Australian Industry Group

4 YEARLY REVIEW OF AWARDS

Alleged inconsistencies with the NES (AM2014/1)

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4 YEARLY REVIEW OF AWARDS – ALLEGED INCONSISTENCIES WITH THE NES (AM2014/1)

1. Introduction

1.1 The Australian Industry Group ("Ai Group") makes this further submission in response to the Full Bench's Statement of 31 October 2014 relating to alleged inconsistencies with the National Employment Standards ("the NES") identified in the context of the 4 yearly review of modern awards

1.2 The submission addresses various alleged inconsistencies identified as falling within category 5. More specifically, the submission deals with:

- Alleged inconsistency regarding award terms providing for notice of transfer to lower paid duties;
- Clause 23.2 of the *Waste Management Award 2010*; and
- Alleged inconsistency associated with award terms relating to annual leave and transfer of employment;

1.3 The submission supplements previous submissions made by the Ai Group in the context of these proceedings.

2. Alleged inconsistency regarding award terms providing for notice of transfer to lower paid duties

2.1 The TWU submission of 21 November 2014 identifies a standard clause in a number of awards that they assert, in effect, conflicts with the NES redundancy provisions. In this regard they identify the following:

- Clause 14.2 of the *Road Transport and Distribution Award 2010;*
- Clause 12.2 of the *Road Transport (Long Distance Operations) Award 2010*;
- Clause 12.2 of the *Passenger Vehicle Transportation Award 2010*;

- Clause 13.2 of the *Airline Operations - Ground Staff Award 2010*; and
- Clause 13.2 of the *Transport (Cash in Transit) Award 2010*.

2.2 In relation to the alleged nature of an inconsistency with the NES, the TWU submissions of 21 November 2014 say as follows:

> *"Section 120 of the Fair Work Act 2009 provides that if employers obtain other acceptable employment the Fair Work Commission may determine to reduce redundancy pay. These clauses allow employers to bypass s 120. The FWC must determine the redundancy payable in the circumstances envisioned by these clauses. The TWU therefore requests that these be deleted."*

2.3 The clauses identified by the union provide as follows:

> *"Where an employee is transferred to lower paid duties by reason of redundancy, the same period of notice must be given as the employee would have been entitled to if the employment had been terminated and the employer may, at the employer's option, make payment instead of an amount equal to the difference between the former ordinary time rate of pay and the ordinary time rate of pay for the number of weeks of notice still owing."*

2.4 The relevant award clauses reflect a model provision inserted into modern awards during the award modernisation process. However the wording reflects the previous test case standard relating to redundancy provisions in federal awards. The origins of the award clauses can be traced back to the first TCR case in which the Australian Conciliation and Arbitration Commission held:

> *"…We are of the opinion that, in general, employers do try to minimize retrenchments and to accommodate the displacement effects in relevant cases through natural wastage and retraining, and we do not think it necessary, or desirable, to make award prescriptions to cover these matters. However consistent with the remainder of our decision, we are prepared to provide that where an employee is transferred to lower paid*

duties because the employer no longer wishes the job the employee is 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 has been terminated. Alternatively, the employer shall pay to the employee maintenance of income payments calculated to bring the rate up to the rate applicable to his/her former classification."[1]

2.5 The specific words of the clause reflect an agreed position reached between the ACTU, Ai Group and ACCI during the course of proceedings associated with the 2004 *Redundancy Case* decision.[2]

2.6 The Full Bench should reject the TWU's assertion that the provision is inconsistent with the NES. Their contention appears to be based on an incorrect understanding of both the relevant award clause and/or the NES.

2.7 The award clauses and legislative provision identified by the union cover different subject matter and cannot be regarded as inconsistent. They serve entirely different purposes and apply in different circumstances. The NES deal with matters associated with the payment of redundancy pay on termination of employment. In contrast the award provides an entitlement to notice or a monetary payment where an employee is transferred to lower paid duties in certain circumstances. Importantly, the award clause has no application in circumstances where an individual's employment is terminated.

2.8 The distinction between the legislative provisions and award clause is evident from a consideration of the history of the clause and in particular the reasoning of the Full Bench in the first TCR decision identified above, as well as from a simple comparison of the respective wording contained in the legislation and the awards. The legislative provisions are set out and discussed below.

[1] *Termination, Change and Redundancy Case*, Print F6230; (1984) 8 IR 34 at p.67

[2] *Redundancy Case*, 26 March 2004, PR032004.

2.9 Section 120 of the *Fair Work Act 2009* ("the Act") deals with an employee's entitlement to redundancy pay. It empowers the Commission to reduce the amount of redundancy pay. It is not about the provision of notice or payments in lieu thereof.

2.10 Section 120 must be read in connection with section 119. When considered in this context it is clear that section 120 relates to an entitlement that arises when an employee's employment is terminated. Moreover, it deals with obligations relating to the payment of "redundancy pay".

2.11 In contrast the award terms create an entitlement or obligation when an employee *"…is transferred to lower paid duties"* and the entitlement is either in the nature of the provision of notice of any transfer to lower paid duties or is calculated by reference to the amount of notice the employee would have *"..been entitled to <u>if the employment had been terminated."</u>* (Emphasis added).

2.12 It is very clear that the award clause and sections 119 and 120 cover different subject matters. No inconsistency arises. Moreover, in response to the TWU's specific concerns, it is very clear that the award does not create a vehicle by which employers may bypass section 120.

2.13 For completeness, we also note that there is no inconsistency with the element of the NES that relates to the provision of notice or payments in lieu thereof upon termination (i.e. sections 117 and 118 of the Act). No party appears to suggest that such an inconsistency arises.

3. TWU submissions relating to the Waste Management Award 2010 ("Waste Award")

3.1 The TWU submission of 21 November 2014 suggests that clause 23.2 of the Waste Award is inconsistent with section 120 of the Act. The clause states:

> *"An employee is not to be transferred to a lower classification level except on seven days' notice."*

3.2 The clause limits any right an employer may otherwise have had to transfer an employee to a lower paid classification. It makes the exercise of such a right subject to the provision of notice. The clause has nothing to do with redundancy pay. For similar reasons to those outlined in relation to the other award clauses identified by the TWU and discussed above, the provision is not inconsistent with the NES.

4. Clauses dealing the annual leave entitlements in the context of a Transfer of Employment

4.1 The National Farmers' Federation (NFF) has alleged that clause 25.9 of the *Horticulture Award 2010* is inconsistent with subsection 91(1) of the Act. The provision states:

> ***"25.9 Transfer of business"***
>
> *Where a business is transferred from one employer to another, the period of continuous service that an employee had with the old 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 for any period in respect of which leave has been taken or paid for."*

4.2 Ai Group has previously indicated its support for the submissions of the NFF. We have also identified a raft of awards that contain either an identical or similar clause and called for such clauses to be deleted.

4.3 Ai Group contends that clauses of this nature are inconsistent with section 91 of the Act, an element of the NES. In this regard we note that the Act now regulates the manner and circumstances in which service with a first employer is to counted as service with a second employer for the purposes of the Act, including the NES. In particular, section 91 regulates the treatment of this issue in the context of paid annual leave entitlements. The approach adopted within these awards differs from the approach taken within the Act and the specific manner in which annual leave entitlements are regulated pursuant to section 91 in particular.

4.4 Moreover we contend that the terms have the effect of excluding a provision of the NES and as such are contrary to subsection 55(1) and therefore not permissible under paragraph 136(2)(b) of the Act. The provision which is excluded is subsection 91(1) and potentially 91(2). Subsection 55(1) provides that a modern award *"…must not exclude the National Employment Standards or any provision of the National employment Standards."*

4.5 The effect of the award clauses is to override or circumvent the operation of subsection 90(1) by "deeming" service with the first employer to be service with the second employer or requiring an employer to recognise such prior service for annual leave purposes when there is a transfer of business. It effectively removes the capacity under the NES for an employer to avoid liability for annual leave accruals with the first employer by deciding not to recognise prior service with that entity, as contemplated by subsection 91(1). Consequently we contend that the award term excludes subsection 90(1) even though it does not contain a statement expressly purporting to exclude the NES.

4.6 Sub-section 91(1) is a term of the NES. Its effect is to limit the application of subsection 22(5). The effect of subsection 22(5) is to require or deem that, if there is a transfer of employment, a period of service with the first employer counts as service with a second employer. It also provides that the period between employment with the employers does not count as continuous service but does not break the period of continuous service. Subject to the operation of subsection 91(1), subsection 22(5) impacts upon the application of the NES. Relevantly, the NES provides that an employee's paid annual leave entitlement is based on their "*service with his or her employer…".* Thus subsection 22(2) extends the definition of service utilised within the NES so that new employers are required to afford transferring employees annual leave entitlements based on service with their old employer.

4.7 The Explanatory Memorandum accompanying the *Fair Work Bill* clearly articulates the intended effect of what is now section 91:

*"**373.** Subclause 91(1) provides that subclause 22(5) (which provides for the automatic recognition of service where there is a transfer of employment) does not apply for the purposes of Division 6 to a transfer of employment between non-associated entities if the second employer decides not to recognise an employee's service with the first employer.*

***374.** The intention of this subclause is that an employee's service with the first (old) employer does not have to be recognised by the second (new) employer in relation to the employee's untaken paid annual leave entitlements where there is a transfer of business between two non-associated employers.*

***375.** The old employer will be required to pay out an employee's untaken paid annual leave where the new employer does not agree to recognize service with the old employer.*

***376.** Subclause 91(2) provides that if subclause 22(5) applies for the purposes of Division 6 to a transfer of employment in relation to an employee, the employee is not entitled to be paid an amount under subclause 90(2) for the period of untaken paid annual leave."*

4.8 In essence, subsection 91(1) gives a new employer in a transfer of employment situation between non-associated entities an ability to elect not to avoid incurring a liability for annual leave entitlements the individual accrued with the former employer.

4.9 The operation of subsection 91(1) is recognised in a note contained in subsection 22(5) which states:

"This subsection does not apply to a transfer of employment between non-associated entities, for the purposes of Division 6 of Part 2-2 (which deals with annual leave) or Subdivision B of Division 11 of Part 2-2 (which deals with redundancy pay), if the second employer decides not to recognise the employee's service with the first employer for the purpose of that Division or Subdivision (see subsections 91(1) and 122(1)."

4.10 There is no recognition or acknowledgement in the note that the operation of subsection 91(1) and the consequentially limited application of subsection 22(5) may in any way be limited by the application of the award. Indeed such an outcome would be inconsistent with the note. Consequently, it does not appear that Parliament envisaged that such an outcome could be possible.

4.11 Importantly, subsection 91(2) provides that an employee is not entitled to a payment in relation to annual leave on termination by their old employer if subsection 22(5) applies.

4.12 Historically, many significant federal awards did contain provisions dealing with rules around the calculation of annual leave in circumstance involving transmission of business.[3] Nonetheless, there is no facility in section 90 or any provision elsewhere in the NES permitting awards to include terms dealing with the recognition of service for the purpose of the accrual of annual leave. This can be contrasted with sections permitting awards to contain terms relating to the taking of annual leave. The absence of such provisions suggests a deliberate intent by Parliament to reform the manner in which prior service is recognised in relevant transfer of employment situations.

4.13 The absence of a legislative provision within the NES expressly permitting an award to include terms dealing with transfer of business or indeed the recognition of service for the purpose of calculating or accruing annual leave means that an award term addressing such matters cannot be regarded as a term permitted by subsection 55(2). Consequently it cannot be that the NES *"…have effect subject to.."* such a term in the manner contemplated by subsection 55(3).

4.14 An additional technical problem flowing from the retention of the relevant award clauses is the absence of any provision comparable to subsection 90(2) in the award. There is nothing in the award to make it clear that, as a product of subsections 22(5) and 90(2), if the new employer decides to recognise service with the old employer the old employer is relieved of the

[3] See for example clause 7.1.5(c) of the *Metal, Engineering and Associated Industries Award 1998*

obligation to make a payment in respect of annual leave pursuant to subsection 90(2) for any period of untaken leave.

4.15 A further related complication arises from the fact that the operation of subsection 91(1) is dependent upon a new employer making a specific "decision". That is, the exemption from subsection 22(5) only applies if the new employer decides not to recognise the employee's service with the first employer. The legislation does not contemplate a circumstance where an award dictates that service with the first employer must simply be "deemed to be service" with a new employer. It assumes a new employer will make a decision about this matter. In contrast, the award does not require a decision to be made. Accordingly, it is not clear that subsection 91(2) would operate to excuse the first employer from paying annual leave pursuant to subsection 90(2) at the time the employment ends as a consequence of the award clause's operation.

Response to CFMEU Submissions

4.16 Ai Group disagrees with the CFMEU's contention that the clauses constitute supplementary terms. Regardless, we say that even if our position is not accepted the clauses are inconsistent with a provision of the NES and warrant deletion from awards through this Review.

4.17 The CFMEU argues that award provisions of the kind in question *"create a supplementary benefit for employees*" and that they operate in *"…supplementation of section 90(1)".*[4] In effect they argue that the award term is a supplementary term permitted by subsection 55(4) of the Act. In its view the *"…critical question is relation to any supplementary term is whether it is detrimental to the employee when compared to the NES*" and, moreover, a relevant award provision is not inconsistent with the NES if it provides a benefit when compared to the NES. Ai Group contends that this is an overly narrow approach to the proper interpretation of subsection 55(4) and is not

[4] CFMEU submission of 20 January 2015

determinative of the question as to whether the provision is inconsistent with the NES so as to justify its deletion.

4.18 Ai Group does not accept that the relevant award terms can be properly considered a term permitted by subsection 55(4). They are not supplementary terms. Rather they are terms which directly contradict a provision of the NES.

4.19 Ai Group accepts that the relevant award terms may be beneficial to employees in many circumstances. However this alone does not meet the requirements of subsection 55(4). To fall within the ambit of this subsection they must be either "*ancillary or incidental to the operation of an entitlement of an employee under the NES"* or "*supplement the NES*".

4.20 The award terms do not supplement the NES. The Macquarie Concise Dictionary defines the term "supplement" to mean:

> *"1. Something added to complete a thing, supply a deficiency, or reinforce or extend a whole…"*

4.21 The term "supplementary" is defined as;

> *"1. of the nature of or forming a supplement…"*

4.22 An award provision that directly contradicts the effect of a provision of the NES, in this instance section 91, should not be regarded as a supplementary term. If any other approach was adopted it would raise the prospect that awards or enterprise agreements could contain provisions that were directly inconsistent with any element of the NES provided they were not detrimental to an employee. This would include, for example, terms that permitted the cashing out of annual leave in a manner prohibited by section 93 if the effect was beneficial to an employee.

4.23 For completeness, we say the terms are not ancillary or incidental to the operation of an entitlement under the NES. Instead, they operate to circumvent a term of the NES (subsection 90(1)) which limits the application of a term of the Act (subsection 22(5)) in order to provide that employees do not have an entitlement under the NES to annual leave in certain circumstances.

4.24 Moreover, subsection 55(4) permits an award to include terms *"…only to the extent that the effect of those terms is not detrimental to an employee in <u>any respect</u>, when compared to the National Employment Standards."* The effect of the clause could be that a potential new employer would be prevented from electing to not recognise the prior service for the purpose of determining annual leave entitlements, with the foreseeable resulting consequence being that the potential new employer elects not to employ that person. This would be a detrimental effect. The use of the words "an employee" in subsection 55(4) suggests that any assessment of the detriment must be made in the context of individual employees, notwithstanding the award having general application. Moreover, the use of the terms *"in any respect"* suggest a very broad assessment of such detriment. In addition to the above reasons why the clause cannot be retained in awards, the above detrimental effects constitute a powerful merit based justification for aligning the award to the operation of section 91.

Broader justifications for deletion of the award clauses based on inconsistency with the legislative framework and NES

4.25 Even if the Full Bench formed the view that the award clauses are not inconsistent with the NES in the sense that they do not require a party to contravene the NES or that they do not contravene subsection 55(1), the removal of such provisions would be justified based on the fact that they are inconsistent with the NES in the sense that they give effect to a different approach to the regulation of transfer of employment situations to that adopted within the Act and NES generally.

4.26 The award clauses undermine the balance struck within the Act in relation to transfer of employment situations. In identifying the "major reforms" introduced by the then *Fair Work Bill*, the Explanatory Memorandum stated:

> *"It provides a framework for dealing with terms and conditions of employment where there is a transfer of business that balances the*

protection of employees' terms and conditions of employment and the interests of employers in running their enterprises efficiently."[5]

4.27 The retention of the current award clauses would undermine Parliament's intent and an important reform. This alone would warrant the deletion of such clauses.

4.28 The deletion of the relevant award clauses would also address the anomalous situation where there are different rules that apply in the context of a transfer of business to employers or employees covered by different awards or in the context of award and agreement free employees when compared to those covered by such instruments. This would simplify Australia's workplace relations system and better achieve the modern awards objective. In particular:

"(f) the likely impact of any exercise of the modern award powers on business, including on productivity, employment costs and the regulatory burden" and

(g) the need to ensure an simple easy to understand, stable and sustainable modern award system…"

4.29 Also, the alignment of award terms relating to annual leave with the balance struck within the legislative framework would remove a disincentive to new employers electing to employ experienced and likely comparatively more productive workers in situations where a transfer of business occurs. This would promote *"…the efficient and productive performance of work" as contemplated under s134(1)(d)".*

4.30 Moreover, given the relevant award clauses are inconsistent with the framework of the Act and in particular the operation of sections 91 and 22(5) they should not be regarded as *"necessary"* to meet the modern awards objective. Such terms cannot legitimately be regarded as *necessary* elements of a fair and *relevant* safety net when the legislation now deals with the regulation of annual leave entitlements in the context of a transfer of

[5] Explanatory Memorandum, p.ii

employment. Such award terms should largely be regarded as a product of the historical regulation of annual leave at the federal level through awards rather than legislation. Consequently the retention of such clauses is inconsistent with section 138. This constitutes a further ground for the deletion of such provisions.