BACKGROUND DOCUMENT

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

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

SYDNEY, 15 DECEMBER 2017

Note: This is a background document only and does not purport to be a comprehensive discussion of all of the submissions in this matter, nor does it represent the concluded view of the Commission on any issue.

[1] The hearing on 15 December 2017 concerns whether Clause E.1(c) of the standard termination of employment clause is a provision which may validly be included in a modern award. In its present form Clause E.1 provides:

> **E. Termination of employment**
>
> NOTE: The NES sets out requirements for notice of termination by an employer. See sections 117 and 123 of the Act.
>
> **E.1 Notice of termination by an employee**
>
> **(a)** An employee must give the employer written notice of termination in accordance with Table X—Period of notice of at least the period specified in column 2 according to the period of continuous service of the employee specified in column 1.
>
> **Table X—Period of notice**

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

> NOTE: The notice of termination required to be given by an employee is the

same as that required of an employer except that the employee does not have to give additional notice based on the age of the employee.

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

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

[2] In a decision issued on 18 October 2017[1] (the October decision) the Commission determined the following issues:

1. Clause E.1(c) is *not* a term which can properly be characterised as being '*about*' any of the matters set out in s.139(1).
2. Clause E.1(c) is *not* a term that *must* be included in a modern award.
3. Pt 2-2 of the Act (which deals with the NES) does *not* permit the inclusion of a term such as Clause E.1(c) in a modern award.
4. In the event that a modern award includes a term specifying the notice of termination to be given by an employee then a term such as Clause E.1(c) *may* be permissible, provided the requirements of s.142 have been met.

[3] The two central issues to be considered in this part of the proceeding are:

1. Whether Clause E.1(c) is incidental to a term permitted to be in a modern award and essential for the purpose of making the permitted term operate in a practical way (see s.142(1)(a) and (b)).
2. Whether Clause E.1(c) is a term which must not be included in a modern award as the term has no effect because of s.326(1) and (4) (see s.151).

[4] To the extent that the Commission has power to include a provision such as Clause E.1(c) in a modern award subsequent proceedings will consider whether, as a matter of merit, such a provision is necessary to achieve the modern awards objective. A further opportunity will be provided for interested parties to address that issue (if necessary) once the Commission has reached a concluded view in respect of the issues set out at [4] above.

[5] Parties were invited to make written submissions in respect of the issues set out at [3] above and in doing so were directed to address a number of specific issues (see Attachment 1).

[6] Submissions were received from the following organisations:

- Australian Council of Trade Unions (ACTU);
- Health Services Union (HSU);
- Australian Property Services Association (APSA);
- Registered Real Estate Salespersons' of SA (RRES);
- Textile Clothing & Footwear Union of Australia (TCFUA);
- Australian Business Industrial and NSW Business Chamber (ABI);
- Australian Industry Group (Ai Group);
- Australian Manufacturing Workers' Union (AWMU);

- Master Electricians Australia (MEA);
- National Road Transport Association (Nat Road); and
- Real Estate Employer's Federation (REEF).

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

- ABI;
- Community and Public Sector Union (CPSU);
- AMWU;
- Ai Group; and
- ACTU.

[8] It is clear from the submissions filed that Issue 1 is disputed. Broadly speaking, the ACTU and the Unions contend that Clause E.1(c) is *not* incidental to a term permitted to be in a modern award and nor is it essential for the purpose of making the permitted term operate in a practical way (within the meaning of s.142(1)(a) and (b)). The various employer organisations (other than ABI) contend to the contrary.

[9] In respect of Issue 2 the ACTU (and the Unions generally) oppose any term permitting a deduction from termination payments owing to an employee in circumstances where the employee has not given the requisite notice. However in the event that their primary submission is rejected and such a term is to be included in modern awards there appears to be a measure of agreement between the parties about *some* of the elements of such a term, as set out below.

1. The scope of Clause E.1(a) having regard to the terms of s.123.

[10] At [226] of the October decision the Commission observed that the scope of Clause E.1(a) may be too broadly expressed in that it requires 'an employee' to give notice of termination.

[11] Clause E.1(a) is a permitted term by virtue of s.136(1)(d) and s.118. Section 118 provides that a modern award 'may include terms specifying the period of notice an employee must give in order to terminate his or her employment'. Section 118 is in Division 11 of Pt 2-2. Section 123 limits the scope of that Division. Relevantly, Division 11 does *not* apply to:

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

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

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

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

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

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

[12] It would seem to follow that the scope of any award term made pursuant to s.118 must be confined to persons falling within the scope of s.118. The ACTU, ABI and Ai Group agree.

[13] The ACTU suggests that a new subclause be inserted, as follows:

> 'The clause applies to employees to whom Subdivision A of Division 11 of Part 2-2 of the Act applies.
>
> Note: Section 123 of the Act excluded some employees from all or part of Division 11 of Part 2-2 of the Act.'

[14] Ai Group proposes an amendment to Clause E.1(a):

> '(a) An employee (other than one excluded under s.123 of the Act) must give the employer written notice of termination in accordance with Table x – Period of notice of at least the period specified in column 2 according to the period of continuous service of the employee specified in column 1.'

[15] ABI submit that the issue could be remedied by inserting a new clause, or a note, in the following terms:

> 'This clause applies to all employees except those identified in sections 123(1) and 123(2) of the Fair Work Act 2009 (Cth)'.

[16] In its reply submission ABI notes that it does not oppose the wording proposed by Ai Group or the ACTU.

[17] We note that Nat Road submits that no change to the terms of Clause E.1(a) is required (see [22] – [27] of Nat Road's submission). This submission does not appear to be supported by any other party. Nat Road is asked to confirm its position, having regard to the submissions advanced by other parties.

2. ***In order to address some uncertainty about the interaction with the NES, Clause E.1(c) should be amended to confine the scope of the capacity to make a deduction to 'wages due to the employee'.***

[18] ABI concedes that to the extent the current Clause E.1(c) permits an employer to deduct an amount from monies payable to an employee under the NES, there is a reasonable argument that the clause is inconsistent with s.55(1). On that basis ABI agreed that the scope of the capacity to make a deduction be limited to 'wages due to the employee'.

[19] Ai Group does not concede that an amendment is necessary or desirable but states that it does 'understand why the Commission has reached this *provisional* view'. On the basis of this submission we have assumed that Ai Group neither opposes nor supports the limitation proposed.

[20] The ACTU submits that if clause E.1(c) is to remain it should be limited not only to deductions from 'wages due to the employee' but rather 'wages due to the employee under this award'. ABI and Ai Group oppose the formulation proposed by the ACTU.

3. *In its current form Clause E.1(c) would have no effect in relation to employees under 18 years of age.*

[21] Section 326(4) provides:

> *Deductions or payments in relation to employees under 18*
>
> (4) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term:
>
> (a) permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work; or
>
> (b) requires, or has the effect of requiring, an employee to make a payment to an employer or another person;
>
> if the employee is under 18 and the deduction or payment is not agreed to in writing by a parent or guardian of the employee.

[22] The ACTU, ABI and Ai Group agree with the proposition that the scope of Clause E.1(c) be confined having regard to the terms of s.123. Different formulations are proposed to address this issue.

[23] The ACTU, ABI and Ai Group accept that Clause E.1(c) would have no effect in relation to an employee under 18 years of age.

[24] The ACTU submits that an employee under 18 should be wholly exempt from Clause E.1(c) on the basis of fairness and to make the clause simple and easy to understand. In support of this proposition the ACTU submits that the prospect of any parent agreeing to have the wages of their son or daughter docked is 'almost certainly nil'.

[25] Ai Group submits that compliance with s.326(4) could be addressed by the inclusion of a new subclause along the following lines:

> '(d) Paragraph (c) does not apply to an employee under 18 years of age, unless the deduction is agreed in writing by a parent or guardian of the employee in accordance with s.326(4) of the Act.'

[26] ABI concedes that s.326(4) operates such that Clause E.1(c) would have no effect in relation to employees under 18 years of age and cannot be included in a modern award in its current form. ABI proposes that a 'carve out' for employees under 18 years of age be inserted into the clause to ensure it is not prohibited by s.326(4). In its reply submission ABI says that it does not oppose the working proposed by Ai Group.

Attachment 1

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

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

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

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

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

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

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

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

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

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

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

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

   (iii) Clause E.1(c) would allow an employer to make a deduction from monies due to an employee in circumstances where the employer has consented (or acquiesced) to an employee providing less than the required period of notice. For instance, an employee with more than 5 years' service resigns. Clause E.1(a) provides that the employee must give the employer 4 weeks' notice of termination. The employee wants to leave in 2

weeks, to take up another job. The employer agrees and accepts the reduced notice period. Despite that agreement, Clause E.1(c) would permit the employer to deduct 2 weeks' pay from the money due to the employee on termination.

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

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

(iv) Clause E.1(c) would allow an employer to make a deduction from monies due to an employee in circumstances where the employee may be unaware of the requirement in Clause E.1(a) to provide notice of termination. In particular, we note NatRoad's submission that 'Most employees would not be aware of the risk of being in breach of the Award by not giving the required period of notice.'

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

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

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

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

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[1] [2017] FWCFB 5258.