

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Plain Language Re-drafting –
Standard Clauses – (Award Specific
Issues)

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Ai
GROUP

**4 YEARLY REVIEW OF MODERN AWARDS
AM2016/15 – PLAIN LANGUAGE RE-DRAFTING – STANDARD
CLAUSES – AWARD SPECIFIC ISSUES**

1. INTRODUCTION

1. This submission of the Australian Industry Group (**Ai Group**) is made in response to the Statement issued by the Fair Work Commission on 24 August 2017¹ (**Statement**) concerning a number of award specific issues which require additional consideration prior to the issuing of the remaining draft determinations relating to the plain language standard clauses.
2. The Statement identifies a number of awards that include award specific notice periods for termination of employment which would be removed by the inclusion of Standard Clause E. – ‘Termination of Employment’. The Statement also refers to industry specific redundancy schemes present in a number of awards which would be removed through the inclusion of the Standard Clauses.
3. This submission deals with the following issues:
 - The need to keep the award specific redundancy terms in the *Building and Construction Industry Award 2010* and the *Plumbing and Fire Sprinklers Award 2010*.
 - The potential inconsistency between clause 12.2 of the *Professional Employees Award 2010* and the National Employment Standards (**NES**).
4. In its decision of 14 August 2018, the Full Bench stated that its provisional view that all modern awards should be varied to replace existing clauses with the standard clauses, would only be displaced if:

“it is demonstrated that there are matters or circumstances particular to that award which compel the conclusion that the achievement of the modern award objective for that award does not necessitate the inclusion of the model standard terms”.²

¹ [2018] FWC 4976.

² [2018] FWCFB 4704 at 15

2. INDUSTRY SPECIFIC REDUNDANCY SCHEMES

5. The industry specific redundancy schemes in clause 17 of the *Building and Construction General On-Site Award* and clause 18 of the *Plumbing and Fire Sprinklers Award 2010* provide different methods of calculating redundancy pay and the number of weeks at which redundancy pay is capped is higher under the NES scheme. The circumstances in which redundancy pay is payable also vary from those contemplated by the NES.
6. Importantly for those operating in these industries, each of these awards afford an employer an ability to offset amounts paid into a redundancy pay scheme against all or part of an employee's redundancy entitlement. The application of such schemes is common amongst employers covered by these awards.
7. Given this context, Ai Group is concerned that the mere replacement of these provisions, in their entirety, with the standard clause may be problematic.

3. SUBCLAUSES 12.2 AND 12.3 OF THE *PROFESSIONAL EMPLOYEES AWARD 2010*

8. The Professional Employees Award provides an award specific regime for the amount of notice that is to be provided by both employers and employees in the context of termination of employment. The award specific provisions should be retained, in preference to the standard clause, but the provisions needs to be redrafted in order to avoid any inconsistency with the NES.
9. Clause 12 of the award provides:

12.1 Notice of termination is provided for in the NES.

12.2 Instead of s.117(3)(a) of the Act, in order to terminate the employment of an employee the employer must give the employee one month's notice.

12.3 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 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.

10. The reference to one month's notice should be construed in accordance with s.2G of the *Acts Interpretation Act 1901*.³ This provides:

Months

- (1) In any Act, **month** means a period:
- (a) starting at the start of any day of one of the calendar months; and
 - (b) ending:
 - (i) immediately before the start of the corresponding day of the next calendar month; or
 - (ii) if there is no such day--at the end of the next calendar month.

...

11. It appears that the award clause is intended to provide an obligation upon both employers and employees to provide one month's notice of termination. This exceeds the amount of notice that would be required to be provided by an employee under the proposed standard clause. In *most* cases, it also exceeds the amount of notice that an employer would be required to provide an employee under the terms of the NES.
12. Given the characteristics of employees covered by this award and the nature of the roles that they undertake, it is both appropriate and important that the award continues to require that employees provide additional notice to that required under the proposed standard clause. The instrument applies to professional employees whose circumstances of employment are by no means typical of most award covered employees.
13. There has also been a long history of award derived obligations on employers and employees to provide at least a month's notice within certain key predecessor instruments to the current award. For example, the *Metal, Engineering and Associated industries (Professional Engineers and Scientists)*

³ Pursuant to s.46(1) (Construction of Instruments) of the *Acts Interpretation Act 1901*.

Award 1998 contained the following provision:⁴

4.5.1(a) Where no greater period is specified in an employee's contract, employment will be terminable by either party on one month's notice or, in the case of an employee older than 45 years of age with at least 2 years service, 5 weeks notice.

14. The Full Bench has observed that clause 12.2 of the Award may be inconsistent with the NES.⁵ It appears that the provision would be contrary to s.55(1) of the *Fair Work Act 2009 (FW Act)* in that it would potentially exclude provisions of the NES (s.117) in the following ways:

- The clause appears to provide for a quantum of notice by employers to employees who are over 55 and have had two years of continuous service that is less than the 5 week entitlement in s.117.
- The clause would *potentially* negate the operation of those elements of the NES that provide a capacity for a payment in lieu of notice to be provided.

15. The question of whether the provisions exclude the NES is difficult to answer definitively as the manner in which clause 12.2 has been drafted renders the precise nature of the interaction between it and the NES somewhat unclear.

16. Before considering the manner in which clause 12.2 interacts with s.117 of the FW Act, we observe that s.117(2) and s.117(3) provide as follows:

- (2) The employer must not terminate the employee's employment unless:
- (a) the time between giving the notice and the day of the termination is at least the period (the ***minimum period of notice***) worked out under subsection (3); or
 - (b) the employer has paid to the employee (or to another person on the employee's behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee's behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.

⁴ The clause also included various exemptions from the obligations contained in this subclause.

⁵ [2018] FWC 4976 at 14

(3) Work out the minimum period of notice as follows:

(a) first, work out the period using the following table:

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

(b) then increase the period by 1 week if the employee is over 45 years old and has completed at least 2 years of continuous service with the employer at the end of the day the notice is given.

17. As can be seen, s.117(2) requires that an employee not be terminated unless they have been given a “minimum period of notice” or payment in lieu thereof. Section 117(3) then explains how to calculate the minimum notice period. In the context of employees over the age of 45 who have 2 years of continuous service, there are two steps to this process. A “period” is first worked out in accordance with a table in s.117(3)(a), based upon an employee’s period of continuous service, and then a period of 1 week is to be added to that period. In some circumstances an employee is entitled to 5 weeks of notice.

18. Clause 12.2 of the Award does not accurately reflect the manner in which the NES operates. It simply provides that, “*Instead of s.117(3)(a) of the Act, in order to terminate the employment of an employee the employer must give the employee one month’s notice.*” This wording incorrectly ascribes to s.117(3) the work of specifying how much notice must be given in order to initiate a termination of employment. It does not recognise that s.117(3)(a) does not, by its own force, impose an obligation upon an employer to provide notice. It is a section that interacts with other elements of s.117 in order to establish the relevant obligation.

19. The Award clause does not address s.117(3)(b). This may be an oversight.
20. The Award also fails to recognise the operation of s.123, which effectively sets out a number of exemptions from the requirement to provide notice under the NES.
21. It may be that clause 12.2 was merely intended to retain the NES as the source of any obligation to provide notice or payment in lieu thereof but to require that a one month period always be adopted instead of any other period contemplated by s.117(3). Nonetheless, the wording does not appear to achieve this. On one view, the award could be argued to require that employers provide employees with one month of notice if their employment is to be terminated, without any capacity for the employer to make a payment in lieu thereof. Clearly, this could not be the intent.
22. Section 55(1) of the FW Act states that a modern award must not exclude the NES or any provision of the NES. Section 55(4) of the FW Act permits clauses to be included in modern awards that are ancillary or incidental to the operation of an entitlement of an employee under the NES or terms that supplement the NES, but only to the extent that the effect of such a term is not detrimental to an employee in any respect when compared with the NES. Section 55(7) of the FW Act provides that, to the extent that a term of a modern award is permitted by subsection (4) or (5), the term does not contravene subsection (1).
23. In relation to s.55(4), it appears that, at least in some contexts, the current term would offend the requirement that term can only be included in awards pursuant to s.55(4) “...to the extent that the effect of those terms is not detrimental to an employee in any respect.” In this regard the relevant detriment is that in some circumstances an entitlement to a month’s notice may be less than 5 weeks. Moreover, to the extent that the award does not permit an employer to provide for a payment in lieu of notice, it is also arguable that this is detrimental to employees.

24. Aside from any issues of NES inconsistency, the award provisions dealing with notice and the manner in which they interact with the NES are far from simple or easy to understand.
25. In light of the abovementioned considerations, Ai Group contends that any Draft Determination should:
- Require an employee to provide no less than one month's notice of termination;⁶ and
 - Require that an employer, for the purposes of s.117, give no less than one month's notice.

⁶ subclause 12.3