Australian Industry Group

# 4 YEARLY REVIEW OF MODERN AWARDS

## Further Reply Submission

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

**21 August 2015**

**4 YEARLY REVIEW OF MODERN AWARDS**

**AM2015/1 FAMILY AND DOMESTIC VIOLENCE CLAUSE**

**AM2015/2 FAMILY FRIENDLY WORK ARRANGEMENTS**

## 1. INTRODUCTION

1. On 13 August 2015, a Full Bench of the Fair Work Commission (Commission) conducted proceedings in respect of a claim made by the Australian Council of Trade Unions (ACTU) to introduce two new entitlements across all modern awards:

    - A clause that would provide an employee experiencing family and domestic violence with 10 days per year of paid leave; and

    - An absolute right to return to work upon ending a period of parental leave to an employee's pre-parental leave position on a part-time basis or on reduced hours, or to a comparable position where the employee's pre-parental leave position is no longer available.

2. The written and oral submissions made by the ACTU, the Australian Industry Group (Ai Group) and other employer organisations related to various 'jurisdictional' objections raised with respect to the ACTU's originating and amended claims.

3. During the aforementioned proceedings, Ai Group referred the Full Bench to a recent decision issued by the Commission regarding alleged inconsistencies between the National Employment Standards (NES) and various award provisions.[1] We hereafter refer to that decision as the 'NES Inconsistencies Decision'.

[1] [2015] FWCFB 3023.

4. The ACTU sought, and was granted, an opportunity to file submissions regarding the NES Inconsistencies Decision.[2] Such submissions were uploaded to the Commission's website on 19 August 2015. In accordance with the Full Bench's directions, Ai Group files these submissions in response.[3] They should be read in conjunction with our earlier submissions of 20 April 2015 and 11 August 2015.

## 2. THE NES INCONSISTENCIES DECISION

5. For ease for reference, we propose to briefly set out the relevant passage of the NES Inconsistencies Decision upon which Ai Group relies.

6. One of the many matters there considered by the Full Bench was a clause found in several modern awards relating to the calculation of an employee's service for the purposes of annual leave accruals where there is a transfer of business. Clause 34.10 of the *Food, Beverage and Tobacco Manufacturing Award 2010* provides an example:

> "34.10 Transfer of business
>
> Where a business is transferred from one employer to another, the period of continuous service that an employee had with the older employer must be deemed to be service with the new employer and taken into account when calculating annual leave. However an employee is not entitled to leave or payment instead of any period in respect of which leave has been taken or paid for."

7. The Commission summarised the arguments made by the unions' in support of the retention of the provisions in question as follows:

> "[35] … The AMWU, supported by the AWU, submitted that the provisions were not inconsistent with s.91(1). They referred to s.55(2), under which a modern award may include terms which are permitted by a provision of Part 2-2 (which deals with the NES), and pointed to s.93(4), which permits a modern award to include "*terms otherwise dealing with the taking of paid annual leave*", as authorising the provisions in question. They also relied on s.55(4), which permits modern award terms which are ancillary or incidental to the NES or which supplement it."

[2] See transcript of proceedings on 13 August 2015, PN350.

[3] See transcript of proceedings on 13 August 2015, PN402.

8. Despite these submissions, the Commission determined that the relevant provisions should be deleted, as contended by Ai Group and various other employer organisations: (emphasis added)

> "[37] We consider that the modern award provisions in question generally are clearly inconsistent with s.91(1). Section 55(1) requires, relevantly, that a modern award "*not exclude the National Employment Standards or any provision of the National Employment Standards*". Section 91(1) is a provision of the NES (being contained within Division 6, Annual Leave, of Part 2-2, The National Employment Standards), and the modern award provision excludes s.91(1) in the sense that in their operation they negate the effect of the subsection. A provision which operates to exclude the NES will not be an incidental, ancillary or supplementary provision authorised by s.55(4). Nor do we consider that the provisions in question are to be characterised as dealing with the taking of paid annual leave such as to be authorised by s.93(4); they are rather concerned with the quantum of the annual leave entitlement for which the second employer is liable."

9. Section 91(1) of the Act is in the following terms:

> **"91 Transfer of employment situations that affect entitlement to payment for period of untaken paid annual leave**
>
> *Transfer of employment situation in which employer may decide not to recognise employee's service with first employer*
>
> (1) Subsection 22(5) does not apply (for the purpose of this Division) to a transfer of employment between non-associated entities in relation to an employee, if the second employer decides not to recognise the employee's service with the first employer (for the purpose of this Division)."

10. Ai Group relies on the NES Inconsistencies Decision for the following reasons:

- It provides an example of an instance in which the Commission has accepted that where a NES provision that affords an employer a right or discretion (i.e. s.91(1)) is excluded by an award clause, the clause will fall foul of s.55(1).[4]

- The decision reflects the Commission's interpretation of s.55 of the Act to the extent that it clarifies that where an award provision operates to exclude the NES, it will not be an incidental, ancillary or supplementary

[4] See transcript of proceedings on 13 August 2015, PN263.

provision authorised by s.55(4).[5]

## 3. THE ACTU'S SUBMISSIONS

11. The ACTU's submissions of 19 August 2015 make the following propositions:

- The NES Inconsistencies Decision can be distinguished from the current controversy because s.65 is enlivened by the *employee's* choice to make a request for flexible working arrangements, whilst s.91(1) operates where an *employer* chooses not to recognise an employee's prior service.

- If the proposed 'family friendly work arrangements' clause was inserted, there would be no need for an employee to make a request under s.65. Thus, the circumstances in which an employer could refuse a request under s.65(5) would not arise and the NES Inconsistencies Decision can be distinguished on this basis.

- Section 65(5) is not an employer *right*. It is a limitation which is placed on when an employer may refuse the employee's request for a flexible working arrangement. Thus, the NES Inconsistencies Decision can be distinguished on this basis.

- The proposed clause supplements another provision of the NES (i.e. s.84). That is, it supplements a provision of the NES other than the one that it arguably excludes. Thus, the NES Inconsistencies Decision can be distinguished on this basis.

- The correct approach in considering s.55 is to first consider s.55(4). If the award provision is ancillary, incidental or supplementary as contemplated by s.55(4), and is not detrimental to an employee, the term is permitted by virtue of ss.55(4) and 55(7). There is therefore no need to consider whether the term excludes the NES or any provision of it, pursuant to s.55(1). The proposed 'family friendly work

[5] See transcript of proceedings on 13 August 2015, PN389 – PN392.

arrangements' clause is permitted by virtue of s.55(4).

- In the alternative, the proposed 'family friendly work arrangements' does not exclude any provision of s.65 because it is only enlivened by an employee's choice and in this event, s.65(5) places a limitation on when an employer may refuse a request made under s.65(1) rather than constituting a *right* of an employer to refuse a request for flexible working arrangements.

12. We propose to deal with each of these arguments below.

## 4. THE CONSTRUCTION OF SECTION 55

### The interaction between s.55(1) and s.55(4) and (7)

13. The ACTU submits that the correct approach in considering s.55 is to first consider s.55(4). If the award provision is ancillary, incidental or supplementary as contemplated by s.55(4), and is not detrimental to an employee, the term is permitted by virtue of ss.55(4) and 55(7). There is therefore, according to the ACTU, no need to consider whether the term excludes the NES or any provision of it, pursuant to s.55(1).[6]

14. Ai Group does not agree with the ACTU's construction of s.55. The 'carve out' from the operation of s.55(1) within s.55(7) only operates in respect of the specific NES term to which the ancillary, incidental or supplementary term pertains. The examples in the Notes in s.55(4) highlight this:

- Note 1(a) gives the example of an ancillary or incidental term which allows an employee to take twice as much annual leave to that prescribed within the annual leave provisions of the NES;

- Note 1(b) gives the example of an ancillary or incidental term to s.90 which specifies when the payment for annual leave prescribed in s.90 must be made.

[6] ACTU's submissions of 19 August 2015 at paragraphs 9 – 10.

- Note 2(a) gives the example of a supplementary term to s.87 that increases the amount of annual leave from the amount specified in s.87.

- Note 2(b) gives the example of a supplementary term to s.90 that requires payment of annual leave at a higher rate than the base rate specified in section 90. This Note gives a further example of a supplementary term to s.99 that requires payment of personal/carer's leave at a higher rate than the base rate specified in section 99.

- Note 3 gives the example of ancillary, incidental or supplementary term to s.74 that requires an employee to give more notice of the taking of unpaid parental leave than required by s.74.

15. If s.55(4) and (7) were interpreted in the manner contented by the ACTU there would be absurd and unfair outcomes. For example:

- The requirement in s.74 that an employee must give written notice of the taking of unpaid parental leave could be excluded by an award provision which supplemented s.70 to provide that unpaid parental leave could be taken without notice.

- The requirement in s.93 that an employee can only cash out annual leave beyond four weeks of accrued leave could be excluded by supplementing s.87 to allow more annual leave to be cashed out.

- The requirement in s.107 that an employee must give the employer notice of the taking of personal/carer's leave could be excluded by supplementing s.96 to provide that no notice is required when personal/carer's leave is taken.

- The provision in s.91 which gives the second employer in a transfer of business scenario the option of deciding not to recognise an employee's service with the first employer for the purposes of annual leave, could be excluded by supplementing s.88 to provide that the second employer must recognise service with the first employer for the

purposes of annual leave.

16. In *J.J. Richards & Sons Pty Ltd v Fair Work Australia*,[7] Justice Flick summarised three "long-established and fundamental principles of statutory construction", namely (Emphasis added):

- "the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther"
- "[i]t is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do"
- "a construction of a statutory provision is to be preferred 'that would best achieve the purpose or object of the Act'" as required by s.15AA of the Acts Interpretation Act 1901 (Cth)"

17. As highlighted by Flick J, the ordinary meaning of a term is to be adhered to unless this would lead to absurdity or inconsistency with the rest of the instrument. The examples set out above highlight the absurdity that would result from the construction contended by the ACTU.

18. Also, as highlighted by Flick J, a construction that best achieves the purpose and objects of the Act is to be preferred. In this regard, s.3(b) of the Act refers to the important object that the provisions of the NES and awards should be 'fair'. Of course fairness is not a 'one way street' – provisions of the safety net need to be fair to employees and employers. The ACTU's construction would lead to obvious unfairness for employers.

19. The ACTU's construction of section 55 is directly inconsistent with the NES Inconsistencies Decision. The Full Bench relevant stated (at para [37]):

> "…. the modern award provision excludes s.91(1) in the sense that in their operation they negate the effect of the subsection. A provision which operates to exclude the NES will not be an incidental, ancillary or supplementary provision authorised by s.55(4)…"

[7] [2012] FCAFC 53 at [49] – [53]

**The need to appropriately characterise the proposed award provision and the relevant provisions of the NES**

20. In the NES Inconsistencies Decision, the Full Bench rejected the unions' attempts to characterise an award provision which excluded s.91(1) of the Act, as a provision which was ancillary, incidental or supplementary to the annual leave provisions of the NES. The Full Bench relevantly said (at para [37]):

> "…Nor do we consider that the provisions in question are to be characterised as dealing with the taking of paid annual leave such as to be authorised by s.93(4); they are rather concerned with the quantum of the annual leave entitlement for which the second employer is liable."

21. In the current proceedings, the unions are endeavouring to characterise their proposed award provision which concerns the entitlement of an employee to part-time employment when returning from parental leave, as a provision which supplements s.84, notwithstanding that fact that s.84 does not deal with hours of work or forms of employment, and s.65 deals with the specific issue of the entitlement of an employee to part-time employment when returning from parental leave.

22. The claim is appropriately characterised as one about the entitlement of an employee to part-time employment when returning from parental leave. The entitlement of an employee in this regard is squarely dealt with in s.65 of the Act. It is an employee entitlement to *request* part-time employment, with the employer having the ability to refuse the request.

23. This entitlement in s.65 has existed since the NES provisions came into operation on 1 January 2010 but the entitlement was amended through the *Fair Work Amendment Bill 2014* to insert a specific provision (s.65(1B)) expressly remove any doubt about an employee's entitlements regarding part-time employment when returning from parental leave.

24. When the unions' proposed provision is properly characterised, there can be no doubt that the provision excludes s.65(5) of the Act.

**Our earlier submissions**

25. In addition to the above submissions on the construction of s.55, we refer to paragraphs 41 – 74 of our submissions dated 11 August 2015.

## 5. THE CIRCUMSTANCES IN WHICH SECTION 65(5) IS 'ENLIVENED'

26. The ACTU submits that the NES Inconsistencies Decision can be distinguished from the current controversy because s.65 is enlivened by the *employee's* choice to make a request for flexible working arrangements, whilst s.91(1) operates where an *employer* chooses not to recognise an employee's prior service.[8]

27. We do not understand the relevance of this distinction when considering the relevant NES provisions in the context of s.55(1). The terms in which s.55(1) is expressed are clear: a modern award must not exclude the NES or *any provision* of it. There is no distinction drawn (nor has the ACTU identified one) between provisions of the NES that operate by virtue of an employee's choice or otherwise.

28. Subsection 55(1) precludes a modern award from excluding the minimum standards set out in Part 2-2 of the Act, or any provision of it. The proposed 'family friendly work arrangements clause' excludes that part of the minimum standard set by s.65 that expressly contemplates the employer's discretion to refuse a request (i.e. s.65(5)). That the relevant provision of the NES is 'enlivened' by an employee's decision to make a request under s.65(1), as compared to the operation of s.91(1) which applies exclusively at the employer's prerogative and is not contingent upon an employee first making an election of some description, is by no means relevant to s.55(1). The plain and ordinary meaning of the provision does not permit such a conclusion.

[8] ACTU's submissions of 19 August 2015 at paragraph 8(a).

## 6. THE NEED TO MAKE A REQUEST UNDER SUBSECTION 65(1) DOES NOT ARISE

29. The ACTU argues that there would be no need for an employee to make a request under s.65 to cater for circumstances to which the entitlements in the proposed clause applied. In this event, the conditions under which an employer could refuse such a request would not arise. It cites this proposition as a point of distinction from the NES Inconsistencies Decision.[9]

30. Once again, we cannot see the relevance of this submission. In addition to the arguments set out above we have dealt with the basis upon s.65(5) is excluded by the proposed term and the proper interpretation of s.55(1) at paragraphs 37 – 40 of our submissions dated 11 August 2015. We continue to rely upon those submissions.

31. Further, we do not agree with the ACTU's contention that the utility of s.65(1) would evaporate if the proposed clause were inserted. This is best illustrated by way of an example. An employee returning from parental leave under the proposed clause has an absolute right to return to their pre-parental leave position on reduced hours. We assume for the purposes of this example that the relevant employee seeks to return to work as such and in addition, seeks to change their location of work. Section 65(1) would enable such a request to be made[10], however the proposed clause does not contemplate the possibility of such an alteration. As a secondary example, an employee to whom the award clause would apply may nonetheless choose to make a request under s.65(1) as they seek to put in place a flexible work arrangement that extends beyond a period of 2 years (see clause X.1.2).

32. The Commission cannot be satisfied that the award clause would apply to all circumstances in which an employee might seek to make a request under s.65(1) such that s.65 would have no application to employees to whom the proposed clause would apply. Even if this were so, we cannot see how this is a matter relevant to the proper interpretation and application of s.55(1).

[9] ACTU submissions of 19 August 2015 at paragraph 8(b).

[10] See note following s.65(1).

## 7. IS SUBSECTION 65(5) APPROPRIATELY DESCRIBED AS A 'RIGHT'

33. The ACTU submits that s.65(5) cannot properly be characterised as an employer right. Rather, it is a limitation which is placed on when an employer may refuse an employee's request for a flexible working arrangement.[11]

34. Ai Group submits that it is beyond contention that the Act contains rights throughout the legislation for both employers and employees,[12] including in the NES.

35. The intent of the legislature was to create a set of standards that include rights afforded to employers is made clear by the Explanatory Memorandum at paragraph 239 where it states: (emphasis added)

> In [Part 2-2], the terms employee and employer mean national system employee and national system employer respectively (as defined in clauses 13 and 14). The rights and obligations of employers and employees set out in [Part 2-2] apply only to the employment relationships within the scope of the corporations and other constitutional powers that are engaged by clauses 13 and 14.

36. However, we submit that the Commission is not here tasked with determining whether or not, as a general proposition, the NES provides rights for employers. Equally, it is not necessary for the Commission to decide whether s.65(5) of the Act should be characterised as a 'right'. These questions pose unnecessary distractions to the simple question before the Full Bench: does the proposed clause exclude s.65(5) of the Act.

37. It remains Ai Group's contention that the proposed clause excludes s.65(5).

38. Section 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 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.

[11] ACTU's submissions of 19 August 2015 at paragraph 8(c).

[12] For example, see s.336(2) as inserted by the *Fair Work Amendment Bill 2012* to clarify that both employers and employees have workplace rights.

39. As explained in our submission of 11 August 2015, the Full Bench's interpretation of s.55(1) in *Re Canavan Building Pty Ltd*[13] 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 provision 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.

40. We submit that it matters not whether s.65(5) is characterised as a right, a discretion, a capability, an ability or otherwise. We accept that the operation of the provision is contingent upon an employee first exercising their right to make a request under s.65(1) of the Act, but none of these matters are relevant to the issue of whether s.55(1) excludes s.65(5) of the Act.

[13] [2014] FWCFB 3202.