

**Fair Work Commission**

**Award Review 2014**

**AM2016/15**

Submissions on Guidelines for Plain  
Language Drafts of Modern Awards

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**Shop Distributive and Allied Employees' Association**

**17 November 2016**

1. The Shop Distributive and Allied Employees' Association (SDA) makes these submissions in response to the Statement issued by the President on 4 November 2016<sup>1</sup> regarding the Guidelines for plain language drafting of modern awards.
2. The SDA makes these submissions in light of the experience it has had in the 'pilot' program with the Pharmacy Industry Award and the Vehicle, Manufacturing, Repair, Service and Retail Award (VMRS&R) drafting process.

## **GENERAL COMMENTS ON THE GUIDELINES AND PLAIN LANGUAGE PILOT AND REDRAFTING PROCESS**

### **Guidelines**

3. While the drafting guidelines published on 9 November 2016 do not appear to be controversial, it is difficult to make comment regarding the guidelines in isolation. It isn't until you are dealing with the guidelines in relation to a re-draft of an award that issues arise in applying the guidelines so that it doesn't impact on legal effect or create ambiguities or interpretation issues which are not present in the current wording of the award.
4. The SDA has concerns about the Guidelines if they are to be used as a one size fits all model. Not all of the principles will be appropriate for all clauses or all awards.
5. The SDA is also concerned, that in drafting, the plain language guidelines will be adopted in preference to maintaining current legal effect, and minimising ambiguity or potential interpretation issues.

### **Changes to legal effect and interpretation**

6. The SDA notes that the Statement<sup>2</sup> of Justice Ross issued on 22 September 2015 provides 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***

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<sup>1</sup> [2016] FWCFB 7968

<sup>2</sup> [2015] FWC 6555, 22 September 2015

*clauses without altering their legal effect. The plain language draft will then be user-tested by individuals covered by the award.*

(Emphasis added)

7. The SDA also notes that the Guidelines issued on the 9 November 2016 state that
  - 1.4 *The aim of plain language drafting is to make the document as simple and easy to understand as possible without taking away from precision or omitting necessary information or changing the legal effect of the document.*
8. The SDA submits that the plain language re-drafting process should never introduce interpretation issues or result in a change to the legal effect of the award. The SDA supports the objective of creating awards that are simple and easy to understand but this must not be done at the cost of current award entitlements and obligations.
9. Our experience in the pilot program of the plain language drafting of the Pharmacy Industry Award has raised some significant concerns regarding the drafting process and the impact this has had on the legal effect of some clauses of the Award, such as the Part-time clause, the Casual clause and the overtime clause.
10. This has included omitting some existing provisions, omitting or changing words which have significant meaning in the context of the clause and give rise to a specific interpretation. Where adopting the plain language guidelines have taken precedence we have examples of more ambiguous clauses that will result in future interpretation issues.
11. The SDA is concerned that the continual re-draft of the Award without proper consideration of the changed legal effect of clauses has resulted in a watering down of entitlements.
12. The SDA submits that plain language principles should not take priority over ensuring there has been no change to the legal effect or potential interpretation issues.

13. The 2012 interim review was conducted to address ambiguities and technical issues arising from the award modernisation process. Ambiguity and technical issues could arise again as a result of the plain language process, requiring a further technical review process. This risk could be minimised by taking into account the views of interested parties throughout the current plain language drafting process.

### **Consent positions**

14. The interested parties to the Award have been constructively involved in the plain language drafting process of the Pharmacy Industry Award. Throughout the process we have been encouraged to work together to identify common concerns with the drafting and to raise these in submissions.
15. The last set of submissions, filed on 18 October 2016 in relation to minor technical and drafting issues, were consent submissions which outlined agreed issues identified with the plain language draft and provided agreed wording to resolve these.
16. The most recent draft of the Award, which was published on 10 November 2016, in response to the joint submission did not take into account the parties agreed position of where we identified the draft had either changed the legal effect or created ambiguity or potential interpretation issues. In most cases the drafter adopted the plain language guidelines in preference to remedying issues which change legal effect or where interpretation issues arise.
17. The *Preliminary Jurisdictional Issues* decision<sup>3</sup> issued by a Full Bench of the Commission on 17 March 2014 stated that:

*[11] The general provisions relating to the performance of the Commission's functions apply to the Review. Sections 577 and 578 are particularly relevant in this regard. Section 577 states:*

*"FWC must perform its functions and exercise its powers in a manner that:*

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<sup>3</sup> [2014] FWCFB 1788

*(a) is fair and just; and*

***(b) is quick, informal and avoids unnecessary technicalities; and***

*(c) is open and transparent; and*

***(d) promotes harmonious and cooperative workplace relations.***

*Note: The President also is responsible for ensuring that FWC performs its functions and exercises its powers efficiently etc. (see section 581).”*

(Emphasis added)

18. The Statement<sup>4</sup> issued by President Ross on 6 May 2016 states that:

*[7] Plain language drafting, supported by appropriate consultation processes, can make modern awards simpler and easier to understand, consistent with s.134(1)(g) of the Fair Work Act 2009 (Cth).*

19. The interested parties to the Pharmacy Industry Award have approached the plain language drafting process in a very cooperative and constructive manner. However, the use of an external third party in the drafting process has not supported this, as there has not been an appropriate mechanism for the drafter to properly consider and adopt consent positions in relation to drafting throughout the process.

20. The interested parties are regular users of the Award with knowledge of the award history, interpretation of the current provisions and how the award is applied in practice. This is particularly relevant where the drafter has dropped terminology which provides the foundation for a particular provision and has a specific industrial meaning. The parties are able to identify where the plain language draft has changed the legal effect or created potential interpretation issues. The consent positions of the parties should be taken into account and adopted by the drafter throughout the process.

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<sup>4</sup> [2016] FWC 2837, <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am20141-plainlanguagestatement-060516.pdf>

21. Paragraph [11](d) of the *Preliminary Jurisdictional Issues* decision above states that *the FWC must perform its functions and exercise its powers in a manner that is quick, informal and avoids unnecessary technicalities*. The consideration and adoption of consent positions during the plain language drafting process would assist in achieving this.
22. The adoption of consent positions will also avoid disputes which may arise following the conclusion of the review regarding interpretation of redrafted clauses. Potential disputes arising regarding interpretation, particularly where the parties have already identified potential problems is not consistent with promoting harmonious and cooperative workplace relations.
23. The 4 yearly review of awards which have not been subject to plain language drafting have largely resulted in the adoption of consent positions and wording both in relation to substantive claims and technical and drafting issues arising from Exposure Drafts. Historically, this is the standard approach adopted by the Commission. It appears that the Awards subject to plain language drafting are being treated differently.
24. The SDA submits that there needs to be greater clarity around how the plain language process should deal with consent positions.

#### **Substantive claims and plain language drafting**

25. The treatment of consent positions throughout this process also creates issues for the parties in relation to agreed substantive claims which also involve agreed wording.
26. The SDA has concerns about how the process has been established to deal with substantive claims which relate to clauses where issues have also arisen as a result of the plain language drafting. For example, the SDA made a substantive claim in relation to overtime and also identified a change in the legal effect of the clause in the plain language draft. The parties have reached a consent position on both the

substantive claim and the plain language drafting issue and agreed to wording which resolves this. However, we are unsure about the process by which this will be dealt with by the Commission as there are now two Full Benches dealing with the Pharmacy Industry Award; one to hear substantive claims and one to hear issues relating to plain language drafting.

27. The SDA submits that there needs to be clarity around how the Commission will deal with consent positions reached where a substantive claim and an issue in relation to plain language drafting intersect.

#### **Common issue proceedings and plain language drafting**

28. The SDA also has concerns about the plain language process and how it impacts on other proceedings in the review. For example, the SDA made a deliberate decision not to pursue a casual conversion clause as part of the ACTU common claim because the current wording of the Casual Employee clause in the Award already provides this.
29. Plain language drafting of the award has resulted in a substantive change to the casual employee clause which removes the obligation the award currently provides that employers must convert a casual employee to part-time if they do not meet the definition of a casual employee, as it is currently defined in the Award. The parties have made several submissions, including joint submissions on the 18 October 2016, which explain this position. The most recent comment from the drafter makes a judgement about the industrial meaning of the current terminology without taking into account the parties' interpretation.
30. The SDA is concerned that if the plain language wording is adopted by a Full Bench we have also missed the opportunity to pursue a casual conversion clause in the common issue proceeding.