IN THE FAIR WORK COMMISSION

Matter No.: AM2016/15 Plain Language Standard Clauses

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 in response to the Full Bench Statement 18 October 2017[1], which arose out of the Full Bench Decision 18 October 2017.[2]

2. In particular, these submissions will address each of the issues referred to at paragraph [2] of the Full Bench Statement 18 October 2017.[3]

1) The scope of Clause E.1(a) should be restricted in the same way s.118 is restricted by s.123

3. The AMWU supports the provisional view of the Full Bench that the scope of Clause E.1(a) should be restricted in the same way as the application of s.118 is restricted.

4. That is, that the following employees should not be required to give notice of termination:

> (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));
>
> (ii) a casual employee (s.123(1)(c));
>
> (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));
>
> (iv) daily hire employees working in the building and construction industry (s.123(3)(b));
>
> (v) daily hire employees working in the meat industry in connection with the slaughter of livestock (s.123(3)(c)); or
>
> (vi) weekly hire employees working in connection with the meat industry whose termination is determined solely by seasonal factors (s.123(3)(d)).

5. Section 123 relevantly identifies that the above employees are not covered by the Division and the Subdivision of the Act to which s.118 belongs.

6. Therefore as Fair Work Commission draws its jurisdiction to include clause E.1(a) in an award from s.118, the scope of the clause should be restricted in the same way as s.118.

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[1] [2017] FWCFB 5367
[2] [2017] FWCFB 5258
[3] [2017] FWCFB 5367 at [2]

2) The requirement for written notice of termination should be removed

7. The effect of the clause is to create an obligation, which if breached results in a civil penalty under s.45.[4]

8. The Commission has correctly identified that a worker who gave notice verbally would still be in breach. This is an unfair scenario, which places an unnecessary onus on the worker, where they may not be aware of the requirement to provide notice in writing.

9. The maximum penalties for breaching the Award is 60 penalty units. This amounts to $12,600, with the current penalty unit being $210. The maximum penalty is 34.9% of the annual wage of an Award-reliant minimum wage worker. Although it is unlikely that a court would order such a penalty, the prospect of a penalty and any compensation is a relevant consideration to removing the technical requirement for an Award-reliant worker to provide written notice.

10. If there is a requirement for a written record to be created, that requirement should fall on the business, as part of its obligations to keep employee records.

11. The penalties available for an employer to seek through a court are a relevant circumstance in considering whether modern Awards should include an ability for an employer to self-execute a penalty in the form of a deduction against monies owed to a worker. The submission will deal with this further below.

3) Any deductions should not be made against NES entitlements

12. The AMWU does not support the inclusion of a clause which provides the power for a business to determine whether or not notice of termination was given and to then enforce a penalty on the worker.

13. However, in response to the Commission's provisional view, the AMWU supports the position that any deduction must avoid deducting from NES entitlements and therefore would be restricted to wages due and arising from the Award.

4) Workers under 18 should not have their wages deducted because of s.326(4)

14. The AMWU agrees that the operation of s.326(4) means that no deductions may have effect without parental consent.

5) Clause E.1(c) is not incidental to E.1(a)

15. The AMWU does not agree that the term E.1(c) is incidental to clause E.1(a).

16. The Commission has adopted in its decision a provisional view based on the Macquarie dictionary meaning of "incidental"[5] being "liable to happen in conjunction with; naturally appertaining to."

[4] S.45 of the Fair Work Act 2009.

17. However, the full s.142(1) reads as follows:

> "'(a) incidental to a term that is permitted or required to be in the modern award;"

18. In its full context, the entitlement to withhold monies in favour of the employer is not something that is incidental to E.1(a).

19. E.1(a) derives is ability to exist from s.118, which is very narrow in its scope. The precise limitation placed on the kind of term permitted by s.118 should not be overcome by a characterisation of E.1(c) as "incidental."

20. E.1(c) is very specific in its operation, which provides for a punitive right of the employer to penalise the employee by withholding monies.

21. The *Apprentices decision* cited by the Full Bench observed that:

> "[149] In the Apprentices decision the Full Bench observed that:
>
> '… s.142(1) provides only a relatively narrow basis for the inclusion of award terms. It is not in itself an additional power for the inclusion of any terms that cannot be appropriately linked back to a term that is permitted by s.139(1). The use of the word 'essential' suggests that the term needs to be 'absolutely indispensable or necessary' for the permitted term to operate in a practical way. The wording of the section suggests that it provides a more limited power to include terms than that of its earlier counterpart in s.89A(6).'"[6] (emphasis added)

22. This general proposition accords with the principle that the specific overrides the general. While there may be a general power to include incidental terms under s.142(1), that general power should not be used where there is a very specific power provided by s.118 which is very narrowly confined. Section 118 is not in the form of a general broad description of a matter such as in s.139 (about terms that may be included) or s.55(4)(b) (about terms that supplement the NES).

23. Further to this, the context of the avenues for seeking penalties through the courts, also tell against a characterisation of the deduction term as "incidental."

24. The existence of s.326 also tells against a characterisation of the deduction term as "incidental."

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[5] [2017] FWCFB 5258 at [134]
[6] [2017] FWCFB 5258 at [149]

6) a) Clause E.1(c) is not essential for the purpose of making E.1(a) operate in a practical way.

b) The purpose of E.1(c) is to provide the business with an ability to penalise a worker for not providing notice and compensate the business

25. The AMWU submits that Clause E.1(c) is not essential for the purpose of making E.1(a) operate in a practical way.

26. E.1(a) does not require an accompanying right of the employer to be judge, jury and executioner. "A practical way" should not mean a way to avoid the courts or the tribunal where there is likely to be a dispute and where the Act provides specifically for an avenue through the courts to access a penalty.

27. The specific provisions of the Act should override the general. The general scope of s.142(1) should not be accessed to create another avenue for the business to access a penalty where, the Act has specifically silent on an ability to withhold monies at s.118 and where specific provision has been made for accessing penalties through the courts.

28. It would appear that the intent of clause E.1(c) is to provide an avenue for the business to extract a penalty from the workers and simultaneously compensate the business for what it perceives to be a loss or damage as a result of a worker not providing notice, without having to go through the court process.

29. The purpose cannot be to encourage compliance from employees. The possibility of a penalty and court orders through s.45 would be sufficient to encourage compliance from a worker. If businesses want to promote compliance, all they need to do is to make the worker aware that they will pursue action in the courts if the worker does not provide the relevant notice as required by the clause.

7) The deduction made pursuant to Clause E.1(c) is not certain of being 'reasonable' in all possible circumstances.

30. The Commission has identified 4 specific circumstances where it has provisionally formed a view that it would be unreasonable for a deduction to occur.

31. The AWMU submits that there are many circumstances where the deduction would be unreasonable, which cannot be anticipated by the Commission. The submissions below will address this submission in general terms. However, the submissions below will also address the specific circumstances identified by the Commission.

The term cannot ensure a proportionate penalty in all the circumstances

32. A term providing for fixed deductions can never be reasonable in all the circumstances, because it can never codify a regime which will result in a proportionate penalty in every circumstance.

33. Even if the maximum deduction is limited to one week's wages, this is a very significant amount to penalise an Award reliant worker. Once week of wages is equivalent to approximately 2% of the annual income of a worker. For someone on the minimum wage, this can be more than what they receive in increases from the FWC *Annual Wage Review*.

34. The Reserve Bank of Australia's inflation target is 2 – 3%. The penalty extracted by the business would equate to approximately the lower end of the inflation target, meaning a worker could effectively suffer a reduction in the real value of their wages because of the penalty extracted by the business through the clause.

35. For the year September 2016 to September 2017, the change in CPI was 1.8%. For this particular period, an Award-reliant worker would have suffered a reduction in real wages as a result of the one week penalty extracted by the business.

36. Such a penalty against an Award-reliant worker on minimum wages, should be ordered by a court, that can take into account the specific circumstances of each individual case.

37. A penalty against an Award-reliant minimum wage worker should be considered in a totally different manner to a penalty against a business.

38. There are too many circumstances which should be taken into account for a one size fits all approach. In particular, the impact on the employer of an employee not providing the relevant notice of termination should be taken into account in determining if such a penalty is proportionate. The Commission's provisional decision identified that a mechanism for ensuring proportionality was not provided for by E.1(c).[7]

39. It would seem that there is no way to devise a mechanism that might achieve this purpose.

40. Given the regime provided for in the Fair Work Act 2009 for penalties and compensation to be pursued through applications to the courts, this is a relevant consideration in determining whether the term is necessary to achieve the modern awards objective.

The power imbalance between the business and the worker is a relevant fixed circumstance

41. There is an inherent power imbalance in the relationship between Award-reliant workers and businesses operating under Awards. This power imbalance exists in all circumstances in which the Award operates, regardless of the size of the business.

42. The power imbalance is exemplified by the reality that the business is the decision maker about what a workers' conditions and entitlements are going to be. Where a business refuses to comply with an Award entitlement, and there is no union or

[7] [2017] FWCFB 5258 at [222]

Fair Work Ombudsman presence, the worker would have to seek the assistance of the Commission or enforce their entitlement in the courts.

43. This power imbalance would be entrenched by providing a business with a further right to withhold monies where the business believes that a worker has not provided the relevant notice. The appropriate avenue for the business should be to pursue the matter in court, where an independent arbiter can assess whether in fact a worker has or has not provided the relevant notice.

44. Shifting the balance in favour of businesses in this way means that Award-reliant workers would need to take time out from their work to pursue a claim in the courts for underpayments.

45. The Modern Awards should be a "fair and relevant safety net," protecting Award-reliant workers without access to collective power from the excesses of business power. The practicality of an Award's operation should be seen from the perspective of this overriding objective. Businesses do not need a safety net to fall into, whereas workers without access to collective processes do need a safety net to fall into.

46. There has been a significant increase in Award reliance according to the most recent *FWC Annual Wage Review's Statistical Report* from 15.2% when Modern Awards began operation in 2010 to 24.5% in 2016.[8]

47. This significant increase in Award-reliance magnifies any loop holes generated by the Commission for businesses to avoid the process of going to court where it claims that a worker has not provided the appropriate notice of termination.

48. The avenue for seeking penalties which is explicitly provided for in the Act tells against a finding that there may be circumstances where a term providing for deductions would be reasonable in any circumstance.

1. A limitation of one week does not result in a proportionate penalty and therefore cannot be reasonable in all circumstances

49. Placing a limitation of one week does not result in a proportionate penalty in all circumstances and cannot ensure that the deduction is reasonable in all the circumstances. Where an employer suffers no loss as a result of the failure to provide notice, there is no reason why the employee should be penalised in those circumstances.

50. A penalty of one week's wages is equivalent to a one week restraint of trade clause in an employment contract. The courts have been very cautious in upholding the validity of such clauses, and only in circumstances involving very high net work individuals. The effective 2% annual pay cut provided for by such a penalty is still an extraordinary amount, where there may or may not even by any negative impact upon the business.

[8] FWC Annual Wage Review 2016-17 Statistical Report at page 39

2. The requirement for written notice should be removed

51. The AMWU agrees that the requirement for written notice should be removed for the reasons outlined earlier in the submission.

3. The specific circumstance of an employer agreeing to a shorter notice period should be excluded

52. The AMWU agrees that the circumstance of employer's agreeing to a shorter notice period should be excluded from the operation of any potential deduction.

4. The inclusion of a generic requirement that "a deduction must not be unreasonable in the circumstances" would not result in an easy to understand award clause

53. Providing for a built in test which emulates the test in s.326 as suggested at [223] of the provisional Full Bench decision,[9] would simply defer the interpretative issues to the parties who are likely to dispute the meaning of such a test, as is currently the case in the present proceedings.

5. A requirement that the employer must notify the employee of the potential deduction cannot address the inherent unreasonableness of the deduction.

54. The AMWU does not object to the idea of including a requirement that the employer should notify an employee of potential deductions that may occur. However, the notification cannot address the primary issues discussed above which weigh heavily in any consideration about whether a deduction is unreasonable in any particular circumstances.

55. In terms of the narrow consideration of the issue of a notification, the notification would need to be at an appropriate time prior to any consideration by the employee of resigning their employment. If the employer provides the notification at the point when the employee has already accepted another position and is providing notice of their intention to cease work, then that would not be an adequate notification to make the deduction reasonable.

56. The difficulties with attempting to identify an appropriate time when the employer should inform the employee highlights why an attempt to codify "unreasonableness" in an Award term is fraught with difficulties.

End

13 November 2017

[9] [2017] FWCFB 5258 at [223] point 4