DECISION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Plain language – standard clauses
(AM2016/15)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER HUNT

SYDNEY, 18 OCTOBER 2017

4 yearly review of modern awards – plain language re-drafting – standard clauses – a term permitting a deduction from money due to an employee on termination where the employee fails to give requisite notice of termination – whether such a term may validly be included in a modern award – transfer to a lower paid job on redundancy.

1. Background

[1] Section 156(2)(a) of the *Fair Work Act 2009* (Cth) (the Act) requires the Commission to review all modern awards every four years (the Review). This Full Bench has been constituted to oversee a number of plain language projects as part of the Review.[1] This decision deals with the redrafting of a number of clauses in modern awards which have been identified as 'standard clauses'.[2]

[2] The standard clauses subject to plain language re-drafting are:

- **A.** Award flexibility;
- **B.** Consultation about major workplace change;
- **C.** Consultation about changes to rosters or hours of work;
- **D.** Dispute resolution;
- **E.** Termination of employment;
- **F.** Redundancy;
- **G.** Transfer to low paid job on redundancy; and
- **H.** Employee leaving during redundancy notice period.

[3] In a decision[3] issued on 28 August 2017 (the August decision) we finalised the terms of most of the standard clauses. In the course of oral argument during the hearing held on 21 August 2017 an issue arose as to whether Clause E.1(c) of the termination of employment standard term is a type of provision which may validly be included in a modern award and, if it is, whether such a provision is necessary to achieve the modern awards objective.

[4] Proposed Clause E.1(c) is set out in paragraph [124] of the August decision as follows:

E. Termination of employment

NOTE: The NES sets out requirements for notice of termination by an employer. See sections 117 and 123 of the Act.

E.1 Notice of termination by an employee

(A) An employee must give the employer written notice of termination in accordance with Table X—Period of notice of at least the period specified in column 2 according to the period of continuous service of the employee specified in column 1.

Table X—Period of notice

Column 1 **Employee's period of continuous service with the employer at the end of the day the notice is given**	**Column 2** **Period of notice**
Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks
More than 3 years but not more than 5 years	3 weeks
More than 5 years	weeks

NOTE: The notice of termination required to be given by an employee is the same as that required of an employer except that the employee does not have to give additional notice based on the age of the employee.

(b) In paragraph (a) **continuous service** has the same meaning as in section 117 of the Act.

(c) If an employee fails to give the period of notice required under paragraph (a), the employer may deduct from any money due to the employee on termination (under this award or the NES), an amount not exceeding the amount that the employee would have been paid in respect of the period of notice not given..

[5] In a Statement[4] issued on 21 August 2017 (August Statement) we raised two issues in relation to Clause E.1(c):

'(1) whether Clause E.1(c), either wholly or insofar as it deals with NES entitlements, is a type of provision which may validly be included in a modern award under the relevant provisions of the FW Act, including but not confined to ss.55, 118, 139 and 142; and

(2) to the extent that the Commission has the power to include a provision of the nature of Clause E.1(c) in a modern award, whether as a matter of merit such a provision is necessary to achieve the modern awards objective in accordance with the requirement in s.138.'

[6] At paragraph [3] of the August Statement we noted that the same issue also arises in relation to the proposed standard Clause H.2, insofar as the Ai Group has submitted that

where an employee who has been given notice of termination due to redundancy leaves his or her employment before the expiration of the notice period and without giving the required period of notice, the employer is or should be permitted pursuant to Clause E.1(c) to make deductions from payments other than for redundancy owing to the employee.

[7] In the August decision we also proposed a revised Clause G – Transfer to lower paid job on redundancy in the following terms:

> '**G.1** Clause G applies if, because of redundancy, the employer decides to transfer an employee to new duties to which a lower ordinary rate of pay is applicable.
>
> **G.2** The employer may:
>
> **(a)** give the employee notice of the transfer of at least the same length as the employee would be entitled to under section 117 of the Act as if it were a notice of termination given by the employer; or
>
> **(b)** transfer the employee to the new duties without giving notice of transfer or before the expiry of a notice of transfer.
>
> **G.3** If the employer acts as mentioned in paragraph G.2(b), the employee is entitled to a payment of an amount equal to the difference between the ordinary rate of pay of the employee (inclusive of shift allowances and penalty rates applicable to ordinary hours) for the hours of work the employee would have worked in the first role, and the ordinary rate of pay (also inclusive of shift allowances and penalty rates applicable to ordinary hours) of the employee in the second role for the period for which notice was not given.' (emphasis added)

[8] Interested parties were invited to make a submission in respect of the matters referred to above.

[9] Submissions were received from the following organisations:

- Australian Business Industrial and New South Wales Business Chamber (ABI);
- Australian Chamber of Commerce and Industry (ACCI);
- Australian Council of Trade Unions (ACTU);
- Australian Industry Group (Ai Group);
- Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU);
- Business SA;
- Community and Public Sector Union (CPSU);
- CFMEU - Forestry, Furnishing, Building Products and Manufacturing Division (CFMEU);
- Housing Industry Association (HIA);
- Shop Distributive and Allied Employees Association (SDA); and
- Textile, Clothing and Footwear Union of Australia (TCFUA).

[10] Submissions in reply were received from the following organisations:

- ACTU;
- Ai Group;
- AMWU;
- National Road Transport Association (NatRoad);

- SDA; and
- TCFUA.

[11] At paragraph [133] of the August decision, parties were advised that we intended to resolve the outstanding matters on the papers unless we considered, on the request of interested parties, that there should be a hearing concerning the issue at which parties may also advance oral submissions. No party requested an oral hearing and hence the remaining outstanding issues will be determined on the basis of the submissions made.

[12] We deal first with the issues identified at paragraph [5] above regarding Clauses E.1(c) and H.2.

2. Standard Clauses E.1(c) and H.2

2.1 History

[13] Before turning to the two issues in respect of Clause E.1(c) we propose to briefly set out some background relating to the existing award term allowing the employer to make a deduction from termination payments due to an employee where the employee has failed to give the requisite notice of termination.

[14] The current standard term (and s.117 of the Act) had its genesis in the two decisions arising from the Termination, Change and Redundancy (TCR) Test Case. The first decision, the *August 1984 TCR decision,*[5] dealt with, among other things, the period of notice required in respect of termination of employment. Prior to the TCR decision one week's notice was the standard in federal awards. The ACTU's claim, as amended during the proceedings, is set out at Appendix B to the decision.[6] The claim in respect of 'Period of Notice of Termination of Employment' was as follows:

> 'In order to terminate the employment of an employee, the employer shall give the employee the following period of notice (or payment directly related to the notice period in lieu thereof):
>
> (a) One week's notice; plus
> (b) One week's notice for each year of service or part thereof of the employee.
>
> In calculating any payment in lieu of notice, regard shall be had to the weekly award rate applying to an employee and to the normal overtime worked by the employee. The "normal overtime" in respect of an employee shall be the average overtime worked per week during the period of four weeks prior to the date of termination of employment.
> The period of notice in this paragraph shall not apply in the case of dismissal for misconduct that justifies instant dismissal or in the case of casual or seasonal employees.
>
> The notice of termination required to be given by an employee to whom paragraph A11 applies shall be one week.'

[15] The claim was opposed by the Confederation of Australian Industry.

[16] The Commission awarded increased notice of termination of employment, as follows:

> '… the claim is for a fundamental change in established standards and practices and we are of the view that in these circumstances we should proceed cautiously. We have decided that there

> should be no extension of the notice period for employees with only a short period of service with the employer, but that those employees who, at the time of the receipt of the notice of termination, have been in continuous full time employment with the employer for more than a calendar year should be entitled to an extra week's notice. For each additional two years of service an additional week's notice should apply, with a maximum period of extended notice of four weeks. Employees over 45 years of age shall be entitled to an additional week's notice of termination after two years' service. The increase in the notice period will only apply to permanent "weekly employees" and it will not apply to casual employees, part-time employees, seasonal employees or employees on daily or hourly hire. Nor will the extended notice apply in cases of misconduct which warrant instant dismissal. Payment in lieu of notice shall be at the weekly award rate applying to an employee. In the general run of cases overtime payments should not be included in any payment in lieu of notice.'[7]

[17] The ACTU had contended that the same periods of notice should not apply to notice by employees and that employees should be able to terminate their employment by giving one week's notice. The Commission rejected this contention:

> '… notwithstanding the ACTU arguments we are not prepared, except to a limited extent, to provide for different periods of notice by employer and employee. In particular, we are concerned at the possible consequences for small firms of a loss of employees with long service and the requirement for such employers to find another employee. We have decided that an employee should be required to give the additional notice based on years of service but that it would not be appropriate to require increased notice from the employee based on age.'[8]

[18] The *August 1984 TCR decision* determined all the issues of principle in respect of the ACTU's claims. There were subsequent proceedings regarding the form of the order to be made to give effect to the Commission's decision. In the subsequent proceedings the ACTU sought a standard form of clause that could be applied to other awards and a separate order in respect of the Metal Industry Award. This issue, amongst others, was dealt with in a Supplementary Decision published on 14 December 1984 (the *December 1984 TCR Supplementary Decision).*[9] In that decision the Commission rejected the proposition that it should produce a standard clause:

> 'We have considered this approach but we feel that given what has transpired in this case, it is too difficult to produce a form of clause which could provide some general basis for all awards. As we have already emphasised, it is necessary to tailor the effect of our decision to each individual award. This we have done in the Metal Industry Award and we feel what we have done in that award, plus what we have said in our reasons, will enable other members of the Commission to distil from them what we intend generally to be applied in other awards.'[10]

[19] In the *August 1984 TCR decision* the Commission determined that an employee should be required to give additional notice based on years of service but that it would not be appropriate to require increased notice for the employee based on age. In the subsequent proceedings, the issue in contention in respect of this part of the *August 1984 TCR decision* concerned the right of the employer to withhold termination monies where the employee did not give the requisite notice. This matter was determined in the *December 1984 TCR Supplementary Decision:*

> 'The primary argument in relation to this part of the decision was concerned with the question whether an employee should be liable for forfeiture only of wages held in hand when an employee fails to give the required notice or whether other moneys in hand might be used. The employers also sought to provide an award right for an employer to recover any moneys due.

> Both of these provisions were opposed by the ACTU. In arguing that the amount of possible forfeiture should be limited to wages only it argued that such a restriction would be a balance between the competing considerations of reciprocity of treatment for employers and employees and the need not to impede the mobility of labour.
>
> We are prepared to provide that the employer shall have the right to withhold any moneys with a maximum amount equal to the ordinary time rate for the period of notice but we are not prepared to extend the award by including a provision which would give the employer an award right to recover any moneys.
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> We are prepared to provide that:
>
> "5. The notice of termination required to be given by an employee shall be the same as that required of an employer, save and except that there shall be no additional notice based on the age of the employee concerned. If an employee fails to give notice the employer shall have the right to withhold moneys due to the employee with a maximum amount equal to the ordinary time rate of pay for the period of notice."[11]

[20] It is apparent from the above extract that the only issue in contention regarding the employer's right to withhold money owed to an employee concerned the extent of that right – that is whether it should be limited to wages earned in respect of work that had been performed but not yet paid (as contended by the ACTU) or whether it should extend to *any* monies owed to an employee (including termination payments in respect of accrued annual and long service leave).

[21] Importantly, the antecedent question – whether the employer should have a right to make *any* deduction at all from an employee's termination payments because the employee had failed to give the required notice – was *not* in contention.

[22] A substantial number of federal awards were subsequently varied to give effect to the determination in the TCR decisions.

[23] A number of the submissions before us rely on the TCR decisions and the fact that terms such as Clause E.1(c) have been a longstanding feature of federal awards.[12] However, as is apparent from the above analysis, in the TCR case the extent of the dispute regarding the merits of a term permitting an employer to withhold monies owed to an employee where the employee fails to give the requisite notice of termination, was quite limited. Further, the fact that a term has been a longstanding feature of federal awards is far from determinative of the issues presently before us.

[24] The nature of modern awards under the Act is quite different from the awards made under previous legislative regimes.[13] In times past awards were made in settlement of industrial disputes. The content of these instruments was determined by the constitutional and legislative limits of the tribunal's jurisdiction; the matters put in issue by the parties (i.e. the 'ambit' of the dispute) and the policies of the tribunal as determined from time to time in wage fixing principles or test cases. An award generally only bound the employers, employer organisations and unions who had been parties to the industrial dispute that gave rise to the making of the award and were named as respondents.

[25] Modern awards are very different to awards of the past. They are not made to prevent or settle industrial disputes between particular parties. Rather, the purpose of modern awards,

together with the National Employment Standards (the NES) and national minimum wage orders, is to provide a safety net of fair, relevant and enforceable minimum terms and conditions of employment for national system employees (see ss.3(b) and 43(1)). They are, in effect, regulatory instruments that set minimum terms and conditions of employment for the employees to whom the modern award applies (see s.47).

[26] Further, the legislative context is a central consideration. The *4 yearly review of modern awards – Annual leave decision*[14] illustrates this point. In that matter the Full Bench was satisfied that the variation of all modern awards to insert a model term dealing with the cashing out of annual leave was necessary to meet the modern awards objective. The change in legislative context (in particular s.93 of the Act) led the Full Bench to depart from previous decisions which had rejected proposals for the cashing out of annual leave:

> 'Under previous legislative regimes, predecessor bodies to the Commission consistently rejected proposals for the cashing out of annual leave on the basis that such provisions undermined the purpose of annual leave, namely, "to provide a reasonable period of physical and mental respite from work". Enterprise agreement provisions providing for the cashing out of annual leave were regarded as being contrary to the public interest as they constituted a reduction in a "well established and accepted community standard".
>
> Three particular observations may be made about s.93. The first is that it is evident from the terms of s.93(1) that it was within the contemplation of the legislature that the Commission may include in modern awards a term providing for the cashing out of paid annual leave, subject to the inclusion of the prescribed safeguards. In our view the legislative determination of appropriate safeguards is significant because it represents an important contextual consideration which was not present when cashing out provisions were considered during the award modernisation process.
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> The NES provisions relating to annual leave (ss.86–94) set out the minimum entitlement to annual leave for employees (other than casual employees) and expressly permit the cashing out of such an entitlement in ss.93 and 94. As the ACTU correctly observed, the inclusion of such a facilitative provision in a modern award is *permitted* rather than *mandated*. But such a distinction misses the point. The enactment of s.93 is a clear legislative statement that a modern award term which permits the cashing out of accrued annual leave, and meets the minimum requirements of s.93(2), is consistent with the NES entitlement to annual leave. Far from frustrating the purpose of a safety net entitlement, as asserted by the ACTU, the legislature has clearly contemplated that a modern award provision such as the cashing out model term may be part of the safety net.'[15] (footnotes omitted)

[27] Similar considerations arise in the present matter and the issues before us must be determined having regard to the relevant provisions of the Act.

[28] The 'standard' TCR provisions in federal awards were modified in the *1997 Award Simplification decision*.

[29] The *1997 Award Simplification decision* concerned 'allowable award matters' and related issues, and the terms of s.89A of the *Workplace Relations Act 1996* (WR Act) and Items 46 to 54 of the *Workplace Relations and Other Legislative Amendment Act 1996*. Simply put, s.89A of the WR Act limited the matters that could be included in an award to the 'allowable award matters' set out in s.89A(2) and to provisions which were 'incidental' to those matters and 'necessary for the effective operation of the award' (s.89A(6)). One of the 'allowable award matters' was 'notice of termination' (s.89A(2)(n)).

[30] In the *1997 Award Simplification decision* the Full Bench decided, amongst other things, to vary the Hospitality Award so that it only dealt with allowable award matters. In respect of the termination of employment provisions the Full Bench held:

> '18. Termination of employment
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> We have adopted a number of the employers' proposals pursuant to Items 49(8)(c) and (d). In addition, we draw attention to the following changes:
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> - We have rejected the proposal that the period of notice should not apply to probationary employees. There was no substantial argument on the merits of this proposal, which clearly represents a reduction in entitlements;
>
> - We have deleted clause 18.1.8 on the basis that it is not an allowable award matter for the reasons we have given in relation to clause 18.6 below;
>
> - Clause 18.4 – Statement of Employment, is not an allowable award matter and we have deleted it;
>
> - The parties agree to the deletion of clause 18.5.2 and we have deleted it; and
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> - Clause 18.6 is the standard clause prohibiting termination of employment which is harsh, unjust or unreasonable. The clause is not allowable. The only matter directly relevant to termination is s.89A(2)(n). Plainly clause 18.6 prohibits termination on certain grounds. A prohibition on termination is not allowable. We have deleted the clause.'[16]

[31] Relevantly for present purposes the Full Bench retained the following provision:

> '17.2.2 If an employee fails to give notice the employer has the right to withhold monies due to the employee to a maximum amount equal to the ordinary time rate of pay for the period of notice.'

[32] However it is unclear whether this term was retained because it fell within the scope of an 'allowable award matter' in s.89A of the WR Act, or whether it was incidental to such a matter (s.89A(6)). We return to this point later.

[33] The quantum of redundancy pay and the exemption of employers of fewer than 15 employees from the requirement to make redundancy payments (and some other related matters) were the subject of the *2004 Redundancy Case.*[17] That decision did not consider the notice of termination provisions and is therefore of no relevance to the issues presently before us.

[34] The notice of termination provisions received some attention (albeit limited) in the award modernisation process.

[35] The award modernisation process was conducted by the Australian Industrial Relations Commission (the AIRC), an antecedent tribunal to the Commission, under Part 10A of the WR Act. The process was completed in four stages, each stage focussing on different industries and occupations. Separate processes, including variously, the provision of

submissions, hearings and release of draft awards, were undertaken in the creation of each modern award to ensure parties were able to make submissions and raise matters of concern relevant to particular awards.

[36] The award modernisation process was initiated by a request by the Minister for Employment and Workplace Relations on 28 March 2008, pursuant to s.576C(1) of the WR Act. The Ministerial Request provided the framework and overarching timetable for the award modernisation process.

[37] Following the Ministerial Request, the AIRC President issued a statement[18] which attached a 'Draft List of Priority Industries' and called for submissions as to which industries should be dealt with first in the process (the 'priority industries'). The Award Modernisation Full Bench comprising of seven Members then dealt with all award modernisation matters between 2008–09. By the end of 2009, the AIRC had reviewed more than 1500 state and federal awards and created 122 industry and occupation based modern awards.

[38] On 17 June 2008 the Minister amended the Ministerial Request. Paragraph 33 of the Amended Request stated:

> '33. The NES provides that particular types of provisions are able to be included in modern awards even though they might otherwise be inconsistent with the NES. The Commission may include provisions dealing with these issues in a modern award. The NES allows, but does not require, modern awards to deal with, amongst other things:
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> …
>
> • The amount of notice an employee may be required to provide when terminating their employment.'

[39] During the award modernisation process, Ai Group proposed (in a submission dated 1 August 2008) that if an employee failed to provide notice of termination then the employer would have the right to withhold certain monies from the employee. The AMWU opposed this proposal and advanced the following submission:

> **'Notice of termination by an employee: Clause 3.6.3(b)**
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> 75. The NES provides that Awards may include provisions required to be given by an employee. The NES allows but does not require employee notice provisions to be included in awards. Where an award supplements the NES it may only do so where the effect of these provisions is not detrimental in any way. Paragraphs 32 and 33 of the Request must be read together. The AIG proposal is detrimental to the employee and is therefore not permissible.'[19] (footnotes omitted)

[40] Ai Group responded to the AMWU's submission in the following terms:

> '254. It is this aspect of the clause that the unions do not support and they have advanced the view that whilst an employee should provide notice of termination, there should be no penalty should that employee fail to abide by such notice.
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> 255. Ai Group submits that such a notion would essentially render the notice of termination provisions for an employee useless. The principle that an employer has the right to withhold monies from an employee to the value of any notice of termination not provided is one that is entrenched within numerous awards and NAPSAs. Within the Metals Award, this concept dates back as far as the terms of the Metal Trades Award 1941.

256. We submit that such a concept must be retained for the modern award as the only other means by which an employer could seek to bind an employee to the requirement to provide notice would be through threat of prosecution for breach of the award. Such a reality would be of little practical effect for an employer given the time and cost associated with pursuing such a remedy.'[20] (footnotes omitted)

[41] It is apparent that Ai Group's submission was based on the proposition that its proposed term had long been a feature of numerous awards and NAPSAs, and *not* by reference to the terms of what is now s.118. Nor did the AMWU's submission address the scope of s.118; rather it contended that a term of the type proposed by Ai Group would be detrimental to employees and hence impermissible. We deal later with the proper construction of s.118.

[42] On 12 September 2008 the Award Modernisation Full Bench issued a Statement[21] and exposure drafts for the Priority Stage Awards. In the section of the Statement headed 'General Matters', the Full Bench stated:

'Termination of Employment

[22] We have drafted a model termination of employment provision which adds to the NES in two respects. The draft clause contains provision for notice by employees and a job search leave entitlement.'

[43] The Model Termination of Employment Provision, published by the Full Bench on 12 September 2008 (within the Priority Stage Exposure Drafts) was worded as follows:

'22. Termination of Employment

22.1 Notice of termination is provided for in the NES.

22.2 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. <u>If an employee fails to give the required notice the employer has the right to withhold pay to a maximum period equal to the amount the employee would have received under the terms of the NES</u>.

22.3 Job search entitlement

Where an employer has given notice of termination to an employee, an employee must be allowed up to one day's time off without loss of pay for the purpose of seeking other employment. The time off must be taken at times that are convenient to the employee after consultation with the employer.' (emphasis added)

[44] In a submission dated 10 October 2008, in respect to the Priority Stage Exposure drafts, ACCI stated:

'118. ACCI welcomes the re-inclusion of the reciprocal notice provisions in awards, and a clarification of an issue which has concerned employers in recent years.

119. It is appropriate that:

a. There be a single formulation of this clause which is applied consistently to all modern awards.
b. The form of this clause is based on the 1984 TCR provision.

120. There is one wording issue which we request the Full Bench to address: that is to provide greater exactitude on precisely which monies can be the subject of a relevant deduction.

121. Our specific concern is that the clause make unambiguously clear that the employer can deduct pay in lieu of employee notice from all monies owing on termination, including any payments under the NES, any payments under the award, and any wages or other payments owing. On this basis, this provision could be redrafted in the following form into all modern awards:

> **'13.2 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 has the right to withhold pay from any and all monies owing to the employee on termination (whether payable under this award, the NES, or otherwise), to a maximum amount equal to the amount the employee would have received under the terms of the NES.'

[45] The ACT Chamber of Commerce and Industry also made submissions on this issue during award modernisation, stating:

> '12. We note that sub-clause14.2 "Notice of termination by an employee" provides that "... the employer has the right to withhold pay to a maximum amount equal to the amount the employee would have received under the terms of the NES." This could be a problematic provision, as "the amount the employee would have received under the terms of the NES" could conceivably include employee entitlements including payment for unused Annual Leave.
>
> 13. This provision means that (if the employee fails to give notice) the employer has the right to withhold all of the employee's Annual Leave entitlements, without any limitation to a finite number of weeks' payment.
>
> Recommendation 1
>
> 14. We therefore recommend that a modified form of the provision be adopted (based on the model proposed by ACCI):
>
> 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 has the right to withhold pay from any and all monies owing to the employee on termination (whether payable under this award, the NES, or otherwise), to a maximum amount equal to the amount the employee would have received under the terms of the NES if the employee had continued in employment for the balance of the required period of notice.'[22]

[46] The SDA tendered the following Statement during the Post-Exposure Draft Consultations held on 5 November 2008 (Exhibit SDA15):

> **'NOTICE OF TERMINATION BY AN EMPLOYEE**
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> The SDA proposes that the second sentence of Clause 14.2 be deleted.
>
> Both ACCI at paras 118 to 121 and ACT CCI at paras 12 to 14 propose amendments to Clause 14.2 to strengthen the power of an employer to take money away from an employee.

> The Commission should remove from Clause 14.2 any capacity for an employer to act as prosecutor judge and executioner.
>
> If there is an allegation by an employer that an employee has failed to comply with the notice of termination provisions, then those allegations can only be dealt with by a court.
> All other alleged breach of award matters must be dealt with by a court.
>
> There is no pressing reason why the Commission should attempt to provide in any Modern Award a provision creating a right for employers to take money from a worker who has been alleged to have breached the Modern Award, when no similar rights are created for employees to take money from their employer in circumstances where the employer is alleged to have breached the award.
>
> The provision in Clause 14.2 would appear on its face to breach the constitutional doctrine of 'separation of powers'. The Boilermakers Case is still relevant.'

[47] We note that neither the ACCI submission, nor the SDA's reply submission addressed the scope of what is now s.118.

[48] In its Priority Stage Award Modernisation Decision[23] of 19 December 2008, the Full Bench stated:

> **'Termination of employment**
>
> [53] A number of matters arose during the exposure draft consultations concerning the termination of employment provision. The first concerns the draft provision for withholding of monies by the employer should the employee fail to give the required notice of termination. The draft provision is as follows:
>
> > **"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 has the right to withhold pay to a maximum amount equal to the amount the employee would have received under the terms of the NES."
>
> [54] It was submitted that the provision is unclear and requires redrafting. We agree. The redrafted clause will permit the employer to withhold monies due on termination equivalent to the amount the employee would have earned for the period of notice less an amount for any notice actually given. It is appropriate that the employer should only have the right to withhold monies due to the employee under the award or the NES. The redrafted clause is:
>
> > "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 the clause less any period of notice actually given by the employee.' (emphasis added)[24]

[49] It is notable that the above extract makes no reference to the questions of jurisdiction or merit, but is focussed on the drafting of the relevant provision.

[50] We now return to the first issue in respect of Clause E.1(c): whether such a provision may validly be included in a modern award.

2.2 Issue 1

Whether Clause E.1(c), either wholly or insofar as it deals with NES entitlements, is a type of provision which may validly be included in a modern award under the relevant provisions of the Act, including but not confined to ss.55, 118, 139 and 142.

[51] Modern awards are dealt with in Pt 2-3 of the Act. The content of modern awards is dealt with in s.136, which states:

> **136 What can be included in modern awards**
>
> *Terms that may or must be included*
>
> (1) A modern award must only include terms that are permitted or required by:
> (a) Subdivision B (which deals with terms that may be included in modern awards); or
> (b) Subdivision C (which deals with terms that must be included in modern awards); or
> (c) section 55 (which deals with interaction between the National Employment Standards and a modern award or enterprise agreement); or
> (d) Part 2-2 (which deals with the National Employment Standards).
>
> Note 1: Subsection 55(4) permits inclusion of terms that are ancillary or incidental to, or that supplement, the National Employment Standards.
> Note 2: Part 2-2 includes a number of provisions permitting inclusion of terms about particular matters.
>
> *Terms that must not be included*
>
> (2) A modern award must not include terms that contravene:
> (a) Subdivision D (which deals with terms that must not be included in modern awards); or
> (b) section 55 (which deals with the interaction between the National Employment Standards and a modern award or enterprise agreement).
>
> Note: The provisions referred to in subsection (2) limit the terms that can be included in modern awards under the provisions referred to in subsection (1).

[52] We turn first to consider whether Clause E.1(c) is a term that *may* be included in a modern award because it is a term which is dealt with in Subdivision B of Division 3 of Pt 2-3 (ss.139-142). Sections 139 and 142 are particularly relevant for present purposes.

[53] Section 139 provides:

> **139 Terms that may be included in modern awards—general**
>
> (1) A modern award may include terms about any of the following matters:
> (a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and:
> (i) skill-based classifications and career structures; and
> (ii) incentive-based payments, piece rates and bonuses;
> (b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities;
> (c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;
> (d) overtime rates;

(e) penalty rates, including for any of the following:
  (i) employees working unsocial, irregular or unpredictable hours;
  (ii) employees working on weekends or public holidays;
  (iii) shift workers;
(f) annualised wage arrangements that:
  (i) have regard to the patterns of work in an occupation, industry or enterprise; and
  (ii) provide an alternative to the separate payment of wages and other monetary entitlements; and
  iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;
(g) allowances, including for any of the following:
  (i) expenses incurred in the course of employment;
  (ii) responsibilities or skills that are not taken into account in rates of pay;
  (iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;
(h) leave, leave loadings and arrangements for taking leave;
(i) superannuation;
(j) procedures for consultation, representation and dispute settlement.

(2) Any allowance included in a modern award must be separately and clearly identified in the award.

[54] Section 142 provides:

142 Incidental and machinery terms

Incidental terms

(1) A modern award may include terms that are:
  (a) incidental to a term that is permitted or required to be in the modern award; and
  (b) essential for the purpose of making a particular term operate in a practical way.

Machinery terms

(2) A modern award may include machinery terms, including formal matters (such as a title, date or table of contents).

[55] Ai Group contended that Clause E.1(c) was a term permitted by s.139(1). Ai Group's submission in respect of this contention was limited to the following statement:

'The ability to make a deduction from wages falls with (sic) those provisions of s139 that enable award provisions to deal with various types of monetary amounts, including s 139(1)(a), (d), (f), (g) and (h);

The ability to make a deduction from wages would also fall within s.142;

The fact that deductions from wages fall within s.136 is clear from s.324(1)(c). If this was not the case, s.324(1)(c) would have no work to do because awards can only contain those types of terms specified in s.136.'[25]

[56] We note that the above submission was advanced for the sake of completeness and that Ai Group's primary submission was that Clause E.1(c) is a term falling within the scope of s.118, a proposition we reject for reasons which follow.

[57] Ai Group was the only party to contend that Clause E.1(c) was a term permitted by s.139(1). The unions and the other employer organisations took a different view.

[58] ACCI submits that:

> 'It is not apparent that proposed Clause E.1(c) which deals with an employer's ability to deduct money due to an employee on termination where the employee fails to give the required period of notice falls within the list of matters identified in section 139.
>
> It is also clear that the provision is neither an outworker term nor an industry specific redundancy scheme pursuant to ss. 140 and 141 in Subdivision B.'[26]

[59] ABI is more emphatic, it submits that Clause E.1(c) is *not* a term about any of the matters in s.139(1).[27]

[60] The AMWU submits that:

> 'The parts of s.139 do not appear to provide any support for the term providing for deduction in favour of the employer.'[28]

[61] The other union parties express no particular view in respect of s.139 but all contend, for varying reasons, that Clause E.1(c) is *not* a term that can be included in a modern award.

[62] Section 139 is in Pt 2-3 of Chapter 2 of the Act. The purpose of Chapter 2 is to prescribe minimum terms and conditions of employment for national system employees. It is appropriate to characterise s.139 as a remedial or beneficial provision, which is intended to benefit national system employees.

[63] The proper approach to the construction of remedial or beneficial provisions was considered by the Full Bench in *Bowker and others v DP World Melbourne Limited T/A DP World; Maritime Union of Australia and others*[29] (*Bowker*). In *Bowker* the Full Bench said:[30]

> 'The characterisation of these provisions as remedial or beneficial has implications for the approach to be taken to their interpretation. As the majority (per Gibbs CJ, Mason, Wilson and Dawson JJ) observed in *Waugh v Kippen*:
>
> > "... the court must proceed with its primary task of extracting the intention of the legislature from the fair meaning of words by which it has expressed that intention, remembering that it is a remedial measure passed for the protection of the worker. It should not be construed so strictly as to deprive the worker of the protection which Parliament intended that he should have."[31]
>
> Any ambiguity is to be construed beneficially to give the fullest relief that a fair meaning of its language will allow,[32] provided that the interpretation adopted is 'restrained within the confines of the actual language employed that is fairly open on the words used.'[33] As their Honours Brennan CJ and McHugh J put it in *IW v City of Perth*[34]:

> "... beneficial and remedial legislation, like the [Equal Opportunity] Act, is to be given a liberal construction. It is to be given 'a fair, large and liberal' interpretation rather than one which is 'literal or technical'. Nevertheless, the task remains one of statutory construction. Although a provision of the Act must be given a liberal and beneficial construction, a court or tribunal is not at liberty to give it a construction that is unreasonable or unnatural."

If the words to be construed admit only one outcome then that is the meaning to be attributed to the words. However if more than one interpretation is available or there is uncertainty as to the meaning of the words, such that the construction of the legislation presents a choice, then a beneficial interpretation may be adopted.'

[64] We adopt the above remarks and apply them to the matter before us.

[65] The particular subject matters set out in s.139(1)(a) to (j) are to be given their ordinary meaning and there is no warrant for a restrictive construction to be placed on any of them.

[66] It is also appropriate to adopt a liberal construction of the word 'about' in s.139(1), to the extent permitted by the context. The legislative context, and particularly s.142, leads us to conclude that more than an incidental connection is required between a proposed award term and one of the subject matters set out in s.139(1)(a) to (j). We note that such an approach is consistent with that adopted by the Full Bench in the *Modern Awards Review 2012 – Apprentices, Trainees and Juniors Decision*[35] (the '*Apprentices decision*') and the *Pastoral Award - learner shearers decision*.[36]

[67] A number of points tell against Ai Group's contention that a term such as Clause E.1(c) is a term permitted by s.139(1).

[68] The legislative history and the terms of s.118 strongly suggest that 'notice of termination' is not a matter falling within the scope of s.139(1).

[69] The legislative antecedent to s.139(1) is s.89A of the WR Act. As is the case with the current provision, s.89A had the effect of limiting the matters that could be included in an award. Section 89A achieved this objective by providing that an industrial dispute was taken to include only 'allowable award matters', for the purpose of:

(a) dealing with an industrial dispute by arbitration;

(b) preventing or settling an industrial dispute by making an award or order;

(c) maintaining the settlement of an industrial dispute by varying an award or order.

[70] Section 89A(2) provided that the following matters, among others, were 'allowable matters':

- long service leave
- **notice of termination**
- personal carer's leave
- parental leave
- public holidays
- redundancy pay

[71] In the Act the safety net is provided by the terms of modern awards *and* the NES. In respect of the NES, Parliament determines the relevant entitlement and in respect of the matters in s.139(1), the content of the relevant award terms is determined by the Commission.

[72] It is notable that *none* of the matters identified above (at [70]) are expressly mentioned in s.139(1) and all are expressly dealt with in the NES. The fact that these matters had been part of the *award* safety net under the WR Act but are now dealt with in the NES and *not* referred to in s.139(1), strongly suggests that a term about 'notice of termination' is *not* a term permitted by s.139(1).

[73] Further, as we have mentioned, these are beneficial provisions, that is they are intended to benefit national system employees.

[74] We note that NatRoad contends that a term such as Clause E.1(c) is *beneficial for employees*:

> 'The effect is also to have in place a mechanism which prevents the employee being formally in breach of the award. It is a mechanism which seeks to avoid the position where employees could be subject to proceedings for award breach. It prevents employees becoming subject to the consequences of an award breach and is therefore beneficial for employees in assisting them to avoid litigation that might otherwise properly be brought against them. Looked at in that light, and having regard to the other beneficial consequences of the form of the Clause, the Commission should not disturb the current award provisions.
>
> …
>
> Without that mechanism, the employee could be sued (punished) for breach of the Award and a civil penalty imposed under section 45 FW Act, as indicated in paragraphs 12-14 of this submission. The employee is benefitted by not being in breach of the Award.
>
> The detriment of having a deduction from monies otherwise payable is offset because of the built-in mechanism whereby the employee is not open to prosecution for breach.
>
> This is an important point.'[37]

[75] We reject the proposition that Clause E.1(c) should be characterised as being beneficial for employees. Rather, the term is plainly intended to benefit employers, by providing a means of encouraging compliance with Clause E.1(a), without the need to institute legal proceedings. Further, the proposition that the term puts in place 'a mechanism which prevents the employee being formally in breach of the award', is plainly wrong. The making of a deduction pursuant to Clause E.1(c) is contingent on a breach of the requirement to give notice under Clause E.1(a); but such a deduction does not operate as an immunity from prosecution in respect of the breach and nor does it indemnify an employee in respect of any penalty that may be imposed.

[76] We are not satisfied that Clause E.1(c) is a term which can be properly characterised as being *'about'* any of the matters set out in s.139(1). We deal later with whether Clause E.1(c) is an 'incidental term' within the meaning of s.142(1).

[77] We now turn to consider whether Clause E.1(c) is a term which *must* be included in a modern award (s.136(1)(b)). Subdivision C of Division 3 of Pt 2-3 deals with mandatory modern award terms.

[78] No party contended that Clause E.1(c) is a term that *must* be included in a modern award. We agree; so much is clear from an examination of ss.143 to 149 (in Subdivision C of Pt 2-3).

[79] The next question is whether Clause E.1(c) is a term which *may* be included in a modern award because it is expressly permitted by a provision of Pt 2-2 (which deals with the NES) (see s.136(1)(c) and (d)). Section 55(2) is relevant in this regard; it states:

> '(2) A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:
>
> (a) by a provision of Part 2-2 (which deals with the National Employment Standards); or
>
> (b) by regulations made for the purposes of section 127.
>
> Note: In determining what is permitted to be included in a modern award or enterprise agreement by a provision referred to in paragraph (a), any regulations made for the purpose of section 127 that expressly prohibit certain terms must be taken into account.'

[80] The NES are contained in Pt 2-2 of the Act. Notice of termination is dealt with in Subdivision A of Division 11 of that Part, as follows:

> **Subdivision A—Notice of termination or payment in lieu of notice**
>
> **117 Requirement for notice of termination or payment in lieu**
>
> *Notice specifying day of termination*
>
> (1) An employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination (which cannot be before the day the notice is given).
>
> Note 1: Section 123 describes situations in which this section does not apply.
>
> Note 2: Sections 28A and 29 of the *Acts Interpretation Act 1901* provide how a notice may be given. In particular, the notice may be given to an employee by:
> (a) delivering it personally; or
> (b) leaving it at the employee's last known address; or
> (c) sending it by pre-paid post to the employee's last known address.
>
> *Amount of notice or payment in lieu of notice*
>
> (2) The employer must not terminate the employee's employment unless:
> (a) the time between giving the notice and the day of the termination is at least the period (the ***minimum period of notice***) worked out under subsection (3); or
> (b) the employer has paid to the employee (or to another person on the employee's behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee's behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.
>
> (3) Work out the minimum period of notice as follows:

(a) first, work out the period using the following table:

Period		
	Employee's period of continuous service with the employer at the end of the day the notice is given	**Period**
1	Not more than 1 year	1 week
2	More than 1 year but not more than 3 years	2 weeks
3	More than 3 years but not more than 5 years	3 weeks
4	More than 5 years	4 weeks

(b) then increase the period by 1 week if the employee is over 45 years old and has completed at least 2 years of continuous service with the employer at the end of the day the notice is given.

118 Modern awards and enterprise agreements may provide for notice of termination by employees

A modern award or enterprise agreement may include terms specifying the period of notice an employee must give in order to terminate his or her employment.

[81] An issue in contention is whether s.118 is a source of power for the inclusion of a term such as Clause E.1(c) in a modern award.

[82] Ai Group contends that Clause E.1(c) is a term which falls within the scope of s.118 and relies on what it describes as 'the relevant historical context', including previous Full Bench decisions, and the heading of Subdivision A of Division 11 of Pt 2-2. The essence of Ai Group's submission is that, historically, the concept of notice of termination by an employer has consisted of two elements:

- a requirement that employers give a specified period of notice to their employee; and
- the employer having the option of making a payment to the employee in lieu of notice.

[83] Ai Group submits that the same broad interpretation should apply to notice of termination *by an employee:*

'Consistent with the longstanding recognised breadth of the term "notice of termination", as used in s.61, s.117 expressly encompasses both notice given in time and payment in lieu of notice. Consistently, s.118 legitimately encompasses notice given in time by an employee and an ability for the employer to make a deduction for notice not given by the employee.'[38]

[84] It is on this basis that Ai Group advances the following submission:

'Placing the interpretation on s.118 that this section does not legitimately include an award term allowing a deduction from monies owed to an employee on termination for notice not given would ignore the historical context in which the concept of 'notice of termination' has been understood and applied for over 75 years.'[39]

[85] We note here that as part of its merits submission Ai Group submits '[i]t is only fair that award clauses operate to provide a *relevantly reciprocal* obligation to those imposed upon employers under s.117.'[40] This notion of 'reciprocal obligation' is also implicit in Ai Group's comparison of ss. 117 and 118, and in its proposed construction of s.118. For our part we do not accept that Clause E.1(c) is an analogue of payment in lieu of notice by the employer. A closer analogue would be that the employee does not have to give notice if they agree to forfeit the wages.

[86] Ascertaining the legal meaning of a statutory provision necessarily begins with the ordinary grammatical meaning of the words used, having regard to their context and legislative purpose. Context includes the language of the Act as a whole, the existing state of the law, the mischief the provision was intended to remedy and any relevant legislative history.[41]

[87] We have applied the above principles to our consideration of the proper construction of s.118. For the reasons which follow we reject Ai Group's contention that a term such as Clause E.1(c) falls within the scope of s.118.

[88] We begin with a consideration of the ordinary grammatical meaning of the words of s.118, having regard to their context.

[89] Section 118 provides that a modern award may include 'terms specifying the period of notice an employee must give in order to terminate his or her employment'. Ai Group submits that:

> 's.118 legitimately encompasses notice given in time by an employee and an ability for the employer to make a deduction for notice not given by the employee.'[42]

[90]
Contrary to the submission advanced the literal meaning (or the ordinary grammatical meaning) of the words of s.118 do not support Ai Group's contention.

[91] The literal meaning of the words of a statutory provision may be displaced by the context and legislative purpose. As the majority observed in *Project Blue Sky*:

> 'the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.'[43]

[92] The legislative context does not assist Ai Group's argument.

[93] As we have mentioned, Ai Group places some reliance on s.61 and the heading to Subdivision A of Division 11 of Pt 2-2 in support of its contention that Clause E.1(c) is a term which falls within the scope of s.118.

[94] It is convenient to deal with s.61 first. The relevant part of s.61 states:

> '(2) The minimum standards relate to the following matters:

… (i) notice of termination and redundancy pay (Division 11)' (emphasis added)

[95] In our view s.61 is merely a guide to the broad subject matters which comprise the NES. In any case it does not assist Ai Group's argument.

[96] As to the headings, it is relevant to observe that s.40A of the Act provides that the *Acts Interpretation Act 1901* (the AI Act) as in force on 25 June 2009, applies to the Act. At the relevant time s.13(1) of the AI Act provided that the headings of the Subdivisions into which an Act is divided are deemed to be part of the Act but that headings to a section of an Act are not. Hence the heading to Subdivision A of Division 11 of Pt 2-2 is deemed to be part of the Act, but the headings to ss. 117 and 118 are not. While the section headings do not form part of the Act regard may be had to them in construing the Act (see s.15AB(2)(a) of the AI Act).

[97] In our view the heading to Subdivision A of Division 11 provides no support for Ai Group's contention, indeed the various headings in Subdivision A tell against the interpretation advanced by Ai Group.

[98] The heading to Subdivision A of Division 11 of Pt 2-2 is 'Notice of termination or payment in lieu.' The heading does not suggest that payment in lieu of notice is incorporated within the concept of notice of termination; rather it is simply a description of the matters dealt with in the Subdivision. Indeed, the use of the disjunctive 'or' suggests that payment in lieu of notice is not incorporated within the concept of notice of termination – a result which accords with the position at common law.[44]

[99] Subdivision A of Division 11 of Pt 2-2 consists of two sections, 117 and 118. Section 117 deals with the requirements for an employer to give employees notice of termination or payment in lieu of notice. The subject matters dealt with in s.117 are reflected in the heading to that section: 'Requirement for notice of termination or payment in lieu'.

[100] The heading and content of s.117 may be contrasted with s.118. Section 118 makes no reference to payment in lieu of notice or to the capacity for an employer to withhold payment in the event that an employee does not give the requisite notice of termination. Nor does the heading to s.118 suggest that such matters are dealt with in the section, it simply says: 'Modern awards and enterprise agreements may provide for notice of termination by employees.'

[101] The content of ss.117 and 118 also tell against the construction advanced by Ai Group. It will be recalled that Ai Group contends that notice of termination by an employee encompasses two elements – the notice period required and the right to deduct for notice not given. Ai Group submits that this is consistent with the breadth of the expression notice of termination by an employer, which it contends encompasses two elements – the notice period required and payment in lieu of notice not given. Two things may be said about this.

[102] The first is that, contrary to Ai Group's submission the term 'notice of termination' does not encompass both the requirement to give notice and payment in lieu of notice. Rather, payment in lieu is a separate concept to notice; it is an alternative to the requirement to give notice. So much is clear from the heading and content of s.117. The heading is 'Requirement for notice of termination or payment in lieu' (emphasis added). The section sets out the primary obligation in s.117(1), that is, 'An employer must not terminate an employee's employment unless the employer has given the employee written notice of the day the

termination …'. The minimum period of notice is prescribed by s.117(3) (see s.117(2)(a)). Section 117(2)(b) provides an alternative to the requirement to give the requisite period of notice; by providing 'payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee.' The fact that payment is an alternative to the giving of notice is clear from the use of the words 'in lieu of notice', in s.117(2)(b), and the use of the disjunctive 'or' between s.117(2)(a) and (b).

[103] The second point against the argument advanced by Ai Group is that it is striking that s.117 expressly deals with what Ai Group submits are the two elements of notice of termination by an employer (at s.117(2)(a) and (b)); but s.118 only refers to one matter, the period of notice an employee must give to terminate his or her employment.

[104] There is a further contextual point which is relevant to the interpretation of s.118. Section 55 deals with the interaction between the NES and, relevantly, a modern award. As we have mentioned, s.55(2) provides:

> '(2) A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:
>
> (a) by a provision of Part 2-2 (which deals with the National Employment Standards);'(emphasis added)

[105] Section 118 does *not* expressly permit a term enabling an employer to deduct from monies owed on termination an amount equivalent to the period of notice not given.

[106] Ai Group raises a further contextual issue in its reply submission of 12 September 2017, at [19] and [20]:

> 'We note that all of the other provisions of Part 2-2 that make the inclusion of certain award terms permissible, deal with matters that interact with, and potentially exclude, the operation of a part of the NES. This includes terms dealing with;
>
> - Cashing out of annual leave (s.93);
> - Taking of annual leave (s.93);
> - Cashing out of paid personal/carer's leave (s.101);
> - Terms setting out the kind of evidence that an employee must provide to be entitled to paid personal/carer's leave, unpaid carer's leave or compassionate leave (s.107);
> - Substitution of public holidays specified in the NES (s.115);
> - Exclusion from the obligation to pay redundancy pay (s.121).
>
> It would be highly anomalous, and indeed inconsistent with the approach otherwise adopted in the Act for s.118 to be interpreted as only allowing award terms that are consistent with the NES. The NES does not regulate the amount of notice of termination that an employee is required to given. Accordingly, if s.118 only operated in the limited manner suggested by the unions it begs the question – why was it included in Part 2-2?'

[107] We acknowledge that the other provisions of Pt 2-2 which permit certain terms to be included in modern awards deal with matters that interact with, and may potentially exclude the operation of the NES or part of the NES. But that fact does not lead inexorably to the

construction contended for by Ai Group. As we have mentioned, the plain words of s.118 and the legislative context do not support Ai Group's contention.

[108] As to the rhetorical question posed by Ai Group – why was s.118 included in Pt 2-2 when the subject matter could have been dealt with in s.139 - we can only speculate in respect of this issue. But it is reasonable to suppose that Parliament wished to regulate the circumstances in which an *employer* could terminate an employee's employment (including the period of notice required) but was content to leave the specification of the period of notice an employee must give in order to terminate his or her employment to the Commission to determine (in the context of the making or variation of a modern award) or for the agreement of the relevant parties (in the context of an enterprise agreement). While Parliament could have chosen to add 'notice of termination by an employee' to s.139(1), it chose not to do so. It may have considered it more convenient to deal with that subject matter in s.118, immediately after dealing with requirements for termination by the employer.

[109] Contrary to Ai Group's submission the legislative context tells against the construction for which it contends.

[110] As to the legislative purpose, s.15AA of the AI Act requires that a construction that would promote the purpose or object of the Act is to be preferred to one that would not promote that purpose or object. The purpose or object of the Act is to be taken into account even if the meaning of a provision is clear. When the purpose or object is brought into account an alternative interpretation may become apparent. If one interpretation does not promote the object or purpose of the Act, and another does, the latter interpretation is to be preferred. Of course, s.15AA requires us to construe the Act, not to rewrite it, in the light of its purpose.[45]

[111] The 'Regulatory Analysis' incorporated into the Explanatory Memorandum to the *Fair Work Bill 2008* includes the following statement:

> '*Notice of termination and redundancy pay*: the NES will provide for written notice of termination and redundancy pay. The current provision for notice of termination is provided under the WR Act but through provisions separate to the Standard. The substantive change under the proposed reforms is for the employer's notice to be in writing. The NES provides a new entitlement to redundancy pay, depending on the level of continuous service by an employee. This NES does not apply to employees of a small business. Modern awards may include industry specific redundancy entitlements. These entitlements will provide more comprehensive protection for employees.' (emphasis added)

[112] ACCI advances the following submission in respect of the above extract from the Explanatory Memorandum:

> 'This suggests that there was no change proposed to the substance of termination provisions relative to the previous Workplace Relations Act 1996 that would have the effect that terms in industrial instruments enabling an employer to deduct money due to an employee on termination, where the employee fails to give the required period of notice, would fall foul of the new statutory context.'[46]

[113] We reject the contention put. The reference in the Explanatory Memorandum to 'the substantive change under the proposed reforms' simply refers to the fact that under s.661 of

the WR Act (as in force before the Act*)* there was no requirement that the notice to be given by *the employer* to an employee had to be in writing.

[114] The Explanatory Memorandum does not suggest that s.118 is a source of power for a term such as Clause E.1(c); it states:

> '470. Clause 118 permits a modern award or enterprise agreement to include terms setting out the period of notice an employee must give in order to terminate his or her employment.'

[115] The evident legislative purpose of s.118 is to continue to allow awards and enterprise agreements to include terms specifying the period of notice an employee must give on resignation. Nor is there anything in the Explanatory Memorandum or in any of the extrinsic materials before us to suggest that s.118 was intended to be read beyond the plain meaning of its terms.

[116] We acknowledge that the object of the Act is 'to provide a balanced framework for cooperative and productive workplace relations'; but that object provides no warrant for interpreting s.118 in the manner proposed by Ai Group.

[117] It is convenient to now deal with Ai Group's contention that past Full Bench decisions have dealt with the matters before us and that such decisions should not be disturbed. Before turning to the particular decisions referred to we propose to make some general observations about the weight to be accorded to previous Full Bench decisions.

[118] As the Full Bench observed in the *Preliminary Jurisdictional Issues decision,*[47] in conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue and that:

> 'The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.'[48]

[119] The above observation was the subject of further elaboration in the *Penalty Rates – Hospitality and Retail Sectors decision,*[49] in which the Full Bench said:

> 'As observed by the Full Bench in the *Preliminary Jurisdictional Issues decision*, while it is appropriate to take account of previous decisions relevant to a contested issue arising in the Review it is necessary to consider the context in which those decisions were made. The particular context may be a cogent reason for *not* following a previous Full Bench decision, for example:
>
> - the legislative context which pertained at that time may be materially different from the FW Act;
>
> - the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will be relevant to the weight to be accorded to the previous decision; or
>
> - the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.'[50]

[120] Ai Group contends that the issues raised in the August Statement have already been determined by the Award Modernisation Full Bench and that decision should not be disturbed. In particular, Ai Group submits that: 'The wording of s.118 was of course central to the AIRC's consideration of whether jurisdiction existed'.

[121]

ACCI advances a similar submission:

> 'During the award modernisation process the former Australian Industrial Relations Commission (AIRC) developed a considered view about whether an employer should have the ability to deduct money due to an employee on termination where the employee fails to give the required period of notice within the context of the statutory framework and Amended Request.'[51] (emphasis added)

[122] As mentioned above, in conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue and will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made. The extent of a previous Full Bench's consideration of a contested issue is relevant to assessing the weight to be attributed to that decision. In the context of the present matter, there is nothing in the decision of the Award Modernisation Full Bench to suggest that it gave any consideration to the contested issues which are before us.

[123] In determining the final provisions in each modern award, the Award Modernisation Full Bench generally adopted the terms and conditions in the preponderance of pre-reform instruments:

> 'The consolidated request also provides that the process is not intended to disadvantage employees or increase costs for employers – objectives which are potentially competing. The content of the awards we have formulated is a combination of existing terms and conditions in relevant awards and existing community standards. In order to minimise disadvantage to employees and increases in costs for employers we have generally adopted terms and conditions which have wide application in the existing awards in the relevant industry or occupation. However the introduction of modern awards applying across the private sector in place of the variety of different provisions in the Federal and State awards inevitably means that some conditions will change in some States. Some wages and conditions will increase as a result of moving to the terms which apply elsewhere in the industry. Equally some existing award entitlements will not be reflected in the applicable modern award because they do not currently have general application.
>
> The creation of modern awards which will constitute the award elements of the safety net necessarily involves striking a balance as to appropriate safety net terms and conditions in light of diverse award arrangements that currently apply. It is in that context that the formulation of appropriate transitional provisions arises.'[52](emphasis added)

[124] The basis of Ai Group's submission that s.118 was 'central to the AIRC's consideration' is unclear. It finds no support in the decision of the Award Modernisation Full Bench (set out at [48] above), which makes no reference to the question of jurisdiction and is focussed on the drafting of the relevant provision. Nor do the submissions advanced in the award modernisation proceedings provide a reasonable basis for Ai Group's contention.

[125] A review of the submissions made and the decision of the Award Modernisation Full Bench suggests that the termination provisions in modern awards reflect the existing provisions in the most widely used pre-reform instruments rather than a detailed review of the issue.

[126] Contrary to Ai Group's submission we have concluded that the jurisdictional issues raised in the present proceedings were *not* the subject of detailed consideration in the Award Modernisation process. Nor did the AIRC Full Bench develop a 'considered view' about these issues, as contended by ACCI.

[127] Ai Group also referred to the *1997 Award Simplification decision*[53] in support of its contention regarding the breadth of the concept of notice of termination by an employee. Contrary to the submission put that decision does not support Ai Group's proposed interpretation of s.118. We have discussed the 1997 decision earlier, at [30] – [32].

[128] Ai Group is apparently advancing the submission that the decision supports its contention that the expression 'notice of termination' includes the right of an employer to withhold monies due equal to the period of notice not given. This submission would have some force if it was apparent that the Full Bench had determined that Clause 17.2.2 fell within the scope of the allowable award matter specified in s.89A(2)(n) (i.e. 'notice of termination'). But there is no statement to that effect in the *1997 Award Simplification decision* and Attachment D to the decision – 'Allowable Matters/Incidental and Necessary Table' – suggests that Clause 17.2.2 could have been allowable *either* because it fell within the scope of s.89A(2)(n) *or* on the basis that it was incidental to that allowable matter and necessary for the effective operation of the award.

[129] For the reasons given we reject Ai Group's contention that Clause E.1(c) is a term which falls within the scope of s.118.

[130] We have concluded that Pt 2-2 of the Act (which deals with the NES) does *not* permit the inclusion of a term such as Clause E.1(c) in a modern award.

[131] However, s.118 does provide that a modern award may include 'terms specifying the period of notice an employee must give in order to terminate his or her employment.' It follows that such a term is 'a term that is permitted … to be in a modern award', within the meaning of s.142(1)(a). In the event that a modern award includes a term specifying the notice of termination to be given by an employee, then a term such as Clause E.1(c) *may* be permissible, provided the requirements of s.142 have been met.

[132] As set out earlier, s.142(1) provides that a modern award may include terms that are:

> '(a) incidental to a term that is permitted or required to be in the modern award; and
>
> (b) essential for the purpose of making a particular term operate in a practical way.'[54]

[133] To be included in a modern award pursuant to s.142 the term must satisfy the requirements of both s.142(1)(a) and (b) (and satisfy s.136(2)(b), a point we deal with later).

[134] As to s.142(1)(a), we adopt the Macquarie Dictionary definition of the phrase 'incidental to', namely: 'liable to happen in conjunction with; naturally appertaining to'.

[135] The legislative history is of some assistance in the interpretation of s.142(1)(b).

[136] Section 89A(6) of the WR Act is a legislative antecedent to s.142. As we have mentioned, s.89A limited the matters which could be included in an award to 'allowable award matters' (set out in s.89A(2)). Relevantly, s.89A(6) provided:

> 'The Commission may include in an award provisions that are incidental to the matters in subsection (2) and necessary for the effective operation of the award.'

[137] The terms of s.89A(6) may be contrasted with s.142(1). The structure of s.142(1) is different but the requirement that the term be 'incidental' to a permitted or required term is common to both s.142(1) and s.89A(6). The difference lies in the second requirement.

[138] In s.89A(6) the requisite test was that the incidental term be 'necessary for the effective operation of the award', whereas s.142(1)(b) requires that the incidental term be 'essential for the purpose of making a particular term operate in a practical way.' Two observations may be made about the differences between these two expressions:

- in s.89A(6) the incidental term must be 'necessary', whereas in s.142(1)(b) the incidental term must be 'essential'; and

- the object of the incidental term is different in s.89A(6) it is for the 'effective operation of the award' and in s.142(1)(b) it is for 'the purpose of making a particular term operate in a practical way'.

[139] As to the first point, we note that, as a general proposition, where the legislature chooses to use a different word it may be presumed that the intention was to change the meaning. As Irvine CJ observed in *Scott v Commercial Hotel Merbein Pty Ltd*:[55]

> '[T]hough it is not to be conclusive, the employment of different language in the same Act may show that the Legislature had in view different objects'.[56]

[140] This observation is also apposite to the circumstance where (as here) the legislature chooses a different word in later legislation dealing (broadly) with the same subject matter.

[141] But, while the use of different words *may* show an intention to change the meaning it is not a necessary consequence of the use of different words and courts have shown little compunction in departing from the general approach.[57]

[142] At first glance the word 'essential' appears to be a word of narrower compass than the word 'necessary'. That which is 'essential' will always be necessary, but the converse may not be so. However, the dictionary definitions suggest that the words are synonymous. The Macquarie Dictionary defines 'essential', when used as an adjective, as 'absolutely necessary; indispensable'; and 'necessary' is defined as 'that cannot be dispensed with'. For our part, we consider that there is little discernible difference between the words 'essential' and 'necessary' when used in the context of a provision such as s.142(1)(b).

[143] In *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)*[58] Tracey J considered the proper construction of the expression 'the Commission is

satisfied that making [a determination varying a modern award] … is *necessary* to achieve the modern awards objective' in s.157(1). His Honour held:

> 'The statutory foundation for the exercise of FWA's power to vary modern awards is to be found in s 157(1) of the Act. The power is discretionary in nature. Its exercise is conditioned upon FWA being satisfied that the variation is "necessary" in order "to achieve the modern awards objective". That objective is very broadly expressed: FWA must "provide a fair and relevant minimum safety net of terms and conditions" which govern employment in various industries. In determining appropriate terms and conditions regard must be had to matters such as the promotion of social inclusion through increased workforce participation and the need to promote flexible working practices.
>
> The subsection also introduced a temporal requirement. FWA must be satisfied that it is necessary to vary the award at a time falling between the prescribed periodic reviews.
>
> The question under this ground then becomes whether there was material before the Vice President upon which he could reasonably be satisfied that a variation to the Award was necessary, at the time at which it was made, in order to achieve the statutory objective …
>
> In reaching my conclusion on this ground I have not overlooked the SDA's subsidiary contention that a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action. Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable. It was open to the Vice President to form the opinion that a variation was necessary.'[59]

[144] The above observation – in particular the distinction between that which is 'necessary' and that which is merely desirable – is apposite to our consideration of what is 'essential' in the context of s.142(1)(b). Further, we agree with the observation that reasonable minds may differ as to whether a particular incidental term is 'essential' for the purpose of making a particular term operate in a practical way.

[145] The second difference between the former s.89A(6) and s.142(1)(b) is more significant. In s.89A(6), the incidental term had to be necessary 'for the effective operation of the award'; whereas in s.142(1)(b) the incidental term must be essential 'for the purpose of making a particular term operate in a practical way'. Hence, s.89A(6) was directed at the *award* whereas s.142(1)(b) is directed at a particular permitted or required *term*.

[146] It seems to us that the range of incidental terms which would meet the requirement in s.142(1)(b) is, in at least one respect, more limited than was the case under the former s.89A(6). As s.89A(6) was directed at 'the effective operation of the award' it would have permitted the inclusion of machinery terms, such as a table of contents; whereas s.142(1) does *not* provide a source of power for the inclusion of such terms. So much is clear from the structure of s.142 – it delineates between incidental and machinery terms. Section 142(1) deals with incidental terms and s.142(2) deals with machinery terms. If machinery terms were permitted by s.142(1) then s.142(2) would be otiose.

[147] It is also notable that s.89A(6) uses the expression 'for *the effective operation* of the award' whereas in s.142(1)(b) the comparable expression is 'for the purpose of making a particular term *operate in a practical way'*.

[148] The Macquarie Dictionary defines 'effective', when used as an adjective, to mean 'serving to effect the purpose; producing the intended or expected result'. The word 'practical' is defined as 'consisting of involving, or resulting from practice or action: a *practical application of a rule*'. It seems to us that 'for the purpose of making a particular term operate *in a practical way*' is an expression of slightly wider import than that used in s.89A(2). A broader range of terms may be said to be for the purpose of making a particular term operate in 'a practical way' than would fall within the scope of the expression 'for the effective operation of the award'.

[149] In the *Apprentices decision* the Full Bench observed that:

> '… s.142(1) provides only a relatively narrow basis for the inclusion of award terms. It is not in itself an additional power for the inclusion of any terms that cannot be appropriately linked back to a term that is permitted by s.139(1). The use of the word 'essential' suggests that the term needs to be 'absolutely indispensable or necessary' for the permitted term to operate in a practical way. The wording of the section suggests that it provides a more limited power to include terms than that of its earlier counterpart in s.89A(6).'[60]

[150] We agree with the observation that s.142(1) is not in itself an additional power for the inclusion of terms in a modern award that cannot be appropriately linked to a permitted term. We also agree that the section provides a more limited power to include terms than s.89A(6), in that it does not extend to machinery terms. However, as noted above, 'for the purpose of making a particular term operate in a practical way' is an expression of slightly wider import than the comparable expression in s.89A(6).

[151] We now turn to consider whether Clause E.1(c) is:

(i) incidental to a term permitted to be in a modern award (in this case Clause E.1(a), which specifies the period of notice an employee must give in order to terminate his or her employment, is a permitted term by virtue of s.118); and

(ii) essential for the purpose of making Clause E.1(a) operate in a practical way.

[152] Contrary to the ACTU's submission, we have reached a *provisional* view that Clause E.1(c) is incidental to Clause E.1(a). It seems to us that there is a sufficient relationship between the two provisions – the right of an employer to make a deduction under Clause E.1(c) only arises in circumstances where the employee is obliged to give written notice of termination in accordance with Clause E.1(a).

[153] ACCI, ABI and NatRoad contend that Clause E.1(c) is essential for the purpose of making Clause E.1(a) operate in a practical way. ACCI advances the following submission in support of this contention:

> 'It is necessary that a provision mandating a requirement for employees to provide a specific period of notice operates in a practical way and a clause which deals with an employer's ability to deduct money due to an employee on termination where the employee fails to give the required period of notice is essential for this purpose.
>
> This is supported by the findings of the Australian Conciliation and Arbitration Commission in the TCR Decision, subsequent reviews of the TCR standard by the AIRC and the AIRC

> decision to include a provision of this nature on a considered basis when making the modern awards.
>
> We see no basis for the current Full Bench to depart from this long established and well considered approach.'[61]

[154] ABI advances the following submission in support of its contention that Clause E.1(c) is essential to ensure Clause E.1(a) operates in a practical way:

> '(a) clause E.1(a) is designed to prevent the significant disruption, inconvenience and cost to employers which arises when employees do not provide the required period of notice of termination of employment;
>
> (b) absent clause E.1(c), there is no other enforcement mechanism in the modern awards to ensure compliance with clause E.1(a);
>
> (c) without the inclusion of a compliance mechanism in the modern awards, an employer's only recourse for a breach of clause E.1(a) would be to sue the employee by way of a common law claim;
>
> (d) the bringing of common law proceedings against an employee is an unsatisfactory course of action for two primary reasons:
>
> (i) it is unduly onerous and costly; and
>
> (ii) it does not actually remedy the inconvenience caused by an employee not providing the required period of notice.'[62]

[155] We note that the argument advanced in paragraphs (b), (c) and (d) above proceeds on a false premise. Central to the argument put is the proposition that an employer's only recourse for a breach of Clause E.1(a) would be 'to sue the employee by way of common law claim'. This is incorrect, there is a statutory remedy for such a breach.

[156] Sections 45 of the Act provides that:

> 'A person must not contravene a term of a modern award.'

[157] In circumstances where a term of a modern award requires an employee to give a period of notice in order to terminate his or her employment, a failure to provide the requisite notice will contravene s.45, which is a civil penalty provision.

[158] An employer affected by the contravention (or an employer organisation to whom the employer belongs) may apply for an order for breach of s.45 to the Federal Court, Federal Circuit Court or an eligible State or Territory Court (see Item 2 in the Table in s.539(2) and s.540(5)). Such a court may impose a maximum pecuniary penalty of 60 penalty units (currently $12,600).[63] The court may, on application, order that the pecuniary penalty (or part of it) be paid to the employer (s.546(3)(c)).

[159] Further, if the application is brought in the Federal Court or Federal Circuit Court, the court may make an order 'awarding compensation for loss that a person has suffered because of the contravention' (s.545(2)(b)).

[160] In *Jetgo Australia Holdings Pty Ltd v Goodsall (No 2)*[64] (*Jetgo*) a penalty of $2550 was imposed on a pilot for failing to give the two weeks' notice required by a modern award

and in *Griffith University v Leiminer*[65] (*Leiminer*) a penalty of $500 was imposed on an academic for breaching a notice of termination provision in an enterprise agreement.

[161] NatRoad also submits that Clause E.1(c) is essential to ensure that Clause E.1(a) operates in a practical way:

> 'It is essential that the claw back provision be included with a mandated requirement for employees to provide a specific period of notice so the provision operates in a practical way, aspects of which have already been touched on in this submission.
>
> …
>
> We submit that the history of the Clause and its application show the fundamentally practical way that the 'claw-back' provision operates. There is no evidence or challenge in the current proceedings to the fact that the practical mechanism which the Clause contains is operating other than in a practical and pragmatic manner, as next addressed.
>
> The starting point is that the history of the insertion of provisions into pre-modern awards relates to having the same notice periods apply to employers and to employees. If the employee were to effectively avoid that obligation to then be in breach of the Award, the clause would operate both to eliminate the fundamental purpose on which it is founded and to expose employees to a breach of the award. That impractical consequence is avoided by inclusion of the "claw back" mechanism.
>
> Most employees would not be aware of the risk of being in breach of the Award by not giving the required period of notice. Accordingly, at a highly practical level, the "self-correcting" or "claw-back" element of the Clause operates to reinforce the basis on which it has been inserted in awards: to provide fairness to employers as well as employees (advantaging in particular smaller employers) and to relieve the employee of liability for breach of the award.
>
> A practical analysis of the Clause shows that the perspective of an employee being 'disentitled' in some manner by the operation of the clause is misconstrued. The employee is merely being held to the law: the part of the clause that vindicates the "claw back" ensures that there is equality in the notice periods required of employers and employees and is doing so in a manner that avoids a breach of a clause which would be readily breached by employees without that "self-correcting" mechanism. For example, clause 11.2 of the Long Distance Award contemplates the contingency of the failure on the part of the employee to give the required notice. Failure to give the required notice is not therefore a breach of the award if the mechanism contemplated to cure that breach is invoked.'[66]

[162] As we have mentioned earlier, the proposition that a term such as Clause E.1(c) operates 'to relieve the employee of liability for breach of the award', is plainly wrong.

[163] The ACTU contends that the question of whether a term satisfies the test in s.142(1)(b) is 'entangled with merit considerations, including whether a term is necessary to meet the modern awards objective, and requires an assessment of relevant evidence.' It is on this basis that the ACTU submits:

> 'it is not possible at this point to rule on whether clause E.1(c) is essential for the purpose of making the preceding provisions of clause E.1 operate in a practical way.'[67]

[164] We disagree. Section 142(1)(b) poses a separate, antecedent, jurisdictional question to the issue of whether it is necessary to include a term in a modern award to achieve the modern awards objective. Combining a consideration of the two issues is apt to confuse and lead to error. It seems to us that the Act envisages a sequential approach to the consideration of

whether to include a term in a modern award. In the context of the present matter that sequential approach involves a consideration of the following questions:

1. Is Clause E.1(c) a term permitted by s.139(1)?

2. Is Clause E.1(c) a term permitted by Pt 2-2 (the NES)?

3. Is Clause E.1(c) incidental to a permitted term and essential for the purpose of making that term operate in a practical way?

4. If any of questions 1, 2 or 3 is answered in the affirmative, then does Clause E.1(c) contravene Subdivision D of Division 3 of Pt 2-3 (particularly ss. 151 and 155)?If the answer to question 4 is no, then is it necessary to include Clause E.1(c) in a modern award to achieve the modern awards objective?

[165] We accept that there may well be a degree of overlap between the submissions advanced in respect of each of these questions. For example, s.151(a) provides that a modern award must not include a term that has no effect because of s.326(1). Section 326(1) provides (in summary) that a term of a modern award has no effect if it permits a deduction from an amount payable to an employee, if the deduction is for the benefit of the employer and 'unreasonable in the circumstances.' The latter expression has been held to mean 'inequitable, unfair and unjustifiable.' In the event that a term is found to be *not* 'unreasonable in the circumstances', within the meaning of s.326(1)(e)(ii) (and hence *not* unfair); that finding will be relevant, though not determinative, of whether the term is necessary to achieve the modern awards objective. This is so because the modern award objective is that modern awards, together with the NES, provide a *fair* and relevant minimum safety net.

[166] But the fact that the considerations relevant to the determination of the various issues may overlap does not mean that the question of jurisdiction should be considered in some sort of omnibus way. Each of the relevant statutory tests must be considered separately, according to their terms.

[167] For our part we accept that a term such as Clause E.1(c) is likely to enhance compliance with an award term which specifies the period of notice an employee must give to terminate his or her employment. Of course such a term is more likely to encourage compliance if employees were made aware of the potential consequence of failing to provide the requisite notice of termination. We also accept that such a term provides an efficient and effective means whereby compliance with employee notice requirements may be encouraged.

[168] The provision of such a mechanism may also avoid the need to enforce the notice provision through litigation. It may also be accepted that a term such as Clause E.1(c) has been a longstanding feature of federal awards. But, as mentioned earlier, that fact is far from determinative of the issues presently before us.

[169] However, the question is whether these considerations are sufficient to warrant a finding that a term such as Clause E.1(c) is essential for the purpose of making Clause E.1(a) operate in a practical way. We are not satisfied that there has been sufficient engagement with this issue to date and intend to provide a further opportunity for interested parties to make submissions in respect of this issue. We return to this subject later in our decision, in Section 4 'Next Steps'.

[170] Even if Clause E.1(c) is a term that *may* be included in a modern award, pursuant to s.142(1), that is not the end of the matter.

[171] As identified in the August Statement to the extent that there is power to include a provision such as Clause E.1(c) in a modern award an issue then arises as to whether as a matter of merit such provision is necessary to achieve the modern awards objective.

[172] But before turning to the modern awards objective we must first consider whether Clause E.1(c) is a term which we are *prohibited* from including in a modern award. Section 136(2) is relevant in this regard, it states:

> (2) A modern award must not include terms that contravene:
>
> (a) Subdivision D (which deals with terms that must not be included in modern awards); or
> (b) section 55 (which deals with the interaction between the National Employment Standards and a modern award or enterprise agreement).
>
> Note: The provisions referred to in subsection (2) limit the terms that can be included in modern awards under the provisions referred to in subsection (1).

[173] It is convenient to first deal with whether Clause E.1(c) contravenes s.55. Section 55 states:

> **55 Interaction between the National Employment Standards and a modern award or enterprise agreement**
>
> *National Employment Standards must not be excluded*
>
> (1) A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.
>
> *Terms expressly permitted by Part 2-2 or regulations may be included*
>
> (2) A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:
> (a) by a provision of Part 2-2 (which deals with the National Employment Standards); or
> (b) by regulations made for the purposes of section 127.
>
> Note: In determining what is permitted to be included in a modern award or enterprise agreement by a provision referred to in paragraph (a), any regulations made for the purpose of section 127 that expressly prohibit certain terms must be taken into account.
>
> (3) The National Employment Standards have effect subject to terms included in a modern award or enterprise agreement as referred to in subsection (2).
> Note: See also the note to section 63 (which deals with the effect of averaging arrangements).
>
> *Ancillary and supplementary terms may be included*
>
> (4) A modern award or enterprise agreement may also include the following kinds of terms:
> (a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;
> (b) terms that supplement the National Employment Standards;
> but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

Note 1: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:

(a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or

(b) that specify when payment under section 90 for paid annual leave must be made.

Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:

(a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or

(b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

Note 3: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74.

Enterprise agreements may include terms that have the same effect as provisions of the National Employment Standards

(5) An enterprise agreement may include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards, whether or not ancillary or supplementary terms are included as referred to in subsection (4).

Effect of terms that give an employee the same entitlement as under the National Employment Standards

(6) To avoid doubt, if a modern award includes terms permitted by subsection (4), or an enterprise agreement includes terms permitted by subsection (4) or (5), then, to the extent that the terms give an employee an entitlement (the ***award or agreement entitlement***) that is the same as an entitlement (the ***NES entitlement***) of the employee under the National Employment Standards:

(a) those terms operate in parallel with the employee's NES entitlement, but not so as to give the employee a double benefit; and

(b) the provisions of the National Employment Standards relating to the NES entitlement apply, as a minimum standard, to the award or agreement entitlement.

Note: For example, if the award or agreement entitlement is to 6 weeks of paid annual leave per year, the provisions of the National Employment Standards relating to the accrual and taking of paid annual leave will apply, as a minimum standard, to 4 weeks of that leave.

Terms permitted by subsection (4) or (5) do not contravene subsection (1)

(7) To the extent that a term of a modern award or enterprise agreement is permitted by subsection (4) or (5), the term does not contravene subsection (1).

Note: A term of a modern award has no effect to the extent that it contravenes this section (see section 56). An enterprise agreement that includes a term that contravenes this section must not be approved (see section 186) and a term of an enterprise agreement has no effect to the extent that it contravenes this section (see section 56).

[174] We propose to deal with s.55(4), then s.55(1), noting that no party contended that Clause E.1(c) was a term permitted by s.55(4).

[175] We first turn to consider whether Clause E.1(c) is a term which is 'ancillary or incidental to the operation of an entitlement of an employee under the NES' within the meaning of s.55(4)(a).

[176] We have already expressed the *provisional* view that under s.142(1)(a) Clause E.1(c) is incidental to Clause E.1(a), which specifies the period of notice an employee must give in

order to terminate his or her employment. Clause E.1(a) is a term expressly permitted by s.118 of the Act. Section 118 is part of the NES but it is not 'an entitlement of an employee under the NES'. It follows that Clause E.1(c) is *not* a term falling within the ambit of s.55(4)(a).

[177] Nor is Clause E.1(c) a term which supplements the NES, within the meaning of s.55(4)(b). The Macquarie Dictionary defines the word 'supplement' when used as a noun as 'something added to complete a thing, supply a deficiency or reinforce or extend a whole'. It is not clear to us that Clause E.1(c) can properly be said to 'supplement the NES', but in any event, to the extent it does it cannot be 'detrimental to an employee in any respect, when compared to the NES'. As mentioned earlier, Clause E.1(c) is incidental to a term permitted by s.118, which is part of the NES but does not prescribe an employee entitlement. It follows that Clause E.1(c) is not a term falling within the ambit of s.55(4)(b).

[178] As Clause E.1(c) is not a term falling within the scope of s.55(4), ss.55(6) and (7) are not relevant. We now return to s.55(1).

[179] Section 55(1) of the Act relevantly provides that a modern award 'must not exclude' the NES or any provision thereof. As discussed in *Canavan Building Ltd,*[68] it is not necessary that an exclusion for the purpose of s.55(1) must be constituted by a provision in a modern award which ousts the operation of an NES provision in express terms. On the ordinary meaning of the language used in s.55(1), if the provisions of a modern award would in their operation result in an outcome whereby employees do not receive (in full or at all) a benefit provided for by the NES, that constitutes a prohibited exclusion of the NES.

[180] The above view is supported by the Explanatory Memorandum for the *Fair Work Bill 2008* as follows:

> "209. This prohibition extends both to statements that purport to exclude the operation of the NES or a part of it, and to provisions that purport to provide lesser entitlements than those provided by the NES. For example, a clause in an enterprise agreement that purported to provide three weeks' annual leave would be contrary to subclause 55(1). Such a clause would be inoperative (clause 56)."

[181] The union parties contend that in its current form Clause E.1(c) excludes provisions of the NES in that it permits deductions from NES entitlements. For instance, s.90(2) provides:

> **90 Payment for annual leave**
>
> ..
>
> (2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.

[182] Clause E.1(c) would permit deductions from accrued paid annual leave payable on termination.

[183] Ai Group and ABI appear to accept the point made, but submit that it can be addressed by an appropriate amendment to Clause E.1(c). Ai Group submits:

> 'any inconsistency with the NES could be readily addressed by modifying the scope of the clause to only permit deductions from monies owed under the award and not those payable under the NES.'[69]

[184] ABI makes a similar point:

> 'In the present case, clause E.1(c) provides for a termination payment regime that could well conflict with NES obligations regarding payments on termination. The most obvious of these relates to subsection 90(2) of the Act, which addresses annual leave payment on termination.
>
> For this reason, ABI and NSWBC consider it prudent that the existing phrase within clause E.1(c)
>
> > *"the employer may deduct from any money due to the employee on termination (under this award or the NES)"*
>
> is rephrased to state:
>
> > *"the employer may deduct from any money due to the employee on termination under this award."*'[70]

[185] We deal with the proposed amendment of Clause E.1(c) later.

[186] We now return to s.136(2)(a) which provides that a modern award must not include terms that contravene Subdivision D of Division 3 of Pt 2-3 (ss.150 – 155A). Sections 151 and 155 are relevant for present purposes.

[187] It is convenient to deal with s.155 first, as it gives rise to a point of narrow compass.

[188] Section 155 provides:

> **155 Terms dealing with long service leave**
>
> A modern award must not include terms dealing with long service leave.

[189] The ACTU contends that Clause E.1(c) contravenes s.155, it submits:

> 'In relation to section 155, clause E.1(c) has the potential, for some employees, to "deal" with their Long Service Leave entitlements by abolishing the right to be paid for untaken on long service leave termination. Section 113 creates entitlements under the National Employment Standards to long service leave[3], albeit only in limited circumstances and where the content of the entitlement is derived from other sources. We are unable to comment on the incidence of such entitlements or the extent to which such entitlements do in fact provide for payment of untaken long service leave on termination. However, the likelihood that such entitlements exist along with the more certain position in relation to 151 is sufficient to conclude that the answer to question (7) above is "yes".'[71](footnotes omitted)

[190] The issue raised by the ACTU was not challenged by any other party. Ai Group was the only employer party to address the issue and its submission was confined to the following statement:

> 'Finally, if the Full Bench forms the view that proposed clause E.1(c) has the potential to "deal" with long service leave entitlements in a prohibited manner, as alluded to by the ACTU, the

provision could be amended to provide that it does not provide for an ability to make deductions from long service leave entitlements.'[72] (footnotes omitted)

[191] Clause E.1(c) permits the deduction of an amount, not exceeding the amount that the employee would have been paid in respect of the period of notice not given, from 'any money due to the employee on termination (under the award or the NES)'.

[192] The NES deals with long service leave in Division 9 of Pt 2-2. Relevantly, s.113(1) provides that an employee is entitled to long service leave in accordance with 'applicable award-derived long service leave terms'. Similarly, s.113(4) provides that if there are 'applicable agreement-derived long service leave terms' in relation to an employee, the employee is entitled to long service leave in accordance with those terms.

[193] The applicable award-derived or agreement-derived long service leave terms may provide employees with an entitlement to the payment of accrued long service leave on termination. Accordingly, it would seem to follow that Clause E.1(c) may permit a deduction from a long service leave termination payment. If this is the case, then it is arguable that Clause E.1(c) is a term 'dealing with long service leave' in contravention of Subdivision D of Division 3 of Pt 2-3 (namely s.155) and hence must not be included in a modern award, because of s.136(2)(a).

[194] We return to this issue shortly.

[195] We now return to s.151. Section 151 provides:

151 Terms about payments and deductions for benefit of employer etc.

A modern award must not include a term that has no effect because of:

(a) subsection 326(1) (which deals with unreasonable deductions for the benefit of an employer); or

(b) subsection 326(3) (which deals with unreasonable requirements to spend or pay an amount); or

(c) subsection 326(4) (which deals with deductions or payments in relation to employees under 18).

[196] The Explanatory Memorandum provides an insight into the purpose of s.151:

'587. Clause 151 prohibits a modern award from including a term that is of no effect because:

- the term includes unreasonable payments and deductions for the benefit of an employer (subclause 326(1)); or
- the term relates to unreasonable requirements in relation to how employees spend their wages or other amounts (subclause 326(3)).

588. Although such terms are of no effect, this clause ensures that such terms are not included in awards, as their inclusion (even though inoperative) could be confusing and create uncertainty.'

[197] Section 151(a) and (c) which make reference to various subsections in s.326, are particularly relevant to the matter before us.

[198] Section 326 is in Division 2 – Payment of Wages in Pt 2-9 of the Act (ss.323-327). Section 323 provides, relevantly for present purposes:

> **323 Method and frequency of payment**
> (1) An employer must pay an employee amounts payable to the employee in relation to the performance of work:
> (a) in full (except as provided by section 324); and
> (b) in money by one, or a combination, of the methods referred to in subsection (2); and
> (c) at least monthly.
>
> Note 1: This subsection is a civil remedy provision (see Part 4-1).
>
> Note 2: Amounts referred to in this subsection include the following if they become payable during a relevant period:
> (a) incentive-based payments and bonuses;
> (b) loadings;
> (c) monetary allowances;
> (d) overtime or penalty rates;
> (e) leave payments.

[199] Section 324 deals with 'permitted deductions', the relevant part states:

> '(1) An employer may deduct an amount from an amount payable to an employee in accordance with subsection 323(1) if:
>
> …
>
> (a) the deduction is authorised by or under a modern award or an FWC order;
>
> …
>
> Note 2: Certain terms of modern awards, enterprise agreements and contracts of employment relating to deductions have no effect (see section 326). A deduction made in accordance with such a term will not be authorised for the purposes of this section.

[200] Section 326 provides that certain terms have no effect:

> *Unreasonable deductions for benefit of employer*
>
> (1) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work, if the deduction is:
>
> (a) directly or indirectly for the benefit of the employer or a party related to the employer; and
> (b) unreasonable in the circumstances.
>
> (2) The regulations may prescribe circumstances in which a deduction referred to in subsection (1) is or is not reasonable.
>
> *Unreasonable requirements to spend or pay an amount*
>
> (3) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term:
>
> (a) permits, or has the effect of permitting, an employer to make a requirement that would contravene subsection 325(1); or

(b) directly or indirectly requires an employee to spend or pay an amount, if the requirement would contravene subsection 325(1) if it had been made by an employer.

Deductions or payments in relation to employees under 18

(4) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term:

(a) permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work; or

(b) requires, or has the effect of requiring, an employee to make a payment to an employer or another person;

if the employee is under 18 and the deduction or payment is not agreed to in writing by a parent or guardian of the employee.

[201] As set out earlier, s.151 relevantly provides that a modern award must not include a term which has no effect because of ss. 326(1) and (4).

[202] It seems clear that Clause E.1(c) is a term that permits 'an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work' and such a deduction is 'directly or indirectly for the benefit of the employer'. No party contended otherwise.

[203] The question then is whether such a deduction is 'unreasonable in the circumstances' in s.326(1)(c)(ii). This expression was considered by Bromberg J in *Australian Education Union* v *State of Victoria (Department of Education and Early Childhood Development).*[73] In that case his Honour found that in the period from 1 July 2009 to 29 November 2013, the employer unlawfully made fortnightly deductions from teachers' salaries, for the cost of laptops that were principally used as a work tool.

[204] The employer had argued that the deductions were authorised by the employees in accordance with relevant enterprise agreements (on the basis that the deductions were part of salary packaging arrangements within the meaning of those agreements), and that a Ministerial Order made on 19 December 2012 also authorised the deductions. Bromberg J held that the laptops were not authorised by the enterprise agreements as they were not provided to teachers as remuneration for their services and therefore were not part of salary packaging arrangements; nor could the Ministerial Order retrospectively authorise the deductions. His Honour also held that the deductions were 'unreasonable in the circumstances' because (in broad terms):

- the contributions made by the employees to the cost of the laptop computers were (with some exceptions) made in the absence of a 'genuine choice' to participate in the laptop program;
- the contribution to the cost was set at an excessive rate;
- the deductions were not principally for the benefit of the employees; and
- the value of the benefits actually received by the employees (i.e. personal use of the laptops) did not provide a 'countervailing justification'.

[205] Ai Group submits that as the judgment flowed from a controversy over whether deductions pursuant to certain contractual provisions were valid:

> 'The reasoning provides limited guidance as to how an assessment should be applied in the circumstances that now fall for the Full Bench's consideration'.[74]

[206] We disagree. In the course of his judgment Bromberg J made a number of general observations about the proper construction of s.326. In particular, his Honour observed that whether a deduction from an employee's pay is 'unreasonable in the circumstances':

> '…calls for an evaluative judgment in which competing considerations need to be assessed. That interpretative task is unassisted by any guiding considerations expressly identified by s 326(1). As always, and particularly when faced with the interpretation of a broadly-expressed standard, the task of statutory construction must give effect to the evident purpose of the legislation and be consistent with its terms: *AB v State of Western Australia* (2011) 244 CLR 390 at [23] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).
>
> Relevantly, the *Oxford English Dictionary* contains the following definitions of "unreasonable:"
> 2. Not within the limits of what would be rational or sensible to expect; excessive in amount or degree.
>
> 3.a. Of an idea, attitude, action, etc.: not guided by, or based upon, reason, good sense, or sound judgement; illogical.
>
> b. Inequitable, unfair; unjustifiable. *Obs*
>
> Of the three senses of the word "unreasonable" there identified, it is the third ("inequitable, unfair; unjustifiable") that best captures the use made by s 326(1)(c) of the word "unreasonable"… " Whilst the word "unreasonable" is used in various provisions of the FW Act, the context is different to that of s 326(1)(c) and no useful guidance can be drawn from cases where the term has been judicially considered. It is the genesis of the scheme established by Division 2 and the origin of s 326(1)(c) itself that shed greater light on the mischief being addressed and the considerations that are likely to be of greatest relevance in an assessment of whether a deduction is "unreasonable in the circumstances."'[75]

[207] After reviewing the relevant legislative history his Honour also observed that:

> 'The legislation evinces a suspicion about deductions that benefit the employer. Terms that provide for deductions of that kind are of no effect, where the deduction is unreasonable in the circumstances.'[76]

[208] His Honour concluded that whether a deduction is 'unreasonable in the circumstances' is a question of fact and degree dependent upon the relevant surrounding circumstances.[77] He then proceeded to identify a number of considerations that are likely to be relevant (though not exhaustive). These considerations appear at [177] – [182] of the judgment and those which are relevant in the present context may be summarised as follows:

> 1. Consideration must commence from the premise that the ultimate purpose of the scheme is to protect employees from practices that have the effect of denying them the benefit of the remuneration they have earned and are thus entitled to fully enjoy.

2. The extent to which the employer or its related party has benefited will likely be relevant. It will be relevant to assess whether the employee has been taken advantage of in some way, with the result that part of the benefit of his or her remuneration has been lost to the employer. A benefit to the employer is not, of itself, a reason for finding that a deduction was unreasonable. There is nothing wrong in an employer gaining a benefit, but, if that benefit is gained at the expense of the employee, that would tend to indicate unreasonableness. It is the possibility of an unreasonable transfer of the benefit from its intended recipient—the employee—to the employer, which is fastened upon by s.326(1)(c).

3. The phrase 'in the circumstances' is of wide import and a broad approach is to be taken to the extent of the circumstances which are considered.

[209] The above observations (at [206] to [208]) are apposite to the matter before us.

[210] The proper construction of s.326 and its implications for Clause E.1(c) did not receive much attention in the submissions filed in these proceedings.

[211] The AMWU contends that Clause E.1(c) is 'unreasonable in the circumstances' and hence inoperative:

'The clause is unreasonable, taking into account the context of what is considered reasonable in the statutory regime. The regulations indicate that deductions which are reasonable include: deductions such as for the supply of goods or services from the employer which are not less favourable or on the same terms as the public might receive, such as health insurance premiums or loan repayments or costs incurred by the employer as a result of the voluntary private use of a property of the employer by the employee, such as mobile phone use, corporate credit card use etc. In this context, a deduction of between one week or four weeks' wages is a very significant amount to deduct from an employee.

Taking into account fairness, the damage suffered by an employer as a result of an employee not giving notice of termination, is not equivalent to 38 to 152 hours of work from an Award reliant employee which amounts to between $694.90 and $6477.07. An employer can find ways to ameliorate an employee's absence at short notice, such as in the circumstance of personal leave. The idea that an employee should be penalised what is equivalent to 1.9% and as much as 7.7% of their annual income because they didn't provide an employer notice is an extraordinary amount.

If an employee was on personal leave for one week, or five days, the employer is required to accommodate that entitlement and make appropriate arrangements. This puts into context the unreasonableness of penalising an employee 5 days pays for not giving 5 days' notice.'[78]

[212] The TCFUA supports and adopts the AMWU's submission.

[213] Only two employer submissions dealt with s.326. At [35] of its submission of 12 September 2017 Ai Group says:

'We contend that a term giving effect to a longstanding test case standard, that has been entrenched in the award system for an extended period of time and, in effect, repeatedly endorsed by the Commission and its predecessors, should not be construed as providing for an unreasonable deduction.'[79]

[214] NatRoad advances a similar point:

> 'Many decades of pre-modern and modern award history tell against the alleged "unreasonable" nature of the deduction.'[80]

[215] We reject the contention (advanced by Ai Group and NatRoad) that because terms such as Clause E.1(c) have been 'entrenched in the award system for an extended period of time' they should not be construed as being 'unreasonable in the circumstances'. As we have mentioned, the fact that a term has been a longstanding feature of federal awards is far from determinative in respect of the issues before us. The nature of modern awards and the current legislative context is quite different from the awards made under previous legislative regimes.

[216] As we have set out earlier, terms such as Clause E.1(c) emanated from the TCR decision and the issue in contention in that case (regarding the employer's right to withhold money owed to an employee) concerned the *extent* of that right, namely, whether it should be limited to wages or whether it should extend to *any* monies owed to an employee. The antecedent question – whether the employer should have a right to make *any* deduction from an employee's termination payments because the employee had failed to give the required notice – was *not* in dispute in the TCR proceedings.

[217] Further, Ai Group's contention that 'the merit of the clause was clearly the subject of specific consideration by the Full Bench in the Part 10A Award Modernisation process', is wrong for the reasons given earlier (at [120] – [126]).

[218] It seems to us that the *purpose* of Clause E.1(c) is a relevant consideration in determining whether it is 'unreasonable in the circumstances.'

[219] The employer parties express differing views as to the purpose of Clause E.1(c). ABI's submission[81] suggests that Clause E.1(c) is intended to encourage compliance with Clause E.1(a). Ai Group advances a similar submission:

> 'A key justification for retention of a right to deduct where an employee fails to provide notice is that it creates an effective disincentive for an employee considering breaching this requirement.'[82]

[220] However, Ai Group's submission also suggests that Clause E.1(c) has a compensatory element:

> 'An employee resigning at short notice can be very disruptive and costly for an employer. Indeed, the associated costs will very often far exceed the quantum of any deduction from the employee's pay permissible under the award.'[83]

[221] In order for Clause E.1(c) to provide an incentive to comply with the requirement to give notice employees would have to be aware of the consequences of non-compliance. We return to this point shortly.

[222] To the extent that Clause E.1(c) is intended to be compensatory it raises issues about whether the compensation is proportionate to the loss and inconvenience arising from an employee's failure to provide the requisite notice. Plainly, some employers may suffer no loss arising from the failure to give notice; for others the loss may be considerable. Clause E.1(c)

does not provide a mechanism for ensuring that the extent of the deduction is proportionate to the loss.

[223] Having regard to the protective purpose of s.326, it is our *provisional* view that a deduction made pursuant to Clause E.1(c) *may* be 'unreasonable in the circumstances' within the meaning of s.326(1)(c)(ii), in the following respects:

1. The deduction permitted by Clause E.1(c) may be disproportionate to the loss suffered by the employer as a consequence of the employee not providing the notice required under Clause E.1(a).

To the extent that the purpose of the provision is compensatory Clause E.1(c) does not contain a mechanism for ensuring that the extent of the deduction is proportionate to the loss. The deduction permitted by the term may be as much as four weeks' wages (for an employee with more than 5 years' service) in circumstances where the employer suffers no loss at all.

This concern may be addressed by a variation to Clause E.1(c) to limit the deduction that can be made – such as, no more than one week's wages.

2. Clause E.1(c) permits an employer to make a deduction from monies due to an employee on termination in circumstances where the employee 'fails to give a period of notice required under paragraph (a)'. Clause E.1(a) provides that 'An employee must give the employer *written* notice of termination in accordance with Table X' (emphasis added). Clause E.1(c) may permit a deduction in circumstances where an employee has given the employer the requisite notice orally but not in writing.

This concern may be addressed by removing the requirement in Clause E.1(a) for notice of termination to be in writing.

3. Clause E.1(c) would allow an employer to make a deduction from monies due to an employee in circumstances where the employer has consented (or acquiesced) to an employee providing less than the required period of notice. For instance, an employee with more than 5 years' service resigns. Clause E.1(a) provides that the employee must give the employer 4 weeks' notice of termination. The employee wants to leave in 2 weeks, to take up another job. The employer agrees and accepts the reduced notice period. Despite that agreement, Clause E.1(c) would permit the employer to deduct 2 weeks' pay from the money due to the employee on termination.

This concern may be addressed by an appropriate qualification to Clause E.1(c), such as:

> *'No deduction can be made pursuant to Clause E.1(c) in circumstances where the employer has agreed to a shorter period of notice than that required in Clause E.1(a).'*

4. Clause E.1(c) would allow an employer to make a deduction from monies due to an employee in circumstances where the employee may be unaware of the requirement in Clause E.1(a) to provide notice of termination. In this regard, we note NatRoad's submission that 'Most employees would not be aware of

the risk of being in breach of the Award by not giving the required period of notice.'

We note that employers must give each employee the Fair Work Information Statement (the Statement) before, or as soon as practicable after, the employee starts employment (s.125(1)). This requirement forms part of the NES (see Division 12 of Pt 2-2: ss.124-125). The Statement must be prepared and published by the Fair Work Ombudsman (s.124(1)). The required content of the Statement is prescribed by the Act and Regulations (s.124(2) and Regulation 2.01) and must contain information, relevantly, about 'termination of employment' (s.124(2)(f)). The current version of the Statement was published on 1 July 2017. It does not contain any information about an employer's capacity under an award to deduct amounts from termination monies payable to an employee because the employee has failed to give the required notice on resignation. The section of the Statement dealing with 'Termination of employment' provides:

> 'Termination of employment can occur for a number of reasons, including redundancy, resignation and dismissal. When your employment relationship ends, you are entitled to receive any outstanding employment entitlements. This may include outstanding wages, payment in lieu of notice, payment for accrued annual leave and long service leave, and any applicable redundancy payments'.

To the extent that the purpose of Clause E.1(c) is to enhance compliance with Clause E.1(a) it seems axiomatic that employees must be made aware of the potential consequence of failing to provide the requisite notice. Absent such knowledge it is difficult to see how Clause E.1(c) can be said to encourage compliance with Clause E.1(a).

This concern may be addressed by an appropriate qualification to Clause E.1(c), such as:

> *'Any deduction made pursuant to Clause E.1(c) must not be unreasonable in the circumstances.'*

Alternatively, Clause E.1 may be varied to expressly provide that no deduction can be made pursuant to Clause E.1(c) unless the employer has informed the employee that a deduction may be made from monies due to the employee on termination in the event that the employee fails to give the period of notice required under Clause E.1(a).

[224] We make three further points in relation to Clause E.1, as currently drafted.

[225] First, Clause E.1(a) provides that an employee must give the employer '*written* notice of termination'. The requirement for 'written' notice is a departure from the TCR standard and the current standard clause. It is our *provisional* view that the word 'written' be deleted from Clause E.1(a).

[226] In respect of Clause E.1(a) we would also observe that the scope of the provision may be too broadly expressed in that it requires 'an employee' to give notice of termination. As we have mentioned, Clause E.1(a) is a permitted term by virtue of s.136(1)(d) and s.118. Section 118 provides that a modern award 'may include terms specifying the period of notice an

employee must give in order to terminate his or her employment'. Section 118 is in Division 11 of Pt 2-2. Section 123 limits the scope of that Division. Relevantly, Division 11 does *not* apply to:

(i) employees employed for a specified period of time, or for a specified task, or for the duration of a specified season (s.123(1)(a));

(ii) a casual employee (s.123(1)(c));

(iii) an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or limited to the duration of the training arrangement (s.123(1)(d));

(iv) daily hire employees working in the building and construction industry (s.123(3)(b));

(v) daily hire employees working in the meat industry in connection with the slaughter of livestock (s.123(3)(c)); or

(vi) weekly hire employees working in connection with the meat industry whose termination is determined solely by seasonal factors (s.123(3)(d)).

[227] It would seem to follow that the scope of any award term made pursuant to s.118 must be confined to persons falling within the scope of s.118. We will invite further submissions in respect of this issue.

[228] Second, as mentioned earlier, there appears to be general agreement that, as currently drafted, Clause E.1(c) may be contrary to s.55(1), insofar as it may permit a deduction from the payment for untaken paid annual leave on termination contrary to s.90(2). Further, Clause E.1(c) may permit a deduction from a long service leave termination payment, contrary to s.155.

[229] As to the first issue, ABI submits that it would be prudent to amend Clause E.1(c) to delete the reference to the NES. In respect of the second issue, Ai Group submits that Clause E.1(c) could be amended to make it clear that it does not authorise any deduction to be made from long service leave termination payments.

[230] We agree with propositions advanced by ABI and Ai Group, insofar as we accept that it would be prudent to amend Clause E.1(c) to address the issues raised. The form of any amendment will be the subject of further submissions. It is our *provisional* view that the amendments proposed by ABI and Ai Group, while technically addressing the issues raised, may make the provision somewhat cumbersome and lacking in clarity. It is also our *provisional* view that the preferred approach to addressing the issues raised would be to amend Clause E.1(c) to confine the scope of the capacity to make a deduction to 'wages due to the employee'. Such an amended version of Clause E.1(c) would read:

> 'If an employee fails to give the period of notice required under paragraph (a), the employer may deduct from any ~~money~~ wages due to the employee on termination ~~(under this award or the NES)~~ …'

[231] In expressing the *provisional* view above we do not wish to be taken to be endorsing a clause in the terms set out. We are simply making the point that confining the scope of the term in the manner proposed is the preferred way of addressing the particular issues raised.

The ultimate form of the term – and whether such a term is permitted in a modern award – will be made after we have considered the further submissions on the various issues we have identified.

[232] Third, as currently drafted, Clause E.1(c) is a term which permits an employer to deduct an amount that is payable to an employee under 18 years of age in circumstances where the deduction is 'not agreed to in writing by a parent or guardian of the employee'. Accordingly as it appears that Clause E.1(c) would have no effect in relation to employees under 18 years of age, because of s.326(4), in its current form it is a term that must not be included in a modern award, because of s.151(c). We propose to invite further submissions in respect of this issue.

[233] It is convenient to now turn to a submission advanced by Ai Group in response to the unions' submission that Clause E.1(c) was 'unreasonable in the circumstances' within the meaning of s.326(1)(c)(ii). In its submission of 12 September 2017 Ai Group submits:

> 'If, contrary to our submissions, the Full Bench forms the view that a provision such as proposed clause E.1(c) is not able to be validly included in an award given the combined operation of s.151 and s.326(1), it should not simply delete the provision. Instead, it should amend it in a manner that, as far as possible, gives effect to the intended operation of the current model clauses.
>
> Any difficulty arising from s.326 could be overcome by amending the proposed award clause to provide for the *forfeiture* of otherwise applicable award derived entitlements in circumstances where an employee breaches their award derived obligation to provide the relevant period of notice.
>
> The proposition that awards provide for the forfeiture of entitlements in the event that they fail to provide the requisite notice of their termination is not novel. As identified at paragraph 28 of our 4 September 2017 submission, subclause 18(b) of the *Metal Trades Award 1941* stated:
>
> > "18(b) Employment shall be terminated by a week's notice on either side given at any time during the week or by payment or forfeiture of a weeks wages as the case may be."
>
> A potentially suitable form of words for an alternate clause E.1(c) that avoids any potential conflict with s.326 and s.151 would be:
>
> > (c) If an employee fails to give the period of notice required under paragraph (a), they will forfeit from any wages owing under this award or the National Employment standards, an amount not exceeding the amount that the employee would have been paid in respect of the period of notice not given. That is, the amount that would have been payable under this award or the NES will be reduced by an amount equivalent to the amount that the employee would have been paid in respect of the period of notice not given.'[84]

[234] In our view the submission advanced lacks merit. Amending Clause E.1(c) to provide for the *forfeiture* of money due to an employee on termination, rather than providing for the *deduction* from money due, does not change the character of the clause.

[235] The Butterworths Encyclopaedic Australian Legal Dictionary relevantly defines forfeiture as:

> 'The loss or determination of an estate or interest in property or a proprietary right, which follows from the failure to observe a contractual obligation: *Legione v Hateley* (1983) 152 CLR 406. Examples are the loss of an interest in a lease or contract for sale of land, and loss of the rights as a hirer of goods as against the owner.'

[236] In terms of its impact upon an employee there is no practical difference between a forfeiture and a deduction. Indeed in its own submissions Ai Group equates the concepts. In its 4 September 2017 submission (at [85]) Ai Group advances the following argument in support of an award term giving an employer the right to make *a deduction* from termination payments due in circumstances where an employee does not give the requisite notice:

> 'there is nothing unfair about an employee, *in effect, forfeiting an amount of wages* calculated by reference to a period in which they have either worked or been employed if it occurs because an employee has breached their award derived obligation to provide notice.'

[237] A forfeiture provision of the type proposed would plainly be contrary to s.323(1))(a) which provides:

> 'An employer must pay an employee amounts payable to the employee in relation to the performance of work:
>
> (a) in full (except as provided by section 324);'

To the extent that there is any difference between a forfeiture and a deduction it appears to us that Ai Group's proposal is merely seeking to do indirectly what the Act, in s.326, may prohibit. It is well established that what cannot be done directly cannot be done indirectly.[85]

[238] Section 326 places clear limitations on the circumstances where a modern award may authorise an employer to withhold monies from an amount payable to an employee in relation to the performance of work. Section 326 is a remedial measure passed for the protection of the employee. We do not propose to introduce a term designed to "deprive the worker of the protection which Parliament intended that he should have."[86]

1.1 Issue 2

To the extent that the Commission has the power to include a provision of the nature of Clause E.1(c) in a modern award, whether as a matter as of merit such a provision is necessary to achieve the modern awards objective in accordance with the requirement in s.138.'

[239] Section 138 of the Act emphasises the importance of the modern awards objective in the following terms:

> 'A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.'

[240] In *CFMEU v Anglo American Metallurgical Coal Pty Ltd ('Anglo American')*[87] the Federal Court considered the expression 'necessary to achieve the modern awards objective' in s.138:

> 'The words "only to the extent necessary" in s 138 emphasise the fact that it is the minimum safety net and minimum wages objective to which the modern awards are directed. Other terms and conditions beyond a minimum are to be the product of enterprise bargaining, and enterprise agreements under Pt 2-4.'[88]

[241] In *Anglo American* the Court also discussed the nature of the Commission's task in conducting the 4 yearly review:

> 'The terms of s 156(2)(a) require the Commission to review all modern awards every four years. That is the task upon which the Commission was engaged. The statutory task is, in this context, not limited to focusing upon any posited variation as necessary to achieve the modern awards objective, as it is under s 157(1)(a). Rather, it is a review of the modern award as a whole. The review is at large, to ensure that the modern awards objective is being met: that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions. This is to be achieved by s 138 – terms may and must be included only to the extent necessary to achieve such an objective.
>
> Viewing the statutory task in this way reveals that it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern award objective. Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.'[89]

[242] The modern awards objective is to 'ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in sections 134(1)(a) to (h) (the s.134 considerations). The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision making process. [90] No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[243] In the *National Retail Association Case* the Court said the following about s 134(1) at 174-175 [109]-[110]:

> [109] It is apparent from the terms of s 134(1) that the factors listed in (a) to (h) are broad considerations which the FWC must take into account in considering whether a modern award meets the objective set by s 134(1), that is to say, whether it provides a fair and relevant minimum safety net of terms and conditions. The listed factors do not, in themselves, however, pose any questions or set any standard against which a modern award could be evaluated. Many of them are broad social objectives. What, for example, was the finding called for in relation to the first factor ("relative living standards and the needs of the low paid")? Furthermore, it was common ground that some of the factors were inapplicable to the SDA's claim.
>
> [110] The relevant finding the FWC is called upon to make is that the modern award either achieves or does not achieve the modern awards objective. The NRA's contention that it was necessary for the FWC to have made a finding that the Retail Award failed to satisfy at least one of the s 134(1) factors must be rejected.

[244] The objective is very broadly expressed[91] and the matters which may be taken into account are not confined to the s.134 considerations. As the Federal Court observed in *Shop, Distributive and Allied Employees Association v The Australian Industry Group ('The Penalty Rates Review')*[92]*:*

> 'What must be recognised, however, is that the duty of ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions itself involves an evaluative exercise. While the considerations in s 134(a)-(h) inform the evaluation of what might constitute a "fair and relevant minimum safety net of terms and conditions", they do not necessarily exhaust the matters which the FWC might properly consider to be relevant to that standard, of a fair and relevant minimum safety net of terms and conditions, in the particular circumstances of a review. The range of such matters "must be determined by implication from the subject matter, scope and purpose of the" Fair Work Act (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39-40).'[93]

[245] As stated in s.578(a), in performing functions and exercising powers under a part of the Act (including the Review function under Pt 2-3 Modern Awards) the Commission must take into account the objects of the Act and any particular objects of the relevant part. The object of Pt 2-3 is expressed in s.134, the modern awards objective. The object of the Act is set out in s.3, as follows:

> 'The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:
>
> (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
>
> (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
>
> (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and
>
> (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
>
> (e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and
>
> (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and
>
> (g) acknowledging the special circumstances of small and medium-sized businesses.'

[246] A number of parties have made submissions directed at the *present* draft Clause E.1(c) and whether the inclusion of award clause in those terms is necessary in order to achieve the modern awards objective.

[247] In our consideration of whether Clause E.1(c) is the type of provision which may validly be included in a modern award (Issue 1) we have expressed a number of *provisional* views regarding the amendment of Clause E.1(c) and have sought further submissions.

[248] It seems to us that these issues need to be resolved – and the draft of any permitted term settled – before parties can be expected to meaningfully respond to Issue 2.

[249] We will provide a further opportunity to respond to Issue 2 once we have reached a concluded view in respect of Issue 1.

3. Standard Clause G

[250] In the 28 August 2017 decision we invited further submissions regarding a revised version of standard Clause G.[94] The revised clause contained modifications to Clauses G.1 and G.3 only, with Clause G.2 having been finalised. In response to this invitation, the only submissions made were by the ACTU and the AMWU. The revised Clause G is set out below:

> '**G.1** Clause G applies if, because of redundancy, the employer decides to transfer an employee to new duties to which a lower ordinary rate of pay is applicable.
>
> **G.2** The employer may:
>
> **(a)** give the employee notice of the transfer of at least the same length as the employee would be entitled to under section 117 of the Act as if it were a notice of termination given by the employer; or
>
> **(b)** transfer the employee to the new duties without giving notice of transfer or before the expiry of a notice of transfer.
>
> **G.3** If the employer acts as mentioned in paragraph G.2(b), the employee is entitled to a payment of an amount equal to the difference between the ordinary rate of pay of the employee (inclusive of shift allowances and penalty rates applicable to ordinary hours) for the hours of work the employee would have worked in the first role, and the ordinary rate of pay (also inclusive of shift allowances and penalty rates applicable to ordinary hours) of the employee in the second role for the period for which notice was not given.'

[251] The ACTU submitted that it 'broadly supported' the revised clause, but identified two matters that would benefit from greater clarification. The first was that, in respect of Clause G.1, the use of the words 'the employer *decides*' might cause the provision to be construed as conferring upon the employer a right to unilaterally transfer a redundant employee to lower-paid employment and thereby avoid the payment of redundancy pay. This, the ACTU contended, differed from the position in the existing clause and the TCR clause where the words 'Where an employee is transferred' were used and only a consensual transfer was contemplated. The second was that Clause G.3 used the expression 'ordinary rate of pay', which was different to the expression 'ordinary hourly rate of pay' adopted in the *Four yearly review of modern awards* decision of 13 July 2015[95] as being inclusive of all-purpose

allowances. The ACTU submitted that a specific reference to all-purpose allowances should be included in Clause G.3 to put the issue beyond doubt.

[252] In relation to Clause G.1, the AMWU similarly submitted that, unlike the existing clause in the *Manufacturing and Associated Industries and Occupations Award 2010*, the new proposed clause appeared to introduce a new concept of a forcible transfer to lower paid duties which had not been contemplated in the *1984 TCR decision*[96]. It proposed that Clause G.1 be amended to replace the words "the employer decides to transfer an employee to new duties" with "an employee agrees to transfer to new duties". The AMWU also submitted that Clause G.3 should include a specific reference to all-purpose allowances.

[253] No employer party filed a submission in reply to the ACTU or AMWU submissions concerning Clause G.

[254] In relation to the proposed Clause G.1, we accept that it is arguable that it changes the meaning of the existing clause by establishing an employer right to unilaterally transfer a redundant employee to lower paid duties which may not have existed before. In the *August 1984 TCR Decision* from which the existing provision ultimately emanates, it is apparent that it was contemplated that any internal transfers of employees whose positions had become redundant would arise out of the consultation process. The relevant part of the Full Bench's discussion was as follows (emphasis added):

> "However, the ACTU also claimed several specific provisions designed to assist those affected to find other employment. These particular claims related to measures which would minimize or avoid the need for termination *such as transfer to jobs elsewhere within firms* and, where necessary, the provision of training and re-training for employees to enable them to perform other duties within the enterprise.
>
> Claims were also made for maintenance of income and payment of relocation expenses where employees are transferred to other duties within an employer's business.
>
> The ACTU claimed that redeployment of workers is frequently used in redundancy situations in order to avoid dismissals, that it was recognized in some private sector redundancy award and agreement provisions, and that its advantages were recognized in the 1978 policy of CAI on retrenchments, in the CITCA Report, and in the 1972 National Labor Advisory Committee Guidelines.
>
> Under the heading 'Retrenchment' the NLAC Guidelines provide:
>
> > 'Every effort should be made, consistent with the efficient operation of business, to avoid retrenchment. If a reduction in the level of employment seems likely as a result of the introduction of planned technological changes, *the employer should accept responsibility to consult, and co-operate with, union officials and/or other recognised employees' representatives, in working out measures to avoid retrenchment*.
> >
> > *For this purpose, some measures which have proved successful in the past could be embraced in the consultations.* They include the introduction of the changes over a period of time (so that natural labour turnover can absorb those whose jobs are becoming redundant and so those who are affected can be trained and retrained) and *transfers to other jobs within the firm or organisation.* It may also help in some circumstances to limit overtime and recruitment.'

> We endorse those remarks by the NLAC and it is our view that these matters are indicative of the matters which should be discussed between the parties in the conferences we envisage taking place in relation to proposed retrenchments. We are of the opinion that, in general, employers do try to minimize retrenchments and to accommodate the displacement effects in relevant cases through natural wastage and re-training, and we do not think it necessary, or desirable, to make award prescriptions to cover these matters.
>
> However, consistent with the remainder of our decision, we are prepared to provide that where an employee is transferred to lower paid duties because the employer no longer wishes the job the employee has been doing, done by anyone, then the employee should be entitled to the same period of notice of the change in employment as he would have been entitled to if his/her employment had been terminated. Alternatively, the employer shall pay to the employee maintenance of income payments calculated to bring the rate up to the rate applicable to his/her former classification in lieu thereof."[97]

[255] The clause ultimately established in the *December 1984 TCR Supplementary Decision*[98] to give effect to the above passage in the *August 1984 TCR Decision* began with the words "Where an employee is transferred to lower paid duties for reasons set out in cl.1 hereof...". The Clause 1 referred to, in paragraph (a), required the employer to hold discussions with directly affected employees and their union/s once it has made "a definite decision that he/she no longer wishes the job the employee has been doing done by anyone...", and paragraphs (b) and (c) detailed further requirements as to the conduct of such discussions. That confirms that any such transfer was to occur as a result of the required consultation process. The truncated element of the TCR standard clause that was retained as a standard provision in the award modernisation process did not retain any consultation requirement, nor do the NES provisions concerning termination and redundancy in ss. 117-123 contain any such requirement.

[256] In the absence of any merits submission that Clause G.1 should, unlike the existing provision, establish or recognise an employer's right to transfer employees to lower paid duties in a redundancy situation, we consider that we should avoid any change in the plain English process that might bring about that result by inadvertence. Clause G.1 will therefore be redrafted to more closely reflect the existing provision. It will be amended to read: 'Clause G applies if, because of redundancy, an employee is transferred to new duties to which a lower ordinary rate of pay is applicable'.

[257] In relation to Clause G.3, we will include an express reference to all-purpose allowances to put beyond doubt that they are encompassed by the expression 'ordinary rate of pay'.

[258] The standard Clause G which we have determined to adopt is set out below:

> '**G.1** Clause G applies if, because of redundancy, an employee is transferred to new duties to which a lower ordinary rate of pay is applicable.
>
> **G.2** The employer may:
>
> > **(a)** give the employee notice of the transfer of at least the same length as the employee would be entitled to under section 117 of the Act as if it were a notice of termination given by the employer; or

(b) transfer the employee to the new duties without giving notice of transfer or before the expiry of a notice of transfer.

G.3 If the employer acts as mentioned in paragraph G.2(b), the employee is entitled to a payment of an amount equal to the difference between the ordinary rate of pay of the employee (inclusive of all purpose allowances, shift allowances and penalty rates applicable to ordinary hours) for the hours of work the employee would have worked in the first role, and the ordinary rate of pay (also inclusive of all purpose allowances, shift allowances and penalty rates applicable to ordinary hours) of the employee in the second role for the period for which notice was not given.'

4. Next Steps

[259] In this decision we have determined the following issues:

1. Clause E.1(c) is *not* a term which can properly be characterised as being '*about*' any of the matters set out in s.139(1) (see [76]).

2. Clause E.1(c) is *not* a term that *must* be included in a modern award (see [78]).

3. Pt 2-2 of the Act (which deals with the NES) does *not* permit the inclusion of a term such as Clause E.1(c) in a modern award (see [130]).

4. In the event that a modern award includes a term specifying the notice of termination to be given by an employee then a term such as Clause E.1(c) *may* be permissible, provided the requirements of s.142 have been met.

[260] The central issues remaining (at least in respect of Issue 1) are:

1. Whether Clause E.1(c) is incidental to a term permitted to be in a modern award and essential for the purpose of making the permitted term operate in a practical way (see s.142(1)(a) and (b)).

2. Whether Clause E.1(c) is a term which must not be included in a modern award as the term has no effect because of s.326(1) and (4) (see s.151).

[261] We invite the parties to make further submissions in respect of these issues. Such submissions should address the following issues:

1. The scope of Clause E.1(a), having regard to the terms of s.123 (see [226]).

2. The *provisional* view that the word 'written' be deleted from Clause E.1(a).

3. The *provisional* view that, in order to address some uncertainty about the interaction with the NES, Clause E.1(c) be amended to confine the scope of the capacity to make a deduction to 'wages due to the employee' (see [223] – [226]).

4. The *provisional* view that deductions pursuant to Clause E.1(c) would have no effect in relation to employees under 18 years of age, because of s.326(4), and hence in its current form it is a term that must not be included in a modern award, because of s.151(c).

5. The *provisional* view that Clause E.1(c) is incidental to a permitted term, namely Clause E.1(a) (see [152]).

6. Is Clause E.1(c) essential for the purpose of making a permitted term (Clause E.1(a)) operate in a practical way? What is the purpose of Clause E.1(c)?

7. Having regard to the protective purpose of s.326, it is our *provisional* view that a deduction made pursuant to Clause E.1(c) *may* be 'unreasonable in the circumstances' within the meaning of s.326(1)(c)(ii), in the following respects:

   (i) The deduction permitted by Clause E.1(c) may be disproportionate to the loss suffered by the employer as a consequence of the employee not providing the notice required under Clause E.1(a).

   To the extent that the purpose of the provision is compensatory Clause E.1(c) does not contain a mechanism for ensuring that the extent of the deduction is proportionate to the loss. The deduction permitted by the term may be as much as four weeks' wages (for an employee with more than 5 years' service) in circumstances where the employer suffers no loss at all.

   This concern may be addressed by a variation to Clause E.1(c) to limit the deduction that can be made – such as, no more than one week's wages.

   (ii) Clause E.1(c) permits an employer to make a deduction from monies due to an employee on termination in circumstances where the employee 'fails to give a period of notice required under paragraph (a)'. Clause E.1(a) provides that 'An employee must give the employer *written* notice of termination in accordance with Table X' (emphasis added). Clause E.1(c) may permit a deduction in circumstances where an employee has given the employer the requisite notice orally but not in writing.

   This concern may be addressed by removing the requirement in Clause E.1(a) for notice of termination to be in writing.

   (iii) Clause E.1(c) would allow an employer to make a deduction from monies due to an employee in circumstances where the employer has consented (or acquiesced) to an employee providing less than the required period of notice. For instance, an employee with more than 5 years' service resigns. Clause E.1(a) provides that the employee must give the employer 4 weeks' notice of termination. The employee wants to leave in 2 weeks, to take up another job. The employer agrees and accepts the reduced notice period. Despite that agreement, Clause E.1(c) would permit the employer to deduct 2 weeks' pay from the money due to the employee on termination.

   This concern may be addressed by an appropriate qualification to Clause E.1(c), such as:

   > *'No deduction can be made pursuant to Clause E.1(c) in circumstances where the employer has agreed to a shorter period of notice than that required in Clause E.1(a).'*

   (iv) Clause E.1(c) would allow an employer to make a deduction from monies due to an employee in circumstances where the employee may be unaware of the requirement in Clause E.1(a) to provide notice of

termination. In particular, we note NatRoad's submission that 'Most employees would not be aware of the risk of being in breach of the Award by not giving the required period of notice.'

We note that employers must give each employee the Fair Work Information Statement (the Statement) before, or as soon as practicable after, the employee starts employment (s.125(1)). This requirement forms part of the NES (see Division 12 of Pt 2-2: ss.124-125). The Statement must be prepared and published by the Fair Work Ombudsman (s.124(1)). The required content of the Statement is prescribed by the Act and Regulations (s.124(2) and Regulation 2.01(1)) and must contain information, relevantly, about 'termination of employment' (s.124(2)(f)). The current version of the Statement was last updated in July 2017. It does not contain any information about an employer's capacity under an award to deduct amounts from termination monies payable to an employee because the employee has failed to give the required notice on resignation. The section of the Statement dealing with 'Termination of Employment' provides:

> 'Termination of employment can occur for a number of reasons, including redundancy, resignation and dismissal. When your employment relationship ends, you are entitled to receive any outstanding employment entitlements. This may include outstanding wages, payment in lieu of notice, payment for accrued annual leave and long service leave, and any applicable redundancy payments'.

To the extent that the purpose of Clause E.1(c) is to enhance compliance with Clause E.1(a) it seems axiomatic that employees must be made aware of the potential consequence of failing to provide the requisite notice. Absent such knowledge it is difficult to see how Clause E.1(c) can be said to encourage compliance with Clause E.1(a).

This concern may be addressed in the same manner as Issue 1. Alternatively, Clause E.1 may be varied to expressly provide that no deduction can be made pursuant to Clause E.1(c) unless the employer has informed the employee that a deduction may be made from monies due to the employee on termination in the event that the employee fails to give the period of notice required under Clause E.1(a).

[262] Directions will be issued in respect of the filing of these submissions and the further hearing of this matter.

[263] We will provide a further opportunity for interested parties to address Issue 2 once we have reached a concluded view in respect of Issue 1.

PRESIDENT

Appearances:

Sydney:

Mr B Ferguson on behalf of the Australian Industry Group

Mr M Nguyen on behalf of the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)

Ms K Thomson of behalf of Australian Business Industrial and the New South Wales Business Chamber

Melbourne:

Mr T Clarke on behalf of the Australian Council of Trade Unions

Ms K Biddleston on behalf of the Shop, Distributive and Allied Employees Association

Ms V Wiles on behalf of the Textile, Clothing and Footwear Union of Australia

Canberra:

Mr S Harris on behalf of the Pharmacy Guild of Australia

Hearing details:

Sydney.

2017.

21 August.

Final written submissions:

Australian Business Industrial and NSW Business Chamber, 4 September 2017

Australian Chamber of Commerce and Industry, 6 September 2017

Australian Industry Group, 5 September 2017

Australian Manufacturing Workers' Union, 4 September 2017

Australian Council of Trade Unions, 4 September 2017

CFMEU – Forestry and Furnishing Products Division, 4 September 2017

Community and Public Sector Union, 4 September 2017

Housing Industry Association, 4 September 2017

National Road Transport Association, 1 September 2017

Shop, Distributed and Allied Employee's Association, 4 September 2017

Textile, Clothing & Footwear Union of Australia, 4 September 2017

Final written submissions in reply:

Australian Council of Trade Unions, 11 September 2017

Australian Industry Group, 12 September 2017

Australian Manufacturing Workers' Union, 11 September 2017

National Road Transport Association, 11 September 2017

Textile, Clothing and Footwear Union of Australia, 12 September 2017

Shop, Distributive and Allied Employees Association, 12 September 2017

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[1] [2016] FWC 4756.
[2] See [2016] FWC 4756.
[3] [2017] FWCFB 4419.
[4] [2017] FWCFB 4355.
[5] [1984] 8 IR 34.
[6] Ibid at pp 97-103.
[7] Ibid at p 50.
[8] Ibid at p 50-51.
[9] (1984) 9 IR 115.
[10] Ibid at pp 117-118.
[11] Ibid at pp 121-122.
[12] See ACCI submission at [21]; Ai Group submission 4 September 2017 at [66]; NatRoad submission at [17]-[22].
[13] *National Retail Association v Fair Work Commission* [2014] FCAFC 118 at [18].
[14] [2015] FWCFB 3406.
[15] Ibid at [222], [237] and [313].
[16] Ibid at page 8.
[17] [2004] 129 IR 155.
[18] [2008] AIRC 387.
[19] AMWU submission 1 August 2008 at paragraph 75.
[20] Ai Group submission 1 August 2008 at paragraphs 254 – 256.
[21] [2008] AIRCFB 717.
[22] ACCI submission 6 September 2017 at paragraph 14.
[23] [2008] AIRCFB 1000.
[24] Ibid at [53]-[54].
[25] Ai Group submission 4 September 2017 at paragraph 61(a).
[26] ACCI submission, September 2017 at paragraphs 27-28.
[27] ABI submission at paragraph 2.2 to 2.4.
[28] AMWU submission 4 September 2017 at [16].
[29] [2014] FWCFB 9227.
[30] Ibid [25]-[27].
[31] *Waugh v Kippen* (1986) 160 CLR 156 at 164.
[32] *Bull v Attorney General (NSW)* (1913) 17 CLR 370 at 384.

[33] See *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622 at 638; and *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18 at [29] per French CJ, Crennan, Kiefel and Keane JJ.

[34] (1997) 191 CLR 1 at 12.

[35] [2013] FWCFB 5411 at [96]-[97].

[36] [2016] FWCFB 4393.

[37] NatRoad submission 1 September 2017 at [31] and [36]-[38].

[38] Ai Group submission 4 September 2017 at paragraph 44.

[39] Ai Group submission 4 September 2017 at paragraph 48.

[40] Ai Group submission 4 September 2017 at [65](b).

[41] See *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at [47]; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69].

[42] Ai Group submission 4 September 2017 at paragraph 44.

[43] (1998) 194 CLR 355 at [78] per McHugh, Gummow, Kirby and Hayne JJ). Also see *Taylor v The Owners - Strata Plan No 11564* [2014] HCA 9 at [65]-[66].

[44] See generally: G McCarry (1999) 'Termination of Employment, Payment in Lieu of Notice, Garden Leave and the Right to Work; *Australian Journal of Labour* Law Vol 22(1) p 87-89.

[45] *Mills v Meeking* (1990) 169 CLR 214 at 235 per Dawson J; *R v L* (1994) 49 FCR 534 at 538.

[46] ACCI submission 6 September 2017 at paragraph 23.

[47] [2014] FWCFB 1788 at [23]-[27].

[48] Ibid at [27].

[49] [2017] FWCFB 1001.

[50] Ibid at [255].

[51] ACCI submission September 2017 at [10].

[52] *Award modernisation – Stage 2 modern awards,* 2 September 2009, [2009] AIRCFB 800.

[53] Print P7500, 23 December 1997.

[54] *Fair Work Act 2009* (Cth*)* s.142(1).

[55] [1930] VLR 75.

[56] Ibid at p30. Also see *Construction, Forestry, Mining and Energy Union v Hadgkiss* [2007] FCAFC 197.

[57] See *Commissioner of Taxes (Vic) v Lennon* (1921) 29 CLR 579 at 590 per Higgins J; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1978) 144 CLR 633 at 643 per Gibbs ACJ.

[58] *Shop, Distributive and Allied Employees Associates v National Retail Association (No.2)* (2012) 205 FCR 227.

[59] Ibid at [35]–[37] and [46].

[60] Ibid at [101].

[61] ACCI submission 6 September 2017 at paragraphs 33-35.

[62] ABI submission 4 September 2017 at paragraph 2.20.

[63] See s.546 and Column 4 in Item 4 in the Table in s.539(2).

[64] [2015] FCCA 1911.

[65] [2008] FMCA 1045.

[66] NatRoad submission 1 September 2017 at paragraphs 52 and 65 – 68.

[67] ACTU submission 4 September 2017 at [27] – [28].

[68] [2014] FWCFB 3202 at [36].

[69] Ai Group submission 4 September 2017 at [62].

[70] ABI submission 4 September 2017 at paragraph 2.16 and 2.17.

[71] ACTU submission 4 September 2017 at [40].

[72] Ai Group submission 12 September 2017 at [47].

[73] [2015] FCA 1196.

[74] Ai Group submission 12 September 2017 at [34].

[75] [2015] FCA 1196 at [148]-[149].

[76] Ibid at [175].

[77] Ibid at [176].

[78] AMWU submission 4 September 2017 at [34]-[36].

[79] Ai Group submission 12 September 2017 at [35].

[80] NatRoad submission 11 September 2017 at [10].

[81] ABI submission at paragraph 2.20(b) and (c).

[82] Ai Group submission 4 September 2017 at [68], also see [65](d) and [71].

[83] Ai Group submission 4 September 2017 at [69]. Also see Ai Group submission of 12 September 2017 at [39].

[84] Ai Group submission 12 September 2017 at [40]-[43].

[85] *Commonwealth v State of Queensland* (1920) 29 CLR 1 at 15; *Toohey v Gunther* (1928) 41 CLR 181 at 195 and *R v Gough; Ex parte Australasian Meat Industry Employees' Union* (1965) 114 CLR 394 at 422; see also DK Singh 'What Cannot be Done Directly Cannot be Done Indirectly: Part I' (1959) 32 ALR 374 and DK Singh, 'What Cannot be Done Directly Cannot be Done Indirectly: Part II' (1959) 33 ALJ 3.

[86] *Waugh v Kippen* (1986) 160 CLR 156 at 164.

[87] [2017] FCAFC 123.

[88] Ibid at [23].

[89] Ibid at [28] – [29].

[90] *Friends of Hinchinbrook Society Inc v Minister for Environment (No 3)* (1997) 77 FCR 153; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121; *Edwards v Giudice* [1999] FCA 1836; *National Retail Association v Fair Work Commission* [2014] FCAFC 118.

[91] See *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35] per Tracey J.

[92] [2017] FCAFC 161.

[93] Ibid at [48].

[94] [2017] FWCFB 4419 at [170]-[171].

[95] [2015] FWCFB 4658 at [35]-[47].

[96] (1984) 8 IR 34.

[97] Ibid at 66-67.

[98] (1984) 9 IR 115.