



Fair Work Commission: 4 yearly review of modern awards

**FAMILY FRIENDLY WORK ARRANGEMENTS:
RESPONSE TO ACTU SUBMISSIONS ON “THE
ALLEGED NES INCONSISTENCIES DECISION”**

AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY AND OTHERS

Matter No. AM2015/1 and AM2015/2

1. This further submission is filed in accordance with the direction of VP Hatcher for ‘employer’ parties to respond to the ACTU note in relation to the *4 yearly review of modern awards – Alleged NES Inconsistencies Decision* [2015] FWCFB 3023 (*NES Decision*).
2. As part of these proceedings, the ACTU seek a modern award term that provides an entitlement for employees to require their employer to create a part time role for them that did not previously exist or if they were working in a part time role to require the employer to reduce their hours of work to suit them after a period of parental leave (Parental Leave Claim).
3. The in the *NES Decision* the Full Bench found at [37] that:

“We consider that the modern award provisions in question generally are clearly inconsistent with section 91(1)...A provision which operates to exclude the NES will not be an incidental, ancillary or supplementary provision authorised by section 55(4)”.
4. As we submitted in the hearing, ACCI contend that on a proper characterisation the Parental Leave Claim cannot be said to be “ancillary or incidental” to or alternatively that it “supplement” the section 76 of section 84 as contended by the ACTU.
5. As we submitted in the hearing, a term that does this properly will not by its nature exclude the operation of section 65 but a term that by its nature creates a new and distinct entitlement or right could exclude the NES and in this case operate to exclude section 65.
6. Section 55 (7) does not work to cure a term that cannot be said to be “ancillary or incidental” or that it “supplements” the NES and as such could otherwise offend section 55 (1).
7. This approach is aligned to the reasoning in the *NES Decision*.
8. We submit that the Parental Leave Claim is not permitted under s55 (4) because it is not:
 - (a) a term that is ancillary or incidental to the operation of an employee’s entitlement to parental leave as provided in ss76 or 84; or
 - (b) a term that supplements ss76 or 84.

12. In these circumstances, section 55 (7) cannot cure such a term from ultimately offending section 55 (1).

Yours faithfully,



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On behalf of the Australian Chamber of Commerce and Industry and Others

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