



STATEMENT

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

MELBOURNE, 21 AUGUST 2017

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

[1] In the conduct of the plain language review of standard clauses in modern awards, an issue has arisen concerning the proposed clause E.1(c) referred to in our Statement of 20 July 2017.¹ The proposed clause E.1 in its entirety, as set out in paragraph [93] of the Statement, is as follows (with mark-ups retained):

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 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	4 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 **National Employment Standards NES**), an

amount not exceeding the amount that the employee would have been paid in respect of the period of notice not given.

[2] The issue that has arisen involves the following questions:

- (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.

[3] The same issue also arises in relation to the proposed 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.²

[4] Interested parties are invited to lodge written submissions concerning the identified issue in accordance with the Directions below. The matter will then be resolved on the papers unless the Full Bench considers, upon the request of interested parties, that there should be a hearing concerning the issue at which parties may also advance oral submissions.

[5] We issue the following Directions:

1. All interested parties shall file written submissions by no later than **4.00 pm on Monday 4 September 2017**.
2. On or before **4pm on Monday 11 September 2017**, interested parties are to file submissions in reply.
3. All material should be sent in a Word document to amod@fwc.gov.au.
4. Liberty to apply.

PRESIDENT

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¹ [2017] FWCFB 3745

² See [2017] FWCFB 3745 at [127]-[132]