AUSTRALIAN BUSINESS
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Fair Work Commission: 4 Yearly Review of Modern Awards

SUBMISSIONS ON ALLEGED NES INCONSISTENCIES: CATEGORY 5 MATTERS

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

1. INTRODUCTION

1.1 These submissions relate to matters in category 5 of the alleged inconsistencies with the National Employment Standards (**NES**).

1.2 These submissions are made on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**).

1.3 ABI is a registered organisation under the Fair Work (Registered Organisations) Act 2009. ABI has some 3,900 members.

1.4 NSWBC is a recognised State registered association pursuant to Schedule 2 of the Fair Work (Registered Organisation) Act 2009 and has some 17,000 members.

2. BACKGROUND

2.1 By letter dated 4 April 2014, the Fair Work Ombudsman (**FWO**) identified a number of provisions in modern awards which it contended are inconsistent with the provisions of the NES.

2.2 In its statement of 13 August 2014, the Commission directed parties to respond to the submissions of the FWO concerning the application of the NES in various modern awards.[1]

2.3 In accordance with that direction, we filed submissions on behalf of ABI and NSWBC on 29 September 2014.

2.4 The Commission then released a Statement on 31 October 2014 which categorised the alleged NES inconsistencies into the following 5 groups[2]:

(a) Provisions which are concerned with restrictions on the payment of annual leave loading upon termination of employment (**Group 1**);

(b) Textile, Clothing, Footwear and Associated Industries Award 2010 provisions (**Group 2**);

(c) Provisions about which there appears to be agreement as to both the existence of an inconsistency with the NES and the award variation appropriate to remedy that inconsistency (**Group 3**);

(d) Provisions about which there appears to be agreement as to the existence of an inconsistency with the NES, but no agreement as yet concerning the appropriate remedial award variation (**Group 4**); and

(e) Provisions about which there is, as yet, no agreement as to the existence of an inconsistency with the NES (**Group 5**).

2.5 In respect of matters in category 5, the Commission released a Background Paper on 14 January 2015, and parties were directed to file any further submissions as to whether an inconsistency exists by no later than 23 January 2015.[3]

2.6 While ABI and NSWBC rely on the submissions initially filed on 29 September 2014, we appreciate the opportunity to expand on those initial submissions as set out below.

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[1] [2014] FWCFB 5537.
[2] [2014] FWCFB 7727.
[3] [2014] FWCFB 7727, at [8].

3. SUBMISSIONS REGARDING INTERACTION BETWEEN MODERN AWARDS AND NES

3.1 The interaction between the NES and modern awards is governed by section 55 of the Act. By way of summary, section 55 provides that:

(a) A modern award must not 'exclude' the NES or any provision of the NES;[4]

(b) A modern award may include any term that the award is expressly permitted to include by a provision of Part 2-2 or by regulations made for the purposes of section 127;[5]

(c) The NES have effect subject to terms included in a modern award under subsection 55(2);[6]

(d) A modern award may also include terms that are ancillary or incidental to the operation of an entitlement of an employee under the NES or terms that supplement the NES, but only to the extent that the effect of those terms is not detrimental to an employee in any respect when compared to the NES;[7]

(e) If a modern award includes terms permitted by subsection 55(4), to the extent that the terms give an employee an entitlement that is the same as an NES entitlement:

(i) The award terms operate in parallel with the NES entitlement, but not so as to give the employee a double benefit; and

(ii) The provisions of the NES relating to the NES entitlement apply as a minimum standard to the award entitlement.[8]

3.2 Section 56 provides that a term of a modern award has no effect to the extent that it contravenes section 55.

3.3 Subsection 55(1) 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 FW Act (**Explanatory Memorandum**) describes the NES as *"Legislated Minimum Employment Standards"*.[9]

3.4 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 increase the value or quantum of NES entitlements (see Note 2 under subsection 55(4)).

3.5 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) this entitlement through:

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[4] Section 55(1).
[5] Section 55(2).
[6] Section 55(3).
[7] Section 55(4).
[8] Section 55(6).
[9] Fair Work Act, Explanatory Memorandum at [6].

(a) the making of awards by the Commission;

(b) the negotiation of enterprise agreements; or

(c) contractual agreements.

3.6 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 NES 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.*
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> *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."*

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

(a) firstly, it seeks to ensure that, where industrial instruments provide the same 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.

3.8 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.

3.9 This interpretation is supported by the Supplementary Explanatory Memorandum to the FW Act, 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' 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 a year, rather than accruing progressively under the NES." (emphasis added)

3.10 The NES must be read as an independent source of entitlements. The NES operates on a different plane to instruments such as modern awards and enterprise agreements, and the purpose and effect of the NES cannot wax and wane by reference to other instruments.

4. SUBMISSIONS ON CATEGORY 5 ALLEGED NES INCONSISTENCIES

4.1 Airline Operations - Ground Staff Award 2010

(a) Subsection 87(1) of the Act provides employees with an entitlement to paid annual leave for each year of service. Subsection 87(2) then deals with the accrual of leave and states that the entitlement accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.

(b) Section 88 then deals with the 'taking' of paid annual leave and provides:

(1) Paid annual leave may be taken for a period agreed between an employee and his or her employer.

(2) The employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

(c) Relevantly, subsection 93(4) provides that:

A modern award or enterprise agreement may include terms otherwise dealing with the taking of paid annual leave.

This allows for machinery provisions associated with "the taking of" paid annual leave; that is paid leave arising from section 87 of the Act. Section 93 is not and cannot be said to be the source of power to include clause 34.2 in a modern award.

(d) Having regard to clause 34.2, the provision has two elements. Firstly, it operates to provide an additional benefit to employees in the form of leave in advance and, secondly, it contains a prohibition on the timing of the taking of any further leave.

(e) Clause 34.2 sits uncomfortably with the current scheme of the Act as far as leave accrual goes, and the clause appears to come from a time when leave was credited each 12 months on the anniversary of commencement of employment.

(f) For clause 34.2 to survive, it would need to survive through either subsection 55(4) or subsection 55(2)[10].

(g) It is difficult to envisage the clause falling within subsection 55(4). Although the first element of the clause is supplementary and beneficial to employees, the second element does not appear to be supplementary within the meaning of subsection 55(4).

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[10] We do not see a need for modern awards to provide for leave in advance at the discretion of the employer. Such a discretionary benefit can be left to contract or general managerial prerogative.

(h) We also do not consider the clause to be permitted by subsection 55(2), as section 93(4) does not 'expressly' permit an arrangement as set out in clause 34.2.

(i) In its current terms clause 34.2 operates contrary to section 88 and section 93 (3) and section 55 does not authorise its operation.

(j) In our submission it should be deleted.

4.2 Mobile Crane Hiring Award 2010

(a) Clause 25.2(c)(i) of this Award is in similar terms to clause 34.2 of the Airline Operations - Ground Staff Award 2010, and therefore we rely on the submissions set out at 4.1 above.

4.3 Airport Employees Award 2010 and 10 other Awards

(a) The National Farmers' Federation (**NFF**) has raised issue with provisions in the Pastoral Award, Horticulture Award and the Wine Industry Award concerning transfer of business and continuity of annual leave entitlements.

(b) We note that similar or identical provisions have been found to exist in the following other modern awards:

(i) Food, Beverage and Tobacco Manufacturing Award;

(ii) Horticulture Award;

(iii) Manufacturing and Associated Industries and Occupations Award;

(iv) Nursery Award;

(v) Pastoral Award;

(vi) Seafood Processing Award;

(vii) Timber Industry Award;

(viii) Wine Industry Award;

(ix) Building and Construction General On-Site Award; and

(x) Plumbing and Fire Sprinklers Award 2010.

(c) Subsection 22(5) mandates the transfer and recognition of service (and therefore service-related entitlements such as accrued paid annual leave) from one employer to another in transfer of employment situations. However, subsection 91(1) operates as a carve-out, by excluding the operation of subsection 22(5), in circumstances where there is a transfer of employment between non-associated entities and the second employer decides not to recognise an employee's service with the first employer.

(d) The effect of subsection 91(1) is that it gives a 'new' employer the right not to recognise service of transferring employees for the purposes of paid annual leave. Where such an election is made, the 'old' employer is obliged to pay-out any accrued but untaken annual leave. Subsection 91(1) is contained within Part 2-2 of the Act and is therefore a provision of the NES.

(e) The relevant clauses of the Awards referred to at 4.3(b) above are contrary to subsection 55(1) as they exclude a provision of the NES by not allowing for employers to exercise the rights provided for by that provision.

(f) We therefore submit that the relevant Award provisions should be removed from the respective Awards.

(g) We note that the AWU in their submissions of 24 October 2014 submit that the relevant Award provisions are permitted under subsection 55(4) as being ancillary and/or supplementary to the NES on the grounds that they "provide an additional entitlement for employees in relevant transfer of employment situations". We respectfully disagree with that submission.

(h) The relevant clauses of the Awards are not ancillary or incidental in the sense of being machinery provisions.

(i) Further, the relevant clauses are not supplementary as they **do not** provide an *additional* entitlement for employees as alleged by the AWU. Rather, the relevant Award provisions simply provide for the transfer of a particular entitlement, as opposed to an automatic pay-out of the equivalent value of that entitlement. There is no additional entitlement. While some employees may consider the transfer of accrued entitlements to be beneficial as compared to an immediate pay-out, it is likely that many employees would prefer to have their annual leave balance paid out in a transfer of employment.

(j) It is clear that the relevant Award provisions exclude subsection 91(1) from operating. The respective clauses are therefore inconsistent with the NES and should be removed from the relevant Awards.

4.4 Educational Services (Post-Secondary Education) Award 2010

(a) ABI and NSWBC rely on their previous submissions made on 29 September 2014. We submit that clause 11.2(b), when read in the context of the other provisions within clause 11 generally, does not contravene the NES.

(b) Clause 11.1 expressly provides that notice of termination is provided for in the NES, and that the other provisions of clause 11 "supplement" the NES.

(c) The intention of clause 11.2 generally is to provide teaching staff with more generous entitlements as compared to the NES. It does so through clause 11.2(a) by providing an entitlement to "at least four weeks' notice", notwithstanding any lesser entitlement under the NES. However, the entitlement at clause 11.2(a) is subject to certain conditions as set out in clause 11.2(b). Where clause 11.2(b) applies, teaching staff are entitled to at least two weeks' notice (again notwithstanding any lesser entitlement under the NES).

(d) Without commenting on the merits of the provision, properly understood subsection 55(4) authorises the clause.

(e) Notwithstanding our view above, if the Commission considers clause 11.2(b) to be inconsistent with the NES, we submit that the appropriate remedy would be to remove clause 11.2 in its entirety and simply rely on the entitlement under clause 11.1 which reflects the NES.

4.5 Hair and Beauty Award 2010

(a) ABI and NSWBC rely on their previous submissions made on 29 September 2014.

(b) In addition to that brief submission, we submit that the clause can be read as contrary to subsection 105(2)(b) in that it appears to require casual employees to take a *minimum* of 48 hours' absence and not a lesser period. Subsection 105(2)(b) expressly allows employees to take two separate periods of 1 day of leave.

(c) The clause also can be read to be contrary to subsection 105(2)(c) which allows an employer and employee to agree to a separate periods of compassionate leave, which may be less than 48 hours.

(d) It is likely that this position was not intended but rather that the clause was an attempt to 'simplify' the relevant NES. However, in the circumstances and for abundant caution, we submit that the wording of clause 34.2(b) should be revised to make it clear that casual employees are entitled to take up to 2 days' unpaid carer's leave or unpaid compassionate leave.

(e) This is best achieved by deleting the clause and simply referring to the NES.

4.6 Timber Industry Award 2010

(a) Subsection 101(1) permits modern awards to include terms that provide for the cashing out of paid personal/carer's leave by an employee. However, such terms must meet the requirements of subsection 101(2).

(b) Clause 34.4 contravenes subsection 101(2)(b) as it does not stipulate that cashing out is subject to agreement between the employer and employee on each separate occasion. It also does not require the agreement to be in writing.

4.7 Airline Operations - Ground Staff Award 2010 and numerous other Awards

(a) The Transport Workers' Union (**TWU**) has raised issue with the 'transfer to lower paid duties' provisions in numerous Awards, including the Waste Management Award 2010, Road Transport and Distribution Award, Road Transport (Long Distance Operations) Award, Passenger Vehicle Transportation Award, Airline Operations- Ground Staff Award and Transport (Cash in Transit) Award.

(b) As a preliminary matter, we note that a similar or identical provision exists within most, if not all, other modern awards. The provision was first introduced into each of the exposure drafts of the priority modern awards pursuant to a decision of a Full Bench of the AIRC in *Award Modernisation - Statement - Full Bench* [2008] AIRCFB 717.[11]

(c) The particular provision has a long history with its origin in the 1984 Termination, Change and Redundancy Case.[12] In that case, the ACTU sought the inclusion of an obligation on the employer to make reasonable endeavours to procure suitable alternative employment for redundant employees as a way to avoid termination of employment. The ACTU claim sought specific measures which would

[11] See [23].
[12] (1984) 8 IR 34.

"minimize or avoid the need for termination such as transfer to jobs elsewhere within firms and, where necessary, the provision of training and re-training for employees to enable them to perform other duties within the enterprise".

(d) In that case, the Australian Conciliation and Arbitration Commission concluded that it was "prepared to provide that where an employee is transferred to lower paid duties because the employer no longer wishes the job the employee has been doing, done by anyone, then the employee should be entitled to the same period of notice of the change in employment as he would have been entitled to if his/her employment had been terminated".

(e) The clause does not (and never did) give rise to a unilateral right for an employer to transfer an employee to lower paid duties. Rather, in circumstances where transfer is permissible (e.g. by contractual right, or by agreement between an employer and employee), the provision simply creates a right to a particular period of notice to effect the transfer and with it the new rate of pay. The provision does not touch upon or cut across anything to do with the NES.

(f) Further, where the provision is utilised no termination of employment will arise and therefore the redundancy provisions in the NES do not apply.

(g) In any event, even if a redundancy situation was triggered, subsection 121(2) provides that a modern award may include a term specifying other situations in which section 119 does not apply to the termination of an employee's employment". The 'transfer to lower paid duties' clause is an Award term which fits the characterisation of subsection 121(2).

4.8 Waste Management Award 2010

(a) ABI and NSWBC disagree with the submission of the TWU that clause 23.2 is inconsistent with section 120.

(b) Under the Waste Management Award, an employee's classification level is largely determined by the piece of equipment the employee is required to operate. Consequently, an employee's rate of pay may not be fixed but rather can fluctuate up or down depending on the particular vehicle or piece of equipment an employee is required to operate at a certain time.

(c) In the waste management industry, employers often have a variety of different pieces of equipment, and from time to time an employer may require an employee to operate a different piece of equipment.

(d) Clause 23.2 acknowledges this particular characteristic of the industry and is a machinery provision which regulates how employees are paid when their classifications change.

(e) Clause 23 of the Award is not in any way related to the NES. The clause does not deal with termination of employment, redundancy or changes to an employee's job.

(f) We also note that sections 119 and 120 are not triggered unless an "employee's employment is terminated". Clause 23 of the Award does not deal with termination of employment - where an employer provides notice under clause 23.2, no termination arises.

Nigel Ward
CEO + Director
Australian Business Lawyers & Advisors Pty Limited
(02) 9458 7286
nigel.ward@ablawyers.com.au

Kyle Scott
Senior Associate
Australian Business Lawyers & Advisors Pty Limited
(02) 9458 7607
kyle.scott@ablawyers.com.au

On behalf of Australian Business Industrial and the NSW Business Chamber Ltd