IN THE FAIR WORK COMMISSION
Fair Work Act 2009
s.156 – Four Yearly Review of Modern Awards
AM2016/15 Plain Language Re-Drafting

SUBMISSIONS OF THE AUSTRALIAN COUNCIL OF TRADE UNIONS

1. These submissions are filed in response to the Decision of the Full Bench dated 28 August 2017 ("the Decision") and the Statement of Full Bench dated 21 August 2017. We appreciate the additional time afforded to us complete these submissions in consultation with our affiliates.

Clause H.4(a) – Job Search Entitlement

2. We support the revised clause set out at paragraph [198] of the decision being adopted as a standard clause. Should any award prescribe a period of notice in excess of the period provided by section 117 of the Fair Work Act 2009 ("the Act"), it would be appropriate (and consistent with the reasoning of the Full Bench) for the clause to be tailored accordingly.

Clause G – Transfer to lower paid duties on redundancy

3. We broadly support the revised clause set out at paragraph [170] of the decision being adopted as a standard clause, noting the observation of the Full Bench at paragraph [155] that the standard clause G.2(a) would be tailored in the event an award provided for a notice period longer than that provided in section 117 of the Act. However, there are two matters that would benefit from some greater clarification.

Clause G.1

4. We are concerned that the reference to a circumstance where "the employer *decides*" (emphasis added) to transfer an employee to new duties might be construed as an award based right to unilaterally transfer an employee in circumstances of redundancy. This to

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be contrasted to the existing clause and the TCR clause only referring to "Where an employee is transferred". The existing clause and the TCR clause envisage a consensual transfer.

5. If one assumes that at least some of the redundancies that the clause might apply to would, in the absence of the clause, otherwise be redundancies that resulted in a termination giving rise to a right to redundancy pay under the NES, the effect of the clause is to give the employer the option of not paying redundancy pay in circumstances when it otherwise would be due. Were it not for section 342(3)(a), if an employer acted on the right afforded by the clause *because* the employee would be terminated and entitled to redundancy pay if the employer did not rely on that right, a real question would arise about whether employer had altered the position of the employee to their prejudice.

6. Section 150 of the Act ensures that section 342(3)(a) cannot function to defeat an employee's claim in the above circumstances by ensuring that an award term – an "objectionable term" – that "permits, has the effect of permitting, or purports to permit or have the effect of permitting" a contravention of Part 3-1, cannot be included in a modern award. Given our analysis above, we submit that clause G.1 may be an objectionable term in some circumstances.

7. We submit that a variation on formulation we previously advanced – "This clause applies where an employee is transferred ….by reason of redundancy" – would avoid these complications as well as being more consistent with the concept as currently expressed.

Clause G.3

8. Based on the Commission's reasons at paragraph [167]- [168[of the Decision, it seems that Commission intended that clause G.3 would maintain the meaning intended by the Full Bench in the TCR decision, including that "..the payment, characterised as income maintenance, would include all amounts payable to the employee for the working of ordinary time, *including all purpose allowances,* loadings and penalties" (emphasis added). However, it is not clear that all purpose allowances have been captured in the drafting for the revised clause. Paragraph [47] of the Commission's decision in [2015] FWCFB 4658, referred to at paragraph [168] of the Decision, indicates that "ordinary hourly rate" is to be a defined term in modern awards where an all purpose allowance is payable. However, the

expression adopted in clause G.3 is "ordinary rate of pay". That term is not a defined term in the exposure drafts as we understand it. If the term "ordinary rate of pay" is to be used, we submit that there would be greater clarity if "all purposes allowances" were referred to in the two groups of bracketed text in clause G.3.

9. It may also be possible to tailor clause G.3 to deal with differentials in Full Rates of Pay where work outside of ordinary hours for the employee concerned was already set or programmed. However, we assume that in most industries this will not be the case.

Clause E.1(c) – Deductions on termination

10. Clause E.1(c) apples to termination of employment at the initiative of the employee. It permits an employer to make a deduction from monies due to an employee on termination, where insufficient notice has been given by the employee of their termination. It permits the deduction to be made from "any money", regardless of the source of the entitlement to that money.

11. Having considered the issues set out at paragraph 2 of the Statement of 21 August[1] we submit that the Commission is unable to, and should not, include clause E.1(c) in modern awards.

Is clause E.1(c), either wholly or insofar as it deals with NES entitlements, a type of provision that may validly be included in a modern award under the relevant provisions of the FW Act.

12. In our submission, clause E.1(c) cannot validly included in a modern award because of the way it deals with NES entitlements *and* because of the way it deals with entitlements outside of the NES. In our submission, it is not possible to confine the entitlements it operates upon in order to give it a valid operation.

13. The Act does permit employers to make deductions from employee's pay in some limited circumstances. However, it does not authorise the Commission to include terms in a

[1] [2017] FWCFB 4355

modern award that would facilitate the deduction, or the range of deductions, contemplated by clause E.1(c).

14. Part 2-9 of the Act is concerned with "Other terms and conditions of employment" and Division 2 thereof deals with "Payment of Wages". Section 323 in that division is a Truck Act type provision requiring employees to paid in full in money (at least monthly) in relation to the performance of work. The limited exemption in section 323(1)(a) to the requirement that employees be paid in full is satisfied where section 324 authorises the employee not to be paid in full. Section 324 provides as follows:

324 Permitted deductions

(1) An employer may deduct an amount from an amount payable to an employee in accordance with subsection 323(1) if:

(a) the deduction is authorised in writing by the employee and is principally for the employee's benefit; or

(b) the deduction is authorised by the employee in accordance with an enterprise agreement; or

(c) the deduction is authorised by or under a modern award or an FWC order; or

(d) the deduction is authorised by or under a law of the Commonwealth, a State or a Territory, or an order of a court.

Note 1: A deduction in accordance with a salary sacrifice or other arrangement, under which an employee chooses to:

(a) forgo an amount payable to the employee in relation to the performance of work; but

(b) receive some other form of benefit or remuneration;

will be permitted if it is made in accordance with this section and the other provisions of this Division.

Note 2: Certain terms of modern awards, enterprise agreements and contracts of employment relating to deductions have no effect (see section 326). A deduction made in accordance with such a term will not be authorised for the purposes of this section.

(2) An authorisation for the purposes of paragraph (1)(a):

(a) must specify the amount of the deduction; and

(b) may be withdrawn in writing by the employee at any time.

(3) Any variation in the amount of the deduction must be authorised in writing by the employee.

15. In our submission, section 324(1) contemplates that a modern award might contain a provision permitting a deduction to be made and prescribes a consequence where that occurs (i.e. an exemption from section 323(1)(a)). However, it is not an authorising provision that permits modern awards to contain terms dealing with deductions. It likewise could not be said that it is an authorising provision that permits Commonwealth, State or

Territory laws to contain such terms. If such authorising provisions exist, they are to be to be found elsewhere.

16. In the case of modern awards, the authorising provisions are found by resort to section 136. Section 136 appears in a Part of the Act that is solely focussed on modern awards, at the beginning of a Division concerned with the terms of modern awards. It provides as follows:

136 What can be included in modern awards

Terms that may or must be included

(1) A modern award must only include terms that are permitted or required by:

(a) Subdivision B (which deals with terms that may be included in modern awards); or

(b) Subdivision C (which deals with terms that must be included in modern awards); or

(c) section 55 (which deals with interaction between the National Employment Standards and a modern award or enterprise agreement); or

(d) Part 2-2 (which deals with the National Employment Standards).

Note 1: Subsection 55(4) permits inclusion of terms that are ancillary or incidental to, or that supplement, the National Employment Standards.

Note 2: Part 2-2 includes a number of provisions permitting inclusion of terms about particular matters.

Terms that must not be included

(2) A modern award must not include terms that contravene:

(a) Subdivision D (which deals with terms that must not be included in modern awards); or

(b) section 55 (which deals with the interaction between the National Employment Standards and a modern award or enterprise agreement).

Note: The provisions referred to in subsection (2) limit the terms that can be included in modern awards under the provisions referred to in subsection (1).

17. Having regard to section 136, a fulsome inquiry involves the following 8 questions:

(1) Does Subdivision B of Division 3 of Part 2-3 of the Act permit or require clause E.1(c) to be included in a modern award?

(2) Does Subdivision C of Division 3 of Part 2-3 of the Act require or permit clause E.1(c) to be included in a modern award?

(3) Does Part 2-2 of the Act permit or require clause E.1(c)? to be included in a modern award?

(4) Is clause E.1(c) incidental to a matter permitted by Part 2-2 of the Act?

(5) Does section 55 permit or require clause E.1(c) to be included in a modern award?

(6) Is clause E.1(c) incidental to a matter permitted by section 55?

(7) Does clause E.1(c) contravene Subdivision D of Division 3 of Part 2-3 of the Act?

(8) Does clause E.1(c) contravene section 55?

18. A more condensed but sufficient inquiry involves only question (7) and (8) above. In any event, we set out our position on each of the above questions.

(1) Does Subdivision B of Division 3 of Part 2-3 of the Act permit or require clause E.1(c) to be included in a modern award?

19. Subject to one proviso, Subdivision B of Division 3 of Part 2-3 (referenced in section 136(1)(a) above) does not identify the same subject matter as that dealt with by clause E.1(c). The proviso relates to section 142, which is as follows:

142 Incidental and machinery terms

Incidental terms

(1) 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.

Machinery terms

(2) A modern award may include machinery terms, including formal matters (such as a title, date or table of contents).

20. We submit that clause E.1(c) is not incidental to a term that is permitted to be included in modern award by any other provision of Subdivision B of Division 3 of Part 2-3. The answer to question (1) above is "no".

21. The real issue of contention is whether is clause E.1(c) deals with a matter permitted to be included in a modern award by Part 2-2 of the Act or section 55 thereof, as referred to in sub paragraphs (c) and (d) of section 136(1), or a matter incidental thereto. If it does, then

the next question becomes whether the content of clause E.1(c) traverses any of the "Terms which must not be included in modern award" referenced in section 136(2).

(2) Does Subdivision C of Division 3 of Part 2-3 of the Act require or permit clause E.1(c) to be included in a modern award?

22. In our submission, there are clearly no provisions in Subdivision C of Division 3 of Part 2-3 (referenced in section 136(1)(b) above) that require modern awards to include a term like clause E.1(c). The answer to question (2) above is "no".

(3) Does Part 2-2 permit or require clause E.1(c)?

23. No provision of Part 2-2 requires clause E.1(c).

24. Section 118 relevantly provides that "A modern award or enterprise agreement may include terms specifying the period of notice an employee must give in order to terminate his or her employment". However, this falls short of authorising a deduction when the requisite notice is not given. In our submission, the answer to question (3) above is "no".

(4) Is clause E.1(c) incidental to a matter permitted by Part 2-2?

25. Clause E.1(c) could only be considered "incidental" (for the purposes of section 142) if it was both truly incidental to the requirement to give notice as well as essential in order that the requirement to operate "in a practical way".

26. There is no settled industrial meaning of what is truly incidental, and the concept seems to encapsulate questions of degree. On the face of it, it does not appear that a power for an employer to withhold monies owing to an employee is any way incidental to an obligation upon the employee to give notice of their termination. The only relationship between the two obligations are that clause E.1(c) creates an incentive for the employee to comply with the preceding provisions of clause E.1. It does so by providing a financial penalty for non-

compliance. It cannot be regarded as compensating the employer for the employee's non compliance, as it cannot be assumed that non-compliance with the obligation to give notice exposes the employer to any cost in all or any cases. In our submission, the relationship is too tenuous for clause E.1(c) to be considered truly incidental to the requirement to give notice. If we are correct about the this, the answer to question (4) above is "no".

27. As to whether the clause E.1(c) is essential for ensuring the obligation to give notice operates in a practical way, recent authority from the Commission in the Four Yearly Review suggests that this question is entangled with merit considerations, including whether a term is necessary to meet the modern awards objective – and requires an assessment of relevant evidence. In *Re Timber Industry Award 2010*[2], a Full Bench rejected a claim by the CFMEU to expand a late payment of wages penalty. The clause which was sought to be varied provided for a late payment penalty when employees paid by cash or cheque were kept waiting for that payment. The claim sought that a penalty also be paid where employees paid by EFT were not paid on time. The Commission approached the claim in this way:

> "**[104]** We accept that an award provision for the payment of wages is incidental to those elements of s.139 dealing with payments to employees: minimum wages, overtime rates, penalty rates and allowances. The issue which then arises is whether or not the terms resulting from the variation to clause 25 of the Timber Award proposed by the CFMEU are essential for the purpose of making the terms operate in a practical way and are the terms necessary to achieve the modern awards objective.
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> **[105]** The CFMEU drew our attention to the inclusion by the Award Modernisation Full Bench of late payment provisions relating to payment by EFT in seven other modern awards. We accept that the Award Modernisation Full Bench was satisfied as to the power to include such a provision, although it is not clear whether that power was based on s.139 or s.142 of the Act. Given our conclusion above in relation to s.139, we think the power was based on the incidental power in s.142 and that the Award Modernisation Full Bench was satisfied that the terms were necessary to achieve the modern awards objective in the particular circumstances of those awards. It is necessary for us to consider whether a similar conclusion arises in relation to the case put by the CFMEU in relation to the Timber Award.
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> **[106]** In support of its proposed variation, the CFMEU relied on direct evidence of its officials and members and the CFMEU Survey of its membership to the effect that late payment is a significant practical problem within the timber industry and its proposed variation, effecting a penalty upon

[2] [2015] FWCFB 2856

employers for late payment by EFT, is essential for the payment of wages term to operate in a practical way and is necessary to achieve the modern awards objective.

[107] The direct evidence of its officials and members goes to a proposition that payment by EFT is now the norm in the timber industry. This proposition was not contested and we accept it. We also accept that late payment can cause costs to employees, both in terms of default and other financial institution fees incurred and disruption to the family and social activities of employees and that many timber workers are award reliant and low paid.

[108] Beyond that, the evidence goes to incidents of late payment in the timber industry. The evidence of five officials simply repeats and relies on the evidence of those officials in the 2012 Review. Such evidence was found by Deputy President Gooley to provide insufficient proof to indicate that late payment was a widespread problem.

…….

as a matter of merit, we think that the prescription of payment in respect of time spent by an employee waiting for a late payment by cash or cheque, in respect of the delayed departure of an employee from their place of employment because their wages are not paid on time is qualitatively different from the imposition of a penalty in respect of late payment by EFT.

[125] We accept that payment by EFT is now the norm in the timber industry. We also accept that late payment can cause costs and disruption to family and social activities of employees and that many timber workers are award reliant and low paid.

[126] We also accept that employers are required by law to pay their employees for their work, on time. Quite apart from their legal entitlement to be paid on time, employees, who make financial and family arrangements on the basis that they will be paid on time, are entitled to expect that they can access their wages when they are due. Employers should, to meet their legal obligations and out of respect for their employee's entitlement to be paid on time, ensure that payroll arrangements are in place with safeguards to avoid late payment through inadvertence and which reflect the practical requirements for the transmission of wages through to the nominated accounts of their employees by the due time, having regard to the transmission processes and the effect of public holidays or extended absences (for example at Christmas and Easter) from work.

[127] However, we are not satisfied that the CFMEU's case, and the evidence which supports it, establishes a practical problem in relation to the current payment of wages provision which makes the variation it proposes necessary to meet the modern awards objective. Whilst there was evidence of some incidences of late payment, it falls short of establishing a incidence of late payment in the timber industry of a frequency which would make the variation sought necessary. In this regard, the CFMEU's survey of its members cannot be relied on as being representative of industry circumstances. Further, we are not satisfied, on the evidence, that the inclusion in the Timber Award of the varied clause proposed would materially affect late payment in the timber industry.

> **[128]** We are not satisfied that the CFMEU has established that its proposed amended clause 25.5 is essential for the purpose of making clause 25 operate in a practical way and can be included in the Timber Award having regard to s.142 of the Act. We are not persuaded that the amended variation to clause 25.5 of the Timber Award is necessary to ensure that the Timber Award, together with the National Employment Standards (NES), provides a fair and relevant minimum safety net of terms and conditions having regard to the s.134 matters. Nor are we satisfied that the CFMEU has established the case for the variation it proposes, having regard to the modern awards objective. We are not satisfied that there are cogent reasons for departing from the position determined by the Award Modernisation Full Bench."

28. In light of this approach, we respectfully submit that it is not possible at this point to rule on whether clause E.1(c) is essential for the purpose of making the preceding provisions of clause E.1 operate in a practical way. However, given the analysis above, we submit that it is unnecessary to rule on the question.

(5) Does section 55 permit or require clause E.1(c)?

29. Section 55 does not require any content in modern awards.

30. The content that it does conditionally permit is dealt with in subsections (2) and (4) of section 55, as follows:

> (2) A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:
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> (a) by a provision of Part 2-2 (which deals with the National Employment Standards); or
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> (b) by regulations made for the purposes of section 127.
>
> Note: In determining what is permitted to be included in a modern award or enterprise agreement by a provision referred to in paragraph (a), any regulations made for the purpose of section 127 that expressly prohibit certain terms must be taken into account.
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> (4) A modern award or enterprise agreement may also include the following kinds of terms:
>
> (a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;
>
> (b) terms that supplement the National Employment Standards;
>
> but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

Note 1: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:

(a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or

(b) that specify when payment under section 90 for paid annual leave must be made.

Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:

(a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or

(b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

Note 3: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74.

31. Our finding in relation to question (3) above precludes a finding that clause E.1(c) is permitted under subsection (2)(a). No regulations have been made for the purposes of section 127, as referred to in subsection 2(b).

32. In relation subsection (4)(a), we submit that there is no entitlement under the National Employment Standards that clause E.1(c) is ancillary or incidental to the operation of. The only entitlement that it has any relationship with is the entitlement of the employer to receive notice from the employee. Whilst the notice entitlement is one which the National Employment Standards authorise an award to confer, it is not an entitlement "under" the National Employment Standards themselves.

33. In relation to subsection 4(b), clause E.1(b) clearly does not supplement any entitlements dealt with in the National Employment Standards.

34. We submit the answer to question (5) above is "no". Clause E.1(c) will however impact on other entitlements that the National Employment Standards confer, but do so in a way that is detrimental to employees compared to those entitlements. We comment on this in dealing with questions (7) and (8) below.

(6) Is clause E.1(c) incidental to a matter permitted by section 55

35. Because section 142 permits modern awards to expand on terms permitted to be included in modern awards, and section 55 permits some terms to be included in modern awards, it is necessary to consider whether clause E.1(c) is a term that qualifies for inclusion under that expanded scope. In our submission:

- Clause E.1(c) is not incidental to a term expressly permitted by Part 2-2 to be included in a modern award;
- Clause E.1(c) is not incidental to a term that is ancillary or incidental to the operation of an entitlement under the National Employment Standards.
- Clause E.1(c) is not incidental to a term that supplements the National Employment Standards.

Therefore, the answer to question (6) above is "no".

(7) Does clause E.1(c) contravene Subdivision D of Division 3 of Part 2-3

36. Subdivision (3) of Division 3 of Part 2-3 contains the following relevant provisions:

151 Terms about payments and deductions for benefit of employer etc.

A modern award must not include a term that has no effect because of subsection 326(1) (which deals with unreasonable payments and deductions for the benefit of an employer) or subsection 326(3) (which deals with unreasonable requirements to spend an amount).

155 Terms dealing with long service leave

A modern award must not include terms dealing with long service leave.

37. Section 326, referred to in section 151 above, is as follows:

326 Certain terms have no effect

Unreasonable payments and deductions for benefit of employer

(1) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term:

(a) permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work; or

(b) requires, or has the effect of requiring, an employee to make a payment to an employer or another person;

if either of the following apply:

(c) the deduction or payment is:

(i) directly or indirectly for the benefit of the employer, or a party related to the employer; and

(ii) unreasonable in the circumstances;

(d) if the employee is under 18—the deduction or payment is not agreed to in writing by a parent or guardian of the employee.

(2) The regulations may prescribe circumstances in which a deduction or payment referred to in subsection (1) is or is not reasonable.

Unreasonable requirements to spend an amount

(3) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term:

(a) permits, or has the effect of permitting, an employer to make a requirement that would contravene subsection 325(1); or

(b) directly or indirectly requires an employee to spend an amount, if the requirement would contravene subsection 325(1) if it had been made by an employer.

38. It is immediately apparently clause E.1.(c), in its current formulation, could fall foul of section 326(1)(d) in its operation with respect to employees under 18. More broadly, the issue is whether deductions of the type authorised by clause E.1(c) are "unreasonable in the circumstances" - as it is beyond doubt that each of those deductions are for the benefit of the employer and most, if not all of them, would be made from amounts payable to an employee "in relation to the performance of work".

39. We suggest that the deductions authorised by clause E.1(c) include deductions that would be found to be unreasonable in the circumstances. Firstly, the deductions are in the form of a penalty, not compensation. There is no basis to assume that in all or any particular terminations with short notice that the employer suffers any loss. Even if any loss were suffered, it is entirely without foundation to assume that the loss which the employer suffers

would be greater if the years of service of the employee were higher. Secondly, there is likewise no basis to penalise an employee of longer standing more harshly than an employee of short standing for not complying with their obligation to give notice. Thirdly, in the absence of the employer proving it has suffered any loss it is entirely inappropriate to provide such an arbitrary set off power against amounts owing for work that the employer accepts has been performed and should be paid for. These issues arise irrespective of whether the amounts deducted from have their origins in the National Employment Standards or in other award entitlements.

40. In relation to section 155, clause E.1(c) has the potential, for some employees, to "deal" with their Long Service Leave entitlements by abolishing the right to be paid for untaken on long service leave termination. Section 113 creates entitlements under the National Employment Standards to long service leave[3], albeit only in limited circumstances and where the content of the entitlement is derived from other sources. We are unable to comment on the incidence of such entitlements or the extent to which such entitlements do in fact provide for payment of untaken long service leave on termination. However, the likelihood that such entitlements exist along with the more certain position in relation to 151 is sufficient to conclude that the answer to question (7) above is "yes".

(8) Does clause E.1(c) contravene section 55?

41. Part 2-2 of the Act deals with some entitlements that would ordinarily be paid out at termination. Section 90(2) in that Part provides the entitlement to be paid for untaken annual leave on termination:

> (2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.

42. In addition, as referred to above, some long service leave entitlements enforced by the National Employment Standards may include a right to payment of untaken leave on termination.

[3] s.113(1), 113(4)

43. The existence of such rights is such that clause E.1(c) directly engages the prohibition in section 55(1) on modern awards excluding "any provision of the National Employment Standards". The answers to question 8 above is "yes".

To the extent that the Commission has the power to include a provision of the nature of clause E.1(c) in a modern award, as a matter of merit is such a provision necessary to achieve the modern awards objective in accordance with the requirement in in s.138?

44. We submit that such a term is not necessary. The existing enforcement regime for non-compliance with awards is sufficient to address any non-compliance with the notice provisions. That framework for enforcement is able to provide penalties, compensation and coercive orders where the facts of the matter justify it, in terms that are tailored to the gravity and consequences of the non-compliance. The circumstances do not justify a "one size fits all" penalty provision that varies only proportionally to the entirely irrelevant variable of the employee's length of service.

45. We otherwise refer to our submissions in under question (7) and refer to and adopt the submissions of our affiliate the AMWU on this issue.

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