Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Plain Language Drafting – Standard Clauses

(AM2016/15)

4 October 2016

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AM2016/15 PLAIN LANGUAGE DRAFTING – STANDARD CLAUSES

1. INTRODUCTION

1. On 17 August 2016, the Fair Work Commission (**Commission**) issued directions regarding the plain language drafting of 'standard' award clauses, those being:

    - the award flexibility term;
    - the consultation term;
    - the dispute resolution term;
    - provisions relating to the termination of employment; and
    - provisions relating to redundancies.

2. The directions require interested parties to file submissions regarding the plain language draft clauses. Specifically, where it is asserted that a redrafted clause has a different legal effect to the corresponding clause in the current award, the parties' submissions are to specify:

    - the legal effect of the clause in the current award;
    - the legal effect of the clause in the plain language re-draft; and
    - an explanation of how they differ.

3. Further, where it is asserted that a clause in the plain language draft does not meet the modern awards objective, the submissions filed are to specify why this is the case.

4. The Australian Industry Group (**Ai Group**) files this submission pursuant to the aforementioned directions.

5. Whilst we support the proposition that awards should be simple and easy to understand, and we acknowledge the Commission's efforts in developing a modern awards system that is so, we remain steadfast in our view that the desire for consistency and simplicity should not unnecessarily override the preservation of the legal effect of the 'standard award terms' that are here to be considered. This is particularly so having regard to the fact that many of these

standard clauses resulted from major test cases. Ai Group has had (and continues to have) significant involvement in such proceedings, including by way of advancing a merit case before the Commission and its predecessors, as well as participating in often lengthy and contentious processes associated with the settlement of orders.

6. With test case provisions, there are often Court and/or Full Bench Commission decisions of relevance to the interpretation of the provisions. These include the initial relevant Commission test case decisions as well as decisions concerning disputes that have arisen about the interpretation of the provisions. In many cases, such decisions over the years have ultimately led to employers and employees gaining a good understanding of the meaning of the test case provisions, including how the provisions are to be applied in particular (usual and unusual) circumstances. It is important that the plain language drafting exercise does not lead to disputation over award provisions that are currently settled and well-understood. There is significant risk of this unless great care is taken by the Commission.

7. Also, some of the current test case provisions were the outcome of extensive conciliation processes before the Commission, and ultimately consent between peak councils of employers and employees. It is important that the plain language drafting exercise does not unnecessarily disturb these consent provisions and lead to disputation.

8. It is of course trite to observe that the redrafting of any of the standard clauses which results in substantive changes to their application or effect may have a significant impact on employers and employees covered by the modern awards system; particularly given their inclusion in virtually all modern awards.

9. Having regarding to the statements issued by the Commission to date regarding the plain language redrafting of the standard clauses, as well as the aforementioned directions, it is not clear to us whether the substantive changes that arise from the redrafting are so intended, or whether they are in fact an inadvertent consequence of the redrafting process. That this process is designed to redraft the standard clauses in "plain language" suggests that it is

not directed to introducing variations to minimum terms and conditions of employment. To the extent that the redrafting of a particular provision reflects a substantive change, the basis upon which that change is proposed is also not evident. To our knowledge, there is no material before the Commission in these proceedings to date that would enable it to conclude (or provisionally conclude) that the substantive changes that arise from the redrafting are necessary to meet the modern awards objective, as required by s.138.

10. These circumstances place organisations such as ours in some difficulty, as it is not clear whether the submissions to be filed are to be limited to the legal effect of the clause or whether it is anticipated that parties effectively mount a merit case in response to the substantive changes proposed.

11. Given the timeframes contemplated for the filing of submissions regarding the redrafted clauses, and the absence of any directions for the filing of evidence, we have here sought to address each of the redrafted standard provisions on the following bases:

- Where the legal effect of a provision has been altered in a manner that we consider problematic, we have identified this for the Commission and provided an explanation as to why we consider that the redrafted clause should not be adopted. Wherever possible, we have also proposed an appropriate amendment to the redrafted clause.

- Whilst we have addressed, in summary form, the merit bases upon which we argue that the substantive changes identified should not be made, we have not done so comprehensively. Rather, it is our respectful submission that any such variations should not be made absent an opportunity for parties to mount a merit case in support and in opposition to the changes proposed, including an opportunity to call evidence. Having considered the parties' submissions filed pursuant to the aforementioned directions, should the Commission form the view that any one of the substantive changes effected by the redrafting ought to be made, a separate process should be instituted for dealing with such proposals.

2. CLAUSE A: AWARD FLEXIBILITY FOR INDIVIDUAL ARRANGEMENTS

Clause A.1 – 'how terms of this award … applies to them'

12. Section 144(1) of the Act requires the inclusion of a flexibility term in all modern awards, which enables an employee and employer "to agree on an arrangement varying the effect of the award". Section 144(4)(a) states that the flexibility term must identify the terms of the modern award, "the effect of which may be varied by an individual flexibility arrangement". The Explanatory Memorandum to the *Fair Work Bill 2008* in this regard states: (emphasis added)

> 570. Clause 144 requires a modern award to include a flexibility term. A flexibility term is a term that enables an employee and his or her employer to agree on an individual flexibility arrangement that will vary the operation of the award to meet the genuine needs of the employee and the employer. For example, an individual flexibility arrangement might provide for varied working hours to allow parents or guardians to drop off or pick up children from school where this suited the business needs of the employer.

13. As can be seen, the Act contemplates an ability to depart from specific terms of an award in a manner that would vary the effect or the operation of the award. Section 144 is sufficiently broad in its terms to allow for the model flexibility term to permit an individual flexibility arrangement that involves an award term (or award terms) applying to an employee in a way that is different to that prescribed in the award, as well an agreement that an award term (or award terms) will not apply at all.

14. The current clause 4.1 reflects this. It states: (emphasis added)

> Notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of certain terms of this award … The terms the employer and the individual employee may agree to vary the application of, are those concerning …

15. In our view, an ability to vary "the application of" certain award terms includes an ability to agree that an award term (or award terms) will not apply to an employee. For example, an employer and employee could agree that an award clause stipulating that ordinary hours cannot be worked on a weekend does not apply to an individual employee. Of course it also enables an agreement as to the *manner* in which a particular clause will apply.

16. We are concerned that the redrafted clause A.1 may give rise to a contention that an agreement of the nature contemplated by the Act and the current provision cannot be reached. This is because the clause allows for an agreement as to "how the terms of this award … applies to [the employee]". The provision appears to presuppose that the relevant provision will apply to the employee and allows for deviation as to the manner in which it will apply.

17. We acknowledge that the redrafted provision may be read such that the *manner* in which a particular award clause is to apply to an employee is that it will *not* apply. However, we do not consider that this is sufficiently clear on the face of the redrafted provision and that the clause may instead give rise to uncertainty and disputation in this regard.

18. For the purposes of maintaining the clarity that is presently contained in clause 4.1 as well as ensuring that the operation of the clause is not inadvertently narrowed, we propose that clause A.1 be amended as follows:

> Despite anything else in this award, an employee who has started employment may agree in writing with the employer to vary ~~how~~ the application of terms of this award relating to any one or more of the following ~~applies to them~~: …

Clauses A.1(b) – (e) – hyperlinks

19. The text at clauses A.1(b) – (e) has been underlined. We proceed on the basis that this is intended to indicate that a hyperlink will be inserted in each instance, which leads readers of the award to a relevant clause.

20. It is trite to observe that the relevant provisions relating to any one of the subject matters identified at clauses A.1(b) – (e) may be located disparately in the award. That is to say, it cannot be assumed that, for example, all "allowances" are located in a single part of the award to which a hyperlink can lead the reader.

21. Take for instance the *Exposure Draft – Clerks Private Sector Award 2015*, published on 7 September 2016. It contains various wage and expense related allowances at clause 11. Pursuant to the model flexibility clause, an IFA could be made to vary the application of any of the subclauses there contained. Shift

allowances can be found at clause 14.4. We consider that they too can be the subject of an IFA pursuant to subclause A.1(b). To this extent, a hyperlink from clause A.1(b) to only clause 11 (or only to clause 14.4) would be misleading.

22. We acknowledge that as a result of the redrafting in the exposure draft, the shift allowances, whilst so identified in the heading, are now referred to as "penalty rates" at clause 14.4(c). The difficulty identified nonetheless subsists, as other "penalty rates" can also be found at, for instance, clauses 13.3, 13.4(b) and 14.6. A hyperlink from clause A.1(d) to any one of the aforementioned provisions but not the others would be similarly misleading. The same issue arises again in respect of "overtime rates" as identified at clause A.1(c) which, in the *Exposure Draft – Clerks Private Sector Award 2015* can be found at clauses 13.2 and 14.5.

23. Whilst we appreciate that the underlying intention of inserting hyperlinks is to improve accessibility to the model flexibility clause, particularly for those who are not familiar with the modern awards system, we are concerned that it may in fact have the effect of suggesting a narrower application of the model term in instances where provisions relating to any of the identified matters are located in various parts of the award, but a single hyperlink is inserted that directs the reader to only one of those parts. We do not consider that the present absence of such hyperlinks has created any difficulty in ascertaining the relevant provisions that can be varied pursuant to an IFA and on that basis, do not consider the insertion of hyperlinks necessary.

Clause A.1(a) and Note – hyperlinks

24. For the reasons articulated above, we do not consider that hyperlinks to relevant award clauses should be inserted in the proposed note regarding clause A.1(a). For instance, in the *Exposure Draft – Clerks Private Sector Award 2015*, provisions relating to hours of work can be found at clause 8 in respect of employees other than shiftworkers and at clause 14 in relation to shiftworkers.

25. We also note that as a result of the potential breadth of clause A.1(a), various provisions could fall within its ambit; an assessment of which would require careful consideration on an award-by-award basis. Any iteration of the proposed note that potentially narrows the scope of clause A.1(a) is opposed by Ai Group.

Clause A.5 – 'on its making'

26. The current clause 4.3(b) specifies that an individual flexibility agreement must result in the employee being better off overall in the following terms: (emphasis added)

> The agreement between the employer and the individual employee must … result in the employee being better off overall <u>at the time the agreement is made</u> than the employee would have been if no individual flexibility agreement had been agreed to.

27. As can be seen, the provision specifies, in a temporal sense, the point in time at which the agreement must result in the employee being better off overall; that being, when the agreement is first made. Importantly, the clause does not require an assessment as to whether an employee will be better off overall throughout the course of the agreement's operation.

28. The text underlined above was inserted during the two year review of modern awards, as a consequence of the award flexibility common issue proceedings:

> [153] The second observation is that the employee must be "better off overall" at the time the IFA is made. In other words the requirement to meet the BOOT is not a continuing obligation over the life of the IFA. The 2008 AIRC Full Bench dealt with this issue at paragraph [180]:
>
> > "The no-disadvantage test should be applied as at the time the agreement commences to operate. We are not satisfied that the test should be continuously applied over the life of the agreement. This would add an extra process requirement to agreement-making and introduce an element of ongoing uncertainty. It is relevant to point out that the provision for termination on notice, which we deal with later, provides some additional protection against disadvantage arising during the life of the agreement. Some parties suggested that we should include provision for a public interest test in the model clause. We have decided not to do so because of the uncertainty which would result."
>
> …

[159] We do, however, think that the model flexibility term should be amended to make it clear that the reference to 'the employee being better off overall' in clause 7.3(b), refers to when the IFA is made.[1]

29. The redrafted clause A.5 is expressed in the following terms: (emphasis added)

An agreement must result in the employee being better off overall <u>on its making</u> than if the agreement had not been made.

30. In our view, the redrafted clause is less clear than the current provision. Whilst we appreciate that the phrase "on its making" is likely intended to carry the same meaning as the current clause, we do not consider that this is clear. Furthermore, we cannot identify any rationale for altering the redrafting of the current clause in circumstances where it plainly articulates the test to be applied and *when* it is to be applied. To this extent, the redrafted provision does not advance s.134(1)(g) of the Act.

31. We are also concerned that the redrafting arguably varies the manner in which the "better off overall" test is to be applied. That is, the proposed clause may be interpreted as requiring that the employee will be better off overall when made and thereafter, on an ongoing basis. Clause D.5 does not definitively reflect the Commission's decision cited above, that the better off overall test is to be applied when the agreement is made and that it is not to be continuously applied over the life of the agreement. For the reasons articulated by the Full Bench, we oppose a substantive variation to the model clause in this manner. Specifically, it could result in significant uncertainty and create obvious difficulties associated with the application of the "better off overall" test.

32. For these reasons, clause A.5 should be amended as follows:

An agreement must result in the employee being better off overall <u>at the time the agreement is made</u> ~~on its making~~ than if the agreement had not been made.

[1] *Modern Awards Review 2012 – Award Flexibility* [2013] FWCFB 2170 at [153] – [159].

Clause A.6(d) – 'show how the agreement results in the employee being better off overall'

33. It is curious that the current use of the word "detail" in clauses 4.4(c) and (d) have been redrafted differently in clauses A.6(c) and A.6(d). The former translates "detail" to "set out", which in our view is a more appropriate approach. The basis upon which the draftsperson has used alternate terminology in clause A.6(d) and whether the resulting alteration in meaning is in fact intended, is unclear.

Clause A.6(d) – 'on its making'

34. For the reasons articulated above, and in the interests of ensuring internal consistency, clause A.6(d) should be amended as follows:

> show how the agreement results in the employee being better off overall <u>at the time the agreement is made</u> ~~on its making~~ than if the agreement had not been made;

Clause A.6(d) – note or definition about "better off overall"

35. The draftspersons comments suggest that a note or definition about "better off overall" "would be beneficial if this could be agreed". Nonetheless, the redrafted provision itself does not contain such a proposal.

36. It is trite to observe that an assessment as to whether an employee will be better off overall is an inherently subjective one, that must be made having regard to all relevant circumstances, including the employee's personal circumstances and, in our view, the receipt of non-monetary benefits. The following extract from the Explanatory Memorandum for the *Fair Work Bill 2008* clarifies that non-monetary benefits can be taken into account: (emphasis added)

> Illustrative example
>
> Josh works as a membership consultant at a gymnasium. Under the enterprise agreement applying to his employment, the ordinary hours of work are 37 ½ hours each week to be performed in a span between 8am and 6pm each day. Hours worked outside this span attract penalty rates. Josh's employer usually requires membership consultants to work from 9am to 5.30pm.
>
> In his spare time, Josh coaches an under-12s footy team. To do this, he needs to be able to leave work at 4pm on Tuesdays and Thursdays each week. He wants to start

work at 7.30am on these days, but usually this would attract a penalty under the terms of the agreement. The agreement allows the employer and an employee to make an individual flexibility arrangement that varies the terms of the agreement dealing with hours of work and penalty rates.

Josh approaches his employer and asks whether the employer will make an individual flexibility arrangement with him under which the employer agrees that Josh can work from 7.30am to 4pm on Tuesdays and Thursdays. Josh agrees that he will not be paid a penalty on these days, even though he starts work at 7.30am. Josh is genuinely happy to agree to this arrangement because it enables him to balance his work and personal commitments. The employer agrees to this arrangement.

The employer must ensure that Josh is better off overall under the individual flexibility arrangement than under the agreement. Often this will require the employer to make a comparison of the relevant financial benefits that the employee would receive under the agreement, and the agreement as varied by the individual flexibility arrangement. In Josh's case, however, he has agreed under the individual flexibility arrangement to give up a financial benefit (penalty rates) in return for a non-financial benefit (leaving work early). It is intended that, in appropriate circumstances, such an arrangement would pass the better off overall test. Because the better off overall test is being applied here to an individual arrangement, it is possible to take into account an employee's personal circumstances in assessing whether the employee is better off overall. Relevant factors in Josh's case that suggest the individual flexibility arrangement is likely to pass the better off overall test are:

- Josh initiated the request for the individual flexibility arrangement, suggesting that he places significant value on being able to leave work early to coach the footy team;
- Josh genuinely agreed to the arrangement;
- the period of time falling outside the span of hours is relatively insignificant. It is only one hour out of the 37 ½ hour ordinary week that Josh works.

37. The formulation of a "definition" for the term "better off overall" is fraught with difficulties.

38. During the two year review, consideration was given by a Full Bench of the Commission as to whether the model clause should be amended to give greater clarity to whether the relevant assessment could include consideration of non-monetary entitlements:

[151] The model flexibility term provides that an IFA must 'result in the employee being better off overall than the employee would have been if no individual flexibility agreement had been agreed to' (clause 7.3(b)). Two observations may be made about this requirement.

[152] The first relates to the meaning of the expression 'being better off overall'. No party in the proceedings before us contended that this expression in the model flexibility term meant anything other than a reference to the BOOT. Section 193 sets out the circumstances in which an enterprise agreement passes the BOOT, relevantly:

> "... if FWC is satisfied, as at the test time, that each award covered employee ... for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee' (s.193(1)).
>
> …
>
> [154] A number of employer submissions supported varying the current model flexibility term to 'provide greater clarity on the treatment of non-monetary benefits' in the assessment of the BOOT. In his oral submission Mr Mammone, on behalf of ACCI, pointed to some uncertainty in relation to the proper interpretation of the BOOT.
>
> [155] The uncertainty referred to relates to the treatment of what are described as 'non-monetary benefits' in the application of the BOOT. In this context reference was made to the apparent inconsistencies between the illustrative example on p.137 of the Explanatory Memorandum to the *Fair Work Bill 2009*; the *FWO Best Practice Guide 3: 'Use of individual flexibility arrangements*'; and the Bupa decision.
>
> …
>
> [157] We acknowledge that there is a degree of tension between the illustrative example in the Explanatory Memorandum, the FWO Best Practice Guide and the Bupa decision (albeit that the Bupa decision dealt with the NDT, not the BOOT). <u>But we are not persuaded that it is appropriate for us, in these proceedings, to address that issue.</u>
>
> [158] <u>Observations about the application of the BOOT and the matters which can be taken into account in making such an assessment are best made in the context of a particular case, rather than in the abstract.</u> Any reconsideration of the Bupa decision should be in an appropriate context, such as an application to approve an enterprise agreement, and any party seeking such a reconsideration should make application (sic) to have the matter referred to a Full Bench, pursuant to s.615A of the FW Act.[2]

39. We respectfully agree with the Full Bench's conclusion that any observations as to the application of the "better off overall" test are best made in the context of a particular case, rather than in the abstract. This is especially so given the inherently subjective evaluation required and the potentially broad range of circumstances that may be relevant, many of which may not form part of the parties' or Commission's contemplation when considered in the abstract.

40. For these reasons, we respectfully submit that in the context of these proceedings, the Commission ought not to proceed to insert a definition or note that deals with the meaning or application of the "better off overall" test.

[2] *Modern Awards Review 2012 – Award Flexibility* [2013] FWCFB 2170 at [151] – [158].

Clause A.10 – 'of any kind'

41. Clause A.10, in essence, prohibits the making of an agreement under duress or coercion: (emphasis added)

> The employer and the employee must genuinely agree, without duress or coercion of any kind, to the variation of the term, or each variation of a term provided for by an agreement.

42. The text underlined above is entirely superfluous and should be deleted. It does not appear in the current clause and its insertion in the redrafted provision does not serve any apparent purpose, apart from unnecessarily lengthening the clause.

Clause A.10 – 'must genuinely agree … to the variation of the term, or each variation of a term, provided for by an agreement'

43. Section 144 of the Act states that each modern award must contain a flexibility term and specifies the requirements for such a term. Specifically, s.144(4)(b) stipulates that the flexibility term must "require that the employee and the employer genuinely agree to any individual flexibility arrangement". That is, the award term must require that any individual flexibility arrangement is genuinely agreed between the employer and the employee. In our view, this encapsulates an agreement to in fact make an individual flexibility arrangement as well as the specific terms of that arrangement.

44. The redrafted clause A.10 potentially departs from the legislative requirement at s.144(4)(b):

> The employer and the employee must genuinely agree, without duress or coercion of any kind, to the variation of the term, or each variation of a term provided for by an agreement.

45. We consider that the proposed clause is unduly complex and to this end, does not advance s.134(1)(g) of the Act.

46. For these reasons, we submit that clause A.10 should be redrafted as follows (noting also the issue we identified above):

The employer and the employee must genuinely agree, without duress or coercion ~~of any kind~~, to ~~the variation of the term, or each variation of a term provided for by an~~ any agreement made.

Clause A.14 – 'and in clause A'

47. Presently, a note appears following clause 4.8 in the following terms:

> NOTE: It any of the requirements of s.144(4), which are reflected in the requirements of this clause, are not met then the agreement may be terminated by either the employee or the employer, giving written notice of not more than 28 days (see s.145 of the Act).

48. The note refers to and summarises the effect of s.145(4), but does not create a substantive right in addition to that provided by the Act.

49. Section 145 applies if an individual flexibility arrangement is made pursuant to the model clause and the arrangement does not meet one of the requirements set out in s.144. In such circumstances, the flexibility term contained in the award is "taken to provide" that the arrangement can be terminated in one of two ways:

- by the employee or the employer, giving written notice of not more than 28 days; or
- by the employee and the employer at any time if they agree, in writing.[3]

50. This note was inserted into all modern awards during the two year review of modern awards, after careful consideration given by a Full Bench of the Commission to the appropriate notice period for terminating an individual flexibility arrangement. Relevantly, the Commission had regard to the operation of s.145 of the Act and the protection that it affords to employees. Whilst accepting that it does not enable the termination of an individual flexibility agreement in all circumstances, it ultimately determined that that was to be balanced against the need for greater certainty. As a result, the model clause was amended so as to extend the period of notice for terminating an agreement from 4 weeks to 13 weeks: (emphasis added)

[3] Section 145(4).

[160] Clause 7.8 of the model flexibility term in modern awards provides that an IFA may be terminated by consent (clause 7.8(b)) or by the employer or the individual employee giving four weeks' written notice of termination (clause 7.8(a)). The IFA ceases to operate at the end of the notice period.

[161] In these proceedings Greater Union and Birch, Carroll & Coyle have sought to vary clause 7.8(a) of the model flexibility term by deleting the reference to "four weeks' notice" and inserting "sixteen weeks notice." The application received general support from employer organisations and was opposed by the ACTU and the unions who made submissions in the proceedings.

…

[172] It is also relevant that employer organisations have consistently identified the four weeks' notice period as a disincentive to employers entering into IFAs. In addition to their submissions in these proceedings, employer organisations advanced similar contentions to the FW Act Review Panel. At page 107 of the Review Report the Panel states:

> "The capacity for an employee to unilaterally terminate an IFA with 28 days notice was cited by many as a key disincentive to use IFAs."

[173] Further, after giving the issue extensive consideration, the Panel recommended that the four weeks' notice period be extended to 90 days.

[174] For our part, we accept that the provision of a longer unilateral termination notice period would provide greater certainty to the employer and individual employee parties to IFAs. A longer notice period would also reduce an existing disincentive for employers entering into IFAs.

[175] But these considerations need to be balanced against the factors cited by the 2008 AIRC Full Bench in support of their adoption of a four week notice period, that is:

- unforeseen developments can render an IFA unacceptable to one of the parties and substantially unfair; and
- it provides some protection for employees who through ignorance or for some other reason make an IFA which materially disadvantages them.

…

[178] The central issue for us is the balance between the considerations identified by the 2008 AIRC Full Bench (see paragraph [175] above), that is:

- employer concerns that provision for termination on notice will lead to an unsatisfactory level of uncertainty for employers; and
- providing some protection for employees who make an agreement which materially disadvantages them.

[179] Section 145 of the FW Act is also relevant in this context:

…

[180] In effect s.145(4) imports a termination provision into an award flexibility term which is *in addition* to any other means of termination of an IFA that the flexibility term provides. Subsection 145(4) states that flexibility term is taken to provide that the purported IFA can be terminated by agreement or by either the employee, or the employer, giving written notice of not more than 28 days.

[181] As previously mentioned, s.145 was not part of the legislative framework at the time of the 2008 AIRC Full Bench decision. This legislative change constitutes a

'significant change in circumstances' within the meaning of the June 2012 Transitional Review decision. The change is significant because it provides a legislative safeguard which addresses the central rationale for the 2008 AIRC Full Bench decision. The fact that a review of the model flexibility clause was specifically contemplated by the AIRC at the time it was determined is also an important factor. …

[183] Contrary to the ACTU's submissions we are persuaded that s.145 (in conjunction with s.144) sufficiently protects an employee from being disadvantaged by an IFA.

…

[185] One of the requirements in s.144 is that the IFA must result in the employee being better off overall than the employee would have been if no IFA were agreed to (s.144(4)(c)). If an employee party to a purported IFA is not better off overall then s.145(4) applies and the IFA may be unilaterally terminated in accordance with s.145(4). The same situation pertains in the event that the employee and employer have not 'genuinely agreed' to the IFA (see s.144(4)(b) or where the IFA has not been signed by the employee and employer parties (see s.144(4)(e)) or where the employer has failed to ensure that a copy of the IFA is given to the employee (s.144(4)(f)).

[186] We accept that s.145 does not apply in all circumstances. For example, it would not give rise to a right of termination if circumstances changed after the IFA was made such that it no longer operated to the mutual benefit of both parties. But, as we have noted earlier, this consideration needs to be balanced against the greater certainty afforded to both parties by a longer notice period.

[187] We are persuaded that it is appropriate to increase the period of notice specified in clause 7.8(a) of the model flexibility term. … Accordingly, we propose to vary clause 7.8(a) of the model flexibility term by deleting the reference to 'four weeks' and inserting a reference to '13 weeks'. We are satisfied that such a variation has merit, will enhance the operational effectiveness of the model term and is consistent with the modern awards objective.

[188] In order to ensure that parties to IFAs are aware of the termination provisions in s.145(4) we will insert an appropriate note at the end of clause 7.8 of the model flexibility term.[4]

51. As can be seen from the passage extracted above, the Commission determined, having regard to the material before it, that a 13 week notice period coupled with s.145 of the Act provides an appropriate balance that is consistent with the modern awards objective.

52. The note now appears as a substantive provision at clause A.14 and is in the following terms: (emphasis added)

> The period of notice required under clause A.12 is reduced to a period of not more than 28 days if an agreement made under this clause does not meet a requirement set out in both section 144(4) of the Fair Work Act and in clause A.

[4] *Modern Awards Review 2012 – Award Flexibility* [2013] FWCFB 2170 at [160] – [188].

53. In addition to enabling the termination of an individual flexibility arrangement where it does not meet the requirements contained in s.144, the clause also enables the termination of an individual flexibility arrangement where it does not meet the requirements in clause A. It is important to appreciate that whilst the requirements of s.144 are "reflected in [the model] clause" (as per the current note), it also imposes additional requirements or limitations.

54. For example, clause A.6 creates various requirements that go to the form of an individual flexibility agreement, but not its substance; which are not otherwise contained in the statute:

- the written agreement must state the names of the employer and employee;
- the written agreement must identify the award term or terms to be varied;
- the written agreement must set out how the award term, or each term, is varied; and
- the written agreement must state the date on which the agreement is to start.

55. If one of the above requirements is not satisfied, neither the award nor the Act presently permits the employer or employee to unilaterally terminate the arrangement at less than 13 weeks' notice.

56. Clause A.14, however, alters the position. In the circumstances described above, it would enable an employer or employee to terminate the individual flexibility arrangement with not more than 28 days' written notice. This is by virtue of the clause now stating that the notice period in clause A.12 is reduced if an individual flexibility arrangement does not meet the requirements "set out both in section 144(4) of the Fair Work Act and in clause A".

57. As we set out in the introductory section to this submission, this is an instance in which it is not clear whether it is intended that the substantive change arising from the redrafting of the current clause is in fact intended and if so, the basis upon which the Commission proposes that change. In any event, we submit that the current note should not be altered in the manner proposed, as it would inappropriately give primacy to a party's ability to terminate the agreement due to potentially minor and insubstantial deviations from the requirements of the model clause, which might otherwise be readily remedied. This is to be contrasted with the requirements imposed by s.144(4) of the Act, which go to the fundamentals of ensuring that any individual flexibility arrangement is genuinely agreed and ensures that the employee is better off overall, as well as basic procedural safeguards. Indeed we consider that minor defects in relation to requirements such as those at A.6 (which go to form rather than substance) could unfairly be relied upon by parties to circumvent the 13 week notice period required at clause A.12. This redrafted clause could potentially undermine the very purpose for which the notice period was so recently extended by the Commission.

58. In the absence of there being a sound basis for varying the note as proposed, it should instead be retained in its current form.

3. CLAUSE B: CONSULTATION REGARDING MAJOR WORKPLACE CHANGE

Clause B.1(b) – change to the timing of the discussions

59. The new wording in B.1(b) would change the obligation relating to the timing of the mandated discussions.

60. Clause 22.1(b)(ii) deals with the timing of discussions relating the range of matters identified in 22(b)(i). It provides that the discussions must *"…commence as early as practicable"*. In effect, the current clause mandates when the discussions about the range of identified matters must begin. The clause does not provide that full discussions must occur or be completed as early as practicable.

61. The corresponding proposed clause B.1(b) provides that:

> (b) at the earliest practicable date, discuss with those employees and their representatives (if any):
>
> (i) when the changes are to be made; and
>
> (ii) their likely effect on employees; and
>
> (iii) the measures that are to be taken to avoid or reduce the adverse effects of the changes on employees

62. Under the proposed clause the obligation as to the timing of the discussion is not limited to the commencement of the discussion. Consequently, the new clause appears to suggest that the entire discussions must occur at the "earliest practicable date…"

63. The inclusion of the word "date" is also potentially problematic. It appears to require that all of the discussion will occur on a single day. The Macquarie Dictionary defines the term "date" to mean; *"1. A particular day, as denoted by some system for marking the passage of time…"*

64. The discussions contemplated by the current clause will sometimes occur over multiple days. Often, for various reasonable reasons, there are gaps between the commencement and conclusion of such discussions. There is no apparent

reason why an award term imposing a more restrictive obligation on the timing of the conduct of the relevant discussions would be *necessary*.[5]

65. The clause should be redrafted to reflect the current longstanding award obligation regarding the timing of the mandated discussions.

Clause B.2(b) – new requirement to set out matters connected to the changes

66. Existing clause 22.1(b)(iii) requires that an employer must provide, in writing, all relevant information *"…about the changes".*

67. Clause B.2(b) now requires that an employer must give a written notice that;

> "sets out any other matters connected with the changes that are likely to affect employees."

68. The requirement contained within the redrafted clause is broader than any obligation contained in the current award clause. This imposes an additional burden upon employers with no apparent justification. The reference to *"any other matters connected…"* with the change potentially compounds the adverse consequences.

Clause B – the employees to be consulted

69. The redrafting of clause B has expanded the obligations currently contained in clause 22.1(b)(i).

70. Clause 22.1 provides an obligation on employers relating to consultation regarding major workplace change. Clause 22.1(a) deals with obligations to notify. Clause 22.1(b) deals with obligations to discuss.

71. Clause 22.1 requires notification of employees "…who may be affected by the proposed changes and their representative*."* In contrast, clause 22.1(b) requires discussions with "the employees affected." The more onerous obligation to discuss only applies in relation to a narrower group. This distinction has been lost in the redrafted version of clause B.

[5] As contemplated by s.138

72. Clause B requires that the various obligations imposed under both 22.1 and 22.2 apply in relation to employees that may be affected. This imposes an unjustified new burden on employers.

B.6 – significant effects

73. **Clause B.6 is** drafted to look like a definition of the term "significant effects". It specifies what significant effects include. However, an important element of the current definition (the last sentence of clause 22.1(ii)) is now dealt with separately in B.5. We appreciate that the clause should be read as a whole but suggest that this approach is likely to result in a reader misinterpreting what constitutes a significant effect if they fail to read every subclause and instead simply skip to what appears to be the relevant definition.

74. Ai Group suggests that the provisions of B.5 be incorporated within B.6.

4. CLAUSE C: CONSULTATION ABOUT CHANGES TO ROSTERS OR HOURS OF WORK

75. Clause 22.2(d) has been omitted from the redraft and should be reinstated. The following extract from the Full Bench decision on the *Consultation clause in modern awards,*[6] highlights the importance of the provision:

> [25] The first is that s.145A does not confer a right on an employer to change an employee's regular roster or ordinary hours of work. It is not a source of power in that sense. The employer's power to change an employee's regular roster or hours of work must be found elsewhere - either in the contract of employment or in an industrial instrument, such as a modern award or enterprise agreement.
>
> - - -
>
> [47] A number of parties contended that the obligation to consult set out in the relevant term should be read subject to other provisions of the modern award such that the other provisions displaced the obligation to consult. An example serves to illustrate the proposition. If a modern award contained a provision which allowed an employer to vary an employee's regular roster on the giving of a specified period of notice (say 7 days) then the obligation to consult imposed by the relevant term would not apply.
>
> [48] We are not persuaded that the relevant term was intended to operate in the manner contended. As mentioned earlier, s.145A is not a source of power in that it does not confer a right on an employer to change an employee's regular roster or ordinary hours of work. The source of such a power must be found elsewhere - either in the contract of employment or in an industrial instrument, such as a modern award. It is significant that s.145A was enacted against the background of existing provisions in modern awards which provide employers with the right to change an employees regular roster or ordinary hours of work. It is also significant that s.145A does not state that the obligation to consult is subject to any other provisions in a modern award.
>
> [49] If the proposition advanced were accepted it would, to a significant extent, effectively render s.145A nugatory. The obligation to consult would have no operation in circumstances where the modern award entitled an employer to change an employees regular roster or ordinary hours of work. We are not persuaded that such a proposition is consistent with the terms of s.145A or its legislative purpose.
>
> [50] Section 145A is intended to impose a new, additional obligation to consult employees in circumstances where their employer proposes to change their regular roster or ordinary hours of work. There is no conflict between the imposition of such an obligation and existing modern award provisions permitting the variation of a regular roster or ordinary hours of work on the giving of a specified period of notice or pursuant to a facilitative provision. There is no impediment to the employer complying with both provisions. The employer may still implement the proposed change on the giving of the requisite notice, but will now be required to consult the employees affected before implementing such a change. As we have mentioned such consultation must provide the affected employees with a genuine opportunity to attempt to persuade the employer to adopt a different course of action. For these reasons the relevant term will make it clear that it is to be read in conjunction with other award provisions concerning the scheduling of work and notice provisions.

[6] [2013] FWCFB 10165

5. CLAUSE D: DISPUTE RESOLUTION

Clause D.1 – 'about the National Employment Standards'

76. The current clause 23.1 states that the clause applies to "a dispute in relation to the NES". This is consistent with s.146(b) of the Act, which states that a modern award must include a term that provides for a procedure for settling disputes "in relation to the National Employment Standards".

77. A recent decision of a Full Bench of the Commission gave consideration to the meaning of the phrase 'in relation to' in the context of s.437(2A) of the Act: (emphasis added)

> [25] The expression 'in relation to' is one 'of broad import' [citing *O'Grady v Northern Queensland Co Ltd* [1990] HCA 16; (1990) 169 CLR 356 at 374 per Toohey and Gaudron JJ]. In *O'Grady v Northern Queensland Co Ltd* McHugh J observed that the expression 'requires no more than a relationship, whether direct or indirect, between two subject matters' [citing: Ibid at 376. Also see *Office of the Premier v Herald and Weekly Times Pty Ltd* [2013] VSCA 79 at [71]; and *Nordland Papier AG v Anti-Dumping Authority* [1999] FCA 10; [1999] 161 ALR 120 at [25]]. Context is important in determining the connection to which a statutory provision is referring. In *Travelex Ltd v Commissioner of Taxation*, French CJ and Hayne J said ((2010) [2010] HCA 33; 241 CLR 510 at [25]):
>
> > 'It may readily be accepted that 'in relation to' is a phrase that can be used in a variety of contexts, in which the degree of connection that must be shown between the two subject matters joined by the expression may differ. It may also be accepted that 'the subject matter of the enquiry, the legislative history, and the facts of the case' are all matters that will bear upon the judgment of what relationship must be shown in order to conclude that there is a supply 'in relation to' rights [citations omitted].'[7]

~~78.~~ Whilst the above decision and those cited in it relate to the construction of the relevant phrase as it appears in contexts other than modern awards, we consider that they are nonetheless relevant to the construction of the phrase "in relation to" in the model dispute resolution clause. This is, at least in part, as the provision appears to take its terms from s.146(b) of the Act.

[7] *The Maritime Union of Australia* [2016] FWCFB 1894 at [25].

79. Clause D.1 instead states that the provision applies if a dispute arises "about the National Employment Standards". We do not consider that the term "about" is synonymous with the phrase "in relation to" and as a result, we contend that the legal effect of the current clause 23.1 has been altered.

80. Specifically, "about" is defined by the Macquarie Dictionary as meaning "of; concerning; in regard to". The use of the word "about" would appear to suggest that the very subject matter of the dispute must be the NES. This narrows the application of the clause when compared to that which presently appears in modern awards.

81. The proposition that the phrase "in relation to" and the word "about" are not inherently interchangeable is furthered when regard is had to s.146 of the Act, to which we have earlier referred. It mandates the inclusion of a term in each modern award that provides for settling disputes as follows:

> Without limiting paragraph 139(1)(j), a modern award must include a term that provides a procedure for settling disputes:
>
> (a) about any matters arising under the award; and
>
> (b) in relation to the National Employment Standards.

82. The legislature's decision to adopt differing nomenclature when describing the scope of the dispute resolution procedure with respect to the award and with respect to the NES suggests, in our view, that the application of the clause is intended to differ.

83. In addition to potentially altering the scope of the dispute resolution clause, to the extent that it presently permits a party to invoke it where a dispute arises in relation to the NES, we are concerned that the proposed clause D.1 would render the provision non-compliant with the requirement contained in s.146(b).

84. Accordingly, clause D.1 should be amended as follows:

> Clause D sets out the procedures to be followed if a dispute arises … ~~about~~ in relation to the National Employment Standards.

Clause D.3 – 'as soon as practicable'

85. The current clause 23.1 states that "the parties will endeavour to resolve the dispute in a timely manner by discussions between the employee or employees concerned and more senior levels of management as appropriate".

86. The clause requires that the parties endeavour to resolve the dispute and that they must do so in a manner that is timely. That is, the parties' efforts to resolve the dispute must be undertaken in a way that is time sensitive. The word "timely" is defined by the Macquarie Dictionary as "*occurring at a suitable time; seasonable; opportune; well-timed"*. An approach designed to cause delay or one that is tardy by its very nature would not be compliant with clause 23.1.

87. The redrafted clause D.3, by contrast, states that parties *"must try to resolve [the dispute] as soon as practicable at the workplace through discussion between the employee and employees concerned and more senior levels of management"*. It effectively introduces a temporal limitation within which the parties are to try to resolve the dispute; that being, the parties must try to resolve the dispute as soon as this can be done. The redrafted provision suggests a greater sense of urgency or immediacy than that in the current clause 23.1. It involves no consideration of the context, the circumstances, or what might be reasonable or appropriate having regard to such factors. In this way, we consider that the operation of clause 23.1 has been substantively altered.

88. It is trite to observe that the dispute resolution procedure is broad in its application. It may be utilised by parties who are in dispute about a very vast range of matters. Some such disputes may, by their very nature, require urgent attention and efforts directed towards resolution. Others, however, may arise in circumstances that do not warrant the absolute prioritisation of the matter or indeed would benefit from an approach that enables the parties to engage with one another in an informed and considered way.

89. For instance, a dispute might arise regarding the manner in which a specific modern award term was applied to an employee some months ago. The matter may be a complex one that requires retrieval and consideration of the

employee's employment records, discussion with various relevant personnel within the business and obtaining legal advice and/or representation by one or both parties. The issue may be one that, in the assessment of each party, would be assisted by such an approach.

90. Clause D.3 would require that the necessary course of action that would enable the resolution of the dispute "as soon as practicable" be undertaken by the parties, without regard for whether this would in fact be reasonable, effective or appropriate in the circumstances. Further, the redrafted provision may indeed be inconsistent with the underlying principle of the dispute resolution clause, which has been crafted to "emphasise the importance of resolution at the workplace"[8], without imposing deadlines or timeframes within which this is to occur.

91. To this end, the relevant element of clause D.3 is contrary to the need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)) and may have an adverse impact on business (s.134(1)(f)). There is no material before the Commission that might satisfy it that it that the imposition of a requirement that during the second stage of the dispute resolution procedure, parties must try to resolve the dispute as soon as practicable, is *necessary* to ensure that each award is achieving the modern awards objective.

92. For the reasons we have here articulated, the words "as soon as practicable" should be replaced with "in a timely manner".

Clause D.4 – 'the dispute is not resolved … through discussions as mentioned in clauses D.2 and D.3'

93. Clause D.4 specifies the circumstances in which a dispute can be referred to the Commission: (emphasis added)

> If the dispute <u>is not resolved</u> at the workplace <u>through discussions as mentioned in clauses D.2 and D.3</u>, a party may refer the dispute to the Fair Work Commission.

[8] *Award Modernisation* [2008] AIRCFB 717 at [19].

94. The effect of the provision is to permit the referral of a dispute to the Commission if the discussions have taken place at the workplace "as mentioned" in clauses D.2 and D.3 and the dispute remains unresolved.

95. The current clause 23.2 imposes a higher threshold. It enables parties to refer a dispute if:

- the dispute "is unable to be resolved"; and
- "all appropriate steps under clause 23.1 have been taken".

96. As can be seen, clause 23.2 requires that all appropriate steps must be taken under clause 23.1, before a dispute can be referred to the Commission. That is, discussions between the employee(s) and the relevant supervisor and subsequently between the employee(s) and more senior levels of management must have taken place. However this, in and of itself, is insufficient. In undertaking such discussions, all appropriate steps must be taken. A consideration of what such steps might be will differ, depending upon the circumstances of the dispute. It is reasonably foreseeable, however, that in certain circumstances, a requirement to take all appropriate steps may necessitate multiple discussions taking place between an employee and his/her supervisor over a period of time, coupled with other steps independently taken by each party in order to facilitate the resolution of the dispute.

97. Clause 23.2 also requires that despite all appropriate steps having been taken, the dispute is unable to be resolved.

98. This again reflects the AIRC's intent when the model term was crafted: (emphasis added)

> [19] The draft dispute resolution clause is designed to be simple, to emphasise the importance of resolution at the workplace, to encourage parties to agree on a process that suits them if the dispute reaches the Commission and, finally, to provide the Commission with the discretion and the power to ensure settlement of the dispute if the dispute is still unresolved. Generally we have not included reference to the dispute resolution provision in draft clauses dealing with particular conditions.[9]

[9] *Award Modernisation* [2008] AIRCFB 717 at [19].

99. The redrafted clause D.4 imposes a markedly lower threshold for the referral of disputes to the Commission and in this way, expands the Commission's jurisdiction to deal with disputes about matters under the award or in relation to the NES. All that is required is that the parties have engaged in some discussions as contemplated by clause 23.1 and the dispute remains unresolved. The provision creates no imposition as to the extent of the discussions that are to take place or the extent to which the parties are required to endeavour to resolve the dispute prior to referral to the Commission. Nor does the clause require that the dispute is unable to be resolved. It is adequate that dispute is not yet resolved.

100. The proposed clause allows parties to refer disputes to the Commission at a stage in the dispute resolution process that is earlier than that which is presently contemplated. To that end, the substantive operation of the clause has been altered in a manner that we consider problematic.

101. A provision that encourages parties to exercise their best endeavours in order to resolve a dispute at the workplace is, in our view, inherently sensible. It promotes cooperative relations between employers and their employees, absent formal proceedings and processes that can be time consuming and costly for all parties involved. Indeed we are concerned that a lowering of the applicable threshold for referring disputes to the Commission is that it may have the effect of exposing parties to additional expense by way of seeking advice and/or representation from a third party. Attendance at the Commission for such purposes can also be disruptive to a business' operations and may, in many circumstances, be a resource-intensive process.

102. We are not aware of any material before the Commission in these proceedings that might suggest that the lowering of the threshold in the manner proposed is necessary in the sense contemplated by s.138. It is not clear whether the change effected by the redrafting is one that is intended and if so, the basis for it. In any event, we consider that there are compelling reasons, such as those outlined above, which tell against the approach adopted in clause D.4. In our view, the verbiage that presently appears in clause 23.2 should be retained.

Clause D.6 – 'is not resolved through the agreed process mentioned in clause D.5'

103. Clause D.5 states that the parties may agree on the process to be followed by the Commission, but does not mandate or require such agreement; the provision is permissive in nature. Neither clause D.5, nor any other element of clause D expressly requires that the Commission must adopt any agreed process between the parties.

104. Nonetheless, clause D.6 proceeds on the basis of two assumptions:

- that a process has been agreed between the parties;
- that such a process was adopted by the Commission.

105. It is convenient to first address the second assumption. In our view, whilst s.595(2) grants the Commission broad discretion to deal with disputes in a manner that it considers appropriate, including those notified pursuant to the model dispute resolution clause, s.739(3) of the Act contemplates that the model term may limit the Commission's powers. By virtue of that provision, the Commission cannot exercise any powers so limited. Accordingly, a provision that mandates (explicitly or by implication) that the Commission must adopt a process agreed between the parties or one that requires that the Commission must, at the very least, have regard to any such agreement, can be included in a modern award. Therefore, if such a provision is included it will have effect.

106. The first assumption made by clause D.6 is problematic. It presupposes that the parties to a dispute will reach agreement as to the process to be adopted. In our view, however, such an assumption cannot properly be made. As the Commission is of course aware, there can be circumstances in which the parties are unable to agree. For instance, whilst one party may seek a recommendation from the Commission regarding the manner in which the dispute should be settled, this may not be agreed by the other party.

107. In addition, the provision does not cater for circumstances in which an agreement is not reached. That is, it does not contemplate the possibility that the parties cannot agree as to the process to be adopted and provide for what is to occur in such a situation. It is only "if the dispute is not resolved through the agreed process mentioned in clause D.5" that the Commission "may use any other method of dispute resolution" permitted by the Act that it considers appropriate. In this way, the clause purports to limit the exercise of the Commission's power to deal with a dispute in any way it considers appropriate (other than arbitration) pursuant to ss.595(2), however in so doing, it erroneously assumes that the parties will reach agreement as contemplated by clause D.5 (noting, as we have previously identified, that clause D.5 does not in fact mandate that such agreement must be reached).

108. We consider that there is general industrial merit in encouraging parties to a dispute to reach agreement as to the process to be adopted by the Commission. Such a clause would be in keeping with the underlying premise of facilitating cooperative workplace relations, which is otherwise reflected in the model clause. The clause should not, however, proceed on the basis that such agreement will necessarily be reached or have the effect of precluding the Commission from dealing with a dispute if an agreement is not reached.

Clause D.7

109. Existing clause 23.5 refers to an employer or employee having the ability to appoint a "person, organisation or association" to represent them. The clause recognises the important role of registered organisations of employers and employees in the workplace relations system. Consistent with the concepts in the current clause, clause D.7 should be reworded as follows:

'An employer or employee ~~party~~ may appoint any person, organisation or association ~~or body~~ to support or represent them in any discussion or process under clause D.

Clause D.8(b) – 'who is a party to the dispute'

110. Clause D.8(b) contains the words "who is a party to the dispute", which do not appear in the present clause. This wording could lead to arguments about whether or not a particular employee who is unreasonably refusing to comply with a direction to perform work is a "party" to a dispute. For example, often unions notify disputes to the Commission but clause D.8(b) only applies to employees.

111. Consistent with the current provision, the words *"any employee who is a party to the dispute must"* should be replaced with *"an employee must".*

6. CLAUSE E: TERMINATION OF EMPLOYMENT

112. We are concerned with a number of aspects of the proposed clause E, as set out below.

Clause E.1(a) and Table x – 'continuous service'

113. Clause E.1(a) of the proposed re-draft specifies that "*an employee must give the employer written notice of termination in accordance with Table x-period of notice*…" Table x then sets out the period of notice to be given by an employee relative to the employee's period of 'continuous service' with the employer.

114. Currently, awards link the notice of termination obligations imposed upon employees to the notice of termination obligations imposed upon employers through a provision typically cast in the following terms:

> The notice of termination required to be given by an employee is the same as that required of an employer except that there is no requirement on the employee to give additional notice based on the age of the employee concerned.

115. Through this approach, awards effectively ensure that employees have largely reciprocal obligations to those of their employers. The awards generally include a mere reference to the notice of termination provisions in the NES which regulate the amount of notice of termination that an employer is to provide.

116. The approach adopted in the redrafted clause differs in that clause E.1 does not contain any reference to obligations imposed upon employers. Instead, it operates entirely independently.

117. Ai Group does not have any inherent opposition to the clause being redrafted so that it expressly identifies the period of notice to be provided. However, if this approach is adopted, a difficulty arises from the absence of a definition of "continuous service" in the award and the removal of the connection to the FW Act. Ai Group is concerned that this could result in the reference to "continuous service" in the award being interpreted in a different manner to that contained in the legislation. The meaning of "continuous service" under the Act is a

contentious issue.[10] For example, in Ai Group's view, under the Act casual service is not counted for the purposes of calculating notice of termination, including for employees who have converted to permanent employment.

Clause E.1(b) – 'the employer may deduct…'

118. We are concerned that the proposed clause E.1(b) lacks sufficient clarity. In particular, we are concerned that the redrafted clause does not adequately and clearly specify:

- from what payments an employer may deduct the relevant amount; and
- what amount may be deducted.

119. The wording in the current clause in most of the modern awards achieves this level of clarity. For example, clause 22.2 of the *Manufacturing and Associated Industries and Occupations Award 2010* (**Manufacturing Award**) provides:

> If an employee fails to give the required notice the employer may withhold from any monies due to the employee on termination under this award or the NES, an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by this clause less any period of notice actually given by the employee.

120. The first part of the above provision clearly specifies what amounts an employer may deduct from (i.e. an employer may withhold "*from any monies due to the employee on termination under this award or the NES*"), whilst the second part clearly sets out what amount may be deducted (i.e. "*an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by this clause less any period of notice actually given by the employee*").

[10] For example, we note that whether or not casual service of an employee who subsequently converts to permanent employment is recognised as part of a period of continuous service for the purposes of the FW Act is a matter that is being contested in the casual employment common issues proceedings.

121. In contrast, the proposed re-draft in clause E.1(b) provides:

> "(b) If an employee fails to give the required period of notice in accordance with Table x- Period of notice, the employer may deduct the amount that would otherwise be payable to the employee (on termination under this award or the National Employment Standards) for the period of notice not given by the employee."

122. The clause does not adequately delineate the amount to be deducted and where that amount is to be deducted from.

123. We suggest that the word "from" should be inserted after the word "deduct" (to make it clear where the amounts are being deducted from).

124. Also, we suggest that the words "*for the period of notice not given by the employee*" should be replaced with the words "*an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by the employee in Clause E.1(a) and Table x less any period of notice actually given by the employee."*

125. These changes would ensure that the awards are simpler and easier to understand, as contemplated in s.134(1)(g) of the FW Act.

Clause E.1(b) – 'in accordance with Table x- Period of notice'

126. Clause E.1(b) permits an employer to make a deduction if an employee "*fails to give the required period of notice in accordance with Table x-period of notice*."

127. As the notice requirements for an employee on termination are specified in clause E.1(a) (of which Table x is only a part), we submit that the reference to *"Table x-period of notice"* in clause E.1(b) should more accurately say *"Clause E.1(a)" or "Clause E.1(a) and Table x-period of notice."*

Clause E.1(b) – 'the amount'

128. Clause E.1(b) refers to "*the amount that would otherwise be payable to the employee*." It is implicit in the term "the amount" that there is *in fact* an amount payable to an employee, but there may not be (for example, an employee may have used up all of his or her leave entitlements and have no wages owing at the time of resignation).

129. Given this, we contend that the term "the amount" should be replaced with the words "any amounts" to make it clear that there may or may not be amounts owing to the employee. This terminology would be consistent with the words used in the current clause in most of the modern awards.

Clause E.1(b) – '(on termination under this award or the National Employment Standards)'

130. The proposed clause E.1(b) refers to the amount "*that would otherwise be payable to the employee (on termination under this award or the National Employment Standards)…"*

131. We suggest that the brackets around the words "*on termination under this award or the National Employment Standards*" should be removed because these words are critical to the determination of the amounts that would otherwise be payable to the employee. The brackets are not contained in the current award clause and there is no reason for them to be included in the redraft as they do not make the clause any clearer.

Clause E.1(b) – alternate clause

132. Given the above concerns, Ai Group suggests that clause E.1(b) should be drafted as follows:

> "(b) If an employee fails to give the required period of notice in accordance with Clause E.1(a) and Table x, the employer may deduct from any amounts that would otherwise be payable to the employee on termination under this award or the National Employment Standards, an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by the employee ~~in Clause E.1(a) and Table x~~ less any period of notice actually given by the employee."

7. CLAUSE G: TRANSFER TO LOWER PAID JOB ON REDUNDANCY

133. We have a number of concerns with the proposed clause G. These are set out below in the order they appear in the clause.

Clause G.1(a) – 'no longer requires the job… to be performed by anyone'

134. The proposed clause G.1(a) specifies that clause G applies if the employer *"no longer requires the job (**the old job**) being performed by an employee to be performed by anyone*."

135. As this clause is purporting to specify when a redundancy occurs for the purposes of determining when an employee could be transferred to a lower paid job by reason of redundancy, we submit that the words "*except where this is due to the ordinary and customary turnover of labour*" should be inserted after the word "anyone" such that clause G.1(a) reads as follows:

> (a) no longer requires the job (**the old job**) being performed by an employee to be performed by anyone, except where this is due to the ordinary and customary turnover of labour; and

136. This would align the application of the obligation under the clause to the circumstances where redundancy pay is payable under the Act. It would also align the application of the clause with the test case award provisions. The definition of "redundancy" in the test case award clauses did not include termination of employment arising from the "ordinary and customary turnover of labour".[11]

Clause G.1(b) – 'wishes to transfer the employee'

137. Clause G.1(b) adds to clause G.1(a) and specifies that clause G applies if the employer *"wishes to transfer the employee to a new job (the new job) at a lower classification and lower hourly rate of pay."*

[11] For example, see the definition of "redundancy" in the award clauses arising from the 2004 *Redundancy Case* decision (PR032004) such as clause 4.4.1(b) in the *Metal, Engineering and Associated Industries Award 1998.*

138. Given that the current clause in the majority of the modern awards uses the words "*where an employee is transferred to lower paid duties*" before setting out the requirements relating to such a transfer, we contend that the words "*wishes to transfer the employee*" should be changed to "*the employee is transferred to a new job*" or "*the employee is going to be transferred to a new job*."

139. Either of these amendments would better reflect the fact that the requirements in clause G that follow only apply if an employee is in fact being transferred to a new job, not merely if an employer "*wishes to transfer the employee to a new job.*" The current wording in the redraft is potentially misleading because it could suggest that an employer needs to comply with the sub-clauses in clause G (for example, by providing written notice of the transfer to a new classification in accordance with clause G.2) as soon as the employer has a desire to transfer an employee to a new job.

G.2 – 'written notice'

140. Clause G.2 creates a new entitlement and should accordingly be amended. The clause specifies that an employee is entitled to be given "written notice" of the transfer to a new classification. However, there has never been a requirement on an employer to provide *written* notice of a transfer to a lower paid job in any of the modern awards that contain the relevant clause dealing with a transfer to a lower paid job, and it is not necessary to create such a requirement now. This obligation is not an element of the test case standard.

141. The new entitlement would increase the administrative burden on employers. This is contrary to considerations arising under section 134(1)(f) of the Act.

G.2 – 'transfer to a new classification'

142. The words "*transfer to a new classification*" are problematic because, on a literal reading, they suggest that clause G.2 applies to any change in a classification under an award, including to a higher classification. We do however acknowledge that clause G.1(b) would mean that this was not the actual effect of the clause when read as a whole.

143. To address this problem, we contend that the words "*transfer to a new job at a lower classification and lower hourly rate of pay"* should be used instead of *"transfer to a new classification".* This aligns the description of the transfer with that given in clause G.1(b).

Clause G.3 – 'the employee is entitled to.'

144. The proposed clause G.3 does not set out the entitlement of an employer to make a payment instead of giving notice of the transfer to a lower paid job.

145. The corresponding clause in the current modern awards specifies that "*the employer may, at the employer's option, make payment instead*," thereby creating a positive entitlement for the employer. The proposed redraft does not do this.

146. Whilst the redrafted clause gives an entitlement to the employee to receive payment in lieu of notice "*if the employer transfers the employee to the new classification before the end of the minimum period of notice*," it does not specify that an employer is at the outset entitled, at its option, to transfer the employee to the new job and make a payment in lieu of notice.

Clause G.3 – 'transfer to a new classification'

147. For the same reasons as specified above, the words *"transfer to a new classification*" in the proposed clause G.3 should be changed to "*transfer to a new job at a lower classification and lower hourly rate of pay."*

Clause G.4(a) & (b) – 'full rate of pay'

148. We strongly oppose the use of the term "full rate of pay" in clause G.4(a) and G.4(b) on the basis that this is a substantial change from the current award that would have a detrimental effect on employers.

149. The current clause in the majority of modern awards specifies that the payment to be made when an employer transfers an employee to lower paid duties before the end of the period of notice is the "*difference between the former*

ordinary time rate of pay and the new ordinary time rate of pay for the number of weeks of notice still owing."

150. The origin of the current clause can be traced back to the decision of the Australian Conciliation and Arbitration Commission in the *1984 Termination, Change and Redundancy Case* (**TCR Case**). In that case, the Commission held:

> "…We are of the opinion that, in general, employers do try and minimize retrenchments and to accommodate the displacement effects in relevant cases through natural wastage and retraining, and we do not think it necessary, or desirable, to make award prescriptions to cover these matters. However, consistent with the remainder of our decision, we are prepared to provide that where an employee is transferred to lower paid duties because the employer no longer wishes the job the employee has been doing, done by anyone, then the employee should be entitled to the same period of notice of the change in employment as he would have been entitled to if his/her employment had been terminated. Alternatively, the employer shall pay to the employee maintenance of income payments calculated to bring the rate up to the rate applicable to his/her former classification in lieu thereof."[12]

151. It is evident from the above decision, that it was never the intention for employees being transferred to a lower paid job before the end of notice period to be paid the difference between what they would have received in the old job and what they will receive in the new job at the 'full rate of pay.' Whilst the TCR case held that an employee is entitled to the same period of notice as he/she would be entitled to if the employment had been terminated, the TCR case did not determine that if an employee is given a payment instead of notice, the quantum must be the same as would apply if the employee was terminated. Rather, the Commission found that the employee should be paid "*the rate applicable to his/her former classification*." The rate applicable to a particular classification under a modern award refers to the minimum rate for that classification and is not intended to reflect shift loadings or other penalties.

152. In contrast, clauses G.4(a) and G.4(b) in the redraft refer to the term "full rate of pay," which the note at the bottom of clause G.4 specifies has the meaning given in section 18 of the FW Act.

[12] *Termination, Change and Redundancy Case*, Print F6230, (1984) 8 IT 34 at p.39

153. Section 18 of the FW Act, specifies that the term “full rate of pay” is the rate payable to the employee, including all the following:

a) incentive-based payments and bonuses;

b) loadings;

c) monetary allowances;

d) overtime or penalty rates;

e) any other separately identifiable amounts.

154. Given the broad definition of “full rate of pay” under the Act it is evident that the proposed redraft gives employees entitlements that are significantly more generous than under the current clause in modern awards.

155. The current award clause is not aligned with the notice of termination clause under the Act and there is no justification for aligning the proposed redraft with the NES notice of termination provision in this manner.

156. More entitlements in the Act are calculated on the “base rate of pay” than those that are calculated on the “full rate of pay”.

157. The circumstances surrounding an actual termination of employment (which would trigger section 117 of the Act) are significantly different to the circumstances surrounding a transfer to a lower paid job and it does not follow that a requirement to make payments in lieu of notice at the “full rate of pay” in the former case necessitates the same requirement in the latter case (particularly where this does not reflect the test case standard).

158. Increasing the award entitlement to reflect the definition of “full rate of pay” in the Act is not necessary to meet the modern awards objective. Requiring employers to make these more generous payments would increase the costs of employers and is therefore a strong factor weighing against its inclusion in the awards, having regard to s.134(1)(f) of the Act.

159. The proposed requirement also creates a foreseeable disincentive for employers to look at creating alternative roles in the context of redundancy. It therefore cannot be said to "*promote social inclusion through increased workforce participation*" in the manner contemplated by s.134(1)(c).

160. The requirement to pay at the "full rate of pay" also complicates rather than simplifies the awards because problems would inevitably arise when determining how to calculate the difference between the full rate of pay in the old job and the new job. For example, how would an employer work out an employee's full rate of pay for the hours the employee would have worked in the old job when the amount of overtime that would have been worked by the employee would in most cases not be known?

161. The inclusion of the words "full rate of pay" in the proposed clause G.4 represents a substantive change to the current award terms. It is a change that should not be made.

162. If the proposed variation is to potentially be entertained, the Commission would need to consider the impact of the proposed requirement on employers in the context of each individual award where the proposed clause would be inserted, including taking into account the different work patterns in the industries affected and how the terms in each award operate. Absent material establishing such matters, the Commission ought not make the proposed variation.

8. CLAUSE H: EMPLOYEE LEAVING DURING REDUNDANCY NOTICE PERIOD

163. We raise the following concerns with respect to the proposed clause H:

Clause H.2– 'may terminate their employment at any time'

164. Clause H.2 specifies that the "*the employee may terminate their employment at any time during the* ***minimum period of notice*** *required to be given by their employer*." It then refers to section 117 of the FW Act (which sets out notice requirements that an employer needs to give on termination). Ai Group is concerned that the words "at any time" suggests that an employee does not have to provide the relevant minimum period of notice specified in the award.

165. The corresponding current standard award clause does not relieve an employee from the providing notice to the employer in the event that they initiate the termination of their employment. Nor does it prevent an employer from withholding equivalent amounts, where authorised by the award, in the event that such notice is not provided.

166. The current standard award clause dealing with employees leaving during the notice period only operates to preserve the employee entitlement to severance pay in circumstances where it would otherwise not be payable given that the employee has, in effect, initiated the termination of their employment by resigning during the relevant notice period.

167. It would be very unfair to employers if an employee was, pursuant to the award, permitted to simply resign absent giving appropriate notice. Not only would such an outcome increase employer costs but it would obviously result in disruption to an employer's business.

168. Accordingly, the words "at any time" should be deleted from clause H.2.

Clause H.3 – 'the requirement for the employer to pay the employee…is not affected'

169. We strongly oppose the proposed clause H.3. It appears to us that the redrafted clause has the complete opposite effect to the current clause contained in most awards and should be deleted.

170. The current clause contained in most modern awards specifies that if an employee terminates their employment during the period of notice given by their employer in circumstances of redundancy they are entitled to the other benefits they would have received had they remained in employment until the expiry of the notice but are not entitled to payment instead of notice.

171. For example, clause 23.4 of the Manufacturing Award specifies as follows:

> An employee given notice of termination in circumstances of redundancy may terminate their employment during the period of notice. The employee is entitled to receive the benefits and payments they would have received under clause 23—Redundancy had they remained in employment until the expiry of the notice, but is not entitled to payment instead of notice.

172. The legal effect of clause 23.4 is that if an employee terminates their employment (i.e. leaves) during the period of notice given by the employer in circumstances of redundancy, the employee is entitled to be paid the other benefits and payments they would have received under the Redundancy clause if they had not terminated their employment (for example, redundancy pay if this applies) but they are not entitled to be paid for the remaining period of notice the employer would otherwise have had to pay.

173. In contrast, the proposed clause H.3 specifies as follows:

> The requirement for the employer to pay the employee at the ***full rate of pay*** for the hours the employee would have worked had the employee continued to be employed until the end of the ***minimum period of notice*** is not affected by the early termination of employment by the employee.

174. The words "*is not affected by the early termination of employment by the employee*," make it clear that the legal effect of clause H.3 is that, if an employee terminates their employment during the minimum period of notice in circumstances of the redundancy, the employer *still* has to pay to the employee

the remaining period of notice. This is quite clearly a substantial change from the current clause and, in fact, has the polar opposite effect of the current clause. That is, whilst the current clause *prevents* an employee who leaves early from being paid out the remaining period of notice, the proposed redraft seems to *mandate* the payment of the remaining period of notice to an employee who leaves early.

Clause H.3 – note referring to section 18 of the FW Act

175. Clause H.3 contains a note at the bottom which says "*See section 18 of the Fair Work Act for the meaning of "**full rate of pay**."*

176. Given the concerns raised above regarding clause H.3, the proposed note should be rejected. A note referring to the definition of 'full rate of pay' in the NES is not required when clause H.3 should not be requiring employers to make payments for periods of notice that an employee has not worked in the first place.

9. CLAUSE I: JOB SEARCH ENTITLEMENT

177. We raise the following concerns regarding the proposed clause I.

Clauses 1.2 and 1.3

178. Clauses 1.2 and 1.3 are confusing as drafted. These clauses should be combined as follows:

> In circumstances in which the employee is entitled to redundancy pay, instead of the entitlement in clause 1.1 the employer must allow the employee during the minimum period of notice paid time off of up to one day for the purposes of seeking other employment.

Clause I.4 – 'more than one day per week'

179. Clause I.4 specifies that:

> If the employee is allowed paid time off of more than one day per week during the ***minimum period of notice*** for the purpose of the employee seeking other employment, the employee must, at the request of the employer, produce proof of attendance at a job interview.

180. The legal effect of the proposed clause is that the employee is only required to produce proof of attendance at a job interview at the request of the employer if the employee takes "*more than one day per week*" off during the minimum period of notice.

181. This represents a substantial change from the current clause in most modern awards, because the current clause requires an employee to produce such proof at the request of the employer "*if the employee has been allowed paid leave for more than one day during the notice period*." That is, whilst under the current clause, an employee can be required to provide proof of attendance at a job interview if they take more than *one day off* during the entire notice period, under the proposed clause I.4, an employee can only be required to provide such proof if they take more than one day off *per week* during the notice period.

182. For the above reasons, we strongly oppose the current form of clause I.4. To rectify the problem raised and to align the clause with the current award clause, the words "per week" in clause I.4 should be deleted.

Clause I.6 – 'not entitled to be paid…in excess of one day per week'

183. The proposed clause I.6 specifies that "*an employee who fails to produce proof when required under clause I.4 is not entitled to be paid for the time off in excess of one day per week."*

184. The effect of clause I.6 is that, if an employee takes more than one day off per week during the minimum notice period and is asked to provide proof of attendance at a job interview for the time off but does not provide it, the employee has the right to be paid for one day off each week of the notice period.

185. The corresponding standard current award provision only permits the taking of one paid day off during the entire notice period without the employee providing relevant proof of attendance at an interview, if such proof is requested.

186. The proposed clause I.6 significantly increases employee entitlements, and employer costs, without any justification.

187. The proposed clause I.6 should be amended by deleting the words "*in excess of one day per week*."