AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

Outline of Submissions

Legislative Framework AM2015/1 & AM2015/2

20 April 2015

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1. INTRODUCTION

1.1 Background

1.1.1 These submissions are made on behalf of the Australian Chamber of Commerce and Industry (**ACCI**).

1.1.2 The Australian Council of Trade Unions has outlined a series of claims:

(a) Family and Domestic Violence 28 October 2014; and

(b) Family Friendly Work Arrangements 28 October 2014,

(**the Claims**).

1.1.3 On 13 February, the Claims were developed by the ACTU into draft award clauses:

(a) "Attachment A - Draft Clause: Support for employees experiencing family and domestic violence"; and

(b) "Attachment B - Draft Clause: Return to work part time from parental leave.

1.1.4 Paragraph 1 of the Directions issued by the Commission on 23 February 2015 requires consideration of four questions that generally go to the jurisdictional basis for the Claims.

1.1.5 This said, we set out below a preliminary submission on the legislative framework relevant to the Claims[1] and then consider the Claims in light of this legislative framework.

[1] The legislative framework applicable to the 4 Yearly Review has been considered in detail in *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (**Preliminary Issues Decision**).

2. LEGISLATIVE FRAMEWORK

2.1 Part 2-3

2.1.1 In order for terms to be inserted in a modern award to give effect to the Claims, the prerequisites outlined in Part 2-3 *Fair Work Act 2009* (**Act**) must be satisfied.

2.1.2 The purpose of Part 2-3 of the Act can be discerned from an examination of the character of the sections within it; this purpose is to contain and limit the contents of modern awards.

2.1.3 In this sense, the scheme of the Act and in particular Part 2-3 operates in contradistinction from other industrial statutory schemes such as the *Industrial Relations Act 1996 (NSW)* which is based around a much broader grant of power and within it discretion. See for instance section 10 of the *Industrial Relations Act 1996 (NSW).*

2.1.4 This notion should be uncontroversial as it continues a scheme of containment and limitation that operated in the *Workplace Relations Act 1996 (Cth)* albeit in different terms.

2.1.5 Section 136 (1) of the Act prescribes that terms may only be included in a modern award if they are permitted or required by:

(a) Subdivision B or C of Part 2-3 of the Act;

(b) section 55 of the Act (which deals with interaction rules pertaining to the National Employment Standards); or

(c) Part 2-2 of the Act (which deals with the National Employment Standards).

2.1.6 Section 136 (2) of the Act prohibits terms from being included in a modern award if they contravene:

(a) Subdivision D of Part 2-3 of the Act; or

(b) Section 55 of the Act (which deals with interaction rules pertaining to the National Employment Standards).

2.1.7 Although the ACTU has not articulated the power upon which the Commission may rely to include terms in a modern award to give effect to the Claims it appears likely that Subdivision C and Part 2-2 of the Act are not relied upon to ground the Commission's jurisdiction for the Claims.

2.1.8 Accordingly these submissions are limited to a consideration of:

(a) section 139 and section 142;

(b) section 55; and

(c) section 134 and section 138.

3. SECTION 139 OF THE ACT

3.1 Section 139 of the Act is the opening provision in Subdivision B of Part 2-3.

3.2 Section 139 of the Act empowers the Commission with discretion[2] to insert terms into modern awards that are "*about*" any of the following matters:

> *(a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and:*
>
> *(i) skill-based classifications and career structures; and*
>
> *(ii) incentive-based payments, piece rates and bonuses;*
>
> *(b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities;*
>
> *(c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;*
>
> *(d) overtime rates;*

[2] This discretion is conditioned by section 134 and section 138 of the Act.

(e) penalty rates, including for any of the following:

(i) employees working unsocial, irregular or unpredictable hours;

(ii) employees working on weekends or public holidays;

(iii) shift workers;

(f) annualised wage arrangements that:

(i) have regard to the patterns of work in an occupation, industry or enterprise; and

(ii) provide an alternative to the separate payment of wages and other monetary entitlements; and

(iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;

(g) allowances, including for any of the following:

(i) expenses incurred in the course of employment;

(ii) responsibilities or skills that are not taken into account in rates of pay;

(iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;

(h) leave, leave loadings and arrangements for taking leave;

(i) superannuation;

(j) procedures for consultation, representation and dispute settlement."

3.3 The initial question that arises for consideration is when a term is "*about*" any of the subject matters prescribed above.

3.4 The word "*about*" is a preposition which is defined by the Macquarie Dictionary as meaning:

"*1. Of, concerning, in regard to... 2. connected with...*"[3]

[3] Macquarie Concise Dictionary, 3rd edition, page 3

3.5 However, the power to create terms "*about*" a particular matter should be distinguished from the power to create terms "*with respect to*" or "*in relation to*" a particular matter. The phrases "*with respect to*" and "*in relation to*" have been judicially held to constitute some of the broadest phrases which could denote a relationship between one subject matter and another.[4] The same cannot be said for the word "*about*".[5]

3.6 The phrases "*in relation to*", "*related to*", "*in respect of*" and the nature of the relationships denoted by those and similar phrase have been repeatedly considered by the courts. The decisions indicate that the words, although of "*broad import*"[6], are not of unlimited scope. As Dawson J pointed out in *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356.

> *The words "in relation to", read out of context, are wide enough to cover every conceivable connection. But those words should not be read out of context, which in this case is provided by the* Mining Act 1968 *(Q).* ***What is required is a relevant relationship, having regard to the scope of the Act****. Where jurisdiction is dependent upon a relation with some matter or thing, something more than a coincidental or mere connection - something in the nature of a relevant relationship - is necessary: see* Reg. V Ross-James; Ex parte Green [1984] HCA 82; [1984 HCA 82; (1984) 156 CLR 185, at pp 196-197, 210. [emphasis added]

3.7 In *J & G Knowles v Commissioner of Taxation* [2000] FCA 196; (2000) 96 FCR 402 a Full Court of the Federal Court considered whether a particular fringe benefit was provided "*in respect of*" employment. Their Honours pointed out that:

> *22 The words "in respect of" have no fixed meaning. They are capable of having a very wide meaning denoting a relationship or connection between two things or subject matters.* ***However the words must, as with any other statutory expression, be given a meaning that depends on the context in which the words are found...***

[4] See *Bank of NSW v the Commonwealth* 1947 76 CLR 1 per Latham CJ at 187; *Nordland Papier AG v Anti-Dumping Authority* (1999) 93 FCR 454 per Lehane J at 461.

[5] The only judicial analysis that we have been able to identify regarding the meaning of the term "*about*" simply notes that the term is no broader than the term "*with respect to*"- see *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 per Gleeson CJ at [11]

[6] *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 at 374 (Toohey and Gaudron JJ)

> 23 *The AAT was correct in stating that the phrase requires a "nexus, some discernible and rational link, between the benefit and employment". That, however does not take the matter far enough.* ***For what is required is a sufficient link for the purposes of the particular legislation****: see* Scully at [38] to [40]. ***It cannot be said that any causal relationship between the benefit and the employment is a sufficient link...***
>
> 24 *...Whatever question is to be asked, it must be remembered that what must be established is whether there is* ***a sufficient or material, rather than a, causal connection or relationship*** *between the benefit and the employment*. [emphasis added]

3.8 Ultimately, when determining the extent to which a preposition such as "*about*" operates, the context within which it appears will be critical, just as has been held to be the case with phrases such as "*in relation to*".[7]

3.9 In this case, the context within which section 139 operates indicates that the legislature not only deliberately chose the term "*about*" in section 139, but also intended there to be limits on the extent of the term's operation.

3.10 This is borne out by an analysis of the entirety of Subdivision B of Part 2-3 of the Act:

(a) Section 139 creates the general power to include certain terms in awards, provided the terms are "*about*" specified subject matters.

(b) Section 140(1) then entitles the Commission to include terms "*relating to*" the conditions of outworkers.

(c) Section 142 then provides that:

> "*A modern award may include terms that are:*
>
> *(a)* ***incidental*** *to a term that is permitted to be included in a modern award;* ***and***
>
> *(b)* ***essential*** *for the purpose of making a particular term operate in a practical way.*" (emphasis added)

3.11 The notion of a term being incidental should be reasonably well settled.

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[7] *Workers' Compensation Board of Queensland v Technical Products Pty Ltd* (1988) 165 CLR 642 per Deane, Dawson and Toohey JJ at 653

3.12 The meaning of the word "*essential*" imports a high bar; "*...absolutely necessary, indispensible...*"[8]

3.13 The second limb (practical operation) is more than simply "*operate*" as the word "*operate*" is coloured by the word "*practical*" which means *"...2. consisting of, involving, or resulting from practice or action: a practical application of a rule...*"[9]

3.14 The following conclusions can be drawn from the above:

(a) Firstly, it is noteworthy that the Act does not empower the Commission to include terms "*about*" outworkers, despite the use of the word "*about*" in the previous subsection. Instead the Act states that the Commission may include terms "*relating to*" outworkers.

The choice of different phraseology when describing the scope of the Commission's powers in adjacent sections of the Act (namely, sections 139 and 140), tellingly suggests that the breadth of the powers conferred by sections 139 and 140 differs.

Given the well documented breadth of the phrase "*relates to*"[10], we submit that the use of the phrase "*about*" in section 139 is intended to have more limited operation than the phrase "*relates to*" in subsection 140.

(b) Secondly, the requirement that "*incidental terms*" must be both incidental and also <u>essential</u> for the practical operation of other award terms prior to being included in modern awards stands in contradistinction to the operation of sections 139 and 140 of the Act. Sections 139 and 140 impose no requirement to consider the essentiality of a term prior to its inclusion.

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[8] Macquarie Concise Dictionary, 3rd edition, page 377

[9] Macquarie Concise Dictionary, 3rd edition, page 904

[10] See *Bank of NSW v the Commonwealth* 1947 76 CLR 1 per Latham CJ at 187; *Nordland Papier AG v Anti-Dumping Authority* (1999) 93 FCR 454 per Lehane J at 461.

This difference in approaches necessarily leads to the conclusion that the phrase "*about*" in section 139 requires a more than "*incidental*" connection between an award term and the subject matters listed in section 139, prior to a term's inclusion in an award pursuant to the powers granted in section 139.

3.15 This "*about*" requirement is stricter than the "*relating to*" requirement which in turn is different from "*incidental and essential*". Pictured as concentric circles formed by dropping a stone in water; "*about*" is the one with the smallest diameter.

3.16 Having considered the above, it is submitted that section 139 requires the Commission to characterise the nature of the term sought to be included in a modern award and determine whether the essence of the subject matter of the term is one which falls within the scope of section 139.

3.17 Section 142 operates with a different requirement; incidental and essential to the practical operation.

3.18 Accordingly for the Commission to be seized with jurisdiction to exercise its discretion in accordance with section 139 it must ensure that:

(a) the essence of the subject matter of the term is one which falls within the scope of section 139; or

(b) alternatively, what is sought is both incidental to a term described at (a) above <u>and</u> is absolutely necessary or else the award cannot operate in a practical way.

4. SECTION 55

4.1 The National Employment Standards (**the NES**) are a set of minimum standards that apply to all "national system employees". This is made clear by section 61 of the Act:

"The National Employment Standards are minimum standards applying to employment of employees

(1) This part sets minimum standards that apply to the employment of employees which cannot be displaced, even if an enterprise agreement includes terms of the kind referred to in subsection 55(5)."

4.2 Section 55 of the Act provides that a term of a modern award or enterprise agreement must not exclude any provision of the NES. This reinforces the standing of the NES as a basic minimum standard of entitlements that is to apply to all national system employees. Equally, the Explanatory Memorandum to the Act (**Explanatory Memorandum** (describes the NES as "*Legislated Minimum Employment Standards*".

4.3 Although the NES is the minimum standard, subsection 55(4) allows modern awards and enterprise agreements to include terms that are ancillary to, or supplement, the NES. That is, modern awards and enterprise agreements can include terms:

(a) explaining how NES entitlements are to be paid (see Note 1 under subsection 55(4)); or

(b) that increases the value or quantum of NES entitlements (see Note 2 under subsection 55(4)).

4.4 The words "...*in any respect..."* in section 55 (4) need focus. Perhaps contrary to the notation in the section these words should be read to provide an absolute protection to the NES not just as a whole or in concept but in relation to every individual element. The words properly applied support the view that elements of the NES cannot be offset by an increased benefit outweighing a detriment.

4.5 In this way, the Act creates a scheme whereby the NES provides a "baseline" entitlement and parties are permitted to build upon (but not detract from it "in any respect") this entitlement through:

(a) the making of modern awards by the Commission;

(b) the negotiation of enterprise agreements; or

(c) contractual agreements.

4.6 Section 55 proceeds to explain the way in which NES provisions are affected when parties choose to supplement terms of the NES at subsection (6):

> *"(6) To avoid doubt, if a modern award includes terms permitted by subsection (4), or an enterprise agreement includes terms permitted by subsection (4) or (5), then, to the extent that the terms give an employee an entitlement ("the award or agreement entitlement") that is the same as an entitlement ("the NS entitlement") of the employee under the National Employment Standards:*
>
> *(a) those terms operate in parallel with the employee's NES entitlement, but not so as to give the employee a double benefit; and*
>
> *(b) the provisions of the National Employment Standards relating to the NES entitlement apply, as a minimum standard , to the award or agreement entitlement.*
>
> *Note: For example, if the award or agreement entitlement is to 6 weeks of paid annual leave per year,* ***the provisions of the National Employment Standards relating to the accrual and taking of paid annual leave will apply, as a minimum standard, to 4 weeks of that leave****."*
> *[emphasis added]*

4.7 Subsection 55(6) is directed towards achieving two related outcomes:

(a) firstly, it seeks to ensure that, where industrial instruments provide the <u>same</u> entitlement as an NES entitlement, employees are not entitled to 'double dip' and access the industrial instrument entitlement in addition to their NES entitlement; and

(b) secondly, the rules applicable to the NES entitlement apply to the industrial instrument entitlement, given that the entitlements are the same.

4.8 Importantly, however, the legislative note accompanying the subsection explains that where the industrial instrument entitlement exceeds the

entitlements conferred by the NES, the rules applicable to the NES only apply to the extent that the industrial instrument entitlements are the same as the NES entitlements. That is, the NES rules only apply so far as the industrial instrument covers the quantum and scope of NES entitlements. The NES rules are not extended to apply to any more generous entitlements that may be contained in the industrial instrument.

4.9 This interpretation is supported by the Supplementary Explanatory Memorandum to the Act (para 29), which states as follows in relation to subsection 55(6):

> "*As the note to subclause 55(6) makes clear, this means, for example, that if an enterprise agreement provides 6 weeks' annual leave, the accrual rules and rules about taking of leave will operate as a minimum standard in relation to the NES entitlement (4 weeks' annual leave), but not in relation to the additional leave.* ***This provision is designed to ensure the integrity of the NES, while allowing flexibility in relation to "above-NES" entitlements****. In the case of an agreement with 6 weeks' annual leave, it would be possible for the parties to agree that the additional two weeks would be provided in a "lump sum" at the end of the year, rather than accruing progressively under the NES*." (emphasis added)

5. SECTION 134 AND SECTION 138

5.1 It should be uncontroversial that section 134 conditions how the Commission exercises the discretion vested by section 139.

5.2 Section 138 conditions what may or must be included in a modern award. It does not in itself deal with what may be included in a modern award, which is the work Subdivision B performs, nor does it in itself deal with what must (or must not) be included, which is the work of Subdivisions C and D.

5.3 Section 138 is uncontroversial in its limiting nature. It is important to understand the proper character of this limitation.

5.4 Section 138 effectively limits the content of a modern award "only to the extent necessary" to achieve the modern awards objective and the minimum wages objective.

5.5 Section 138 must necessarily be read alongside section 134 and section 284 of the Act.

5.6 Section 134(1) sets out the modern awards objective. The objective requires that modern awards along with the National Employment Standards provide a "fair and relevant minimum safety net" of terms and conditions.

5.7 What is "fair and relevant" is conditioned by the requirement to take into account the matters set out in section 134(1)(a) to (h) of the Act.

5.8 What is being created is a "minimum safety net".

5.9 The notion of a "safety[11] net[12]" is effectively the creation of a floor ensuring employees are caught preventing them from being exposed to hurt, injury or danger.

5.10 The addition of the term "minimum" reinforces the level that this floor is calibrated to - "...the least quantity or amount possible[13]...".

5.11 Similar nomenclature appears in the minimum wages objective (section 284 of the Act).

5.12 This consideration illuminates what the phrase "only to the extent necessary" relates to. That is the Commission only includes terms in a modern award to the extent necessary to create a minimum floor. Once this minimum floor is created section 138 restrains the Commission from going any further irrespective of what historically would be called the general industrial merits of the case.

5.13 In addition the Commission cannot vary a modern award if to do so would take the award below this floor.

5.14 This construction of section 138 (and related sections) is consistent with the Objects of the Act and also the overall scheme of the Act which sets a

[11] Macquarie Concise Dictionary, 3rd edition, page 1025
[12] Macquarie Concise Dictionary, 3rd edition, page p 769
[13] Macquarie Concise Dictionary, 3rd edition, page p 727

minimum safety net which is overlaid by a comprehensive enterprise bargaining regime.

5.15 Obviously what blend of terms and conditions in a particular modern award create this floor could vary greatly; there may be many different formulations in a modern award that could do this depending on the blend and balance of terms and conditions in the context of the industry or occupation of the modern award covers.

5.16 What section 138 does not create is a "necessity test" that operates as a preliminary hurdle. A proper consideration of what section 138 requires necessarily would need to be undertaken at a time when the totality of the terms of a modern award and all possible variations to that award can be weighed and balanced against section 138 (as each modern award is reviewed in its own right - section 156(5) of the Act).

6. ATTACHEMENT A - SUPPORT FOR EMPLOYEES EXPEREINCING FAMILY AND DOMESTIC VIOLENCE

6.1 Attachment A seeks to create an entitlement to a form of leave for an employee experiencing family and domestic violence:

6.2 Clause X.5.1 seeks to establish an entitlement to 10 days paid leave per year.

6.3 Clause X.5.2 seeks to establish an entitlement to up to 2 days unpaid leave on each occasion.

6.4 Clause X.5.3 seeks to establish an entitlement to further unpaid leave by agreement with an employer.

6.5 It should be uncontroversial that these clause are grounded in section 139 (1) (h); "leave...arrangement for taking leave".

6.6 The inclusion of the definition in clause X.1 that sets out what is meant by "family and domestic violence" is reasonably grounded in section 142 if not 139 (1) (h) itself.

6.7 Clause X.5.4 can be properly characterised as a provision about arrangements for taking leave and as such is reasonably grounded in section 139 (1) (h); "leave...arrangement for taking leave".

6.8 The same can be said for clauses X.5.6 and X.5.7.

6.9 The jurisdictional basis for the remaining provisions in Attachment A is in our submission questionable.

6.10 Clause X.2 cannot on any proper basis be said to be grounded in section 139 (1) as it deals with the confidentiality of personal information. It also could not be said to meet the requirements of section 142 either as it is not incidental to the grant of leave or taking of the leave and certainly not essential for the leave term to operate practically in the workplace.

6.11 Clause X.3 cannot on any proper basis be said to be grounded in section 139 (1) as it deals with an obligation to appoint contact persons and to train them. It also could not be said to meet the requirements of section 142 either as it is not incidental to the grant of leave or taking of the leave and certainly not essential for the leave term to operate practically in the workplace.

6.12 Clause X.4 cannot on any proper basis be said to be grounded in section 139 (1) as it seeks to establish an obligation on the employer of an occupational, health and safety nature "...to ensure their safety". It also could not be said to meet the requirements of section 142 either as it is not incidental to the grant of leave or taking of the leave and certainly not essential for the leave term to operate practically in the workplace. We note also that the field covered by the Act at its commencement did not include OHS; refer Part 1-3.

6.13 Clause X.5.5 is effectively a notation drafted as a clause as it does not create any legal rights or obligations itself. It cannot on any proper basis be said to

be grounded in section 139 (1) given its character. It also could not be said to meet the requirements of section 142 either as it is not incidental to the grant of leave or taking of the leave and certainly not essential for the leave term to operate practically in the workplace.

6.14 Clause X.5.8 offends section 55 (1) of the Act. It cannot be said to supplement the NES but rather on its face seeks to extend the use of NES leave entitlements beyond the purposes set out in the NES itself. Section 55 does not permit this to occur and in particular section 55 (4) is clear. Allowing an NES leave entitlement to be used for a purpose not established by the NES for that leave entitlement fails the "in any respects" test as an employee who exercised the proposed clause would no longer be able to access the NES leave entitlement for the purpose it is established should the need arise to the extend they exercised the proposed clause.

6.15 Clause X.6 is said to operate to supplement the NES (section 65). On a proper reading of the proposed clause it could not be said to operate to supplement the NES in the manner contemplated by section 55 (4). Rather it appears to create a distinctly separate and new entitlement that is at large and bearing little resemblance to the entitlement set out in section 65.

6.16 For the reasons set out above we submit that the following clauses fail for want of jurisdiction; X.6, X.5.8, X.5.5, X.4, X.3 and X.2.

7. ATTACHEMENT B - RETRUN TO WORK PART TIME FROM PARENTAL LEAVE

7.1 Attachment B seeks to create a variety of entitlements and without more specific grounds and reasons being provided it is difficult to determine how it is pleaded.

7.2 Clause X.1 seeks to establish a right for persons returning to work after taking parental leave, presumably in accordance with Part 2-2, Division 5.

7.3 Clause X.2 seeks to establish a right to supplement the rights created in clause X.1.

7.4 Clause X.3 seeks to establish a general right associated with "...an employee who is pregnant".

7.5 Clause X.4 seeks to establish a right to paid leave for the "...purposes of attending appointments associated with pregnancy, adoption or permanent care orders".

7.6 Clauses X.1 to X.3 seem to be advanced on the basis that they are grounded in section 55 (4) and supplement the NES; Part 2-2, Division 5. It may be that this characterisation is wrong and if so ACCI will address this matter further in oral argument at the hearing.

7.7 Assuming for present purposes that this characterisation is correct then it raises the question of whether or not these clauses can be said to "supplement" the NES (it appears unavailable to argue that they are ancillary or incidental to the NES).

7.8 Do the clauses 'build upon' the NES? In our submission the answer to this is no.

7.9 Clause X.1 does not build upon and therefore supplement the return to work guarantee in section 84 but rather seeks to establish a distinct and separate new entitlement that is plainly distinguishable and apart from the entitlement in section 84.

7.10 Clause X.2 does not purport to build upon the NES (and therefore supplement it) but rather (if anything) builds upon the entitlement in clause X.1.

7.11 Clause X.3 does not build upon and therefore supplement the transfer to a safe job and/or paid no safe job leave provisions in section 81 and 82 but rather seeks to establish a distinct and separate new entitlement that is plainly distinguishable and apart from the entitlement in section 81 and/or section 82.

7.12 It should be uncontroversial that clause X.4.1 can be grounded in section 139 (1) (h); "leave...arrangement for taking leave".

7.13 Clause X.4.2 can be properly characterised as a provision about arrangements for taking leave and as such is reasonably grounded in section 139 (1) (h); "leave...arrangement for taking leave".

7.14 Clauses X.4.3 and X.4.4 offend section 55 (1) of the Act. They cannot be said to supplement the NES but rather on its face seeks to extend the use of NES leave entitlements beyond the purposes set out in the NES itself. Section 55 does not permit this to occur and in particular section 55 (4) is clear. Allowing an NES leave entitlement to be used for a purpose not established by the NES for that leave entitlement fails the "in any respects" test as an employee who exercised the proposed clause would no longer be able to access the NES leave entitlement for the purpose it is established should the need arise to the extent they exercised the proposed clause.

7.15 For the reasons set out above (and subject to the qualification in paragraph 7.6) we submit that the following clauses fail for want of jurisdiction: X.1, X.2, X.3, X.4.3 and X.4.4.