



The Australian Industry Group  
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6 April 2017

The Hon. Justice Ross AO, President  
Fair Work Commission  
11 Exhibition Street  
Melbourne VIC 3000

Dear Justice Ross,

**Re. AM2016/15 Plain Language Re-drafting – Building and Construction General On-site Award 2010**

This letter is sent on behalf of the Australian Industry Group (**Ai Group**); the Construction, Forestry, Mining and Energy Union (**CFMEU**); the Australian Workers' Union (**AWU**); the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers Union (**AMWU**); and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**).

We refer to the Statement issued by the Fair Work Commission on 27 March 2017 ([2017] FWCFB 1638) regarding the plain language re-drafting process.

At paragraph [21] of the Statement, the Commission provisionally proposed that the *Building and Construction General On-site Award 2010* (**Construction Award**) be included in the second tranche of awards to be re-drafted in plain language. In accordance with paragraph [25] of the Statement, we write to provide comment on this proposal.

We oppose the proposed re-drafting of the Construction Award in plain language at this time, for the following reasons:

1. The significant number of clauses in the Construction Award that have been the subject of contested 4 Yearly Review proceedings, with major proceedings currently being heard, and several significant decisions still reserved;
2. The serious strain that a plain language re-drafting exercise for the Construction Award would impose on our resources at a time when the parties are already involved in a very large number of other 4 Yearly Review proceedings;
3. The potential changes to the legal effect of the Award that may result;
4. The need to ensure a stable awards system; and
5. The absence of evidence establishing widespread award non-compliance in the Construction Industry.

These issues are discussed below.



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## **Numerous contested and unresolved exposure draft issues, substantive claims and common issues**

Numerous provisions in the Construction Award have been contested during the 4 Yearly Review, either as part of the exposure draft process, as substantive claims, or as common issues. Major proceedings are currently being heard and several Full Bench decisions are still outstanding which will deal with the wording of numerous clauses in the Award.

It would be very disruptive and unproductive for a plain language re-drafting exercise to be imposed on the parties at this time.

## **Significant strain on the parties' resources**

The current 4 Yearly Review is placing a very significant strain on the resources of industrial parties.

We are currently dealing with a large number of common issue cases, a large number of technical and drafting matters, a large number of substantive claims, and the plain language re-drafting of common award clauses.

A decision to re-draft the Construction Award in plain language will further exacerbate the resource strains that the industrial parties are under, and would make it even more difficult for us to represent the interests of our members in the 4 Yearly Review process. It would also make it more difficult for the Commission to achieve its objectives, given that the Commission relies heavily on the submissions and evidence presented by parties in order to make fair and informed decisions.

The plain language re-drafting of the Construction Award would necessarily involve the industrial parties in analysing all of the re-drafted clauses in each version of the draft award that is published, the filing of multiple detailed submissions, attendance at Commission proceedings, and participation in discussions independent of the Commission.

We urge the Commission not to proceed with a process which will necessarily require the dedication of significant resources of the industrial parties in circumstances where we are presently under significant strain due to the 4 Yearly Review.

## **Potential changes to the legal effect of award clauses**

While we acknowledge that the Commission has stated that the re-drafting process is not intended to result in changes to the legal effect of any award provisions, we are concerned that this may nonetheless eventuate, based on our experiences to date with the plain language re-drafting process. Numerous examples have arisen to date of clauses which have been re-drafted in plain language that would have a very different legal effect to the original clause, to the detriment of employees, employers, or both. Numerous concerns have been raised by various parties about particular re-drafted clauses and most of these matters have not yet been resolved by the Commission.

At the start of the 4 Yearly Review process, the Fair Work Ombudsman identified those clauses in modern awards that had, in its experience, led to some interpretation difficulties. Very few Construction Award provisions were identified and, those that were, are being addressed during the exposure draft process.

### **The need to ensure a stable modern awards system**

The Construction Award came into effect in January 2010, after lengthy Commission proceedings. Since that time, it has been the subject of numerous proceedings before the Commission and its predecessors:

- It was the subject of a number of variation applications shortly after it was made, which were dealt with during 2010 – 2011.
- During 2012 – 2013, several applications to vary the Award were made in the context of the two year review of modern awards. These included issues specific to the Construction Award and common issues.
- The current Review is into its 4<sup>th</sup> year, with proceedings undoubtedly set to continue into next year.

Accordingly, the Construction Award has been the subject of ongoing development and review for the past nine years, since 2008.

In the circumstances of the Construction Award, the plain language re-drafting of the Award at this time would be contrary to the need to ensure a stable award system (s.134(1)(g)).

To undertake a process that results in the Award being in a further state of flux would be undesirable for employers and employees. A plain language re-drafting process would give rise to uncertainty for those covered by the Award as well as those covered by enterprise agreements linked to the Award.

### **The extent of non-compliance**

At paragraph [20] of the Commission's Statement of 27 March 2017, the Full Bench states that the second tranche of awards have been selected having regard to "industries or subsectors identified by the Fair Work Ombudsman as having high levels of non-compliance". It refers to page 5 of the Fair Work Ombudsman's (FWO) Annual Report of 2015 – 2016 in this regard.

We note that the industries or subsectors covered by the Construction Award are not identified in the FWO's annual report as "having high levels of non-compliance". The industries that are identified are "hospitality, retail, cleaning, security and trolley collecting".



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To our knowledge, there is no other material before the Commission in the context of these proceedings that establishes high levels of non-compliance in the industries or subsectors covered by the Construction Award. Nor is there any material to establish the extent to which non-compliance is caused by any alleged ambiguity or uncertainty arising from the Construction Award.

Accordingly, we urge the Commission to remove the Construction Award from the second tranche list of awards to be re-drafted in plain language.

Yours sincerely,

**Stephen Smith**  
Head of National Workplace Relations Policy  
Australian Industry Group