Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Further Submission

AM2015/1 and AM2015/2
Family and Domestic Violence Clause
& Family Friendly Work Arrangements

11 August 2015

4 YEARLY REVIEW OF MODERN AWARDS

AM2015/1 FAMILY AND DOMESTIC VIOLENCE CLAUSE

AM2015/2 FAMILY FRIENDLY WORK ARRANGEMENTS

1. INTRODUCTION

1. The Australian Council of Trade Unions (ACTU) is pursuing the introduction of two new entitlements across the modern awards system, which have been deemed 'common issues' to be dealt as part of the 4 Yearly Review of Modern Awards. The matters have been set down for hearing before a Full Bench of the Fair Work Commission (Commission) on 13 August 2015, to deal with various 'jurisdictional' objections raised by the Australian Industry Group (Ai Group) and other organisations representing employer interests.

2. On 2 March 2015, the ACTU filed draft determinations that set out the terms of new clauses sought. The effect of the proposed provisions was to:

    - Introduce an entitlement about family and domestic violence. The proposed clause would, amongst other things, afford an employee 10 days of paid leave per year, require an employer to appoint a family and domestic violence workplace contact person, require an employer to take reasonable measures to ensure the employee's safety and mandate that an employer approve any reasonable request from an employee experiencing family and domestic violence to alter their working arrangements.

    - Create a new "right to return" for an employee who is returning to work after taking parental leave and who has responsibility for the care of a child. In addition, the proposed clause would enable an employee to change their work arrangements for the duration of their pregnancy, provide additional leave entitlements for the purposes of attending appointments associated with pregnancy, adoption or permanent care orders and extend the circumstances in which paid personal/carer's

leave under the National Employment Standards (NES) can be accessed.

3. In accordance with the Commission's directions of 23 February 2015, Ai Group[1] and other employer organisations filed written submissions addressing various preliminary jurisdictional issues arising from the ACTU's claims.

4. On 15 June 2015, the ACTU filed its submissions in reply, accompanied by significantly amended claims. They can be found at Attachments A and B to correspondence from the ACTU of the same date. The variations to the ACTU's originating claims appear to have been made in light of the aforementioned submissions filed by Ai Group and other employer interests and as such, address many jurisdictional issues raised.

5. Whilst the Commission's directions do not contemplate the filing of a written response to the ACTU's submissions (nor have further directions been issued pursuant to the ACTU's amended claim), Ai Group respectfully seeks leave from the Commission to rely upon these written submissions, which we intend to speak to during the upcoming proceedings before the Commission. They address two matters:

   - The extent to which Ai Group continues to rely on its earlier submissions, dated 20 April 2015, in light of the ACTU's amended claims; and

   - The submissions in reply filed by the ACTU on 15 June 2015.

6. We note that the amendments made have resulted in alterations to the numbering of the proposed clauses. All references to clause numbers in this submission relate to the ACTU's amended claims. This submission should be read in conjunction with Attachments A and B to the ACTU's correspondence of 15 June 2015.

[1] See submissions dated 20 April 2015.

2. THE ACTU'S AMENDED CLAIMS

7. The amendments made by the ACTU to its claims significantly alter their scope. Many of the elements identified by Ai Group and others as being beyond jurisdiction when considered in light of various provisions of the *Fair Work Act 2009* (Act) have been removed by the ACTU. We are pleased that the ACTU has apparently been convinced of the merits of our submissions on these matters and has narrowed its claims in response.

8. Ai Group's submissions of 20 April 2015 were filed with reference to the ACTU's originating claims. The effect of the amendments however, is to obviate the need to consider many of the jurisdictional matters earlier raised. Indeed it appears that the following paragraphs of our submissions are no longer relevant:

- Paragraphs 21 – 33;
- The second and third bullet points in paragraph 46;
- Paragraphs 49 – 66;
- References to clauses X.3 and X.4 in paragraph 67 – 73;
- Paragraph 76;
- References to clauses X.1.2 – X.1.7 in paragraph 78;
- The second sentence of paragraph 78;
- Paragraph 83;
- Paragraphs 85 – 88;
- The second bullet point in paragraph 89;
- Paragraphs 91 – 93; and
- Paragraphs 100 – 112.

9. Nonetheless, should the ACTU, any other interested party or the Commission form the view that any of the elements deleted by the ACTU should in fact be included in the proposed clauses; Ai Group may seek an opportunity to address the Commission on matters such as those raised in the paragraphs listed above and any other additional relevant jurisdictional concerns.

10. The principal arguments that Ai Group continues to advance regarding the proposed family and domestic violence clause can be summarised as follows:

- That the proposed clause is not 'necessary' to achieve the modern awards objective, as required by s.138; although we acknowledge that what is 'necessary' in a particular case is a value judgement based on an assessment of the considerations listed in s.134(1), having regard to submissions and evidence directed to those matters.[2]

- That clause X.3.3, which deals with confidentiality, is not 'about' a matter listed in s.139(1) and therefore cannot be included in a modern award (s.136(1)(a)). To the extent that such a term is inserted, it would have no effect (s.137).[3]

- That clause X.3.3, which deals with confidentiality, is not an incidental or machinery term, as permitted by s.142 of the Act.[4]

11. We also continue to rely upon the following arguments in respect of the family friendly work arrangements proposal:

- That the proposed clause X.1 would operate to exclude s.65 of the NES. By virtue of ss.55(1) and 56, it would have no effect.[5]

- That the proposed clause is not 'necessary' to achieve the modern awards objective, as required by s.138.[6]

[2] Ai Group's submissions dated 20 April 2015, paragraphs 35 – 36 and 67.
[3] Ai Group's submissions dated 20 April 2015, paragraphs 37 – 48.
[4] Ai Group's submissions dated 20 April 2015, paragraphs 68 – 73.
[5] Ai Group's submissions dated 20 April 2015, paragraphs 77 – 78, 80 – 82 and 84.
[6] Ai Group's submissions dated 20 April 2015, paragraphs 94 – 99.

3. SUBMISSIONS IN RESPONSE TO THE ACTU'S REPLY SUBMISSIONS

12. The ACTU's reply submissions of 15 June 2015 address the jurisdictional submissions made by Ai Group and other employer organisations in the context of its amended claims. We here propose to provide a brief response to those submissions.

The Family and Domestic Violence Clause

13. The ACTU's submissions deal with arguments made regarding the permissibility of the proposed family and domestic violence clause. Specifically, it deals with clause X.3.3, which provides as follows:

> **X.3.3 Confidentiality**
>
> The employer must take all reasonable measures to ensure personal information provided by the employee to the employer concerning an employee's experience of family and domestic violence is kept confidential.

14. With respect to clause X.3.3, the ACTU submits that the clause may be included in a modern award because:

- The proposed family and domestic violence clause is about leave and arrangements for taking leave. It can, therefore, be included pursuant to s.139(1)(h);[7] and
- Clause X.3.3 "is essential given the nature of the leave for the purpose of providing employees experiencing family or domestic violence with the benefit of and ability to practically access such leave."[8]

15. We first deal with the proposition that the clause is one that is 'about' leave or arrangements for taking leave.

16. Clause X.3.3 is about an obligation to keep certain information confidential. That is, as such, the subject matter of the clause. The obligation relates to '*any* personal information' that is provided by the employee to the employer

[7] ACTU's submissions dated 15 June 2015 at paragraph 17.

[8] ACTU's submissions dated 15 June 2015 at paragraph 19(b)(ii).

'concerning *an employee's experience* of family and domestic violence'. Notably, it is not confined to information provided by an employee accessing leave under the proposed provision or information that is provided pursuant to the clause (for example, by way of evidence provided to their employer under the proposed clause X.3). The term, as presently drafted, is not 'about' leave or arrangements for taking leave, as contemplated by s.139(1)(h).

17. Clause X.3.3 corresponds with clause X.2 of the ACTU's originating claim, which formed part of a far more expansive clause than what now remains before the Commission. It included certain elements that may have resulted in an employee communicating and/or an employer obtaining information regarding 'an employee's experience of family and domestic violence'. This could have occurred irrespective of whether the employee also sought to take leave under the clause.

18. As an example, we point to clause X.3 of the originating claim, which required an employer to appoint a family and domestic violence contact person trained in family and domestic violence and able to provide employees with access to the relevant support and resources. When read with that provision, the drafting of clause X.3.3 can be easily explained (although we do not concede that it would have been permitted by s.139(1) in that context either).

19. The ACTU also relies on s.142 of the Act. We refer the Commission to paragraphs 68 – 73 of our earlier submissions in this regard and reiterate the high hurdle that must be overcome in order for the Commission to be satisfied that a term is incidental and essential for the purposes of making a particular term operate in a practical way.

20. In light of the submissions we have here made, we also submit that the proposed term is not *incidental* to a permitted award term (that is, if clause X.2 is permitted under s.139(1)). This is because clause X.3.3 is drafted such that it could operate in circumstances that are not limited to an employee seeking to access leave under the proposed clause.

21. Even if the ACTU could establish that the term is an incidental one, there is no

evidence before the Commission that establishes that it is "absolutely indispensable or necessary for the permitted term to operate in a practical way".[9] This is a factual proposition that has been made in the absence of any evidence that might support it. That is, there is no material before the Commission that could allow it to conclude that the proposed clause would not operate in a practical way in the absence of clause X.3.3. The Commission cannot be satisfied that the clause meets the requirements of s.142(1)(b).

22. Neither s.139(1) nor s.142 provide a basis upon which the proposed clause X.3.3 can be included in a modern award.

The Family Friendly Work Arrangements Clause

23. The ACTU's revised claim seeks to create a broad unilateral right for employees returning from parental leave to work part-time or on reduced hours for up to two years and an entitlement to paid 'antenatal leave' for the purpose of attending a wide range of different appointments – not limited to medical appointments.

24. The ACTU's amended claim is significantly different to its original claim. It is as follows:

> PARENTAL LEAVE
>
> X.1 Return to work part-time or on reduced hours
>
> X.1.1 Subject to this clause, on ending parental leave, an employee who is the primary carer of the child is entitled to return to:
>
> (a) the employee's pre-parental leave position on a part-time basis; or
>
> (b) if the employee's pre-parental leave position is part-time, on reduced hours; or
>
> (c) if the employee's pre-parental leave no longer exists – an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position on a part-time basis or on reduced hours.
>
> X.1.2 An employee who returns to work part-time or on reduced hours may

[9] [2013] FWCFB 5411 at [101].

continue to work part-time or on reduced hours for a period not exceeding two years from the date of birth or placement of the child (the nominated period).

X.1.3 At the end of the nominated period the employee has the right to return to their pre-parental leave position, or at such other time before the end of the nominated period by agreement.

X.2 Antenatal Leave

X.2.1 An employee shall be entitled to 15.2 hours paid antenatal leave per year for the purpose of attending appointments associated with:

(a) antenatal;

(b) fertility treatment;

(c) surrogacy;

(d) pre-adoption; or

(e) permanent care orders.

X.2.2 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 reason as set out in X.2.1.

X.2.3 For the purpose of clause X.2.1(a), an employee includes an employee who is the spouse or de factor partner.

25. The ACTU's amended clause X.1:

- creates a new unilateral right for employees returning from parental leave who are the primary carer of the child to return to the employee's pre-parental leave position part-time, or on reduced hours; or a comparable position where the employee's pre-parental leave position no longer exists; and

- provides a two year period over which an employee may work part-time or on reduced hours.

26. Ai Group remains opposed to the ACTU's amended family friendly work arrangements clause. Apart from various merit grounds that are not the subject of this stage of the proceedings, we are opposed to the clause on jurisdictional grounds.

27. Specifically, the ACTU's revised clause X.1 excludes s.65(5) and in doing so contravenes s.55(1), which provides that a modern award must not exclude the NES, or any provision of it. Pursuant to s.56, a term of a modern award has no effect to the extent that it contravenes s.55. Further, by virtue of s.136(2)(b), such a term must not be included in a modern award.

Does the proposed clause contravene s.55(1)?

28. The starting point must be to assess whether the proposed clause excludes the NES or a provision of it.

29. The meaning to be attributed to the term 'exclude' in s.55(1) was considered by a Full Bench of the Commission in *Re Canavan Building Pty Ltd.*[10] The Commission was there considering whether an enterprise agreement term excluded the entitlement to 'paid annual leave' under s.87(1) and the requirement for payment in respect of annual leave in s.90(1) (emphasis added):

> [36] Section 55(1) of the Act relevantly provides that an enterprise agreement "*must not exclude*" the NES or any provision thereof. It is not necessary that an exclusion for the purpose of s.55(1) must be constituted by a provision in the agreement ousting the operation of an NES provision in express terms. On the ordinary meaning of the language used in s.55(1), we consider that if the provisions of an agreement would in their operation result in an outcome whereby employees do not receive (in full or at all) a benefit provided for by the NES, that constitutes a prohibited exclusion of the NES. That was the approach taken by the Full Bench in *Hull-Moody*. The correctness of that approach is also confirmed by the Explanatory Memorandum for the *Fair Work Bill 2009* as follows:
>
> > "209. This prohibition extends both to statements that purport to exclude the operation of the NES or a part of it, and to provisions that purport to provide lesser entitlements than those provided by the NES. For example, a clause in an enterprise agreement that purported to provide three weeks' annual leave would be contrary to subclause 55(1). Such a clause would be inoperative (clause 56)."

[10] [2014] FWCFB 3202.

30. It is uncontroversial that the proposed clause does not expressly purport to exclude the NES or any provision of it. However, it is our contention that the clause, by its operation, excludes s.65(5) of the Act.

31. We acknowledge that the aforementioned decision refers specifically to circumstances in which a term in an enterprise agreement might result "in an outcome whereby *employees do not receive (in full or at all) a benefit provided by the NES*" and thereby constitutes a "prohibited exclusion" of the NES. In our view, s.55(1) is not confined to entitlements or benefits afforded by the NES to employees. The plain and ordinary meaning of the provision is clear: a modern award or enterprise agreement must not exclude the NES or *any provision* of the NES. This necessarily extends to a provision that gives employers a right or discretion in respect of an employee entitlement.

32. The Full Bench's above interpretation of s.55(1) must be seen in light of the issue that was there before them. That is, the Bench was tasked with considering whether an enterprise agreement excluded either of two identified NES provisions, which were characterised as employee entitlements. We do not read the Commission's decision to have determined that s.55(1) must necessarily be confined in its application to such provisions of the NES.

33. We turn now to consider the various provisions of s.65 of the Act.

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

35. A full-time or part-time employee can make a request under s.65(1) if they 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.[11]

36. Section 65 is framed as a right to *request* flexible working arrangements. This, in and of itself, implies that an employer has some discretion in determining whether a change to the employee's working arrangements will be implemented. Section 65(5) expressly contemplates that ability, whilst also placing a limitation on the exercise of that discretion. It provides that an employer may refuse a request made under s.65(1), but only on reasonable business grounds, including that:

- the new working arrangements requested by the employee would be too costly for the employer;
- there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;
- it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;
- the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;
- the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.[12]

37. The ability for an employer to refuse an employee's request to change their working arrangements has no application whatsoever in the ACTU's amended claim, whereby employees are entitled to return from parental leave on a part-time basis or on reduced hours. By its operation, the absolute right granted by the clause, excludes s.65(5) of the Act.

38. The outcome of the proposed variation, if made, would be to exclude s.65(5)

[11] See s.65(2).

[12] See s.65(5A).

of the Act. That is, there may be circumstances in which an employee to whom the proposed clause would apply, would also be eligible to make a request under s.65(1). If the employee made a request under s.65(1) to return to work on a part-time basis or otherwise, the employer would be afforded a discretion in determining whether or not a change to the employee's working arrangements will be implemented. Thus, s.65 does not compel an employer to accede to a request. The proposed clause however, by its operation, would mandate that the employee return to work part-time or on reduced hours.

39. That s.65(5) would continue to "have work to do" even if the proposed clause were inserted in circumstances where a request was made pursuant to s.65(1) by an employee eligible under s.65(1A)[13] is beside the point. All that is required for an award term to fall foul of s.55(1) is that it excludes the NES or any provision of it, in any identifiable circumstance. The proper test is not whether a provision of the NES will become otiose, or whether it will continue to have some practical operation despite the application of an award provision.

40. It is our submission that by its operation, the proposed clause would exclude s.65(5). This is prohibited by s.55(1) of the Act.

Can the proposed clause be inserted by virtue of s.55(4)?

41. Section 55(7) states that to the extent that a term of a modern award or enterprise agreement is permitted by subsection (4) or (5), the term does not contravene s.55(1).

42. Of relevance to the matter now before the Commission is s.55(4), which permits the inclusion of certain kinds of terms.

43. Section 55(4) states: (emphasis added)

> Ancillary and supplementary terms may be included
>
> 55(4) A modern award or enterprise agreement may also include the following kinds of terms:

[13] ACTU's submissions dated 15 June 2015 at paragraph 12(d)(iii).

> (a) Terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;
>
> (b) Terms that supplement the National Employment Standards
>
> but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

44. The ACTU asserts that its amended parental leave clause "builds upon" existing entitlements and is an extension of the return to work guarantee in s.84 and the right to request an extension of unpaid parental leave in s.76. Specifically, the ACTU claims that the right to return part-time for up to two years builds upon the NES' return to work guarantee in s.84.

45. This submission should be rejected. Section 55(4) provides very limited circumstances in which a term relating to the NES may be included.

Is the proposed term ancillary or incidental to the operation of an entitlement of an employee under the NES?

46. Section 55(4)(a) permits the inclusion of a modern award term that is ancillary or incidental to the operation of an entitlement of an employee under the NES.

47. Before proceeding to deal with the application of this provision, we note that the proposed clause purports to provide an entitlement to an employee 'on ending parental leave'. That is, it applies to an employee returning to work after a period of parental leave. The drafting of the clause leaves ambiguous whether this is confined to those employees who are entitled to unpaid parental leave under the NES or whether it would also apply where an employee has been on a period of parental leave pursuant to a more generous entitlement afforded to them by their employer in circumstances where they would not otherwise be eligible for unpaid parental leave under the NES as they do not satisfy the requirements found at s.67 of the Act.

48. For the purposes of these submissions, we assume that the clause is intended to apply only to those employees who are entitled to parental leave under the NES. We make this assumption given that the ACTU asserts that its

proposed clause is intended to "build upon" entitlements found in Part 2-2, Division 5 of the NES, which deals with parental leave and related entitlements.

49. The Macquarie Dictionary defines "ancillary" as:

> 1. accessory; auxiliary.
>
> 2. an accessory, subsidiary or helping thing or person.

50. It further defines "incidental" as: (emphasis added)

> 1. happening or likely to happen in fortuitous or subordinate conjunction with something else.
>
> 2. incurred casually and in addition to the regular or main amount.
>
> 3. minor expenses.
>
> 4. <u>incidental to, liable to happen in connection with; naturally appertaining to.</u>

51. The ACTU simplistically argues that it's proposed clause "builds on" or "expands existing entitlements while creating new entitlements".[14] This does not, however, necessarily deem the term 'ancillary' or 'incidental' in the sense contemplated by s.55(4)(a). A new entitlement to return to work part-time or on reduced hours is a separate entitlement that is not ancillary or incidental to the operation of an entitlement of an employee under the NES.

52. The ACTU relies on s.84 of the Act in this regard. It affords a guarantee to an employee returning from unpaid parental leave to their pre-parental leave position, or another available comparable position if the pre-parental leave position no long exists. The guarantee does not separately deal with particular employment conditions on the employee's return, other than to qualify the nature of the position if the pre-parental leave position does not exist. That is, it does not deal with the employee's working arrangements, hours of work or

[14] ACTU's Submission dated 15 June 2015 at paragraph 15(a).

type of employment (i.e. part-time or otherwise). It simply assures that an employee returning from unpaid parental leave is entitled to a particular position. It goes no further.

53. An award provision attempting to create new employment conditions on the employee's return is too far removed to be an "accessory" term or a term "liable to happen in connection with" the operation of the return to work guarantee. Instead, the clause would provide an entirely separate right that operates independently of s.84.

54. Similarly, the amended clause cannot be said to be ancillary or incidental to s.76, which provides that an employee may request an extension of unpaid parental leave by up to 12 months. It has no connection with the employment conditions on which the employee returns to work.

55. An award provision attempting to create significant new employment conditions pertaining to the employee's right to return is too far removed to be ancillary or incidental to the operation of s.76.

56. Accordingly, the proposed clause X.1 is incapable of being an award term that is ancillary or incidental to the operation of an entitlement of an employee under the NES.

Does the proposed term supplement the NES?

57. Section 55(4)(b) allows the inclusion of an award term that supplements the NES.

58. The Macquarie Dictionary relevantly defines "supplement" as *"something added to complete a thing, supply a deficiency, or reinforce or extend a whole."*[15]

59. Our contentions in this regard are not dissimilar to the arguments we have earlier put in respect of s.55(4)(a). The introduction of a significant substantive right to return to work part-time or on reduced hours, is hardly supplementary

[15] The Macquarie Dictionary, 3rd Edition, 1998

to the NES.

60. The proposed clause is not "*something added to complete*" the return to work guarantee found in s.84. That provision is a statutory guarantee for an employee returning from parental leave to their pre-parental leave position. The return to work guarantee is a provision of the NES that stands in its own right in preserving the pre-parental leave position of employees on parental leave.

61. The amended claim is not seeking to apply the return to work guarantee in a different way (for example, by extending it to a new class of employee). Nor is the claim remedying any identified deficiency. Similarly, it does not reinforce or extend s.84 as a whole. As we have previously explained, it simply creates a standalone right that does not add to an entitlement already found in the NES. The clause cannot properly be characterised as one that 'supplements' the return to work guarantee in s.84.

62. We need not detail our arguments against the proposition that the proposed term supplements s.76 of the Act. This submission is baseless. The clause quite clearly deals with a matter that is entirely separate to the ability for an employee to request that a period of unpaid parental leave be extended. It is in no way connected to an employee's conditions of employment upon returning to work after a period of leave.

63. We submit that the Commission should find that the amended clause X.1 is neither ancillary, incidental or supplementary in the sense contemplated by s.55(4).

Is the effect of the proposed term detrimental to an employee in any respect when compared to the NES?

64. If the Commission finds, despite our submissions, that the proposed term is ancillary, incidental or supplementary pursuant to s.55(4), then Ai Group submits that the amended clause X.1 may be detrimental to an employee in some respects when compared to the NES, and thus is not a term permitted by s.55(4).

65. Specifically, employees who rely on the amended clause for a unilateral right to work part-time or reduced hours for up to a two year period, could be deprived of the right to make a request for s.65(1) for flexible work arrangements.

66. Section 65(1) confers the right to request only when there are circumstances applying to the employee as defined in s.65(1A) and where the employee would like to *change* his or her working arrangements because of those circumstances.

67. For reference s.65(1) states:

> Employee may request change in working arrangements
>
> (1) If:
>
> (a) Any of the circumstances referred to in subsection (1A) apply to an employee; and
>
> (b) the employee would like to change his or her working arrangements because of those circumstances;
>
> then the employee may request the employer for a change in working arrangements relating to those circumstances.

68. Section 65(1A)(a) recognises one of the circumstances referred to in s.65(1)(a) as 'the employee is the parent, or has responsibility for the care, of a child who is of school age or younger'.

69. The Explanatory Memorandum to the *Fair Work Amendment Bill 2013* in relation to the amended s.65 states:

> 27. New subsection 65(1) provides that if an employee would like to change his or her working arrangements because of any of the circumstances specified in new subsection 65(1A),then the employee is entitled to request a change in his or her working arrangements. The terms of new subsection 65(1) make clear that the reason the employee would like to change their working arrangement is because of the particular circumstances of the employee. That is, there must be a nexus between the request and the employee's particular circumstances.
>
> 28. These provisions are not intended to limit the timing or nature of discussions about flexible working arrangements generally. For example, where an employee can foresee that he or she may need to assume caring responsibilities in the short to medium term, it is anticipated that the employee could commence discussions ahead of assuming those responsibilities to `flag'

> that a request in accordance with these provisions may be coming, and to give the parties an opportunity to explore suitable alternative arrangements that accommodate the needs of both parties. 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.

70. An employee who has worked for two years in their pre-parental leave position on a part-time basis or reduced hours, and would like to work in accordance with those same arrangements, would not be seeking a *"change to his or her working arrangements".*

71. Neither the words of s.65 or the Explanatory Memorandum contemplate the right to request flexible working arrangements as an extension of previously exercised rights to flexible work.

72. The effect is therefore that an employee who wishes to continue to work under the same arrangements that have been implemented under the proposed clause X.1.1 beyond the two year period contemplated by it would not have the right to make this request under s.65(1).

73. This would clearly be detrimental to many working parents who could otherwise have access to a greater duration of flexible work than the ACTU's proposed clause provides.

74. Accordingly, the clause is not one permitted by s.55(4).

Does the Commission have power to insert the proposed clause X.1?

75. The proposed clause X.1.1 contravenes s.55(1) to the extent that it excludes s.65(5), which is a provision of the NES. For the reasons we have earlier provided, the clause cannot be inserted on the basis of s.55(4) as the term is not ancillary, incidental or supplementary in the sense contemplated by that provision of the Act. In any event, it cannot be said that the clause is not detrimental to an employee in any respect when compared to the NES.

76. Section 136 stipulates terms that may, must and must not be included in a

modern award. Relevantly, s.136(2)(b) precludes the inclusion of an award term that contravenes s.55. Thus, the Commission does not have power to insert the proposed clause X.1.1. If it were inserted, by virtue of s.56, it would have no effect.