



Fair Work Commission
Section 156 – Fair Work Act 2009 (the Act)
4 Yearly Review of Modern Awards
(AM2014/1 and Ors)

Alleged Inconsistencies with NES
Submission In Reply Category 5 NES matters
Australian Manufacturing Workers Union
(AMWU)

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Background

1. The AMWU makes this submission pursuant to the Fair Work Commission's (the Commission) Statement of 23 December, 2104¹ regarding alleged inconsistencies with the National Employment Standards (NES).
2. The AMWU has made previous submissions² regarding the NES matters. The particular issues addressed below relate to the "Category 5" matters identified in the Commission's 31 October Decision³ and 23 December, 2014 decision⁴. and are by nature in-reply.

Airline Operations – Ground Staff Award 2010 (the Award).

Annual leave in Advance- Clause 34.2

3. The AMWU previously addressed this issue in our January 23, 2015 submission⁵. We stated that the FWO had identified that Clause 34.2 of the Airline Operations may be confusing and further, that the Clause restricts the reaching of agreement between an employer and employee regarding the taking of annual leave.⁶ and hence is inconsistent with s.88(1) of the Act..

Submission of Australian Business Lawyers and Advisors⁷ (ABI)

Legislative provisions

¹ [2014]FWCFB 9412

² <http://www.fwc.gov.au/documents/sites/awardsmodernfouryr/MultipleMA-sub-NES-AMWU-260914.pdf>

³ [2014] FWCFB 7727

⁴ Ibid

⁵ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/MultiMa-sub-NES-AMWU-230115.pdf> paragraphs 3-11

⁶ FWC 4 yearly Review of Modern awards- NES Issues; updated 31 October, 2014; p.2

⁷ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/MultiMA-sub-NES-ABI-270115.pdf>

4. The ABI's submission provides a construction of s.55 of the Act. The submission concludes⁸ that:

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. (emphasis added)

5. The ABI's conclusion is not supported by the terms of the NES. The NES at ss.55 (7) enables an award or enterprise agreement provision enabled under ss.55(4) or (5) to not contravene ss.55(1). The Explanatory Memorandum(the EM) to the Fair Work Bill 2008 makes this clear:

215. A term permitted by subclause 55(4) does not contravene subclause 55(1) (subclause 55(5))⁹.

6. The NES also enables its provisions to wax and wane by the operation of s.55(2) and ss.55(3). The EM states:

210. Some provisions of the NES expressly authorise a modern award or enterprise agreement to deal with certain issues in a way that would, or might, otherwise be contrary to the NES – and which may therefore be prohibited by subclause 55(1).

211. Subclause 55(2) ensures that such terms are able to be included in a modern award or enterprise agreement. Subclause 55(2) also ensures that an award or agreement may include any additional matters permitted by regulations made under clause 127.

212. The NES operates subject to such terms (subclause 55(3))¹⁰

⁸ Ibid @ 3.10

⁹House of Representatives; FAIR WORK BILL 2008,EXPLANATORY MEMORANDUM; p.34

7. The ABI submit¹¹ that the provisions of ss.55(6) lend support to their argument that the NES cannot wax and wane by reference to other instruments. Subsection 55(6) however is limited to where an award or agreement includes items permitted by ss.55(4) or (5) which give:

“55(6) ... 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:” (emphasis added).

8. Subsection 55(6) does not operate where the NES provision does not provide an “employee entitlement” such as for example, ss.91(1).
9. The ability for an agreement to contain provisions enabling arbitration regarding requests for flexible working arrangements is another example of where the NES wanes as dispute resolution about the issue is generally not available.
10. ABI submit¹² that ss. 93(4):

93(4) A modern award or enterprise agreement may include terms otherwise dealing with the taking of paid annual leave

Is a “**machinery**” term and cannot be the source of Clause 34.2 of the Award.

11. Sub-Section.142 (2) of the Act provides:

“142(2) A modern award may include machinery terms, including formal matters (such as title, date or table of contents).

12. If ss.93(4) was a “machinery term” it would be otiose as ss.142(2) does that work. There is nothing within the Act that narrowing the operation of ss.93(4) in the manner ABI advances.

¹⁰ Ibid pp34-35

¹¹ Ibid @ paragraph 3.6

¹² Ibid @ 4.1(c)

13. Sub-section 93(4) is more than capable of supporting an award provision enabling the taking of annual leave in advance of its accrual.. The Explanatory Memorandum¹³ is clear that s.93(4) contemplates award provisions dealing with leave in advance:

383. Subclause 93(4) enables an award or agreement to include other terms about the taking of paid annual leave – e.g., the taking of paid annual leave in advance of accrual.

14. ABI concede that the leave in advance benefit of Clause 34.2 is supplementary and beneficial.¹⁴ ABI also submit that the latter part of the clause's reference to the requirement for 12 months service before additional leave can be taken is not supplementary within the meaning of s.55(4).

15. The ABI's submission in effect supports the AMWU's submission¹⁵ that the benefit to employees provided by the supplementary entitlement to leave in advance of accrual be maintained and be expressed in a form no less beneficial than the NES. Such an outcome is found at Clause 41.7 of the Manufacturing and Associated Industries and Occupations Award 2010 and supports our earlier submission that these provisions replace the current confusing and NES inconsistent expression found at Clause 34.2 of the Award.

AIG Submission 23 January, 2015

16. The AIG submissions of 26 September and 15 October, 2015 address Clause 34.2 of the Award. The AIG's submission of 23 January, 2015 does not include further submission going to this matter.

17. Our earlier submissions have addressed issues previously raised by the AIG. We note however that the submission of the AIG that Section 93(4) permits an award to include

¹³ The Parliament Of The Commonwealth Of Australia House Of Representatives **Fair Work Bill 2008** Explanatory Memorandum; page 62

¹⁴ Ibid @ 4.1(g).

¹⁵ AMWU 23 January, 2015 submission at paragraphs 10-11

terms that deal with the taking of annual leave and that Clause 34.2 is such a term¹⁶ envisaged by s.93(4). We support the AIG on this point and note that the AIG submission contradicts the ABI submission that the Clause is not permitted by subsection 55(2) as *“section 93(4) does not ‘expressly’ permit an arrangement as set out in Clause 34.2.”*¹⁷.

18. In effect the AIG submission is that the content of a clause enabled by s.55(2) does not have to be “expressed” line by line within Part 2-2 but must fall within the scope of an expressly permitted provision within Part 2-2.

Airport Employees Award 2010 - Clause 31.10; Manufacturing and Associated Industries and Occupations Award 2010 (Manufacturing Award) Clause 41.9; Food, Beverage and Tobacco Manufacturing Award Clause 34.10, Seafood Processing Clause 27.10, and Timber Industry Award Clause 33.9 (the Award clauses)

Annual Leave - Alleged Inconsistency regarding recognition of service on transfer of employment

19. The AMWU addressed this matter in our submission of 23 January, 2015.¹⁸ Unlike other alleged NES inconsistencies, this matter has not been identified by the FWO.
20. Our submission is that the award provisions supplement the NES as provided by ss.55(4) and/or are provisions capable of being included in an award pursuant to ss.55(2).

Does s.55 (4) enable the award clauses?

21. The award provisions allow transferring employees to continue accessing their accrued annual leave entitlement at a time chosen to meet their personal circumstances rather than being dictated by commercial decisions of their employers, old and/or new.

¹⁶ AIG Submission 15 October, 2015 at paragraph 2.6

¹⁷ ABI Submission 27 January, 2015 at paragraph 4.1(h)

¹⁸ Ibid @ paragraphs 12-20

- 22.** The Fair Work Act 2009 introduced a new schema for the timing of taking annual leave. Prior to the Act the Metal, Engineering and Associated Industries and Occupations Award 1998¹⁹ clauses enabled an employer to fix the time when a employee took leave and direct an employee to take their leave.
- 23.** The supplementary award clauses reflect the Act's purpose at s.88 that the timing of taking leave is a matter to be agreed upon by the employer and employee. The parties agreed at the making of the modern awards that the provisions were appropriate in the context of the particular modern awards.
- 24.** In the Manufacturing Award the subject clause was agreed by the parties and included in their draft modern award.²⁰.

6.1.8 Transmission of business (AGREED)

Where a business is transmitted from one employer to another, the period of continuous service that the employee had with the transmitter shall be deemed to be service with the transmittee and taken into account when calculating annual leave. However an employee shall not be entitled to leave or payment in lieu for any period in respect of which leave has been taken or paid for.

- 25.** The employers have not presented a persuasive case regarding an inconsistency with the NES. Their case does not supporting a departure from the consent arrangements which were subsequently endorsed by Fair Work Australia.
- 26.** The AMWU has previously submitted that the award clauses are supplementary to s.91(1) and are therefore supported by ss.55(4).

¹⁹ AP789529CRV; Clause 7.1.9

²⁰

http://www.airc.gov.au/awardmod/databases/metal/Draft/AiGroup_draft_manufacturing_award_version2.pdf @ Clause

27. The Award provisions are not detrimental to an employee in any respect when compared to the national employment standard as the provisions:

* do not detract or diminish the quantum of leave (ss.87 (1))

* do not detract or diminish accrual arrangements (ss.87 (2)); and

* support employee choice regarding the timing of taking. annual leave, maintaining the policy position behind ss.88(1).

28. Sub-section 55(7) establishes that award provisions permitted by ss.55 (4) or (5) do not contravene ss.55 (1). The award clauses meet the ss.55(4) tests and therefore do not contravene ss.55(1).

Does ss.55 (2) support the inclusion of the award provisions?

29. Sub section 55(2) provides that modern awards may include any term that the award is expressly permitted to include:

a. By a provision of Part 2-2 (which deals with the National Employment Standards); or

b. By regulations made for the purpose of s.127.

30. As argued above an expressly permitted award term does not have to be one provided for verbatim in Part2-2 but be one capable of falling within an expressly permitted provision of that Part..

31. Sub-section 55(3) provides that if a term is enabled by s.55(2) the National Employment Standards have effect subject to the enabled award terms.

32. Part 2-2 Division 6 – Annual Leave, ss.93(4) provides that awards may include terms about taking annual leave:

ss.93(4) A modern award or enterprise agreement may include terms otherwise dealing with the taking of paid annual leave.

33. The award provisions are terms enabling annual leave to be taken and are therefore terms “dealing with the taking of annual leave”. The provisions enable annual leave to be taken at a time agreed pursuant to s.88(1). Absent the award provisions, annual leave would not be able to be taken where leave was required to be cashed out by a new employer refusing to recognise service under s.91(1).

34. The award provisions fall within a matter permitted by ss.52(2) and consequently s.53 subjects s.91(1) to the award provisions. The subjugation resolves any alleged inconsistency.

The ABI Submission of 27 January 2015

35. ABI argue that the subject Award clauses are inconsistent with ss.55 (1) as they exclude a provision of the NES, that is s.91(1)²¹. The AMWU, AWU and CFMEU argue that the Award clauses are supplementary to s.91 (1) pursuant to ss.55(4) or covered by ss.55(2).

36. The Award Clauses do not expressly exclude s.91 (1). The clauses attract the operation of s.55(7) and are therefore not inconsistent or constrained by s.55(1) to the extent the effect of the award clauses are not detrimental to an employee in any respect, when compared to the National Employment Standards.

37. The ABI traverse s.55, the interaction between modern awards and the NES at paragraph 3 of their submission. The ABI’s review of s.55 does not however include the work of ss.55(7). Subsection 55(7) provides that award terms permitted by ss.55(4) and ss.55(5) do not contravene ss.55(1).

38. ABI argue²² that the award provisions are not supplementary as they do not provide an additional benefit. The award provisions do supply an additional benefit and that benefit is the retention of a choice to take annual leave rather than leaving it to another’s decision in the context of s.91(1). Choice is beneficial. It is accepted that the

²¹ ABI Submission 27 January 20105 @ 4.3(e)

²² Ibid @ 4.3(i)

ability to make choices and have a level of control over one's work and work environment is associated with increased employee satisfaction and reduced stress.

- 39.** The ABI misconstrue s.91 (1) and the award clause. The section does not concern “the transfer of *“annual leave accrual or the “automatic pay-out of the equivalent value²³”*” Section 91 concerns the recognition or otherwise of an employee's service. The additional (supplementary) benefit provided by the Award Clause is to have service recognised. For example, a second employer could determine to recognise service with the first employer. That decision would not result in the second employer's obligation to pay accrued annual leave if the first employer made an agreement with the transferring employee for the employee to take leave prior to transferring, regardless of the second employer's decision under s.91.
- 40.** The above outcome is manifest in the award provision where recognition of service by the second employer is an employee entitlement however there is no entitlement to annual leave or payment in lieu thereof where leave has been taken or paid²⁴.

The AIG Submission of 23 January, 2015

- 41.** The AIG submit²⁵, consistent with ABI, that the award clauses exclude a provision of the NES and are therefore contrary to s.55 (1). We have argued above that recognition of service is a beneficial supplementation to s.91. The provisions fall within the ambit of ss.55 (4) and/or ss55(2) via ss.93(4).
- 42.** The award provisions also fall within the matters prescribed at s.136 (1) - *What can be Included In modern awards.*
- 43.** Section 136(1) contains the specific note that:

²³ Ibid

²⁴ For example Clause 41.9 of the Manufacturing and Associated Industries and Occupations Award 2010.

²⁵ Aig Submission @ 4.4

Note 1 Subsection 55(4) permits inclusion of terms that are ancillary or incidental to, or that supplement the National Employment Standards.

44. Conversely, if the legislation intended that the matters prescribed in s.91(1) never be the subject of Award prescription as argued by AIG²⁶, then recognition of service on transfer would have been a matter specifically excluded under s.136(2)- *Terms that must not be included* and subdivision D of Part 2-3. If the legislative intent was to prevent the award provisions from gracing modern awards then the award provisions could have been excluded by regulation under s.127.
45. The AIG submit²⁷ that the absence of an award provision within the NES expressly permitting an award to include terms dealing with a transfer of business or recognition of service means that the award provisions cannot fall within the ambit of s.55(2). We have addressed that issue at paragraphs 12 and 16-18 above. The AIG apply a narrow construction to the term “expressly permitted” at s.55 (2) when no such construction is warranted. The AIG’s construction narrowing the term “expressly permitted” is inconsistent with their earlier views regarding annual leave in advance.
46. “Expressly permitted” at ss.55(2) does not require that the subject detail of the award provision be expressed in a provision of Part 2-2 but that the award provision falls within a subject “expressly permitted” under that Part. The language of ss.93(4) is very broad:

ss.93(4) A modern award or enterprise agreement may include terms otherwise dealing with the taking of paid annual leave

The “otherwise” in this context includes **all** matters related to the taking of annual leave other than those covered elsewhere in s.93. Award provisions enabling leave to be taken in advance are within the scope of ss.93(4). Enabling annual leave to be taken as opposed to being paid out is surely a *matter “ otherwise dealing with the taking of paid annual leave”*.

²⁶ Ibid @ 4.12-13

²⁷ Ibid @ 4.1.13

47. The AIG argue that the award provisions effectively remove the capacity for the second employer to avoid liability for annual leave. Liability could be avoided where the first employer and transferring employee agree for the employee to take accrued leave prior to or at the time of transfer. In those circumstances no liability arises for the second employer. The first and second employers have the opportunity to make arrangements regarding liability.
48. The AIG submit²⁸ that additional technical problems flow as the award provisions operate in the absence of any award provision comparable to s.90(2). The AIG argue that there is nothing in the Award to prevent a “double dip”. The submission is not correct as Clause 6 of the Manufacturing Award identifies that the “NES and the award” contain the minimum conditions.
49. The NES at s.22(6) specifies that a benefit may not be counted twice. The provision at s.91 (2) is also clear that where service is recognised by the second employer s.90(2) does not operate to provide a “double dip”. The AIG has successfully argued that Clause 6 of the Award captures the rights and obligations for both employees and employers.²⁹ under the Award and the NES. AIG should not be concerned however their concern is easily resolved by making s.91 (2) manifest in the Award.

END

²⁸ Ibid @ 4.14 -4.15

²⁹ [2014] FWCFB 9412 @ 23-24