



HOUSING INDUSTRY ASSOCIATION



# Housing Australians



Submission to the  
Fair Work Commission

**AM2016/15 – Plain Language Drafting**

29 September 2016



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## 1. INTRODUCTION

- 1.1.1 In May 2016<sup>1</sup> the Fair Work Commission (**Commission**) indicated that in addition to conducting a pilot to produce a plain language draft of the *Pharmacy Industry Award 2010*, the pilot would also involve plain language redrafting of provisions that are common to most modern awards.
- 1.1.2 In a further Statement issued in July 2016<sup>2</sup>, the Commission advised of the constitution of a Full Bench to oversee the plain language projects and confirmed its commitment to undertake a plain language redraft of those modern award provisions identified as *Common* and those identified as *Standard*.<sup>3</sup>
- 1.1.3 It was determined that the consideration of plain language redrafts of the *Standard* provisions would commence this year, while the consideration of plain language redrafts of the *Common* provisions will not commence until 2017.
- 1.1.4 On 11 August, the Commission issued a document that set out the standard clauses from the *Exposure Draft Pharmacy Industry Award (Exposure Draft Pharmacy Award)*, a plain language draft of those standard clauses (**Plain Language Draft Clauses**) and a number of Drafters Comments.
- 1.1.5 By way of Directions dated 17 August 2016 (**August Directions**), the Commission directed interested parties to provide written submissions on the Plain Language Draft Clauses.
- 1.1.6 HIA primarily expresses an interest in the following Modern Awards:
- *Building and Construction General Onsite Award 2010 (Onsite Award)*.
  - *Joinery and Building Trades Award 2010 (Joinery Award)*.
  - *Timber Industry Award 2010 (Timber Award)*.
- 1.1.7 HIA makes these submissions in accordance with the August Directions.

## 2. PLAIN LANGUAGE DRAFT STANDARD CLAUSES

- 2.1.1 In providing comments on the Plain Language Draft Clauses HIA notes the following outlined in the August Directions:
- that where an interested party formed the view that the plain language draft has a different legal effect to the corresponding clause in the current awards the submission should specify:
    - the legal effect of the clause in the current award;
    - the legal effect of the clause in the plain language re-draft; and
    - an explanation of how they differ.

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<sup>1</sup> [2016] FWC 2837

<sup>2</sup> [2016] FWC 4756

<sup>3</sup> [2016] FWC 4756 at paragraph 5



- that where a party asserts that a clause in the plain language draft does not meet the modern awards objectives the submission should specify why this is the case.

2.1.2 The Plain Language Draft Clauses also include a number of Drafters Comments. HIA also takes this opportunity to respond to those comments.

## 2.2 GENERAL OBSERVATIONS

2.2.1 HIA supports moves that would see Modern Awards become simpler and easier to understand and agrees with the proposition that Modern Awards should be drafted in plain language.

2.2.2 However, in undertaking such a task there must be a balance between the treatment of Modern Awards as industrial instruments, the breach of which could result in serious penalties and the inclusion within those industrial instruments of guidance materials, which is generally found other than in the instrument itself and provided by external sources.

2.2.3 HIA submits that to conflate these functions i.e. as a regulatory instrument and as a form of guidance would be at odds with the Modern Awards Objectives and should be avoided.

### *The use of 'notes'*

2.2.4 A number of the Plain Language Draft Clauses include 'notes'.

2.2.5 HIA recognises the desire of small businesses to have one document that contains all the terms and conditions of employment.

2.2.6 As such, HIA would generally be supportive of:

- The use of hyperlinks within the Modern Awards to the full NES entitlements.
- The limited use of 'notes' on the basis that it is made clear that the note is not intended to give rise to award obligations.

### *Differences across Modern Awards*

2.2.7 HIA notes that Attachment A to the Plain Language Draft Clauses comparison document highlights those Modern Awards that contain provisions that differ from those within the Exposure Draft Pharmacy Award.

2.2.8 HIA notes that at paragraph 7 of the August 11 Statement<sup>4</sup> the Full Bench determined that:

*'Awards that contain provisions that differ from the standard terms or contain allied provisions....will be dealt with by either the Plain Language Full Bench or through the Award stage proceedings for the relevant award. Those matters will be dealt with after a decision on the plain language standard clauses has been issued.'*<sup>5</sup>

<sup>4</sup> [2016] FWCFB 5621

<sup>5</sup> A similar observation was made in the 15 July 2016 Statement [2016] FWC 4756 at paragraph 16



2.2.9 For the sake of clarity, where appropriate, HIA has identified in Attachment A to these submissions a different or allied provision within the awards in which HIA has an interest.

## 2.3 AWARD FLEXIBILITY

### A.1 (a) arrangements for when work is performed

2.3.1 While HIA would agree with the Drafters Comments that more specificity in relation to the meaning of 'arrangements for when work is performed' within the Modern Awards is desirable, HIA has a number of reservation about the proposal to include the following NOTE at Clause A.1:

*'NOTE: Arrangements for when work is performed include such matters as hours of work, roster arrangements and breaks.'*

2.3.2 In the Award Flexibility Decision<sup>6</sup> the Commission identified the uncertainty arising from A.1(a):

*[108] While we are not persuaded to vary the scope of the model flexibility term in the manner sought we acknowledge that subclause 7.1 has given rise to some ambiguity and uncertainty, particularly in relation to the scope of the expression 'arrangements for when work is performed'. It is appropriate that this ambiguity and uncertainty be addressed.*

*[109] As to how this matter may be addressed a number of parties agreed with the proposition that one way of providing clarification would be to identify the specific provisions within each modern award that fall within the expression 'arrangements for when work is performed' in clause 7.1...*

...

*[111] It is tolerably clear that the AIRC Full Bench intended that the reference to 'arrangements for when work is performed' would include the matters specifically identified in s.576J(1)(c), of the WR Act (now s.139(1)(c) of the FW Act), that is 'hours of work, rostering, notice periods, rest breaks and variations to working hours'.*

...

*[117] Having rejected the contention that minimum engagement terms fall within the meaning of the expression 'arrangements for when work is performed', the task remains to provide greater clarity as to the award terms that do fall within that expression. In our view, this is best done on an award by award basis, on application by an interested party. In the event such an application is made we will publish draft variations which will identify the specific clauses in the relevant modern award which fall within the purview of the expression 'arrangements for when work is performed'.*

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<sup>6</sup> [2013] FWCFB 2170



- 2.3.3 Despite the invitation of the Full Bench in its decision HIA is unaware of any party making such an application.
- 2.3.4 On the face of it, the extracts above are obiter and properly characterised as guidance on the meaning of the term *'arrangements for when work is performed'* as such, whilst these views may be persuasive they are not legally binding.
- 2.3.5 Additionally while a 'note' does not hold legal force, in HIA's view, in this case, its inclusion implicitly gives weight to a certain interpretation of the provision.
- 2.3.6 HIA submits that the insight provided by the Award Flexibility Decision is most appropriately relied on and disseminated by the Fair Work Ombudsman (**FWO**) and other industrial parties.
- 2.3.7 Additionally, if it is suggested that hyperlinks be used (indicated by the underlining of certain terms in the Plain Language Draft Clause) to link the various *hours or work, rostering arrangements* and *breaks* provision within the Award to clause 7.1 HIA is concerned that this may, in fact lead to confusion.
- 2.3.8 For example, under the Onsite Award provisions in relation to breaks are located at various places throughout the Modern Award. Also, the Onsite Award refers to crib time, rest breaks and meal breaks; the express interaction between these award provisions raises the question of whether the reference to *breaks* in the NOTE is intended to apply across all types of rest periods under the Onsite Award.
- 2.3.9 In light of the above when weighed against the Modern Awards Objectives to consider *the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden* HIA submits that this NOTE should be removed.

**A.3 and A.4 – Requirements for an employee to request/propose an individual agreement**

- 2.3.10 HIA notes the Drafters Comments in relation to the requirements for an employee to request/propose an individual agreement.
- 2.3.11 HIA would agree with the interpretation of the AIRC Full Bench Decision<sup>7</sup> that the intention of the Award Flexibility Term was not to impose any procedural requirements on an employee seeking to enter into an agreement. As such, no change is necessary.
- 2.3.12 Further, to insert, as suggested by the Drafters Comments, an additional provision stating how an employee may initiate the making of an agreement would represent a substantive change to the Modern Awards requiring the provision of cogent evidence demonstrating that the change is necessary to meet the Modern Awards Objectives.<sup>8</sup>

**A.6(c) set out how the award term, or each term, is varied**

- 2.3.13 HIA submits that the redraft of A.6(c) could be improved.

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<sup>7</sup> [2008] AIRCFB 1000  
<sup>8</sup> [2014] FWCFB 1788 at paragraph 60



2.3.14 It is unclear why the terms 'or each term' have been included.

2.3.15 In HIA's view it is sufficient that A.6 (c) state:

*'set out how the award term is varied'*

**A.6 (d) show how the agreement results in the employee being better off overall on its making than if the agreement had not been made**

2.3.16 HIA notes that the existing term 'detail' has been replaced with the word 'show'.

2.3.17 *Detail* is defined as:

*'an individual or minute part; an item or particular...particulars collectively; minutiae....a dealing with or treating part by part or item by item.'*<sup>9</sup>

2.3.18 *Show* is defined as:

*'to cause or allow to be seen: exhibit; display; present....to make clear: make known; explain...to prove; demonstrate.'*<sup>10</sup>

2.3.19 Clearly there is a difference in the meaning of the two terms, yet there is no explanation within the Drafters Comments as to the need for the change in the interests of plain language drafting.

2.3.20 It is HIA's view that the use of the term 'show' imposes a higher threshold on an employer when considering and substantiating that an Individual Flexibility Agreement meets the BOOT and as such potentially changes the legal effect of the provision.

2.3.21 Further, in the interests of promoting a 'stable' modern awards system that does not adversely impact employment costs and regulatory burden HIA submits the existing term 'detail' be retained, the satisfaction of this requirement is understood.

2.3.22 For completeness HIA would not be supportive of the insertion of a NOTE or definition of 'better off overall' as suggested in the Drafters Comments. Such matters are best left to judicial interpretation and as outlined above, such materials are best left as guidance material to be relied on and disseminated by the FWO and industrial parties.

## **2.4 CONSULTATION ABOUT MAJOR WORKPLACE CHANGE**

2.4.1 HIA is supportive of the proposed changes to this provision.

<sup>9</sup> Macquarie Dictionary (2006) 4<sup>th</sup> edition at pg. 215

<sup>10</sup> Macquarie Dictionary (2006) 4<sup>th</sup> edition at pg. 742



## 2.5 CONSULTATION ABOUT CHANGE TO ROSTER OR HOURS OF WORK

2.5.1 HIA raises two matters in relation to the Plain Language Draft Clause of the *consultation about change to roster or hours of work* provision:

- The removal of existing Clause 22.2(d); and
- The removal of the parenthesis in C.3(d).

### **Clause 22.2(d)**

2.5.2 HIA notes that clause 22.2(d) has been removed from the Plain Language Draft Clause.

2.5.3 The Commission in its decision of 23 December 2013 *Consultation Clause in Modern Awards*<sup>11</sup> (**Consultation Decision**) inserted clause 22.2(d) to make it clear that the newly inserted consultation term was to be *'read in conjunction with other award provisions concerning the scheduling of work and notice provisions.'*<sup>12</sup>

2.5.4 The Commission has held that previous Full Bench decisions should be followed *'in the absence of cogent reasons for not doing so.'*<sup>13</sup>

2.5.5 On this basis HIA submit that the existing clause 22.2(d) be retained within the consultation term.

### **Clause C.3(d)**

2.5.6 HIA notes that the Plain Language Draft Clause has removed the parenthesis from the words *'including the impact in relation to their family or caring responsibility'* in clause C.3(b). HIA opposed this change.

2.5.7 In general terms, a *'bracket'* is understood as something that provides support.<sup>14</sup>

2.5.8 In grammatical terms, parenthesis are mainly used:

- To separate off information that isn't essential to the meaning of the rest of the sentence. If you removed the bracketed material the sentence would still make sense.<sup>15</sup>
- To enclose a word which is offered to explain or supplement a point.<sup>16</sup>

2.5.9 The current provision is reflective of section 145A of the *Fair Work Act 2009 (Act)* and was considered by the Full Bench in the Consultation Decision, who determined that the term remain consistent with that provided by the Act.

2.5.10 Further, and in light of the reason for the use of parenthesis, HIA is concerned that the removal of the parenthesis may impact the legal effect of the provision, by, for example, elevating the current terms

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<sup>11</sup> [2013] FWCFB 10165 at paragraphs 46 – 50.

<sup>12</sup> Ibid at paragraph 50

<sup>13</sup> [2014] FWCFB 1788 at paragraph 60

<sup>14</sup> Macquarie Dictionary (2006) 4<sup>th</sup> edition at pg.92

<sup>15</sup> <https://en.oxforddictionaries.com/punctuation/parentheses-and-brackets>

<sup>16</sup> <https://www.macquariedictionary.com.au/resources/view/resource/6/>



to the exclusion of other matters to the detriment of both an employer (who may inadvertently breach the award) and an employee (who maybe resisting a change on some other basis).

- 2.5.11 On the basis of the above and in lieu of any reasons being provided as to the necessity for the change, HIA submits that parenthesis be retained.

## 2.6 DISPUTE RESOLUTION

- 2.6.1 Clause 23.2 provides:

*'If a dispute about a matter arising under this award or a dispute in relation to the NES is unable to be resolved at the workplace, and all appropriate steps under clause 23.1 have been taken, a party to the dispute may refer the dispute to the Fair Work Commission.'*

- 2.6.2 HIA notes that the Plain Language Draft Clause changes the words highlight in yellow as follows:

*'If the dispute is not resolved at the workplace through discussions as mentioned in clauses D.2 and D.3, a party may refer the dispute to the Fair Work Commission.'*

- 2.6.3 Significantly, the words *'to the dispute'* have been removed.

- 2.6.4 HIA opposes this change.

- 2.6.5 HIA submits that if this change were adopted it would change the legal effect of the provision and broaden its application to permit 'any party' a right to refer a dispute to the Commission. This is at odds with the intention of the current provision which clearly confines this right to the parties to the dispute.

- 2.6.6 HIA submits that the words *'to the dispute'* be retained within the Plain Language Draft Clause.

### ***Dispute resolution procedure training leave***

- 2.6.7 Both the Onsite Award and the Timber Award provide an additional provision that provides for dispute resolution in relation to training leave (see Attachment A).

## 2.7 TERMINATION OF EMPLOYMENT

- 2.7.1 HIA seeks to raise two of matters in relation to the Termination of Employment Plain Language Draft Clause including:

- The use of NOTES; and
- The inclusion of NES summaries.

- 2.7.2 These matters relate predominately to the satisfaction of the Modern Awards Objectives.

- 2.7.3 HIA notes that the provisions of the Onsite Award, Joinery Award and Timber Award all differ from those contained within the Exposure Draft Pharmacy Award, in that they do not currently extract Table x – Period of Notice.

- 2.7.4 Attachment A extracts the relevant provisions of the abovementioned awards.



### **The use of 'notes'**

2.7.5 The Plain Language Draft Clause includes a NOTE in the following terms:

*NOTE: The National Employment Standards set out requirements for notice of termination by an employer. See Part 2.2, Division 11 of the Fair Work Act*

2.7.6 The Onsite Award, Joinery Award and Timber Award contain the following provision which simply states:

*'Notice of termination is provided for in the NES'.*

2.7.7 HIA opposes the proposed change and the use of the NOTE in the terms above. HIA supports the retention of the existing provision which, in HIA view, is clearer and easier to understand and as such better meets the Modern Awards Objectives.

2.7.8 It is also of concern that if a hyperlink is inserted linking the award to **Part 2.2, Division 11 of the Fair Work Act**, this may actually result in some confusion as this directs the reader to provisions that go beyond just the required notice of termination. Such an outcome should be avoided.

### **NES Summaries**

2.7.9 The inclusion of summaries of the National Employment Standards was addressed during the review of Group 1 Awards.

2.7.10 During those proceedings HIA made submissions dated 11 November 2014 outlining opposition to the inclusion of substantive NES entitlements within Modern Awards on the basis that there is a real risk that the inclusion of the NES entitlement within Modern Awards would give rise to an additional obligations, the consequence of which is that an award breach may result in a penalty for both the breach of an award term and a penalty for a breach of a legislative provision.

2.7.11 Such an outcome sits at odds with the Modern Awards Objectives that requires the Commission to consider the *'impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden'*.

2.7.12 Further, in its decision of 23 December 2014<sup>17</sup> (**December Decision**) the Commission stated that:

*'At the hearing on 18 November 2014 the Commission foreshadowed an approach whereby it would publish two documents – the legal instrument, being the modern award as reviewed, and an annotated version of each modern award. The legal instrument would not contain summaries of NES entitlements or links to various legislation, such as the proposal in relation to pay slips. The second document will be an annotated version of each award, published by the administrative arm of the Commission and will contain summaries of NES entitlements and links to various legislative provisions. Interested parties will be consulted as to the terms of annotated awards to be published by the Commission.'*

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<sup>17</sup> [2014] FWCFB 9421 at paragraph 35



- 2.7.13 On the basis of the December Decision HIA submit that for those Modern Awards that do not currently include the provision as contained within the Exposure Draft Pharmacy Award, such provisions should not be incorporated into those Modern Awards.
- 2.7.14 Additionally, it would seem a duplication to include a hyperlink to the relevant sections of the Act (addressed above) and also extract the relevant notice of termination periods within the content of the Modern Award. In the alternative HIA submit that if a hyperlink is included then the provisions of the NES need not be extracted.

## **2.8 REDUNDANCY**

- 2.8.1 HIA notes that clause 17 of the Onsite Award provides for an industry specific redundancy scheme which is subject to a number of variation applications during this 4 yearly review of Modern Awards.
- 2.8.2 HIA also notes that despite the small business exemption from the obligation to pay redundancy provided by the Act, clause 17.2 of the Joinery Award and clause 15.7 of the Timber Award provide for the application of redundancy to small businesses covered by those awards.
- 2.8.3 As such HIA submits that this Plain Language Draft Clause is not relevant for these awards.

## **2.9 TRANSFER TO LOWER PAID DUTIES**

- 2.9.1 It is unclear from the Plain Language Draft Clause if the terms in bold and italics are intended to be defined terms.
- 2.9.2 If they are to be defined terms, the insertion of the Plain Language Draft Clause will need to be assessed on an award by award basis to ensure the terms used (and to be defined) are appropriate. Specifically, the use of the term '*full rate of pay*' will need to be considered in light of the terms used in each Modern Award, for example neither the Timber Award nor the Joinery Award use this terminology. Further, the use of the appropriate term in this context will also be impacted by the Commissions decisions in relation to the definition of 'ordinary hourly rate' and the treatment of all-purpose allowances.<sup>18</sup>
- 2.9.3 HIA respectfully submits that these matters are best dealt with during the Award Stage and for Group 1 Awards such as the Timber Award, on issuance of draft determinations in relation to that award.
- 2.9.4 HIA notes that the Onsite Award does not currently contain this provision of the Exposure Draft Pharmacy Award.

## **2.10 EMPLOYEE LEAVE DURING REDUNDANCY NOTICE PERIOD**

- 2.10.1 HIA submits that clause H.3 of the Plain Language Draft Clause is not simpler and easier to understand than the current provision.

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<sup>18</sup> See [2014] FWCFB 9412, [2015] FWCFB 4658



- 2.10.2 HIA understands that the intent of the current provision is to preserve the redundancy entitlements of an employee who may leave the employment during the notice of termination period, but that if the employee does in fact leave during that notice period the employee is not entitled to payment instead of notice.
- 2.10.3 In HIA's view H.3 reverses the operation of the current provision such that if an employee, made redundant, leaves during the notice period the employer will be required to pay the employee despite the early termination.
- 2.10.4 Clearly the Plain Language Draft changes the legal effect of the provision and if adopted would be substantially at odds with the Modern Awards Objectives.
- 2.10.5 HIA submits that the current provision be retained.
- 2.10.6 HIA also notes that there are some award specific differences that will require that the Plain language Draft Clause be tailored to suit those awards, for example the reference to section 119 of the Act will not be relevant for, for example the Onsite Award.

## **2.11 JOB SEARCH ENTITLEMENT**

- 2.11.1 HIA supports the Plain Language Draft Job Search Entitlement clause.
- 2.11.2 For the sake of clarity, under the Onsite Award clause 17, the industry specific redundancy scheme does not provide for a job search entitlement, this entitlement is confined to Clause 16 – termination of employment.



## ATTACHMENT A

<b>DISPUTE RESOLUTION PROCEDURE TRAINING LEAVE</b>	
Onsite Award	<p>Clause 9.7</p> <p>(a) For the purpose of this clause, an eligible employee representative is an employee who is a shop steward, a delegate, or an employee representative duly elected or appointed by the employees in an enterprise or workplace or part of an enterprise or workplace for the purpose of representing those employees in the dispute resolution procedure.</p> <p>(b) An eligible employee representative will be entitled to up to five days' paid leave per year to undertake training that will assist them in their settlement of disputes role. The time of taking such leave will be agreed between them and their employer so as to minimise any adverse effect on the employer's operations.</p>
Timber Award	<p>11.1 An eligible employee representative who will be involved in dispute resolution will be allowed to be trained in order to assist the employee to settle disputes as per this clause. The employee must arrange for suitable training and apply in writing with a minimum of six weeks notice (or less amount by agreement) for up to five days leave with pay each calendar year, non-cumulative.</p> <p>11.2 The notice to the employer must include details of the type, content and duration of the course to be attended. The employer must have a reasonable opportunity to:</p> <p style="padding-left: 40px;">(a) consult with the eligible employee representative and/or the training provider regarding dispute resolution training; and</p> <p style="padding-left: 40px;">(b) participate in the development of the dispute resolution training course.</p> <p>11.3 Leave of absence granted pursuant to this clause will count as service for all purposes.</p> <p>11.4 The time of taking leave will be arranged so as to minimise any adverse effect on the employer's operations.</p> <p>11.5 For the purpose of determining the entitlement of employee representatives to dispute resolution procedure training leave, an eligible employee representative is an employee who is a shop steward, a delegate, or an employee representative duly elected or appointed by the employees in an enterprise or workplace generally or collectively for all or part of an enterprise or workplace for the purpose of representing those employees in the dispute resolution procedure</p>
<b>TERMINATION OF EMPLOYMENT</b>	
Onsite Award	<p>16.1 Notice of termination is provided for in the NES. The notice provisions of the NES do not apply to a daily hire employee working in the building and construction industry.</p> <p>16.2 Notice of termination by an employee</p> <p>The notice of termination required to be given by an employee is the same as that required of an employer, save and except that there is no requirement on the employee to give additional notice based on the age of the employee concerned. If an employee fails to give the required notice the employer may withhold from any monies due to the employee on termination, under this award or the NES, an amount not exceeding the amount the employee would have been paid under this award in respect of the</p>

	period of notice required by this clause, less any period of notice actually given by the employee.
Timber Award	<p>14.1 Notice of termination is provided for in the NES.</p> <p>14.2 Notice of termination by an employee  The notice of termination required to be given by an employee is the same as that required of an employer except that there is no requirement on the employee to give additional notice based on the age of the employee concerned. If an employee fails to give the required notice the employer may withhold from any moneys due to the employee on termination under this award or the NES, an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by this clause less any period of notice actually given by the employee</p>
Joinery Award	<p>16.1 Notice of termination is provided for in the NES.</p> <p>16.2 Notice of termination by an employee  The notice of termination required to be given by an employee is the same as that required of an employer except that there is no requirement on the employee to give additional notice based on the age of the employee concerned. If an employee fails to give the required notice the employer may withhold from any monies due to the employee on termination under this award or the NES, an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by this clause less any period of notice actually given by the employee.</p>