

4 yearly review of modern awards

Family and domestic violence clause and Family friendly work arrangements

AM2015/1 and 2015/2

NATIONAL FARMERS' FEDERATION

SUBMISSION ON PRELIMINARY ISSUES

Date: 20 April 2015

1. The National Farmers' Federation (NFF) is the peak industry body representing Australian farmers and agribusiness across the supply chain, including all of Australia's major agricultural commodity groups.
2. This submission deals with preliminary issues raised in these proceedings, including whether any of the claims made by the ACTU in these proceedings are inconsistent with the National Employment Standards (NES) or incapable of inclusion in modern awards under Part 2-3 of the *Fair Work Act 2009* (FW Act).

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

3. In our submission, the claim for Individual Support (clause X.6 of Attachment A) is inconsistent with the NES to the extent that it prevents an employer from refusing a request for flexible work arrangements on reasonable business grounds.

Requiring employers to approve requests for flexible work arrangements

4. The ACTU claim seeks to facilitate flexible work arrangements for employees experiencing family and domestic violence under section 65 of the FW Act.¹ Relevantly, section 65 is a provision of the NES.
5. Section 65 provides for employees to request flexible working arrangements. Employers can only refuse a request for flexible working arrangements on reasonable business grounds (subsection 65(5)).
6. The ACTU claim seeks to 'supplement' section 65 by providing additional grounds on which flexible working arrangements can be sought. To this extent, the claim is likely to be capable of inclusion in modern awards.
7. However, the ACTU claim also requires that employers 'will approve' any reasonable request from an employee. This is directly inconsistent with subsection 65(5).

¹ ACTU submission, Attachment A, clause X.6, 13 February 2015

8. In our submission, the ACTU claim is impermissible to the extent that it seeks to exclude the right of employers to refuse a request for flexible working arrangements on reasonable business grounds. The claim should be refused to that extent.

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?

9. Certain elements of the claim in relation to family and domestic violence are not capable of inclusion in modern awards under Part 2-3 of the FW Act.
10. The following claims are not amenable to inclusion in modern awards:
- a. in relation to Confidentiality (clause X.2 of Attachment A) – the claim that employers maintain the confidentiality of personal information;
 - b. in relation to Family and Domestic Violence Workplace Contacts and advice referral (clause X.3 of Attachment A), the claims:
 - i. that employers appoint a family and domestic violence contact person; and
 - ii. that employers train a person in family and domestic violence issues and ensure that the person can provide access for employees to an Employee Assistance Program and/or appropriate local specialist resources, support and referral services;
 - c. in relation to Workplace Safety (clause X.4 of Attachment A) - the claim that employers take reasonable measures to ensure the safety of employees and visitors of the employer.
11. This is because:
- a. the claims are not about matters pertaining to the employment relationship; and/or
 - b. there is no statutory basis for their inclusion in modern awards.

Terms that can be included in modern awards

Matters pertaining to the employment relationship

12. Modern awards are instruments that regulate terms and conditions of employment.
13. This is evident from:
- a. the objects of the FW Act, which include “ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the NES, modern awards and national minimum wage orders” (subsection 3(b));
 - b. the guide to the FW Act, which describes Chapter 2 as providing for “terms and conditions of employment” (paragraph 4(1)(a));
 - c. the description that “Chapter 2 provides for terms and conditions of employment of national system employees” and that modern awards “provide

additional minimum terms and conditions for those national system employees to whom it applies” (subsection 5(4)); and

- d. the modern awards objective, which requires the Fair Work Commission to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions” (section 134).

14. As these provisions suggest, modern awards are intended to regulate a limited number of matters pertaining to the employment relationship – that is, the relationship of employers and employees in their capacity as such.²

The statutory framework

15. The FW Act sets out the matters that can be dealt with in modern awards. Under section 136, a modern award can, and can only, include terms that are permitted or required by:
 - a. Subdivision B of Part 2-3 (terms that may be included in modern awards)
 - b. Subdivision C of Part 2-3 (terms that must be included in modern awards)
 - c. Section 55 (interaction between the NES and modern awards or enterprise agreements); or
 - d. Part 2-2 (National Employment Standards).
16. Modern awards must not include any terms that contravene Subdivision D of Part 2-3, or section 55 of the FW Act (section 136).
17. The following table summarises the content that can be included in modern awards, as well as the content that must not be included in modern awards, reflecting the terms of Part 2-3 of the FW Act.

The content of modern awards – Part 2-3 of the FW Act

Must be included	May be included	Must not be included
<ul style="list-style-type: none"> • coverage; • individual flexibility arrangements; • dispute settlement; • ordinary hours of work; • rates of pay for pieceworkers; and • automatic variation of allowances; and • superannuation. 	<ul style="list-style-type: none"> • minimum wages, skill-based classifications and career structures and incentive-based payments; • type of employment and flexible working arrangements; • arrangements for when work is performed; • overtime rates; • penalty rates; • certain annualised wage arrangements; • allowances; 	<ul style="list-style-type: none"> • objectionable terms; • terms about unreasonable deductions; • certain right of entry terms; • discriminatory terms; • State-based difference terms; • terms about long service leave; • certain superannuation terms.

²² *Electrolux Home Products Pty Ltd v AWU* [2004] HCA 40

	<ul style="list-style-type: none"> • leave, leave loadings and arrangements for taking leave; • superannuation; • procedures for consultation, representation and dispute settlement; • outworker terms; • industry-specific redundancy scheme terms; and • incidental and machinery terms. 	
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18. Modern awards may also include any terms permitted by the NES or by section 55 (for example, terms that are ancillary to, or supplement, the NES).
19. Modern award terms must not exclude the NES, or any provision of the NES (subsection 55(1)).

Requiring employers to maintain confidentiality of personal information

20. The ACTU claim seeks to require employers to maintain the confidentiality of certain personal information of employees.³
21. The term ‘personal information’ is not defined. The obligation arises whether or not personal information is disclosed, and regardless of whether a disclosure is made in the workplace. There is no temporal limit on the obligation. On one reading, this would require all employers to have processes in place to cover the possibility of employees experiencing, or having ever experienced, family and domestic violence. This goes beyond the sphere of terms and conditions of employment.
22. The proposed clause is not one that fits easily into any of the categories in the table at paragraph 17 above. For example, there is no provision in the FW Act for modern awards to deal with personal or confidential information.
23. The claim is made under the title of “support for employees experiencing family and domestic violence”. Expressed broadly as one of a suite of support measures, the requirement to maintain confidentiality of information is an entitlement which stands alone from the other measures proposed.
24. While aspects of the claim deal with leave and flexible working arrangements, others deal with separate, and unrelated, entitlements.

³ACTU submission, Attachment A, clause X.2, 13 February 2015

25. The proposal relating to confidential information is not limited in any way. For example, it is not expressed to apply only when an employee requests leave or flexible working arrangements.
26. For these reasons, the claim is not:
 - a. about a matter which can be included in modern awards; or
 - b. incidental to one of those matters; or
 - c. machinery in nature.
27. To the extent that the claim deals with confidentiality, it cannot succeed, and should be dismissed.

Requiring employers to appoint a family and domestic violence contact person

28. The ACTU claim also includes a requirement on employers to train a “workplace contact person” as a first point of contact in family and domestic violence issues and “be able to” make available an Employee Assistance Program and/or appropriate local specialist resources, support and referral services.⁴
29. As with the earlier claim, the provision does not fit easily into any category of matters that can be dealt with in modern awards. For example, there is no capacity for modern awards to deal with particular types of training at the workplace or minimum staffing roles that a business must maintain.
30. It is not clear, in the proposed clause, whether the requirement to make available certain specialist support and referral services rests with the employer or the proposed workplace contact person.
31. Either way, the requirement to facilitate access to support services goes beyond regulation of the employment relationship, because:
 - a. it arises in the context of an employee’s personal circumstances, and not as an incident of the employment relationship; and
 - b. it imposes responsibility for the provision of public services on private employers, where public services are readily available⁵.
32. As with the claim relating to confidentiality, the requirement is not limited so that it applies only where an employee requests leave or flexible working arrangements. Instead, it applies generally, whether or not either of these circumstances arises.
33. In our submission, the claim is not amenable to inclusion in modern awards, either on its own or as an incidental or machinery term. The claim should be dismissed.

⁴ACTU submission, Attachment A, clause X.3, 13 February 2015

⁵ For example, the NSW Department of Family and Community Services has a Domestic Violence Line which provides counselling, information and referrals for persons experiencing domestic violence:
http://www.community.nsw.gov.au/docs_menu/parents_carers_and_families/domestic_and_family_violence/dv_line.html

Requiring employers to take reasonable measures to ensure the safety of employees and visitors of the employer

34. Finally, the ACTU claim seeks to impose a requirement on employers to ensure the safety of employees and visitors.⁶ Once again, the requirement is not limited so that it applies only where an employee seeks to take leave, or requests flexible working arrangements. Instead, it applies generally, whether or not either of these circumstances arises.
35. Workplace health and safety is comprehensively regulated at Commonwealth and State level. Employers have a primary duty of care to ensure, so far as is reasonably practicable, the health and safety of persons at the workplace. This includes both employees and visitors.⁷
36. There is no need for modern awards, which can only apply to employers and their employees, to replicate these rules through additional layers of regulation. Such an approach would place employers at risk of double jeopardy, where one set of events leads to contraventions of both work health and safety laws and the relevant modern award.
37. In our view, this cannot have been what Parliament intended, and that is why 'work health and safety' is not one of the categories of matters that can be dealt with in modern awards (see the table at paragraph 17 above).
38. A requirement to ensure the safety of visitors (presumably at the workplace, although this is not clear from the proposed clause) is not about the relationship between an employer and its employees. It is not a matter that can be dealt with in modern awards.
39. While ensuring the safety of employees at work may be a matter pertaining to the employment relationship, it is not a matter that can be included in modern awards, either on its own, or in the proposed claim, because it is incidental or machinery in nature.
40. The claim, to the extent that it deals with Workplace Safety, should be dismissed.

Signature



Name

Sarah McKinnon

Position

Manager, Workplace Relations & Legal Affairs

Date

20 April 2015

⁶ACTU submission, Attachment A, clause X.4, 13 February 2015

⁷ For example, section 19 of the *Work Health and Safety Act 2011* (Cth).