



DETERMINATION

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards—plain language re-drafting—standard clauses

(AM2016/15)

MARINE TOWAGE AWARD 2010

[MA000050]

Port authorities

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER HUNT

MELBOURNE, 20 AUGUST 2019

4 yearly review of modern awards—plain language re-drafting—standard clauses—Marine Towage Award 2010.

A. Further to the Full Bench decision [\[\[2019\] FWCFB 5409\]](#),¹ issued by the Fair Work Commission on 20 August 2019, the above award is varied as follows:

1. By deleting clause 7—Award flexibility and inserting the following:

7. Individual flexibility arrangements

7.1 Despite anything else in this award, an employer and an individual employee may agree to vary the application of the terms of this award relating to any of the following in order to meet the genuine needs of both the employee and the employer:

- (a) arrangements for when work is performed; or
- (b) overtime rates; or
- (c) penalty rates; or
- (d) allowances; or
- (e) annual leave loading.

¹ See also [\[2018\] FWCFB 7447](#), [\[2018\] FWCFB 4704](#), [\[2018\] FWCFB 4177](#), [\[2018\] FWCFB 3009](#), [\[2017\] FWCFB 5258](#), [\[2017\] FWCFB 4419](#)

- 7.2** An agreement must be one that is genuinely made by the employer and the individual employee without coercion or duress.
- 7.3** An agreement may only be made after the individual employee has commenced employment with the employer.
- 7.4** An employer who wishes to initiate the making of an agreement must:
- (a)** give the employee a written proposal; and
 - (b)** if the employer is aware that the employee has, or reasonably should be aware that the employee may have, limited understanding of written English, take reasonable steps (including providing a translation in an appropriate language) to ensure that the employee understands the proposal.
- 7.5** An agreement must result in the employee being better off overall at the time the agreement is made than if the agreement had not been made.
- 7.6** An agreement must do all of the following:
- (a)** state the names of the employer and the employee; and
 - (b)** identify the award term, or award terms, the application of which is to be varied; and
 - (c)** set out how the application of the award term, or each award term, is varied; and
 - (d)** set out how the agreement results in the employee being better off overall at the time the agreement is made than if the agreement had not been made; and
 - (e)** state the date the agreement is to start.
- 7.7** An agreement must be:
- (a)** in writing; and
 - (b)** signed by the employer and the employee and, if the employee is under 18 years of age, by the employee's parent or guardian.
- 7.8** Except as provided in clause 7.7(b), an agreement must not require the approval or consent of a person other than the employer and the employee.
- 7.9** The employer must keep the agreement as a time and wages record and give a copy to the employee.
- 7.10** The employer and the employee must genuinely agree, without duress or coercion to any variation of an award provided for by an agreement.

7.11 An agreement may be terminated:

- (a) at any time, by written agreement between the employer and the employee; or
- (b) by the employer or employee giving 13 weeks' written notice to the other party (reduced to 4 weeks if the agreement was entered into before the first full pay period starting on or after 4 December 2013).

NOTE: If an employer and employee agree to an arrangement that purports to be an individual flexibility arrangement under this award term and the arrangement does not meet a requirement set out in section 144 then the employee or the employer may terminate the arrangement by giving written notice of not more than 28 days (see section 145 of the [Act](#)).

7.12 An agreement terminated as mentioned in clause 7.11(b) ceases to have effect at the end of the period of notice required under that clause.

7.13 The right to make an agreement under clause 7 is additional to, and does not affect, any other term of this award that provides for an agreement between an employer and an individual employee.

2. By deleting clause 8—Consultation and inserting the following:

8. Consultation about major workplace change

8.1 If an employer makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must:

- (a) give notice of the changes to all employees who may be affected by them and their representatives (if any); and
- (b) discuss with affected employees and their representatives (if any):
 - (i) the introduction of the changes; and
 - (ii) their likely effect on employees; and
 - (iii) measures to avoid or reduce the adverse effects of the changes on employees; and
- (c) commence discussions as soon as practicable after a definite decision has been made.

8.2 For the purposes of the discussion under clause 8.1(b), the employer must give in writing to the affected employees and their representatives (if any) all relevant information about the changes including:

- (a) their nature; and

- (b) their expected effect on employees; and
- (c) any other matters likely to affect employees.

8.3 Clause 8.2 does not require an employer to disclose any confidential information if its disclosure would be contrary to the employer's interests.

8.4 The employer must promptly consider any matters raised by the employees or their representatives about the changes in the course of the discussion under clause 8.1(b).

8.5 In clause 8:

significant effects, on employees, includes any of the following:

- (a) termination of employment; or
- (b) major changes in the composition, operation or size of the employer's workforce or in the skills required; or
- (c) loss of, or reduction in, job or promotion opportunities; or
- (d) loss of, or reduction in, job tenure; or
- (e) alteration of hours of work; or
- (f) the need for employees to be retrained or transferred to other work or locations;
or
- (g) job restructuring.

8.6 Where this award makes provision for alteration of any of the matters defined at clause 8.5, such alteration is taken not to have significant effect.

3. By inserting clause 8A as follows:

8A. Consultation about changes to rosters or hours of work

8A.1 Clause 8A applies if an employer proposes to change the regular roster or ordinary hours of work of an employee, other than an employee whose working hours are irregular, sporadic or unpredictable.

8A.2 The employer must consult with any employees affected by the proposed change and their representatives (if any).

8A.3 For the purpose of the consultation, the employer must:

- (a) provide to the employees and representatives mentioned in clause 8A.2 information about the proposed change (for example, information about the nature of the change and when it is to begin); and

- (b) invite the employees to give their views about the impact of the proposed change on them (including any impact on their family or caring responsibilities) and also invite their representative (if any) to give their views about that impact.

8A.4 The employer must consider any views given under clause 8A.3(b).

8A.5 Clause 8A is to be read in conjunction with any other provisions of this award concerning the scheduling of work or the giving of notice.

4. By deleting clause 9 and inserting the following:

9. Dispute resolution

9.1 Clause 9 sets out the procedures to be followed if a dispute arises about a matter under this award or in relation to the [NES](#).

9.2 The parties to the dispute must first try to resolve the dispute at the workplace through discussion between the employee or employees concerned and the relevant supervisor.

9.3 If the dispute is not resolved through discussion as mentioned in clause 9.2, the parties to the dispute must then try to resolve it in a timely manner at the workplace through discussion between the employee or employees concerned and more senior levels of management, as appropriate.

9.4 If the dispute is unable to be resolved at the workplace and all appropriate steps have been taken under clauses 9.2 and 9.3, a party to the dispute may refer it to the Fair Work Commission.

9.5 The parties may agree on the process to be followed by the Fair Work Commission in dealing with the dispute, including mediation, conciliation and consent arbitration.

9.6 If the dispute remains unresolved, the Fair Work Commission may use any method of dispute resolution that it is permitted by the [Act](#) to use and that it considers appropriate for resolving the dispute.

9.7 A party to the dispute may appoint a person, organisation or association to support and/or represent them in any discussion or process under clause 9.

9.8 While procedures are being followed under clause 9 in relation to a dispute:

- (a) work must continue in accordance with this award and the [Act](#); and
- (b) an employee must not unreasonably fail to comply with any direction given by the employer about performing work, whether at the same or another workplace, that is safe and appropriate for the employee to perform.

9.9 Clause 9.8 is subject to any applicable work health and safety legislation.

5. By deleting clause 11 and inserting the following:

11. Termination of employment

NOTE: Sections 117 and 123 of the [Act](#) set out requirements for notice of termination by an employer under the [NES](#). Clause 11.1 requires an employer to give a greater minimum period of notice than that generally required under the [NES](#).

11.1 Notice of termination by employer—permanent employees

(a) Despite the terms of the [NES](#), in order to terminate the employment of an officer the employer must give to the employee the following written notice:

Period of continuous service	Period of notice
1 year or less	2 weeks
More than 1 year but less than 4 years	6 weeks
More than 4 years	8 weeks

(b) Payment instead of the notice prescribed in paragraph (a) may be made.

(c) An employer may terminate an employee's employment by giving part of the notice prescribed in paragraph (a) and part payment instead of notice.

(d) In calculating any payment instead of notice, the wages an employee would have received in respect of ordinary time the employee would have worked during the period of notice if the employee's employment had not been terminated must be used.

11.2 Job search entitlement

Where an employer has given notice of termination to an employee, the employee must be allowed time off without loss of pay of up to one day for the purpose of seeking other employment.

11.3 The time off under clause 11.2 is to be taken at times that are convenient to the employee after consultation with the employer.

11.4 Return to place of engagement

If the employment of an employee is terminated by the employer elsewhere than at the employee's home port or place of engagement for any reason other than misconduct, the employer will be responsible for conveying the employee to the employee's home port or place of engagement.

11.5 Termination without notice

Despite the above provisions, an employer may terminate an employee's employment without notice, or payment instead of notice, for serious misconduct.

11.6 Notice of termination by employee—permanent employee

- (a) Clause 11.6 applies to all employees except those identified in sections 123(1) and 123(3) of the [Act](#).
- (b) An employee may terminate their employment by giving the employer the following notice in writing:
 - (i) in the case of officers, 2 weeks' notice; or
 - (ii) in the case of ratings, one week's notice.
- (c) If an employee does not give the period of notice required under paragraph (b), then the employer may deduct from wages due to the employee under this award an amount that is no more than one week's wages for the employee.
- (d) If the employer has agreed to a shorter period of notice than that required under paragraph (b), then no deduction can be made under paragraph (c).
- (e) Any deduction under paragraph (c) must not be unreasonable in the circumstances.

11.7 Casual employees

The employment of a casual employee terminates at the end of each period of duty.

- 6. By deleting “clause 11.3” in clause 12.3(e) and inserting “clauses 11.2 and 11.3”.
 - 7. By updating the table of contents and cross-references accordingly.
- B. This determination comes into operation from 30 August 2019. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after 30 August 2019.

PRESIDENT