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 Statement of the Full Bench dated 20 July 2017 (**Statement**). We appreciate the additional time afforded to us complete these submissions in consultation with our affiliates.

Amendment of clause A.1 to remove note.

2. The ACTU supports the provisional view that the note under clause A.1 be deleted.

Deletion of clause A.4, amend clause A.1

3. The ACTU does not oppose the combined approach of deleting clause A.4 and incorporating the "genuine needs" issue into an amended clause A.1, but we consider adding the word "both" before "the employee" to be preferable.

4. The benefit of having clause A.4 stand on its own is that the reader is more likely to absorb that the requirement that an IFA can only be entered into if it meets the genuine needs of both the employer and the employee. Table 6.3 of the November 2015 General Manager's report[1] illustrates that the matters that are most likely to result in take home pay being reduced are included in IFA's where the employer initiates the IFA. Table 6.5 of the report indicates that less half of IFAs resulted in higher take home pay. Those findings, coupled with the fact that only 58% of employers indicated that the IFAs they had made documented how the employee

[1] *O'Neill, B*. "General Manager's report into individual flexibility arrangements under s. 653 of the Fair Work Act 2009", FWC, November 2015.

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was better off[2], at least raises the suggestion that many IFA's may not be meeting the genuine needs of the employees concerned.

Deletion of clause A.5 and A.6

5. The ACTU does not oppose the deletion of clause A.5. Should any party seek the deletion of clause A.6, this will be opposed by us.

Consolidation of clauses A.7 to A.9

6. We would not support the consolidation of clauses A.7 to A.9 in the form proposed at paragraph [39] of the Statement. We do not understand that any party is presently pressing for that change.

Amendment of clause A.8(d)

7. It is unclear to us what the provisional view of the Full Bench on this issue is, as the two propositions put in the final sentence of paragraph [42] of the Statement appear to be contradictory.

8. Our position is that both paragraphs (c) and (d) of clause 8 should commence with the words "set out how", reflecting the position reached at the November conference.

Clause A.14 versus a proposed note

9. The ACTU does not oppose the conversion of clause A.14 to a note on the substantive merits. There may be a technical barrier to doing so. Section 144(4)(d) of the Fair Work Act positively requires the flexibility term to "set out how any flexibility arrangement may be terminated by the employer or the employee or the employer". This presumably includes "arrangements" that have effect as if they are individual flexibility arrangements by force of section 145(2). This points to the necessity of including clause A.14 (or something like it) within the clause itself rather than as a note. Against this, it is recognised that there would no need for the flexibility term to be "taken to provide" the matters in section 145(4) were this analysis correct.

10. We do not oppose the wording of the proposed note however we likewise do not perceive it to be an improvement over the note that currently appears under clause X.8(b) in the existing term.

[2] *Ibid*, at page 33.

Amendment of clause B.1 and consequential changes to clauses B.5 and B.6

11. The agreed position on this issue is set out at paragraph [65] of the Statement. We do not support the departures from the agreed position suggested by the expert at paragraphs [67] and [71].

12. The suggestions made by the expert re-introduce some of the same difficulties concerning obligations to discuss (and the timing thereof) that were resolved at the April conference, we refer in particular to our submissions contained at PN2591-PN2595. The points we made on that occasion were that it is essential that the obligation to discuss exists separate to an obligation to commence the discussions as soon as practicable. Conflating the obligations and making both of them subject to an "as soon as practicable" requirement leads to a situation where:

    (a) there is no obligation for the discussions to conclude; and

    (b) the discussions that do occur are rushed.

    The expert's suggestions raise (again) the problem identified at (b) above.

13. Further, the expert's suggestions confuse the issue of exemptions from "significant effects" of change with the nature of the change itself. Changes and their effects are different concepts. This issue was canvassed at some length during the April conference and it is surprising that it has presented again. It is not entirely clear to us what the expert is proposing in relation this matter although there appear to be two possible interpretations - both of which we oppose and both which involve changes in substance to a provision that the Statement notes at [24] is uncontroversial.

14. On one view, taking a narrow view of the word "matter" in B.1, the expert's proposal is that where the award "provides for" the making of changes in "production, program, organisation, structure or technology", then the obligation to consult does not arise. On this view it is difficult to see how the exclusion would operate in practice, as modern awards rarely make such provision, at least explicitly. The matters that are proposed to be excluded are generally matters of managerial prerogative, the consequences of which are dealt with by awards: awards do not regulate trading hours, but they often do provide for penalty rates during ordinary hours and for overtime outside of this and/or for shift allowances and rest periods.

15. On the alternate view, taking the word "matter" in B.1 at its broadest, the expert has re-introduced the problem of making the entirety of the consultation obligation conditional on exemptions originally designed only to qualify the definition of significant effects. A "major change in production, program, organisation, structure or technology" may have a number of

effects. Assume for example, a decision to introduce particular technological change, the introduction of new machinery at a particular location, results in:

(a) the need for retaining;

(b) the need to transfer employees; and

(c) the need to alter working hours.

16. Each of these are "significant effects". Some awards provide for the alteration of work locations, most provide for the alteration of working hours yet few (if any) provide for the need for retraining. The current qualifier to "significant effects" means that the obligation to consult would remain in our example, at the very least, where the awards did not regulate retraining. On this alternative view of the expert's proposals, the obligation to consult would not exist at all in relation to any aspect of the change or its effect where the change could be characterised as involving one matter that was otherwise dealt with by the award.

Amendment to clause C.3(b)

17. We do not oppose the proposed amendment.

Amendments to clause D – party/parties vs. employer/employees

18. We oppose the amendments proposed by expert at paragraph [87] of the Statement and refer to the comments made at the April conference in particular at paragraphs PN2832-2836, PN2859-2862. In addition, continuing to use the words "party" and "parties" is in keeping with section 739 of the Fair Work Act which conditions the Commission's jurisdiction to deal with a dispute referred to it pursuant to a dispute resolution procedure in a modern award.

Amendment to clause D.7 – "process"

19. We support this amendment. It is necessary to retain the breadth of representation rights in the exiting clause, which refers to representation "for the purposes of this clause".

Amendment to clause E

20. We do not agree that replacing a reference to a deduction of "an amount not exceeding the amount…" with a reference to a deduction of "the amount" creates the option of not deducting the whole amount. Rather, we think the change proposed by the expert removes that option. On that basis, we oppose the amendment.

Amendment to clause G.1

21. We have not been provided with a specific proposal from any employer interest in relation to this issue. We note that some of the comments attributed to us in the Statement were in fact made by Mr Ferguson on behalf of the Ai Group.

22. In our view, there is nothing to recommend the revised clause G.1 set out at paragraph 101 of the Statement over the more simple drafting already found in these awards. A review of the transcript of the January conference reveals that the present dispute arose from an assumption on the part of the expert that the definition of redundancy for the purposes of the clause should take its meaning from the conditions in section 119 of the *Fair Work Act* governing when an entitlement exists to redundancy pay:

> [At PN1228]
> "THE COMMISSIONER: Is that all that needs to be said with respect to the notes? We'll move onto transfer to lower paid job and redundancy. Mr Moran, you might wish to speak to that first.
>
> MR MORAN: Yes. Commissioner, it started off by looking at 21.2 which at the moment says:
> Where an employee is transferred to lower paid duties by reason of redundancy.
> What we tried to do was try and explain a bit what it was that we were talking about, by reference to what's in 119 of the Act, and therefore picking up 119 talks about that an employee is entitled to be paid redundancy pay if the employee's employment is terminated because the employer no longer requires the job done by the employee to be done by anyone.
> That really helped frame what was in paragraph (a). I think the comments have been made by some parties that it needs to go on and say as 119(1)(a) of the Act says:
> Except where this is due to the ordinary and customary turnover of labour.
> I can see that that point is a very valid point, and it really should have those extra bits. The paragraph (b) which has caused some issue, talks about "wishes to transfer". In drafting that we had thought, well, if you're talking about a period of notice you should be talking about things that actually happened before the transfer.
> But if the transfer actually happens straight away, I agree then you would just talk about transfers the employee. So it's really just whether it was intending to transfer or wishes to transfer, that was the thinking behind paragraph (b)."
> …….
> [At PN1298]
> "THE COMMISSIONER: Now, Mr Moran, can you perhaps provide some guidance as to why G.1 has been drafted as it is?
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> MR MORAN: Yes. Commissioner, I think it really was an attempt to try and define what was meant by redundancy, so as to be helpful to the reader, but obviously there's an issue whether it has accurately covered completely what is covered by redundancy. So that was the purpose of it. It was then looking at what the Act says about when redundancy pay is payable, and using that description to describe redundancy."

23. The assumption is an incorrect one. The Ai Group has leveraged this assumption to make its own case that clause G.1 should define redundancy in a manner consistent with section 119. Our position that is clause G.1 should not attempt to define redundancy, if one is to accept that the intention of the present proceedings is not to alter the legal effect of the existing clause.

24. In any event, it is no more appropriate to adopt wording of section 119 of the *Fair Work Act* than it is to adopted the wording of section 309(1): the point is that neither purports to provide a general or all purpose definition of "redundancy", or even a definition at all. One creates a minimum safety net for a payment on termination in certain circumstances and the other creates defence against an unfair dismissal claim.

25. The law today is that "In the industrial context, redundancy of position is not a concept of clearly defined and inflexible meaning"[3] and indeed that "redundancy" in industrial an instrument "should be construed consistently with the practice which existed for many years in the area of employment regulated by it"[4]. In any event, it ought not be forgotten that in the original TCR decision of August 1984[5], the Conciliation and Arbitration Commission did not define redundancy – the closest it came was to observe that there was "substantial debate" on the issue and to comment that a definition referred to it by the ACTU contained as "a key element…that the employer no longer requires to have the work done by anyone"[6]. It should also be noted that when the matter was finalised in December 1984, the Commission explicitly declined to develop a standard clause of general application and instead varied only the Metal Industry Award:

> "The ACTU asked us to do two things as a result of this case. One was to produce a standard form of clause which could be applied as required to other awards of the Commission, and separately to produce an order in the Metal Industry Award. We have considered this approach but we feel that given what has transpired in this case, it is too difficult to produce a form of clause which could provide some general basis for all awards. As we have already emphasised, it is necessary to tailor the effect of our decision to each individual award. This we have done in the Metal Industry Award and we feel what we have done in that award, plus what we have said in our reasons, will enable other members of the Commission to distil from them what we intend generally to be applied in other awards."[7]

26. Clause G.1 should read "This clause applies where an employee is transferred to lower paid duties by reason of redundancy".

Amendment to clause G.2

27. We do not oppose the change proposed to this clause as a standard clause. We are not aware of any award that provides a notice period longer than that required by section 117 of the Fair Work Act, however if there was such an award then the clause would need to be tailored accordingly.

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[3] *Amcor Ltd v. CFMEU* [2005] HCA 10 at [12], per Gleeson CJ & McHugh J.

[4] *Port Kembla Coal Terminal Ltd. v .CFMEU* [2016] FCAFC 99 at [172], per Jessup J.

[5] Print F6230

[6] *Ibid.* at page 24

[7] Print F7262 at page 5.

Amendment to clause G.3

28. The issue regarding the ordinary rate of pay should be resolved on the basis that Notice or Pay in Lieu of Notice ought to have the same value. So much was recognised in the TCR case where the alternative to notice was described as "maintenance of income payments"[8].

29. We otherwise support and adopt the submissions of our affiliates, including those of the CFMEU (para 3.2-3.5) and AMWU (para 90-103) referred to at paragraph 121 of the Statement.

Amendment to clause H.2 and H.3

30. We do not understand there to be a significant difference between the parties on the intended operation of these clauses.

31. The principles, as we understand them, are as follows:

    (a) An employee who has been made redundant is entitled to notice of termination and to redundancy pay.

    (b) Redundancy pay is calculated on the basis of years of service.

    (c) The calculation of years of service is to be based on the termination date, which is at the end of the notice period.

    (d) An employee made redundant may elect to leave their employment before the end of the notice period.

    (e) If the employee chooses to do this, even though their employment ends earlier than the employer expected, the redundancy pay should not be reduced to reflect the earlier termination date.

    (f) The employee cannot insist on being paid notice pay for the period not worked.

32. The real issue appears to be whether or not, if the above transpires, the employer can then make deduction from any other payments due to the employee on the basis that the employee did not give the employer the required period of notice of their termination. That is, are the employer's rights under clause E.1(c) activated in the above circumstances? In our submission they are not.

[8] Print F6230 at page 39

33. In essence, the employee is not giving the employer notice of termination by electing to leave before the expiry of the notice period in these circumstances. Rather, the award is operating to deem the notice period to expire on the employee's last day of employment.

34. If any amendment is required, we suggest that clause H.3 be broken up into two elements, as follows:

> "However:
>
> (a) The employee is not entitled to be paid for any part of the period of notice remaining after the employee ceased to employed;
> (b) The employee's decision to leave their employment in these circumstances does not constitute notice of termination by the employee for the purposes of clause [E.1]"

35. We otherwise support and adopt the submissions of our affiliate the SDA on these matters.

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