Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Plain Language Drafting – Standard Clauses

(AM2016/15)

14 November 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 response to the Statement and Directions issued by the Fair Work Commission (**Commission**) on 18 October 2017[1] regarding the plain language drafting of 'standard' award Clause E.1 – Notice of termination by an employee.

2. On the same day that the Statement and Directions were issued, the Full Bench issued a decision (**18 October Decision**) expressing a number of *"provisional views"* in respect of Clause E.1(a) and Clause E.1(c) and inviting submissions on those issues.

3. Ai Group's response to the matters raised in the Commission's Statement and Directions is set out below. This submission should be read in conjunction with Ai Group's submission of 4 September 2017 and Ai Group's reply submission of 12 September 2017.

2. CLAUSE E.1 – NOTICE OF TERMINATION BY AN EMPLOYEE

4. The version of Clause E.1 set out in the Commission's Statement and Directions of 18 October is:

> **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.

[1] [2017] FWCFB 5367

Table X—Period of notice

COLUMN 1 EMPLOYEE'S PERIOD OF CONTINUOUS SERVICE WITH THE EMPLOYER AT THE 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.

3. THE COMMISSION'S DIRECTIONS

5. The Commission's Directions of 18 October 2017 relevantly stated:

[1] Further to the Decision issued on 18 October 2017 we are seeking further submissions from interested parties in respect of two issues:

1. Whether Clause E.1(c) is incidental to a term permitted to be in a modern award and essential for the purpose of making the permitted term operate in a practical way (see s.142(1)(a) and (b)).

2. Whether Clause E.1(c) is a term which must not be included in a modern award as the term has no effect because of s.326(1) and (4). (see s.151)

[2] Such submissions should address the following issues:

(i) The scope of Clause E.1(a), having regard to the terms of s.123.

(ii) The *provisional* view that the word 'written' be deleted from Clause E.1(a).

(iii) The *provisional* view that, in order to address some uncertainty about the interaction with the NES, Clause E.1(c) be amended to confine the scope of the capacity to make a deduction to 'wages due to the employee.'

(iv) The *provisional* view that deductions pursuant to Clause E.1(c) would have no effect in relation to employees under 18 years of age, because of s.326(4), and hence in its current form it is a term that must not be included in a modern award, because of s.151(c).

(v) The *provisional* view that Clause E.1(c) is incidental to a permitted term, namely Clause E.1(a).

(vi) Is Clause E.1(c) essential for the purpose of making a permitted term (Clause E.1(a)) operate in a practical way? What is the purpose of Clause E.1(c)?

(vii) Having regard to the protective purpose of s.326, it is our *provisional* view that a deduction made pursuant to Clause E.1(c) *may* be 'unreasonable in the circumstances' within the meaning of s.326(1)(c)(ii), in the following respects:

1. The deduction permitted by Clause E.1(c) may be disproportionate to the loss suffered by the employer as a consequence of the employee not providing the notice required under Clause E.1(a).

   To the extent that the purpose of the provision is compensatory Clause E.1(c) does not contain a mechanism for ensuring that the extent of the deduction is proportionate to the loss. The deduction permitted by the term may be as much as four weeks' wages (for an employee with more than 5 years' service) in circumstances where the employer suffers no loss at all.

   This concern may be addressed by a variation to Clause E.1(c) to limit the deduction that can be made – such as, no more than one week's wages.

2. Clause E.1(c) permits an employer to make a deduction from monies due to an employee on termination in circumstances where the employee 'fails to give a period of notice required under paragraph (a)'. Clause E.1(a) provides that 'An employee must give the employer written notice of termination in accordance with Table X' (emphasis added). Clause E.1(c) may permit a deduction in circumstances where an employee has given the employer the requisite notice orally but not in writing.

   This concern may be addressed by removing the requirement in Clause E.1(a) for notice of termination to be in writing.

3. Clause E.1(c) would allow an employer to make a deduction from monies due to an employee in circumstances where the employer has consented (or acquiesced) to an employee providing less than the required period of notice. For instance, an employee with more than 5 years' service resigns. Clause E.1(a) provides that the employee must give the employer 4 weeks' notice of termination. The employee wants to leave in 2 weeks, to take up another job. The employer agrees and accepts the reduced notice period. Despite that agreement, Clause E.1(c) would permit the employer to deduct 2 weeks' pay from the money due to the employee on termination.

   This concern may be addressed by an appropriate qualification to Clause E.1(c), such as:

   'No deduction can be made pursuant to Clause E.1(c) in circumstances where the employer has agreed to a shorter period of notice than that required in Clause E.1(a).'

4. Clause E.1(c) would allow an employer to make a deduction from monies due to an employee in circumstances where the employee may be unaware of the requirement in Clause E.1(a) to provide notice of termination. In this regard, we note NatRoad's submission that 'Most employees would not be aware of the risk of being in breach of the Award by not giving the required period of notice.'

   We note that employers must give each employee the Fair Work Information Statement (the Statement) before, or as soon as practicable after, the employee starts employment (s.125(1)). This requirement forms part of the NES (see Division 12 of Pt 2-2: ss.124-125). The Statement must be prepared and published by the Fair Work Ombudsman (s.124(1)). The required content of the Statement is prescribed by the Act and Regulations (s.124(2) and Regulation 2.01) and must contain information, relevantly, about 'termination of employment' (s.124(2)(f)). The current version of the Statement was published on 1 July 2017. It does not contain any information about an employer's capacity under an award to deduct amounts from termination monies payable to an employee because the employee has failed to give the required notice on resignation. The section of the Statement dealing with 'Termination of employment' provides:

   > 'Termination of employment can occur for a number of reasons, including redundancy, resignation and dismissal. When your employment relationship ends, you are entitled to receive any outstanding employment entitlements. This may include outstanding wages, payment in lieu of notice, payment for accrued annual leave and long service leave, and any applicable redundancy payments'.

   To the extent that the purpose of Clause E.1(c) is to enhance compliance with Clause E.1(a) it seems axiomatic that

employees must be made aware of the potential consequence of failing to provide the requisite notice. Absent such knowledge it is difficult to see how Clause E.1(c) can be said to encourage compliance with Clause E.1(a).

This concern may be addressed in the same manner as Issue 1. Alternatively, Clause E.1 may be varied to expressly provide that no deduction can be made pursuant to Clause E.1(c) unless the employer has informed the employee that a deduction may be made from monies due to the employee on termination in the event that the employee fails to give the period of notice required under Clause E.1(a).

6. The above issues are addressed below.

4. ISSUES RAISED IN THE COMMISSION'S STATEMENT AND DIRECTIONS OF 18 OCTOBER 2017

(i) The scope of Clause E.1(a), having regard to the terms of s.123

7. In its 18 October Decision, the Full Bench stated:

> **[226]** In respect of Clause E.1(a) we would also observe that the scope of the provision may be too broadly expressed in that it requires 'an employee' to give notice of termination. As we have mentioned, Clause E.1(a) is a permitted term by virtue of s.136(1)(d) and s.118. Section 118 provides that a modern award 'may include terms specifying the period of notice an employee must give in order to terminate his or her employment'. Section 118 is in Division 11 of Pt 2-2. Section 123 limits the scope of that Division. Relevantly, Division 11 does *not* apply to:
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> (i) employees employed for a specified period of time, or for a specified task, or for the duration of a specified season (s.123(1)(a));
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> (ii) a casual employee (s.123(1)(c));
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> (iii) an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or limited to the duration of the training arrangement (s.123(1)(d));
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> (iv) daily hire employees working in the building and construction industry (s.123(3)(b));
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> (v) daily hire employees working in the meat industry in connection with the slaughter of livestock (s.123(3)(c)); or
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> (vi) weekly hire employees working in connection with the meat industry whose termination is determined solely by seasonal factors (s.123(3)(d)).

[227] It would seem to follow that the scope of any award term made pursuant to s.118 must be confined to persons falling within the scope of s.118. We will invite further submissions in respect of this issue.

8. To address the above issue, we propose the following amendment to Clause E.1(a):

> **E.1 Notice of termination by an employee**
>
> **(a)** An employee (other than one excluded under s.123 of the Act) 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.

(ii) The *provisional* view that the word 'written' be deleted from Clause E.1(a).

9. The Commission's Directions of 18 October relevantly stated:

> (vii) Having regard to the protective purpose of s.326, it is our *provisional* view that a deduction made pursuant to Clause E.1(c) *may* be 'unreasonable in the circumstances' within the meaning of s.326(1)(c)(ii), in the following respects:
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> 2. Clause E.1(c) permits an employer to make a deduction from monies due to an employee on termination in circumstances where the employee 'fails to give a period of notice required under paragraph (a)'. Clause E.1(a) provides that 'An employee must give the employer written notice of termination in accordance with Table X' (emphasis added). Clause E.1(c) may permit a deduction in circumstances where an employee has given the employer the requisite notice orally but not in writing.
>
> This concern may be addressed by removing the requirement in Clause E.1(a) for notice of termination to be in writing.

10. Ai Group does not agree that Clause E.1(a) should be amended to remove the word *"written"*. It is the interests of employers and employees for notice of termination to be given in writing to avoid any uncertainty.

11. The issue of whether or not an employee has resigned has, on many occasions, been contested in unfair dismissal cases. Removing the requirement that notice be given in writing will most likely increase disputation over such matters.

12. If the Commission is of the view that this issue needs to be addressed a better solution would be to amend Clause E.1(c) along the lines of the following (rather than Clause E.1(a)):

> **(c)** If an employee fails to give the period of notice required under paragraph (a), either in writing or orally, 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.

13. The above amendment would address the concern raised by the Commission about the operation of Clause E.1(c) without disturbing the key requirement in Clause E.1(a) that notice must be given by an employee in writing.

(iii) The *provisional* view that, in order to address some uncertainty about the interaction with the NES, Clause E.1(c) be amended to confine the scope of the capacity to make a deduction to 'wages due to the employee'

14. Ai Group does not concede that this amendment is necessary or desirable. However, we understand the reasons why the Commission has reached this *"provisional view".*

(iv) The *provisional* view that deductions pursuant to Clause E.1(c) would have no effect in relation to employees under 18 years of age, because of s.326(4), and hence in its current form it is a term that must not be included in a modern award, because of s.151(c)

15. Subsection 326(4) of the Act states:

> (4) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term:
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> (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
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> (b) requires, or has the effect of requiring, an employee to make a payment to an employer or another person;
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> if the employee is under 18 and the deduction or payment is not agreed to in writing by a parent or guardian of the employee.

16. Compliance with s.326(4) could be addressed through the inclusion of a new paragraph (d) in Clause E.1 along the lines of the following:

> (d) Paragraph (c) does not apply to an employee under 18 years of age, unless the deduction is agreed in writing by a parent or guardian of the employee in accordance with s.326(4) of the Act.

(v) The *provisional* view that Clause E.1(c) is incidental to a permitted term, namely Clause E.1(a)

17. The Commission's has formed the *"provisional view"* that Clause E.1(c) is *"incidental"* to Clause E.1(a) (a term that is permissible as a result of s.118 of the Act).

18. The following extracts from the Commission's Decision are relevant:

> **[134]** As to s.142(1)(a), we adopt the Macquarie Dictionary definition of the phrase 'incidental to', namely: 'liable to happen in conjunction with; naturally appertaining to'.
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> **[150]** We agree with the observation that s.142(1) is not in itself an additional power for the inclusion of terms in a modern award that cannot be appropriately linked to a permitted term. We also agree that the section provides a more limited power to include terms than s.89A(6), in that it does not extend to machinery terms. However, as noted above, 'for the purpose of making a particular term operate in a practical way' is an expression of slightly wider import than the comparable expression in s.89A(6).
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> **[151]** We now turn to consider whether Clause E.1(c) is:
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> > (i) incidental to a term permitted to be in a modern award (in this case Clause E.1(a), which specifies the period of notice an employee must give in order to terminate his or her employment, is a permitted term by virtue of s.118); and
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> > (ii) essential for the purpose of making Clause E.1(a) operate in a practical way.
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> **[152]** Contrary to the ACTU's submission, we have reached a *provisional* view that Clause E.1(c) is incidental to Clause E.1(a). It seems to us that there is a sufficient relationship between the two provisions – the right of an employer to make a deduction under Clause E.1(c) only arises in circumstances where the employee is obliged to give written notice of termination in accordance with Clause E.1(a).

19. We agree with the Commission's *"provisional view"* that clause E.1(c) is *"incidental"* to Clause E.1(a). We concur with the reasoning in the above extracts from the 18 October Decision.

(vi) Is Clause E.1(c) essential for the purpose of making a permitted term (Clause E.1(a)) operate in a practical way?

20. Clause E.1(c) is *"essential for the purpose of making the permitted term operate in a practical way"* (s.142(1)(b)).

21. In its 18 October Decision, the Full Bench stated:

> **[148]** …. It seems to us that 'for the purpose of making a particular term operate *in a practical way*' is an expression of slightly wider import than that used in s.89A(2). A broader range of terms may be said to be for the purpose of making a particular term operate in 'a practical way' than would fall within the scope of the expression 'for the effective operation of the award'.

22. Accordingly, Clause E.1(c) is not required to be *"essential"* for the effective operation of the award. Clause E.1(c) is only required to be essential for the purpose of making Clause E.1(a) *"operate in a practical way".*

23. Clause E.1(c) is *"essential"* for the purpose of making Clause E.1(a) *"operate in a practical way"* for the following reasons:

a. The provision provides a practical means of encouraging compliance by employees with the notice requirements in Clause E.1(a). As recognised by the Full Bench of the AIRC in the main TCR Decision of 2 August 1984, there are adverse impacts upon employers when employees terminate their employment without giving notice: (emphasis added)

> However, notwithstanding the ACTU arguments we are not prepared, except to a limited extent, to provide for different periods of notice by employer and employee. In particular, we are concerned at the possible consequences for small firms of a loss of employees with long service and the requirement for such employers to find another employee. We have decided that an employee should be required to give the additional notice based on years of service but that it would not be appropriate to require increased notice from the employee based on age.

b. Clause E.1(c) operates to minimise the significant disruption and cost to employers which arises when employees do not give notice of termination of employment.

c. It would not be practical for an employer to pursue a civil penalty against an employee under s.45 of the Act for a breach of Clause E.1(a), because:

- Civil penalties associated with award breaches are typically paid into consolidated revenue, rather than to an aggrieved party. An employer would need to convince the appropriate court that an order requiring a payment to the employer was appropriate in the particular circumstances;

- The legal and other costs associated with pursuing an action against an ex-employee under s.45 would far outweigh any benefit to the employer; and

- Unlike an employee, an employer cannot elect to have proceedings relating to a breach of s.45 dealt with as small claims proceedings under s.548. Section 548 only relates to amounts that *"an employer was required to pay..."*.

d. Given that employers would be extremely unlikely to pursue an action against an employee for breaching the notice requirements in the award, employees would typically be able to breach Clause E.1(a) with impunity, were it not for Clause E.1(c).

e. It is not in the interests of employers or employees for an employer to be required to pursue formal legal proceedings against an employee to seek redress for an employee's breach of an award if a simpler, less time consuming and less costly remedy can be readily achieved (and is currently in place).

f. The Fair Work Ombudsman does not commonly pursue legal proceedings against individual employees who breach award terms.

g. To ensure fairness to employers, it is essential to include Clause E.1(c) in awards.

24. It is evident, when all of the terms of the 122 modern industry and occupational awards are considered, that the Commission has taken a practical and not overly narrow approach when determining whether longstanding award provisions meet legislative requirements relating to award provisions that are incidental to subject matters allowed to be in awards. In this regard, the following extract from the *Priority Stage Award Modernisation* Decision[2] is relevant: (emphasis added)

> **[46]** The Minister and a number of parties made submissions concerning dispute resolution training leave. This type of leave was found to be incidental to an allowable award matter and necessary for its effective operation pursuant to s.89A of the WR Act, as it stood at that time, by a Full Bench of the Commission in 1998. Dispute resolution training leave, although quite common in pre-reform awards prior to the Work Choices amendments, has never been a test case provision. We have decided to maintain dispute resolution training leave where it is a prevailing industry standard.

25. For all of the above reasons, Clause E.1(c) is *"essential"* for the purpose of making Clause E.1(a) *"operate in a practical way".*

What is the purpose of Clause E.1(c)?

26. The purpose of Clause E.1(c) is to ensure that Clause E.1(a) operates as intended and in a practical way, as discussed above.

27. In addition, there are various merit-based reasons for including Clause E.1(c) in awards which highlight the important purpose of Clause E.1(c). We understand that merit-based issues will be explored by the Commission in the context of Issue 2 (as referred to in paragraph [238] of the 18 October Decision).

[2] [2008] AIRCFB 1000

(vii) Having regard to the protective purpose of s.326, the *provisional* view that a deduction made pursuant to Clause E.1(c) *may* be 'unreasonable in the circumstances' within the meaning of s.326(1)(c)(ii), in certain respects

28. In the 18 October Decision, the Full Bench stated:

> **[202]** It seems clear that Clause E.1(c) is a term that permits 'an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work' and such a deduction is 'directly or indirectly for the benefit of the employer'. No party contended otherwise.

29. Accordingly, Clause E.1(c) cannot permit an employer to make a deduction that is "unreasonable in the circumstances".

30. In the 18 October Decision, the Full Bench considered the views expressed by Bromberg J of the Federal Court of Australia regarding the construction of the expression *"unreasonable in the circumstances"* in *Australian Education Union* v *State of Victoria (Department of Education and Early Childhood Development)* [2015] FCA 1196. The following extract from the Commission's 18 October Decision is relevant:

> **[208]** His Honour concluded that whether a deduction is 'unreasonable in the circumstances' is a question of fact and degree dependent upon the relevant surrounding circumstances. He then proceeded to identify a number of considerations that are likely to be relevant (though not exhaustive). These considerations appear at [177] – [182] of the judgment and those which are relevant in the present context may be summarised as follows:
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> > 1. Consideration must commence from the premise that the ultimate purpose of the scheme is to protect employees from practices that have the effect of denying them the benefit of the remuneration they have earned and are thus entitled to fully enjoy.
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> > 2. The extent to which the employer or its related party has benefited will likely be relevant. It will be relevant to assess whether the employee has been taken advantage of in some way, with the result that part of the benefit of his or her remuneration has been lost to the employer. A benefit to the employer is not, of itself, a reason for finding that a deduction was unreasonable. There is nothing wrong in an employer gaining a benefit, but, if that benefit is gained at the expense of the employee, that would tend to indicate unreasonableness. It is the possibility of an unreasonable transfer of the benefit from its intended recipient—the employee—to the employer, which is fastened upon by s.326(1)(c).
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> > 3. The phrase 'in the circumstances' is of wide import and a broad approach is to be taken to the extent of the circumstances which are considered.

[209] The above observations (at [206] to [208]) are apposite to the matter before us.

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[218] It seems to us that the *purpose* of Clause E.1(c) is a relevant consideration in determining whether it is 'unreasonable in the circumstances.'

[219] The employer parties express differing views as to the purpose of Clause E.1(c). ABI's submission suggests that Clause E.1(c) is intended to encourage compliance with Clause E.1(a). Ai Group advances a similar submission:

> 'A key justification for retention of a right to deduct where an employee fails to provide notice is that it creates an effective disincentive for an employee considering breaching this requirement.'

[220] However, Ai Group's submission also suggests that Clause E.1(c) has a compensatory element:

> 'An employee resigning at short notice can be very disruptive and costly for an employer. Indeed, the associated costs will very often far exceed the quantum of any deduction from the employee's pay permissible under the award.'

[221] In order for Clause E.1(c) to provide an incentive to comply with the requirement to give notice employees would have to be aware of the consequences of non-compliance. We return to this point shortly.

[222] To the extent that Clause E.1(c) is intended to be compensatory it raises issues about whether the compensation is proportionate to the loss and inconvenience arising from an employee's failure to provide the requisite notice. Plainly, some employers may suffer no loss arising from the failure to give notice; for others the loss may be considerable. Clause E.1(c) does not provide a mechanism for ensuring that the extent of the deduction is proportionate to the loss.

31. The deduction provided for in Clause E.1(c) is not "unreasonable in the circumstances" because:

    a. Employees are able to readily avoid a deduction being made from their wages on termination by not breaching their award obligation to give the employer notice of termination.

    b. An employee resigning at short notice can be very disruptive and costly for an employer. Indeed, the associated costs will very often far exceed the quantum of any deduction from the employee's pay permissible under the award.

c. The provision provides a practical means of encouraging compliance by employees with the notice requirements in Clause E.1(a). As recognised by the Full Bench of the AIRC in the main TCR Decision of 2 August 1984, there are adverse impacts upon employers when employees terminate their employment without giving notice: (emphasis added)

> However, notwithstanding the ACTU arguments we are not prepared, except to a limited extent, to provide for different periods of notice by employer and employee. In particular, we are concerned at the possible consequences for small firms of a loss of employees with long service and the requirement for such employers to find another employee. We have decided that an employee should be required to give the additional notice based on years of service but that it would not be appropriate to require increased notice from the employee based on age.

d. Clause E.1(c) operates to minimise the significant disruption and cost to employers which arises when employees do not give notice of termination of employment.

e. It would not be practical for an employer to pursue a civil penalty against an employee under s.45 of the Act for a breach of Clause E.1(a), because:

- Civil penalties associated with award breaches are typically paid into consolidated revenue, rather than to an aggrieved party. An employer would need to convince the appropriate court that an order requiring a payment to the employer was appropriate in the particular circumstances;

- The legal and other costs associated with pursuing an action against an ex-employee under s.45 would far outweigh any benefit to the employer; and

- Unlike an employee, an employer cannot elect to have proceedings relating to a breach of s.45 dealt with as small claims proceedings under s.548. Section 548 only relates to amounts that *"an employer was required to pay..."*.

f. Given that employers would be extremely unlikely to pursue an action against an employee for breaching the notice requirements in the award, employees would typically be able to breach Clause E.1(a) with impunity, were it not for Clause E.1(c).

g. It is not in the interests of employers or employees for an employer to be required to pursue formal legal proceedings against an employee to seek redress for an employee's breach of an award if a simpler, less time consuming and less costly remedy can be readily achieved (and is currently in place).

h. The Fair Work Ombudsman does not commonly pursue legal proceedings against individual employees who breach award terms.

i. To ensure fairness to employers, it is essential to include Clause E.1(c) in awards.

32. The Commission's Directions of 18 October relevantly stated:

> (vii) Having regard to the protective purpose of s.326, it is our *provisional* view that a deduction made pursuant to Clause E.1(c) *may* be 'unreasonable in the circumstances' within the meaning of s.326(1)(c)(ii), in the following respects:
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> 1. The deduction permitted by Clause E.1(c) may be disproportionate to the loss suffered by the employer as a consequence of the employee not providing the notice required under Clause E.1(a).
>
> To the extent that the purpose of the provision is compensatory Clause E.1(c) does not contain a mechanism for ensuring that the extent of the deduction is proportionate to the loss. The deduction permitted by the term may be as much as four weeks' wages (for an employee with more than 5 years' service) in circumstances where the employer suffers no loss at all.
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> This concern may be addressed by a variation to Clause E.1(c) to limit the deduction that can be made – such as, no more than one week's wages.

33. Ai Group does not agree that the deduction permitted by Clause E.1(c) is disproportionate to the loss suffered by the employer. In general, the resignation of an employee with lengthier service will impose greater costs and disruption upon an employer than the resignation of an employee with a shorter

amount of service. This was accepted by the AIRC in the main TCR Decision of 2 August 1984 where the Full Bench stated:

> "… In particular, we are concerned at the possible consequences for small firms of a loss of employees with long service and the requirement for such employers to find another employee."

34. The Commission's Directions of 18 October also stated:

> (vii) Having regard to the protective purpose of s.326, it is our *provisional* view that a deduction made pursuant to Clause E.1(c) *may* be 'unreasonable in the circumstances' within the meaning of s.326(1)(c)(ii), in the following respects:
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> 2. Clause E.1(c) permits an employer to make a deduction from monies due to an employee on termination in circumstances where the employee 'fails to give a period of notice required under paragraph (a)'. Clause E.1(a) provides that 'An employee must give the employer written notice of termination in accordance with Table X' (emphasis added). Clause E.1(c) may permit a deduction in circumstances where an employee has given the employer the requisite notice orally but not in writing.
>
> This concern may be addressed by removing the requirement in Clause E.1(a) for notice of termination to be in writing.

35. This issue is addressed at paragraphs 9 to 13 of this submission.

36. The Commission's Directions of 18 October further stated:

> (vii) Having regard to the protective purpose of s.326, it is our *provisional* view that a deduction made pursuant to Clause E.1(c) *may* be 'unreasonable in the circumstances' within the meaning of s.326(1)(c)(ii), in the following respects:
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> 3. Clause E.1(c) would allow an employer to make a deduction from monies due to an employee in circumstances where the employer has consented (or acquiesced) to an employee providing less than the required period of notice. For instance, an employee with more than 5 years' service resigns. Clause E.1(a) provides that the employee must give the employer 4 weeks' notice of termination. The employee wants to leave in 2 weeks, to take up another job. The employer agrees and accepts the reduced notice period. Despite that agreement, Clause E.1(c) would permit the employer to deduct 2 weeks' pay from the money due to the employee on termination.

This concern may be addressed by an appropriate qualification to Clause E.1(c), such as:

'No deduction can be made pursuant to Clause E.1(c) in circumstances where the employer has agreed to a shorter period of notice than that required in Clause E.1(a).'

37. Ai Group does not oppose the inclusion of the above qualification to Clause E.1(c).

38. Finally, the Commission's Directions of 18 October stated:

> (vii) Having regard to the protective purpose of s.326, it is our *provisional* view that a deduction made pursuant to Clause E.1(c) *may* be 'unreasonable in the circumstances' within the meaning of s.326(1)(c)(ii), in the following respects:
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> 4. Clause E.1(c) would allow an employer to make a deduction from monies due to an employee in circumstances where the employee may be unaware of the requirement in Clause E.1(a) to provide notice of termination. In this regard, we note NatRoad's submission that 'Most employees would not be aware of the risk of being in breach of the Award by not giving the required period of notice.'
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> We note that employers must give each employee the Fair Work Information Statement (the Statement) before, or as soon as practicable after, the employee starts employment (s.125(1)). This requirement forms part of the NES (see Division 12 of Pt 2-2: ss.124-125). The Statement must be prepared and published by the Fair Work Ombudsman (s.124(1)). The required content of the Statement is prescribed by the Act and Regulations (s.124(2) and Regulation 2.01) and must contain information, relevantly, about 'termination of employment' (s.124(2)(f)). The current version of the Statement was published on 1 July 2017. It does not contain any information about an employer's capacity under an award to deduct amounts from termination monies payable to an employee because the employee has failed to give the required notice on resignation. The section of the Statement dealing with 'Termination of employment' provides:
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> 'Termination of employment can occur for a number of reasons, including redundancy, resignation and dismissal. When your employment relationship ends, you are entitled to receive any outstanding employment entitlements. This may include outstanding wages, payment in lieu of notice, payment for accrued annual leave and long service leave, and any applicable redundancy payments'.
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> To the extent that the purpose of Clause E.1(c) is to enhance compliance with Clause E.1(a) it seems axiomatic that employees must be made aware of the potential consequence of failing to provide

the requisite notice. Absent such knowledge it is difficult to see how Clause E.1(c) can be said to encourage compliance with Clause E.1(a).

This concern may be addressed in the same manner as Issue 1. Alternatively, Clause E.1 may be varied to expressly provide that no deduction can be made pursuant to Clause E.1(c) unless the employer has informed the employee that a deduction may be made from monies due to the employee on termination in the event that the employee fails to give the period of notice required under Clause E.1(a).

39. Ai Group strongly disagrees with the view expressed by NatRoad that *'Most employees would not be aware of the risk of being in breach of the Award by not giving the required period of notice.'* This view has been expressed by only one party in the proceedings and should not be accepted by the Commission, given the following facts:

- Provisions similar to Clause E.1(a) and (c) have been included in nearly all federal awards since the mid-1980s (i.e. for more than 30 years) and the provisions are very widely understood by employers and employees;
- All modern awards contain an obligation for employers to make a copy of each applicable award available to employees;
- Copies of awards are readily available to employees on-line; and
- The Fair Work Ombudsman is a very well-resourced and active Regulator which distributes a wide range of materials to employees to assist them to understand their award obligations.

40. Given that there is no evidence before the Commission that employees do not widely understand the effect of Clause E.1(c), there is no basis for a finding by the Commission that employees do not widely understand the very longstanding award obligation of employees to give the required period of notice to their employer.

41. Accordingly, the proposals identified at paragraph (viii)(4) of the Commission's Directions are not necessary, and are opposed by Ai Group.