Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Plain Language Drafting – Standard Clauses

(AM2016/15)

12 September 2017

4 YEARLY REVIEW OF MODERN AWARDS

AM2016/15 PLAIN LANGUAGE DRAFTING – STANDARD CLAUSES

1. INTRODUCTION

1. This submission of the Australian Industry Group (**Ai Group**) is made in relation to the Statement issued by the Fair Work Commission (**Commission**) on 21 August 2017[1] (**Statement**) regarding the plain language drafting of 'standard' award clauses.

2. The submission is made in response to the submissions of union parties including the ACTU, AMWU and CPSU regarding the proposed clause E.1(c).

2. CONSIDERATIONS FLOWING FROM THE SUBMISSIONS CONCERNING CLAUSE E.1(c)

3. For the reasons articulated in our previous submission, and as otherwise set out in this submission, Ai Group remains of the view that a provision such as the proposed clause E.1(c) is both valid (having regarding to ss.55, 136, 118, 139, 142, 151 and 323) and necessary to ensure that such instruments meet the modern awards objective, as contemplated by s.138. Nonetheless, we address the following preliminary issues relating to the nature of these proceedings.

[1] [2017] FWCFB 4355

4. The Full Bench has sought submissions addressing the proposed clause E.1(c):

E.1 Notice of termination by an employee

(a) An employee must give the employer written notice of termination in accordance with Table X—Period of notice of at least the period specified in column 2 according to the period of continuous service of the employee specified in column 1.

Table X—Period of notice

Column 1 **Employee's period of continuous service with the employer at the at end of the day the notice is given**	**Column 2** **Period of notice**
Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks
More than 3 years but not more than 5 years	3 weeks
More than 5 years	4 weeks

NOTE: The notice of termination required to be given by an employee is the same as that required of an employer except that the employee does not have to give additional notice based on the age of the employee.

(b) In paragraph (a) **continuous service** has the same meaning as in section 117 of the Act.

(c) If an employee fails to give the period of notice required under paragraph (a), the employer may deduct from any money due to the employee on termination (under this award or the ~~National Employment Standards~~ NES), an amount not exceeding the amount that the employee would have been paid in respect of the period of notice not given.

5. The corresponding current standard award provision is cast in the following terms:[2]

22. Termination of employment

22.1 Notice of termination is provided for in the NES.

22.2 Notice of termination by an employee

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

[2] The wording is taken from the Manufacturing and Associated Industries and Occupations Award 2010

> concerned. 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.

6. Clause E.1(c) is not a current award provision. It is a product of the plain language drafting project being undertaken by a Full Bench that has been constituted for this specific purpose.

7. The Statement of the Full Bench has not called for submissions addressing the validity of current awards terms regulating "notice of termination by an employee". Nor was this a matter that was dealt with by the Full Bench that was specifically constituted for the purpose of dealing with NES inconsistencies. Moreover, the Full Bench has not expressly indicated that the removal of existing employer rights flowing from such provisions is a possibility.

8. The removal or watering down of a right to make a deduction from wages of an employee who fails to meet their award derived obligations in relation to the provision of notice is a very significant matter. It will impact upon the vast array of parties covered by all modern awards. It is very unlikely that it is widely appreciated by such parties that proceedings associated with the translation of standard award provision into Plain language could be a catalyst for such a sweeping change to the safety net.

9. The plain language drafting process has been broadly, or at least initially, portrayed as not intended to result in substantive changes to modern awards.[3] Relevantly, the Full Bench Statement of 13 December 2016 dealing with the Plain language drafting of the standard clauses provided, "…We wish to make it clear that the redrafting process is not intended to change the legal effect of a provision." Whilst Ai Group appreciates that there have been articulated caveats on this proposition,[4] such subtleties are very likely to be lost on parties that are not intimately involved in the highly burdensome detail of the conduct of this 4 Yearly Review of Modern Awards.

[3] [2016] FWCFB 8932 at paragraph 11.

[4] [2017] FWCFB 344 at paragraphs 10 to 13

10. If, as a product of the current proceedings, the Full Bench forms a provisional view that current award terms regulating notice of termination by an employee may be contrary to the NES, it should invite further submissions in relation to this matter from parties that have an interest in any of the affected awards.

3. RESPONSE TO CONTENTIONS THAT THE PROPOSED CLAUSE E.1(c) CONTRAVENES SECTION 55(1)

11. Various union parties submit that, in effect, proposed clause E.1(c) is not an award term that is permitted to be included in awards pursuant to s.118 and that it would contravene subsection s.55(1) by excluding the NES. The inclusion of such a provision in awards is therefore said to be prohibited by s.136.

12. Ai Group's primary position remains that s.118 permits awards to include terms such as the proposed E.1(c) and the current award provision regulating notice of termination by an employee. We rely on our previous submissions in support of this contention and repeat the following observation in response to the alternate view proffered by the various union parties. If such terms are permissible under s.118, the NES would operate subject to such terms, given the operation of s.55(2) and s.55(3).

13. In short, Ai Group contends that the approach adopted by the various unions fails to have proper regard to the relevant context of the text of s.118 and, in particular, the purpose of the provision. In the *Penalty Rates Case*,[5] the Full Bench made the following general observations regarding the task of statutory construction:

> **[96]** The starting point is to construe the words of a statute according to their ordinary meaning having regard to their context and legislative purpose. Context includes the existing state of the law and the mischief the legislative provisions was intended to remedy. Regard may also be had to the legislative history in order to work out what a current legislative provision was intended to achieve.
>
> **[97]** Each provision of the FW Act must be read in context by reference to the language of the FW Act as a whole. The relevant legislative context may operate to limit a word or expression of wide possible connotation. The literal meaning (or the ordinary grammatical meaning) of the words of a statutory provision may be

[5] [2017] FWCFB 1001

displaced by the context and legislative purpose, as the majority observed in *Project Blue Sky*:

> '… the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.'

[98] The provisions of an act must be read together such that they fit with one another. This may require a provision to be read more narrowly than it would if it stood on its own.

[99] More recently, in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (*Alcan*) the High Court described the task of legislative interpretation in the following terms:

> 'This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.'

14. Section 118 relevantly provides that *"A modern award or enterprise agreement may include term specifying the period of notice an employee must give in order to terminate his or her employment."*

15. A strictly literal reading of s.118 would suggest that it only enables awards to contain terms that provide that an employee cannot terminate his or her employment unless the specified period of notice has been given. Such a strictly literal reading of the words ought not be adopted. The consequence of such a strictly literal reading would be absurd and reflect a complete disconnect from the practical reality that employees commonly terminate their employment without providing the requisite notice. It could not sensibly be put that the purpose of such a provision was to enable awards to provide that in such instances the employment of the employee has not terminated. Instead, a construction of the provision that is consistent with the purpose of the section, as gleamed from its broader legislative context needs to be adopted.

16. The purpose of s.118 is to enable awards to regulate the matter of notice of termination that is provided by an employee of their termination and, significantly, to enable awards to do so in a manner that permits departure from the operation from the NES. That is, the purpose of s.118 is not only to permit award regulation of the notice of termination provided by an employee, but to ensure that the NES operates subject to such provisions. This is evident when regard is had to the structure of the Act.

17. Section 118 is contained within Chapter 2, Part 2-2 which deals with the NES. As observed by others, s.118 does not directly regulate the provision of notice by an employee. Instead, it enables an award to regulate such matters.

18. The position of s.118 in the broader scheme of the Act is significant. Subsection 55(2) provides that an award may include any terms that it is expressly permitted to include by a provision of Part 2-2. Section 55(3) provides that the NES have effect subject to terms included in a modern award or enterprise agreement as referred to in s.55(2). Relevantly, these elements of s.55 clarify that the award terms referred to in s.55(2) are able to exclude the NES, were it not for the operation of s.55(2) and (3).

19. We note that all of the other provisions of Part 2-2 that make the inclusion of certain award terms permissible, deal with matters that interact with, and potentially exclude, the operation of a part of the NES. This includes terms dealing with;

- Cashing out of annual leave (s.93)
- Taking of annual leave (s.93)
- Cashing out of paid personal/carer's leave (s.101);
- Terms setting out the kind of evidence that an employee must provide to be entitled to paid personal/carers leave, unpaid carer's leave or compassionate leave (s.107);
- Substitution of public holidays specified in the NES (s.115);

- Exclusion from the obligation to pay redundancy pay (s.121).

20. It would be highly anomalous, and indeed inconsistent with the approach otherwise adopted in the Act for s.118 to be interpreted as only allowing award terms that are consistent with the NES. The NES does not regulate the amount of notice of termination that an employee is required to given. Accordingly, if s.118 only operated in the limited manner suggested by the unions it begs the question – why was it included in Part 2-2?

21. If the Legislature had merely intended that awards regulate notice of termination by an employee in a manner that does not in any way depart from the NES, this could have been dealt with under s.139. This would have ensured that the NES was sacrosanct. The Legislature adopted a different approach.

22. The purpose of s.118 is to enable awards to provide for notice of termination in a manner that overrides relevant provisions of the NES. This enables the maintenance of the historic treatment of such a matter within the award and workplace relations system, notwithstanding the adoption of the new framework of the NES.

23. The unions seek, in effect, to ascribe to s.118 a construction that would only permit inclusion of award terms providing for a temporal requirement associated with the giving of notice by an employee of the termination of their employment and nothing more. Clearly, current award provisions regulate the period of time that must constitute the notice an employee provides. However, it does not follow that a term which is permissible under s.118 cannot validly address both this matter and the consequence of failing to comply with such a requirement. That is, the part of the term that provides for this consequence is also permissible under s.118 if the term regulates the period of notice to be given. A reading of s.118 that mandates the artificial divorcing of these two intertwined concepts adopts an unwarrantedly literal interpretation of the provision, that fails to have proper regard to the Legislature's evident intended purpose for the provision, having regarding to the structure of the Act and the history of the legislative provision (as set out in our earlier submissions).

4. THE RELEVANCE OF SECTION 324

24. The ACTU, AMWU and CPSU have advanced submissions which contend that proposed clause E.1(c) cannot be included in awards because of the combined effect of s.151 and s.326. For the reasons set out below, this contention is either wrong or able to be overcome through the redrafting of the provision.

25. Relevantly, section s.151 provides:

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

26. Section 326 provides:

> **Certain terms have no effect**
>
> Unreasonable payments and deductions for benefit of employer
>
> (1) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term:
>
> (a) permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work; or
>
> (b) requires, or has the effect of requiring, an employee to make a payment to an employer or another person; if either of the following apply:
>
> (c) the deduction or payment is:
>
> (i) directly or indirectly for the benefit of the employer, or a party related to the employer; and
>
> (ii) unreasonable in the circumstances;
>
> (d) if the employee is under 18--the deduction or payment is not agreed to in writing by a parent or guardian of the employee.

27. The first difficulty with the unions' position is that amounts payable under the NES do not constitute amounts that are payable "in relation to the performance of work" as contemplated by s.326(1). The Full Bench dealing with the Payment

of Wages Common Issue has questioned whether the similarly worded s.323 applies to termination payments arising under the NES .[6]

> **[28]** Section 323 only applies to 'amounts payable to the employee *in relation to the performance of work*'. The precise scope of this expression is unclear. While it is apt to cover wages (including commission payments 15) and wage related amounts such as leave payments16, it is not clear whether it encompasses all termination payments.

28. Ai Group contends that NES derived entitlements to termination payments do not constitute 'amounts payable is payable to an employee in relation to the performance of work' as contemplated by s.326(1). Accordingly, the effect of s.326 cannot be that awards are prohibited from including provisions that prevent deductions from amounts payable under the NES.

29. This only leaves open the possibility that s.326 may prohibit deductions from amounts payable under awards. Of course, s.326 would not apply to prohibit any deduction from amounts that may be for a reason other than the performance of work. We do not propose to undertake a comprehensive assessment of amounts that are payable pursuant to awards for reasons other than the performance of work, but note that it would include, for example, accident pay or payments in relation to training undertaken by an employee that does not constitute work.

30. The unions uniformly contend that deductions for notice of termination not given by an employee would be "unreasonable" as contemplated by s.326(1). Ai Group disputes this assertion. If our contention is accepted there is no need to further consider the operation of s.151 and s.326 in relation to the current controversy, except for in relation to employees who are under the age of 18 (see s.326(1)(d)).

31. The Macquarie Dictionary defines the term unreasonable as:

[6] [2016] FWCFB 8463 at 28 and 73

> 1. Not reasonable; not endowed with reason. 2. Not guided by reason or good sense…4. Not based on or in accordance with reason or sound judgement. 5. Exceeding the bounds of reason, immoderate; exorbitant.[7]

32. A deduction that is made in accordance with proposed clause E.1(c), could not be construed as unreasonable, in the ordinary sense of the word.

33. Ai Group has not identified any judicial authority dealing with the application of s.326(1) in the context of deductions authorised by awards. In *Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)*, Bromberg J gave detailed consideration to the manner in which the term unreasonable, as utilised in s.326(1), should be construed:[8]

> Whether a deduction from an employee's pay that is directly or indirectly for the benefit of the employer is unreasonable in the circumstances calls for an evaluative judgment in which competing considerations need to be assessed. That interpretative task is unassisted by any guiding considerations expressly identified by s 326(1). As always, and particularly when faced with the interpretation of a broadly-expressed standard, the task of statutory construction must give effect to the evident purpose of the legislation and be consistent with its terms: *AB v State of Western Australia* (2011) 244 CLR 390 at [23] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).
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> Relevantly, the *Oxford English Dictionary* contains the following definitions of "unreasonable:"
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> > Not within the limits of what would be rational or sensible to expect; excessive in amount or degree.
> >
> > a. Of an idea, attitude, action, etc.: not guided by, or based upon, reason, good sense, or sound judgement; illogical.
> >
> > b. Inequitable, unfair; unjustifiable. *Obs*
>
> Of the three senses of the word "unreasonable" there identified, it is the third ("inequitable, unfair; unjustifiable") that best captures the use made by s 326(1)(c) of the word "unreasonable". Beyond that observation, as *Stroud's Judicial Dictionary of Words and Phrases* (4th ed, Sweet & Maxwell Limited, 1974, at 2258) says in its definition for the word "reasonable" – "it would be unreasonable to expect an exact definition of the word 'reasonable.'" Whilst the word "unreasonable" is used in various provisions of the FW Act, the context is different to that of s 326(1)(c) and no useful guidance can be drawn from cases where the term has been judicially considered. It is the genesis of the scheme

[7] The Macquarie Concise Dictionary, Third Edition, 1999

[8] [2015] FCA 1196, at 143 to 184

> established by Division 2 and the origin of s 326(1)(c) itself that shed greater light on the mischief being addressed and the considerations that are likely to be of greatest relevance in an assessment of whether a deduction is "unreasonable in the circumstances".

34. The judgment went on to provide analysis of the contextual consideration associated with the legislative history of the provision. However, this decision flowed from a controversy over whether deductions pursuant to certain contractual provisions were valid. The reasoning provides limited guidance as to how an assessment should be applied in the circumstances that now fall for the Full Bench's consideration.

35. We contend that a term giving effect to a longstanding test case standard, that has been entrenched in the award system for an extended period of time and, in effect, repeatedly endorsed by the Commission and its predecessors, should not be construed as providing for an unreasonable deduction. The merit of the clause was clearly the subject of specific consideration by the Full Bench in the Part 10A Award Modernisation process (as explained in our earlier submissions).

36. Ai Group also contends that s.326(1) should be construed in a manner that is consistent with, and furthers the objects of, the Act. Section 3 provides that the object of this Act is to provide a 'balanced' framework for cooperative and productive workplace relations. This should be construed as framework that balances the interests of employers and employees. Also relevant is the context of the modern awards objective which the Commission has repeatedly recognised requires a consideration of fairness from both the perspective of employers and employees.[9]

37. Further, given the merit based justifications for the clause identified in paragraphs 63 to 94 of our 4 September 2017 submissions, we contend that a deduction made in accordance with a provision such as proposed clause E.1(c) would not be contrary to s.326(1). It cannot be considered 'inequitable, unfair or unjustifiable', as contemplated by that element of the Oxford Dictionary

[9] [2017] FWCFB 1001 at 37 and 117.

definition of the term ‘unreasonable’ that Bromberg J has said best captures the use of the word in s.326(1).

38. The ACTU’s contention that there is no basis for penalising longer serving employees ignores the rationale for providing a scaled range of notice requirements for employers and employees. The rational for this approach is to provide a degree of reciprocity between employer and employee obligations, not equality of employee obligations.[10]

39. The AMWU’s submissions variously assert that the penalty that proposed clause E.1(c) provides is completely disproportionate to the inconvenience experienced by the employer. The submissions fail to grapple with the reality that, in many instances, the cost or damage suffered by an employer may well significantly exceed the quantum of any deduction permissible under the award, or possible in practice. Of course, in the current context, the Full Bench has no evidence before it in relation to such factual matters. It would, accordingly, be inappropriate for it to conclude that there was any substance to the AMWU’s submissions. Regardless, we do not accept that the deduction in the circumstances of an employee failing to give notice in accordance with their legal obligations under the award should be considered unreasonable, even if the deduction does not strictly align with any level of financial damage or suffered by the employer.

40. If, contrary to our submissions, the Full Bench forms the view that a provision such as proposed clause E.1(c) is not able to be validly included in an award given the combined operation of s.151 and s.326(1), it should not simply delete the provision. Instead, it should amend it in a manner that, as far as possible, gives effect to the intended operation of the current model clauses.

41. Any difficulty arising from s.326 could be overcome by amending the proposed award clause to provide for the *forfeiture* of otherwise applicable award derived

[10] (1984) 8 IR 34; Moore J, President, Maddern J Deputy President and Brown Commissioner, 2 August 1984, Print F623

entitlements in circumstances where an employee breaches their award derived obligation to provide the relevant period of notice.

42. The proposition that awards provide for the forfeiture of entitlements in the event that they fail to provide the requisite notice of their termination is not novel. As identified at paragraph 28 of our 4 September 2017 submission, subclause 18(b) of the *Metal Trades Award 1941* stated:

> "18(b) Employment shall be terminated by a week's notice o either side given at any time during the week or by payment or forfeiture of a weeks wages as the case may be."

43. A potentially suitable form of words for an alternate clause E.1(c) that avoids any potential conflict with s.326 and s.151 would be:

> (c) If an employee fails to give the period of notice required under paragraph (a), they will forfeit from any wages owing under this award or the National Employment standards, an amount not exceeding the amount that the employee would have been paid in respect of the period of notice not given. That is, the amount that would have been payable under this award or the NES will be reduced by an amount equivalent to the amount that the employee would have been paid in respect of the period of notice not given.

44. In advancing this alternate clause, Ai Group notes that either the Full Bench or the plain language drafting expert may be able to develop a preferable form of words that have the same substantive effect. We also acknowledge that the references to the "National Employment Standards" may need to be amended if the Full Bench does not accept our primary contention in relation to s.118.

45. Recasting the proposed clause so that it provided for the forfeiture of wages rather than a deduction would also overcome the ACTU's contention that s.326(1) would prohibit deductions from certain payments even if they were reasonable.

46. For clarity, we content that a clause providing for the forfeiture of otherwise applicable entitlements in the nature of a payment in relation to any of the matters specified in s.139 could be validly included in an award pursuant to s.139. That is, s.139 validly permits the inclusion in an award of a term providing for the forfeiture of minimum wages, overtime rates, penalty rates and

allowances in certain circumstances. We contend that it would be a term about such matters.

47. Finally, if the Full Bench forms the view that proposed clause E.1(c) has the potential to "deal" with long service leave entitlements in a prohibited manner, as alluded to by the ACTU,[11] the provision could be amended to provide that it does not provide for an ability to make deductions from long service leave entitlements.

[11] ACTU submission 4 September 2017, paragraph 40