



Fair Work Commission: 4 Yearly Review of Modern Awards

**SUBMISSIONS ON PLAIN LANGUAGE STANDARD
CLAUSES:
NOTICE OF TERMINATION BY EMPLOYEES**

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

1. INTRODUCTION

- 1.1 These submissions are made in response to the Statement issued on 21 August 2017 ([2017] FWCFB 4355) (**Statement**) with respect to matter AM2016/15 - Plain language - standard clauses.
- 1.2 These submissions are filed on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**).
- 1.3 ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) (**FWRO Act**). ABI has over 4,100 members.
- 1.4 NSWBC is a recognised State registered association pursuant to Schedule 2 of the FWRO Act and has some 21,000 members.
- 1.5 The Full Bench has identified an issue with respect to the proposed clause E.1(c) of the tranche of standard clauses. Clause E.1 deals generally with notice of termination by an employee. Clause E.1(c) is proposed to read as follows:

“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.”

- 1.6 These submissions relate to the matters raised at [2] of the Statement as to whether or not clause E.1(c) may validly be included in a modern award in accordance with the *Fair Work Act 2009* (Cth) (**Act**).

2. CAN CLAUSE E.1(C) VALIDLY BE INCLUDED IN A MODERN AWARD?

- 2.1 We will consider each of the sections of the Act which may empower the Fair Work Commission (**Commission**) to include clause E.1(c) in turn.

Section 139

- 2.2 Section 139 of the Act provides a general list of terms which may be included in modern awards.
- 2.3 Clause E.1(c) is not a term about any of the following for the purpose of section 139:
- (a) Minimum wages;
 - (b) Types of employment;
 - (c) Arrangements for when work is performed;

- (d) Overtime rates;
- (e) Penalty rates;
- (f) Annualised wage arrangements;
- (g) Allowances;
- (h) Leave, leave loadings and arrangements for taking leave;
- (i) Superannuation; or
- (j) Procedures for consultation, representation and dispute settlement.

2.4 Accordingly, clause E.1(c) cannot be included in modern awards in accordance with the Commission's powers under section 139.

Part 2-3 Division 3 - Subdivision C

2.5 Subdivision C contains a list of terms which must be included in modern awards. Clause E.1(c) is not one of these terms. Accordingly, the Commission is not obliged to include it in accordance with a section of this subdivision.

Part 2-1 Division 3 - Subdivision A

2.6 The interaction between the National Employment Standards (**NES**) and modern awards is governed by section 55 of the Act. By way of summary, section 55 provides that:

- (a) A modern award must not exclude the NES, or any provision of the NES;¹
- (b) A modern award may include any term that the award is expressly permitted to include by a provision of Part 2-2 or by regulations made for the purposes of section 127;²
- (c) The NES have effect subject to terms included in a modern award under subsection 55(2), which may otherwise be contrary to the NES;³
- (d) A modern award may also include terms that are ancillary or incidental to the operation of an entitlement of an employee under the NES or terms that supplement the NES, but only to the extent that the effect of those terms is not detrimental to an employee in any respect when compared to the NES;⁴

¹ Section 55(1).

² Section 55(2).

³ Section 55(3).

⁴ Section 55(4).

- (e) If a modern award includes terms permitted by subsection 55(4), to the extent that the terms give an employee an entitlement that is the same as an NES entitlement:
 - (i) The award terms operate in parallel with the NES entitlement, but not so as to give the employee a double benefit;
 - (ii) The provisions of the NES relating to the NES entitlement apply as a minimum standard to the award entitlement.⁵

2.7 Section 56 provides that a term of a modern award has no effect to the extent that it contravenes section 55.

2.8 Importantly, although the NES is the minimum standard, subsection 55(4) permits modern awards and enterprise agreements to include terms that are ancillary to, or supplement, the NES. That is, modern awards and enterprise agreements can include terms:

- (a) explaining how NES entitlements are to be paid (see Note 1 under subsection 55(4)); or
- (b) that increase the value or quantum of NES entitlements (see Note 2 under subsection 55(4)).

2.9 Note 3 under subsection 55(4) relevantly provides some indication of terms which are not permitted, such as a requirement to provide a period of notice of the taking of leave which is greater than is required by the NES.

Is clause E.1(c) ancillary, incidental or supplementary to a NES entitlement?

2.10 When properly characterised, it is apparent that clause E.1(c) is a term which is incidental or ancillary to the terms of the award which require an employee to give notice of termination. This is because clause E.1(c) dictates what consequences follow when an employee does not provide notice of termination as required by the award.

2.11 There is, however, no entitlement within the NES which provides for employees to give employers notice of termination.

2.12 Whilst section 118 of the FW Act provides that *modern awards and enterprise agreements* may provide for notice of termination by employees, notice of termination by employees does not itself constitute an NES entitlement. Rather, notice of termination

⁵ Section 55(6).

by employees will only become an entitlement if included in a modern award or enterprise agreement by the Fair Work Commission/relevant parties to an agreement. In this way, notice of termination by employees is properly understood as an entitlement arising under an industrial instrument, as opposed to the NES.

- 2.13 Clause E.1(c) accordingly does not appear to have any relationship with any NES entitlements and accordingly cannot be said to be ancillary, incidental or supplementary to any NES entitlement.

Does clause E.1(c) exclude the NES in any way?

- 2.14 To the extent that 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 excluding the operation of the NES, in a manner inconsistent with subsection 55(1).
- 2.15 Whilst the meaning of the term “exclude” is not specifically explained in subsection 55(1), the Explanatory Memorandum to the Fair Work Act identifies that the intention of subsection 55(1) is to ensure that the minimum safety net entitlements provided by the NES are not in any way detracted from:

“The intent of the NES is that it provides enforceable minimum entitlements for all eligible employees. This is reflected in subclause 55(1), which provides that a modern award or enterprise agreement may not exclude the NES, or any part of it.

This prohibition extends both to statements that purport to exclude the operation of the NES or a part of it, and to provisions that purport to provide lesser entitlements than those provided by the NES.”

- 2.16 In the present case, clause E.1(c) provides for a termination payment regime that could well conflict with NES obligations regarding payments on termination. The most obvious of these relates to subsection 90(2) of the Act, which addresses annual leave payment on termination.
- 2.17 For this reason, ABI and NSWBC consider it prudent that the existing phrase within clause E.1(c)

“the employer may deduct from any money due to the employee on termination (under this award or the NES)”

is rephrased to state:

“the employer may deduct from any money due to the employee on termination under this award.”

Section 142

- 2.18 The final head of power by which the Commission may be empowered to include clause E.1(c) in modern awards is section 142, which deals with incidental and machinery terms. Section 142(1) provides that a modern award may include terms that are:
- (a) Incidental to a term that is permitted or required to be in the modern award; and
 - (b) Essential for the purpose of making a particular term operate in a practical way.
- 2.19 Our clients submit that clause E.1(c) can be categorised as an ‘incidental term’ for the purpose of section 142 and can be validly included in modern awards for the following reasons:
- (a) Clause E.1(a) is a permitted term by virtue of section 118; and
 - (b) Clause E.1(c) is incidental to clause E.1(a), which is apparent from both its subject matter and location.
- 2.20 Our clients also submit that clause E.1(c) is essential to ensure clause E.1(a) operates in a practical way for the following reasons:
- (a) clause E.1(a) is designed to prevent the significant disruption, inconvenience and cost to employers which arises when employees do not provide the required period of notice of termination of employment;
 - (b) absent clause E.1(c), there is no other enforcement mechanism in the modern awards to ensure compliance with clause E.1(a);
 - (c) without the inclusion of a compliance mechanism in the modern awards, an employer’s only recourse for a breach of clause E.1(a) would be to sue the employee by way of a common law claim;
 - (d) the bringing of common law proceedings against an employee is an unsatisfactory course of action for two primary reasons:
 - (i) it is unduly onerous and costly; and
 - (ii) it does not actually remedy the inconvenience caused by an employee not providing the required period of notice.
- 2.21 Accordingly, our clients submit that clause E.1(c) is a term which may be validly included in a modern award, and indeed should be so included. We will deal with the merits of its inclusion in the next section.

3. IS THE INCLUSION OF CLAUSE E.1(C) NECESSARY TO MEET THE MODERN AWARDS OBJECTIVE?

3.1 Our clients submit there are merit arguments in favour of the inclusion of such a provision to achieve the modern awards objective in accordance with section 138.

3.2 The *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 confirms (at [23]) that the Commission remains at all times obliged to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid;
- (b) the need to encourage collective bargaining;
- (c) the need to promote social inclusion through increased workforce participation;
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work;
- (e) the need to provide additional remuneration for:
 - (i) employees working overtime; or
 - (ii) employees working unsocial, irregular or unpredictable hours; or
 - (iii) employees working on weekends or public holidays; or
 - (iv) employees working shifts;
- (f) the principle of equal remuneration for work of equal or comparable value;
- (g) the likely impact of any exercise of modern award powers on business, including on productivity employment costs and the regulatory burden;
- (h) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- (i) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

(This is the modern awards objective).

3.3 The inclusion of clause E.1(c) in modern awards helps to provide a fair and relevant safety net of terms and conditions, particularly with respect to:

- (a) The need to promote social inclusion through increased workforce participation, by providing safeguards for employers who are looking to employ new staff;
- (b) The need to promote flexible modern work practices and the efficient and productive performance of work, by ensuring that employers are able to rely on a stable workforce in order to maximise productivity and efficiency (and having sufficient notice of change when it does occur); and
- (c) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden, by ensuring employers are able to effectively plan for staff turnover.

3.4 Accordingly, our clients submit that the inclusion of clause E.1(c) in modern awards (with the revised drafting proposed earlier above) meets the modern awards objective. In support of this submission we also rely on the merit arguments outlined at paragraph 2.19 above.

3.5 Should you have any questions about these submissions please contact Kate Thomson on 02 49891003.



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