

IN THE FAIR WORK COMMISSION

Matter No: 2016/15

Title: s. 156 - 4 Yearly Review of Modern Awards

GUIDELINES FOR PLAIN LANGUAGE DRAFTING OF MODERN AWARDS

SUBMISSIONS

21/11/2016

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Introduction

1. The Health Services Union (HSU) makes these submissions in response to the Statement issued by the President on 4 November 2016¹ and concerning the ‘Guidelines for plain language drafting of modern awards’.
2. The HSU makes these submissions in light of the experience it has had in the ‘pilot’ program with the Pharmacy Industry Award.
3. The HSU has read and supports the submissions made by the Shop Distributive and Allied Employees’ Association (SDA) in relation to the draft guidelines.
4. The HSU agrees with the SDA concerns that the drafting guidelines cannot really be interpreted until their impact is viewed through the lens of drafting of an award or clause.
5. The general provisions, organisation of the entitlements, and division of the award, as outlined in the plain language guidelines, are not contested, and indeed have been followed [at least to some extent] by the Award Modernisation team in developing Exposure Drafts for each award; and are supported in principle by the HSU.
6. The HSU has also read the submissions from other organisations and notes that the information contained tends, in our view, to support the premise outlined by the SDA, that the guidelines in and of themselves are not fundamentally contentious.
7. Fundamentally the HSU does not have significant concerns with the guidelines themselves. The HSU refers to the statement² of Justice Ross issued on 22 September 2015 which 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 clauses without altering their legal effect**. The plain language draft will then be user-tested by individuals covered by the award.’*

(Emphasis added)

8. This is in keeping with the general principles issued by the Full Bench concerning the development of the Exposure Drafts in all modern awards, and the statement on the front page accompanying all drafts.

‘This exposure draft does not seek to amend any entitlements under the Pharmacy [sic] award but has been prepared to address some of the structural issues identified in modern awards.’

9. 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.

10. The HSU agrees with the SDA submissions that the plain language re-drafting process should never introduce interpretation issues or result in a change to the legal effect of the award.
11. The HSUs experience, not unsurprisingly, mirrors the SDAs concerning the redrafting of the Pharmacy Industry Award 2010. It is the actual drafting of an award, and therefore the implementation of the guidelines that concerns the HSU.

¹ [2016] FWC 7968

² [2015] FWC 6555, 22 September 2015



12. 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.
13. 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.
14. The HSU reiterates the SDA concerns about the continual re-draft of the Award without proper consideration of the changed legal effect, including in some cases where there is agreement that the redrafted proposal represents a change of meaning.



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