IN THE FAIR WORK COMMISSION

AM2016/15

4 yearly review of modern awards
Plain Language Redrafting – Standard Clauses

SUBMISSIONS OF THE ACTU

1. These brief submissions are responsive to the invitation at paragraph [105] of the Decision of the Full Bench in [2018] FWCFB 3009.

2. We have previously expressed the view that a clause in the nature of standard clause E.1 is not a clause that is necessary to meet the modern awards objective. We continue to press that as our primary position. We also provide an alternative position.

3. In support of our primary position, we submit that an award provision that serves purely to impose an obligation and consequent penalty on an employee, as opposed to imposing obligations merely as limits or conditions on rights otherwise created by an award or NES term, sits uncomfortably with the notion of a "safety net" that is "fair and relevant".

4. The Expert Panel of the Commission has characterised the legislative provisions which govern the Annual Wage Review as beneficial legislation.[1] We submit that the same may be said of the provisions that condition the making, and review of Modern Awards:

> "The purpose of Chapter 2 of the Act is to prescribe minimum terms and conditions of employment for national system employees (including those terms and conditions arising from a NMW order). We accept that it is appropriate to characterise the statutory provisions relating to the Review and to NMW orders as remedial, or beneficial, provisions. They are intended to benefit national system employees by creating regulatory instruments which intervene in the market, setting minimum wages to lift the floor of such wages. While these statutory provisions are properly characterised as remedial or beneficial provisions, the extent to which they are to be given 'a fair, large and liberal' interpretation in pursuit of that broad purpose is constrained by the fact that the relevant

[1] [2017] FWCFB 3500 at [133]-[142], [2018] FWCFB 3500 at [14]-[24]

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provisions seek to strike a balance between competing interests."[2] (emphasis added)

5. We concur with the Expert Panel's observations that assessing fairness (as is called for by the modern awards objective) involves assessing the perspectives of employees and employers. Further, we accept the award making and review provisions of the *Fair Work Act* do not pursue their beneficial purpose "at all costs". However, surely the issue of whether or not a prospective safety net term actually creates any minimum conditions of employment for national system employees is central. Among conventional award terms, a clause in the nature of clause E.1 is an outlier because it does not do this. The closest comparator is the power of an employer to direct an employee with no accrued annual leave to take unpaid leave during a close-down, however even in that example there is at least some employee benefit in the sense that the close-down itself must at least be partly motivated by a desire to allow other employees to access their safety net annual leave entitlement.

6. Beyond those fundamental considerations, we make the following points relevant to modern awards objective:

    a. the deprivation of wages does not meet the needs of the low paid;

    b. it is neither in the interests of employees or the economy for barriers to be created which impede pathways to higher paid work among those who are currently low paid;

    c. a power to deduct from wages earned for work performed over long or unsociable hours is inconsistent with ensuring additional remuneration is provided for work performed at those times;

    d. the overarching legislative requirement that any deduction not be unreasonable in the circumstances may conflict with action taken that otherwise complies with the proposed term, which makes its operation neither simple or easy to understand; and

    e. the impact on business of employees not providing notice is less today than was the case when the TCR standard was developed, for

[2] [2018] FWCFB 3500 at [16]

the reasons set out at paragraph 18 of our submissions in reply dated 22 November 2017.

7. For the above reasons, we cannot conceive of an employer power to withhold wages earned for work performed as a necessary component of fair and relevant safety net.

Alternative position

8. As explained in some detail in [2017] FWCFB 5258[3], the initial TCR standard emanated from an industrial relations framework that was premised on settling industrial disputes, avoiding industrial disputes and maintaining the settlement of industrial disputes.

9. We readily concede that an award provision that serves as a substitute for the uncertain determination at common law of what constitutes "reasonable notice in the circumstances" and (depending on that determination, also an assessment of damages) has merit as a mechanism for avoiding disputation, even if in the real world resort to such proceedings for award based employment would in any event be rare. In addition, we note that the Commission has already accepted that a term providing for a deduction of this nature is likely to enhance compliance with an employee notice provision (particularly if employees are made aware of it), and may at a practical level reduce the need to enforce the employee notice provision through legal proceedings.[4] Such acceptance may be taken as signifying that a term such as the present one remains valuable today as a mechanism for avoiding disputation. However, the modern awards objective does not directly reference the avoidance of disputes as a matter that is required to be taken into account in the assessment of a "fair and relevant safety net".

10. Nonetheless, the Commission has accepted that the matters which are explicitly identified in the modern awards objective are not the only considerations that might be taken into account when applying that

[3] At [13]-[49]
[4] [2017] FWCFB 5258 at [167]-[168]

objective.[5] In the present context, we consider it relevant that one of the objectives of the Act is to provide a balanced framework of *cooperative* workplace relations, and that the "*safety net* of *fair, relevant* and enforceable minimum conditions" is expressed in that objective as one of the ways in which that cooperative framework is to be delivered.[6] This suggests that the reference to a "fair and relevant safety net" in the modern awards objective ought to be considered as serving a purpose of cooperative workplace relations, among other things. This may provide a hook, as it were, to consider the benefits of the provision in avoiding disputation. Consideration of that benefit, if permissible, would of course still require balancing against the other relevant matters, including those at paragraph 6 above.

11. Whilst we express no concluded view on whether this additional consideration would alter the balance to such a degree as render clause E.1 necessary to meet the modern awards objective, we acknowledge that the manner in which the proposed clause addresses the issue of avoiding disputes is fairer to employees than any of its predecessors have been. Further, we submit that there is no evidence to suggest that the formulation now proposed would be any less effective in achieving its purpose of avoiding disputation than its predecessors have been.

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[5] *Ibid.* at [244]-[245]
[6] *Fair Work Act* 2009, s. 3