

4 YEARLY REVIEW OF MODERN AWARDS

Fair Work Act 2009 – s 156

AM2016/15 – PLAIN LANGUAGE – STANDARD CLAUSES

**SUBMISSION BY CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION,
MINING AND ENERGY DIVISION**

**DRAFT DETERMINATIONS – COAL EXPORT TERMINALS AWARD 2010, ELECTRICAL POWER
INDUSTRY AWARD 2010 AND MINING INDUSTRY AWARD 2010**

1. Subsequent to a decision by the Full Bench on 14 August 2018¹, the Fair Work Commission ('FWC'), on 24 August 2018, issued a schedule of draft determinations for 108 modern awards.
2. Of those 108 modern awards, the Mining and Energy Division of the Construction, Forestry, Maritime, Mining and Energy Union ("CFMMEU M& E") has an interest in 3 modern awards namely;
 - **Coal Export Terminals Award 2010**
 - **Electrical Power Industry Award 2010**
 - **Mining Industry Award 2010**
3. This submission is to advise that the CFMMEU M & E is opposed to the making of final determinations in the form issued by the FWC on 24 August 2018 in each of the abovementioned modern awards.
4. Our objection goes to the Transfer to lower paid duties on redundancy term in each of those draft determinations and in particular, sub clause (a). The reason for our objection is that the provision in the draft determinations is not the provision determined by the Full Bench.

¹ [2018] FWCFB 4704, 4 yearly review of modern awards – plain language re-drafting – standard clauses

5. A review of the history of the making of this particular clause reveals that sub clause (a) in each of the draft determination was an earlier version provisionally proposed by the FWC but one which was subsequently amended. This is apparent from the 18 October 2017 decision of the Full Bench in this matter.² The decision shows:

- (i) At PN [250], the decision sets out the clause then under discussion. Note that sub clause G.1 at PN [250] is now the clause the FWC has inserted in the draft determinations.
- (ii) At PN [251]-[252], both the ACTU and AMWU object to the wording of clause G.1 because the provision could be: *“construed as conferring upon the employer a right to unilaterally transfer a redundant employee to lower paid employment and thereby avoid the payment of redundancy.”*³ It was submitted that this is inconsistent with the outcome in the TCR Decision.
- (iii) At PN [254] the decision includes an extract from the TCR Decision.
- (iv) At PN [255]-[256] the decision addresses the TCR Decision and concludes: *“In the absence of any merits submission that Clause G.1 should, unlike the existing provision, establish or recognise an employer’s right to transfer employees to lower paid duties in a redundancy situation, we consider that we should avoid any change in the plain English process that might bring about that result by inadvertence.”*⁴
- (v) At PN [258] the FWC determines a new provision, relevantly: *“G.1 Clause G applies if, because of redundancy, an employee is transferred to new duties to which a lower ordinary rate of pay is applicable.”* This, of course, is not the clause inserted in the draft determinations.

² [2017] FWCFB 5258, 4 yearly review of modern awards -plain language – standard clauses

³ PN [251]

⁴ PN [256]

6. That the sub clause in point 5 (v) above was the final clause as determined by the FWC is confirmed in a statement issued by the Full Bench on 13 June 2018, when addressing an appropriate title for the clause and where the Full Bench said: *“The terms of Clause G were finalised in the October 2017 decision.”*⁵
7. The history of the development of this clause reveals that the FWC has inserted in the draft determinations a provision it had earlier rejected on the basis of inconsistency with the meaning and intent of the provision as determined in the TCR decision and the requirement to *“avoid any change in the plain English process that might bring about that result by inadvertence.”*⁶
8. Further, in the form provided in the draft determinations, the clause will have a deleterious effect on employees if used. This is contrary to the guidelines on the plain language drafting of awards as it would result in *“unintentionally changing the legal effect of the award.”*⁷
9. Whilst we have not examined each and every draft determination, we have looked at a further 4 draft determinations and observe that the same provision exists in those awards.⁸ It is submitted that this issue is not confined to the modern awards named in paragraph 2 above.
10. For the reasons set out herein the CFMMEU M & E opposes the making of final determinations in the form of the draft determinations.

Construction, Forestry, Maritime, Mining and Energy Union

Mining and Energy Division

7 September 2018

⁵ [2018] FWCFB 3258 @ PN [4]

⁶ [2017] FWCFB 5258 @ PN [256]

⁷ See GUIDELINES Plain language drafting of modern awards, 20 June 2017, paragraph 2.2

⁸ It is noted that the wording of this clause as appears in the draft determinations also (incorrectly) appears in the decision of 14 August finalisation of the plain language clauses – see [2018] FWCFB 4704, Attachment A, clause G.1