

## **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 IN REPLY**

1. These brief submissions are filed in response to the Submissions of the Australian Chamber of Commerce and Industry, the Australian Industry Group, Australian Business Industrial & the NSW Business Chamber and NatRoad.

#### **Reply to submissions of the Australian Chamber of Commerce and Industry**

2. Paragraphs 5-16 of the submissions serve to demonstrate that issue of the permissibility of a clause permitting deductions was not explored in any detail during award modernisation. Even if it had been, that does not absolve interested parties from grappling with the issues that now present themselves in this matter.
3. The extract of the Explanatory Memorandum set out in paragraph 22 does not provide any insights into the statutory construction of the provisions at issue in the current matter. In any event, the extract is solely concerned with notice and redundancy pay.
4. Even if it is correct, as asserted in paragraph 32, that clause E.1(c) may be regarded ancillary or incidental for the purpose of section 14 to a term that is permitted by section 118 to be included in an award, that is not the end of the matter. Leaving aside merit considerations, for a term to be permitted in a modern award it must not only pass through the tests referred to in section 136(1) but it must also not fail the tests referred to in section 136(2).
5. The submissions at paragraph 37 and 38 fail to appreciate that clause E.1.(c) deals with NES entitlements, such the NES entitlement to payment of annual leave on termination.

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## Reply to submissions of the Australian Industry Group

6. In relation to paragraphs 4-25 of the submission:
  - The content of the submissions made by any party to the Minister in developing the NES shed no light on the construction questions at issue in the present proceeding;
  - The content of the submissions made to the Commission during award modernisation are not a substitute its reasons for decision;
  - To the extent that the discussion raises the question of the utility of breach of award provisions, it omits to mention that the *Fair Work Act*, unlike its predecessors, does not limit Courts in enforcement proceedings to making only pecuniary penalty orders or orders to compensate an underpayment;/non-payment of wages and entitlements<sup>1</sup>.
  - We otherwise refer to and repeat the submissions at paragraph 2 above.
  
7. In relation to paragraphs 33 of the submission, the matters that require determination now have not already been determined by the Award Modernisation Full Bench (nor could they have been given the terms of the *Fair Work Act* were not settled at the time its decision was made). The reasons of the Award Modernisation Full Bench give no indication that it ruled upon the permissibility of the deduction provision or that it was called upon to resolve the issue of whether it had the power to include that term. The reasons merely indicate it was convinced of the merits of the term but resolved to improve the drafting of it.
  
8. Paragraphs 34-60 seek to argue, by reference to historical considerations, that the capacity of employers to deduct monies where notice is not given by an employee is a capacity contemplated by the phrase “notice of termination”. This analysis ignores the fact that “notice” and “payment” are separately identified in section 117 of the Act. It also ignores the fact that the test for the inclusion of “incidental” matters has changed from “incidental to the matters...and necessary for the effective operation of the award”<sup>2</sup> (emphasis added) – wherein the purpose of an award was to prevent, settle or maintain the settlement of an industrial dispute – to a test where permitted incidental matters are those which are

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<sup>1</sup> Compare section 539-545 of the *Fair Work Act* with sections 719-723 of the *Workplace Relations Act*. These matters are also relevant in light of the submissions made by the Ai Group on merit considerations

<sup>2</sup> See for example section 89A(6) of the *Workplace Relations Act* [1996-2005]

“incidental to a term that is permitted or required...and essential for the purpose of making a particular term operate in a practical way”<sup>3</sup> (emphasis added).

9. Paragraphs 61-62 are no answer the matters raised at paragraphs 36-43 of our initial submissions.

### **Reply to submissions of NatRoad**

10. In response to paragraphs 23-43:

- We concur that the mere fact that provision may be characterised as imposing a penalty does not mean that the provision is not capable of being included in an award. That characterisation does not however conclude the necessary inquiry;
- We do not concur that an employee who suffers the penalty in clause E.1(c) is thereby immune from prosecution for breach of clause E.(1)(a). The practical likelihood of prosecution, at least by the employer, is reduced where the penalty is applied, but this is a different proposition.
- The submissions are no answer to the matters raised at paragraphs 38-39 of our initial submissions.

11. We otherwise submit that, even if NatRoad’s submissions as to section 142 are correct, they fail to engage with the fact that for a term to be permitted in a modern award it must not only pass through the tests referred to in section 136(1) but it must also not fail the tests referred to in section 136(2). In particular, NatRoad does not deal with section 55(1), or fully with sections 155 and 151.

### **Submission of Australian Business Industrial & NSW Business Chamber**

12. We concur with paragraph 2.16 of the submissions. However, the “work around” offered in paragraph 2.17 is unavailable for the reasons set out in paragraphs 36-40 of our initial submissions.

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<sup>3</sup> *Fair Work Act* s. 142

13. Paragraphs 2.18 to 2.21 proceed on the erroneous assumption that satisfaction of section 142 alone is sufficient to ensure a clause is permitted in a modern award.

Australian Council of Trade Unions