Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

AM 2015/1 and AM 2015/2 Family and domestic violence clause and Family friendly work arrangements

20 APRIL 2015

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AM2015/1 AND AM2015/2 – FAMILY AND DOMESTIC VIOLENCE CLAUSE AND FAMILY FRIENDLY WORK ARRANGEMENTS

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) makes this submission pursuant to the Directions of the Fair Work Commission (**FWC**) issued on 23 February 2015 identifying four preliminary jurisdictional issues raised by the Ai Group and ACCI in respect to claims by the ACTU and other unions for:

    - A family and domestic violence clause to be inserted in all modern awards, including a provision requiring employers to provide 10 days paid family and domestic violence leave;

    - Family friendly provisions in modern awards, which go beyond those entitlements already provided for by the *Fair Work Act 2009* (**FW Act**).

2. The jurisdictional issues raised are set out below:

    - Are any elements of the claims of the ACTU or individuals unions inconsistent with Part 2-1 or Part 2-2 of the FW Act?

    - Do any elements of the claims of the ACTU or individual unions require terms that are not permitted to be included in a modern award under Part 2-3 of the FW Act?

    - Are any elements of the claims of the ACTU or individual unions inconsistent with Part 6-2 of the FW Act?

    - Do any elements of the claims of the ACTU or individual unions purport to give the Commission powers which it does not have under the FW Act?

3. This submission addresses the above jurisdictional issues raised with respect to the ACTU's draft determinations filed 2 March 2015.

4. We note that in the draft determinations provided by the ACTU on 2 March 2015 and 13 February 2015 the ACTU has indicated that the United Firefighters Union (UFU) intends to pursue a separate determination in respect of the *Fire Fighting Industry Award 2010*. It appears that the UFU has not filed a draft determination. Given the UFU's failure to comply with the Commission's directions, any separate claim which it makes should be rejected by the Commission.

2. FAMILY AND DOMESTIC VIOLENCE CLAUSE

2.1 Ai Group's position on Family Violence and the unions' award claims

5. Family violence is an important community problem. Federal and State governments, police forces, courts, community services organisations, health professionals, the legal profession, the media, employers, employees and many others in the community, all have roles to play in addressing the problem.

6. The problem is currently receiving considerable attention by governments. For example, the Communique from the 17 April 2015 Meeting of the Council of Australian Governments (COAG), records that the Commonwealth and State Governments agreed upon the following measures at the meeting:

> ***"Reducing Violence against Women***
>
> *As of 13 April, the media had reported 31 women who have died in Australia in 2015 as a result of violence. The most recent verified annual data show that on average one woman a week is killed by her current or former partner.*
>
> *COAG agreed to take urgent collective action in 2015 to address this unacceptable level of violence against women.*
>
> *By the end of 2015:*
>
> - *a national domestic violence order (DVO) scheme will be agreed, where DVOs will be automatically recognised and enforceable in any state or territory of Australia;*

- *progress will be reported on a national information system that will enable courts and police in different states and territories to share information on active DVOs – New South Wales, Queensland and Tasmania will trial the system;*
- *COAG will consider national standards to ensure perpetrators of violence against women are held to account at the same standard across Australia, for implementation in 2016; and*
- *COAG will consider strategies to tackle the increased use of technology to facilitate abuse against women, and to ensure women have adequate legal protections against this form of abuse.*

COAG agreed to jointly contribute $30 million for a national campaign to reduce violence against women and their children and potentially for associated increased services to support women seeking assistance. It noted the importance of ensuring frontline services in all jurisdictions continue to meet the needs of vulnerable women and children.

This campaign will build on efforts already underway by states and territories. It will be based on extensive research, with a focus on high-risk groups, including Indigenous women.

COAG will be assisted with this work by the COAG Advisory Panel on Reducing Violence against Women, chaired by the former Victorian Police Chief Commissioner, Mr Ken Lay APM, and with 2015 Australian of the Year, Ms Rosie Batty as a founding member."

7. Ai Group supports the above measures and many other programs and forms of assistance that have been implemented by governments, police forces, courts, community groups, and others within the community.

8. Ai Group also supports appropriate initiatives to educate employers about the problem of family violence and the role that employers can play in assisting employee victims. In Ai Group's view, the key to success with this important issue is to engage with employers in a positive way, not for heavy handed and inappropriate industrial claims to be pursued, such as those being pursued by the unions in the 4 Yearly Review of Awards. The pursuit of such claims risks the generation of negative views amongst employers, when most employers would be willing participants in workable initiatives to address this community problem.

9. Many large employers have relevant policies and procedures to assist employees who are victims of family violence. These policies, for example, often providing access to the following measures for victims of family violence

- Employee support programs;
- Annual leave, personal / carer's leave and/or unpaid leave; and
- Flexible work arrangements, consistent with the right to request provisions of the National Employment Standards (NES).

10. In addition, employer policies sometimes provide guidelines for receptionists and other staff to follow when a violent family member seeks to contact a victim at the workplace.

11. Family violence is not appropriately dealt with through specific clauses in awards.

12. Modern awards are intended to provide, together with the NES, a fair and relevant minimum safety net of terms and conditions of employment. Awards are already far too complex to constitute a genuine safety net. Awards need to be simplified - not expanded to deal with the numerous very important community problems which exist. If family violence is to be dealt with through a specific clause in awards, why not street crime, drug dependence, alcohol dependence, illiteracy, homelessness, mental health, age discrimination, gender inequality, road accidents, traffic congestion, environmental degradation, and so on? All social problems interact with the workplace in one way or another.

13. With most community problems, employers have a role to play but the role is usually nowhere near as significant as that of governments and others in the community, as is the case with family violence. Employers of course are in no way the cause of the problem of family violence or a contributor to it. With most community problems, the best way to facilitate employers playing a constructive role is to educate them and encourage their participation, not to impose heavy handed and inappropriate measures upon them.

14. The NES provide employees who are victims of family violence with the right to request flexible work arrangements. This amendment was made to the NES relatively recently.

15. If Parliament had seen a need to create an additional specific category of leave to address family violence, it would have logically varied the NES to provide for this when the right to request provisions of the Act were recently amended.

16. Leave is a topic which is comprehensively addressed in the NES. While awards are permitted to supplement the NES, it is not appropriate for awards to provide additional discrete types of leave such as family violence leave.

17. Parliament has decided upon what specific workplace rights are appropriate for employees and employers in the area of family violence, and the FWC should not disturb the careful balance that has been struck.

18. There are a wide range of workplace rights which protect and provide assistance to victims of family violence including:

- The NES right to request provisions;
- Personal / carer's leave entitlements;
- Annual leave entitlements;
- Facilitative provisions and other award flexibilities;
- Individual flexibility arrangements;
- The general protections, including protections against adverse action because the person has a workplace right, protections against termination for a prohibited reason, and protections against discrimination;
- Unfair dismissal laws; and
- Anti-discrimination laws.

19. The ACTU's claims should be rejected.

20. Ai Group's broad position on family violence and the ACTU's claims is set out above. The four jurisdictional set out in the FWC's Directions of 23 February 2014 are addressed below.

2.2 The ACTU's proposed family and domestic violence clause

21. The ACTU's clause, as filed on 2 March 2015, is as follows

"XX SUPPORT FOR EMPLOYEES EXPERIENCING FAMILY AND DOMESTIC VIOLENCE

X.1 Definition

For the purpose of this clause, family and domestic violence is defined as any violent, threatening or other behaviour by a person that coerces or controls a member of the person's family or household or causes the family or household member to be fearful. It includes current or former partners in an intimate relationship, whenever and wherever the violence occurs. It may include physical, sexual, emotional, psychological or financial abuse.

X.2 Confidentiality

The employer must take all reasonable measures to ensure personal information concerning an employee's experience of family and domestic violence is kept confidential.

X.3 Family and Domestic Violence Workplace Contacts and advice referral

X.3.1 The employer will appoint a family and domestic violence workplace contact person to provide a point of first contact for employees experiencing family and domestic violence. The name and contact details of the nominated contact person shall be disseminated to all employees.

X.3.2 The employer must ensure the contact person is trained in family and domestic violence issues and be able to provide employees with access to the relevant Employee Assistance Program and / or appropriate local specialist resources, support and referral services.

X.4 Workplace Safety

If it is determined that the disclosing employee, other employees or visitors of the employer may be at risk of physical harm, the employer must take reasonable measures to ensure their safety.

X.5 Leave

X.5.1 An employee experiencing family and domestic violence will have access to 10 days per year of paid family and domestic violence leave to attend legal proceedings, counselling, appointments with a medical or legal practitioner, relocation, the making of safety arrangements and other activities associated with the experience of family and domestic violence.

X.5.2 Upon exhaustion of the leave entitlements in clauses X.5.1, employees shall be entitled to up to 2 days unpaid family and domestic violence leave on each occasion where paid leave would be available.

X.5.3 If required, employees may take additional paid or unpaid family and domestic violence leave by agreement with the employer.

X.5.4 Family and domestic violence leave is in addition to any other existing leave entitlements, and may be taken as consecutive or single days or as a fraction of a day.

X.5.5 Nothing in this clause shall prohibit the employee from accessing other available forms of leave for the purposes of attending legal proceedings, counselling, appointments with a medical or legal practitioner, relocation, the making of safety arrangements and other activities associated with the experience of family and domestic violence.

X.5.6 The employee shall give his or her employer notice of the taking of the leave under this clause, and if required by the employer, evidence that would satisfy a reasonable person that the leave was for the purposes of attending medical appointments, legal proceedings, legal assistance, court appearances, counselling, relocation, the making of safety arrangements and other activities associated with the experience of family and domestic violence.

X.5.7 Proof of family and domestic violence may be required and may include a document issued by the police service, a court, a doctor (including a medical certificate), district nurse, maternal and child health care nurse, a family violence support service or lawyer or a statutory declaration.

X.5.8 An employee is entitled to use the NES entitlement to personal / carer's leave for the purpose of providing care or support to a person who is experiencing family and domestic violence, including but not limited to, accompanying them to legal proceedings, counselling, appointments with a medical or legal practitioner or to assist them with relocation, the making of safety arrangements, minding children and other activities associated with the experience of family and domestic violence.

X.6 Individual Support

[This clause supplements the entitlement to request flexible work arrangements pursuant to s.65 of the FWA.]

In order to provide support to an employee experiencing family and domestic violence and to provide a safe work environment to all employees, the employer will approve any reasonable request from an employee experiencing family and domestic violence for:

(i) changes to their span of hours or pattern of hours and/or shift patterns;

(ii) job redesign or changes to duties;

(iii) changes to the location of work;

(iii) a change to their telephone number or email address to avoid harassing contact;

(iv) any other appropriate measure including those available under s.65 of the FWA."

2.3 Are any elements of the claims of the ACTU or individuals unions inconsistent with Part 2-1 or Part 2-2 of the FW Act?

22. Part 2-1 of the FW Act sets out the core provisions for Chapter 2 of the Act which deals with the terms and conditions of employment.

23. Part 2-2 of the Act sets out the NES.

24. Clause X.5 of the draft determination deals with the provision of additional paid leave for employees suffering from family and domestic violence beyond the leave entitlements provided by the NES.

25. Clauses X.5.5 and X.5.8 of the draft determination contemplates the use of personal/carers leave under the NES in a way which is different to the NES.

26. For example clause X.5.5 provides the opportunity for 'other forms of leave' (which would include personal/carers leave) to be accessed by an employee "*for the purposes of attending legal proceedings, counselling, appointments with a medical or legal practitioner, relocation, the making of safety arrangements and other activities associated with the experience of family and domestic violence*".

27. Clause X.5.8 purports to extend the NES entitlement to personal/carers leave to be used "*for the purpose of providing care or support to a person who is experiencing family and domestic violence, including but not limited to, accompanying them to legal proceedings, counselling, appointments with a medical or legal practitioner or to assist them with relocation, the making of safety arrangements, minding children and other activities associated with the experience of family and domestic violence*".

28. The NES limits the taking of personal/carers leave to the following circumstances:

- If the employee is not fit for work because of a personal illness or personal injury affecting the employee;[1] or

- To provide care or support for a member of the employee's immediately family, or member of the employee's household, who requires support because of a personal illness or injury affecting the family or household member or due to an unexpected emergency affecting the family or household member.[2]

29. Section 55(1) prohibits a modern award from excluding the NES.

30. The draft determination (namely clauses X.5.5 and X.5.8) offends 55(1) of the FW Act. If a modern award permits personal/carer's leave to be used for a purpose other than the purpose for which it was intended, then this would result in the NES personal/carer's leave provisions being excluded by the modern award. If the personal/carer's leave entitlements are exhausted for family or domestic violence purposes, the employee would not have an entitlement to paid leave in circumstances where the employee is ill or injured or needs to provide care to a family or household member, who is ill, injured or experiencing an unexpected emergency.

31. Section 55(4) of the FW Act allows modern awards to include terms which are ancillary or incidental and terms that are supplementary to the NES, so long as the terms are not detrimental to an employee in any respect when compared to the NES. Clauses X.5.5 and X.5.8 of the draft determination are not consistent with section 55(4) of the FW Act.

32. Clauses X.5.5 and X.5.8 would permit an employee to use personal/carer's leave for a family and domestic violence purpose, a purpose which is not contemplated by section 97 of the NES. The effect of this would be that an employee who exhausts their personal/carer's leave entitlement for a family violence purpose would thereby have no personal/carer's leave (or less personal/carer's leave) to take when the employee is not fit for work because

[1] *Fair Work Act 2009*, s.97(a).

[2] *Fair Work Act 2009*, s.97(b).

he or she is ill or injured, or to provide care to a family or household member who is ill or injured or is experiencing an unexpected emergency. This would be contrary to section 55(4) of the FW Act as it would be detrimental to the employee. The use of the phrase '*in any respect'* in section 55(4) of the FW Act suggests a very broad assessment of any detriment that may arise because of the operation of Clauses X.5.5 and X.5.8.

33. The Unions allege that Clause X.6 supplements the entitlement to request "flexible working arrangements", yet some of the concepts in the clause do not pertain to working arrangements. The note in section 65(1) of the Act gives three examples of working arrangements, namely hours of work, pattern of work and location of work. The following elements of Clause X.6 cannot be legitimately regarded as "working arrangements":

- "*job redesign";*
- *"changes to duties";*
- *"a change to their telephone number or email address to avoid harassing contact;*
- "*any other appropriate measure"*

2.4 Do any elements of the claims of the ACTU or individual unions require terms that are not permitted to be included in a modern award under Part 2-3 of the FW Act?

34. Part 2-3 of the FW Act deals with modern awards. Specially, Part 2-3 includes sections 138 and 139(1)

Section 138

35. Section 138 of the FW Act provides that "*a modern award may include terms that it is permitted to include, and must include terms it is required to include,* [but] *only to the extent necessary to achieve the modern awards objective and (to any extent applicable) the minimum wages objective*" (emphasis added).

36. We submit that the draft determination is not 'necessary' for the purposes of section 138 of the FW Act, however we acknowledge that what is necessary in a particular case is a value judgment based on an assessment of the considerations of the modern awards objective in section 134(1) of the FW Act having regard to the submissions and evidence directed to those considerations.[3]

Sections 136 and 139

37. Sections 136 and 139 of the FW Act impose limitations on the terms that can be included in modern awards. The terms referred to in s.139 are:

- Minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and:
    - Skill-based classifications and career structures; and
    - Incentive-based payments, piece rates and bonuses;
- Types of employment, such as full-time employment, casual employment, regular part-time employment an shift work, and the facilitation of flexible working arrangements, particularly employees with family responsibilities;
- Arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;
- Overtime rates;
- Penalty rates, including for the following:
    - Employees working unsocial, irregular or unpredictable hours;

[3] [2014] FWCFB 1788 at [36] and [60].

- Employees working on weekends or public holidays;
- Shift workers;

- Annualised wage arrangements that:
  - Have regard to the patterns of work in an occupation, industry or enterprise;
  - Provide an alternative to the separate payment of wages and other monetary entitlements; and
  - Include appropriate safeguards to ensure that individual employees are not disadvantaged;

- Allowances, including for any of the following:
  - Expenses incurred in the course of employment;
  - Responsibilities or skills that are not taken into account in rates of pay;
  - Disabilities associated with the performance of particular tasks or work in particular conditions or locations;

- Leave, leave loadings and arrangements for taking leave;
- Superannuation; and
- Procedures for consultation, representation and dispute settlement.

38. Section 139 of the FW Act reflects those terms that the modern awards were 'permitted' to include as part of the award modernisation process, that is, those terms in section 576J of the *Workplace Relations Act 1996* (see the Explanatory Memorandum to the *Fair Work Bill 2008* at paragraph 529).

39. Section 576J was inserted by the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*. The Explanatory Memorandum to this Bill (at paragraph 42) identified the list of matters in the former section 576J as allowable modern award matters. The Explanatory Memorandum also said (at paragraph 42) that each allowable award matter would have its ordinary workplace relations meaning. The phrase 'allowable award matter' and the principle that each allowable matter would have its ordinary workplace relations meaning derives from section 89A of the *Workplace Relations Act 1996*.

40. The Full Bench of the Australian Industrial Relations Commission (**AIRC**) in *the Award Simplification Decision*[4] considered section 89A. The Full Bench referred to a decision made by another Full Bench in the *Commonwealth Bank of Australia Officers Award.*[5] The Full Bench in that earlier case held that (emphasis added):

> *"The list of allowable award matters is comprised of concepts of particular kinds of award benefits and conditions of employment. The construction of Section 89A(2) demands that each concept be given a meaning consistent with the use of the concepts in industrial relations practice in Australia. In its context, section 89A is not a provision for which there is a need for either a restrictive or a generous construction. The terms in it are to be given their ordinary meaning in regard to industrial relations usage. Most of the allowable award matters listed are industrial concepts formulated around entitlements and conditions of employment ubiquitously the subject of award provisions in State and Federal industrial jurisdictions. Even within the standard award concepts, the formulation of an award provision covering employment entitlements and conditions has long allowed room for craft and drafting skills. Conceivably, some conditions of employment could be formulated in sufficiently various ways to bring the conditions within one, another, or more than one of the allowable award matters. The categories of allowable award matters are not mutually exclusive. However it is generally the case that established award provisions are of a sufficiently standard content and form to be identifiable as coming within one or occasionally, more of the allowable award categories, or as not coming within the category at all."*

41. The Full Bench in the *Award Simplification Decision* made the following additional points (emphasis added):

[4] Print P7500.

[5] (1997) 74 IR 446.

"…*In the first place, s.89A(2) does not contain a grant of power at all, but a limitation on power. Secondly, even if the principle applied, it cannot be used to broaden the scope of the power itself, but only to provide the means to carry it into effect. Each head of power in s.51 of the Constitution describes a category of laws which are within the competence of the Commonwealth Parliament to enact. By contrast, s.89A specifies particular subjects for award regulation. An example illustrates the distinction. The decision in Burton v. Honan [cited above] was concerned with the scope of the power to make laws with respect to trade and commerce with other countries contained in s.51(i) of the Constitution. Specifically, the Court had to consider whether a provision for forfeiture and seizure of goods was a law with respect to trade and commerce. An inquiry of this kind is not analogous to an inquiry as to the breadth of a specified subject (such as annual leave) for the purpose of the exercise of the Commission's arbitral power. Thirdly, the WR Act itself, in s.89A(6), establishes the limits of the category. That subsection makes it clear that the matters specified in s.89A(2) are not to be expanded, but that an award provision which is incidental to one of the matters is permitted, provided it is also necessary for the effective operation of the award. The State of New South Wales, supported by the LTU and the ACTU, submitted that the implied incidental power is not restricted to that which is "necessary or essential" for the effective operation of the express power. It cited authorities (to which we have already referred) concerning the construction of various grants of power in s.51 of the Constitution in support of that proposition. It went on to submit that, even if s.89A(6) is more restrictive than the implied incidental power, the implied incidental power is still available. We do not accept these submissions. We have already pointed out the difference in character between a constitutional grant of power and the specification of allowable award matters. In addition, it is impossible to construe s.89A(6) by resort to an implied power which is inconsistent with the clear words of that subsection. In enacting s.89A(6), the legislature has given direct guidance on the extent to which the Commission may make provisions extending beyond the subject matters specified in s.89A(2). We see no reason to depart from the language of the statute, as explained in the CBAOA Case [cited above], and limited by s.89A(6).*"

42. The interpretation of the allowable matters in section 89A(2), and the interpretation of section 89A more broadly, has relevance to the interpretation of sections 136 and 139 of the FW Act. This is because the list of allowable award matters in section 89A is similar to the list of matters in section 139 of the FW Act. The above extracts from the *Award Simplification Decision* provides useful guidance with respect to limitations on the powers on the Commission under sections 136 and 139.

43. Family violence is not a matter which falls within the list of matters in section 139(1) of the FW Act.

44. A similarity can be drawn with the deletion of the sexual harassment clause from the *Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1995* in the *Award Simplification Decision.*[6] In this decision, the Full Bench said:

> *"**14.1 Sexual Harassment***
>
> *We have decided to delete clause 14.1.1 as it is not an allowable award matter. HREOC submitted that it should be retained pursuant to s.89A(6). Such a provision might be capable of inclusion in a model anti-discrimination clause but we would be reluctant to alter that clause, other than in the manner indicated above, without a more wide-ranging examination of the implications. For similar reasons we have deleted clause 14.1.2. We point out that remedies are provided in other legislation for sexual harassment where it occurs. Whilst the unlawful dismissal provisions are relevant to the matters contained in both subclauses, sexual harassment is specifically made unlawful by the Sex Discrimination Act 1984 (Commonwealth) and similar legislation in all States and both Territories."*

45. The same reasoning could be applied to the clause proposed by the ACTU. That is, remedies for family violence are provided for in numerous pieces of legislation which extend beyond the workplace, for example the criminal law.

46. Paragraph 139(1)(h) provides that modern awards may include terms about leave. Putting aside merit objections as to the appropriateness and necessity of the proposed obligation for employers to provide additional paid leave to employees, there are a number of clauses of the ACTU's proposed variation which run contrary to sections 136 and 139 of the FW Act. These clauses are:

- Clause X.2, which deals with confidentiality;
- Clause X.3, which deals with contact officers and referrals; and
- Clause X.4, which deals with workplace safety.

47. The above matters are incapable of being award matters under section 139 of the FW Act, as these matters are outside of the scope of section 139(1) of the FW Act.

[6] Print P7500

48. Clause X.2 purports to impose a further obligation on an employer to "*take all reasonable measures to ensure personal information concerning an employee's experience of family and domestic violence is kept confidential*". The subject matter of clause X.2, confidentiality of family violence information is not listed in section 139(1) of the FW Act and cannot be characterised as an allowable award matter.

49. Clause X.3, which deals with contact officers and referrals, is not an allowable award matter under section 139(1) of the FW Act. The subject matter of contact officers and referrals has some similarity to clauses dealing with first aid officers and casualty officers that appeared, for example, in the *Power and Energy Industry Electrical, Electronic and Engineering Employees Act 1998* (C No. 90275 of 1998). While allowances for first aid officers were retained in many awards, award provisions dealing with the equipment for first aid officers and the number of first aid officers were removed from numerous awards. For example, the Full Bench of the AIRC in Print R2700 [1999] AIRC 1549 determined that award terms dealing with the number of first aid officers and casualty officers were not allowable pursuant to section 89A of the *Workplace Relations Act 1996*.[7]

50. Similarity with clause X.3 can also be drawn from provisions like clauses 37(b)(i), 37(b)(ii) and 37(b)(iv) of the pre-reform *Toyota Australia Vehicle Industry Award 1998* (C No.90274 of 1998), which dealt with union officers, particularly:

- The appointment of a shop steward at the workplace and recognition of the shop steward as an accredited representative of the union;
- The shop steward being allowed time off during work hours to interview the employer or the employer's representatives on matters affecting employees whom the shop steward represents;
- The number of shop stewards at the workplace; and

[7] See Print R2700 [1999] AIRC 1549 at [127].

- Shop steward education, including the payment for attending trade union training.

51. The Full Bench of the AIRC in Print R2700 [1999] AIRC 1549 determined that clauses 37(b)(i), 37(b)(ii) and 37(b)(iv) of the pre-reform *Toyota Australia Vehicle Industry Award 1998* (C No.90274 of 1998) were not allowable because the provisions dealt with the role and responsibilities of shop stewards and any connection to the dispute settling procedures within the award was too remote.[8] The Full Bench made reference to the decision of Senior Deputy President Marsh in P9311 in relation to the simplification of the *Metal Industry Award 1984 - Part I* whereby Her Honour said:

> "*In my view a role for shop stewards is not an adjunct to the dispute settling procedure, although a clause arguably could be constructed which recognises the representation role of shop stewards within the hierarchy of representation provided for in the clause (see hospitality decision p.67 which indicates that representation is an allowable matter under dispute settling procedures (s.89A(2)(p)).*"[9]

52. Both clause X.3 in the Unions' draft determination and the clauses contemplated by the AIRC in R2700 [1999] AIRC 1549 (as referred to above) deal with matters concerning the appointment of 'officers' at the workplace and hence are not permitted.

53. Clause X.4 deals with safety. Matters of work health and safety are not permitted to be included in awards under sections 136 and 139(1) of the FW Act.

54. The allowability of work health and safety terms in awards was considered in the *Award Simplification Decision* whereby the Full Bench of the AIRC held that matters of this nature were not allowable under section 89A of the *Workplace Relations Act 1996*.[10]

[8] Print R2700 [1999] AIRC 1549 at [166] and [167]. Also see [155]-[158] and [173] of the decision.

[9] (1998) Print P9311 at page 20. Also see Print R2700 [1999] AIRC 1549 at [157].

[10] See Print P7500 at paragraph 42 and attachment F.

55. This was accepted by the Full Bench in T4176, [2000] AIRC 671 dealing with the simplification of the *Pastoral Industry Award 1986* whereby at paragraph [7] the Full Bench said:

> "*... The Minister contends that the clause deals solely with matters of occupational health and safety and constitutes a procedure for determining whether an occupational health and safety issue exists. Such a provision is not an allowable matter*".

56. Furthermore, Senior Deputy President Marsh held that clauses dealing with the protection of employees involved in asbestos control / eradication in parts 8.3 and 8.5 of the *Metal Industry Award 1984 – Part 1* were not allowable. The Senior Deputy President said:

> "*The Commonwealth also sought the deletion of parts 8.3 Asbestos Control and 8.5 Protection of Employees, on the basis that the matters are occupational health and safety and not allowable. I accept MTIA's submissions that "asbestos is a very emotive issue for many parties involved in the industry" but cannot, given the statue accept that the other provisions of this clause are entwined in such a manner as to make these provisions "provisions which would not normally be allowable, allowable as part of this clause" (Tpt p62). The provisions does no more than state the law. It cannot be characterised as falling under s.89A(6) or meeting the requirements of Item 49(7).*"[11]

57. Senior Deputy President Marsh's comments (above) were endorsed by Senior Deputy Duncan in his consideration of the simplification of the *Aged and Disabled Persons' Hostels (ALHMWU) Interim Award 1996,* the *Nursing Assistant (ALHMWU) Interim Award 1996*, and *Private Hospitals and Nursing Homes (ALHMWU) Interim Award 1996*. Citing Senior Deputy President Marsh, Senior Deputy Duncan said with respect to a subclause proposed by the LHMU requiring that an employer's direction to employees must be consistent with the employer's responsibility to provide a safe and healthy working environment in accordance with the provisions of occupational health and safety law:

> "*This applies to subparagraph (b) as sought by the LHMU and for the same reasons advanced by Marsh SDP it will not be accepted in the simplified award*".[12]

[11] (1998) Print P9311.

[12] PR910160 at [183] and [184].

Sections 26, 27 and 29

58. Furthermore, Clause X.4, when considered on its own, if included in modern awards, would have no effect because it is inconsistent with State and Territory work health and safety laws.

59. Section 29 of the FW Act provides:

> *"29 Interaction of modern awards and enterprise agreements with State and Territory laws*
>
> *(1) Modern award or enterprise agreement prevails over a law of a State or Territory, to the extent of any inconsistency.*
>
> *(2) Despite subsection (1), a term of a modern award or enterprise agreement applies subject to the following:*
>
> *(a) any law covered by subsection 27(1A);*
>
> *(b) any law of a State or Territory so far as it is covered by paragraph 27(1)(b), (c) or (d).*
>
> *(3) Despite subsection (2), a term of a modern award or enterprise agreement does not apply subject to a law of a State or Territory that is prescribed by the regulations as a law to which modern awards and enterprise agreements are not subject."*

60. The operation of section 29 of the FW Act must be considered in the context of sections 26 and 27 of the Act.

61. These sections, and the interaction between them was considered by a Full Bench of the Commission in [2012] FWAFB 10080 which concerned an application by the Master Builders' Association (**MBA**) to remove provisions in the *Building and Construction General On-site Award 2010* that purported to regulate work health and safety on the basis that these terms were not lawful. While the MBA did not succeed with its claim, the Full Bench provided some useful guidance on the interaction rules between modern awards and State and Territory laws:

> *"[51] … It is necessary to examine the interaction between the Act, awards and agreements and laws regulating OHS. Section 26 of the Act provides that it applies to the exclusion of State and Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer. Section 27, however, provides that a number of State and Territory laws are not*

excluded by s.26. In particular s.27(1)(c) provides that State and Territory laws in relation to specified "non-excluded matters" are not excluded. Section 27(2)(c) deals with OHS, including it as a "non-excluded matter".

…

[53] While s.29(1) of the Act provides that, as a general rule, modern awards prevail over State and Territory laws to the extent of any inconsistency, s.29(2) provides an exception in relation to a term of an enterprise agreement which is inconsistent with, relevantly, a law of a State or Territory covered by s.27(1)(c). Section 27(1)(c), as we have already noted, refers to non-excluded matters, one of which is OHS.

[54] The effect of these provisions is that in the event of inconsistency between a term of a modern award dealing with OHS and State and Territory OHS legislation the latter prevails. To the extent that a provision in a modern award purports to reduce an entitlement under the relevant State and Territory legislation, the provision is of no legal effect. As the Government noted, this is consistent with paragraph 149 of the Explanatory Memorandum:

> *"149. However, subclause 29(2) provides that a modern award or enterprise agreement is subject to any of the State or Territory laws that are saved by clause 27, as well as any State or Territory laws prescribed by the regulations. This means that a modern award or enterprise agreement cannot diminish, but may supplement rights and obligations under these laws."*

[55] Provided that a modern award term must or may be included in modern awards under Division 3 of Part 2-3 of the Act, its inclusion is lawful, even if it reduces an entitlement under the relevant State and Territory legislation saved by s.27. Division 2 of Part 1-3 of the Act does not render such a term unlawful, rather it renders the provision to be of no legal effect. Although it is unnecessary, we note for completeness, we are not persuaded that any of the provisions identified by the MBA in the On-site Award or other modern awards reduces an entitlement under the relevant State and Territory legislation saved by s.27.

[56] It is clear that Division 2 of Part 1-3 of the Act does not deal with the lawfulness of the content in modern awards or any other instruments made under the Act. Its purpose is to provide interaction rules to operate in conjunction with ss.109 and 122 of The Constitution, with s.26 providing an express statement of an intention to cover a field and s.27 setting out the exceptions to that exclusivity set out in s.26. Sections 26 to 30 are not directed to nor have the effect of enlarging or confining the matters which may lawfully be contained in a modern award. They are concerned with resolving issues relating to inconsistency of laws under s.109 of The Constitution and have nothing to do with the lawfulness or otherwise of what may be contained in a modern award.

[57] We reject the proposition that Division 2 of Part 1-3 of the Act has the effect that provisions which "directly regulate" health and safety may not lawfully be included in modern awards. Division 2 of Part 1-3 of the Act raises no question of power or lawfulness of such provisions in modern awards."

62. The Full Bench's interpretation was endorsed by a second Full Bench of the Commission in [2013] FWCFB 5411:

[118] Some of the interaction provisions were considered by a Full Bench in Master Builders Australia Ltd re Award Modernisation Review. 60 That decision arose out of the Transitional Review of the Building Award. A large number of applications to vary

the award had been made. One of the applications made by MBA was to remove provisions which regulated OHS on the ground that they were not lawful and accordingly should not be contained in a modern award. The Full Bench described the contention of MBA as being that the Act does not displace OHS laws of the States and Territories and that modern awards do not, and should not, have the function or purpose of directly regulating OHS.61 The Full Bench referred to MBA's argument relying as it had on the provisions of ss.27 and 29 for its proposal that "... the provisions of a modern award would apply subject to any OHS law of a State or Territory because OHS is mentioned in s.27(2)(c) which is a non-excluded matter as expressed in s.27(1)(c). Hence, the general provisions of the Act clearly do not contemplate that the Act's jurisdiction will encompass regulation of OHS but that State and Territory laws will prevail."62 Similarly, a challenge was made to FWA's power to include consultation, representation and dispute settlement clauses in so far as they related to OHS matters. It was submitted that they cannot be included in modern awards.63 The Full Bench considered the provisions of ss.27 and 29 of the Act and said:

> *"[55] Provided that a modern award term must or may be included in modern awards under Division 3 of Part 2-3 of the Act, its inclusion is lawful, even if it reduces an entitlement under the relevant State and Territory legislation saved by s.27. Division 2 of Part 1-3 of the Act does not render such a term unlawful, rather it renders the provision to be of no legal effect. Although it is unnecessary, we note for completeness, we are not persuaded that any of the provisions identified by the MBA in the On-site Award or other modern awards reduces an entitlement under the relevant State and Territory legislation saved by s.27.*
>
> *[56] It is clear that Division 2 of Part 1-3 of the Act does not deal with the lawfulness of the content in modern awards or any other instruments made under the Act. Its purpose is to provide interaction rules to operate in conjunction with ss.109 and 122 of The Constitution, with s.26 providing an express statement of an intention to cover a field and s.27 setting out the exceptions to that exclusivity set out in s.26. Sections 26 to 30 are not directed to nor have the effect of enlarging or confining the matters which may lawfully be contained in a modern award. They are concerned with resolving issues relating to inconsistency of laws under s.109 of The Constitution and have nothing to do with the lawfulness or otherwise of what may be contained in a modern award."*

[119] We agree with those comments. Our interpretation of the various sections of the Act and the Regulations is consistent with them. We observe however that despite our finding that the interaction rules do not operate to preclude jurisdiction or power to entertain the subject matters of the variations sought by the unions, we acknowledge the force of the employers' submissions that these provisions require attention be given to significant discretionary considerations. We also accept that a cautious approach should be taken before including new terms concerning apprentices in a modern award which may have the effect of overriding State and Territory legislation."

63. Clause X.4, as proposed by the ACTU, provides (emphasis added):

"*If it is determined that the disclosing employee, other employees or visitors of the employer may be at risk of physical harm, the employer must take reasonable measures <u>to ensure their safety</u>*."

64. Clause X.4 is directly inconsistent with State and Territory work health and safety laws insofar that it does not qualify the employer's obligation to *ensure* employee safety '*so far as reasonably practicable'.* [13] Clause X.4 would therefore be unenforceable and of no effect.

65. The absence of the words '*so far as reasonable practicable'* in clause X.4 has the effect of altering the obligation of the employer to ensure the safety of its employees. The words '*so far as reasonably practicable'* qualify an employer's obligation with respect to work health and safety.

66. In addition, the draft determination proposes that employers be obliged to *take reasonable measures* with respect to ensuring the safety of employees under the proposed clause. The concept of '*reasonable measures*' does not appear in State and Territory work health and safety laws and potentially conflicts with the notion of '*reasonably practicable*'.

67. If, contrary, to the arguments above, the Full Bench finds that the Clauses X.2, X.3 and X.4 are permitted to be included in awards pursuant to section 136 and 139 of the FW Act, these clauses must nonetheless satisfy the requirement of section 138 of the FW Act. That is, the Full Bench must be satisfied that the clauses are '*necessary to achieve the modern awards objective'*. We submit that they are not.

Section 142

68. Clauses X.2, X.3 and X.4 also fail to satisfy section 142 of the FW Act. Section 142 permits the inclusion of terms in a modern award which are incidental or machinery to a term of the award. Specifically section 142 provides:

[13] Work Health and Safety Act 2011 (Cth), Work Health and Safety Act 2011 (NSW), Work Health and Safety (National Uniform Legislation) Act 2011 (NT), Work Health and Safety Act 2011 (QLD), Work Health and Safety Act 2012 (SA), Work Health and Safety Act 2012 (TAS), Occupational Health and Safety Act 2004 (VIC). We note that the Occupational Safety and Health Act 1984 (WA) uses the term 'practicable' to qualify the duty of employers, rather than the phrase 'reasonably practicable', however the Work Health and Safety Bill 2014 (WA), which if passed by the Western Australian parliament will repeal the current act, uses the model language of 'reasonably practicable'.

"***Incidental terms***

142(1) A modern award may include terms that are:

(a) Incidental to a term that is permitted or required to be in the modern award; and

(b) Essential for the purpose of making a particular term operate in a practical way.

Machinery terms

142(2) A modern award may include machinery terms, including formal matters (such as a title, date or table of contents)."

69. Clauses X.2, X.3 and X.4 are not incidental or machinery terms and thereby fail to satisfy s.142(2) of the FW Act.

70. Section 142(1), which concerns incidental terms in modern awards, was considered during the Two Year Review of Modern Awards with respect to apprentices, trainees and juniors. In its decision, the Full Bench observed the following (emphasis added):

"*[101] We should, however, say something about s.142(1), which allows terms to be included in an award that are incidental to a term that is permitted or required to be in an award and which is essential to make the particular term operate in a practical way. The terms of this section are to be contrasted with s.89A(6) of the WR Act. That section provided that the AIRC "may include in an award provisions that are incidental to the matters in subsection (2) and necessary for the effective operation of the award". We agree with the submission of the employers that s.142(1) provides only a relatively narrow basis for the inclusion of award terms. It is not in itself an additional power for the inclusion of any terms that cannot be appropriately linked back to a term that is permitted by s.139(1). The use of the word "essential" suggests that the term needs to be "absolutely indispensable or necessary" for the permitted term to operate in a practical way. The wording of the section suggests that it provides a more limited power to include terms than that of its earlier counterpart in s.89A(6).*"[14]

71. As can be seen from the above passage, section 142 imposes a high bar. Both limbs of the statutory test must be satisfied. Further, and of particular relevance to these proceedings, the term must be *"absolutely indispensable or necessary"* for the purpose of making a particular term operate in a practical way.

[14] *Modern Awards Review 2012 – Apprentices, Trainees and Juniors* [2013] FWCFB 5411 at [101].

72. The operation of section 142(1)(b) was considered by the Full Bench in *Consultation Clause in Modern Awards*[15] (the Model Consultation Decision) and this decision is instructive regarding the criteria in section 142 and its application to the ACTU's proposed variation. In this regard, the Full Bench:

- Was reluctant to import an additional procedural requirement in the consultation process in the absence of there being evidence of the '*practical application of the term at the workplace level*'.[16]

- Was prepared to insert a term that was definitional in nature and articulated the hours of work arrangements that were excluded from the operation of the clause.[17]

73. Given the high bar imposed under section 142(1) of the FW Act, we submit that clauses X.2, X.3 and X.4 cannot be taken to be incidental or machinery terms.

3. FAMILY FRIENDLY WORK ARRANGEMENTS

74. The ACTU's proposed 'Return to Work Part Time from Parental Leave' Schedule finds its roots in the NES, in particular:

- Division 5 of Part 2-2 of the FW Act dealing with parental leave and related entitlements; and

- Division 4 of Part 2-2 of the FW Act dealing with requests for flexible work arrangements.

75. Clearly the terms of the proposed Schedule extend far beyond what is indicated by the Unions' proposed title for the Schedule.

[15] [2013] FWCFB 10165.

[16] *Consultation Clause in Modern Awards* [2013] FWCFB 10165 at [86] and [88].

[17] Ibid at [102] – [105]

3.1 The ACTU's proposed Return to Work Part Time from Parental Leave Schedule

76. The ACTU's proposed Schedule, as filed on 2 March 2015, is as follows:

"XX RETURN TO WORK PART TIME FROM PARENTAL LEAVE

X.1 Returning to work part time from parental leave

X.1.1 An employee who is returning to work after taking parental leave and who has responsibility for the care of a child is entitled, subject to this clause, to return to the position they held prior to taking parental leave:

(a) part time; or

(b) on reduced hours.

This is the employee's "Right to Return".

X.1.2 An employer must give effect to the employee's Right to Return, subject to the following:

(a) Where there are substantial countervailing business grounds or where the position no longer exists, the employer must offer to accommodate the employees return to work on reduced hours in an equivalent position commensurate in status and pay to that of the employee's substantive position and for which the employee is qualified and capable of performing.

(b) The employer may decline to make an offer to accommodate the employee's return to work on reduced hours in an equivalent position under paragraph (a) above only on substantial countervailing business grounds.

X.1.3 The employee seeking to exercise the Right to Return shall provide written application to the employer no less than 28 days prior to the employee's due date of return to work from parental leave.

X.1.4 The employer must discuss the employee's application with the employee, and where they choose, their representative, within [14 days] of receiving the application.

X.1.5 The employer must take into account all relevant circumstances in considering the employee's application, including-

(a) the employee's circumstances; and

(b) the nature of the employee's role; and

(c) the nature of the arrangements required to accommodate the circumstances or responsibilities;

(d) the consequences for the employee of not making such accommodation; and

(e) alternative arrangements that might address the employee's circumstances.

X.1.6 A written agreement must be provided by the employer to the employee within 7 days which records an arrangement reached under this clause and which

includes, at a minimum, the following matters:

(a) the location, hours, days and commencing and finishing times to be worked by the employee;

(b) the classification, job description and remuneration of the work to be performed;

(b) the period of changed work arrangements;

(c) that the terms of the agreement may be varied by written consent; and

(d) that all part time working arrangements are subject to the provisions of the Award.

X.1.7 Where the employee's application is refused or where the employer declines to make an offer in accordance with sub clause 1.2, the employer must provide its reasons (including evidence of its consideration of the alternative arrangements that might address the requirements of the employee) to the employee in writing within 7 days of discussing the employee's application under X.1.4.

X.2: Right to revert to position and / or work arrangements held prior to taking parental leave

X.2.1 An employee who has changed their work arrangements in accordance with clause X.1, has the right to revert to the position and / or working arrangements they held prior to taking parental leave, up to 2 years from the date of birth or placement of the child.

X.2.2 An employee who intends to revert to the position and / or working arrangements they held prior to taking parental leave upon the 2 year anniversary of the date of birth or placement of the child, shall provide no less than 28 days' notice to the employer of their intention. The employer must accommodate the employee's transition to the position and / or working arrangements they held prior to taking parental leave within 28 days of receiving the employee's notice.

X.2.3 An employee may revert to the position and / or working arrangements they held prior to taking parental leave at any time before or after 2 years from the date of birth or placement of the child by agreement with the employer.

X.2.4 The terms of the agreement, or any variation to it, must be in writing and retained by the employer. A copy of the agreement and any variation to it shall be provided to the employee by the employer.

X.3: Safe work arrangements during pregnancy

X.3.1 An employee who is pregnant may change their work arrangements (including hours, patterns, types and location of work) for the duration of their pregnancy to ensure their safety and that of their baby.

X.3.2 An employee who changes their work arrangements in accordance with this clause, is entitled to return to the position and/or work arrangements they held prior to changing their work conditions at any time by agreement with their employer.

X.4: Paid leave for the purpose of attending appointments associated with pre-natal, preadoption or permanent care orders

X.4.1 An employee shall be entitled to 2 days paid leave for the purpose of attending appointments associated with pregnancy, adoption or permanent care orders. Any leave accessed under this clause will be deducted from the employee's entitlement based on the actual time taken to attend each appointment.

X.4.2 The employee shall give his or her employer notice of the taking of the leave under this clause, and if required by the employer, evidence that would satisfy a reasonable person that the leave was for the purposes of attending an appointment associated with pre-natal, pre-adoption or permanent care orders.

X.4.3 Once paid leave has been exhausted, an employee can access accrued personal leave for the purpose of attending appointments associated with pregnancy, adoption or permanent care orders.

X.4.4 An employee is entitled to use the NES entitlement to personal / carer's leave for the purpose of providing care or support or to accompany a person taking leave to attend an appointment associated with pre-natal, pre-adoption or permanent care orders."

3.2 Are any elements of the claims of the ACTU or individuals unions inconsistent with Part 2-1 or Part 2-2 of the FW Act?

77. The draft determination would operate to exclude (and override the purpose of) the NES if it is made by the Commission. This would be contrary to s.55(1) of the FW Act.

Clauses X.1.1 – X.1.7 and X.2

78. Clauses X.1.1 – X.1.7 and X.2 of the ACTU's proposed variation would provide an automatic entitlement to an employee returning from a period of parental leave to return to work on a part-time basis. The employer cannot refuse to accommodate the employee's 'right' unless there are substantial countervailing business grounds and an employer must take into account the employee's circumstances if deciding to not refuse the employee's entitlement.

79. While the ACTU labels its proposed clause as 'Return to Work Part Time from Parental Leave' it is clearly premised upon the 'right to request' provisions in the NES.

80. Section 65(1) of the FW Act allows an employee to request flexible working arrangements if the employee, amongst other specified circumstances, is the parent, or has responsibility for the care, of a child who is of school age or younger.

81. Section 65(1B) of the FW Act allows an employee who is a parent or has responsibility for the care of a child and who is returning to work after taking leave in relation to the birth or adoption of the child, to request to work part-time to assist the employee to care for the child.

82. To access the entitlements under sections 65(1) and 65(1B), section 65(2) requires that weekly employees have completed at least 12 months' continuous service with the employer immediately before making the request. The provisions also apply to certain long term casuals.

83. The ACTU's proposed variation differs from section 65 in so far that it:

- Replaces the 'right to request' a return to work on a part-time basis after a period of parental leave (see section 65(1B)) with a 'right' to return to work on a part-time basis subject to an employer refusing on 'substantial countervailing business grounds';
- Does not require that the employee have responsibility for the care of the child for which the employee was on a period of parental leave, but rather any child;
- Significantly reduces the circumstances whereby an employer can refuse a return to work on a part-time basis after a period of parental leave; and
- Extends the entitlement to employees with less than 12 months' continuous service and to all casual employees.

84. The outcome of the draft determination, if made, would be to exclude section 65 of the FW Act. The outcome would be that section 65(1B) of the FW Act would have no work to do and the rights of employers under s.65(1) would be severely affected. This is prohibited by section 55(1) of the FW Act.

Clause X.3

85. Clause X.3, if made, would allow pregnant employees to unilaterally change their work arrangements for the duration of their pregnancy to ensure the safety of the child.

86. This clause appears to be premised on section 81 of the FW Act which allows a pregnant employee to transfer to a 'safe job' if she provides her employer with evidence that would satisfy a reasonable person that she is fit for work, but it is inadvisable for her to continue in her present position during a stated period (the risk period) because of:

- Illness, or risks, arising out of her pregnancy; or
- Hazards connected with the pregnancy.

87. If there is a 'safe job' available, then the employer is required to transfer the employee to that job for the risk period, without other change to the employee's terms and conditions of employment. If no appropriate 'safe job' is available, then the employee is entitled to 'paid no safe job' leave in accordance with section 81A of the FW Act.

88. Clause X.3, if made, would operate to exclude an important element of section 81 of the FW Act, being the obligation of an employer, on the production of satisfactory evidence, to assign a pregnant employee to an appropriate safe job[18] and the utility of section 81 would be brought into question as a pregnant employee could sidestep the NES to unilaterally change her working arrangements.

[18] FW Act, section 55(1).

Clause X.4

89. Clause X.4 purports to extend the NES entitlement to personal/carers leave to enable it to be used for:

- *"the purpose of attending appointments associated with pregnancy, adoption or permanent care orders: and*
- "*the purpose of providing care or support or to accompany a person taking leave to attend an appointment associated with pre-natal, pre-adoption or permanent care orders."*

90. The NES limits the taking of personal/carers leave to the following circumstances:

- If the employee is not fit for work because of a personal illness or personal injury affecting the employee;[19] or
- To provide care or support for a member of the employee's immediately family, or member of the employee's household, who requires support because of a personal illness or injury affecting the family or household member or due to an unexpected emergency affecting the family or household member.[20]

91. Clause X.4 of the draft determination offends 55(1) of the FW Act. If a modern award permits personal/carer's leave to be used for a purpose other than a purpose specified in the NES, this would result in the NES personal/carer's leave provisions being excluded by the modern award. If the personal/carer's leave entitlement is exhausted for purposes other than those set out in the NES, the employee would not have an entitlement to paid leave in circumstances when the employee is ill or injured or needs to provide care to a family or household member, who is ill, injured or is experiencing unexpected emergency.

[19] *Fair Work Act 2009*, s.97(a).

[20] *Fair Work Act 2009*, s.97(b).

92. Section 55(4) of the FW Act allows modern awards to include terms which are ancillary or incidental and terms that are supplementary to the NES, so long as the terms are not detrimental to an employee in any respect when compared to the NES. The draft determination is not consistent with section 55(4) of the FW Act.

93. Clause X.4 would permit an employee to use personal/carer's leave for purposes which are not contemplated by section 97 of the NES. The effect of this would be that an employee who exhausts his or her personal/carer's leave for a purpose other than one specified in the NES, would have no personal/carer's leave to take when the employee is not fit for work because of illness or injury, or the employee provides care to a family or household member who is ill or injured or is experiencing an unexpected emergency. This would be contrary to section 55(4) of the FW Act as it would be detrimental to the employee. The use of the phrase '*in any respect'* in section 55(4) of the FW Act suggests a very broad assessment of any detriment that may arise because of the operation of Clause X.4.

3.3 Do any elements of the claims of the ACTU or individual unions require terms that are not permitted to be included in a modern award under Part 2-3 of the FW Act?

94. For a clause to be permitted under Part 2-3 of the FW Act it must be 'necessary' to achieve the modern awards objective.

95. In this regard, we draw the Commission's attention to the comments made by the Award Modernisation Full Bench in [2008] AIRCFB 1000 whereby it considered submissions by parties to supplement the entitlement to concurrent parental leave in the NES. The Award Modernisation Full Bench rejected these submissions on the basis that an entitlement of the nature contemplated would amount to the creation of a new minimum standard rather than a mere supplementation.

"***Parental leave***

[94] We received some submissions which urged us to supplement the entitlement to concurrent parental leave which is provided for in the NES. We have decided not to do so. This appears to be an area in which it would be necessary to supplement the NES in all awards and the result would therefore be the creation of a new minimum standard rather than mere supplementation."

96. The Award Modernisation Full Bench, in a decision[21] the following year, reinforced the position that it had taken on the issue:

"[48] Turning to another matter, the ACTU submitted that the Commission has so far taken a view of its power to supplement the terms of the NES which is too restrictive. It referred in particular to passages in the 19 December 2008 decision relating to concurrent parental leave, community service leave and public holidays. We adhere to those views. We think that we should give proper weight to the Parliament's decision to regulate minimum standards in relation to the matters covered by the NES. It cannot have been Parliament's intention that the Commission could make general provision for higher standards. We accept, however, that there may be room for argument about what constitutes supplementation in a particular case."

97. The draft determination, including its application to all awards,[22] would result in a new minimum standard rather than mere supplementation of the NES. The ACTU claims for such new standards have been rejected on two occasions by the Award Modernisation Full Bench, and the ACTU is now seeking to pursue the issue on a third occasion. The variation is clearly not necessary to achieve the modern awards objective and is not appropriate.

98. Clause X.2 of the ACTU's proposed variation would provide the right to employees who have returned to work from a period of parental leave on a part-time basis to revert to their original position or work arrangements, up to two years from the birth or placement of the child.

99. The ACTU during the *Family Provisions Case*[23] in 2003-2005 sought award terms relatively similar to the clause sought now. In that case, the ACTU sought that employees returning to work from a period of parental leave have the right to work on a part-time basis until the child reached school age. The

[21] [2009] AIRCFB 345

[22] We note that the ACTU proposed determinations state that a separate determination is being made by the United Firefighters Union for the Firefighting Industry Award 2010. This separate determination has not yet been received by Ai Group.

[23] PR082005.

five member Full Bench of the AIRC held that such a clause would be "*impractical and would impose costs and constraints on employers which could not be justified*.[24] Instead the Full Bench determined that such employees should have a right to request part-time employment, with a right for the employer to refuse the request on reasonable grounds related to the effect on the workplace or the employer's business.[25] The 'right to request' concept was adopted by Parliament and is now reflected in section 65 of the FW Act.

3.4 Are any elements of the claims of the ACTU or individual unions inconsistent with Part 6-2 of the FW Act?

100. An integral feature of the 'right to request' provisions in section 65 of the FW Act is the ability for an employer to refuse a request from an employee for flexible working arrangements on reasonable business grounds.

101. The FW Act does not permit the Commission to deal with a dispute about whether an employer had reasonable business grounds to refuse a request, unless the parties otherwise agree.[26]

102. The intention of the 'right to request' provisions is apparent from the following extract from the NES Discussion Paper released by the Federal Government during the development of the NES:

> '***Can Fair Work Australia impose a flexible working arrangement on an employer?***
>
> *No. The proposed flexible working arrangements NES sets out a process for encouraging discussion between employees and employers. The NES recognises the need for employers to be able to refuse a request where there are 'reasonable business grounds'. Fair Work Australia will not be empowered to impose the requested working arrangements on an employer.*'

103. The above extract, while in response to a question about arbitration, makes it clear that the 'right to request' was included in the NES so as to encourage discussion about flexible work at the workplace level.

[24] PR082005 at [254].

[25] PR082005 at [254] to [255].

[26] See for example sections 146 and 736 of the FW Act.

104. This is also reflected in the Explanatory Memorandum to the *Fair Work Bill 2008* in paragraph 258, which explained that '*the intention of these provisions is to promote discussion between employers and employees about the issue of flexible working arrangements*'.

105. Section 65 was expanded by the *Fair Work Amendment Act 2013* to include a wider group of employees in section 65(1) and additional entitlements in section 65(1B). The Explanatory Memorandum to the *Fair Work Amendment Bill 2013* echoed the original intention of 'right to request provisions':

> *"28. … Consistent with the current operation of the right to request provisions and the intent of these provisions to promote discussion between employers and employees about flexible working arrangements, there is no evidence requirement attaching to the request. It would be expected that documentation relating to the particular circumstances of an employee would be addressed in discussions between employers and employees."*

106. The draft determination circumvents the clear intent of the 'right to request' provisions, by adopting language which falls outside the limitations in sections 146 and 739 of the FW Act.

107. Section 146 of the FW Act provides that a modern award must include a dispute settling term that provides a procedure for the settling of disputes under the modern award and NES. The section includes a note reminding the reader that the FWC (see section 739 of the FW Act), or another person (see section 740 of the FW Act), must not settle a dispute about whether the employer had reasonable business grounds under section 65(5) (i.e. the 'right to request') or section 76(4) (i.e. extending a period of parental leave).

108. Section 739(2) prohibits the Commission (and section 740(2) prohibits another person) from dealing with a dispute to the extent that the dispute is about 'reasonable business grounds'. It is clear from s.595(2) that the concept of 'dealing with' encompasses a wide range of methods.

109. The draft determination replaces the term 'reasonable business grounds' with the higher threshold of 'substantial countervailing business grounds', thereby purportedly enabling the dispute resolution clause within a modern award (and in turn the Commission) to deal with a dispute about 'substantial

countervailing business grounds'. This is a thinly disguised attempt to circumvent the prohibition in s.739(2) of the Act.

110. The potential empowering of the Commission to deal with a dispute that would be similar in nature to a dispute under section 65(5) of the FW Act conflicts with s.739(2) of the Act.

111. Similar issues arise regarding the prohibition in s.44 of the FW Act on the Federal Court and Federal Circuit Court making an order in respect of a contravention or alleged contravention of s.65(5) of the FW Act.

112. The ACTU's attempt to insert the 'substantial countervailing business grounds' threshold in awards is a thinly disguised attempt to circumvent the prohibition in s.44 of the Act. If the claim succeeds, the protection afforded to employers under s.44 would be lost because employers would be exposed to actions under s.45 for breaches of the Unions' proposed clause.