

Australian Industry Group

# 4 YEARLY REVIEW OF MODERN AWARDS

## **Reply Submission**

Plain Language Re-drafting – Standard  
Clauses  
(AM2016/15)

**16 July 2018**

**Ai**  
GROUP

## 4 YEARLY REVIEW OF MODERN AWARDS

### AM2016/15 PLAIN LANGUAGE RE-DRAFTING – STANDARD CLAUSES

#### 1. INTRODUCTION

1. This submission is made in reply to the submissions filed by various other parties in response to the Full Bench Decision ([2018] FWCFB 3009) of 13 June 2018 in the Plain Language Re-drafting of Standard Clauses proceedings regarding Standard Clause E.
2. Ai Group maintains the views set out in our [submission](#) of 2 July 2018.

#### 2. ACTU SUBMISSION OF 2 JULY

3. In its submission of 2 July (at paragraphs 3 to 5), the ACTU argues that prospective safety net terms should create minimum conditions of employment, and terms that do not do so are “outliers”. This argument fails to recognise that numerous terms of the National Employment Standards (NES) and awards impose obligations upon employees and/or prescribe rights for employers, including, for example:
  - a. There is an obligation upon an employee to provide notice and evidence when taking unpaid parental leave, personal/carer’s leave and compassionate leave (ss.74 and 110 of the *Fair Work Act 2009*);
  - b. Where an employee wishes to make a request for flexible work arrangements under s.65 of the Act, the employee has an obligation to set out the request in writing, including providing details of the change sought and the reasons for the change (s.65(3) of the Act);
  - c. Under the Commission’s new model family and domestic violence clause, there is an obligation upon an employee to provide notice and evidence (subclause X.6);

- d. Clause 20 – Absence from Duty, of the *Manufacturing and Associated Industries and Occupations Award 2010* (**Manufacturing Award**) gives an employer the right to deduct pay for any time of non-attendance by an employee;
  - e. Clause 31 – Employer and Employee Duties, of the Manufacturing Award gives an employer the right to direct an employee to carry out duties that are within an employee’s skills, competence and training; and
  - f. Clause 27.6 of the *Business Equipment Award 2010* gives an employer the right to require an employee to work under a different arrangement of hours or on a different shift with one week’s notice (24 hours’ notice in the case of an emergency).
4. The ACTU submission (at paragraph 6) goes on to make certain arguments, which we respond to below:

- a. ***ACTU argument: The deprivation of wages does not meet the needs of the low paid***

Contrary to the ACTU’s argument, an employee who provides the required amount of notice to the employer is not deprived of any wages. Also, where an employee fails to give notice, the employer is only permitted to deduct a modest amount of pay.

- b. ***ACTU argument: The clause would impede pathways to higher paid work among those who are currently low paid***

The ACTU has not identified why the clause would have this effect. The argument is fanciful.

- c. ***ACTU argument: A power to deduct from wages earned for work performed over long or unsociable hours is inconsistent with ensuring additional remuneration is provided for work performed at those times***

An employee who provides the required amount of notice to the employer is not deprived of any wages. Also, where an employee fails to give notice, the employer is only permitted to deduct a modest amount of pay.

- d. ***ACTU argument: The proposed term is not simple or easy to understand***

Contrary to the ACTU's argument, the clause is simple and easy to understand.

- e. ***ACTU argument: The impact on business of employees not providing notice is less today than was the case when the TCR standard was developed***

This argument is invalid. There is significant disruption and cost to employers when employees do not give notice of termination of employment.

5. In the alternative argument set out at paragraphs 8 to 11 of its submission, the ACTU concedes that the proposed clause may reduce disputation. The ACTU also expresses the view that the proposed clause is fairer for employees than any of the predecessor provisions.

### 3. AMWU SUBMISSION OF 3 JULY

6. In its submission of 3 July, the AMWU makes various arguments, that we respond to below.

a. ***AMWU argument: Claims about disruption to the employer are overstated***

Contrary to the AMWU's argument, there is often significant disruption and cost to employers when employees do not give notice of termination of employment. This was recognised by the Full Bench of the AIRC in the [main TCR Decision](#) of 2 August 1984 (emphasis added)

However, notwithstanding the ACTU arguments we are not prepared, except to a limited extent, to provide for different periods of notice by employer and employee. In particular, we are concerned at the possible consequences for small firms of a loss of employees with long service and the requirement for such employers to find another employee. We have decided that an employee should be required to give the additional notice based on years of service but that it would not be appropriate to require increased notice from the employee based on age.

b. ***AMWU argument: The inclusion of the legislative criteria highlights the deficiency of the process***

Contrary to the AMWU's argument, there is nothing unusual about an award provision that requires that something be reasonable or not unreasonable. There are numerous award provisions that are cast in this manner including common award clauses that deal with dispute resolution, consultation, casual conversion, expenses, training, travel, hours of work, overtime, and numerous other subject matters.

c. ***AMWU argument: The disadvantage suffered by award reliant workers***

An employee who provides the required amount of notice to the employer is not deprived of any wages. Also, where an employee fails to give notice, the employer is only permitted to deduct a modest amount of pay.

- d. ***AMWU argument: Relative living standards and the needs of the low paid***

An employee who provides the required amount of notice to the employer is not deprived of any wages. Also, where an employee fails to give notice, the employer is only permitted to deduct a modest amount of pay.

- e. ***AMWU argument: The need to promote social inclusion through workforce participation***

It is fanciful to suggest that the clause would have a material adverse impact on workforce participation.

- f. ***AMWU argument: The need to promote flexible modern work practices and the efficient performance of work***

It is fanciful to suggest that the clause would have a material adverse impact on flexible modern work practices and the efficient performance of work. The clause would have a positive impact on the efficient and productive performance of work because it would reduce the incidence of employers being faced with the disruption that commonly arises when an employee leaves without giving notice.

- g. ***AMWU argument: The likely impact on business, including on productivity, employment costs and the regulatory burden***

It is fanciful to suggest that the clause would have a material adverse impact on business, including on productivity, employment costs or the regulatory burden. The clause would have a positive impact on business because it would reduce the incidence of employers being faced with the loss of productivity and increased costs that commonly result from an employee leaving without giving notice.

- h. ***AMWU argument: The need to ensure a simple, easy to understand sustainable modern award system***

It is fanciful to suggest that the clause would have a material adverse impact on the maintenance of a simple, easy to understand and sustainable modern award system.

- i. ***AMWU argument: The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy***

It is fanciful to suggest that the clause would have a material adverse impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

7. At paragraphs 44 to 48 of its submission, the AMWU identifies some exceptional circumstances where an employee may terminate his or her employment, including where there is a need to care for a relative, where the employee dies and where the employee is affected by personal trauma. The draft clause caters for exceptional circumstances through the requirement that any deduction must not be unreasonable in the circumstances.

#### **4. NATIONAL ROAD TRANSPORT ASSOCIATION SUBMISSION OF 3 JULY**

8. In its submission of 3 July, the National Road Transport Association endorsed and adopted the submissions made on 2 July by Ai Group in respect of Standard Clause E.

#### **5. ABI SUBMISSION OF 3 JULY**

9. The views expressed by Australian Business Industrial and the NSW Business Chamber in their submission of 3 July are consistent with the views expressed by Ai Group in our submission of 2 July in respect of Standard Clause E.

## **6. CONCLUSION**

10. For the above reasons and those set out in our previous submissions in the current proceedings, the revised model clause is 'necessary to achieve the modern awards objective' and hence consistent with ss.134 and 138 of the Act.