4 yearly review of modern awards - plain language – standard clauses

AM2016/15

NATIONAL FARMERS' FEDERATION

SUBMISSION

Date: 29 September 2016

1. The National Farmers' Federation (**NFF**) is the peak industry body representing Australian farmers and agribusiness across the supply chain, including all of Australia's major agricultural commodity groups.

2. The NFF makes this submission in accordance with the Directions issued by the Fair Work Commission (**Commission**) on 17 August 2016 in the above matter. Specifically, it deals with:

    a. areas where clauses in the plain language draft have a different legal effect to the corresponding clause in the current award; and

    b. areas where a clause in the plain language draft does not meet the modern awards objective.

The modern award review

3. Under the *Fair Work Act 2009* (**FW Act**), the Commission must review each modern award in its own right every four years (section 156). The modern awards objective applies to the review.

4. Section 134 contains the modern awards objective. The Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account the following relevant criteria:

    a. the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (subsection 134(1)(f)); and

    b. the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (subsection 134(1)(g)).

The plain language pilot

5. The Commission has embarked on a process of seeking to simplify modern awards by redrafting them in 'plain language'.[1]

6. While the process is initially limited to a small number of modern awards, it is likely that changes made to those modern awards will flow through to other modern awards in a number of respects.

7. The Commission has made clear that a number of plain language 'standard clauses' will be inserted into exposure drafts as they are periodically revised during the Award stage of the Review.[2] Standard clauses deal with award flexibility, termination of employment, redundancy, consultation and dispute resolution.

8. Further plain language changes may be introduced, depending on the resources available to the Commission, during the remaining period of the four yearly review.

Clauses that would have a different legal effect

9. The NFF's comments on the standard clauses in the Exposure Draft of the Pharmacy Industry Award 2014 are set out below, in relation to each of the proposed standard clauses.

Award flexibility

<u>Clause A.1</u>

10. Proposed clause A.1 rewrites current clause 4.1 of the Pharmacy Award.

11. Under clause 4.1, an employer and an individual employee may <u>agree to vary the application</u> of certain terms of the award.

12. Under proposed clause A.1, an employee who has started employment may agree in writing with the employer to <u>vary how terms of the award apply</u> to them.

13. There is a difference between the phrase "vary the application" and the phrase "vary how the terms of the award apply".

14. "Vary the application" could include varying the fact of application of a particular term. For example, an individual flexibility arrangement (IFA) might provide for payment of a gross annual salary which factors for the first aid allowance each week.

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[1] *4 yearly review of modern awards - Plain language modern awards* [2016] FWC 2837, 6 May 2016
[2] [2016] FWCFB 5621 at [6]

The effect of the agreement would be to disapply the first aid allowance award term on the basis that compensation for the allowance was included in the annual salary.

15. In contrast, the phrase "vary how the terms of the award apply" implies that what can be agreed is how a term applies to the employee in a particular respect – not that the particular term cannot apply at all.

16. This can be overcome by amending proposed clause A.1 so that it reads "…an employee who has started employment may agree in writing with the employer to <u>vary the application of any one or more of the following terms</u>...".

<u>Clause A.6(d)</u>

17. The opening word of clause A.6(d) replaces the word "detail" with the word "show".

18. In our submission, this represents a nuanced change in meaning. "Detail" requires that a description of the manner in which the employee will be better off overall must be included in the IFA. "Show" lifts the bar slightly, suggesting that the detail provided must demonstrate conclusively that the better off overall test is met.

19. Our preference would be to retain the word "detail", to avoid any suggestion that this requirement is more onerous than it is intended to be.

20. In relation to the proposed FWO note about "better off overall", changes would be required in order for the NFF to support the form of words provided:

    a. The note suggests that it is the employer's responsibility to ensure that the employee is better off overall than if there was no IFA. In our view, this is a joint responsibility, achieved by agreement. Employers may bear all the legal risk of an employee not being better off overall, but they rely on information provided by the employee to ascertain whether the relevant threshold has been met.

    b. The note suggests that only non-financial benefits that are "significant to the employee" can be considered in the context of the better off overall test for IFAs. In our view, this is not what section 203(4) of the FW Act provides. Any non-monetary benefits can be considered in the context of an IFA, as long as overall, the IFA results in the employee being better off overall. A note which seeks to narrow the terms of the FW Act in this way will influence how the

better off overall test is applied in relation to IFAs and may lead the Commission into error in its application of the relevant test in the FW Act.

<u>Clause A.9</u>

21. Proposed clause A.9 requires the employer to "keep a copy of the agreement" (that is, the IFA) as a time and wages record and "give another copy" to the employee.

22. This is different to current clause 4.5, which requires the employer to keep the actual agreement as a time and wages record, and give a copy of the IFA to the employee.

<u>Clause A.14</u>

23. Proposed clause A.14 converts a notation in the current award into a substantive award term. This may affect the interpretation of the award and at the very least duplicates a legal requirement of the FW Act in the award. The notation should be retained.

Consultation

<u>Clause B.1</u>

24. Proposed clause B.1 changes the language in clause 22 of the current award from past tense to present tense. Given that clause 22 has a long history and is frequently the subject of disputes, care should be taken not to disrupt the well-established meaning of its terms.

25. In particular, it should be made clear that the obligation to consult only arises <u>after</u> a definite decision has been made to introduce major change.

26. The combination of a shift to present tense and removal of the phrase "after a definite decision has been made" (appearing in clause 22.1(b)(ii)) of the current award) may be interpreted as requiring consultation to occur "at the earliest practicable date", which may be before or after the decision is made.

27. This concern can be remedied by amending proposed clause B.1(b) as follows:

    "(b) at the earliest practicable date *after the decision has been made*, discuss…".

28. Proposed clause B.1(b) sets out what must be discussed with employees and their representatives. The changes in wording alter the meaning of the clause, as set out in the table below.

Clause	Subject matter – current term	Subject matter – proposed term	Difference
Old clause 22.1(b)(i); New clause B.1(b)(i)	The introduction of change	*When* the changes *are* to be made	The current form of words is about the fact that changes will be made. The proposed form of words is about when those changes will be made.
Old clause 22.1(b)(i); New clause B.1(b)(ii)	The effects the changes are likely to have on employees	Their likely effect on employees	No difference
Old clause 22.1(b)(i); New clause B.1(b)(iii)	Measures to avert or mitigate the adverse effects of such changes on employees	*The* measures that *are to be taken* to avoid or reduce the adverse effects of the changes on employees	The current form of words requires discussion on *any* measures (whether proposed or possible) that may assist in reducing the effect on employees, without creating an obligation to adopt measures of this kind. The proposed form of words implies that measures must be taken with the aim of reducing the effect on employees.

Clause B.2

29. Proposed clause B.2 is more prescriptive than current clause 22.1(b)(iii) of the award.
30. Under clause 22.1(b)(iii), the employer must provide, in writing, all relevant information about the changes.
31. Under clause B.2, the employer must provide "a written notice" that "contains all relevant information about the changes".
32. This change of words suggests that the information provided to employees be in a single notice, as opposed to multiple documents which together contain all relevant information.

33. The change in meaning could be overcome by amending proposed clause B.2 as follows:

    B.2 For the purposes of the discussion under clause B.1(b), the employer must give*, in writing,* ~~a written notice~~ to the employees and their representatives (if any) ~~that~~:

    (a) ~~contains~~ all relevant information about the changes including:…".

<u>Clause B.5</u>

34. Proposed clause B.5 seeks to reflect the last sentence of current clause 22.1(a)(ii). However, its separation from the definition of "significant effects" may unintentionally broaden its meaning.
35. In the current award term, the provision is as follows:

    "Provided that where this award makes provision for alteration <u>of any of these matters</u>…".
36. "These matters" are those specified in the definition of "significant effects":
    a. termination of employment;
    b. major changes in the composition, operation or size of the employer's workforce or in the skills required;
    c. elimination or diminution of job opportunities;
    d. promotion opportunities or job tenure;
    e. alteration of hours of work;
    f. need for retraining or transfer of employees to other work or locations; and
    g. restructuring of jobs.
37. In clause B.5, the term reads as follows:

    "For the purpose of clause B, a change that is provided for by this award (other than clause B) is taken not to have a significant effect on employees."
38. The type of change is not limited by subject matter, unlike current clause 22.1(a)(ii).
39. To address this concern, clause B.5 could be amended as follows:

    "For the purpose of clause B, a change *of the kind described in clause B.6(a) – (g)* that is provided for by this award (other than clause B) is taken not to have ~~a~~ significant effect*s* on employees."
40. Subclause B.6(b) should be amended to reflect the wording in the current award:

    "(b) major changes in the composition, operation or size of the *employer's* workforce or in the skills required ~~by employees.~~"

41. This change is important so that the scope of consultation is not extended to cover changes in the composition of the workforce or the skills required at a workplace that are not limited to the workforce of the employer. For example, contractors could fall within the scope of the expanded clause.

Clause C.3(b)

42. Under proposed clause C.3(b), an employer must invite employees to "give their views about the impact of the proposed change on them, including *its* impact on their family or caring responsibilities.
43. Under current clause 22.(b)(ii), the requirement is expressed as inviting employees to "give their views about the impact of the proposed change on them, (including *any* impact in relation to their family or caring responsibilities).
44. The word "its" should be replaced with the word "any" to accommodate circumstances where an employee has no family or caring responsibilities.

Dispute resolution

Clause D.3

45. Proposed clause D.3 replaces the words "in a timely manner" in current clause 23.1 with the words "as soon as practicable". This change of words imposes a greater urgency on parties to resolve the dispute than is currently required.

Clause D.4

46. Proposed clause D.4 applies "if the dispute is not resolved at the workplace through discussions" mentioned in clauses D.2 and D.3.
47. The equivalent term in the current award, clause 23.2, applies if a dispute "is unable to be resolved at the workplace" and all appropriate steps under clause 23.1 have been taken.
48. Elements of the current clause that have been omitted from proposed clause D.4 are:
    a. the inability of the parties to resolve the dispute (not just the fact that they have not done so); and
    b. the requirement that all prior appropriate steps under the dispute resolution procedure be followed before the matter is referred to the Commission.
49. These elements are an important inducement to the parties to make all reasonable efforts to resolve disputes before they are referred to the Commission, and should be retained.

Clause D.7

50. Proposed clause D.7 provides that “a party” may appoint “any person or body to support or represent them” in a dispute resolution process.
51. Current clause 23.5 provides that “an employer or employee” may appoint “another person, organisation or association to accompany and/or represent them” in a dispute resolution process.
52. The reference to “a party” is broader than the reference to “an employer or employee”. For example, it could include a representative who has been involved in the dispute.
53. The reference to “any person or body” is broader than the reference to “another person, organisation or association” as it would also include a self-appointment (although this is unlikely to have any significant practical effect). The use of the word “any”, however, may give rise to an inconsistency with section 176(3) of the FW Act to the extent that it permits representation by a person who cannot be a bargaining representative under the relevant industrial rules.
54. The reference to “support or represent” is narrower than the reference to “accompany and/or represent”. Under the current clause, an appointed person can take on one or both of the support and representation roles. Under the proposed clause, only one role could be taken on by the appointed person or body.

Clause D.8(b)

55. Proposed clause D.8(b) limits the obligation on employees in relation to compliance with directions to perform work to employees who are party to the dispute. This limitation is not found in current clause 23.6 of the award.

Redundancy

Clause G.1(b)

56. Proposed clause G.1(b) applies if an employer “wishes to transfer” an employee to a “new” job, whereas current clause 21.2 applies where an employee “is transferred”. There may be occasions, such as in a voluntary redundancy scenario, where the transfer is initiated by the employee. There is no need to introduce the element of intent into the clause or that the job be a “new” one (which may be interpreted as a

newly created job). All that is required is that an employee is transferred to lower paid duties.

57. Similarly, clause G.1(b) introduces the new concept of transfer to a "lower classification and lower hourly rate of pay". This may limit the scope of the clause to transfers to other classifications contained in the award, and/or operate so that it does not apply to employees who are not engaged on an hourly basis (such as pieceworkers).
58. This can be overcome by revising clause G.1(b) as follows:

"(b) ~~wishes to~~ transfer*s* the employee to a ~~new,~~ *lower paid* job (**the new job**) ~~at a lower classification and lower hourly rate of pay~~."

Clause G.4

59. Proposed clause G.4 increases the amount payable to an employee transferred to lower paid duties.
60. Under the FW Act, notice of termination and redundancy entitlements are paid at the base rate of pay, which is defined in section 16 of the FW Act and excludes (among other things) overtime and penalty rates.
61. Under current award clause 21.2, payment for the period of notice where an employee is transferred to lower paid duties is at the "ordinary time rate of pay" (which also excludes overtime and penalty rates).
62. Proposed clause G.4 would apply the full rate of pay to these entitlements. Full rate of pay is defined in section 18 of the FW Act and includes overtime and other loadings and penalty rate payments.
63. If clause G is to be adopted in lieu of current clause 21.2 (which is much simpler), it should refer to the base rate of pay and the note should refer to section 16 of the FW Act.

Clause H

64. Clause H.1 should apply if an employee has been given notice of termination, including where the notice is given by a liquidator or receiver who may not be the employer of employees.

65. The cross reference at the end of clause H.1 to section 119 of the FW Act should also refer to sections 121 and 122, which affect an employee's entitlement to redundancy pay.

66. Clauses H.2 and H.3 change the meaning of current clause 21.3, as follows:

Clause 21.3	**Proposed clause H.2**	**Difference**
An employee given notice of termination in circumstances of redundancy may terminate their employment during the period of notice.	An employee may terminate their employment at any time during the minimum period of notice required to be given by their employer.	If an employer gives an employee a longer period of notice than that required by the FW Act, entitlements in relation to notice under this clause are limited to entitlements in relation to notice under the NES.
The employee is entitled to receive the benefits and 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.	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 under the end of the minimum period of notice is not affected by the early termination of employment by the employee.	Notice and redundancy payments are paid at the base rate of pay. The intention of the current clause is to ensure that wages and accrued entitlements are calculated up to the end of the period of notice, and to relieve the employer of the obligation to pay instead of notice where an employee chooses to leave early. This latter element of the current clause is not reflected in the revised clause. As a result, employers would be required to pay an employee instead of notice in addition to their wages and accrued entitlements up until the last day of notice, even though the employee chose to leave early.

Clause I

67. Proposed clause I.6 limits the 'no entitlement to payment' rule where no proof is provided to time off in excess of one day per week.
68. Current clause 21.4 provides that if an employee has been allowed paid leave for more than one day during the notice period (as opposed to more than one day per week during the notice period) and the employee does not produce proof of attendance at an interview on request, they will not be entitled to payment "for the time absent". The non-entitlement to payment is for all time absent, not only time absent in excess of one day per week.

Clauses that would not meet the modern awards objective

Clauses A.5 and A.6(d)

69. Clauses A.5 and A.6(d) also replace the phrase "at the time the agreement is made" in clause 4.3(b) of the current award with the phrase "on its making". In our view, the phrase "at the time the agreement is made" should be retained, as it is easier to understand than the alternative proposed wording, both on a plain reading of the text and because it has been the subject of many Commission decisions.

Clause A.10

70. Proposed clause A.10 rewrites clause 4.2 of the current award term, which deals with coercion and duress.

71. Under clause 4.2, an employer and employee "must have genuinely made the agreement without coercion or duress."

72. Under proposed clause A.10, an employer and 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."

73. In our submission, current clause 4.2 is much simpler and easier to understand and should be retained to the extent that it deals with a prohibition on coercion and duress.

Clause A.11

74. Proposed clause A.11 rewrites clause 4.8(b) of the current award, but not in a way that makes the clause simpler or easier to understand. The words "at any time" appears in the middle of the sentence, interrupting its flow.

75. This concern could be overcome by revising proposed clause A.11 as follows:

"The employer and the employee may agree in writing to terminate the agreement at any time."

Clause A.12

76. Proposed clause A.12 should be separated into two parts, one dealing with the requirement to give 13 weeks' notice and one dealing with the requirement to give 4 weeks' notice, to make the provisions simpler and easier to understand.

Clause B.2

77. Proposed clause B.2 is more complex than it needs to be. In our view, the approach taken in proposed clause C.3(a) is to be preferred.

Clause D.1

78. Proposed clause D.1 sets out the NES in full. As NES is a defined term, it may be appropriate to use the acronym rather than set it out in full.

Clause D.9

79. Proposed clause D.9 refers to "applicable occupational health and safety legislation". Given the shift toward model work health and safety legislation, it would be consistent with the modern awards objective to replace the word "occupational" with the word "work".

Clause E.1

80. Proposed clause E.1 is more complex than current clause 20.2, and retains two long sentences separated by a table. In our view, the current clause should be retained to ensure that modern awards terms dealing with termination of employment are both stable and easy to understand.

Clauses F, G, H and I

81. In our view, provisions dealing with redundancy should remain together in one modern award clause, in the same way that proposed clause E.1 supplements the cross reference in clause E to the NES. Each of clauses F, G, H and I deal with redundancy and/or entitlements in connection with redundancy.
82. Clauses 21.2, 21.3 and 21.4 are much simpler than proposed clauses G, H and I. They should be retained, consistent with the modern awards objective of ensuring that awards are simple and easy to understand.

Clause I

83. The notes in proposed clause I are confusing. For example, proposed clause I.3 only applies to redundancy situations, but clause 117 deals with notice of termination. This needs to be clarified to aid understanding.

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