand their rights and responsibilities.
- Small business owners make up a large proportion of our membership, these businesses are often not **able to devote the necessary resources to fully understand Australia's complex workplace regulations.**
- The modern award objective is to provide a fair and relevant minimum safety net of terms and conditions.⁴ Modern awards must be drafted such that those using the award are able to determine what they can expect and what is expected of them.
- The re-drafting process must not simplify awards such that they lose legal clarity. Certainty must prevail over simplicity.

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¹ [Directions](#) [1].

² [Plain language draft standard clauses](#), 9 August 2016.

³ [Directions](#) [2].

⁴ *Fair Work Act 2009* (Cth) s 134(1).

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1.0 Drafting Submissions

1.1 Clause A.1 – Award Flexibility for individual arrangements

The phrase at A.1 (a) ‘Arrangements for when work is performed’ has been identified as a phrase requiring further explanation under the plain language drafting principles⁵. Drafter comments⁶ note that, **“in Modern Awards Review 2012 – Award Flexibility [2013] FWCFB 2170, a Full Bench stated that while the expression “arrangements for when work is performed” is somewhat ambiguous, it is tolerably clear that hours of work, rostering, notice periods, rest breaks and variations to working hours are included in the phrase ([para 111]) (and see s.139(1)(c) of the Fair Work Act).”** As a result, a note has been proposed which indicates that such arrangements include certain clauses (listed and hyperlinked) in that specific award.

Business SA objects to the use of notes generally and in this case in particular, further submits that the note is vague as it: uses the word ‘including’ (indicating other clauses in the award may also apply); does not include all possible ‘arrangements for when work is performed’ clauses; and will have to be varied for every award it is included in to provide hyperlinks to the relevant clause.

Business SA submits the Full Bench has decided the phrase is ‘tolerably clear’ and that the note is potentially misleading and not necessary.

1.2 Clause A.6 (d) Award flexibility for individual agreements

The current award provisions require the agreement between the employer and the employee to “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). The drafter has replaced the word ‘detail’ with the word ‘show’. Business SA submits this is an unnecessary change and the word ‘show’ is a broader requirement.

1.3 Clause A.6 (d) Award flexibility for individual agreements

Clause 4.8 of the current award provisions deals with how and when the agreement may be terminated in two subclauses, (a) or (b). The redrafted provisions separate these two into A.11 and A.12 without the inclusion of the word ‘or’. Business SA submits that the change is unnecessary and possibly misleading.

1.4 Clause B.5 – Consultation about major workplace change

Business SA submits clause B.5 is less clear than the current award provision. The words ‘is deemed’ have been unnecessarily replaced with ‘must be taken’.

The current award provision is clause 22.1(a)(ii).⁷ The final sentence of this clause reads:

⁵ Report from Plain Language modern award pilot April 2016

⁶ Standard Clauses – plain language drafts and comparison table 09/08/2016

“**Provided** that where this award makes provision for alteration of any of these matters an alteration is deemed not to have **significant effect.**” (emphasis added).

The re-draft states: “**For the purpose of clause B, a change that is provided for by this award (other than clause B) must be taken not to have a significant effect on employees.**”⁸ (emphasis added).

The word ‘deem’ is defined as “to form or have an opinion; judge; think.”⁹ The phrase ‘is deemed not to have’ already uses ordinary language; it is not complex or legalistic. The current phrase clearly states the alteration of certain elements of an award is already decided to not have **significant effect.** By rephrasing this clause as ‘**must be taken not to have significant effect**’ the re-draft says the same thing in a less clear manner.

Business SA submits clause B.5 be amended to better reflect the current award. Business SA proposes the following example:

B.5 For the purpose of clause B, a change that is provided for by this award (other than clause B) *is deemed not to have significant effect. (changes emphasised).*

Alternatively, Business SA submits the final sentence of current award clause 22.1(a)(ii) could be reinstated in place of clause B.5.

- 1.5 Clause B.6(b) – Consultation about major workplace change – significant events
Business SA submits the wording of clause B.6(b) is less precise than clause 22.1(a)(ii) of the current award.¹⁰ Specifically use of **the phrase ‘skills required by employees’** in regards to the meaning of ‘significant effect’.

The current award’s language centres on the needs of the employer and the skills required by the workplace. It states:

“Significant effects include termination of employment; major changes in the **composition, operation or size of the employer’s workforce or in the skills required;** ...”¹¹ (emphasis added).

The draft standard clause states:

“significant effects, on employees, includes any of the following:

- (a) termination of employment;
- (b) major changes in the composition, operation or size of the workforce or in the skills required by employees;¹² (emphasis added).

The re-drafted clause now states a significant effect is one which changes the skills required by employees. The outcome of the significant effect/major change is what determines any new skills required in the workplace. Consequently, the skills are required by the workplace, not required ‘by the employee’.

⁷ Pharmacy Industry Award 2010.

⁸ Clause B.5.

⁹ Macquarie, *Macquarie Essential Dictionary*, 5th ed (2010), ‘Deem’, p 215.

¹⁰ Pharmacy Industry Award 2010.

¹¹ Ibid cl 22.1(a)(ii).

¹² Clause B.6.

Business SA submits that the current wording ‘the skills required’ be retained without additional wording.

- 1.6 Clause C – Consultation about changes to rosters or hours of work
Business SA submits clause 22.2(d) of the current award be returned to the re-drafted standard clause.

Clause 22.2(d) of the current award states:

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

Clause 22.2(d) serves a useful function, it makes clear to the reader that clause 22.2 operates alongside specific award provisions concerning scheduling of work and notice requirements. This clause has not been reproduced in the standard clause re-draft of the Consultation about changes to rosters or hours of work clause.

Business SA submits clause 22.2(d) be reproduced in the standard clause re-draft. Business SA proposes the following possible wording to achieve this:

‘C.5 The provisions of clause C are to be read in conjunction with other award provisions concerning the scheduling of work and notice requirements.’

- 1.7 Clause D.6 – Dispute resolution
Business SA submits clause D.6 has been unnecessarily altered between the current award¹³ and the standard clause re-draft.

Clause 23.4 allows the Fair Work Commission to use any dispute resolution method permitted by the Act¹⁴ that it considers appropriate to ensure the dispute is settled. The exact wording used is:

“Where the matter in dispute remains unresolved, the Fair Work Commission may exercise any method of dispute resolution permitted by the Act that it considers appropriate to ensure the settlement of the dispute.”

The re-drafted clause adds to this. The re-drafted clause is reproduced below:

“If the dispute is not resolved through the agreed process mentioned in clause D.5, the Fair Work Commission may use any other method of dispute resolution that it is permitted by the Fair Work Act to use and **that it considers appropriate for resolving the dispute.**”
(additions highlighted).

Business SA submits **the words ‘that it is’ and ‘to use and’ highlighted above unnecessarily** lengthen the clause without providing any interpretative benefit. While referring to the Act in full is a positive plain language step, the other additions do not make this clause any easier to interpret. Where legal and interpretative clarity will be unaffected, clauses should be as short as practicable.

Business SA submits the wording in current clause 23.4 be retained.

¹³ Pharmacy Award 2010 cl 23.4.

¹⁴ Fair Work Act 2009 (Cth).

- 1.8 Clause H.3 – Employee leaving during redundancy notice period
Business SA submits clause H.3 does not accurately reflect clause 21.3 of the current award. Particularly, the final element of the clause which excludes payment instead of notice.

The current award clause states at 21.3:

“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 had payments they would have received under this clause had they remained in employment until the expiry of the notice, but is not entitled to payment instead of notice.” (emphasis added).

The re-drafted clause states at H.3:

“The requirement for the employer to pay the employee at the *full rate of pay* for the hours the employee would have worked had the employee continued to be employed until the end of the *minimum period of notice* is not affected by the early termination of **employment by the employee.”** (emphasis in original).

While the re-drafted clause is clearer, it does not exclude payment instead of notice. This principle was stated in the current award. This creates an inconsistency between the current award and the plain language re-draft.

Business SA submits the re-draft more closely reflect the current award. One means by which this could be achieved is by adding a new clause H.4. Business SA proposes the following as possible wording:

‘H.4 An employee who terminates their employment under clause H.2 is not entitled to payment instead of notice.’

2.0 Altered Legal Effect Submissions

2.1 Clause D.4 – Dispute resolution

Clause	Pharmacy Award 2010 legal effect	Re-drafted standard clause legal effect
23.2/D.4	Clause 23.2 restricts the ability to refer a dispute to the Fair Work Commission to parties to the dispute.	Clause D.4 does not restrict ability to refer disputes to the Fair Work Commission in this manner.
How they differ	<p>The above clauses differ because the current award only allows parties to the dispute to refer the dispute to the Fair Work Commission. The re-drafted dispute resolution clause makes no such restriction. This has widened the legal scope of this clause.</p> <p>Currently, only a party to the dispute may refer that dispute to the Fair Work Commission. Under the re-drafted dispute resolution clause, a party external to the dispute could intervene and refer that dispute, even where that third party has no connection to the dispute itself.</p> <p>Business SA submits the restriction of clause 23.2 be reinstated.</p>	

3.0 Conclusion

Business SA would like to thank the Fair Work Commission for the opportunity to comment on these plain language re-drafted standard clauses.

4.0 Additional Information

Business SA's 25 May 2016 plain language submission can be found [here](#). Our 2 September 2016 submission on the plain language re-draft of the *Pharmacy Industry Award* can be found [here](#).