**Response to Question on Notice: Interaction Rules and entitlements derived from s. 113 of the *Fair Work Act* 2009.**

1. The *Fair Work* Act 2009 (“the Act”) establishes a national workplace relations system in large measure in reliance on the legislative power of the Commonwealth Parliament to regulate Corporations and the legal relationships that Corporations enter into[[1]](#footnote-1). However, the Commonwealth’s occupation of the field of workplace relations law is not absolute and exclusive. Sections 26 and 27 of the Act are relevant to ascertaining its extent, but are not a complete statement of it.

The scheme of sections 26 and 27 of the Act

1. Section 26 is an express statement of an intention to cover a field, of the type approved more than half a century ago by the High Court in *Wenn v. Attorney General Victoria[[2]](#footnote-2).* Ideally, it relieves the Court of the need to search from some operative indirect inconsistency or discern an intention of the extent of the field sought to be covered from other provisions of the Commonwealth law in question. By expressly describing the Commonwealth law as exclusive in some respect (in this case, in respect of "State or Territory industrial laws" in so far as they would otherwise apply to national system employees or national system employers), section 109 of the Constitution is engaged even where no inconsistency would otherwise exist.
2. Section 27 of the Act sets out the exceptions to the field of exclusivity set out in section 26. The manner in which the two sections work together is far from novel. The general framework of such legislative provisions was described by Mason J in *R v. Credit Tribunal; Ex parte General Motors Acceptance Corporation[[3]](#footnote-3)*as follows:

[after referring to *Wenn*] "The judgements to which I have referred make the point that although a provision in a Commonwealth statute which attempts to deny operational validity to a State law cannot of its own force achieve that object, it may nevertheless validly evince an intention on the part of the statute to make exhaustive or exclusive provision on the subject with which it deals, thereby bringing s. 109 into play.

Equally, a Commonwealth law may provide that it is not intended to make exhaustive or exclusive provision on the subject with which it deals, thereby enabling State laws, not inconsistent with Commonwealth law, to have an operation. Here again the Commonwealth law does not of its own force give State law a valid operation. All that it does is to make it clear that the Commonwealth law is not intended to cover the field, thereby leaving room for the operation of such State laws as do not conflict with Commonwealth law.

It is of course now well established a provision in a Commonwealth statute evincing an intention that the statute is not intended to cover the field cannot avoid or eliminate a case of direct inconsistency or collision, of the kind which arises, for example, when Commonwealth and State laws make contradictory provision upon the same topic, making it impossible for both laws to be obeyed. In *Reg. v. Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338, at pp 346-347, I pointed out that such a provision in a Commonwealth law cannot displace the operation of s. 109 in rendering the State law inoperative. But where there is no direct inconsistency, where inconsistency can only arise if the Commonwealth law is intended to be an exhaustive and exclusive law, a provision of the kind under consideration will be effective to avoid inconsistency by making it clear that the law is not intended to be exhaustive or exclusive."

1. It is to be noted from the above that there is a middle ground between the Commonwealth covering the field exclusively, and vacating the field entirely in favour of the exclusive operation of State law - which is allowing section 109 do its work where an inconsistency arises. In the areas of exclusion identified by section 27, that is precisely the position (as is alluded to by section 30).

Long Service Leave and “the field”

1. We have located only one decision that deals with the treatment of long service leave under the scheme established by sections 26 and 27. In *Armacell* *Australia Pty Ltd & Ors[[4]](#footnote-4)*, a Full Bench of Fair Work Australia, as it then was, said as follows:

“It is necessary to summarise some aspects of the manner in which long service leave is regulated in Australia. [Section 26](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s26.html) of the [Fair Work Act](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/) provides that it applies to the exclusion of State and Territory industrial laws. It is not necessary to set the section out. [Section 27](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s27.html), however, provides that a number of State and Territory laws are not excluded by [s.26.](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s26.html) In particular [s.27(1)(c)](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s27.html) provides that State and Territory laws in relation to specified “non-excluded matters” are not excluded. [Section 27(2)(g)](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s27.html) deals with long service leave. It reads:

“State and Territory Laws that are not excluded by [Section 26](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s26.html)

... ...

(2) The *non-excluded matters* are as follows:

... ...

(g) long service leave, except in relation to an employee who is entitled under Division 9 of [Part 2](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/index.html#p2)-[2](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/index.html#p2) to long service leave;

... ...”

In order to ascertain whether an employee is entitled to long service leave under Division 9 of [Part 2](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/index.html#p2)–[2](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/index.html#p2) it is necessary to have regard to  [s.113.](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s113.html)   [Section 113](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s113.html) , which is in Division 9 of [Part 2](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/index.html#p2)–[2](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/index.html#p2), provides in part that a long service leave provision in a federal award or State reference transitional award that was in operation immediately before 1 July 2009 or, for a Division 2B State reference employee, immediately before 1 January 2010, is preserved for the benefit of an employee.

While the relevant terms of [ss.26](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s26.html) and [27](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s27.html) are cast in the negative, it is clear enough that the NES does not create a general entitlement to long service leave. The position can be contrasted with that applying in relation to annual leave where the NES contains a standard which applies to all employees. Speaking generally, where an employee would have had an entitlement to long service leave under a federal award if that award had continued to apply there is an entitlement under the [Fair Work Act](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/). All other cases are governed by the relevant State legislation. State long service leave laws are not excluded by the operation of the [Fair Work Act](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/) unless an employee is entitled to long service leave in accordance with a relevant federal award or State reference transitional award operating immediately prior to 1 July 2009 or 1 January 2010 as the case may be.”[[5]](#footnote-5)

1. It appears that in *Armacell*, the definition by section 27(2)(g) of “long service leave, except in relation to an employee who is entitled under Division 9 of Part 2-2 to long service leave” as a “non-excluded matter” was taken, in the absence of any indication that it was matter of argument, as being determinative of the issue of whether or not (and the extent to which) State long service leave laws were excluded by the field marked out by the Commonwealth. With respect, such an analysis in our view may fail to appropriately construe the introductory words of section 27(1), which identifies the laws that “Section 26 does not apply to…”. In our view, it is arguable that section 27(1) only sets out exceptions to the rule established by section 26. Accordingly, an identification of the relevant “field” ought to begin with an examination of whether State long service leave laws are captured by section 26 as laws that the Act “..is intended to apply to the exclusion of”.
2. Section 26(2)(c) gives a rather strong indication that State long service leave laws were not intended to fall within the description of laws that the Act “..is intended to apply to the exclusion of” in that it identifies “a law of a State or Territory that applies to employment generally and deals with leave (other than long service leave or leave for victims of crime)” as one of the many categories of excluded laws. None of the other types of laws described in paragraphs 26(2)(d)-(h) capture State or Territory Long Service Leave Laws. Nor could such laws be said to be have as a “main purpose” any of the matters listed in sub-paragraphs 26(2)(b)(i)-(vi). The closest those sub-paragraphs come to capturing such laws is sub-paragraph (iii), however whilst such laws provide a term or condition of employment (long service leave) and for its enforcement, they do not provide “for the establishment” of that term or condition. Other language, used in other sub-paragraphs and not used in sub-paragraph(iii), is more apt to describe a law that directly prescribes a term or condition or right such as “regulating” (in (i)), “prohibiting conduct” (in (iv)) and “providing for rights” (in (v) and (vii)). [[6]](#footnote-6)
3. We recognise that the above analysis leaves section 27(2)(g) with no obvious work to do, except perhaps in conjunction with section 29(2)(b). We nonetheless believe our analysis to be correct. In the result, sections 26 and 27 are ineffective at marking out a field that either includes or excludes State and Territory long service leave laws.

Section 113

1. Section 113 was set out in the background paper and we do not set it out in full here. For present purposes we highlight that it provides that where there are “applicable award derived long service leave terms”, an employee “is entitled to long service leave in accordance with those terms”. Taken on its own, such a statement might be considered sufficient to mark out a field of Commonwealth regulation, if not create the conditions for a direct inconsistency wherein a State long service law would invariably “alter, impair or distract from the operation”[[7]](#footnote-7) of section 113. Indeed, in the matter of *Maughan Theim Auto Sales v. Cooper[[8]](#footnote-8),* referred to in the MTA organisations’ submissions, the Court approached the issue on the assumption that either section 113 would apply, or State law would apply, but not both:

“It was common ground that, if s 113(3)(a) applied, then the State Act did not govern Mr Cooper’s long service leave claim. In other words, Mr Cooper was entitled to long service leave under the State Act only if there were no “applicable award-derived long service leave terms” (as defined in subsection (3)) that related to him. Consequently, the question below was whether s 113(3)(a) applied to him. To answer that question it was necessary to decide first, whether there was an award containing terms which would have applied to Mr Cooper immediately before Part 2-2 of the Act commenced and secondly, whether the terms of that award would have entitled him to long service leave. Maughan’s case was that there are terms in the LSL award that would have applied to Mr Cooper at the test time and that would have entitled him to long service leave. Consequently, Maughan contended that the State Act did not govern Mr Cooper’s long service leave claim.”[[9]](#footnote-9)

The same approach is evident from the final paragraph in the extract from *Armacell* above.

1. However, section 113 ought not be considered in isolation. It forms part Division 9 of Part 2-2 of the Act and therefore forms part of the National Employment Standards[[10]](#footnote-10). Of the National Employment Standards, section 61 relevantly says:

“61(1) This Part sets minimum standards that apply to the employment of employees which cannot be displaced, even if an enterprise agreement includes terms of the kind referred to in subsection 55(5)

(2) The minimum standards relate to the following matters:

…..

(g) long service leave (Division 9)” (emphasis added)

1. Once section 113 is correctly understood as prescribing a minimum standard, it cannot be contended that it is intended to operate entirely to the exclusion of State laws where they provide a greater benefit. Nor could the impossibility of simultaneous obedience conceivably arise where the Commonwealth law clearly and unambiguously states that it is concerned only with prescribing a minimum standard rather than a mandatory prescription or prohibition of particular conduct.
2. A conclusion that section 113 does operate mandatorily to the exclusion of State long service leave laws would require, as a pre-condition, discerning an intention that section 113 is a statement of “minimum long service leave standards” intended to apply to the exclusion of the entirety of any State law that also contained “minimum long service leave standards”. If that were the intention, one would have expected:
   1. that section 26 would entirely capture such laws to begin with, rather than ensuring in section 26(2)(c) that they were not captured at all;, and
   2. that section 27 would contain an exclusion to support the application of State laws to persons who did not have either “applicable award derived long service leave terms” or “applicable agreement derived long service leave terms”.

Doing only the later, as explained in the previous section, is meaningless and ineffective.

1. A consequence of the interpretation we provide at paragraph 11 above is that it may be rather difficult to ascertain, for any given employee to who section 113(1) applies:
   1. what their entitlements are;
   2. which law those entitlements arise under; and
   3. which law those entitlements may be enforced under

given the variability in accrual rates, the level of accrual before leave may be taken and the restrictions on the “blocks” in which leave may be taken. For example, the NES would apply and be enforceable where the “applicable award derived long service leave terms” provided for an accrual rate that was more beneficial than the State legislation, however the employee would retain any rights they may have under the State legislation to insist on payment on termination at earlier time than the “applicable award derived long service leave terms” allow for. Such is the consequence the Commonwealth minimum standard prevailing to the extent of any lesser standard in the State law.

1. The complexity of this outcome rather suggests that the Commonwealth ought to place a greater priority on devising a National Long Service Leave scheme than was evident from its submission.

ACTU

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1. *NSW v. the Commonwealth* [2006] HCA 2 at [198]. [↑](#footnote-ref-1)
2. [1948] HCA 13 [↑](#footnote-ref-2)
3. [1977] HCA 34 [↑](#footnote-ref-3)
4. [2010] FWAFB 9985 [↑](#footnote-ref-4)
5. At [24]-[26] [↑](#footnote-ref-5)
6. See also *Endeavour Coal Pty Ltd v. CFMEU* [2007] FCAFC 177 at [65] [↑](#footnote-ref-6)
7. *Victoria v. the Commonwealth* [1937] HCA 82 per Dixon J. [↑](#footnote-ref-7)
8. [2014] FCAFC 94 [↑](#footnote-ref-8)
9. At [29] [↑](#footnote-ref-9)
10. S.61(3) [↑](#footnote-ref-10)