IN THE FAIR WORK COMMISSION

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

Submissions 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

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 Submissions to the Fair Work Commission in response to directions given in both the Full Bench Statement 21 August 2017[1] and in the Full Bench Decision 28 August 2017.[2]

2. The Directions in the Statement 21 August 2017 sought the views of interested parties about Clause E.1(c) which provides as follows:

> "E.1(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 NES), an amount not exceeding the amount that the employee would have been paid in respect of the period of notice not given."

3. In particular the directions sought views about the following:

   a. whether clause E.1(c), either wholly or insofar as it deals with NES entitlements, is a type of provision which may validly be included in a modern award under the relevant provisions of the FW Act, including but not confined to ss.55, 118, 139 and 142; and

   b. the extent that the Commission has the power to include a provision of the nature of clause E.1(c) in a modern award, whether as a matter as of merit such a provision is necessary to achieve the modern awards objective in accordance with the requirement in s.138.[3]

4. The Full Bench also noted that the AiGroup's interpretation of how clause H.2 interacted with E.1(c) was another dimension to the issue.

5. The AMWU supports and adopts the submissions of the Australian Council of Trade Unions (ACTU).

6. In addition, the AMWU's submissions will address the two issues in relation to clause E.1(c) and the AiGroup's interpretation of the interaction between E.1(c) and H.2. Specifically the submissions address:

   a. The parts of the Act which indicate that E.1(c) cannot be included in a modern award; and

   b. The disproportionate effect of the penalty provided by E.1(c) when compared to the impact on the employer of an employee failing to give notice.

7. The Directions in the Decision 28 August 2017 also sought views on a range of issues. The AMWU's submissions will address the revised draft clause G and the

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[1] [2017] FWCFB 4355
[2] [2017] FWCFB 4419
[3] [2017] FWCFB 4355 at paragraph [2] and [3]

Full Bench's reconsideration at paragraphs [170] to [171] of the Decision 28 August 2017.[4] Specifically, the AMWU's submissions will address:

a. The change in language indicating an employer can transfer an employee against their will; and

b. The definition of "ordinary rate of pay" and what is included in that payment.

What is the effect of Clause E.1(c) and deductions for the benefit of the employer?

8. The effect of E.1(c) is to allow the employer to deduct from money due to the employee on termination where the employee has not given notice of termination. On termination an employee would be entitled to be paid at a minimum:

a. Any unpaid wages and entitlements for the performance of work;

b. Any NES/Award Annual Leave accrued; and

c. Any NES or State legislation Long Service Leave accrued that may be payable.

9. They may also be entitled to other payments above the Award such as any Personal Leave accrued.

10. The amount that an employer may deduct, varies from 1 week to 4 weeks of pay equal to the amount the employee would have been paid in respect of the period of notice not given.

11. For a worker in a classification in the *Manufacturing and Associated Industries and Occupations Award* 2010, the minimum deduction, would be as follows:

Classification level	**1 week**	**4 weeks**	**+30%**	**+30% + Sat + Sun**
	$	$	$	$
C14	694.90	2779.60	3613.48	4113.81
C13	714.90	2859.60	3717.48	4232.21
C12	742.30	2969.20	3859.96	4394.42
C11	767.80	3071.20	3992.56	4545.38
C10	809.10	3236.40	4207.32	4789.87
C9	834.40	3337.60	4338.88	4939.65

[4] [2017] FWCFB 4419 at [170] to [171]

C8	859.80	3439.20	4470.96	5090.02
C7	882.80	3531.20	4590.56	5226.18
C6	927.50	3710	4823	5490.80
C5	946.50	3786	4921.8	5603.28
C4	971.90	3887.60	5053.88	5753.65
C3	1022.80	4091.20	5318.56	6054.98
C2(a)	1048.30	4193.20	5451.16	6205.94
C2(b)	1094.10	4376.40	5689.32	6477.07

12. The first two columns are for day workers 1 week and 4 week wages. The third column is a night shift worker. The fourth column is a night shift worker who also works ordinary hours on Saturday and Sunday. The table does not include any all purpose allowances, which would increase all the rates. This indicates that a worker could have between $694.90 and $6477.07 deducted from unpaid monies and entitlements, without taking into account all purpose allowances.

Relevant Legislative provisions

13. In exercising its powers relating to Modern Awards, the Commission must ensure that it is achieving the modern awards objective. The objective being to ensure that the NES and the Modern Awards are a "*fair and relevant minimum safety net of terms and conditions."*

14. Section 136 sets out the broad framework for terms permitted, required or not permitted to be in awards. Section 136(1)(c) and (d) and 136(2) are the most relevant. Section 136 provides the following:

> **"136 What can be included in modern awards**
>
> *Terms that may or must be included*
>
> (1) A modern award must only include terms that are permitted or required by:
>
> (a) Subdivision B (which deals with terms that may be included in modern awards); or
>
> (b) Subdivision C (which deals with terms that must be included in modern awards); or
>
> **(c) Section 55 (which deals with interaction between the National Employment Standards and a modern award or enterprise agreement); or**
>
> **(d) Part 2-2 (which deals with the National Employment Standards).**

Note 1: Subsection 55(4) permits inclusion of terms that are ancillary or incidental to, or that supplement, the National Employment Standards.

Note 2: Part 2-2 includes a number of provisions permitting inclusion of terms about particular matters.

Terms that must not be included

(2) A modern award must not include terms that contravene:

(a) Subdivision D (which deals with terms that must not be included in modern awards); or

(b) Section 55 (which deals with the interaction between the National Employment Standards and a modern award or enterprise agreement).

Note: The provisions referred to in subsection (2) limit the terms that can be included in modern awards under the provisions referred to in subsection (1)." **(emphasis added)**

15. Section 138, is relevant as it places a further boundary on the permitted terms. Section 138 provides the following:

"138 Achieving the modern awards objective

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." (**Emphasis Added**)

16. Section 139 provides further detail to section 136(1)(a) about the permitted matters in addition to the NES matters (s.136(1)(c) and (d)). The parts of s.139 do not appear to provide any support for the term providing for deduction in favour of the employer.

17. Section 55 provides the interaction rules for the NES and Awards and is relevant to the extent that clause E.1(c) is about a matter in the NES or has an interaction with a matter in the NES. The relevant parts of section 55 provides as follows:

"55 Interaction between the National Employment Standards and a modern award or enterprise agreement

National Employment Standards must not be excluded

(1) A modern award or enterprise agreement **must not exclude the National Employment Standards** or any provision of the National Employment Standards.

Terms expressly permitted by Part 2-2 or regulations may be included

(2) A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:

(a) by a provision of Part 2-2 (which deals with the National Employment Standards); or

(b) by regulations made for the purposes of section 127.

Note: In determining what is permitted to be included in a modern award or enterprise agreement by a provision referred to in paragraph (a), any regulations made for the purpose of section 127 that expressly prohibit certain terms must be taken into account.

(3) The National Employment Standards have effect subject to terms included in a modern award or enterprise agreement as referred to in subsection (2).

Note: See also the note to section 63 (which deals with the effect of averaging arrangements).

Ancillary and supplementary terms may be included

(4) A modern award or enterprise agreement may also include the following kinds of terms:

(a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;

(b) terms that supplement the National Employment Standards;

but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

Note 1: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:

(a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or

(b) that specify when payment under section 90 for paid annual leave must be made.

Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:

(a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or

(b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

Note 3: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74.

…

Terms permitted by subsection (4) or (5) do not contravene subsection (1)

(7) **To the extent that a term of a modern award or enterprise agreement is permitted by subsection (4) or (5), the term does not contravene subsection (1).**

Note: A term of a modern award has no effect to the extent that it contravenes this section (see section 56). An enterprise agreement that includes a term that contravenes this section must not be approved (see section 186) and a term of an enterprise agreement has no effect to the

extent that it contravenes this section (see section 56)." **(emphasis added)**

18. It is relevant to note that s.55(7) indicates that a term permitted by subsection 55(4) and (5) do not contravene s.55(1). However, there is no express statement in relation to s.55(2). This reduces the scope of terms which derive their existence from s.55(2), i.e. the NES allows for a specific type of term in a modern award, such as s.118.

19. There is also a similar section to s.55(4)(a) for Award terms which is s.142. Section 142 is relevant for considering whether clause E.1(c) may be permitted because it is incidental or provides for how a particular Award term is to operate. Section 142 provides as follows:

> **"142 Incidental and machinery terms**
>
> *Incidental terms*
>
> (1) A modern award may include terms that are:
>
> (a) incidental to a term that is permitted or required to be in the modern award; and
>
> (b) essential for the purpose of making a particular term operate in a practical way."

20. Clause E.1(c) may be incidental to the operation of a clause which provides for notice of termination by an employee. However, the way in which it makes the term operate must still be compliant with other sections.

21. It is also relevant to consider Subdivision D, which provides for terms that are not permitted to be in Awards. This is relevant for considering whether clause E.1(c) is a term that is not permitted to be included in an Award. The second section in Subdivision D is s.151 about deductions for the benefit of the employer.

22. Section 151 provides as follows:

> "**151 Terms about payments and deductions for benefit of employer etc.**
>
> 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 an employer) or subsection 326(3) (which deals with unreasonable requirements to spend an amount)."

23. Its necessary arising out of section 151 to also look at section 326 which defines when deductions for the benefit of the employer have no effect.

> **"326 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.

(2) The regulations may prescribe circumstances in which a deduction or payment referred to in subsection (1) is or is not reasonable.

Unreasonable requirements to spend an amount

(3) 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 make a requirement that would contravene subsection 325(1); or

(b) directly or indirectly requires an employee to spend an amount, if the requirement would contravene subsection 325(1) if it had been made by an employer."

24. Section 326 deals with a specific type of deduction, which are deductions for the benefit of the employer and should be applied in the current context.[5]

25. The regulations, which may provide for certain terms to be or not to be reasonable do not appear to contain any relevant exemptions.

26. The parts of the NES which deal with entitlements and termination of employment are relevant to considering whether clause E.1(c) contravenes, or is ancillary, incidental, supplementary or permitted by an express provision of the NES.

27. Section 90 of the NES provides as follows:

"90 Payment for annual leave

(1) If, in accordance with this Division, an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.

(2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, **the employer must pay the employee the amount that would have been payable to the**

[5] The principle for interpreting legislation *Generalia specialibus non derogant*, meaning where there is a conflict between the general and specific provisions, the specific provisions prevail may be applicable. However, the Union's primary submission is that both s.326 and 324 can be read together without conflict. This is supported for the Union's position by the note to s.324, which refers the reader to the requirements of s.326.

employee had the employee taken that period of leave."
(emphasis added)

28. Section 117 and 118 of the NES provides as follows:

"117 Requirement for notice of termination or payment in lieu

Notice specifying day of termination

(1) An employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination (which cannot be before the day the notice is given).

Note 1: Section 123 describes situations in which this section does not apply.

Note 2: Sections 28A and 29 of the *Acts Interpretation Act 1901* provide how a notice may be given. In particular, the notice may be given to an employee by:
(a) delivering it personally; or
(b) leaving it at the employee's last known address; or
(c) sending it by pre-paid post to the employee's last known address.

Amount of notice or payment in lieu of notice

(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.

(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	**Perio d**
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

Period		
	Employee's period of continuous service with the employer at the end of the day the notice is given	**Period**
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.

118 Modern awards and enterprise agreements may provide for notice of termination by employees

A modern award or enterprise agreement may include terms **specifying the period of notice an employee must give in order to terminate his or her employment**." (**Emphasis Added**)

Is clause E.1(c) permitted as an Award term?

29. Clause E.1 is a term which specifies the period of notice an employee must give in order to terminate his or her employment, which means that it is expressly allowed by s.118 of Part 2-2 of the Act (above), and therefore permitted by s.136(1)(d) which provides:

"(1) A modern award must only include terms that are permitted or required by:

…

(d) Part 2-2 (which deals with the National Employment Standards)."

An unreasonable deduction it is not permitted

30. However, s.136(2)(a) indicates that a modern award most not contain terms that contravene subdivision D.

31. Section 151 about "deductions for benefit of employer etc" is in subdivision D which indicates that a Modern Award must not include a term which has no effect because of subsection 326(1).

32. Looking at subsection 326(1) again, it is apparent that E.1(c) may be a term that is caught by s.151. Subsection 326(1) provides as follows:

"326 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;

...

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."

33. Clause E.1(c) meets all the qualification criteria of this subsection which would render the clause inoperative. It 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 (s.326(1)(a)), it is directly for the benefit of the employer (s.326(1)(c)(i) and it is unreasonable in the circumstances (s.326(1)(c)(ii)).

34. The clause is unreasonable, taking into account the context of what is considered reasonable in the statutory regime. The regulations indicate that deductions which are reasonable include: deductions such as for the supply of goods or services from the employer which are not less favourable or on the same terms as the public might receive, such as health insurance premiums or loan repayments[6] or costs incurred by the employer as a result of the voluntary private use of a property of the employer by the employee, such as mobile phone use, corporate credit card use etc[7]. In this context, a deduction of between one week or four weeks' wages is a very significant amount to deduct from an employee.

35. Taking into account fairness, the damage suffered by an employer as a result of an employee not giving notice of termination, is not equivalent to 38 to 152 hours of work from an Award reliant employee which amounts to between $694.90 and $6477.07. An employer can find ways to ameliorate an employee's absence at short notice, such as in the circumstance of personal leave. The idea that an employee should be penalised what is equivalent to 1.9% and as much as 7.7% of their annual income because they didn't provide an employer notice is an extraordinary amount.

36. If an employee was on personal leave for one week, or five days, the employer is required to accommodate that entitlement and make appropriate arrangements. This puts into context the unreasonableness of penalising an employee 5 days pays for not giving 5 days notice.

37. To give further context the average increase in annual wages arising from the Annual Wage Review since the Fair Work Act came into operation has been between 2.4% (AWR 2015-16)[8] and 3.4% (AWR 2010-11[9]). The power given to an employer by the clause E.1(c) allows for a penalty that is close to and potentially more than double the increases awarded by the Commission in Annual Wage Reviews. This is extraordinarily disproportionate and unfair penalty when

[6] Fair Work Regulations 2009 regulation 2.12(1)
[7] Fair Work Regulations 2009 regulation 2.12(2)
[8] Annual Wage Review Decision [2016] FWCFB 3500
[9] Annual Wage Review Decision [2011] FWAFB 3400

compared to the minor inconvenience that may be experienced by an employer arising from an employee not giving notice of their termination of employment.

38. The recent "Minimum Income for Healthy Living Budget Standards for Low-Paid and Unemployed Australians"[10] (MIHL) indicates that the total budget for low paid workers were as follow:

Healthy Living Budget Standard for:	Amount
Single Adult	$597.31
Couple, no children	$833.24
Couple, 1 child, girl age 6	$969.90
Couple, 2 children, girl age 6 boy age 10	$1,173.38
Sole parent, 1 child, girl age 6	$827.70[11]

39. These living healthy budget standards give a clear indication of the proportion of an Award reliant employee's wages per week that they would spend on a weekly budget. The budget standards allows for a degree of social participation consistent with social inclusion and healthy living, and for other factors that are reflected in the MIHL standard. The budget standards reinforce the disproportionate penalty which the employer's deduction places on the life of an award reliant worker.

40. Given it meets the qualification criteria in subsection 326(1), specifically that it is unreasonable, it therefore cannot be permitted because of s.151.

There is no merit to a penalty of such proportions in favour of an employer

41. The penalty in favour of the employer is completely disproportionate to the inconvenience experienced by the employer and completely disproportionate taking into account the financial circumstances of a business as compared to a workers.

42. In order for there to be fairness, if an employee can penalise an employee between 1 and 4 weeks of their pay for not providing notice, an employee who is not given the appropriate notice of termination by the employer should be able to

[10] New Minimum Income for Healthy Living Budget Standards for Low Paid and Unemployed Australians, Saunders P. and Bedford M, UNSW Social Policy Research Centre, Sydney August 2017
[11] New Minimum Income for Healthy Living Budget Standards for Low Paid and Unemployed Australians, Saunders P. and Bedford M, UNSW Social Policy Research Centre, Sydney August 2017 at page 103, Table 5.17

extract a penalty equivalent to 1 to 4 weeks of profits from the business as a penalty, or 1 to 4 weeks of the total expenses of the business as a penalty.

43. A business would find it very difficult and uncomfortable to having a penalty of that size added to its operations.

44. Similarly, as demonstrated by the MIHL Budget Standards, a worker does find it equally difficult to manage with a penalty of that proportion added to their personal budget.

45. The inclusion of the term is unfair and goes against the modern awards objective, which is to ensure that the modern awards and the NES together provide a "*fair and relevant minimum safety net of terms and condition*."[12]

A term that contravenes the rules about interaction between the NES and Awards is not permitted

46. Clause E.1(c) purports to permit an employer to avoid paying an employee for the NES entitlements which they may be owed, such as accrued annual leave or long service leave, where the employee has failed to provide notice of termination.

47. Subsection 136(2)(b) requires that a modern award must not include terms that contravene, "section 55 (which deals with the interaction between the National Employment Standards and a modern award or enterprise agreement)."

48. Subection 55(1) is very clear that "a modern award… must not exclude the National Employment Standards or any provision of the National Employment Standards."

49. However, Subsection 55(2) relevantly provides that a modern award may include any terms that are permitted "by a provision of Part 2-2."

50. Section 118, which is Part 2-2, does provide that "a modern award … may include terms specifying the period of notice an employee must give in order to terminate his or her employment."

51. In context, it does not seem that the intention of section 118 would be to allow for deductions against other NES entitlement. It only provides that the award may include terms "specifying the period of notice." There is no explicit reference to an ability for a penalty to be enforced without reference to a court by the employer.

52. Taking into account the context of the legislation is useful to interpreting the intention of the section. A relevant context is that the legislation does expressly provide for other entitlements such as annual leave and long service leave. Those entitlements should not be able to be taken away by the operation of a clause which provides for a "period of notice an employee must give in order to terminate his or her employment."

[12] Section 134(1) of the *Fair Work Act* 2009

53. There is a further context in s.55(7) which supports the interpretation that terms permitted by s.55(2), cannot exclude any part of the NES.

54. Subsection 55(7) expressly states that a term of a Modern Award that is permitted by Ss.55(4) and (5), "does not contravene subsection (1)." There is no subsection which states that a term that is permitted by subsection 55(2) does not contravene subsection (1).

55. This context must be read to mean that the terms expressly permitted by subsection 55(2) may only do what they are expressly permitted to do, and they must also comply with subsection 55(1) which requires that a term must not exclude the NES.

56. The context of an express provision not allowing for unreasonable deductions for the benefit of an employer, in the form of s.151 must also be read in conjunction with s.55's interaction terms. While a term may be included under s.118, an award must also not allow for unreasonable deductions for the benefit of an employer under s.151.

57. Section 55 and section 151 are not in conflict with each other. Therefore clause E.1(c) must comply with both sections.

Conclusion about clause E.1(c)

58. The AMWU submits that the term in the form of E.1(c) cannot be included in a modern award, because it is:

    a. providing for a deduction for the benefit of an employer which is unreasonable and cannot be included in a Modern Award (s.151);

    b. is a penalty on the employee, which is completely disproportionate to the inconvenience experience by the employer and would result in an unfair minimum safety net (s.134); and

    c. has the effect of excluding other parts of the National Employment Standards such as Annual Leave and Long Service Leave (s.55(1)), which is not permitted by s.55(2) and (7).

59. To the extent that the AiGroup's interpretation of the clause H.2 allows for a deduction for the benefit of an employer, it also cannot be permitted.

Revised Clause G. Transfer to lower paid duties

60. The Commission has produced a revised draft clause at [170][13] as follows:

> "G.1 Clause G applies if, because of redundancy, the employer decides to transfer an employee to new duties to which a lower ordinary rate of pay is applicable.
>
> G.2 The employer may:

[13] [2017] FWCFB 4419 at [170]

(a) give the employee notice of the transfer of at least the same length as the employee would be entitled to under section 117 of the Act as if it were a notice of termination given by the employer; or

(b) transfer the employee to the new duties without giving notice of transfer or before the expiry of a notice of transfer.

G.3 If the employer acts as mentioned in paragraph G.2(b), the employee is entitled to a payment of an amount equal to the difference between the ordinary rate of pay of the employee (inclusive of shift allowances and penalty rates applicable to ordinary hours) for the hours of work the employee would have worked in the first role, and the ordinary rate of pay (also inclusive of shift allowances and penalty rates applicable to ordinary hours) of the employee in the second role for the period for which notice was not given."

Employee should not be transferred by the employer against their will

61. The clause introduces a concept which doesn't appear to be included in the current clause. The revised clause indicates that Clause G applies where an "employer decides to transfer."

62. The current clause which exists in the *Manufacturing and Associated Industries and Occupations Award* 2010 (Manufacturing Award), does not indicate that an employer has an unfettered right to transfer an employee to lower paid duties. The current clause in the Manufacturing Award is as follows:

> "23.3 Transfer to lower paid duties
>
> Where an employee is transferred to lower paid duties by reason of redundancy the same period of notice must be given as the employee would have been entitled to if the employment had been terminated and the employer may, at the employer's option, make payment instead of an amount equal to the difference between the former ordinary time rate of pay and the new ordinary time rate of pay for the number of weeks of notice still owing."

63. At the time that the clause was drafted by the TCR Decision 1984 and the TCR Supplementary Decision, there wasn't any indication that an employer had the right to transfer an employee forcibly. The original TCR Decision 1984 in context also developed the formulation of "*acceptable alternative employment*"[14] which applies in instances where the employment is terminated, but alternative employment is found with another employer. The decision taken as whole could not have intended for an employer to be able to transfer forcibly an employee to a lower paid duties that would not satisfy the criteria of "acceptable alternative employment" if the position was with another employer.

64. The part in G.1 that reads "the employer decides to transfer an employee to new duties" should be replaced with "an employee agrees to transfer to new duties."

[14] *Termination, Change and Redundancy Test Case* (1984) 8 IR 34 at page 75

65. If an employer is able to forcibly transfer an employee to lower duties in order to avoid redundancy pay, it would appear to allow adverse action because an employee is entitled to a workplace right (redundancy pay). This raises a question about whether the term is an objectionable term which is not permitted to be in an award as required by s.150.

The Ordinary Rate of Pay should include All Purpose allowances

66. The clause continues to use the phrase "ordinary rate of pay," which is not defined anywhere. The context of the provisional decision's selection of "ordinary rate of pay" is that the words have been chosen over the words "ordinary time rate of pay," which are the current words and "ordinary hourly rate of pay" which the AiGroup proposed in the proceedings. This context could be interpreted to indicate that the phrase is not intended to mean what those two phrases mean.

67. Paragraph [167] of the Decision 28 August 2017 which developed the revised clause summarised the intent of the original drafters of the entitlement as follows:

> "[167] It is apparent from the above passage that the Full Bench intended that the payment in lieu of notice was intended to equalise the position of the employee to what it would have been if the employee had received actual notice of the transfer. ***It necessarily follows that the payment, characterised as income maintenance, would include all payments payable to the employee for the working of ordinary time, including all-purpose allowances, loadings and penalties.*** The reference to the 'former classification' in the last sentence reflects the fact that because the 'duties' of the new role are 'lower paid' than for the old role, a change to the classification level will be involved, but there is no reason to read this as excluding some aspects of total ordinary time pay from the required payment in lieu of notice. The actual clause developed in the TCR Supplementary Decision (earlier set out), which refers to the payment constituting the difference between the old and new ordinary time rate of pay, confirms the Full Bench's intention in this respect."[15] (emphasis added)

68. The decision indicates that the payment should include any entitlements related to the working of "ordinary time." The decision also indicates that the payments associated with ordinary time include "all-purpose allowances, loadings and penalties."

69. Since the Commission did not use the phrase "ordinary hourly rate of pay", the clause cannot automatically be assumed to include the minimum rate of pay and all purpose allowances. Although the phrasing and use of the term "ordinary rate of pay" in context with the words, "hours the employee would have worked" would seem to indicate that all purpose allowances should be paid. In order to aid easy interpretation of the clause, it should include the all purpose allowances.

70. The AMWU proposes that clause G.3 should be amended to reflect the decision and include the reference "all purpose allowances" as follows:

[15] [2017] FWCFB 4419 at [167]

"G.3 If the employer acts as mentioned in paragraph G.2(b), the employee is entitled to a payment of an amount equal to the difference between the ordinary rate of pay of the employee (inclusive of **all purpose allowances,** shift allowances and penalty rates applicable to ordinary hours) for the hours of work the employee would have worked in the first role, and the ordinary rate of pay (also inclusive of **all purpose allowances,** shift allowances and penalty rates applicable to ordinary hours) of the employee in the second role for the period for which notice was not given." (**additions emphasised**)

71. The full clause proposed by the AMWU is as follows:

"**G.1** Clause G applies if, because of redundancy, an employee agrees to transfer to new duties to which a lower ordinary rate of pay is applicable.

G.2 The employer may:

(a) give the employee notice of the transfer of at least the same length as the employee would be entitled to under section 117 of the Act as if it were a notice of termination given by the employer; or

(b) transfer the employee to the new duties without giving notice of transfer or before the expiry of a notice of transfer.

G.3 If the employer acts as mentioned in paragraph G.2(b), the employee is entitled to a payment of an amount equal to the difference between the ordinary rate of pay of the employee (inclusive of all purpose allowances, shift allowances and penalty rates applicable to ordinary hours) for the hours of work the employee would have worked in the first role, and the ordinary rate of pay (also inclusive of all purpose allowances, shift allowances and penalty rates applicable to ordinary hours) of the employee in the second role for the period for which notice was not given.'

End

4 September 2017