BACKGROUND PAPER

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

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

(AM2016/15) MELBOURNE, 25 SEPTEMBER 2019

This is a background paper only and does not purport to be a comprehensive discussion of the issues involved. It does not represent the view of the Commission on an issue.

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

[1] Five 'standard clauses' are common to most awards, namely:

- Award flexibility
- Consultation
- Dispute resolution
- Termination of employment; and
- Redundancy.

[2] These standard clauses have now all been redrafted in plain language and determinations varying most modern awards were issued on 26 October 2018 and 13 December 2018.

[3] A decision issued on 11 December 2018[1] (the *December 2018 Decision*) addressed a number of award specific issues with respect to the model standard clauses. In the *December 2018 Decision* the Full Bench expressed a range of *provisional* views about these matters. Draft Determinations were issued on 13 December 2018 and interested parties had until 25 January 2019 to file submissions. Submissions in reply were due by 7 February 2019.

[4] A hearing is listed before the Plain Language Full Bench on Thursday 26 September 2019 to deal with a number of outstanding issues. At a Mention[2] on 20 September 2019 it was agreed that these issues would be dealt with in accordance with the following schedule:

[1] [2018] FWCFB 7447

[2] Transcript, 20 September 2019

Time	Matter
9:30 AM	**Plain language standard clauses** *Educational Services (Teachers) Award 2010* (Teachers Award)
11:00 am	**Plain language redrafting** *Cleaning Services Award 2010* (Cleaning Award)
12:00 noon	**Plain language standard clauses** *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing Award)
2:00 pm	**Plain language standard clauses** *Joinery and Building Trades Award 2010* (Joinery Award) *Timber Industry Award 2010* (Timber Award)

[5] The purpose of this document is to outline the issues to be determined at the hearing.

Educational Services (Teachers) Award 2010

[6] In the *December 2018 Decision*, the Full Bench set out a *provisional* view in relation to the redrafting of the termination of employment clause in the Teachers Award. The current award term in the Teachers Award departs from the plain language standard termination of employment clause in the following ways:

(i) there is no exclusion of employees under 18 years of age from the capacity of the employer to make a deduction from wages;
(ii) there is no prohibition of deductions in circumstances where an employer has agreed to accept less than the required period of notice;
(iii) the amount that may be deducted from monies due to the employee is not 'capped' at one week's wages; and
(iv) there is no qualification that any deduction made pursuant to the clause must not be unreasonable in the circumstances.

[7] As to matters (ii) to (iv), the rationale for the other elements of the standard term was explained in the *June 2018 Decision*[3] and the *October 2017 Decision*.[4] These elements of the standard clause were inserted to ensure that a deduction of an amount from monies owed to an employee was not 'unreasonable in the circumstances', within the meaning of s.326(1)(b). In the *December 2018 Decision* the Full Bench noted that, for the same reason, these protections need to be reflected in clause 11.5 of the Teachers Award.

[3] [2018] FWCFB 3009

[4] [2017] FWCFB 5258

[8] At [116] of the *December 2018 Decision* the Full Bench expressed the *provisional* view that clauses 11.4 and 11.5 of the Teachers Award should be redrafted to read as follows:

> '**11. Notice of termination by an employee**
>
> **(a)** The notice of termination required to be given by an employee is the same as that required of the employee's employer under clause 11.2 or 11.3.
>
> **(b)** If an employee does not give the period of notice required under paragraph (a), then the employer may deduct from wages due to the employee under this award an amount that is no more than one week's wages for the employee.
>
> **(c)** If the employer has agreed to a shorter period of notice than that required under paragraph (a), then no deduction can be made under paragraph (b).
>
> **(d)** Any deduction under paragraph (b) must not be unreasonable in the circumstances.'

[9] Further, the Full Bench noted that consistent with the Plain Language Guidelines, clauses 11.2, 11.3 and 11.9 of the Teachers Award should be redrafted with application clauses (rather than their application being indicated by the clause headings) and expressed the *provisional* view is that these clauses should be redrafted to read as follows:

> '**11.2 Notice of termination by an employer—schools**
>
> **(a)** Clause 11.2 applies to an employee employed in a school.
>
> **(b)** Subject to clause 12.5, the employment of an employee (other than a casual employee) will not be terminated without at least 7 term weeks' notice (inclusive of the notice required under the NES), the payment of 7 weeks' salary instead of notice, or part notice and part payment instead of notice provided that the total weeks' notice and weeks' payment instead equal 7.
>
> **11.3 Notice of termination by an employer—other than schools**
>
> **(a)** Clause 11.3 applies to an employee who is not employed in a school.
>
> **(b)** The employment of an employee (other than a casual employee) will not be terminated without at least 4 weeks' notice (inclusive of the notice required under the NES), or 4 preschool term weeks in the case of a preschool employee, or the payment of 4 weeks' salary instead of notice. If the employee is over 45 years of age and has completed at least 2 years of service, the NES notice period will apply.
>
> **11.9 Termination of casual employment by an employer—early childhood teachers**
>
> **(a)** Clause 11.9 applies to a casual early childhood teacher.
>
> **(b)** On termination of casual employment, the employer will indicate on the employee's service card the length of service with the employer. Upon request a casual employee will also be given a statement setting out the number of days of duty worked by the employee during the period of the engagement.'

[10] A draft determination giving effect to the provisional view was issued on 13 December 2018. A copy of the draft determination is set out at **Attachment 1**. Interested parties were given the opportunity to comment on the draft.

[11] Submissions were received from:

- Independent Education Union of Australia
- Independent Schools of Victoria, Independent Schools Tasmania and the Associations of Independent Schools of NSW

[12] A witness statement was also filed by the Independent Schools.[5]

Cleaning Services Award 2010

[13] There is one outstanding issue in relation to the plain language redrafting of the Cleaning Award. The issue concerns the payment for annual leave and the payment of accrued annual leave on termination. A background document outlining the recent history of this issue is set out at **Attachment 2**. A further submission was received from United Voice on 24 September 2019.

Manufacturing and Associated Industries and Occupations Award 2010

[14] The Manufacturing Award contains a 'small furnishing employer' provision that refers to one of the same predecessor awards as the Timber Award and therefore raises the same issue about state-based differences. Clause 23.2 of the Manufacturing Award is set out below:

> **'23.2 Small furnishing employer**
>
> (a) For the purposes of clause 23.2(b), small employer means an employer to whom Subdivision B of Division 11 of the NES does not apply because of the provisions of s.121(1)(b) of the Act.
>
> (b) Despite the terms of s.121(1)(b) of the Act, the remaining provisions of Subdivisions B and C of Division 11 of the NES apply in relation to an employee of a small employer who performs any of the work within the Manufacturing and Associated Industries and Occupations which immediately prior to 1 January 2010 was in clauses 6.1 to 6.6 of the *Furnishing Industry National Award 2003*, except that the amount of redundancy pay to which such an employee is entitled must be calculated in accordance with the following table:

Employee's period of continuous service with the employer on termination	**Redundancy pay period**
Less than 1 year	Nil
At least 1 year but less than 2 years	4 weeks pay
At least 2 years but less than 3 years	6 weeks pay
At least 3 years but less than 4 years	7 weeks pay
At least 4 years and over	8 weeks pay

[15] The coverage clause of the predecessor award referred to in clause 23.2(b) limited the application of the award to specified States and Territories, whereas the Manufacturing Award covers employers throughout Australia. At [47] of the *December 2018 Decision*, the Full Bench said that if the Manufacturing Award limits the application of small employer

[5] Witness statement of Ms Kerri Knopp Director Strategic Relations of Independent Schools Victoria

redundancy pay on a geographic basis, the potential options would be either to entirely remove the 'small furnishing employer' redundancy pay provision from the award or to omit the geographic limitations, because it would be a 'State-based difference term' that is now prohibited by s.154 of the *Fair Work Act 2009* (Cth) (FW Act).

[16] The inclusion of state-based differences in modern awards was considered in *Australian Chamber of Commerce and Industry v Australian Council of Trade Unions* [2015] FCAFC 131 and *4 yearly review of modern awards - transitional provisions* [2015] FWCFB 644.

[17] In the *December 2018 Decision*, the Full Bench expressed the *provisional view* that the clause should be redrafted:

> '[46] Our *provisional* view is that Manufacturing Award clause 23—Redundancy, should be replaced by the plain language standard redundancy clause together with a new redundancy pay provision, clause 23.4—Redundancy pay for employee of furnishing small business employer, as set out at [49] below. As the description of the types of work to which the present redundancy pay provision applies (as per clause 23.2(b) above) is not as amenable to simplification as the corresponding provision in the Timber Award, the present description is reproduced in the new redundancy pay provision. We later invite submissions as to how the current description of the types of work to which the present redundancy pay provision applies may be simplified.'

[18] The proposed new 'furnishing small business employer' redundancy pay provision the Full Bench proposed was as follows:

> '**23.4 Redundancy pay for employee of furnishing small business employer**
>
> **(a)** Clause 23.4 applies to an employee of a small business employer who performs any of the work within the Manufacturing and Associated Industries and Occupations which, immediately prior to 1 January 2010, was in clauses 6.1 to 6.6 of the *Furnishing Industry National Award 2003*, except for an employee who is excluded from redundancy pay under the NES by section 121(1)(a), section 123(1) or section 123(4)(a) of the Act.
>
> **(b)** In paragraph (a) an employee is an employee of a small business employer if, immediately before the time the employee's employment is terminated, or at the time when the employee is given notice of termination as described in section 117(1) of the Act (whichever happens first), the employer is a small business employer as defined by section 23 of the Act.
>
> **(c)** Subject to paragraphs (f) and (g), an employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:
>
> **(i)** at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or
>
> **(ii)** because of the insolvency or bankruptcy of the employer.
>
> **(d)** The amount of the redundancy pay in paragraph (c) equals the total amount payable to the employee for the redundancy pay period specified in column 2 of Table 2—Redundancy pay period according to the period of continuous service of the employee specified in column 1, worked out at the employee's base rate of pay for his or her ordinary hours of work.
>
> **Table 2—Redundancy pay period**

Column 1 Employee's period of continuous service with the employer on termination	Column 2 Redundancy pay period
Less than 1 year	Nil
At least 1 year but less than 2 years	4 weeks
At least 2 years but less than 3 years	6 weeks
At least 3 years but less than 4 years	7 weeks
At least 4 years and over	8 weeks

(e) In paragraph (d) continuous service has the same meaning as in section 119 of the Act.

(f) The terms of section 120 of the Act apply as if section 120 referred to 'paragraph (c)' rather than 'section 119'.

NOTE: Under section 120 of the Act the Fair Work Commission can determine that the amount of redundancy pay under the NES is to be reduced if the employer obtains other acceptable employment for the employee or cannot pay that amount. Paragraph (f) applies these arrangements also to redundancy pay under clause 23.4.

(g) The terms of section 122 of the Act apply as if section 122 referred to 'clause 23.4' rather than 'this Subdivision' and to 'paragraph (c)' rather than 'section 119'.

NOTE: Under section 122 of the Act transfer of employment situations can affect the obligation to pay redundancy pay under the NES and the Fair Work Commission can make orders affecting redundancy pay. Paragraph (g) applies these arrangements also to redundancy pay under clause 23.4.'

[19] Interested parties were given an opportunity to make submissions about whether clause 23.2(b) of the Manufacturing Award does limit the application of 'small furnishing employer' redundancy pay on a geographic basis, and if so, how it should now be dealt with having regard to the prohibition of 'State-based difference terms' in s.154 of the FW Act. Parties were also invited to make submissions as to how the current description of the types of work to which the present redundancy pay provision applies may be simplified.

[20] Submissions were received from:

- Ai Group;
- the Australian Manufacturing Workers' Union (AMWU)
- Construction, Forestry, Maritime, Mining and Energy Union–Construction and General (CFMMEU-C&G); and
- (CFMMEU-Manufacturing).

Timber Industry Award 2010

[21] In the *December 2018 Decision*, the Full Bench expressed the *provisional view* that the redundancy provision in the Timber Award should be replaced with a modified version of the plain language standard redundancy term. There were two issues in the current Timber

Award relating to the small employer redundancy provisions that require further consideration. The first issue relates to the application of clause 15.7 and the second issue relates to the operation of clause 15.8. These clauses are as follows:

> **'15.7 Small employer**
>
> **(a)** For the purposes of this clause small employer means an employer to whom the NES does not apply because of the provisions of s.121(1)(b) of the Act.
>
> **(b)** Despite the terms of s.121(1)(b) of the Act, the remaining provisions of Subdivisions B and C of Division 11 of the NES apply in relation to an employee of a small employer who performs any of the work within the scope of this award which immediately prior to 1 January 2010 was in clause 6 of the *Timber and Allied Industries Award 1999*, or clause 6 of the *Furnishing Industry National Award 2003* except that the amount of redundancy pay to which such an employee is entitled must be calculated in accordance with the following table:
>
> | **Employee's period of continuous service with the employer on termination** | **Redundancy pay period** |
> |---|---|
> | Less than 1 year | Nil |
> | At least 1 year but less than 2 years | 4 weeks |
> | At least 2 years but less than 3 years | 6 weeks |
> | At least 3 years but less than 4 years | 7 weeks |
> | At least 4 years and over | 8 weeks |
>
> **15.8** Such provisions do not apply to weekly piecework employees.'

[22] Similar to the Manufacturing Award, the coverage clauses of the two predecessor awards referred to in clause 15.7(b) limited the application of the awards to specified States and Territories, whereas the Timber Award covers employers throughout Australia. At [41] of the *December 2018 Decision*, the Full Bench said that if the Timber Award limits the application of small employer redundancy pay on a geographic basis, it would be a 'State-based difference term' and that the potential options would be either to entirely remove the 'small employer' redundancy pay provision from the Timber Award or to omit the geographic limitations from the provision so that (like proposed new clause 15.4) it applies throughout Australia.

[23] The second issue is the operation of clause 15.8. It is not entirely clear whether the exclusion in clause 15.8 is directed just to clause 15.7—Small employer, or to all of clause 15—Redundancy. In any case, the Full Bench expressed the *provisional view* that clause 15.8 appears to be unnecessary given the exclusion of pieceworkers from various award provisions (including clause 15) under clause 12.5(d) of the award and proposed to omit it from the new redundancy provision:

> '[42] In relation to the second issue, the operation of clause 15.8 of the Timber Award, it is not entirely clear whether the exclusion in clause 15.8 is directed just to clause 15.7—Small employer, or to all of clause 15—Redundancy. In any case, clause 15.8 appears to be otiose given the exclusion of pieceworkers from various award provisions (including clause 15) under clause 12.5(d) of the award and we propose to omit it from the new redundancy provision.
>
> [43] The new 'small business employer' redundancy pay provision we propose to insert into the Timber Award is set out below:

15.4 Redundancy pay for employee of small business employer

(a) Clause 15.4 applies to an employee of a small business employer except for an employee who:

(i) only performs work within clause 4.2(f)—Pulp and paper sector of this award; or

(ii) is excluded from redundancy pay under the NES by section 121(1)(a), section 123(1) or section 123(4)(a) of the Act.

(b) In paragraph (a) an employee is **an employee of a small business employer** if, immediately before the time the employee's employment is terminated, or at the time when the employee is given notice of termination as described in section 117(1) of the Act (whichever happens first), the employer is a small business employer as defined by section 23 of the Act.

(c) Subject to paragraphs (f) and (g), an employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:

(i) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or

(ii) because of the insolvency or bankruptcy of the employer.

(d) The amount of the redundancy pay in paragraph (c) equals the total amount payable to the employee for the redundancy pay period specified in column 2 of **Table 2—Redundancy pay period** according to the period of continuous service of the employee specified in column 1, worked out at the employee's base rate of pay for his or her ordinary hours of work.

Table 2—Redundancy pay period

Column 1	**Column 2**
Employee's period of continuous service with the employer on termination	**Redundancy pay period**
Less than 1 year	Nil
At least 1 year but less than 2 years	4 weeks
At least 2 years but less than 3 years	6 weeks
At least 3 years but less than 4 years	7 weeks
At least 4 years and over	8 weeks

(e) In paragraph (d) **continuous service** has the same meaning as in section 119 of the Act.

(f) The terms of section 120 of the Act apply as if section 120 referred to 'paragraph (c)' rather than 'section 119'.
NOTE: Under section 120 of the Act the Fair Work Commission can determine that the amount of redundancy pay under the NES is to be reduced if the employer obtains other

acceptable employment for the employee or cannot pay that amount. Paragraph (f) applies these arrangements also to redundancy pay under clause 15.4.

(g) The terms of section 122 of the Act apply as if section 122 referred to 'clause 15.4' rather than 'this Subdivision' and to 'paragraph (c)' rather than 'section 119'.
NOTE: Under section 122 of the Act transfer of employment situations can affect the obligation to pay redundancy pay under the NES and the Fair Work Commission can make orders affecting redundancy pay. Paragraph (g) applies these arrangements also to redundancy pay under clause 15.4.'

[24] Submissions were received from:

- the Australian Industry Group (Ai Group)[6];
- Construction, Forestry, Maritime, Mining and Energy Union–Manufacturing (CFMMEU-Manufacturing); and
- the Housing Industry Association (HIA)[7].

Joinery and Building Trades Award 2010

[25] In the *December 2018 Decision*, the Joinery Award was categorised as an award with an industry-specific redundancy element that supplements the NES as it also contains a small business entitlement. The Full Bench expressed the *provisional* view that the award should be amended to include the plain language standard redundancy clause, but with adaptations as necessary to retain the substance of the industry-specific elements:

'[28] Our *provisional* view is that awards with an industry-specific element that supplements the NES should be amended to include the plain language standard redundancy clause, but with adaptations as necessary to retain the substance of the industry-specific elements. The note at the beginning of the redundancy clause in these awards may also be amended so as to refer to the industry-specific elements.'[8]

[26] A draft determination was published on 13 December 2018, giving effect to this *provisional* view. The draft determination is set out at **Attachment 3**. Interested parties were invited to make submissions.

[27] Submissions were received from:

- AMWU
- CFMMEU-C&G;
- CFMMEU-Manufacturing;
- HIA
- Master Builders Australia (MBA)

[28] MBA sought an amendment to part of the standard clause that had not been amended to incorporate award specific elements. The proposed amendment to clause 17.1 is marked up below:

(c) If the employer acts as mentioned in paragraph (b)(ii), the employee is entitled to a payment of an amount equal to the difference between the ordinary rate of pay of the

[6] Ai Group submission, 25 January 2019

[7] HIA submission, 21 December 2018

[8] [2018] FWCFB 7447 at paragraph [28]

employee ~~(inclusive of all-purpose allowances, shift rates and penalty rates applicable to ordinary hours)~~ for the hours of work the employee would have worked in the first role, and the ordinary rate of pay ~~(also inclusive of all-purpose allowances, shift rates and penalty rates applicable to ordinary hours)~~ of the employee in the second role for the period for which notice was not given.

[29] The AMWU, CFMMEU-C&G and CFMMEU-Manufacturing all object to the proposed amendment on the basis that it was already determined in [2017] FWCFB 4419 at [168] as follows:

> '[168] Having identified the intended meaning of the existing prescription, it becomes necessary to consider whether the proposed clause G.3 maintains or changes that meaning. On consideration, the use of the expression 'ordinary rate of pay' in the proposed clause G.3 may not capture that meaning. As was made clear in the *Four yearly review of modern awards* decision of 13 July 2015 93, the expression 'ordinary hourly rate of pay' was adopted in exposure drafts, in distinction to the expression 'minimum hourly rate of pay', on the basis that it was inclusive of all-purpose allowances, but it was not treated as inclusive of shift allowances and penalty rates applicable to ordinary hours of work. We are not minded to adopt the AMWU's approach of using the expression 'full rate of pay', which is a defined expression in s.18 of the Act, because we are anxious to avoid introducing yet another linguistic formulation concerning rates of pay into modern awards, and because the s.18 definition makes it clear that 'full rate of pay' includes overtime rates, which would confuse the position. We consider the better course is to modify the provision to specifically include shift allowances and penalty rates where applicable to ordinary time as follows:
>
> > 'G.3 If the employer acts as mentioned in paragraph G.2(b), the employee is entitled to a payment of an amount equal to the difference between the ordinary rate of pay of the employee (inclusive of shift allowances and penalty rates applicable to ordinary hours) for the hours of work the employee would have worked in the first role and the ordinary rate of pay (also inclusive of shift allowances and penalty rates applicable to ordinary hours) of the employee in the second role for the period for which notice was not given.''

[30] The HIA raised an issue with 17.4(f) and (g), submitting that these provisions require award users to read and interpret the award and the NES together and that this may cause confusion.

ATTACHMENT 1

DRAFT DETERMINATION

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

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

(AM2016/15)

EDUCATIONAL SERVICES (TEACHERS) AWARD 2010

[MA000077]

Educational services

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER HUNT

PLACE, DATE OF SIGNING

4 yearly review of modern awards—plain language re-drafting—standard clauses—Educational Services (Teachers) Award 2010.

A. Further to the Full Bench decision [[2018] FWCFB 7447],[9] issued by the Fair Work Commission on 11 December 2018, the above award is varied as follows:

1. By deleting clause 7—Award flexibility and inserting the following:

7. Individual flexibility arrangements

7.1 Despite anything else in this award, an employer and an individual employee may agree to vary the application of the terms of this award relating to any of the following in order to meet the genuine needs of both the employee and the employer:

(a) arrangements for when work is performed; or

(b) overtime rates; or

(c) penalty rates; or

(d) allowances; or

(e) annual leave loading.

[9] See also [2018] FWCFB 4704, [2018] FWCFB 4177, [2018] FWCFB 3009, [2017] FWCFB 5258, [2017] FWCFB 4419

7.2 An agreement must be one that is genuinely made by the employer and the individual employee without coercion or duress.

7.3 An agreement may only be made after the individual employee has commenced employment with the employer.

7.4 An employer who wishes to initiate the making of an agreement must:

(a) give the employee a written proposal; and

(b) if the employer is aware that the employee has, or reasonably should be aware that the employee may have, limited understanding of written English, take reasonable steps (including providing a translation in an appropriate language) to ensure that the employee understands the proposal.

7.5 An agreement must result in the employee being better off overall at the time the agreement is made than if the agreement had not been made.

7.6 An agreement must do all of the following:

(a) state the names of the employer and the employee; and

(b) identify the award term, or award terms, the application of which is to be varied; and

(c) set out how the application of the award term, or each award term, is varied; and

(d) set out how the agreement results in the employee being better off overall at the time the agreement is made than if the agreement had not been made; and

(e) state the date the agreement is to start.

7.7 An agreement must be:

(a) in writing; and

(b) signed by the employer and the employee and, if the employee is under 18 years of age, by the employee's parent or guardian.

7.8 Except as provided in clause 7.7(b), an agreement must not require the approval or consent of a person other than the employer and the employee.

7.9 The employer must keep the agreement as a time and wages record and give a copy to the employee.

7.10 The employer and the employee must genuinely agree, without duress or coercion to any variation of an award provided for by an agreement.

7.11 An agreement may be terminated:

(a) at any time, by written agreement between the employer and the employee; or

(b) by the employer or employee giving 13 weeks' written notice to the other party (reduced to 4 weeks if the agreement was entered into before the first full pay period starting on or after 4 December 2013).

Note: If an employer and employee agree to an arrangement that purports to be an individual flexibility arrangement under this award term and the arrangement does not meet a requirement set out in s.144 then the employee or the employer may terminate the arrangement by giving written notice of not more than 28 days (see s.145 of the Act).

7.12 An agreement terminated as mentioned in clause 7.11(b) ceases to have effect at the end of the period of notice required under that clause.

7.13 The right to make an agreement under clause 7 is additional to, and does not affect, any other term of this award that provides for an agreement between an employer and an individual employee.

2. By deleting clause 8—Consultation and inserting the following:

8. Consultation about major workplace change

8.1 If an employer makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must:

(a) give notice of the changes to all employees who may be affected by them and their representatives (if any); and

(b) discuss with affected employees and their representatives (if any):

(i) the introduction of the changes; and

(ii) their likely effect on employees; and

(iii) measures to avoid or reduce the adverse effects of the changes on employees; and

(c) commence discussions as soon as practicable after a definite decision has been made.

8.2 For the purposes of the discussion under clause 8.1(b), the employer must give in writing to the affected employees and their representatives (if any) all relevant information about the changes including:

(a) their nature; and

(b) their expected effect on employees; and

(c) any other matters likely to affect employees.

8.3 Clause 8.2 does not require an employer to disclose any confidential information if its disclosure would be contrary to the employer's interests.

8.4 The employer must promptly consider any matters raised by the employees or their representatives about the changes in the course of the discussion under clause 8.1(b).

8.5 In clause 8:

significant effects, on employees, includes any of the following:

(a) termination of employment; or

(b) major changes in the composition, operation or size of the employer's workforce or in the skills required; or

(c) loss of, or reduction in, job or promotion opportunities; or

(d) loss of, or reduction in, job tenure; or

(e) alteration of hours of work; or

(f) the need for employees to be retrained or transferred to other work or locations; or

(g) job restructuring.

8.6 Where this award makes provision for alteration of any of the matters defined at clause 8.5, such alteration is taken not to have significant effect.

3. By inserting clause 8A as follows:

8A. Consultation about changes to rosters or hours of work

8A.1 Clause 8A applies if an employer proposes to change the regular roster or ordinary hours of work of an employee, other than an employee whose working hours are irregular, sporadic or unpredictable.

8A.2 The employer must consult with any employees affected by the proposed change and their representatives (if any).

8A.3 For the purpose of the consultation, the employer must:

(a) provide to the employees and representatives mentioned in clause 8A.2 information about the proposed change (for example, information about the nature of the change and when it is to begin); and

(b) invite the employees to give their views about the impact of the proposed change on them (including any impact on their family or caring responsibilities) and also invite their representative (if any) to give their views about that impact.

8A.4 The employer must consider any views given under clause 8A.3(b).

8A.5 Clause 8A is to be read in conjunction with any other provisions of this award concerning the scheduling of work or the giving of notice.

4. By deleting clause 9 and inserting the following:

9. Dispute resolution

9.1 Clause 9 sets out the procedures to be followed if a dispute arises about a matter under this award or in relation to the NES.

9.2 The parties to the dispute must first try to resolve the dispute at the workplace through discussion between the employee or employees concerned and the relevant supervisor.

9.3 If the dispute is not resolved through discussion as mentioned in clause 9.2, the parties to the dispute must then try to resolve it in a timely manner at the workplace through discussion between the employee or employees concerned and more senior levels of management, as appropriate.

9.4 If the dispute is unable to be resolved at the workplace and all appropriate steps have been taken under clauses 9.2 and 9.3, a party to the dispute may refer it to the Fair Work Commission.

9.5 The parties may agree on the process to be followed by the Fair Work Commission in dealing with the dispute, including mediation, conciliation and consent arbitration.

9.6 If the dispute remains unresolved, the Fair Work Commission may use any method of dispute resolution that it is permitted by the Act to use and that it considers appropriate for resolving the dispute.

9.7 A party to the dispute may appoint a person, organisation or association to support and/or represent them in any discussion or process under clause 9.

9.8 While procedures are being followed under clause 9 in relation to a dispute:

(a) work must continue in accordance with this award and the Act; and

(b) an employee must not unreasonably fail to comply with any direction given by the employer about performing work, whether at the same or another workplace, that is safe and appropriate for the employee to perform.

9.9 Clause 9.8 is subject to any applicable work health and safety legislation.

5. By deleting clause 11 and inserting the following:

11. Termination of employment

Note: Sections 117 and 123 of the Act set out requirements for notice of termination by an employer under the NES. Clauses 11.1 and 11.2 require an employer to give a greater minimum period of notice than that generally required under the NES.

11.1 Notice of termination by an employer—schools

(a) Clause 11.1 applies to an employee employed in a school.

(b) Subject to clause 12.4, the employment of an employee (other than a casual employee) will not be terminated without at least 7 term weeks' notice (inclusive of the notice required under the NES), the payment of 7 weeks' salary instead of notice, or part notice and part payment instead of notice provided that the total weeks' notice and weeks' payment instead equal 7.

11.2 Notice of termination by an employer—other than schools

(a) Clause 11.2 applies to an employee who is not employed in a school.

(b) The employment of an employee (other than a casual employee) will not be terminated without at least 4 weeks' notice (inclusive of the notice required under the NES), or 4 preschool term weeks in the case of a preschool employee, or the payment of 4 weeks' salary instead of notice. If the employee is over 45 years of age and has completed at least 2 years of service, the NES notice period will apply.

11.3 Notice of termination by an employee

(a) The notice of termination required to be given by an employee is the same as that required of the employee's employer under clause 11.1 or 11.2.

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

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

(b) Any deduction under paragraph (b) must not be unreasonable in the circumstances.

11.4 Job search entitlement

Where an employer has given notice of termination to an employee, the employee must be allowed time off without loss of pay of up to one day for the purpose of seeking other employment.

11.5 The time off under clause 11.4 is to be taken at times that are convenient to the employee after consultation with the employer.

11.6 Exclusions

Employees who are excluded from coverage of the notice of termination provisions in the NES are also excluded from coverage of the notice of termination provisions in this award.

11.7 Statement of service

Upon the termination of employment of an employee (other than a casual employee) the employer will provide upon the request of the employee, a statement of service setting out the commencement and cessation dates of employment.

11.8 Termination of casual employment by an employer—early childhood teachers

(a) Clause 11.8 applies to a casual early childhood teacher.

(b) On termination of casual employment, the employer will indicate on the employee's service card the length of service with the employer. Upon request a casual employee will also be given a statement setting out the number of days of duty worked by the employee during the period of the engagement.

6. By deleting clause 12 and inserting the following:

12. Redundancy

Note: Redundancy pay is provided for in the NES. See ss.119–123 of the Act. This clause provides industry specific detail and supplements the NES.

12.1 Transfer to lower paid duties on redundancy

(a) Clause 12.1 applies if, because of redundancy, an employee is transferred to new duties to which a lower ordinary rate of pay applies.

(b) The employer may:

(i) give the employee notice of the transfer of at least the same length as the employee would be entitled to under s.117 of the Act as if it were a notice of termination given by the employer; or

(ii) transfer the employee to the new duties without giving notice of transfer or before the expiry of a notice of transfer, provided that the employer pays the employee as set out in paragraph (c).

(c) If the employer acts as mentioned in paragraph (b)(ii), the employee is entitled to a payment of an amount equal to the difference between the ordinary rate of

pay of the employee (inclusive of all-purpose allowances, shift rates and penalty rates applicable to ordinary hours) for the hours of work the employee would have worked in the first role, and the ordinary rate of pay (also inclusive of all-purpose allowances, shift rates and penalty rates applicable to ordinary hours) of the employee in the second role for the period for which notice was not given.

12.2 Employee leaving during redundancy notice period

(a) An employee given notice of termination in circumstances of redundancy may terminate their employment during the minimum period of notice prescribed by s.117(3) of the Act.

(b) The employee is entitled to receive the benefits and payments they would have received under clause 12 or under ss.119–123 of the Act had they remained in employment until the expiry of the notice.

(c) However, the employee is not entitled to be paid for any part of the period of notice remaining after the employee ceased to be employed.

12.3 Job search entitlement

(a) Where an employer has given notice of termination to an employee in circumstances of redundancy, the employee must be allowed time off without loss of pay of up to one day each week of the minimum period of notice prescribed by s.117(3) of the Act for the purpose of seeking other employment.

(b) If an employee is allowed time off without loss of pay of more than one day under paragraph (a), the employee must, at the request of the employer, produce proof of attendance at an interview.

(c) A statutory declaration is sufficient for the purpose of paragraph (b).

(d) An employee who fails to produce proof when required under paragraph (b) is not entitled to be paid for the time off.

(e) This entitlement applies instead of clauses 11.4 and 11.5.

12.4 Interaction of this clause with clause 11—Termination of employment

Where the employee's employment is terminated on the grounds of redundancy, the employee will be entitled only to the greater of:

(a) notice of termination under clause 11.1 or 11.2; or

(b) notice of termination and severance payments under the NES.

12.5 Part-time employees

If a part-time employee's hours are reduced, without their consent, by more than 25% they will be entitled to the provisions of this clause.

7. By updating the table of contents and cross-references accordingly.

B. This determination comes into operation from [date of operation]. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after [date of operation].

PRESIDENT

ATTACHMENT 2

BACKGROUND DOCUMENT

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

4 yearly review of modern awards—Plain Language re-drafting—*Cleaning Services Award 2010*—annual leave provisions

(AM2016/15, AM2014/69) MELBOURNE, 25 SEPTEMBER 2019

This is a background document only and does not purport to be a comprehensive discussion of the issues involved. It does not represent the view of the Commission on an issue.

1. Introduction

[31] A plain language exposure draft of the *Cleaning Services Award 2010* (Cleaning Award) was first published on 8 September 2017.[10] Conferences were held on 8 November 2017, 22 June 2018 and 27 September 2018 to discuss items raised by parties in relation to the plain language exposure draft of the Cleaning Award. Statements regarding the outcomes of the conferences were issued on 9 November 2017,[11] 21 February 2018[12] and 29 June 2018.[13] There is currently one outstanding issue in relation to the plain language re-drafting of the Cleaning Award. The issue concerns the payment for annual leave and the payment of accrued annual leave on termination.

2. Background to the proceedings

[32] In response to the first published exposure draft on 8 September 2017, Ai Group submitted that clause 25.3(c) of the plain language exposure draft needed to be amended. It contended that the award required that a 17.5 percent loading be paid on annual leave on termination of employment; not any higher shift loading.[14]

[33] United Voice disagreed with Ai Group. It submitted that clause 25.3 of the plain language exposure draft reduced the entitlements of employees. It stated that under the current award in clause 29.7, employees should receive a loading of 17.5 percent on their 'ordinary

[10] Cleaning Award – plain language exposure draft, 8 September 2017
[11] [2017] FWC 5874
[12] [2018] FWC 1117
[13] [2018] FWC 3842
[14] Ai Group submission, 12 October 2017 at [23]

time rate of pay', which includes penalty rates for shift work as well as other entitlements outlined in clause 29.3. United Voice contended that under clause 25.3 of the plain language draft, an employee would only receive the greater of the two options in clause 25.3(b).[15] It submitted that this could substantially reduce an employee's entitlements and supported retaining the current award clause.[16]

[34] A conference was held on 8 November 2017 to discuss the plain language re-drafting of the Cleaning Award. During the conference it was decided that the plain language drafter would provide comments about how this issue may be resolved.[17] In a summary of submissions document published by the Commission on 25 January 2018, the drafter's proposed amendment was included at Attachment A of the document. The proposed rewording of clause 25.3(c) stated:

> "(c) The employer must pay an employee for a period of untaken paid annual leave when the employment of the employee ends, a loading of 17.5% calculated on the employee's base rate of pay as defined in paragraph (a)."[18]

[35] The President issued a decision on 21 February 2018, setting out the next steps in the plain language project in relation to the re-drafting of the Cleaning Award following the conference held on 8 November 2017. The decision confirmed that the proposed rewording of clause 25.3(c) above had been provisionally resolved pending the parties' views on those changes. Parties were invited to confirm their position in respect of the provisionally resolved item at a further conference to be held.

[36] The matter was relisted for conference on 22 June 2018, for parties to confirm whether the amendments proposed resolved the issue. The President issued a Statement on 29 June 2018 setting out the outcome of the June 2018 conference and the next steps in finalising the plain language exposure draft of the Cleaning Award.[19] The Statement confirmed that United Voice and Ai Group were to have further discussions in respect of this issue and provide a joint report on the outcome of those discussions, with submissions in reply to follow.

[37] On 13 August 2018, Ai Group and United Voice reported on the outcome of their discussions in relation to this item. The parties submitted that they were in agreement on the interpretation of how annual leave is paid when taken in accordance with clauses 29.3 and 29.4 of the Cleaning Award, however had not been able to reach agreement on the appropriate form of words to reflect this agreement in the plain language exposure draft. The parties further advised that they were in dispute regarding how the plain language exposure draft should reflect how annual leave is paid on termination in accordance with the 'payment of accrued leave on termination' clause in clause 29.7 of the Cleaning Award.

[38] On the same day, United Voice filed a submission in respect of the joint report filed by itself and Ai Group. United Voice submitted that clause 25.3 of the exposure draft which dealt with the 'payment of annual leave when taken' accurately reflected clauses 29.3 and 29.4 of the Cleaning Award.[20] With regards to 'payment of annual leave on termination', United Voice contended that the proposed rewording by the plain language drafter was an accurate

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[15] Clause reference to 25 should be clause 24

[16] United Voice submission, 20 October 2017 at [32] – [33]

[17] Statement [2017] FWC 5874, at [2] and see also attached Report

[18] Summary of submissions, 25 January 2018

[19] Statement [2018] FWC 3842

[20] United Voice submission, 13 August 2018 at [4]

reflection of clause 29.7 of the Cleaning Award. It submitted that in the modern award, the entitlement to receive shift loadings and the annual leave loading was separated when annual leave is taken during employment in clause 29.4 of the Cleaning Award; however this entitlement was not separated in clause 29.7 of the Award. As such, United Voice contended that the proposed amendment was an accurate reflection of the current entitlement and should be adopted.[21]

[39] Ai Group filed a submission in reply on 24 August 2018.[22] It submitted that whilst the scope of the discussions associated with this item were to be directed at issues associated with payment of annual leave on termination, they have revealed broader difficulties with the plain language exposure draft provisions dealing with payment of annual leave that is taken. The Full Bench in [2018] FWCFB 6781 set out the Ai Group's submissions below:

> "[40] Ai Group submits that the terms of clauses 29.3 and 29.4 of the Cleaning Award are 'problematic', noting that:
>
> - clause 29.3 purports to define the term 'ordinary pay' for the purpose of payment of annual leave but clause 29.4 (which deals with the payment of annual leave) does not actually refer to the term 'ordinary pay'; and
>
> - read together, clauses 29.4(a) and 29.4(b), imply that penalties for shiftwork and ordinary hours worked on a weekend could be paid under both clause 29(3)(c) and 29.4(b) in connection with a single period of annual leave where the relevant penalties under clause 29.4(b) are higher than the 17.5% annual leave loading.
>
> [41] In Ai Group's submission the current award provisions result in 'double dipping' and are not justifiable in the context of a fair and relevant minimum safety net of terms and conditions. Ai Group submits that the revised PLED clarifies some of these matters but also gives rise to the potential for 'double dipping'.
>
> [42] The alleged 'double dipping' arises as follows. Clause 25.3(a)(iii) of the revised PLED includes 'penalty rates paid for shiftwork or rostered ordinary hours of work on a Saturday or Sunday' in the base rate of pay to be used to calculate the amount that an employer is required to pay an employee for a period of annual leave by s. 90 of the Act. However, clause 25.3(b)(ii) requires an employer to pay an employee for the employee's ordinary hours of work in a period of paid annual leave, the 'shift, weekend or public holiday penalty rates that the employee would have received for ordinary hours of work for which the employee would have been rostered in the period had the employee not been on leave' where this amount would be greater than the 17.5% annual leave loading.
>
> [43] Put simply, because clause 25.3(b) is worded so as to provide for a payment that is 'an additional payment' it appears to suggest that employees get both the payments under clauses 25.3(a) and 25.3(b). It is on this basis that Ai Group submits that the

[21] United Voice submission, 13 August 2018 at [14]

[22] Ai Group submission, 24 August 2018

revised PLED has not resolved the issue of 'double dipping' with regard to payment of shift and weekend penalty rates during a period of annual leave.

[40] Ai Group outlined its understanding of the issue in contest as follows:

> "17. The submissions filed by United Voice on 13 August 2018 do not address payment for annual leave that is taken in any detail. Nonetheless, Ai Group understands that United Voice does not believe that the current award entitles an employee to be paid the relevant shift, weekend or public holiday penalties twice in relation to a period of leave that is taken. Moreover, we understand that it is common ground between the parties that the Award should only provide that an employee receives either the relevant penalties or the 17.5% loading. As such, we understand that the contest between the parties relates to whether the drafting of PLED properly reflects this position. Ai Group contend that the proposed provisions require amendment."[23]

[41] Ai Group proposed deleting clause 24.3(a)(iii) of the plain language exposure draft in order to address the issue that arises regarding double payment of shift and ordinary hours of work penalties, and annual leave loading. It submitted that the suggested amendment preserves the entitlement to the rates listed in clause 24.3(b)(ii) where these are 'collectively higher than the 17.5% annual leave loading payable under clause 24.3(b)(i).'[24] In respect of clause 29.7 of the Cleaning Award, Ai Group submitted that clause 25.4(c) of the exposure draft should be deleted to avoid a circumstance where the award delivered an entitlement lower than the NES.

[42] On 10 September 2018, the Commission issued a draft list of outstanding issues summarising the list of outstanding claims,[25] followed by a revised list on 25 September 2018.[26]

[43] During the September 2018 conference, Australian Business Industrial and NSW Business Chamber (ABI) supported Ai Group's proposed deletion of clause 24.3(a)(iii). United Voice agreed with Ai Group's characterisation of the disputed issue however opposed the proposed deletion. United Voice stated that it was willing to consider amendment to clause 24.3(b) to resolve the item.[27] In respect of clause 29.7 of the Cleaning Award, United Voice submitted that it supported retaining the current award clause.

[44] In response, the Full Bench in [2018] FWCFB 6791 (*November Decision*) stated as follows:

> "**[54]** It appears from the foregoing that it is common ground between the parties that the revised PLED should only provide that an employee receives *either* the relevant penalties (ie penalty rates for shiftwork or weekend work) *or* the 17.5% loading, but not both. Further, United Voice does not believe that the current award entitles an employee to be paid the relevant shift, weekend or public holiday payments twice in relation to a period of leave.

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[23] Ai Group submission, 24 August 2018 at [17]

[24] Ibid

[25] Draft list of outstanding issues, 10 September 2018

[26] Revised list and agenda, 25 September 2018

[27] [2018] FWCFB 6781 at [46] and [48]

> **[55]** It is our *provisional* view that, absent some special circumstances pertaining to this award, we would amend clause 24.3 of the PLED by deleting clause 24.3(a)(iii), as proposed by Ai Group. The proposed variation is consistent with the common position espoused by the parties. In taking annual leave an employee would receive the greater of *either* the relevant penalties (by virtue of clause 24.3(b)(ii)) *or* the 17.5% leave loading (by virtue of clause 24.3(a)), but not both.
>
> **[56]** It is also our *provisional* view that clause 24.3(c) of the revised PLED be deleted. If clause 24.3(c) was retained it may result in an employee receiving less than would have been payable to the employee had the employee taken that leave. For example, if the employee's shift, weekend or public holiday penalty rates they would have received for ordinary hours of work for which the employee would have been rostered in the period had they not been on leave are *greater than* 17.5% of the employee's ordinary hourly rate, then the payment on termination under clause 24.3(c) would be less than they would have received had they taken the leave. Such an outcome would be contrary to s.90(2) and contravene s.55. In such circumstances the relevant award term – clause 24.3(c) – would have no effect (s.56)."

[45] Submissions were received from Ai Group and United Voice in response to the Commission's provisional views. United Voice submitted that the characterisation of its position on payment of annual leave on termination at [54] of the *November Decision* is incorrect and that there is no common position between United Voice and Ai Group in respect of payment of annual leave on termination.[28] Further, United Voice submitted that it does not support the provisional view that clause 24.3(a)(iii) of the plain language exposure draft should be deleted and submitted that clause 24.3(a) defines the employee's base rate of pay for the purposes of s.90 of the Act.[29] It submitted that by deleting clause 24.3(a)(iii), an employee's entitlement to 'penalty rates paid for shiftwork or rostered ordinary hours of work on Saturday or Sunday will no longer form part of their base rate of pay.

[46] United Voice further objected to the provisional view that clause 24.3(c) of the plain language exposure draft be deleted and submitted that clause 24.3(c) is the only clause in the exposure draft that relates to payment of annual leave on termination. It submitted that clause 24.3(c) identifies the method for calculating annual leave on termination and that, regardless of which interpretation the Commission settles on, there should remain a clause in the award that stipulates to employers and employees how annual leave is to be paid on termination.[30]

[47] On 30 November 2018, Ai Group filed a reply submission in which it submitted that United Voice's submission does not raise any new or additional issues that warrant a departure from the provisional views expressed. If the Full Bench decided to alter from their provisional views, Ai Group requested another opportunity to comment on such a proposal.

[48] The Commission issued a decision on 20 August 2019, determining various issues in the plain language project. Given the complexity of the issues raised in this matter, the Full

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[28] United Voice submission, 23 November 2018 at [2]

[29] Ibid at [5] and [6]

[30] Ibid at [8] to [10]

Bench proposed to list the matter for oral hearing at 9.30am on 26 and 27 September 2017 in Sydney.

Attachment A

Clauses 29.3, 29.4 and 29.7 of the *Cleaning Services Award 2010*

29.3 Definition of ordinary pay

For the purposes of payment of annual leave, an employee's ordinary pay means remuneration for the employee's normal weekly number of hours of work calculated at the ordinary time rate of pay and in addition will include:

(a) leading hand allowance;

(b) first aid allowance;

(c) penalty rates paid for shiftwork or rostered ordinary hours of work on Saturday and/or Sunday; and

(d) part-time allowance for part-time employees working shiftwork (Monday to Friday) or rostered ordinary hours on a Saturday and/or a Sunday

29.4 Payment of annual leave

(a) The terms of the NES prescribe the basis for payment for annual leave, including payment for untaken leave upon the termination of employment. In addition to the terms of the NES, an employer is required to pay an additional leave loading of 17.5% calculated on an employee's ordinary time rate of pay.

(b) Provided that where the employee would have received a saved or transitional rate of pay, or shift, weekend (Saturday or Sunday), or public holiday penalty payments according to the roster or projected roster, had the employee not been on leave during the relevant period, and such saved, transitional or penalty payments would have entitled to employee to a greater amount than the loading of 17.5% on the rates set out in clause 16—Minimum Wages of this award, then such rates will be paid instead of the 17.5% loading.

29.7 Payment of accrued annual leave on termination

Where an employee is entitled to payment of untaken annual leave on termination of employment under the terms of the NES, the employer must also pay the employee a loading of 17.5% calculated on an employee's ordinary time rate of pay.

Attachment B

Tracked clause 24.3 of the plain language exposure draft of the *Cleaning Services Award 2010* as at 13 February 2019

24.3 Payment for annual leave

The *provisional* view expressed by the Full Bench in [2018] FWCFB 6781 at paragraph [55] is reflected in the amendment at clause 24.3(a)(iii). Submissions have been invited. See [2018] FWCFB 6781 at paragraph [65].

(a) For the purpose of calculating the amount that the employer is required by section 90 of the Act to pay an employee for a period of paid annual leave, the employee's base rate of pay for the employee's ordinary hours of work in the period must be taken to include any of the following that are payable to the employee:

(i) a leading hand allowance; and

(ii) a first aid allowance; and

(iii) a part-time allowance for part-time employees working shiftwork (Monday to Friday) or rostered ordinary hours on a Saturday or a Sunday.

(b) The employer must pay an employee for the employee's ordinary hours of work in a period of paid annual leave an additional payment that is the greater of the following amounts:

(i) **17.5%** of the employee's ordinary hourly rate (that is the employee's rate of pay for ordinary hours of work not including any shift, weekend or public holiday penalties);

(ii) the shift, weekend or public holiday penalty rates that the employee would have received for ordinary hours of work for which the employee would have been rostered in the period had the employee not been on leave.

The *provisional* view expressed by the Full Bench in [2018] FWCFB 6781 at paragraph [56] is reflected in the amendment at clause 24.3(c). Submissions have been invited. See [2018] FWCFB 6781 at paragraph [65].

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DRAFT DETERMINATION

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

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

(AM2016/15)

JOINERY AND BUILDING TRADES AWARD 2010

[MA000029]

Building, metal and civil construction industries

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER HUNT

PLACE, DATE OF SIGNING

4 yearly review of modern awards—plain language re-drafting—standard clauses—Joinery and Building Trades Award 2010.

A. Further to the Full Bench decision [[2018] FWCFB 7447],[31] issued by the Fair Work Commission on 11 December 2018, the above award is varied as follows:

1. By deleting clause 7—Award flexibility and inserting the following:

7. Individual flexibility arrangements

7.1 Despite anything else in this award, an employer and an individual employee may agree to vary the application of the terms of this award relating to any of the following in order to meet the genuine needs of both the employee and the employer:

(a) arrangements for when work is performed; or

(b) overtime rates; or

(c) penalty rates; or

(d) allowances; or

[31] See also [2018] FWCFB 4704, [2018] FWCFB 4177, [2018] FWCFB 3009, [2017] FWCFB 5258, [2017] FWCFB 4419

(e) annual leave loading.

7.2 An agreement must be one that is genuinely made by the employer and the individual employee without coercion or duress.

7.3 An agreement may only be made after the individual employee has commenced employment with the employer.

7.4 An employer who wishes to initiate the making of an agreement must:

(a) give the employee a written proposal; and

(b) if the employer is aware that the employee has, or reasonably should be aware that the employee may have, limited understanding of written English, take reasonable steps (including providing a translation in an appropriate language) to ensure that the employee understands the proposal.

7.5 An agreement must result in the employee being better off overall at the time the agreement is made than if the agreement had not been made.

7.6 An agreement must do all of the following:

(a) state the names of the employer and the employee; and

(b) identify the award term, or award terms, the application of which is to be varied; and

(c) set out how the application of the award term, or each award term, is varied; and

(d) set out how the agreement results in the employee being better off overall at the time the agreement is made than if the agreement had not been made; and

(e) state the date the agreement is to start.

7.7 An agreement must be:

(a) in writing; and

(b) signed by the employer and the employee and, if the employee is under 18 years of age, by the employee's parent or guardian.

7.8 Except as provided in clause 7.7(b), an agreement must not require the approval or consent of a person other than the employer and the employee.

7.9 The employer must keep the agreement as a time and wages record and give a copy to the employee.

7.10 The employer and the employee must genuinely agree, without duress or coercion to any variation of an award provided for by an agreement.

7.11 An agreement may be terminated:

(a) at any time, by written agreement between the employer and the employee; or

(b) by the employer or employee giving 13 weeks' written notice to the other party (reduced to 4 weeks if the agreement was entered into before the first full pay period starting on or after 4 December 2013).

Note: If an employer and employee agree to an arrangement that purports to be an individual flexibility arrangement under this award term and the arrangement does not meet a requirement set out in s.144 then the employee or the employer may terminate the arrangement by giving written notice of not more than 28 days (see s.145 of the Act).

7.12 An agreement terminated as mentioned in clause 7.11(b) ceases to have effect at the end of the period of notice required under that clause.

7.13 The right to make an agreement under clause 7 is additional to, and does not affect, any other term of this award that provides for an agreement between an employer and an individual employee.

2. By deleting clause 8—Consultation and inserting the following:

8. Consultation about major workplace change

8.1 If an employer makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must:

(a) give notice of the changes to all employees who may be affected by them and their representatives (if any); and

(b) discuss with affected employees and their representatives (if any):

(i) the introduction of the changes; and

(ii) their likely effect on employees; and

(iii) measures to avoid or reduce the adverse effects of the changes on employees; and

(c) commence discussions as soon as practicable after a definite decision has been made.

8.2 For the purposes of the discussion under clause 8.1(b), the employer must give in writing to the affected employees and their representatives (if any) all relevant information about the changes including:

(a) their nature; and

(b) their expected effect on employees; and

(c) any other matters likely to affect employees.

8.3 Clause 8.2 does not require an employer to disclose any confidential information if its disclosure would be contrary to the employer's interests.

8.4 The employer must promptly consider any matters raised by the employees or their representatives about the changes in the course of the discussion under clause 8.1(b).

8.5 In clause 8:

significant effects, on employees, includes any of the following:

(a) termination of employment; or

(b) major changes in the composition, operation or size of the employer's workforce or in the skills required; or

(c) loss of, or reduction in, job or promotion opportunities; or

(d) loss of, or reduction in, job tenure; or

(e) alteration of hours of work; or

(f) the need for employees to be retrained or transferred to other work or locations; or

(g) job restructuring.

8.6 Where this award makes provision for alteration of any of the matters defined at clause 8.5, such alteration is taken not to have significant effect.

3. By inserting clause 8A as follows:

8A. Consultation about changes to rosters or hours of work

8A.1 Clause 8A applies if an employer proposes to change the regular roster or ordinary hours of work of an employee, other than an employee whose working hours are irregular, sporadic or unpredictable.

8A.2 The employer must consult with any employees affected by the proposed change and their representatives (if any).

8A.3 For the purpose of the consultation, the employer must:

(a) provide to the employees and representatives mentioned in clause 8A.2 information about the proposed change (for example, information about the nature of the change and when it is to begin); and

(b) invite the employees to give their views about the impact of the proposed change on them (including any impact on their family or caring responsibilities) and also invite their representative (if any) to give their views about that impact.

8A.4 The employer must consider any views given under clause 8A.3(b).

8A.5 Clause 8A is to be read in conjunction with any other provisions of this award concerning the scheduling of work or the giving of notice.

4. By deleting clause 9 and inserting the following:

9. Dispute resolution

9.1 Clause 9 sets out the procedures to be followed if a dispute arises about a matter under this award or in relation to the NES.

9.2 The parties to the dispute must first try to resolve the dispute at the workplace through discussion between the employee or employees concerned and the relevant supervisor.

9.3 If the dispute is not resolved through discussion as mentioned in clause 9.2, the parties to the dispute must then try to resolve it in a timely manner at the workplace through discussion between the employee or employees concerned and more senior levels of management, as appropriate.

9.4 If the dispute is unable to be resolved at the workplace and all appropriate steps have been taken under clauses 9.2 and 9.3, a party to the dispute may refer it to the Fair Work Commission.

9.5 The parties may agree on the process to be followed by the Fair Work Commission in dealing with the dispute, including mediation, conciliation and consent arbitration.

9.6 If the dispute remains unresolved, the Fair Work Commission may use any method of dispute resolution that it is permitted by the Act to use and that it considers appropriate for resolving the dispute.

9.7 A party to the dispute may appoint a person, organisation or association to support and/or represent them in any discussion or process under clause 9.

9.8 While procedures are being followed under clause 9 in relation to a dispute:

(a) work must continue in accordance with this award and the Act; and

(b) an employee must not unreasonably fail to comply with any direction given by the employer about performing work, whether at the same or another workplace, that is safe and appropriate for the employee to perform.

9.9 Clause 9.8 is subject to any applicable work health and safety legislation.

5. By deleting clause 16 and inserting the following:

16. Termination of employment

Note: The NES sets out requirements for notice of termination by an employer. See ss.117 and 123 of the Act.

16.1 Notice of termination by an employee

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

(b) An employee must give the employer notice of termination in accordance with Table 1—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 1—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.

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

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

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

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

16.2 Job search entitlement

Where an employer has given notice of termination to an employee, the employee must be allowed time off without loss of pay of up to one day for the purpose of seeking other employment.

16.3 The time off under clause 16.2 is to be taken at times that are convenient to the employee after consultation with the employer.

6. By deleting clause 17 and inserting the following:

17. Redundancy

Note: Redundancy pay is provided for in the NES. See ss.119–123 of the Act. Clause 17.4 supplements the NES by providing redundancy pay for employees of a small business employer.

17.1 Transfer to lower paid duties on redundancy

(a) Clause 17.1 applies if, because of redundancy, an employee is transferred to new duties to which a lower ordinary rate of pay applies.

(b) The employer may:

(i) give the employee notice of the transfer of at least the same length as the employee would be entitled to under s.117 of the Act as if it were a notice of termination given by the employer; or

(ii) transfer the employee to the new duties without giving notice of transfer or before the expiry of a notice of transfer, provided that the employer pays the employee as set out in paragraph (c).

(c) If the employer acts as mentioned in paragraph (b)(ii), the employee is entitled to a payment of an amount equal to the difference between the ordinary rate of pay of the employee (inclusive of all-purpose allowances, shift rates and penalty rates applicable to ordinary hours) for the hours of work the employee would have worked in the first role, and the ordinary rate of pay (also inclusive of all-purpose allowances, shift rates and penalty rates applicable to ordinary hours) of the employee in the second role for the period for which notice was not given.

17.2 Employee leaving during redundancy notice period

(a) An employee given notice of termination in circumstances of redundancy may terminate their employment during the minimum period of notice prescribed by s.117(3) of the Act.

(b) The employee is entitled to receive the benefits and payments they would have received under clause 17 or under ss.119–123 of the Act had they remained in employment until the expiry of the notice.

(c) However, the employee is not entitled to be paid for any part of the period of notice remaining after the employee ceased to be employed.

17.3 Job search entitlement

(a) Where an employer has given notice of termination to an employee in circumstances of redundancy, the employee must be allowed time off without loss of pay of up to one day each week of the minimum period of notice prescribed by s.117(3) of the Act for the purpose of seeking other employment.

(b) If an employee is allowed time off without loss of pay of more than one day under paragraph (a), the employee must, at the request of the employer, produce proof of attendance at an interview.

(c) A statutory declaration is sufficient for the purpose of paragraph (b).

(d) An employee who fails to produce proof when required under paragraph (b) is not entitled to be paid for the time off.

(e) This entitlement applies instead of clauses 16.2 and 16.3.

17.4 Redundancy pay for employee of small business employer

(a) Clause 17.4 applies to an employee of a small business employer except for an employee who is excluded from redundancy pay under the NES by s.121(1)(a), s.123(1) or s.123(4)(a) of the Act.

(b) In paragraph (a) an employee is **an employee of a small business employer** if, immediately before the time the employee's employment is terminated, or at the time when the employee is given notice of termination as described in s.117(1) of the Act (whichever happens first), the employer is a small business employer as defined by s.23 of the Act.

(c) Subject to paragraphs (f) and (g), an employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:

(i) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or

(ii) because of the insolvency or bankruptcy of the employer.

(d) The amount of the redundancy pay in paragraph (c) equals the total amount payable to the employee for the redundancy pay period specified in column 2 of **Table 2—Redundancy pay period** according to the period of continuous service of the employee specified in column 1, worked out at the employee's base rate of pay for his or her ordinary hours of work.

Table 2—Redundancy pay period

Column 1 **Employee's period of continuous service with the employer on termination**	**Column 2** **Redundancy pay period**
Less than 1 year	Nil
At least 1 year but less than 2 years	4 weeks
At least 2 years but less than 3 years	6 weeks
At least 3 years but less than 4 years	7 weeks
At least 4 years and over	8 weeks

(e) In paragraph (d) **continuous service** has the same meaning as in s.119 of the Act.

(f) The terms of s.120 of the Act apply as if s.120 referred to 'paragraph (c)' rather than 'section 119'.

Note: Under s.120 of the Act the Fair Work Commission can determine that the amount of redundancy pay under the NES is to be reduced if the employer obtains other acceptable employment for the employee or cannot pay that amount. Paragraph (f) applies these arrangements also to redundancy pay under clause 17.4.

(g) The terms of s.122 of the Act apply as if s.122 referred to 'clause 17.4' rather than 'this Subdivision' and to 'paragraph (c)' rather than 'section 119'.

Note: Under s.122 of the Act transfer of employment situations can affect the obligation to pay redundancy pay under the NES and the Fair Work Commission can make orders affecting redundancy pay. Paragraph (g) applies these arrangements also to redundancy pay under clause 17.4.

7. By updating the table of contents and cross-references accordingly.

B. This determination comes into operation from [date of operation]. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after [date of operation].

PRESIDENT