

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Further Submission

Plain Language Drafting – Standard Clauses
(AM2016/15)

18 December 2017

Ai
GROUP

4 YEARLY REVIEW OF MODERN AWARDS

AM2016/15 PLAIN LANGUAGE DRAFTING

– STANDARD CLAUSES

1. Introduction

1. This Further Submission of the Australian Industry Group (**Ai Group**) is made in response to Directions issued by the Fair Work Commission (**FWC or Commission**) at the hearing on 15 December 2017 regarding the plain language drafting of ‘standard’ award Clause E.1 – Notice of termination by an employee.
2. This submission responds to the submissions made by ABI that paragraph E.1(c) cannot be included in awards because it is inconsistent with s.142 of the *Fair Work Act 2009*.

2. Relevant Full Bench authorities on the construction of s.142 of the Act

3. There are a number of key FWC Full Bench decisions which clarify the meaning of s.142 of the Act.
4. In the *Modern Awards Review 2012 – Apprentices, Trainees and Juniors Decision* [2013] FWCFB 5411, the Full Bench stated:

[101] We should, however, say something about s.142(1), which allows terms to be included in an award that are incidental to a term that is permitted or required to be in an award and which is essential to make the particular term operate in a practical way. The terms of this section are to be contrasted with s.89A(6) of the WR Act. That section provided that the AIRC “may include in an award provisions that are incidental to the matters in subsection (2) and necessary for the effective operation of the award”. 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. 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).

5. In the 4 yearly review of modern awards—*Pastoral Award 2010 – Learner Shearers Decision* [2016] FWCFB 4393, the Full Bench stated:

[54] 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.

[55] 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* ('*Bowker*'). In *Bowker* the Full Bench said:

'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 he should have."

Any ambiguity is to be construed beneficially to give the fullest relief that a fair meaning of its language will allow, provided that the interpretation adopted is 'restrained within the confines of the actual language employed that is fairly open on the words used.' As their Honours Brennan CJ and McHugh J put it in *IW v City of Perth*:

"...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.'

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

[57] As to the meaning of the word 'about' in s.139(1), we accept the proposition advanced by ABI that having regard to the legislative context (and particularly s.142), the word 'about' requires more than an 'incidental' connection between the proposed award term and one of the subject matters listed in s.139(1).

[58] We also accept that it is appropriate to adopt a liberal construction of the word 'about' in s.139(1), to the extent permitted by the context. The particular subject matters set out in s.139(1) are to be given their ordinary meaning and there is no warrant for a restrictive construction to be placed on any of them. 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* (the '*Apprentices decision*').

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

'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.'

6. It can be seen from the above that in the *Pastoral Award Decision* the Full Bench characterised ss.139 and 142 as 'beneficial provisions'.
7. In Ai Group's Reply Submission of 13 April 2017 in the *Annual Wage Review 2016-2017*, we made detailed submissions on the statutory interpretation principles relating to beneficial provisions, and expressed concern about the concession made by ABI in the *Pastoral Award* proceedings that ss.139 and 142 are beneficial provisions, without any apparent argument to the contrary. In reference to the concession made by ABI, in our 13 April Submission, Ai Group stated:

If Ai Group had been involved in the above proceedings relating to the *Pastoral Award 2010*, we would not have simply accepted the proposition referred to in paragraphs [41], [43] and [54] above, that ss.139 and 142 of the FW Act are entitled to a beneficial or remedial construction. At the very least we would have sought to make detailed arguments about the approach that Courts have taken to interpreting beneficial provisions in legislation (like the FW Act) which strikes a balance between competing interests.

8. The *Annual Wage Review 2016-2017 Decision* includes the following relatively lengthy section on beneficial provisions:

(i) Beneficial legislation

[132] ACCER submits that the provisions of the Act which deal with the setting of the NMW should be 'treated as beneficial legislation and should not be construed or applied narrowly'.

[133] The statutory provisions relating to the Review and to NMW orders are set out in Divisions 3 (ss.284–292) and 4 (ss.293–299) of Part 2-6 of the Act. The purpose of Chapter 2 is to prescribe minimum terms and conditions of employment for national system employees (including those terms and conditions arising from a NMW order).

[134] A remedial or beneficial provision is one that gives some benefit to a person and thereby remedies some injustice. We accept that it is appropriate to characterise the statutory provisions relating to the variation of the NMW as remedial or beneficial provisions. They are intended to benefit national system employees. Further, as the Panel observed in its Preliminary Decision dealing with the proposed adoption of a medium-term target for the NMW:

‘The effect of a fair and relevant safety net is to raise wages received by the low paid above those that they would receive in the absence of enforceable minimum wages.’

[135] A NMW order operates in the same way. An award/agreement free employee cannot be paid less than the rate specified in the NMW order and hence, in practice, the effect of such an order is to raise the wages received by the lowest paid award/agreement free employees above what they would receive in the absence of such an order. Contrary to the submissions advanced by Ai Group, it is appropriate to regard such a legislative scheme as remedial or beneficial. It is intended to create a regulatory instrument which intervenes in the market setting minimum wages, to lift the floor of such wages.

[136] 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* (‘*Bowker*’). In *Bowker* the Full Bench said:

‘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 he should have.”

Any ambiguity is to be construed beneficially to give the fullest relief that a fair meaning of its language will allow, provided that the interpretation adopted is ‘restrained within the confines of the actual language employed that is fairly open on the words used.’ As their Honours Brennan CJ and McHugh J put it in *IW v City of Perth*:

“...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.’ (footnotes omitted)

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

[138] Section 15AA of the *Acts Interpretation Act 1901* is also relevant. It 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 (noting that s.40A of the Act provides that the *Acts Interpretation Act 1901*, as in force at 25 June 2009, applies to the Act). 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.

[139] Despite its beneficial purpose a statutory provision may be constrained in its operation if it represents a compromise between competing intentions. As Gleeson CJ observed in *Carr v Western Australia*:

‘Another general consideration relevant to statutory construction is one to which I referred in *Nicholls v The Queen*. It was also discussed, in relation to a similar legislative scheme, in *Kelly v The Queen*. It concerns the matter of purposive construction. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object. As to federal legislation, that approach is required by s 15AA of the *Acts Interpretation Act 1901* (Cth) (“the Acts Interpretation Act”). It is also required by corresponding State legislation, including, so far as presently relevant, s 18 of the *Interpretation Act 1984* (WA). That general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.’ [Footnotes omitted]

[140] Similar observations are made in *Victims Compensation Fund v Brown* and in *Baytech Trades Pty Ltd v Coinvest Ltd*.

[141] It seems to us that the statutory provisions relevant to the fixation of the NMW plainly seek to strike a balance between competing interests. So much is clear from the range of considerations the Panel is required to take into account in giving effect to the minimum wages objective (for example compare s.284(1)(a)

and (c)). It is also clear from the minimum wages objective itself—to “establish and maintain a safety net of *fair* minimum wages”. Fairness in this context is to be assessed from the perspective of the employees and employers covered by the NMW order. The object of the Act also speaks to multiple legislative purposes. Section 3 provides that the object of the Act ‘is to provide a *balanced framework* for cooperative and productive workplace relations that promotes national prosperity and social inclusion for all Australians’ (emphasis added), by the means specified in sections 3(a) to (g).

[142] It follows that while the statutory provisions relating to the Review and to NMW orders are properly characterised as remedial or beneficial provisions, the extent to which they are to be given ‘a fair, large and liberal’ interpretation in pursuit of that broad purpose is constrained by the fact that the relevant provisions seek to strike a balance between competing interests.

(ii) The modern awards objective – ‘a fair and *relevant* minimum safety net’.

[143] The ACTU drew attention to the observations in the *Penalty Rates decision* about the meaning of the word ‘relevant’ in the modern awards objective. The relevant passage is at [120] of the *Penalty Rates decision*:

‘Second, the word “relevant” is defined in the Macquarie Dictionary (6th Edition) to mean “bearing upon or connected with the matter in hand; to the purpose; pertinent”. In the context of s.134(1) we think the word “relevant” is intended to convey that a modern award should be suited to contemporary circumstances. As stated in the Explanatory Memorandum to what is now s.138:

‘... the scope and effect of permitted and mandatory terms of a modern award must be directed at achieving the modern awards objective of a fair and relevant safety net *that accords with community standards and expectations.*’

[144] In respect of the above proposition, the ACTU submits:

‘In essence, the proposition is that the creation by statute of a regulatory function to centrally set and maintain “fair” minimum wages is a labour market intervention that stems from the legislature taking the position that in the absence of such an intervention, the minimum wages of employees would not (or at least might not) be fair. If one accepts that proposition, it cannot follow that “relevant” centrally determined minimum wages—minimum wages that are suited to contemporary circumstances—must always follow, predict or seek to reproduce the trends observed in market wages. Rather, contemporary circumstances may demand that the intervention enabled by the legislation be exercised to a much fuller extent, including an extent that results in a major disparity between market wage movements and movements in minimum wages.’

[145] We agree with the ACTU’s submission above. In particular, the requirement that modern awards provide a fair and relevant minimum safety net does not imply that the variation of modern award minimum wages must ‘always follow, predict or seek to reproduce the trends observed in market wages’. One of the considerations the Panel must take into account in giving effect to the modern awards objective is ‘relative living standards’. Trends in market wages are relevant

for that purpose, but they are not determinative. As we have mentioned, the range of considerations we are required to take into account calls for the exercise of broad judgement rather than a mechanistic or decision rule approach to wage fixation.

9. Similar to the conclusions reached by the Expert Panel regarding the statutory provisions relating to variations to the National Minimum Wage, s.142 should be characterised as representing a compromise between competing interests. In such circumstances, as Gleeson CJ observed in *Carr v Western Australia* (and as cited in *Victims Compensation Fund v Brown* (2003) 201 ALR 260 and in *Baytech Trades Pty Ltd v Coinvest Ltd* [2015] VSCA 342), the general rule of interpretation relating to beneficial provisions may be of little assistance:

“.... That general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.’

10. In its 18 October 2017 decision in the current proceedings, the Full Bench made the following statements about s.142:

[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.’

[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*:

‘[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’.

[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.

[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)* 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.’

[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).’

[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.'

[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.'

[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). 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) (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 (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.’

[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.’

[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'.

3. Application of the Full Bench authorities on s.142 of the Act to clause E.1(c)

'Incidental'

11. In Ai Group's view, the *'provisional view'* reached by the Full Bench in its 18 October Decision, that clause E.1(c) is *'incidental'* to clause E.1(a) is correct. The *'provisional view'* appropriately applies key principles that flow from the above authorities.
12. The reasons why the Full Bench reached the *'provisional view'* that clause E.1(c) is *'incidental'* to clause E.1(a) are set out in the following extract from the 18 October Decision:

[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'.

[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).

13. Ai Group concurs with the reasoning in the above extracts from the 18 October Decision.
14. Similar to Ai Group, ABI concurs with Commission's *'preliminary view'* that clause E.1(c) is *'incidental'* to clause E.1(a).¹

'Essential for the purpose of making a permitted term operate in a practical way'

15. At the hearing on 15 December, there was discussion about the meaning of the word *'essential'* and whether the meaning differed from the word *'necessary'* which appeared in s.89A(6) of the *Workplace Relations Act 1996 (WR Act)*.
16. It appears to be beyond contention that if something is *'essential'*, then it is *'necessary'* – a point made at paragraph [142] of the Commission's 18 October Decision. However, the question arises as to whether there is a category of award terms that would be *'necessary'* but not *'essential'*.
17. In the *Modern Awards Review 2012 – Apprentices, Trainees and Juniors Decision* [2013] FWCFB 5411 (at paragraph [101]), the Full Bench aligned the term *'essential'* with *'necessary'*, in the following manner: *'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.'* This extract was cited with approval by the Full Bench (at paragraph [59]) in the *4 yearly review of modern awards—Pastoral Award 2010 – Learner Shearers Decision* [2016] FWCFB 4393.
18. Ai Group is not convinced that any differences in the meaning of the words *'essential'* and *'necessary'* could be articulated in a manner that would enable the FWC to sensibly delineate between award terms that are *'essential'*, and award terms that are simply *'necessary'* but not *'essential'*.

¹ Transcript of 15 December 2017 hearing at PN 56.

19. In any event, ABI's submissions place an excessive amount of weight on the word 'essential' and inadequate weight on the fact that this word appears within the phrase 'essential for the purpose of making a permitted term operate in a practical way'.

20. In its 18 October Decision, the Full Bench stated:

[148] 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'.

21. As highlighted by the Full Bench, clause E.1(c) is not required to be 'essential' for the effective operation of the award. Clause E.1(c) is only required to be essential for the purpose of making Clause E.1(a) 'operate in a practical way'. Also, the expression 'for the purpose of making a particular term operate in a practical way' is an expression of slightly wider import than the expression 'for the effective operation of the award'.

22. Clause E.1(c) is 'essential for the purpose of making (clause E.1(a)) operate in a practical way' for the following reasons:

- a. The provision provides a practical means of encouraging compliance by employees with the notice requirements in Clause E.1(a). As recognised by the Full Bench of the AIRC in the [main TCR Decision](#) of 2 August 1984, there are adverse impacts upon employers when employees terminate their employment without giving notice: (emphasis added)

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.

- b. Clause E.1(c) operates to minimise the significant disruption and cost to employers which arises when employees do not give notice of termination of employment.

- c. It would not be practical for an employer to pursue a civil penalty against an employee under s.45 of the Act for a breach of Clause E.1(a), because:
- Civil penalties associated with award breaches are typically paid into consolidated revenue, rather than to an aggrieved party. An employer would need to convince the appropriate court that an order requiring a payment to the employer was appropriate in the particular circumstances;
 - The legal and other costs associated with pursuing an action against an ex-employee under s.45 would far outweigh any benefit to the employer; and
 - Unlike an employee, an employer cannot elect to have proceedings relating to a breach of s.45 dealt with as small claims proceedings under s.548. Section 548 only relates to amounts that *“an employer was required to pay...”*.
- d. Given that employers would be extremely unlikely to pursue an action against an employee for breaching the notice requirements in the award, employees would typically be able to breach Clause E.1(a) with impunity, were it not for Clause E.1(c).
- e. It is not in the interests of employers or employees for an employer to be required to pursue formal legal proceedings against an employee to seek redress for an employee’s breach of an award if a simpler, less time consuming and less costly remedy can be readily achieved (and is currently in place).
- f. The Fair Work Ombudsman does not commonly pursue legal proceedings against individual employees who breach award terms.
- g. It would not be in the public interest for the Fair Work Ombudsman to divert resources towards pursuing legal proceedings against individual employees who breach the notice provisions in clause E.1(a) when a

practical mechanism for dealing with such breaches is already enshrined within the award system through clause E.1(c).

- h. To ensure fairness to employers, it is essential to include Clause E.1(c) in awards.
23. If the Full Bench in these proceedings decides to depart from the Full Bench authorities referred to in this submission and adopts an excessively narrow interpretation of s.142, the decision is likely to be used by employer or union parties to challenge numerous existing award provisions. Many provisions of modern awards can be traced back to decisions made during the award simplification process in the mid to late-1990s to retain award provisions as a result of s.89A(6) of the WR Act.
24. For example, a word search of the *Metal Industry Award Simplification Decision* (Print P9311) reveals that s.89A(6) is referred to 50 times, and underpinned numerous provisions that were retained in the Award. Many of these provisions are still found in the *Manufacturing and Associated Industries and Occupations Award 2010*. Some of the provisions primarily benefit employees while others primarily benefit employers.

4. Conclusion

25. For the reasons set out above, clause E.1(c) is “*essential*” for the purpose of making Clause E.1(a) “*operate in a practical way*”.
26. It is vital that clause E.1(c) be retained in the Award.