IN THE FAIR WORK COMMISSION

AM2016/15

4 Yearly Review of modern awards – Plain Language – standard clauses – notice of termination by employee

Submissions of the National Road Transport Association (NatRoad)

Introduction

1. These submissions are filed on behalf of the National Road Transport Association (**NatRoad**) in response to the publication of a Statement dated 21 August 2017 (**Statement**) [1] by the Full Bench of the Fair Work Commission (the **Commission**) in relation to the proposed re-drafting of a standard modern award clause about notice of termination by an employee (**the Clause**).

2. For ease of reference that part of the Clause in contention is now set out. It is referred to as clause E.1(c) in the Statement (proposed amendments to the Clause are not indicated):

   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.

3. The substance of the Clause, inclusive of the provision in the prior paragraph, as set out at paragraph 1 of the Statement, is reflected in clauses 13.2 and 11.2 of the *Road Transport and Distribution Award 2010* (**Distribution Award)** and the *Road Transport (Long Distance Operations) Award 2010* (**Long Distance Award**) respectively.

4. Accordingly, NatRoad's interest arises from the concerns expressed in this submission about potential unfairness to transport industry employers should the Clause be changed to remove the element which has been called into question in the current proceedings.

[1] [2017] FWCFB 4355 https://www.fwc.gov.au/documents/decisionssigned/html/2017fwcfb4355.htm.

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5. The Full Bench seeks submissions on two issues that have arisen in the context of the re-drafting process to apply plain English drafting to standard Award provisions. That process has counter-intuitively led to the position where the Full Bench is now seeking submissions as set out in paragraph 7 of this submission.

6. Albeit the proceedings from which these issues emerged comprise the task of a re-drafting to achieve greater clarity in standard award provisions, a far-reaching substantive issue has been raised in the course of proceedings akin to the 'tossing of a hand grenade into the debate'.[2]

7. The issues about which the Full Bench seeks submissions are set out at paragraph 2 of the Statement as follows:

   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 as of merit such a provision is necessary to achieve the modern awards objective in accordance with the requirement in s.138.

8. NatRoad now responds to these two matters.

9. Firstly, the background to the establishment of the Clause as part of current modern transport awards is touched on. Then the statutory provisions are analysed. Lastly, the merit issues are addressed.

10. NatRoad is a not-for-profit industry association. It represents the interests of more than 1100 contract carriers, employing contractors, and owner-drivers, working within the road transport industry throughout Australia. Most of NatRoad's members are small business owners and operators.

Background

11. The Clause requires an employee to give the employer written notice of termination in accordance with the table set out in the Clause. The notice required to be given is the same as an employer is required to provide to an employee on termination[3] with the exception that an employee does not have to give additional notice based on the age of the employee. The matter of the notice being the same for employees as for employers is set out in a note to the table in the Clause but made express in the provisions in the road transport Awards mentioned at paragraph 3 of this submission.

12. The substance of the Clause enables an employer to deduct from monies due to the employee on termination an amount that does not exceed the amount the employee would have been paid under the award or the National Employment Standards (the **NES**) for the period of notice required less any notice actually given by the employee.

13. In practice, this operates to compensate the employer for the employee's failure to provide the requisite notice and acts as a deterrent to an employee not giving the

[2] Per the President Transcript AM2016/15 21 August 2017 PN154.
[3] Derived from s117(3) *Fair Work Act 2009 (Cth)*.

required statutory notice. It also absolves the employee from liability for the difference between the required period of notice being given where the actual period of notice is less than that mandated by the relevant award. The highlighted part of clause 11.2 of the Long Distance Award as follows illustrates this point:

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 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.***

14. In the absence of the 'claw back' from the employee, the failure to give the correct amount of notice would amount to a breach of an Award provision: see section 45 of the *Fair Work Act, 2009 (Cth)* (**FW Act**).

15. The failure of the employee is not a breach of the NES though. This is because the obligation on the employee to give the relevant period of notice is an Award-based obligation. Section 118 FW Act states:

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.

16. The Clause reflects that the notice period for an employee is the same as for employers. The consistency in the notice periods for employers and employees appears to derive from the 1984 *Termination Change and Redundancy case*.[4]

17. In that case the Full Bench of the then Australian Conciliation and Arbitration Commission (**ACAC**) said:

However, 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.[5]

18. The concerns of the 1984 Full Bench remain a valid consideration. They should not lightly be put aside. This is especially the case because the modern award system should be 'stable' per s134(1)(g) FW Act, taken up below. As indicated by the Full Bench in a recent decision:

The matter in s.134(1)(g) is particularly apposite in the context of the plain language redrafting project, that is, 'the need to ensure a simple, easy to understand, ***stable*** *and sustainable modern award system.'*[6]

[4] (1984) 8 IR 34; Moore J, President, Maddern J Deputy President and Brown Commissioner, Decision issued 2 August 1984, Print F6230.
[5] Id at page 20.
[6] [2017] FWCFB 4419 at para 3.

19. In addition, consistent with the approach determined by the Preliminary Issues Full Bench[7] it is noted that prima facie the particular modern award being reviewed achieved the modern awards objective at the time that it was made. Further, that decision is authority for the proposition that it is necessary to have regard to the historical context applicable to each modern award and previous decisions relevant to any contested issue (and their context); previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.[8]

20. The originating concerns of the ACAC Full Bench were certainly carried over into pre-modern Awards. From our understanding, all major transport pre-modern awards contained the relevant obligation and 'claw back' provision contained in the Clause. For example, clause 13.2 of the *Transport Workers Award, 1998* [9] contained the same substance as the Clause; another example is clause 16 of the *Transport Workers (Distribution Facilities New South Wales Award 2004.*[10]

21. Indeed, modern awards have contained the provision since their formulation. The relevant award modernisation Full Bench said:

    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.*[11]

22. The Clause derives from the original model term.

Argument: Permitted Power; Analogy to "Penalty" Provision

23. The Full Bench now seeks feedback on the relevant provisions of the FW Act that impinge on the validity of the inclusion of E.1(c) in modern Awards.

24. Paragraph 15 above indicates that there is a specific power derived from s118 FW Act to include in modern awards matters relating to specifying the period of notice an employee must give on termination. Section 118 is contained within Part 2-2 of the FW Act.

25. At paragraph PN171 of the transcript[12] Vice President Hatcher refers to the source of the Commission's power to include E.1(c) as being section 118. He then indicates that:

    So, there's no express power to have this further, as it were penal provision, it depends on the notion that it's somehow incidental or ancillary to that primary power.[13]

26. We respectfully agree that the part of the Clause now in question as set out in paragraph 2 of this submission, is indeed incidental to the principal power identified by the Vice President (**VP**), as argued in paragraph 59 et seq below.

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[7] [2014] FWCFB 1788, at para 25.
[8] Id at para 60.
[9] http://awardviewer.fwo.gov.au/award/show/AP799474#25 .
[10] https://www.fwc.gov.au/documents/consolidated_awards/at/at832213/asframe.html.
[11] [2008] AIRCFB 717 at paragraph 22 http://www.airc.gov.au/decisionssigned/html/2008AIRCFB717.htm.
[12] Above note 2.
[13] Id at PN173.

27. A penal or penalty provision is at law something that is a punishment for breaking the law. The issue of the legal permissibility of penalty provisions in modern awards has been comprehensively considered by a four-member Full Bench of the Commission[14]

28. At paragraph 38 of the relevant decision, the Full Bench indicated that "the existence of a statutory compliance framework for the enforcement of, amongst others instruments (sic)" does not limit the capacity of the Commission to include a penalty provision in the Award then in contention "if its inclusion is otherwise within power." The same considerations apply in the current context.

29. The statement just quoted is able to be contrasted with the comment by Hatcher VP in the current proceedings that:

If an employer failed to give notice, the employee's remedy is to go to a court. So, I have difficulty comprehending how it could be that if an employee breaches the notice that an employer can have a self-enforcing system whereby they can, in effect, not pay somebody for work they've already done.[15]

30. With respect, the effect is not confined to the deprivation of payment of an employee for work that they have already done.

31. 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.

32. The Full Bench in the case mentioned in paragraph 19 of this submission went on to say:

It also submitted that as a matter of discretion, the Commission should not include a term in a modern award which would have the effect of imposing a penalty on a person to whom the award applied in the event that a particular term in a modern award was not complied with by that person. This latter submission is not one that touches upon the power of the Commission. Rather it is a submission directed to the merits of including such a term. Consequently we do not propose to deal with that submission in this proceeding. [16]

33. The Full Bench that ultimately decided the merits of the matter said [emphasis added]: *The Timber Award provides for a **penalty** for late payment if the employees are paid in cash.*[17]

34. Further in the decision relating to the case on the legal permissibility of a penalty provision, the imposition of what was labelled as a penalty was characterised thus (noting the analogy with the provision now under scrutiny) [emphasis added]:

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[14] [2015] FWCFB 1549.
[15] Above note 2 at PN176.
[16] Above note 11 at para 14.
[17] [2015] FWCFB 2856 at para 49 NatRoad's emphasis.

Even assuming it is correct to characterise the Proposed Term as a penalty, the effect of its inclusion in the TI Award would be to create ***a right to the payment of a particular sum in particular circumstances.*** *This is not an exercise involving the adjudication of rights that presently exist or a determining a remedy consequent on those rights. Rather it is an exercise in determining what future rights or obligations should exist and subject to the statute, creating those rights or obligations by varying the modern award. It does not involve the exercise of judicial power.*[18]

35. Similarly, the Clause contains a mechanism by which an employee is able to comply with the Award even where the requisite notice under the Clause is not given. It provides the employer with a right which then vindicates an otherwise Award breach by an employee. It does that by **creating a right to the payment of a particular sum in the particular circumstance of the employee failing to give the mandated period of notice.** This is made clear in Clause 11.2 of the Long Distance Award as set out in paragraph 13 of this submission by use of the words: "***If an employee fails to give the required notice***" showing that the "claw-back" is contingent on that required notice not being given.

36. 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.

37. 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.

38. This is an important point.

39. In contrast, where the penalty for waiting time applies (the subject of the Full Bench proceedings discussed infra) there remains an Award breach. Here there is no breach because the clause is self-executing. There is a mechanism within the Award which lifts that employee burden, a burden where the amount that is able to be "clawed back" from the employee equates with their monetary legal liability.

40. In *Bienias v Iplex Pipelines Australia Pty Limited*[19] (**Iplex**) a Full Bench of the Commission determined that clause 21 of the *Manufacturing and Associated Industries and Occupations Award 2010* has no effect because it is not a clause that can be included in an award under the FW Act. That case appears to have brought about the current focus from the Full Bench. That case centred on a provision which "would operate to automatically terminate employment."[20]

41. We agree that termination of employment cannot be automatic and without notice (the crux of the *Iplex* case) and therefore that the provision under scrutiny in *Iplex* should not stand.

42. However, the provision currently under scrutiny operates to the opposite effect to the provision in *Iplex*. It requires the requisite notice to be given or an amount equivalent to the lawfully required notice period to be paid by way of deduction from monies otherwise due.

[18] Above note 11 at para 32.
[19] [2017] FWCFB 38
[20] Id at para 56

43. The Clause therefore has the effect of reinforcing that termination of employment cannot be automatic and without notice. The difference is that in the current instance the shoe is on the employee's foot.

Argument: Statutory Provisions

44. The Full Bench seeks submissions inter alia in relation to section 55 of the FW Act. The section sets out the relationship between the NES and modern awards and enterprise agreements.

45. Section 55(2)(a) indicates that "a modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include by a provision of Part 2-2." As indicated in paragraph 24 of this submission, section 118 is within Part 2-2 of the FW Act.

46. Accordingly, terms related to employee notice are authorised by section 118 and are therefore recognised in section 55 as permissible.

47. Section 324(1)(c) states that deductions by employers from moneys otherwise payable to an employee are able to be made if authorised by a modern award. The Clause provides that authorisation.

48. Section 55(4) states:

> *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*.

49. Clearly, s 55(4) is not at issue in the current context. It is expressed to be additional to other powers to include provisions in modern awards: note the NatRoad bolding of the word "also" in the prior paragraph.

50. In addition, the Clause is not part of the NES and so is not ancillary or incidental to the operation of an entitlement of an employee under the NES. The Clause does not supplement the NES. Hence the comparative exercise required in s55(4) does not arise.

51. The Clause is permitted as a result of the specific power conferred by section 118 to include provisions relating to employee notice in awards. The 'claw back' provision is incidental to the employee notice period. Its inclusion is able to be made as a result of the Commission's power under section 142 discussed below.

52. 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.

53. This submission in earlier paragraphs has discussed the importance of section 118 to the Clause.

54. We add one further point to the discussion of section 118. In the *Iplex* decision the Full Bench indicated[21] that the clause then in contention, Clause 21, was not "a term specifying the period of notice an employee must give in order to terminate his or her employment."[22] Clearly, by the terms of the *Iplex* decision itself, it is a case distinguishable from the current inquiry.

55. Section 136(1)(d) indicates that the inclusion of a modern award term that derives from Part 2-2 is permitted. That is made very clear in statutory note 2 to s136(1) which says: *Part 2-2 includes a number of provisions permitting inclusion of terms about particular matters*.

56. In contrast section 139 of the FW Act sets out the kinds of terms that **may** be included in modern awards. Section 139 is not relevant to the basis on which the Clause is permitted to be placed in modern awards. That is because of a separate express power to include the Clause in modern awards.

57. For completeness, we note that the Clause is not made impermissible by reason of a specific provision in the FW Act. For example, there are no elements of sections 150-155 in question, provisions which deal with terms that must not be included in modern awards, for example objectionable or discriminatory terms (see ss.150 and 153); or terms about right of entry or dealing with long service leave (see ss.152 and 155).

58. Section142 FW Act permits a modern award to include incidental or machinery terms.

59. In the Full Bench decision mentioned in paragraph 19 of this submission, the Full Bench indicated[23] that the power to include the term then before the Commission was likely to be found in section 142(1) of the FW Act.

60. NatRoad submits section 142(1) to be the provision which permits the impugned part of the Clause to be permissible.

61. Section 142(1) says that a modern award may include terms that are incidental to a term that is permitted or required to be in the modern award and essential for the purpose of making a particular term operate in a practical way.

62. The Commission has characterised s139 and s142 of the FW Act thus:

> *Sections 139 and 142 are in Chapter 2 of Part 2-3 of the Act. The purpose of Chapter 2 is to prescribe minimum terms and conditions of employment for national system employees. We accept that it is appropriate to characterise ss.139 and 142 as remedial or beneficial provisions. They are intended to benefit national system employees[24].*

63. That approach led the Full Bench to express the view that a 'liberal' approach should be adopted in construing the relevant proposed provision. However, the Full Bench also said that, in relation to section 142:

> *As to the proper construction of s.142 of the Act, we agree with the following observation from the Apprentices decision:*

[21] Above note 16 at para 57
[22] Ibid
[23] Above note 11 at para 29.
[24] [2016] FWCFB 4393 at para 54.

We agree with the submission of the employers 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.[25]

64. In this instance, the question is whether the terms of E.1(c) are able to be 'appropriately linked back' (to use the expression in the prior paragraph) to the inclusion in modern awards of provisions about notice that are expressly permitted. This linkage must be revealed as indispensable to permitting the term to operate in a practical way.

65. 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.

66. 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.

67. 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.

68. 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.

Case Study

69. For example, NatRoad received a query from a member on Monday 28 August 2017 in respect of an employee who had resigned by text message on the Sunday (the day before) indicating that the employee would not be returning to work. The employer was assuaged by the fact that moneys representing the required one week's notice the employee should have provided were to be deducted from monies otherwise due. The

[25] Id at para 59

employer was highly concerned that the employee's capricious resignation had caused his enterprise scheduling and other difficulties which were costly to cover. The 'claw back' provision meant that the employee was not in breach of the award and that the employer was satisfied that there was at least a small amount of money that the employee was required to forgo being paid in the circumstances to alleviate some of the financial burden that the resignation had caused.

70. Part 4-1 FW Act allows for both compensation and punishment following a breach of the FW Act: s 545(2)(b) and s 546 FW Act. In addition, section 545 FW Act provides that the Federal Court and Federal Circuit Court "may make any order the court considers appropriate" where a civil remedy provision has been breached, including orders imposing injunctions and ordering compensation. In the absence of the impugned part of the Clause, it is much more likely that employers would seek from employees compensation that reflected the actual loss flowing from the breach of the award. The Commission should therefore be doubly cautious in acting to eliminate the "claw back provision."

71. This practical consideration is reinforced when the merit arguments are assessed, as follows.

Argument: Merit

72. Section 138 of the FW Act is mentioned in the second part of the Full Bench's desired feedback set out at paragraph 5 of this submission. Section 138 provides:

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.

73. The modern awards objective (in s.134) referred to in s138 applies to the performance or exercise of the Commission's modern award powers, which are defined to include the Commission's functions or powers under Part 2-3 of the Act. The Review function in s.156 is in Part 2-3 of the Act and therefore involves the performance or exercise of the Commission's modern award powers. It follows that the modern awards objective applies to the consideration of the merits of including the Clause in modern awards, as has already been alluded to when referring to s134(1)(g) earlier in this submission.

74. The modern awards objective is set out in s.134(1) as follows:

1) The FWC must 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

a) relative living standards and the needs of the low paid; and

b) the need to encourage collective bargaining; and

c) the need to promote social inclusion through increased workforce participation; and

d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) 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; and

e) the principle of equal remuneration for work of equal or comparable value; and

f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

75. In essence, the relevant modern awards objectives when looking at the terms of the Clause are 134(1)(d), (f) and (g). The latter objective has already been addressed in paragraph 12. The award system has contained the substantive terms of the Clause since its determination as an appropriate provision in 1984. Pre-modern awards reflected its terms. Modern awards have contained its terms since their creation. The Clause should be retained. That contributes to a "stable" system.

76. We submit that the efficient and productive performance of work requires that there be an appropriate period during which an employee works out notice for the reasons articulated by the ACAC Full Bench, set out at paragraph 17 of this submission and illustrated by the NatRoad case study at paragraph 69 of this submission.

77. In addition, the simplicity of a "claw back" mechanism benefits both the employer and the employee.

78. The simplicity of that provision when compared with the increase in the burden of regulation involved when litigation is the way in which employers would enforce the obligation against employees is stark.

79. The Commission should not promote the taking of litigation against employees: it should not disturb the provision that contains a practical solution to the problems which arise when litigation is the only other path to resolution. In deleting the highly practical 'claw back' provision the Commission would be increasing the regulatory burden and increasing the costs associated with the termination of employment at the initiative of employees. That position is counter to the intent of s134(1)(f).

Conclusion

80. The Commission should not find that part of the Clause which is identified as E.1(c) as impermissible or as without merit.

81. The Clause should be retained

National Road Transport Association

1 September 2017