
Fair Work Commission: 4 Yearly Review of Modern Awards

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

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

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1. INTRODUCTION

1.1 At the hearing of these proceedings on 15 December 2017, ABI and NSWBC made oral submissions about the operation of section 142 of the FW Act.

1.2 In response to these oral submissions, amongst others:

(a) Mr Trevor Clarke from the ACTU made oral submissions on 15 December 2017;

(b) Ai Group has filed written submissions on 19 December 2017; and

(c) NatRoads has filed written submissions on 19 December 2017.

1.3 These written submissions respond to the above mentioned submissions in reply.

2. MISUNDERSTANDING OF THE ABI & NSWBC SUBMISSIONS

2.1 A number of the submissions in reply appear to misunderstand the position put by ABI and NSWBC on 15 December 2017. By way of example:

(a) Nat Roads has stated that ABI considers there is a distinction between *“that which is necessary and that which is absolutely necessary”*.

(b) NatRoads has also stated that:

“It is difficult to propose any meaningful distinction between an award term that might be considered necessary but not essential. The ABI submissions do not reveal the manner in which any such test could be applied.”

(c) Ai Group has stated as follows:

“However, the question arises as to whether there is a category of award terms that would be ‘necessary’ but not ‘essential’... Ai Group is not convinced that any differences in the meaning of the words ‘essential’ and ‘necessary’ could be articulated in a manner that would enable the FWC to sensibly delineate between award

terms that are 'essential' and award terms that are simply 'necessary' but not 'essential'."

2.2 ABI and NSWBC wish to confirm that they are not arguing that the meaning of the term "*essential*" differs in any material way from the meaning of the term "*necessary*". To take a simple hypothetical example:

- (a) If a term is "*necessary*" to be included in a modern award for the award to meet the modern awards objective, the term *needs to* be included in order for the objective to be met.
- (b) If a term is "*essential*" to be included in a modern award for the award to meet the modern awards objective, the term *needs to* be included in order for the objective to be met.

2.3 Accordingly, ABI and NSWBC do not consider that there is a class of award terms that are "*essential*" for inclusion in a modern award and a different class of award terms that are "*necessary*" for inclusion in a modern award.

2.4 However, ABI and NSWBC have outlined in their oral submissions that the term "*essential*" is more emphatic than "*necessary*". This is obvious from the dictionary definitions filed by ABI and NSWBC on 18 December 2017. Most of those dictionary definitions describe the term "*essential*" as:

- (a) "*absolutely necessary*" or "*completely necessary*"; or
- (b) "*extremely important*" or "*vitaly important*".

2.5 None of these additional terms used to describe the phrase "*essential*" appear in the dictionary definition of "*necessary*". This is because the importance of something which is "*essential*" is greater than that which is "*necessary*".

2.6 The different emphasis ascribed to the two terms by the dictionaries appears mirrored in the legislative provisions, given that the term "*necessary*" is used 38

times in the Fair Work Act, whereas the stand-alone adjective “*essential*” appears only once (in section 142).

- 2.7 This reinforces the notion that, by using the term “*essential*”, the legislature is signalling to the Fair Work Commission that the requirement that the Commission satisfy itself that the term is “*needed*”, when applying section 142 of the Fair Work Act, is particularly important (and perhaps more important than usual).
- 2.8 ABI has advanced a logical reason to explain why the Parliament placed particular emphasis on the test in section 142. Specifically, if the Commission is including a term in a modern award under section 142, this means that the term does not ordinarily fall within the types of matters that the Parliament has authorised to be included in a modern award.
- 2.9 By enacting section 136 of the Fair Work Act, the Parliament has spelt out in great and exhaustive detail which type of content is appropriate for inclusion in modern awards. If the Commission is to include content in awards that goes beyond the content Parliament generally considered should be in modern awards, it stands to reason that the Parliament would expect the Commission to be satisfied that the terms are absolutely needed. By using the term “*essential*”, the Parliament is simply signalling or emphasising to the Commission that inserting a new type of content into modern awards (not otherwise permitted by the Fair Work Act) is a significant step to take and accordingly one that should not be taken lightly.
- 2.10 This is the legislative context within which the current proceedings are being conducted.
- 2.11 Although ABI and NSWBC maintain that the content of clause E.1(c) is desirable, having regard to the above statutory context, ABI and NSWBC contend that the Commission would need to have a cogent or sound basis before it includes clause E.1(c) in any modern awards.

2.12 Given that there are pre-existing enforcement provisions in the Fair Work Act to encourage compliance with modern award provisions and given the lack of any evidence to establish:

- (a) how clauses similar to clause E.1(a) are currently operating; or
- (b) the need for clause E.1(c) to be included in a modern award in order for clause E.1(a) to operate in a practical way,

ABI and NSWBC have formed the view that the relevant pre-requisites outlined by section 142 of the Fair Work Act are not satisfied in this particular case.

Is evidence always required?

2.13 It may be the case that, in some instances, the need for an award term to be included under section 142 is self-evident. In such circumstances, evidence may not be required for a term to be included pursuant to section 142.

2.14 However, given the importance of the statutory pre-requisites in section 142 (an importance which is underlined by the use of the word “*essential*”), in many if not most cases, the introduction of new content into modern awards (not ordinarily contemplated by section 136 of the Fair Work Act) would likely require a sound or cogent evidentiary case.

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