Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Plain Language Drafting – Standard Clauses

(AM2016/15)

27 November 2017

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AM2016/15 PLAIN LANGUAGE DRAFTING – STANDARD CLAUSES

1. Introduction

1. This Reply Submission of the Australian Industry Group (**Ai Group**) is made in response to the Statement and Directions issued by the Fair Work Commission (**Commission**) on 18 October 2017[1] regarding the plain language drafting of 'standard' award Clause E.1 – Notice of termination by an employee.

2. On the same day that the Statement and Directions were issued, the Full Bench issued a decision (**18 October Decision**) expressing a number of *"provisional views"* in respect of Clause E.1(a) and Clause E.1(c) and inviting submissions on those issues.

3. This Reply Submission responds to various submissions of other parties. Ai Group's position in response to most of the issues raised by other parties would be obvious from the terms of our submission of 14 November 2017. None of the submissions of other parties have convinced Ai Group that the positions set out in our submission of 14 November should be amended.

4. This Reply Submission should be read in conjunction with Ai Group's submission of 14 November 2017, Ai Group's submission of 4 September 2017 and Ai Group's reply submission of 12 September 2017.

2. The scope of Clause E.1(a), having regard to the terms of s.123

5. Ai Group's views on this issue are set out at paragraphs 7 and 8 of our submission of 14 September.

[1] [2017] FWCFB 5367

6. In its submission of 20 November, the ACTU has proposed an overly complicated form of words to address the scope of the clause. The simpler form of words proposed by Ai Group is preferable to the ACTU's proposal.

3. The *provisional* view that the word 'written' be deleted from Clause E.1(a)

7. Ai Group's views on this issue are set out at paragraphs 9 to 13 of our submission of 14 September. Such views address the submissions made by other parties on this issue.

4. The *provisional* view that, in order to address some uncertainty about the interaction with the NES, Clause E.1(c) be amended to confine the scope of the capacity to make a deduction to 'wages due to the employee'

8. Ai Group's views on this issue are set out at paragraph 14 of our submission of 14 September. Such views address the submissions made by other parties on this issue.

9. The proposal in the ACTU submission of 20 November that the phrase "wages due to the employee" be replaced with "wages due to the employee under this award" is opposed by Ai Group. The additional words are unnecessary.

5. The *provisional* view that deductions pursuant to Clause E.1(c) would have no effect in relation to employees under 18 years of age, because of s.326(4), and hence in its current form it is a term that must not be included in a modern award, because of s.151(c)

10. Ai Group's views on this issue are set out at paragraphs 15 and 16 of our submission of 14 September. Such views address the submissions made by other parties on this issue.

6. The *provisional* view that Clause E.1(c) is incidental to a permitted term, namely Clause E.1(a)

11. Ai Group's views on this issue are set out at paragraphs 17 to 19 of our submission of 14 September.

12. In the ACTU's submission of 20 November and the AMWU's submission of 13 November, the Commission is urged to adopt an excessively narrow interpretation of the concept of "incidental" provisions, which, if adopted, would potentially lead to challenges by employer or union parties against numerous award provisions which have been held by the Commission and its predecessors to be incidental to other award provisions.

13. Ai Group agrees with the Commission's *"provisional view"* that clause E.1(c) is *"incidental"* to Clause E.1(a).

7. Is Clause E.1(c) essential for the purpose of making a permitted term (Clause E.1(a)) operate in a practical way?

14. Ai Group's views on this issue are set out at paragraphs 20 to 25 of our submission of 14 September.

15. For the reasons set out in Ai Group's submission of 14 September, Ai Group disagrees with the views expressed in the ACTU's submission of 20 November and the AMWU's submission of 13 November.

16. In its reply submission of 22 November, the ACTU alleges that the Commission's decision of 18 October, at paragraphs [163] and [164], specifically rejected the relevance of the benefits of avoiding litigation, providing incentives for compliance and providing deterrence when applying s.142(1)(b). This mischaracterises the Commission's decision. At paragraphs [163] and [164], the Full Bench said:

> **[163]** The ACTU contends that the question of whether a term satisfies the test in s.142(1)(b) is 'entangled with merit considerations, including whether a term is necessary to meet the modern awards objective, and requires an assessment of relevant evidence.' It is on this basis that the ACTU submits:

> ‘it is not possible at this point to rule on whether clause E.1(c) is essential for the purpose of making the preceding provisions of clause E.1 operate in a practical way.’
>
> **[164]** We disagree. Section 142(1)(b) poses a separate, antecedent, jurisdictional question to the issue of whether it is necessary to include a term in a modern award to achieve the modern awards objective. Combining a consideration of the two issues is apt to confuse and lead to error. It seems to us that the Act envisages a sequential approach to the consideration of whether to include a term in a modern award. In the context of the present matter that sequential approach involves a consideration of the following questions:
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> 1. Is Clause E.1(c) a term permitted by s.139(1)?
>
> 2. Is Clause E.1(c) a term permitted by Pt 2-2 (the NES)?
>
> 3. Is Clause E.1(c) incidental to a permitted term and essential for the purpose of making that term operate in a practical way?
>
> 4. If any of questions 1, 2 or 3 is answered in the affirmative, then does Clause E.1(c) contravene Subdivision D of Division 3 of Pt 2-3 (particularly ss. 151 and 155)?If the answer to question 4 is no, then is it necessary to include Clause E.1(c) in a modern award to achieve the modern awards objective?

17. It can be seen from the above that the Full Bench did not rule out the potential relevance of the benefits of avoiding litigation, providing incentives for compliance and providing deterrence in determining whether the clause E.1(c) is *“essential for the purpose of making the permitted term operate in a practical way”* (s.142(1)(b)). The Full Bench simply made the point that s.142(1)(b) is a separate jurisdictional requirement to the requirements of other relevant sections of the Act.

18. In its reply submission of 22 November, the ACTU submits that paragraph 24 of Ai Group’s submission of 14 November is not relevant to the construction of s.142(1)(b) because s.142(1)(b) was not in existence when AIRC made its *Priority Stage Award Modernisation* Decision.[2]

19. Paragraph 24 of Ai Group’s submission of 14 November states:

> 24. It is evident, when all of the terms of the 122 modern industry and occupational awards are considered, that the Commission has taken a practical and not overly narrow approach when determining whether longstanding award provisions meet legislative requirements relating to

[2] [2008] AIRCFB 1000

award provisions that are incidental to subject matters allowed to be in awards. In this regard, the following extract from the *Priority Stage Award Modernisation* Decision[3] is relevant: (emphasis added)

> **[46]** The Minister and a number of parties made submissions concerning dispute resolution training leave. This type of leave was found to be incidental to an allowable award matter and necessary for its effective operation pursuant to s.89A of the WR Act, as it stood at that time, by a Full Bench of the Commission in 1998. Dispute resolution training leave, although quite common in pre-reform awards prior to the Work Choices amendments, has never been a test case provision. We have decided to maintain dispute resolution training leave where it is a prevailing industry standard.

20. While it is true that s.142 was not in operation when the *Priority Stage Award Modernisation Decision* was made, a relatively similar (but narrower) provision was in place. In its 18 October Decision, the Full Bench stated:

> **[148]** …. It seems to us that 'for the purpose of making a particular term operate *in a practical way*' is an expression of slightly wider import than that used in s.89A(2). A broader range of terms may be said to be for the purpose of making a particular term operate in 'a practical way' than would fall within the scope of the expression 'for the effective operation of the award'.

21. Accordingly, Clause E.1(c) is *"essential"* for the purpose of making Clause E.1(a) *"operate in a practical way".*

8. The purpose of Clause E.1(c)?

22. Ai Group's views on this issue are set out at paragraphs 20 to 27 of our submission of 14 September.

9. Having regard to the protective purpose of s.326, the *provisional* view that a deduction made pursuant to Clause E.1(c) *may* be 'unreasonable in the circumstances' within the meaning of s.326(1)(c)(ii), in certain respects

23. Ai Group's views on this issue are set out at paragraphs 28 to 40 of our submission of 14 September.

[3] [2008] AIRCFB 1000

24. For the reasons set out in Ai Group's submission of 14 September, Ai Group disagrees with the views expressed in the ACTU's submission of 20 November and the AMWU's submission of 13 November.

25. In its reply submission of 22 November, the ACTU attempts to discount the ongoing relevance of the concerns expressed in the main TCR Decision about the adverse impacts upon small businesses of employees leaving without giving their employer notice. This issue has obvious ongoing relevance despite any changes that may have occurred over time to vocational education and training policies, award classification structures, on-line recruiting platforms, industry structures and/or award reliance (i.e. the issues raised by the ACTU).

26. In its reply submission, the ACTU even attempts to argue that the decline in union membership levels supports their argument that Clause E.1(c) is not reasonable. This is an invalid argument but, to the extent that it has any relevance, the decline in union membership has been accompanied by a huge expansion in the role, services and resources of the regulator (nowadays, the Fair Work Ombudsman) and the ready access of employees to information about awards on-line.

27. In its submission of 13 November, the AMWU argues that Clause E.1(c) must be reasonable in every possible circumstance. This is not the test in the Act. The Commission needs to make a practical assessment about whether or not the clause is unreasonable, consistent with the objects of the Act and the manner in which the Commission is required to perform its functions under the Act (ss.577 and 578). In exercising its powers to make and vary awards, it is of course impossible for the Commission to be aware of the circumstances of every single employer and every single employee covered by each award. When such a practical assessment is made, clearly the clause is not unreasonable.