DECISION

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

4 yearly review of modern awards – plain language re-drafting – standard clauses

(AM2016/15)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER HUNT SYDNEY, 18 JULY 2018

4 yearly review of modern awards – plain language re-drafting – standard clauses E.1 and G

Introduction

[1] Section 165(2)(a) of the *Fair Work Act* (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. This decision deals with the re-drafting of a number of clauses in modern awards which have been identified as standard clauses and, in particular, determines whether the variation of modern awards to insert the revised model standard term clause E, 'Termination of Employment', is necessary to achieve the modern awards objective. The decision also finalises the title of standard clause G.

[2] It is necessary to first say something about the Commission's task in the Review.

The Review

[3] Section 156 deals with the conduct of the Review and s.156(2) provides that the Commission *must* review all modern awards and *may*, among other things, make determinations varying modern awards. In this context 'review' has its ordinary and natural meaning of 'survey, inspect, re-examine or look back upon'.[1] The discretion in s.156(2)(b)(i) to make determinations varying modern awards in a Review, is expressed in general, unqualified, terms.

[4] If a power to decide is conferred by a statute and the context (including the subject-matter to be decided) provides no positive indication of the considerations by reference to which a decision is to be made, a general discretion confined only by the scope and purposes of the legislation will ordinarily be implied.[2] However, a number of provisions of the Act which are relevant to the Review operate to constrain the breadth of the discretion in

[1] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [38].

[2] *O'Sullivan v Farrer* (1989) 168 CLR 210 at p. 216 per Mason CJ, Brennan, Dawson and Gaudron JJ.

s.156(2)(b)(i). In particular, the Review function is in Part 2-3 of the Act and hence involves the performance or exercise of the Commission's 'modern award powers' (see s.134(2)(a)). It follows that the 'modern awards objective' in s.134 applies to the Review.

[5] A range of other provisions of the Act and s.138 (achieving the modern awards objective) are also relevant to the Review: s.3 (object of the Act); s.55 (interaction with the National Employment Standards (NES)); Part 2-2 (the NES); s.135 (special provisions relating to modern award minimum wages); Division 3 (terms of modern awards) and Division 6 (general provisions relating to modern award powers) of Part 2-3; s.284 (the minimum wages objective); s.577 (performance of functions etc by the Commission); s.578 (matters the Commission must take into account in performing functions etc), and Division 3 of Part 5-1 (conduct of matters before the Commission).

[6] 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 ss.134(1)(a)–(h) (the s.134 considerations). The modern awards objective is very broadly expressed.[3] It is a composite expression which requires that modern awards, together with the NES, provide 'a fair and relevant minimum safety net of terms and conditions', taking into account the matters in ss.134(1)(a)–(h).[4] Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.[5]

[7] 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.[6] No particular primacy is attached to any of the s.134 considerations[7] and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[8] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.[8] Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.[9] In giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s.134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.[10]

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

[4] [2017] FWCFB 1001 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]–[44].

[5] [2018] FWCFB 3500 at [21]-[24].

[6] *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]-[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [56].

[7] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [33].

[8] *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]-[106].

[9] See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [109]-[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission's task in the Review.

[10] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [28]-[29].

[9] Further, the matters which may be taken into account are not confined to the s.134 considerations. As the Full Court observed in *Shop, Distributive and Allied Employees Association v The Australian Industry Group*[11] (*Penalty Rates Review*):

> '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).'[12]

[10] Section 138 of the Act emphasises the importance of the modern awards objective:

> **'138 Achieving the modern awards objective**
>
> 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.'

[11] As noted by the Full Federal Court in *CFMEU v Anglo American Metallurgical Coal Pty Ltd ('Anglo American')*:

> '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 the minimum are to be the product of enterprise bargaining, and enterprise agreements under Pt 2-4.'[13]

[12] What is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.[14]

[13] In *Anglo American* the Full Court also said: '...the task was not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation met the objective.'[15]

[14] We apply the above observations in this decision.

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[11] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161.

[12] Ibid at [48].

[13] *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123 at [23]; cited with approval in *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [45].

[14] See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227.

[15] Ibid at [46].

Clause E.1 Notice of termination by an employee

[15] In a decision on 13 June 2018[16] (the *June 2018 decision*) we determined the following matters in relation to clause E.1,:

- clause E.1(c) is incidental to clause E.1(a), a permitted term within the meaning of s.142(1)(a);[17]
- a term such as clause E.1(c) is essential for the purpose of making a term such as clause E.1(a) operate in a practical way;[18]
- any deductions to be confined to 'wages due to the employee';[19]
- the capacity to make deductions to be limited to one weeks' wages;[20]
- clause E.1(c) will not apply to employees under 18 years of age;[21]
- to insert a prohibition on deductions in circumstances where an employer has agreed to accept less than the required period of notice;[22]
- to insert a qualification to clause E.1(c) that: 'Any deduction made pursuant to clause E.1(c) must not be unreasonable in the circumstances';[23] and
- the amendments we propose to clause E.1(c) are such that deductions made in compliance with the term would not be 'of no effect' (because of the operation of ss.151 and 326) and hence there would be no prohibition from including such a term in a modern award.[24]

[16] A revised model clause E.1 was published at Attachment 1 to the *June 2018 decision* and is set out at Attachment 1 to this decision.

[17] The *June 2018 decision* also noted that the remaining outstanding issue in relation to clause E.1 is whether such a provision is 'necessary to achieve the modern awards objective' within the meaning of s.138 of the Act. Interested parties were invited to file submissions in respect of this issue.

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[16] [2018] FWCFB 3009.

[17] [2018] FWCFB 3009 at [46].

[18] [2018] FWCFB 3009 at [59].

[19] [2018] FWCFB 3009 at [67].

[20] [2018] FWCFB 3009 at [67] and [97].

[21] [2018] FWCFB 3009 at [89].

[22] [2018] FWCFB 3009 at [93].

[23] [2018] FWCFB 3009 at [97] and [102].

[24] [2018] FWCFB 3009 at [103].

[18] The following parties made submissions in relation to the revised clause E.1:

- Australian Council of Trade Unions (ACTU);[25]
- Australian Industry Group (Ai Group); [26]
- National Road Transport Association (NatRoad);[27]
- "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU);[28] and
- Australian Business Industrial and NSW Business Chamber (ABI).[29]

[19] Submissions in reply were received from Ai Group.[30]

[20] Ai Group and ABI submit that the model term is necessary to meet the modern awards objective and is consistent with ss.134 and 138 of the Act.[31] Both parties sought to rely on their previous submissions and submitted that the clause is fair and that an employer should be entitled to recover an amount from the employee where an employee under clause E.1(d) fails to give the required notice under clause E.1(b). NatRoad supported the submission of the Ai Group.[32]

[21] The ACTU submitted that a clause such as Clause E.1 is not a clause that is necessary to meet the modern awards objective and continue to press that as their primary position[33] and also expressed an alternate position, as follows:[34]

> '6. Beyond those fundamental considerations, we make the following points relevant to modern awards objective:
>
> (i) the deprivation of wages does not meet the needs of the low paid;
>
> (ii) it is neither in the interests of employees or the economy for barriers to be created which impede pathways to higher paid work among those who are currently low paid;
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> (iii) a power to deduct from wages earned for work performed over long or unsociable hours is inconsistent with ensuring additional remuneration is provided for work performed at those times;

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[25] ACTU submission, 2 July 2018.

[26] Ai Group submission, 2 July 2018.

[27] NatRoad submission, 3 July 2018.

[28] AMWU submission, 3 July 2018.

[29] ABI submission, 4 July 2018.

[30] Ai Group submission, 16 July 2018.

[31] Ai Group submission, 2 July 2018, paragraphs 4 and 11; ABI submission, 4 July 2018, paragraphs 2.2 and 2.4.

[32] NatRoad submission, 3 July 2018.

[33] ACTU submission, 2 July 2018, paragraph 2.

[34] ACTU submission, 2 July 2018, paragraphs 6 – 11.

(v) the overarching legislative requirement that any deduction not be unreasonable in the circumstances may conflict with action taken that otherwise complies with the proposed term, which makes its operation neither simple or easy to understand; and

(iv) the impact on business of employees not providing notice is less today than was the case when the TCR standard was developed, for the reasons set out at paragraph 18 of our submissions in reply dated 22 November 2017.

7. For the above reasons, we cannot conceive of an employer power to withhold wages earned for work performed as a necessary component of fair and relevant safety net.

Alternative position

8. As explained in some detail in [2017] FWCFB 5258,[35] the initial TCR standard emanated from an industrial relations framework that was premised on settling industrial disputes, avoiding industrial disputes and maintaining the settlement of industrial disputes.

9. We readily concede that an award provision that serves as a substitute for the uncertain determination at common law of what constitutes "reasonable notice in the circumstances" and (depending on that determination, also an assessment of damages) has merit as a mechanism for avoiding disputation, even if in the real world resort to such proceedings for award based employment would be in any event rare. In addition, we note that the Commission has already accepted that a term providing for a deduction of this nature is likely to enhance compliance with an employee notice provision (particularly if employees are made aware of it), and may at a practical level reduce the need to enforce the employee notice provision through legal proceedings. Such acceptance may be taken as signifying that a term such as the present one remains valuable today as a mechanism for avoiding disputation. However, the modern awards objective does not directly reference the avoidance of disputes as a matter that is required to be taken into account in the assessment of a "fair and relevant safety net".

10. Nonetheless, the Commission has accepted that the matters which are explicitly identified in the modern awards objective are not the only considerations that might be taken into account when applying that objective. In the present context, we consider it relevant that one of the objectives of the Act is to provide a balanced framework of cooperative workplace relations, and that the "safety net of fair, relevant and enforceable minimum conditions" is expressed in that objective as one of the ways in which that cooperative framework is to be delivered. This suggests that the reference to a "fair and relevant safety net" in the modern awards objective ought to be considered as serving a purpose of cooperative workplace relations, among other things. This may provide a hook, as it were, to consider the benefits of the provision in avoiding disputation. Consideration of that benefit, if permissible, would of course still require balancing against the other relevant matters, including those at paragraph 6 above.

11. Whilst we express no concluded view on whether this additional consideration would alter the balance to such a degree as render clause E.1 necessary to meet the modern awards objective, we acknowledge that the manner in which the proposed clause addresses the issue of avoiding disputes is fairer to employees than any of its

[35] At [13]-[49].

> predecessors have been. Further, we submit that there is no evidence to suggest that the formulation now proposed would be any less effective in achieving its purpose of avoiding disputation than its predecessors have been.'

[22] The AMWU supports and adopts the submissions of the ACTU.[36] The AMWU referred to the Ai Group submission of 4 September 2017 and submits that the merits and factual circumstances being put forward by the Ai Group are not universal to all awards and the matter cannot be dealt with on a 'whole of modern award system basis'.[37]

[23] The AMWU also made submissions in relation to the model term and s.134 considerations and provided examples of situations it would be unreasonable to make deductions.[38] We note clause E.1(f) provides that any deductions 'must not be unreasonable in the circumstances'.

[24] As mentioned earlier, before varying a modern award the Commission must be satisfied that if the modern award is varied in the manner proposed then it would only include terms necessary to achieve the modern awards objective.

[25] 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 s.134(1)(a) to (h). We now turn to the s.134 considerations.

[26] Section 134(1)(a) requires that we take into account 'relative living standards and the needs of the low paid'. A threshold of two-thirds of median full-time wages provides a suitable benchmark for identifying the 'low paid' for the purpose of s.134(1)(a).[39]

[27] The majority of low paid employees are award-reliant and some of these employees may be adversely affected by deductions made pursuant to paragraph E.1(d) of the model term. However we would observe that such a deduction can only be made in circumstances where the employee has not complied with their obligation to provide their employer with notice of termination in accordance with paragraph E.1(b). Further, paragraph E.1(f) provides that any deduction made 'must not be unreasonable in the circumstances'.

[28] On balance, this consideration is a factor against varying modern awards to include the model term.

[29] Section 134(1)(b) requires that we take into account 'the need to encourage enterprise bargaining'. There is no evidence before us which would lead us to conclude that inserting the model term would have an adverse impact on the incentive to bargain in respect of this matter. However, we would also observe that the evidence does not persuade us that such a term would necessarily *encourage* enterprise bargaining.

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[36] AMWU submission, 3 July 2018, paragraph 2.

[37] AMWU submission, 3 July 2018, paragraph 15.

[38] AMWU submission, 3 July 2018, paragraphs 44 – 49.

[39] See *4 yearly review of modern awards – Penalty Rates – Hospitality and Retail sectors* [2017] FWCFB 1001 at [166]-[168].

[30] Section 134(1)(c) requires that we take into account 'the need to promote social inclusion through increased workforce participation'. The use of the conjunctive 'through' makes it clear that in the context of s.134(1)(c), social inclusion is a concept to be promoted exclusively '*through* increased workforce participation'. As the Expert Panel observed in the *2012-2013 Annual Wage Review decision*[40] *obtaining employment* is the focus of this consideration. We are not persuaded that varying modern awards to include the model term will have any impact on workforce participation and we reject the AMWU's submission to the contrary.[41]

[31] It is convenient to deal with ss.134(1)(d) and (f) together.

[32] Section 134(1)(d) requires that we take into account 'the need to promote flexible modern work practices and the efficient and productive performance of work' and s.134(1)(f) requires that we take into account 'the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden'.

[33] The word 'productivity' in s.134 has the conventional meaning it is given in economics of the number of units of output per unit of input. Productivity is a measure of the volumes or quantities of inputs and outputs, not the cost of purchasing those inputs or the value of outputs generated. The price of inputs, including the cost of labour, raises separate considerations relating to business competitiveness and employment costs.[42]

[34] Section 134(1)(f) is expressed in very broad terms; it refers to the likely impact of any exercise of modern award powers 'on business, *including*' (but not confined to) the specific matters mentioned, that is, 'productivity, employment costs and the regulatory burden'.

[35] Paragraphs E.1(d), (e) and (f) of the model term provide a practical means of encouraging compliance with an employee's obligation to provide notice of termination. Encouraging such compliance will reduce the disruption and cost to employers which may arise when an employee fails to give the prescribed notice of termination. Accordingly inclusion of the model term in modern awards is likely to reduce employment costs. This is a consideration which weighs in favour of varying modern awards to include the model term.

[36] Further, the variation of modern awards to insert the model term will not increase in the regulatory burden upon business.

[37] We reject the AMWU's contention that the inclusion of the model term in modern awards will reduce flexibility and increase employment costs and the regulatory burden.[43]

[38] The considerations in ss.134(1)(d) and (f) tell *in favour* of varying modern awards to include the model term.

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[40] [2012] FWCFB 4000 at [100]-[102].

[41] AMWU submissions 2 July 2018 at [29].

[42] [2017] FWCFB 1001 at [220]-[225].

[43] AMWU submissions 2 July 2018 at [30] – [40].

[39] Section 134(1)(da) requires that we take into account the 'need to provide additional remuneration' for:

> '(i) employees working overtime; or
>
> (ii) employees working unsocial, irregular or unpredictable hours; or
>
> (iii) employees working on weekends or public holidays; or
>
> (iv) employees working shifts.'

[40] This consideration is not relevant in the present context.

[41] Section 134(1)(e) requires that we take into account 'the principle of equal remuneration for work of equal or comparable value'. The expression 'equal remuneration for work of equal or comparable value' is defined in s.302(2) to mean 'equal remuneration for men and women workers for work of equal or comparable value'. The consideration in s.134(1)(e) is not relevant in the present context.

[42] Section 134(1)(g) requires that we take into account 'the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards'.

[43] The variation of modern awards to insert the model term will simplify the existing award terms dealing with this subject matter and ensure that awards comply with the terms of the Act (in particular ss. 136(2)(a), 151, 155, and 326). The decisions we have made in relation to the content of the model term are intended to make the provision simple and easy to understand. We reject the AMWU's submission that the model term 'creates further uncertainty for employees and employers [and] detracts from a simple, easy to understand Award'.[44]

[44] Section 134(1)(h) requires that we take into account 'the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy'. The matters mentioned in s.134(1)(h) focus on the aggregate (as opposed to sectorial) impact of an exercise of modern award powers.

[45] In our view the variation of modern awards to insert the model term will not give rise to any significant adverse impact on the national economy.

[46] As mentioned earlier, fairness in the context of the modern awards objective is to be assessed from the perspective of employers and employees. Section 117 of the Act provides that employers must not terminate an employee's employment without giving the prescribed notice of termination or payment in lieu of notice. 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'. The model term specifies the period of notice of termination an employee[45] must give an employer (at Clause E.1(b) and (c)). As such it may

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[44] AMWU submissions 2 July 2018 at [41]. Also see the ACTU's submissions at [6](d).

[45] The model term applies to all employees except those identified in ss.123(1) and (3)).

be seen as a reciprocal obligation to that specified in s.117. In this instance the imposition of a reciprocal obligation is 'fair', within the context of the modern awards objective. As ABI put it in their submission:

> 'the requirement for an employee to provide the *same* period of notice of termination as an employer is fundamentally equitable, having regard to the potentially significant negative consequences (both in terms of disruption and cost) experienced by employers when employees do not provide adequate notice of termination;'[46]

[47] Further, subject to a range of qualifications, the balance of the model term provides that if an employee does not give the required period of notice then the employer may deduct from the wages due to the employee under the award an amount that is no more than one week's wages for the employee. Clause E.1(f) provides that any such deduction 'must not be unreasonable in the circumstances'.

[48] For the reasons given in the *June 2018 decision* we are satisfied that paragraphs E.1(d), (e) and (f) are incidental to a permitted term and essential for the purpose of making paragraphs E.1(b) and (c) operate in a practical way. These elements of the model term provide a practical means of encouraging compliance with an employee's obligation to provide notice of termination. By encouraging such compliance the provisions will operate to reduce the disruption and cost to employers which may arise when employees fail to give the prescribed notice.

[49] The model term, together with s.117 of the NES, strike an appropriate balance between the interests of employees and employers, and contribute to the provision of a 'balanced framework for cooperative and productive workplace relations', consistent with the object of the Act.

[50] We have taken into account the considerations in ss.134(1)(a) to (h) and it is our *provisional* view that a variation to *all* modern awards to include the model term is necessary to ensure that such awards achieve the modern awards objective. That *provisional* view would only be displaced in respect of any particular award if it is demonstrated that there are matters or circumstances peculiar to that award which compel the conclusion that the achievement of the modern awards objective for that award does not necessitate the inclusion of the model term.

Clause G – Transfer to lower paid job on redundancy – clause title

[51] In a Statement issue on 14 June 2018 (the *June 2018 Statement*) we expressed the *provisional* view that the title of clause G should be amended as follows to reflect the terminology used in the body of the clause:

> **'G—Transfer to lower paid ~~job~~ duties on redundancy'**

[52] Interested parties were invited to make submission in relation to the title of clause G. We indicated that in the absence of a request for an oral hearing, the issue about the title of clause G would be determined on the papers.

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[46] ABI submission, 4 July 2018.

[53] The only submission received in relation to clause G was from Ai Group, who did not oppose the *provisional* view.[47] We confirm our *provisional* view in respect of the title of clause G.

Next steps

[54] We have now finalised each of the following standard clauses:

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; and

G. Transfer to low paid job on redundancy.

[55] Two issues in relation to Clause H remain outstanding. A Statement will be issued shortly dealing with these issues.

[56] As set out earlier, it is our *provisional* view that it is necessary to vary all modern awards to include the redrafted Clause E to ensure that those modern awards achieve the modern awards objective. In due course we propose to issue draft variation determinations to give effect to that *provisional* view. Any interested party who wishes to contest the *provisional* view in respect of a particular award will be given an opportunity to do so. Such a process will ensure that award specific considerations are taken into account.

[57] Draft variation determinations will be published after the outstanding issues in Clause H have been determined. Interested parties will have 14 days to comment on the draft variation determinations.

PRESIDENT

[47] Ai Group submission, 2 July 2018, paragraphs 12 – 13.

Appearances:

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

Mr Clarke for Australian Council of Trade Unions

Mr Smith for Australian Industry Group

Ms Liebhaber for Health Services Union

Mr Izzo and *Ms Thomson* for Australian Business Industrial and New South Wales Business Chamber

Mr Calver for National Road Transport Association

Mr Harris for Pharmacy Guild of Australia

Hearing details:

Sydney.

15 December.

2017.

Final written submissions:

Australian Business Industrial and NSW Business Chamber, 4 July 2018

"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU), 2 July 2018

Australian Industry Group, 2 July 2018

National Road Transport Association, 3 July 2018

Australian Council of Trade Unions, 2 July 2018

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Attachment A—Revised model termination of employment clause

‘**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) This clause applies to all employees except those identified in sections 123(1) and 123(3) of the Act.

(b) An employee must give the employer 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	**Column 2**
EMPLOYEE'S PERIOD OF CONTINUOUS SERVICE WITH THE EMPLOYER AT THE END OF THE DAY THE NOTICE IS GIVEN	**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.

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

(d) If an employee who is at least 18 years old does not give the period of notice required under paragraph (b), then the employer may deduct from wages due to the employee under this award an amount that is no more than one week's wages for the employee.

(e) If the employer has agreed to a shorter period of notice than that required under paragraph (b), then no deduction can be made under paragraph (d).

(f) Any deduction made under paragraph (d) must not be unreasonable in the circumstances.