Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Plain Language Drafting – Standard Clauses

(AM2016/15)

4 September 2017

4 YEARLY REVIEW OF MODERN AWARDS

AM2016/15 PLAIN LANGUAGE DRAFTING – STANDARD CLAUSES

1. INTRODUCTION

1. This submission of the Australian Industry Group (**Ai Group**) is made in response to the Statement issued by the Fair Work Commission (**Commission**) on 21 August 2017[1] (**Statement**) regarding the plain language drafting of 'standard' award clauses.

2. The Statement invites submissions on the following questions regarding proposed clause E.1(c) which deals with Notice of Termination by an Employee:

    a. Whether clause E.1(c), either wholly or insofar as it deals with NES entitlements, is a type of provision which may validly be included in a modern award under the relevant provisions of the FW Act, including but not confined to ss.55, 118, 139 and 142; and

    b. To the extent that the Commission has the power to include a provision of the nature of clause E.1(c) in a modern award, whether as a matter of merit such a provision is necessary to achieve the modern awards objective in accordance with the requirement in s.138.

3. The Statement also invites submissions on aspects of clause H.2 which relates to redundancy.

[1] [2017] FWCFB 4355

2. THE ISSUES CONCERNING CLAUSE E.1(c) WERE CONSIDERED IN DETAIL AND DETERMINED DURING THE AWARD MODERNISATION PROCESS

4. The issue of whether the standard Notice of Termination by an Employee clause can and should contain a provision enabling an employer to deduct notice not given from monies owing on termination was contested in detail during the Award Modernisation process. The Australian Industrial Relations Commission (**AIRC**) decided that such a provision can and should be included in modern awards.

5. The following events are relevant.

6. As explained in paragraph r.20 of the Regulatory Analysis in the Explanatory Memorandum for the *Fair Work Bill 2008*, the Australian Government released an NES discussion paper and exposure draft on 14 February 2008, and the proposed NES on 16 June 2008:

> **"Consultation on National Employment Standards**
>
> 20. The Government has also undertaken extensive consultation on the proposed NES. The Government released the NES and invited submissions on the NES exposure draft and discussion paper on 14 February 2008. A total of 129 submissions were subsequently received from a wide range of stakeholders, including employer and employee representatives, community groups, businesses, state governments and interested individuals. After consideration of the submissions received, the Government released the proposed NES on 16 June 2008."

7. In a submission of April 2008 to the Federal Government, in relation to the NES Exposure Draft, Ai Group stated: (emphasis added)

> "166. The NES should also include:
>
> - minimum notice periods to be given by employees; and
> - <u>the ability for an employer to deduct pay in lieu from other amounts to be paid to the employee on termination when an employee fails to give notice</u>.
>
> 167. Provisions of this nature are commonly found in awards and workplace agreements and are part of the AIRC's *Redundancy Case* award provisions."

8. On 16 June 2008, the Federal Government released the proposed NES.

9. On 17 June 2008, the Minister for Employment and Workplace Relations amended the Award Modernisation Request to, amongst other amendments, include new paragraphs 28 to 46 dealing with the interaction between modern awards and the NES. Paragraph 33 of the Amended Award Modernisation Request relevantly stated:

> "33. The NES provides that particular types of provisions are able to be included in modern awards even though they might otherwise be inconsistent with the NES. The Commission may include provisions dealing with these issues in a modern award. The NES allows, but does not require, modern awards to deal with, amongst other things:
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> - - - -
>
> - The amount of notice an employee may be required to provide when terminating their employment."

10. On 22 July 2008, the Award Modernisation Full Bench issued a Statement and amended timetable for filing drafts of Priority Stage modern awards and submissions on these awards. Such drafts and submissions were required to be filed by 1 August 2008.

11. On 1 August 2008, Ai Group filed a detailed submission and a number of draft modern awards, including a Joint Ai Group / Metal Trades Federation of Unions (MTFU) Draft *Manufacturing and Associated Industries Award*.

12. Ai Group's submission of 1 August 2008, contained the following relevant extract: (emphasis added)

> **"Termination of employment**
>
> 251. The terms of the NES identify the notice period that an employer is required to provide to an employee in order to terminate their employment[2]. In relation to the notice an employee is required to provide to an employer, the NES allows for the terms of a modern award to deal with this matter stating:

[2] Section 57 of the National Employment Standards

"59 Modern awards may provide for notice of termination by employees

A modern award may include provisions specifying the period of notice an employee must give in order to terminate his or her employment."

252. Ai Group and the unions have agreed that it is appropriate that the period of notice that an employee should be required to provide to an employer if seeking to terminate their employment be the same as that which is detailed in the NES for an employer when terminating an employee, excepting any additional notice that an employer would have to provide based upon the age of the employee. This agreement is reflected in clause 3.6.3(a) of Part 2.

253. In addition, Ai Group proposes that should an employee fail to provide such notice of termination, the employer shall have the right to withhold certain monies from the employee. This notion is reflected in clause 3.6.3(b) of Part 2 of the draft award in the following terms:

"Ai Group clause:

3.6.3(b) *If an employee fails to give the notice set out in 3.6.2(a) then the employer has the right to withhold monies due to the employee to a maximum amount equal to the payment in lieu of notice that the employee would have received under the NES."*

254. It is this aspect of the clause that the unions do not support and they have advanced the view that whilst an employee should provide notice of termination, there should be no penalty should that employee fail to abide by such notice.

255. Ai Group submits that such a notion would essentially render the notice of termination provisions for an employee useless. The principle that an employer has the right to withhold monies from an employee to the value of any notice of termination not provided is one that is entrenched within numerous awards and NAPSAs. Within the Metals Award, this concept dates back as far as the terms of the *Metal Trades Award 1941*[3].

256. We submit that such a concept must be retained for the modern award as the only other means by which an employer could seek to bind an employee to the requirement to provide notice would be through threat of prosecution for breach of the award. Such a reality would be of little practical effect for an employer given the time and cost associated with pursuing such a remedy.

[3] (1941) 45 CAR 751; at 774 which provides the following:

"18(b) Employment shall be terminated by a week's notice on either side given at any time during the week or by payment or forf*eiture of a weeks wages as the case may be."*

13. In a submission of 1 August 2008, the AMWU argued:

> **Notice of termination by an employee: Clause 3.6.3(b)**
>
> 75. The NES provides that Awards may include provisions required to be given by an employee. The NES allows but does not require employee notice provisions to be included in awards [4] . Where an award supplements the NES it may only do so where the effect of these provisions is not detrimental in any way[5]. Paragraphs 32 and 33 of the Request must be read together. The AIG proposal is detrimental to the employee and is therefore not permissible.

14. The following extracts from the transcript of the AIRC's Pre-Exposure draft Consultations on 5 August 2008 are relevant.

15. Mr Barry Terzic of the AMWU submitted: (emphasis added)

> "PN64 On the issue of notice of termination of requirements to effectively terminate an employee on notice, that is dealt with by the standard. The award has traditionally had a similar provision but the award contained a reciprocal obligation on the employee to give similar periods of notice as required by the employer, except for the over 45. We say because the standard has left that out, it would be detracting from the standard to insert that in the award and carry it over so we say that just purely as a matter of power the Commission would not be able to insert that in the award. That's dealt with in the AMWU's submission at paragraph 75. The AIG dealt with it at paragraph 251.
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> PN65 THE SENIOR DEPUTY PRESIDENT: Is that the whole of that clause or just the part concerning recouping from final pay?
>
> PN66 MR TERZIC: I beg your pardon, your Honour?
>
> PN67 THE SENIOR DEPUTY PRESIDENT: Is it the whole of the clause concerning employee notice that you object to or is it just the part of the employer's proposed clause concerning recoupment of maybe equivalent to notice in final pay?
>
> PN68 MR TERZIC: Both - just the recoupment, sorry, your Honour. I was thrown into this at the last moment and I've had to learn a lot quickly."

16. Mr Stephen Smith of Ai Group submitted: (emphasis added)

> "PN309 On the issue of termination of employment, which starts on page 42 of the draft, this is the first one of the clauses that interacts with the National Employment Standards. As your Honour can see, there is an agreed format for this which essentially starts by saying that:

[4] Request paragraph 33

[5] Request paragraph 32

PN310 This clause of the award supplements –

PN311 and then it identifies the relevant sections from the NES and gives some brief description of what those entitlements are and that right the way through the document has been agreed. The only issue that's not agreed in this clause is that issue of notice and the withholding of monies. The idea that employees have to give notice is agreed but the unions assert that it is inconsistent with the legislation for the employer to have the ability to withhold monies.

PN312 Now, we say that is just totally incorrect. The concept of notice from an employer point of view is either a time or money concept. You can either give people notice in time or money and exactly the same principle should apply to the issue of employee notice. They either give the notice in time or there is a penalty associated with not giving that and they have to run the risk that the employer will deduct the monies. Without that provision it really makes the whole employee notice concept absolutely useless, your Honour, because what is the employer to do, pursue a breach of award case against the employee which in practical sense is never going to happen. So we argue very strongly that that test case provision should remain.

PN313 THE SENIOR DEPUTY PRESIDENT: I think there was one just recently, wasn't there?

PN314 MR SMITH: Yes, that's right."

17. On 12 September 2008, the 7-Member Award Modernisation Full Bench issued a Statement and exposure drafts for the Priority Stage Awards. In the section of the Statement headed "GENERAL MATTERS", the Full Bench stated:

> **"Termination of Employment**
>
> **[22]** We have drafted a model termination of employment provision which adds to the NES in two respects. The draft clause contains provision for notice by employees and a job search leave entitlement.

18. The Model Termination of Employment Provision, published by the Full Bench on 12 September 2008 (within the Priority Stage Exposure Drafts) was worded as follows:

> **"22. Termination of employment**
>
> **22.1** Notice of termination is provided for in the NES.
>
> **22.2 Notice of termination by an employee**
>
> The notice of termination required to be given by an employee is the same as that required of an employer except that there is no requirement on the employee to give additional notice based on the age of the employee

concerned. If an employee fails to give the required notice the employer has the right to withhold pay to a maximum amount equal to the amount the employee would have received under the terms of the NES.

22.3 Job search entitlement

Where an employer has given notice of termination to an employee, an employee must be allowed up to one day's time off without loss of pay for the purpose of seeking other employment. The time off must be taken at times that are convenient to the employee after consultation with the employer."

19. Submissions on the Priority Stage Exposure Drafts were due on 10 October 2008.

20. The Minister made a detailed submission on 10 October 2008 in response to the publication of the Priority Stage Exposure Drafts, which dealt with various issues concerning the interaction between the NES and modern awards. In addition to addressing many other provisions of the Exposure Drafts, the submission dealt at length with the redundancy issue referred to at paragraph [23] of the AIRC's Statement of 12 September 2008 and other aspects of the Statement. The submission does not express any concerns about the model Notice of Termination by Employee clause addressed at paragraph [22] of the Statement. Therefore, it can be assumed that the Minister did not disagree with the AIRC's model clause.

21. In a submission of 10 October 2008, ACCI stated:

"**7. TERMINATION OF EMPLOYMENT**

NOTICE OF TERMINATION BY THE EMPLOYEE

118. ACCI welcomes the re-inclusion of the reciprocal notice provisions in awards, and a clarification of an issue which has concerned employers in recent years.

119. It is appropriate that:

a. There be a single formulation of this clause which is applied consistently to all modern awards.

b. The form of this clause is based on the 1984 TCR provision.

120. There is one wording issue which we request the Full Bench to address: that is to provide greater exactitude on precisely which monies can be the subject of a relevant deduction.

121. Our specific concern is that the clause make unambiguously clear that the employer can deduct pay in lieu of employee notice from all monies owing on termination, including any payments under the NES, any payments under the award, and any wages or other payments owing. On this basis, this provision could be redrafted in the following form into all modern awards:

> **13.2 Notice of termination by an employee:**
>
> The notice of termination required to be given by an employee is the same as that required of an employer except that there is no requirement on the employee to give additional notice based on the age of the employee concerned. If an employee fails to give the required notice the employer has the right to withhold pay from any and all monies owing to the employee on termination (whether payable under this award, the NES, or otherwise), to a maximum amount equal to the amount the employee would have received under the terms of the NES."

22. At the Post-Exposure Draft Consultations on 5 November 2008, Mr John Ryan of the SDA made the following submissions to the Full Bench:

> "PN3688 MR RYAN: Thank you, your Honour. Another issue which has been raised by ACCI and ACTCCI relates to withholding of wages from employees who fail to give the proper notice of termination. I have also prepared a written statement on this one which I would also seek to tender.
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> EXHIBIT #SDA15 - WRITTEN STATEMENT"

23. The SDA's Statement as tendered at the Consultations on 5 November 2008 (Exhibit SDA15) stated:

> **"NOTICE OF TERMINATION BY AN EMPLOYEE**
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> The SDA proposes that the second sentence of Clause 14.2 be deleted.
>
> Both ACCI at paras 118 to 121 and ACT CCI at paras 12 to 14 propose amendments to Clause 14.2 to strengthen the power of an employer to take money away from an employee.
>
> The Commission should remove from Clause 14.2 any capacity for an employer to act as prosecutor judge and executioner.
>
> If there is an allegation by an employer that an employee has failed to comply with the notice of termination provisions, then those allegations can only be dealt with by a court.
>
> All other alleged breach of award matters must be dealt with by a court.
>
> There is no pressing reason why the Commission should attempt to provide in any Modern Award a provision creating a right for employers to take money from a

worker who has been alleged to have breached the Modern Award, when no similar rights are created for employees to take money from their employer in circumstances where the employer is alleged to have breached the award.

The provision in Clause 14.2 would appear on its face to breach the constitutional doctrine of "separation of powers". The Boilermakers Case is still relevant."

24. In its Priority Stage Award Modernisation Decision of 19 December 2008, the Full Bench stated: (emphasis added)

> **"Termination of employment**
>
> **[53]** A number of matters arose during the exposure draft consultations concerning the termination of employment provision. The first concerns the draft provision for withholding of monies by the employer should the employee fail to give the required notice of termination. The draft provision is as follows:
>
> > "**Notice of termination by an employee**
> >
> > The notice of termination required to be given by an employee is the same as that required of an employer except that there is no requirement on the employee to give additional notice based on the age of the employee concerned. If an employee fails to give the required notice the employer has the right to withhold pay to a maximum amount equal to the amount the employee would have received under the terms of the NES."
>
> **[54]** It was submitted that the provision is unclear and requires redrafting. We agree. The redrafted clause will permit the employer to withhold monies due on termination equivalent to the amount the employee would have earned for the period of notice less an amount for any notice actually given. It is appropriate that the employer should only have the right to withhold monies due to the employee under the award or the NES. The redrafted clause is:
>
> > "If an employee fails to give the required notice the employer may withhold from any monies due to the employee on termination under this award or the NES, an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by the clause less any period of notice actually given by the employee."

25. The following important points arise from the above:

a. The issue of whether an award can include a provision allowing deduction of monies for notice not given by an employee was an issue that was contested in detail during the Priority Stage of Award Modernisation.

b. Issues of jurisdiction and merit regarding the Notice of Termination by an Employee clause were considered and determined by the AIRC; in particular, whether the clause can and should contain a provision allowing deduction of monies for notice not given by an employee, and the wording of such a provision.

c. There are no material differences between the provision in section 59 of the proposed NES released by the Minister on 16 June 2008 (see paragraph 251 of Ai Group's submission of 1 August 2008) and s.118 of the *Fair Work Act 2009* (**FW Act**) except for the inclusion of a reference to enterprise agreements in s.118.

3. TCR TEST CASE

26. Within the Metal / Manufacturing Award, the concept of an employer being able to deduct monies for notice of termination not given by an employee dates back at least as far as the *Metal Trades Award 1941*. Subclause 18(b) of the 1941 Award stated:

> **"18(b)** Employment shall be terminated by a week's notice on either side given at any time during the week or by payment or forfeiture of a weeks wages as the case may be."

27. In the 1984 *Termination, Change and Redundancy Case*, detailed consideration was given to the common provisions in awards that enabled employers to deduct monies for notice not given.

28. In the main TCR Decision of 2 August 1984, the Full Bench stated:

> ***Period of notice of termination of employment***
>
> One week's period of notice of termination of employment has been the standard in Federal awards for a long time. The ACTU described this position as archaic and claimed four weeks' notice of termination should be given by an employer if the period of employment is less than one year, with an additional two weeks' notice for each year of service or part thereof if the period of employment is more than one year.
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> - - -

The ACTU argued that the same periods of notice should not apply to notice by employees and that employees should be able to terminate employment by giving one week's notice because:

(a) completely different consequences of termination of employment exist for the employer and the employee.

(b) reciprocity might operate as an undue restriction upon mobility of employees; and

(c) in most Western European countries protective legislation with respect to dismissals which contain service related notice periods only applies to termination by the employer and not termination by the employee.

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.

29. In the TCR Supplementary Decision of 14 December 1984, the Full Bench relevantly stated: (emphasis added)

Notice of termination by employee

The decision provided 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.

The primary argument in relation to this part of the decision was concerned with the question whether an employee should be liable for forfeiture only of wages held in hand when an employee fails to give the required notice or whether other moneys in hand might be used. The employers also sought to provide an award right for an employer to recover any moneys due.

Both of these provisions were opposed by the ACTU. In arguing that the amount of possible forfeiture should be limited to wages only it argued that such a restriction would be a balance between the competing considerations of reciprocity of treatment for employers and employees and the need not to impede the mobility of labour.

We are prepared to provide that the employer shall have the right to withhold any moneys with a maximum amount equal to the ordinary time rate for the period of notice but we are not prepared to extend the award by including a provision which would give the employer an award right to recover any moneys.

We are prepared to provide that:

5. The notice of termination required to be given by an employee shall be the same as that required of an employer, save and except that there

shall be no additional notice based on the age of the employee concerned.

If an employee fails to give notice the employer shall have the right to withhold moneys due to the employee with a maximum amount equal to the ordinary time rate of pay for the period of notice.

4. IMPORTANCE OF NOT DISTURBING FULL BENCH AUTHORITY

30. A Full Bench of the Commission is not bound by the principle of *stare decisis* to follow the decision of another Full Bench, however as a matter of policy and sound administration, it generally does so, in the absence of cogent reasons for taking another course.[6]

31. The reconsideration of a Full Bench authority is a serious step that is rarely taken.[7]

32. At the commencement of the 4 Yearly Review of Modern Awards, a Full Bench dealt with various preliminary issues. The Commission's *Preliminary Jurisdictional Issues Decision*[8] contains the following relevant passage:

> **[25]** Although the Commission is not bound by principles of *stare decisis* it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in *Nguyen v Nguyen*:
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> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see *Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq*."
>
> **[26]** While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian

[6] [2016] FWCFB 2432 at paragraph 28. See also *Cetin v Ripon Pty Ltd (t/as Parkview Hotel), (2003)* 127 IR 205 at p. 214. See also *Re Queensland v Construction, Forestry, Mining and Energy Union* (1998) 86 IR 216.

[7] [2016] FWCFB 2432 at paragraph 29. See also *Telstra Corporation Ltd v Treloar* [2000] FCA 1170; (2000) 102 FCR 595, at paragraph 28; and *Australian Nursing Federation v Alcheringa Hostel Inc*, (2004) 134 IR 466 at p. 457.

[8] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

Industrial Relations Commission observed in *Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin)*:

> "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."

[27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.

33. The matters raised in the Commission's Statement of 21 August 2017 regarding clause E.1(c) have already been determined by the 7-Member Award Modernisation Full Bench and the decision should not be disturbed.

5. WHETHER CLAUSE E.1(c) CAN BE VALIDLY INCLUDED IN A MODERN AWARD

34. Clause E.1(c) can be validly included in a modern award because the provision falls within the scope of s.118 of the FW Act. Section 118 needs to be interpreted with regard to the relevant historical context.

35. For over 75 years, federal awards have commonly required that employees give a specified period of notice to their employer, with the employer permitted to deduct from monies owed on termination an amount equivalent to the period of notice not given. For over 75 years, these two elements have been recognised as those that comprise the concept of "Notice of Termination by an Employee".

36. Similarly, for over 75 years, federal awards have given employers the option of providing a specified period of notice to employees, or making a payment to the employee in lieu of the notice not given. For over 75 years, these two elements have been recognised as those that comprise the concept of "Notice of Termination by an Employer".

37. Section 170CM of the pre-Work Choices version of the *Workplace Relations Act 1996* (**WR Act**) imposed statutory obligations upon employers to give specified periods of notice of termination of up to five weeks. The title of s.170CM was "Employer to Give Notice of Termination". The clause imposed obligations to either give notice of make a payment in lieu of notice. That is, it dealt with the two elements that have long been recognised as comprising the concept of "Notice of Termination by an Employer".

38. Also, s.89A(2)(n) of the pre-Work Choices version of the WR Act specified the relevant allowable matter as "notice of termination" but award clauses underpinned by this allowable matter included both notice and compensation in lieu of notice, for employers and employees.

39. In the Award Simplification Decision relating to the Hospitality Industry Award, a five Member Full Bench of the Commission decided to delete a number of existing standard provisions in Notice of Termination clauses on the basis that such provisions did not fall within the scope of s.89A(2)(n) ("notice of termination"). However, the Full Bench retained the Notice of Termination by an Employee clause, including the provision which enabled monies to be deducted for notice not given. The following extract from the decision is relevant:

> 18. Termination of Employment
>
> We have adopted a number of the employers' proposals pursuant to Items 49(8)(c) and (d). In addition, we draw attention to the following changes:
>
> - we have rejected the proposal that the period of notice should not apply to probationary employees. There was no substantial argument on the merits of this proposal, which clearly represents a reduction in entitlements;
>
> - we have deleted clause 18.1.8 on the basis that it is not an allowable award matter for the reasons we have given in relation to clause 18.6. below;
>
> - clause 18.4 - Statement of Employment, is not an allowable award matter and we have deleted it;
>
> - the parties agree to the deletion of clause 18.5.2 and we have deleted it; and

- clause 18.6 is the standard clause prohibiting termination of employment which is harsh, unjust or unreasonable. The clause is not allowable. The only matter directly relevant to termination is s.89A(2)(n). Plainly clause 18.6 prohibits terminations on certain grounds. A prohibition on termination is not allowable. We have deleted the clause.

40. Section 661 of the Work Choices version of the WR Act imposed statutory obligations upon employers to give specified periods of notice of termination of up to five weeks. The title of s.661 was "Employer to Give Notice of Termination". The clause imposed obligations to either give notice of make a payment in lieu of notice. That is, it dealt with the two elements that have long been recognised as comprising the concept of "Notice of Termination by an Employer".

41. "Notice of termination" was a "preserved award term" under the Work Choices version of the WR Act (see ss.520 and 527(2)). The scope of this reserved award term included award clauses dealing with notice of termination by an employee, and the right to deduct for notice not given.

42. When consideration is given to the manner in which "notice of termination" has been very widely understood and addressed in predecessor legislation and in pre-modern awards, the wording in ss.61, 117 and 118 of the FW Act is not surprising.

43. Subsection 61(2) of the FW Act simply states: (emphasis added)

> (2) The minimum standards relate to the following matters:
>
> (i) notice of termination and redundancy pay (Division 11).

44. Consistent with the longstanding recognised breadth of the term "notice of termination", as used in s.61, s.117 expressly encompasses both notice given in time and payment in lieu of notice. Consistently, s.118 legitimately encompasses notice given in time by an employee and an ability for the employer to make a deduction for notice not given by the employee.

45. The heading of Subdivision A of Division 11 of Part 2-2 is “Notice of Termination and Payment in Lieu of Notice”. This section includes s.117 and s.118.

46. Section 118 states:

> “A modern award or enterprise agreement may include terms specifying the period of notice an employee must give in order to terminate his or her employment”.

47. The above wording is a simple description of the type of clause that can be included in a modern award. Consistent with the interpretation adopted by the Award Modernisation Full Bench, with the support of the Labor Federal Government at the time (see paragraph 20 above), the provision should not be interpreted in an excessively narrow manner.

48. Placing the interpretation on s.118 that this section does not legitimately include an award term allowing a deduction from monies owed to an employee on termination for notice not given would ignore the historical context in which the concept of “notice of termination” has been understood and applied for over 75 years.

49. In *Re Canavan Building Pty Ltd*[9], a Full Bench of the Commission considered the meaning of the term “paid annual leave” in the FW Act and decided that it was important to take the historical context into account in determining whether the term included a payment in lieu of annual leave:

> **[46]** The historical context is of significant assistance in understanding the provisions of Division 6 of Part 2-2. (Footnote) The enactment by the legislature of a NES entitlement to paid annual leave in the Act did not occur in a vacuum, but rather against the lengthy historical background of the development and establishment of paid annual leave as a standard industrial entitlement through decisions and awards of industrial tribunals and earlier State and federal statutory provisions. We consider that we are entitled, under s.15AB(1)(a) of the *Acts Interpretation Act 1901* (Cth), to have regard to that historical context in order to confirm that the meaning of “*paid annual leave*” and s.90 “*is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act*”.
>
> *Footnote: See Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd [2013] HCA 36 at [45], [52]-[59] for an example of the way in which historical context may be used as an aid to statutory interpretation.*

[9] [2014] FWCFB 3202.

50. In Justice Jessup's judgment in *Anglican Care v NSW Nurses and Midwives' Association,*[10] His Honour gave significant weight to the fact that there was no indication in the Explanatory Memorandum or other Parliamentary materials for the FW Act that there was any intention to change particular rights and obligations in the WR Act. Jessup J made the point that in such circumstances, the Court is *"justified in resolving any obscurity of meaning in favour of one which would not amount to a significant alteration in rights and obligations"* (emphasis added):

> **13** It was in this state of things that the WR Act was repealed and replaced by the FW Act. Section 130 undoubtedly dealt with the matter that had previously been the concern of s 237 of the WR Act, but it did so in different terms. Whereas s 237 had been based upon inconsistency with a law that would prevent or restrict the taking or accruing of leave, s 130(1) disentitled the relevant employee whenever he or she was absent from work on account of an illness or injury for which he or she was receiving compensation payments, and then subs (2) excepted from that disentitling rule any situation in which the taking or accruing of leave was permitted by the law in question. It is not apparent why the legislature made this change: the Explanatory Memorandum for the Bill which became the FW Act is not helpful in this regard. The change was, it seems, wholly responsible for the present litigation: the appellant accepts that, under s 237 of the WR Act, Ms Copas was entitled to accrue annual leave entitlements during the period when she was absent and in receipt of compensation payments under the WC Act.
>
> **14** It is tempting to suppose that the change from s 237 of the WR Act to s 130 of the FW Act was a change of a kind referred to in s 15AC of the *Acts Interpretation Act 1901* (Cth), but I cannot form the view the new wording was adopted "for the purpose of using a clearer style": regrettably, if anything, the contrary is the case.
>
> **15** Nonetheless, there is nothing to suggest that a change in substance was intended with the enactment of s 130 of the FW Act. That does not mean that we should construe this section as though it was in the same terms as s 237 of the WR Act. It was and is in its own terms, and effect must be given to them as they stand in the statute. But it does mean that we are justified in resolving any obscurity of meaning in favour of one which would not amount to a significant alteration in rights and obligations arising under the section. On the case of the appellant, there was such an alteration, and it was, moreover, one which cut back the entitlements which employees previously had under the WR Act. I would not, however, impute to the legislature an intention to give effect to such an alteration, at least without some appropriate indication in the Explanatory Memorandum or other Parliamentary materials."

[10] [2015] FCAFC 81

51. It cannot be legitimately concluded that the Legislature intended that the concept of "notice of termination" have a narrower meaning than it had under the WR Act, given the historical context associated with the concept, and the absence of any such indication in the Explanatory Memorandum or other Parliamentary materials relating to *Fair Work Bill 2008*.

52. The explanation about s.118 in the Explanatory Memorandum simply states:

> ***Subdivision A – Notice of termination or payment in lieu of notice***
>
> 463. This Subdivision provides an entitlement to notice upon termination of employment, or payment in lieu of that notice. (See, also, Part 6-3 which provides for the extended application of this entitlement to non-national system employees.)
>
> - - -
>
> **Clause 118 – Modern awards and enterprise agreements may provide for notice of**
>
> **termination by employees**
>
> 470. Clause 118 permits a modern award or enterprise agreement to include terms setting out the period of notice an employee must give in order to terminate his or her employment.

53. Further, the Explanatory Memorandum (at paragraph r.26 of the Regulatory Analysis) identifies only one substantive change from the previous legislative provisions about notice of termination: (emphasis added):

> *Notice of termination and redundancy pay*: the NES will provide for written notice of termination and redundancy pay. The current provision for notice of termination is provided under the WR Act but through provisions separate to the Standard. <u>The substantive change under the proposed reforms is for the employer's notice to be in writing</u>. The NES provides a new entitlement to redundancy pay, depending on the level of continuous service by an employee. This NES does not apply to employees of a small business. Modern awards may include industry specific redundancy entitlements. These entitlements will provide more comprehensive protection for employees.

54. With other award provisions expressly permitted by the NES, the FWC has not adopted an overly narrow interpretation of the scope of each provision. Consistently, the Commission should not adopt an overly narrow interpretation of s.118.

55. Placing an overly narrow interpretation on s.118, that the section does not include award provisions allowing an employer to deduct monies for notice not given by an employee on termination, would directly conflict with the Priority Stage Award Modernisation Decision of the seven-Member Award Modernisation Full Bench. As explained in section 2 of this submission, the argument that the Commission does not have the jurisdiction to include clauses in modern awards giving employers the right to make a deduction for notice of termination not given by an employee, was squarely argued by the unions in the Priority Stage of the award modernisation process and rejected by the Full Bench.

56. The wording in s.118 was of course central to the AIRC's consideration of whether jurisdiction existed.

57. There are no cogent reasons why the decision of the Award Modernisation Full Bench on the interpretation of s.118 should be revisited.

58. The reconsideration of a Full Bench authority is a serious step that is rarely taken.[11]

59. For the reasons identified above, s.118 of the FW Act legitimately encompasses award provisions which give an employer the right to deduct monies for notice of termination not given by an employee.

60. Given that such award provisions fall within s.118, there is no inconsistency with the NES (see s.55(2) and (3)).

61. Ai Group submits that the above arguments about the scope of s.118 are very strong and therefore it is unnecessary for the Full Bench as currently constituted to consider whether awards can include provisions allowing deductions for notice not given by employees on termination if such provisions are not within

[11] [2016] FWCFB 2432 at paragraph 29. See also *Telstra Corporation Ltd v Treloar* [2000] FCA 1170; (2000) 102 FCR 595, at paragraph 28; and *Australian Nursing Federation v Alcheringa Hostel Inc*, (2004) 134 IR 466 at p. 457.

the scope of s.118. However, for the purposes of completeness, we make the following submissions:

a. The ability to make a deduction from wages falls with those provisions of s.139 that enable award provisions to deal with various types of monetary amounts, including s.139(1)(a), (d), (e), (f), (g) and (h);

b. The ability to make a deduction from wages would also fall within s.142;

c. The fact that deductions from wages fall within s.136 is clear from s.324(1)(c). If this was not the case, s.324(1)(c) would have no work to do because awards can only contain those types of terms specified in s.136.

62. If the Commission rejects the argument that s.118 covers award provisions allowing deductions from monies owed on termination for notice not given by an employee, such provisions are clearly covered by ss.136 and 139. In such circumstances, any inconsistency with the NES could be readily addressed by modifying the scope of the clause to only permit deductions from monies owed under the award and not those payable under the NES.

6. WHETHER CLAUSE E.1(c) AS A MATTER OF MERIT SHOULD BE INCLUDED IN MODERN AWARDS

63. The Commission has called for submissions addressing whether, as a matter of merit, a provision such as the proposed clause E.1(c) is *necessary* to ensure that awards meet the modern awards objective in accordance with s.138.

64. As already identified, the right to make a deduction from amounts payable to an employee in circumstances where an employee fails to meet their legal obligation to provide a minimum period of notice when terminating their employment is a longstanding element of the Australia's workplace relations system that has been repeatedly endorsed in Full Bench decisions. It is a matter that is both inherently fair to employers and employees, and highly valued by employers.

65. In short, the Full Bench should accept that such provisions are *necessary*[12] to meet the modern awards objective[13] given:

a. The merit of award clauses regulating the notice of termination by an employee and an associated employer right to make deductions from amounts otherwise payable to employees if such notice is not given has, in effect, been confirmed in numerous previous Full Bench decisions.

b. It is only fair that award clauses operate to provide a relevantly reciprocal obligation to those imposed upon employers under s.117.

c. To the extent that the approach adopted within award clauses dealing with deductions for failing to provide the requisite notice differs from the approach adopted in s.117, this is appropriate given the different circumstances of employees and employers. That is, it is entirely appropriate that the clause provides employers with a 'self-enforcing system' for dealing with award breaches.

d. The right to deduct is essential to the practical operation of award clauses providing obligations on employees to provide notice of their resignation. It provides an effective disincentive to employee contravention of such terms.

e. Retention of a right to make a deduction is consistent with various matters identified in s.134(1) of the FW Act. In particular, a consideration of the matters identified in s.134(1)(d), (f) and (g) weigh in favour of a determination that such provisions are necessary.

f. Retention of a right to make the relevant deduction is consistent with the object of the Act, as articulated in s.3.[14]

66. These matters are addressed in detailed in the section that follows.

[12] As contemplated by s.138

[13] Subsection 134(1)

[14] Section 3

67. An employer terminating an individual's employment must either provide a period of notice or a payment in lieu thereof.[15] It is only fair that there be reciprocal, or at least relevantly similar, obligations on an employee who is terminating their employment. Fairness, as contemplated in the context of s.134(1), must be considered from the perspective of both an employer and employee.[16] Moreover, aside from an overarching appeal to fairness, there are various merit based considerations that weigh in favour of retaining the provision.

68. A key justification for retention of a right to deduct where an employee fails to provide notice is that it creates an effective disincentive for an employee considering breaching this requirement. The provision is essential for the practical operation of the award clause as, for reasons we identify below, there is very little prospect of an employee who has failed to comply with the award derived notice requirements having any other consequence visited upon them.

69. An employee resigning at short notice can be very disruptive and costly for an employer. Indeed, the associated costs will very often far exceed the quantum of any deduction from the employee's pay permissible under the award.

70. The need for awards to require that employees provide minimum notice of termination was identified by the Full Bench in the main TCR Decision of 2 August 1984, as extracted at paragraph 28 of these submissions.

71. Given the recognised need for employees to provide notice of their resignation, there is obvious merit to an award clause that promotes compliance with the minimum notice requirement specified in awards. This is a key objective of award provisions affording a right to make a deduction from amounts payable in circumstances where the individual fails to provide the requisite period of notice.

[15] Section 117

[16] *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001 at 117

72. Even more significantly, the Full Bench in the TCR Supplementary Decision of 14 December 1984[17] considered whether an employer should have a right to recover payments from any monies due to the employee in circumstances where they have failed to provide the requisite notice contemplated in the main TCR Decision. As identified in paragraph 29 of these submissions, the Full Bench held: (emphasis added)

> We are prepared to provide that the employer shall have the right to withhold any moneys with a maximum amount equal to the ordinary time rate for the period of notice but we are not prepared to extend the award by including a provision which would give the employer an award right to recover any moneys.

73. Further, the previously cited decision of a 7-Member Full Bench in the Part 10A Award Modernisation Process to include a provision in modern awards permitting deductions from entitlements for an employee's failure to give notice of termination, in circumstances where there was clearly a contest in the proceedings in relation to the issue, represents a further powerful endorsement of the merits of such a provision.

74. The clear pattern of endorsement by the Commission of the essential elements of the current award provisions should weigh very heavily in favour of retaining the provisions. Even if the Commission decided that some changes to the standard clause should be made for jurisdictional reasons, the Commission should not now reach a fundamentally different conclusion as to the merits of the provisions compared to that consistently adopted by the Commission over an extended period. There are no cogent reasons for such a radical reassessment of these matters.

75. Although employers and employees have a reciprocal obligation relating to notice of termination under the safety net, there is a difference in the way the relevant award clauses work and the operation of s.117 of the NES.

76. Section 117 of the NES requires, in effect, that an employer provide an employee with a period of notice or a payment in lieu thereof. Awards similarly require that employees provide a period of notice before they terminate their

[17] Print F6230

employment. However, award clauses do not go so far as to create an obligation for an employee to make a payment to an employer. Rather, they permit deductions from amounts otherwise payable to an employee in circumstances where the individual fails to provide the relevant period of notice required by the award. Although this means that there is a substantive difference between the way s.117 and the award clauses operate, this is warranted given the different circumstances of an employee and an employer and differences in the obligations under the s.117 and the relevant award provision.

77. It might be put that an employer who suffers from an employee's failure to comply with an award term should go to a relevant court in the same way that an employee who does not receive notice or a payment in lieu under s.117 can.

78. The approach currently adopted within awards is consistent with that contemplated in the supplementary TCR Supplementary Decision of 14 December 1984.[18] The Full Bench rejected the notion of employers having a right to recover any monies in a court for notice not given:

> We are prepared to provide that the employer shall have the right to withhold any moneys with a maximum amount equal to the ordinary time rate for the period of notice but we are not prepared to extend the award by including a provision which would give the employer an award right to recover any moneys.

79. In addition, there are at least six key reasons why awards should provide for a self-enforcing system that affords a limited and modest right for an employer to make deductions from the pay of an employee who, in breach of an award term, fails to provide the employer with notice of termination

80. **Firstly**, an employer who suffers because of a breach of an award clause does not have the same capacity to seek a remedy from a court as an employee, given that:

- Awards do not expressly provide that a payment has to be made by the employee to the employer for notice not given on termination.

[18] Print F6230

Accordingly, an employer would need to convince the appropriate court that an order requiring a payment to the employer was appropriate in the particular circumstances.

- An employer cannot elect to have proceedings relating to a breach of s.45 dealt with as small claims proceedings under s.548. Section 548 only relates to amounts that "an employer was required to pay...".

- We are unaware of any instances in which an employee has had proceedings brought against them for failure to comply with their award obligations relating to notice of termination. The Fair Work Ombudsman (**FWO**) does not have a practice of pursuing such matters.

- Pursuit by an employer in a court of an employee's contravention of the minimum notice period in an award would require cost and management time out of all proportion with the amount that could be recovered. This problem is compounded by the reality that employee failure to provide the relevant notice is not an uncommon phenomenon.

81. It is accordingly appropriate that awards provide for the consequence of an employee's failure to provide notice of their termination.

82. **Secondly**, the award clause is, in certain respects, less onerous on employees than s.117 in on employers. The amount that may be deducted from an employee's pay is not the "Full Rate of Pay" for the period of notice, contemplated by s.117 and s.118. Moreover, the award does not require that employees over the age of 45 provide an additional week of notice.

83. **Thirdly**, in practice the amount from which a deduction can be made will often not be sufficient to cover the applicable deduction. For example, if an employee who is paid weekly needs to provide four weeks' notice of their termination, but fails to do so, an employer may only have a week's wages in hand to make a deduction from. This means that the employee's liability flowing from their non-compliance with the award is significantly less than it would be if they were simply required to make a payment in lieu of notice in the same manner as is

required of their employer. Accordingly, the award system's adoption of a right to deduct from amounts payable rather than a truly reciprocal obligation on an employee to provide a payment in lieu of notice should be considered as a mechanism that is beneficial to an employee. It ensures that an employee is not put in a position of having to pay an employer monies that they do not have. It limits the exposure of the employee to monies that they would otherwise have been paid. This ensures that the employee's failure to comply with the award does not give rise to a situation where the employee owes a debt to their employer.

84. **Fourthly**, if the obligation on an employee were to be more strictly aligned with a comparable obligation upon an employer it would necessitate an employee providing a payment in lieu of notice to their employer. This would not be sensible or consistent with the fundamental nature of the employment relationship. Employees do not ordinarily make payments to their employers. Moreover, the approach of permitting a deduction has the effect of reducing an employee's taxable income. This is obviously preferable to a situation whereby the employee is either required to provide a payment in lieu of notice to an employer or make a payment as a consequence of a court order.

85. **Fifthly,** there is nothing unfair about an employee, in effect, forfeiting an amount of wages calculated by reference to a period in which they have either worked or been employed if it occurs because an employee has breached their award derived obligation to provide notice. This is an event that should not occur and, if it does, it is difficult to understand why an employee should not incur financial detriment.

86. **Sixthly**, it is not in the interests of employers or employees for there to need to be formal legal proceedings brought against an employee in circumstances where the employee has breached award obligations if a simpler, less time consuming and less costly remedy can be readily achieved (and is currently in place).

The Modern Awards Objective and the Object of the Act

87. The elements of the modern awards objective weight heavily in favour of the retention of award clauses that permit an employer to deduct monies for notice not given by an employee on termination.

88. An employer who is not afforded advanced notice of an employee's resignation will, in many instances, suffer significant disruption to their operations and associated costs. To the extent that the award clause operates to discourage employees from resigning without notice, it facilitates the orderly replacement of that employee and promotes the efficient and productive performance of work (s.134(1)(d)).

89. The removal of the current longstanding award provision would be inconsistent with the maintenance of a stable award system. (s,134(1)(g)).

90. The retention of an employer right to make a deduction from wages in circumstances where the employee has breached the award by failing to provide notice is also consistent with elements of the object of the Act, as set out in s.3. There are currently a relevantly reciprocal set of obligations upon employers and employees with regard to notice of termination. In so doing the current provisions further the objective of delivering a. "…balanced framework for cooperative and productive workplace relations" (emphasis added).[19] Further, the current provisions are particularly important in the context of the "…special circumstances of small and medium-sized businesses."[20] As the Full Bench in the main TCR Decision of 2 August 1984 identified, small firms will often be particularly disadvantaged by employees leaving without providing the requisite notice.[21]

91. Finally, even if the Full Bench determines that the relevant award clauses cannot validly permit deductions from NES entitlements, it does not mean that the employer right to deduct from award derived entitlements should be

[19] Section 3

[20] Subsection 3(g)

[21] First TCR Decision

removed. Rather, as previously submitted, the relevant award clause could be readily redrafted. This need not give rise to any complexity or difficulty.

92. It would not be difficult for an employer to determine how much is separately owing for the purposes of NES derived entitlements.

93. Finally, we note that the existing awards clauses do not mandate that employers make a deduction. It only provides that an employer *may* make a relevant deduction. Accordingly, if an employer is faced with any difficulty in either calculating or implementing the deduction they could simply elect not to do it.

94. In balancing the relevant criteria in s.134(1), the need to ensure a simple and easy to understand award system should not be viewed as warranting a removal of an important and longstanding employer right.

7. CLAUSE H.2

95. In the Commission's Statement of 21 August 2017, after dealing with clause E.1(c), the Full Bench made the following comments about clause H.2:

> **[3]** The same issue also arises in relation to the proposed clause H.2 insofar as the Ai Group has submitted that where an employee who has been given notice of termination due to redundancy leaves his or her employment before the expiration of the notice period and without giving the required period of notice, the employer is or should be permitted pursuant to clause E.1(c) to make deductions from payments other than for redundancy owing to the employee.

96. The revised plain language drafts of clauses H.1, H.2 and H.3 are

> **H.1** An employee given notice of termination in circumstances of redundancy may terminate their employment during the period of the notice.
>
> **H.2** The employee is entitled to receive the benefits and payments they would have received under this award or the ~~National Employment Standards~~ NES had they remained in employment until the expiry of the notice.
>
> **H.3** However, the employee is not entitled to be paid for any part of the period of notice remaining after the employee ceased to be employed

97. In its decision of 28 August 2017,[22] in respect of the plain language drafting of standard award clauses, the Full Bench accurately summarised Ai Group's position as follows:

> **[175]** Ai Group made the following submissions:
>
> '31. The existing entitlement for an employee who leaves during the notice period is to receive the entitlements that they would have received under the redundancy clause of the award, had they remained in employment until the expiry of the notice. This is a very longstanding entitlement that was inserted into awards following the 1984 Termination, Change and Redundancy Decision and Supplementary Decision.
>
> 32. The entitlement was retained in awards after the 2004 Redundancy Case Decision.'
>
> **[176]** Ai Group submit that the re-drafted wording results in a substantial increase in the entitlements of employees who are made redundant, and a substantial increase in employer costs. Ai Group state that it is not uncommon for an employee to leave during the notice period when the employee's position becomes redundant. In these circumstances, employees receive their redundancy entitlements and not the annual leave that would have accrued if the full period of notice had been worked out.
>
> **[177]** Ai Group submit that clause H.2 should be amended as follows:
>
> 'H.2 The employee is entitled to receive the benefits and payments they would have received under Clause H of this award or sections 119-122 of the NES had they remained in employment until the expiry of the notice.'

98. Ai Group proposes the following slightly modified clause to that set out in paragraph [177] above:

> 'H.2 The employee is entitled to receive the benefits and payments they would have received under Clause H of this award or sections 119-122 of the NES had they remained in employment until the expiry of the notice prescribed by section 117.'

99. The above proposed clause would clarify entitlements in circumstances where an employer gives an employee a longer period of notice than required under s.117 of the FW Act. The inclusion of the proposed additional wording is consistent with the Commission's decision of 28 August 2017 regarding clause H.4:

> **[197]** …. We therefore accept the Ai Group submission that the standard clause H.4 needs to be modified so that it is made clear the job search leave entitlement

[22] [2017] FWCFB 4419

> does not extend beyond the minimum periods of notice prescribed by s.117. Such a modification is consistent with proposition earlier established in the 4 yearly review that it is not the function of the minimum safety net to regulate the interaction between minimum award entitlements and overaward payments. We consider that this proposition may be extended to the interaction between the NES and payments and benefits in excess of those required by the NES (unless the Act specifically provides to the contrary).

100. Beyond clarifying the above issue, Ai Group's proposed wording addresses the unfairness to employers, the inconsistency with current industry practices, and the inconsistency with current award entitlements that would result if employers were required to make payments (beyond redundancy payments) to an employee for entitlements that would have been earned had the employee remained in employment until the end of the notice period. Such payments would include additional annual leave and long service leave accruals between the day that the employee terminated his or her employment and the end of the notice period that the employer was required to give under s.117.

101. We otherwise rely upon the submissions that we have previously made regarding clause H.2.