

## IN THE FAIR WORK COMMISSION

**Matter No.:** AM2016/15 Plain Language Standard Clauses  
**Re Application by:** "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)



### **Submission of the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)**

#### **4 Yearly Review of Modern Awards**

**2 July 2018**

## **COVER SHEET**

### **About the Australian Manufacturing Workers' Union**

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents members working across major sectors of the Australian economy, including in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding degrees.

The AMWU's purpose is to improve member's entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

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## Introduction

1. The Australian Manufacturing Workers' Union (AMWU) makes the following submission to the Fair Work Commission in accordance with the Full Bench Decision 13 June 2018.<sup>1</sup>
2. The AMWU supports and adopts the submissions of the Australian Council of Trade Unions (ACTU).
3. The Full Bench Decision has asked parties to file submissions on the remaining issue of whether the revised Model Termination of Employment Clause<sup>2</sup> (the Model Clause) is "necessary to achieve the modern awards objective," within the meaning of s.138.<sup>3</sup>
4. This submission will address the following:
  - a. The recent judicial treatment of s.138 and relevant principles;
  - b. The purpose of the Model Clause lacking universality;
  - c. The disadvantage suffered by Award reliant workers; and
  - d. The relevant s.134 matters to be considered.

## Recent judicial treatment of s.138 and the Statutory Task

5. In *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd*<sup>4</sup> [2017] FCAFC 123, (*Black Coal Mining Industry Award 2010 Redundancy Cap*) Allsop CJ, North and O'Callaghan JJ set out their joint understanding of s.138 as follows:

"22 Section 138 is entitled "Achieving the Modern Awards Objective" and is as follows:

*A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.*

23 Terms that "it is permitted to include" are dealt with in subdiv B of Div 3 (ss 139-142), and terms that "it is required to include" are dealt with in subdiv C of Div 3 (ss 143-149D). **The words "only to the extent necessary" in s 138 emphasise the fact that it is the minimum safety net and minimum wages objective to which the modern awards are directed. Other terms and conditions beyond a minimum are to be**

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<sup>1</sup> [2018] FWCFB 3009

<sup>2</sup> [2018] FWCFB 3009 at Attachment 1 of the decision

<sup>3</sup> [2018] FWCFB 3009 at paragraph [105]

<sup>4</sup> [2017] FCAFC 123

**the product of enterprise bargaining, and enterprise agreements under Pt 2-4.** As the Guide to Pt 2-4 in s 169 says:

*This Part is about enterprise agreements. An enterprise agreement is made at the enterprise level and provides terms and conditions for those national system employees to whom it applies. An enterprise agreement can have terms that are ancillary or supplementary to the National Employment Standards.”<sup>5</sup> (**emphasis added**)*

6. The decision went on to more broadly describe the statutory task at hand, in the context of the 4 yearly review of modern awards, in the following way:

“28 The terms of s 156(2)(a) require the Commission to review all modern awards every four years. That is the task upon which the Commission was engaged. The statutory task is, in this context, not limited to focusing upon any posited variation as necessary to achieve the modern awards objective, as it is under s 157(1)(a). Rather, it is a review of the modern award as a whole. The review is at large, to ensure that the modern awards objective is being met: that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions. This is to be achieved by s 138 – terms may and must be included only to the extent necessary to achieve such an objective.

29 Viewing the statutory task in this way reveals that it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern award objective. Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.”<sup>6</sup>

7. These two paragraphs of the Full Court have been cited with approval by a decision of North, Tracey, Flick, Jagot and Bromberg JJ in *Shop, Distributive and Allied Employees Association v Australian Industry Group* [2017] FCAFC 161 (Penalty Rates Cut).<sup>7</sup>
8. A Full Bench in the present 4 yearly review of modern awards has also cited the two paragraphs as directive principles (alongside the Commission’s own jurisdictional issues, annual leave, and penalty rates cut decisions) in its decision in *AM2016/13 Annualised Wage Arrangements* [2018] FWCFB 154.<sup>8</sup>
9. Hatcher VP, Dean DP and Saunders C also went further to add:

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<sup>5</sup> [2017] FCAFC 123 at paragraphs 18 to 19

<sup>6</sup> [2017] FCAFC 123 at paragraphs 28 to 29

<sup>7</sup> [2017] FCAFC 161 and (2017) 272 IR 88 at paragraph 45

<sup>8</sup> [2018] FWCFB 154 and (2018) 274 IR 29 at paragraph 6

“In the same decision the Full Court also said: “... the task was not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation met the objective.””<sup>9</sup>

10. The paragraphs were also cited in the 18 October 2017 Decision<sup>10</sup> of this Full Bench in the present matter, where the Full Bench in applying the principles determined that it should first finalise the form of the Model Clause before providing an opportunity for parties to respond to the issue of whether the Model Clause is “necessary to achieve the modern awards objective.”<sup>11</sup>
11. In the present matter, the AMWU understands that the Commission is undertaking to re-write current Award terms in plain language, without changing their legal effect. However, in doing so, the Commission has uncovered jurisdictional issues requiring the legal effect of terms to be changed in order for the Commission to be able to include them in modern awards.
12. Applying the principles as outlined by the Full Court in the *Black Coal Mining Industry Award Redundancy Cap Decision*<sup>12</sup>, requires an evaluation of the Award as a whole, including the Model Clause proposed to determine whether the Award meets the Modern Awards Objective.
13. The present process of dealing with “Standard Clauses” in isolation from the Modern Awards in which they will be included is not conducive to adhering to the process and method outlined in the *Black Coal Mining Industry Award Redundancy Decision*<sup>13</sup>. In the present matter, the Commission appears to be adopting a universal whole of modern award system approach.
14. In certain circumstances, the universal approach may be appropriate where the merits and arguments are of a universal nature and applicable to every occupation and classification in every industry, perhaps with few exceptions which are more efficiently dealt with as exceptions.
15. In the present circumstances, the AMWU submits that the merits and factual circumstances being put forward by the AiGroup are not universal and are not self-evident. These will be addressed in the following sections of the submission. Given the matters raised by the AiGroup in support of a deduction are not universal, the matter cannot be dealt with on a whole of modern award system basis.
16. In the current process in order to assess whether the Model Clause is necessary to achieve the modern awards objective for each modern award, there should be an assessment of the claims made in support of the model clause. In particular, there should be an assessment of whether these claims are true universally.

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<sup>9</sup> [2018] FWCFB 154 and (2018) 274 IR 29 at paragraph 7 citing *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123 at [46].

<sup>10</sup> [2017] FWCFB 5258

<sup>11</sup> [2017] FWCFB 5258 at paragraphs [239] to [249].

<sup>12</sup> [2017] FCAFC 123

<sup>13</sup> [2017] FCAFC 123

## **The purposes and assessed effect of the Model Clause lack a universal character**

### **Claims about disruption to the employer are overstated**

17. The AiGroup, in addressing s.138 in their 4 September 2017 submission made the following unsubstantiated claim:

*“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.”<sup>14</sup>*

18. The claim that an employee resigning at short notice can be disruptive may hold as universally true for individuals with particularly unique skills. However, for the majority of award classifications for which casual employment is available and/or labour hire arrangements exist, there is no shortage of capacity available for employers to replace employees at short notice.
19. Both underemployment and unemployment rates have remained at levels higher than before the Global Financial Crisis in 2008.<sup>15</sup> At the same time, the FWC analysis reveals that underemployed people are mostly underemployed for a short time before moving to full time employment or to non-employment.<sup>16</sup> The current levels of underemployment and unemployment point to a labour market that still contains capacity to absorb increases in demand for labour on a macro level.
20. The ACTU’s submission 22 November 2018 at paragraph 18<sup>17</sup> highlights the key characteristics of the Award reliant workforce which improve labour mobility and/or result in minimal disruption to an employer from employee mobility.
21. At the end of the day, the claim that the associated costs of the disruption “far exceed the quantum of any deductions” is unsubstantiated and far from a self evident fact.
22. Applying the principles from the *Black Coal Mining Industry Award Redundancy Cap Decision*<sup>18</sup>, it is impossible from the material before the Commission to conclude that, universally across the Modern Award system, that there are always costs associated with the disruption to an employer caused by an employee’s departure with less than the Award specified period notice to the employer.

### **The inclusion of the legislative criteria highlights the deficiency of the process**

23. The Model Clause now contains the full legislative test that the deduction “must not be unreasonable in the circumstances.” The inclusion of this legislative test is evidence that the Commission has not been able to craft a term that would be able

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<sup>14</sup> [AiGroup Submission 4 September 2017](#) at paragraph 69

<sup>15</sup> Annual Wage Review Decision [\[2018\] FWCFCB 3500](#) table at paragraph [173]

<sup>16</sup> Annual Wage Review Decision [\[2018\] FWCFCB 3500](#) at paragraphs [178] to [181]

<sup>17</sup> [ACTU Submission 22 November 2017](#) at paragraph 18

<sup>18</sup> [2017] FCAFC 123

to be assessed as universally satisfying the legislative test. If a process is unable to craft a term that universally satisfies the legislative test (without simply replicating the test in the term), it is impossible for that process to have applied the *Black Coal Mining Industry Redundancy Cap Decision*<sup>19</sup> principles. It seems that the only way to satisfy the legislative test, is to include the test itself in the Model Clause.

### **The Disadvantage suffered by Award reliant workers**

24. What can be universally stated, is that one week's wages for a worker in the C10 classification would wipe out more than half<sup>20</sup> of the Annual Wage Review annual increase. That's without taking into account inflation.
25. Taking into account inflation, it wiped out most of this year's Annual Wage Review increase and looking at previous years, it would wipe out most Annual Wage Review increases over the past decade.<sup>21</sup>
26. The loss of a week's wages for some Award reliant employees without any savings should always be unreasonable.
27. The financial impact would reduce the kinds of positions which an employee may be likely to take. The limitations on labour mobility that affect an employee's capacity to earn have been treated very carefully by courts, when it comes to restraint of trade clauses. While a deduction of a week's wages is not in the same league as a restriction on earning capacity, for Award reliant workers, it would change the equation for the types of positions which they would likely accept.

### **Relevant matters to be taken into account by the Commission s.134**

#### **(a) The relative living standards and the needs of the low paid**

28. The size of a week's wages as a proportion of an employee's annual wage increase along with the continuing evidence of financial stress amongst a proportion of households<sup>22</sup> weighs against introducing the Model Clause.

#### **(c) the need to promote social inclusion through workforce participation**

29. The Model Clause is a disincentive for employees wanting to change jobs quickly. From this perspective, it weighs against the introduction of the Model Clause.

#### **(d) the need to promote flexible modern work practices and the efficient and productive performance of work**

30. The Model Clause has an intended purpose of acting as a disincentive on workers being able to move to other employment without first giving the Award specified period of notice (the disincentive purpose).

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<sup>19</sup> [2017] FCAFC 123

<sup>20</sup> C10 Rate \$809.10 increased by \$28.30 to \$837.40. Annual increase of  $(\$28.30 \times 48) + (\$28.30 \times 4 \times 1.175) = \$1491.40$ .  $\$837.4 / \$1491.40 = 56\%$

<sup>21</sup> Annual Wage Review Decision [\[2018\] FWCFB 3500](#) table at paragraph [277]

<sup>22</sup> Annual Wage Review Decision [\[2018\] FWCFB 3500](#) table at paragraph [362]

31. Where employers require an employee to join their workplace quickly, they usually have such requirements because they are a growing business. Having disincentives to or restrictions on workers moving to a growing and thriving businesses reduces the flexibility of those thriving workplaces to ramp up to meet demand. It would in those circumstances reduce the efficiency and productivity of work.

**(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden**

32. The disincentive purpose has a negative impact on growing and thriving businesses. The disincentive purpose rewards employers who are failing to plan for changes in their workforce or for growth in their business.
33. In order to attract the employee, the thriving employer would need to pay the penalty the employee is required to pay to the stagnating poorly organised employer in addition to offering any other improved employment prospects and benefits.
34. The Model Clause increases the cost of employment across the system.
35. This creates a system of rewarding and funnelling resources towards businesses who have not planned their workforce properly and have not taken proper advantage of broad banded classifications and other flexibilities in the Award system that allow for employees to perform a range of duties outside of their classification for short periods.
36. The regulatory burden is likely to be increased, as a result of the uncertainty surrounding the meaning of “unreasonable in the circumstances.”
37. The FWC’s research reveals a low level of knowledge about Awards across both employers and Award reliant employees.<sup>23</sup>
38. These factors weigh against including the Model Clause. The alternative of allowing for increased labour mobility, increases the incentive for employers to attract workers to remain at their workplace.
39. If an employer wants to avoid employees going to other businesses without notice, they should work on improving the employment prospects and entitlements and conditions of their employees.
40. The disincentive and self-enforcing penalty purpose of the Model Clause gives credence to ideas about what businesses need that do not promote growing and thriving businesses. It reinforces the idea that employers can recoup the costs of hiring new employees onto employees themselves. The Award system should facilitate and encourage businesses that can compete not only for demand and investment in a global economy but also for workers.

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<sup>23</sup> <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/report.pdf> at page 22

**(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards**

41. The inclusion of the legislative test creates further uncertainty for employees and employers. It detracts from a simple, easy to understand award.
42. This weighs against the inclusion of the Model Clause in Awards.

**(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy**

43. The disincentive purpose reduces the ability for businesses that are contributing to employment growth from doing so as efficiently as possible. This has a flow on effect of reducing the competitiveness of the national economy.

**Other matters**

**When does an employee terminate their employment?**

44. While a general assumption may be made that employees leaving employment may be going to other employment, there are a number of other circumstances where an employee may terminate their employment.
45. Employees may be required at short notice to enter into care for a relative. It would be unreasonable in such circumstances for an employee to be penalised when they are entering into community service that is of benefit to society. In all circumstances, the penalty on the employee for ending their employment to become a carer cannot result in a fair and relevant Award safety net.
46. Employees may be required to terminate their employment because they have unexpectedly passed away. In these circumstances, it would be unreasonable for the employer to deduct wages.
47. Employees may be affected by personal trauma and issues that result in them having an incapacity to continue to work without causing harm to themselves and their work colleagues. It would be unreasonable to penalise these employees for making a decision which is the best outcome for all potentially affected people.
48. There may be a whole range of other circumstances where an employee may be required to terminate their employment.
49. The human impact of the termination of employment should be given careful consideration and weight by the Commission. Employees do not take such decisions lightly.

**End**

**3 July 2018**