

From: Kate Thomson [<mailto:Kate.Thomson@Ablawyers.com.au>]
Sent: Wednesday, 4 July 2018 3:47 PM
To: AMOD
Cc: Chambers - Ross J
Subject: AM2016/15 Modern Awards - Plain Language [ABLAW-ImanageDocs.FID153201]

Dear AMOD Team

AM2016/15 Modern Awards - Plain Language

Attached by way of filing on behalf of our clients ABI and the NSWBC please find submissions in respect of the above matter.

We respectfully seek the leave of the Commission to file these submissions out of time.

Please do not hesitate to contact me should you wish to discuss.

Yours sincerely

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Fair Work Commission: 4 Yearly Review of Modern Awards

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

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

4 JULY 2018

1. INTRODUCTION

1.1 These submissions are made in respect of the Full Bench decision of 13 June 2018 ([2018] FWCFB 3009) (**Decision**), in which it was decided that standard clause E.1(c) (relating to deductions from employees' final pay where required period of notice of termination is not provided) may be included in modern awards by virtue of section 142 of the *Fair Work Act 2009* (Cth) (**FW Act**).

1.2 Our clients, Australian Business Industrial (**ABI**) and the NSW Business Chamber (**NSWBC**) rely on our previous submission filed 18 December 2017, to the extent the view was expressed that the content of standard clause E.1(c) (now clause E.1(d)) is "desirable" ([2.11]).

1.3 Attachment 1 to the Decision contains an updated Clause E, and parties have been provided with the opportunity to file submissions in respect of whether the proposed term is 'necessary to meet the modern awards objective' in accordance with section 138 of the *Fair Work Act 2009* (Cth) (**FW Act**). These submissions address this confined issue.

2. SECTION 138

2.1 Here, the Commission's task is to ensure that modern awards, should they include the model term (and together with the NES), provide a 'fair and relevant' minimum safety net of terms and conditions, taking into account the various elements of section 134(1)(a)-(h).

2.2 The starting point is a consideration of whether the proposed clause (in its entirety) provides a 'fair and relevant' minimum safety net. Our clients consider that it achieves this objective, for the following reasons:

- (a) the requirement for an employee to provide the same period of notice of termination as an employer is fundamentally equitable, having regard to the potentially significant negative consequences (both in terms of disruption and

cost) experienced by employers when employees do not provide adequate notice of termination; and

- (b) the proposed term does not require an employee to provide notice in writing, which renders compliance even less onerous than it may previously have been.

2.3 With respect to clause E.1(d) specifically, our clients submit:

- (a) where an employee fails to comply with the requirement to provide notice in accordance with clauses E.1(b), causing his or her employer to incur costs (for example, due to the need to utilise casual labour or pay other employees at overtime rates), it is fair that the employer should be entitled to recover an amount from the employee to cover these amounts;
- (b) indeed, the Full Bench acknowledged that this ability to recover costs is *essential* for making the requirement to provide notice operate in a practical way (at [59] of the Decision);
- (c) an employee will not be required to compensate an employer for all costs that may be incurred, as the permissible deduction is proposed to be limited to the equivalent of one week's pay, which constrains the potential financial burden on the employee; and
- (d) an employee can quite simply avoid any deduction by providing the necessary period of notice.

2.4 The proposed clause is also consistent with:

- (a) the need to promote flexible modern work practices and the efficient and productive performance of work (section 134(1)(d)), by providing employers with a safeguard to the disruption to productivity that may arise from the departure of employees; and

(b) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (section 134(1)(f)), by providing employers with a method of redress to recover some of the costs incurred where an employee fails to provide the required notice of termination.

2.5 Our clients consider the rest of the factors in section 134(1) to be neutral considerations.

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



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On behalf of Australian Business Industrial and the NSW Business Chamber Ltd