

CFMEU

CONSTRUCTION

IN THE FAIR WORK COMMISSION
Matter Number: AM2016/15

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Plain language –Standard clauses
(AM2016/15)

SUBMISSION OF THE CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION (CONSTRUCTION & GENERAL DIVISION) ON THE PLAIN LANGUAGE LIGHT TOUCH APPROACH TO THE GARDENING AND LANDSCAPING SERVICES AWARD

9th May 2019

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Introduction

1. The Fair Work Commission (the Commission) is currently undertaking a 4 yearly review of modern awards (the Review) in accordance with the transitional provisions of Schedule 1, Part 5 – Amendments made by the Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018, of the *Fair Work Act 2009* (the FW Act).
2. On the 28th February 2019 the Full Bench issued a Statement ([2019] FWCFB 1255) setting out the current status of matters before the Plain Language Full Bench and the next steps in the plain language project. Following a conference on 29th April 2019 a further Statement ([2019] FWC 2984) was issued by the President, Justice Ross, on 2nd May 2019, which identified the specific issues that parties were asked to focus on in any submissions filed in relation to the published example of the “light touch process” of plain language re-drafting applied to the Gardening and Landscaping Services Award exposure draft (the Gardening award). Submissions were required to be filed by 4pm on 9th May 2019.
3. The CFMMEU (Manufacturing Division) filed a submission on 2nd May 2019 on the Gardening award and identified a number of concerns. The CFMMEU (Construction and General Division) (CFMMEU C&G) supports that submission and makes this brief submission on additional matters that it has identified.

Clause 2 - Definitions

4. The Definitions clause includes a new definition “training agreement”. It is unclear where this definition originates from,¹ and appears to be inconsistent with other awards where the term training contract or (contract of training) is normally used. Also the meaning given is not as precise as other definitions used, for example under Schedule C of the Miscellaneous Award the following definition is used:

“**training contract** means an agreement for a traineeship made between an employer and an employee that is registered by the relevant State or Territory training authority”.

The CFMMEU (C&G) submits that it would be preferable to have consistent terminology used for this term across awards and suggests the following wording:

¹ There is a reference in the Hospitality PLED published on 22nd January 2018 (<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-14272-exposure-draft-hospitality-revised-220118.pdf>) to using the words “training agreement” rather than “training contract” but that award does not contain a definition.

“**training contract or contract of training** means an approved agreement for training registered with the appropriate State or Territory training authority or under the provisions of the appropriate State or Territory training legislation.”

Clause 4 - Coverage

5. In clause 4.5, clause 4.5(b) still makes reference to “an enterprise instrument” and clause 4.5(c) still refers to “a State reference public sector transitional award”. As both of these types of industrial instrument no longer have any application it is suggested that the wording be deleted.

Clause 10 – Part-time employment

6. In clause 10.3 the word “mutual” has been deleted. The inclusion of the word “mutual” is important as it makes clear that the agreement must be by consent and made without coercion. The CFMMEU (C&G) submits that the word should be re-instated.

Clause 11 – Casual employment

7. There are incorrect clause references in clauses 11.4(n), (o) and (p) to “clause 8.6”. The correct reference should be “clause 11.4”. Also in in clause 11.4(r) the reference to” clause 11.4(r)” should be to “clause 11.4(q)”.

Clause 12 - Apprentices

8. The majority of clause 12 is new, and from the table of amendments would appear to reflect the clause from the Plain Language Exposure Draft of the Hospitality Industry (General) Award 2010 (Hospitality PLED).The CFMMEU C&G does not support this clause and notes that many awards contain more detailed clauses dealing with apprentices conditions of employment. Any plain language re-drafting of this clause should therefore be dealt with on an award by award basis.

Clause 17.4 – Adult apprentice rates

9. The wording in clause 17.4(c) in the Gardening award should be rejected as it changes the effect of the clause and is a reduction from the existing provision. Under the existing clause 14.4 of the *Gardening and Landscaping Services Award 2010*, a currently employed employee who enters into a training contract for an adult apprenticeship receives the higher of their current rate of pay or the adult apprentice rate applicable to the year of the apprenticeship. Under clause 17.4(c) of the Gardening award the minimum rate applicable

before entering the training contract would continue to be applicable to the employee “throughout the apprenticeship”.

Clause 17.6 – higher duties

10. The wording in clause 17.6 – higher duties, is significantly different to that contained in the existing award. The existing award refers to “An employee who is required to perform work for which a higher rate is fixed than that provided for in their ordinary duties” whereas the wording in the Gardening award refers to “An employer who requires an employer to perform work at a higher classification than the employee’s ordinary classification”.
11. There is a subtle difference between the two in that one refers to performing work which attracts a higher rate of pay, whereas the other refers to performing work at a higher classification. An employer may require an employee to perform only one of the tasks performed by a higher classification and not the full range of duties of the higher classification. The proposed wording in the Gardening award is ambiguous as to whether the higher duties provision would apply in such a situation. As the proposed wording is potentially detrimental to employees it is not supported by the CFMMEU (C&G).

Clause 19 - Allowances

12. In clause 19.2 the wording is ambiguous. It is suggested that the word “and” be inserted so that it reads “Allowances paid for **all purposes** are included in the rate of pay of an employee who is entitled to the allowance, and when calculating any penalties or loadings or payment while they are on annual leave.”
