Ai GROUP SUBMISSION

Fair Work Commission

Annual Wage Review 2016-2017
Preliminary Hearing
Reply Submission Regarding Questions on Notice

2 November 2016

Preliminary Hearing

Reply Submission Regarding Questions on Notice

Introduction

This Reply Submission responds to the ACTU's submission of 28 October 2016 regarding Questions on Notice from the Preliminary Hearing. In that submission, the ACTU expressed views on the construction of ss.26, 27 and 113 of the *Fair Work Act 2009* (**FW Act**) and their interaction with State and Territory long service leave laws.

The nature and effect of s.26 of the FW Act

Ai Group agrees with the ACTU that s.26 of the FW Act is an express statement of an intention to cover the field.

Section 26 of the FW Act is similar in structure and broad intent to s.16(1) of the *Workplace Relations Act 1996* (**WR Act**) as varied by the *Work Relations Amendment (Work Choices) Act 2005*.

In *New South Wales v Commonwealth* ("The Work Choices Case"),[1] Gleeson CJ Gummow, Hayne, Heydon and Crennan J, in upholding the validity of s.16(1) of the WR Act, stated: (emphasis added and footnotes omitted)

> 359. Hence s 16(1) on its true construction is limited to the exclusion of State and Territory laws so far as they would otherwise apply to an employee or employer, defined by reference to the heads of constitutional power referred to in pars (a)-(f) of the definition of "employer" in s 6(1).
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> 369. *The Commonwealth's arguments.* The Commonwealth specifically declined to contend that if a Commonwealth law simply sought to exclude State law in a field and made no provision whatever on the same subject-matter it was within power. The Commonwealth contended rather that it was open to the Commonwealth Parliament to indicate the relevant field it intended to cover to the exclusion of State law, that s 109 would then operate even though the Commonwealth had not made its own detailed provisions about every matter within that field which State law dealt with, and that it sufficed for the Commonwealth to have some provisions dealing with aspects of the field, leaving others unregulated. The Commonwealth submitted that the relevant field was to be identified, not by reference to the areas regulated by State law, but by reference to the terms of the Commonwealth law. It was concluded above that the Commonwealth has power to regulate the relationships between employees and employers as defined in ss 5(1) and 6(1) by reliance on the heads of power referred to in pars (a), (e) and (f) of the definition of "employer" in s 6(1). The Commonwealth submitted that it was open to the Parliament to identify the rights and obligations arising out of those relationships of employees and employers as a field, and to indicate an intention to cover that field (or, as here, part of it, because of the limitations to s 16(1) and the operation of s 16(2) and (3)). On

[1] [2006] HCA 52

the construction of s 16(1) accepted above, the Commonwealth chose to exclude State law only in respect of the relations of employees and employers as defined in ss 5(1) and 6(1).

370. *No bare attempt to limit or exclude State legislative power.* The Commonwealth's submissions are to be preferred. Western Australia pointed to nothing in s 109 itself or in the case law on s 109 suggesting that s 109 will not cause Commonwealth law to prevail over an inconsistent State law and render it invalid to the extent of the inconsistency unless the Commonwealth law provides some regime for regulating each particular aspect of the topics dealt with by the State law. Rather, as Dixon CJ put it in *Lamshed v Lake*, the distinction is between a law which lays down a positive rule and a law "seeking rather to limit State power". Section 109 may operate where the Commonwealth chooses to enact a scheme involving a more detailed form of regulation than State law provides. Equally, s 109 may operate where the Commonwealth creates a scheme involving less detailed regulation than State law provides. And s 109 may operate where the Parliament has done what it has in the new Act - to provide a more detailed scheme than State law in some respects and a less detailed scheme in other respects. The Commonwealth has legislated to provide a detailed set of rules for particular agreements; it has not dealt, for example, with unfair contracts except in relation to independent contractors, but that does not preclude it from defining a field of relationships between s 5(1) employees and s 6(1) employers, and occupying parts of that field, like unfair contracts, to the exclusion of State law.

371. Section 16 of the new Act strongly resembles s 24(2) of the *Re-establishment and Employment Act 1945* (Cth). It relevantly provided:

> "The provisions of this Division shall apply to the exclusion of any provisions, providing for preference in any matter relating to the employment of discharged members of the Forces, of any law of a State, or of any industrial award, order, determination or agreement made or filed under or in pursuance of any such law ..."

Section 27(5)(a) provided that there was to be no preference in relation to promotion for discharged servicemen already employed by an employer. In *Wenn v Attorney-General (Vict)* the defendant advanced the argument which Western Australia has advanced in this case:

> "[T]he doctrine of 'covering the field' applies only where the Commonwealth Parliament has itself made some positive provision with respect to a particular subject with which provision any State law on that subject would be inconsistent. Section 27(5)(a) excludes the application of any preference in promotion by virtue of the Federal Act. It does not make any positive provision with respect to promotions. The defendant argues that therefore the field is free for the States, the Commonwealth Parliament not having provided any law with respect to promotions, so that s. 109 of the Commonwealth Constitution cannot apply so as to render any State law inoperative."

The Court unanimously rejected that argument. Latham CJ (with whom McTiernan J agreed) said:

> "Section 24(2) is a provision prescribing the area within which Federal law, as enacted in the Act, is to apply to the exclusion of State law in respect of a subject as to which the Commonwealth Parliament has full legislative power. ....
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> It is ... within Federal legislative power to prevent the operation of separate and possibly varying State enactments dealing with the same subject."

Dixon J (with whom Rich J agreed) said:

> "Section 24 and s. 27 ... justify the conclusion that, on the one hand, the Federal Parliament intended to define the extent to which the duty to give preference should go and to do it so as to exclude promotion, and, that on the other hand, it intended to provide in this and other respects what would be the only rule upon the subject and so would operate uniformly and without differentiation based on locality or other conditions. In this Court it is far too late to contend that s. 109 does not invalidate State law which in such a state of affairs carries the regulation of the same matter further than the Federal legislation has decided to go. This is

> a case where the Federal legislation undertakes a regulation or statutory determination of the very subject and then goes on to express an intention that it shall be an exhaustive declaration of the law on that particular subject."

Dixon J then said:

> "To legislate upon a subject exhaustively to the intent that the areas of liberty designedly left should not be closed up is ... an exercise of legislative authority different in kind from a bare attempt to exclude State concurrent power from a subject the Federal legislature has not effectively dealt with by regulation, control or otherwise."

He said there was "a debatable area where Federal laws may be found that seem to be aimed rather at preventing State legislative action than dealing with a subject matter assigned to the Commonwealth Parliament". But he concluded that the federal Act was "well within the line".

372. The similarity of the statutory position in that case to that in the present case makes the reasoning directly applicable. *Wenn* has been cited with approval in many cases including *Botany Municipal Council v Federal Airports Corporation*, *Western Australia v The Commonwealth* (*Native Title Act Case*) and the *Industrial Relations Act Case*. Western Australia did not contend that any of these cases should be departed from. It follows that Western Australia's second challenge to the validity of s 16 must fail.

More recently, in *Jemena Asset Management (3) Pty Ltd v Coinvest Limited*[2] the High Court considered whether the *Construction Industry (Long Service Leave) Act 1997* (Vic) was inconsistent with long service leave provisions in a number of federal industrial instruments under the WR Act. Importantly, the Respondent (CoINVEST – the administrator of the Victorian Construction Industry Portable Long Service Leave Fund) argued that the State Act did not provide any entitlements to actual long service leave or payment in lieu of long service leave; it simply required that employers pay a levy to a Fund and provided for employees to be paid monies out of the Fund. In their unanimous judgment, French CJ, Gummow, Heydon, Crennan, Kiefel and Bell J said: (emphasis added and footnoted omitted)

Reasoning in the courts below

30. It was common ground throughout the proceedings that the inconsistency alleged by the appellants was said to arise between the State Act and the applicable provisions of the Commonwealth Act, as embodied in the federal instruments, and the separate questions were framed accordingly.

31. The primary judge's answer to each of the separate questions concerning the existence of any inconsistency was "No" reflecting his views that the scheme under the State Act did not alter, impair or detract from the operation of the federal instruments or enter the field intended to be covered by them. In particular, his Honour considered that nothing in the federal instruments indicated that they were intended to cover the subject matter of the State Act scheme, namely "portable long service leave in the construction industry funded by way of a charge ... and paid out of a fund."

32. On the question of whether the State Act scheme altered, impaired or detracted from the operation of the federal instruments (and, therefore, the Commonwealth Act), the Full Court of the Federal Court found that the duty imposed on particular employers under the State Act scheme did not conflict with that imposed by the federal instruments, nor did the former regime deny or vary any right, power or privilege conferred by the latter. Their Honours agreed with the primary judge that the State Act and the federal instruments "co-exist in harmony such that each of them may be considered supplementary to or cumulative upon the other".

[2] [2011] HCA 33

33. The Full Court of the Federal Court also agreed with the primary judge that the Fund rules "fundamentally provide[d] for the entitlement to be paid monies out of the [F]und, and not the entitlement for actual long service leave or payment in lieu." This, in turn, determined the ambit of the entitlement to long service leave under s 6(1) of the State Act by virtue of the interpretative rule contained in s 3(2). In the Full Court's view, the primary entitlement afforded under the Fund rules could be characterised as a Long Service Leave Benefit, defined in r 1.1 as an entitlement to be paid out of the Fund in accordance with the Fund rules. Although the amount of this entitlement was expressed in certain circumstances as a period of leave – for example, the entitlement to 13 weeks' leave "on Ordinary Pay" under r 27.2(a) – nevertheless the respondent's only obligation under the Fund rules was to make payments from the Fund upon receipt of a request for a long service leave benefit.

34. The Attorney-General of the Commonwealth intervened in this appeal pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the respondent, asserting the lack of inconsistency.

35. For the reasons which follow, the respondent's submissions on the validity of the State Act must be accepted and the appeal should be dismissed.

Applicable principles

36. The paramountcy of the Parliament of the Commonwealth under the Constitution resolves any conflict between Commonwealth and State law as set out in covering cl 5 and s 109 of the Constitution:

> "5 This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and every part of the Commonwealth, notwithstanding anything in the laws of any State ...
>
> 109 When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

37. Quick and Garran describe s 109 as "practically a corollary" of ss 106, 107 and 108 of the Constitution which deal respectively with the saving of State Constitutions, powers of State Parliaments and State laws, all of which are made subject to the Constitution. In the context of the law-making powers of the State and Commonwealth Parliaments under their respective Constitutions, s 109 requires a comparison between any two laws which create rights, privileges or powers, and duties or obligations, and s 109 resolves conflict, if any exists, in favour of the Commonwealth.

38. The expressions "a law of the State" and "a law of the Commonwealth" in s 109 are sufficiently general for s 109 to be capable of applying to inconsistencies which involve not only a statute or provisions in a statute, but also, as mentioned, an industrial order or award, or other legislative instrument or regulation, made under a statute.

39. Applicable principles have been reiterated in the joint reasons of the whole Court in *Dickson v The Queen*:

> "The statement of principle respecting s 109 of the Constitution which had been made by Dixon J in *Victoria v The Commonwealth* [('the *Kakariki Case*')] was taken up in the joint reasons of the whole Court in *Telstra Corporation Ltd v Worthing* as follows:
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> > 'In *Victoria v The Commonwealth*, Dixon J stated two propositions which are presently material. The first was: "When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid." The second, which followed immediately in the same passage, was: "Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent." ...'The first proposition is often associated with the description 'direct

> inconsistency', and the second with the expressions 'covering the field' and 'indirect inconsistency'."

40. The expression "cover the field" means "cover the subject matter", which was the description used and explained by Dixon J in *Ex parte McLean*. From the outset the aspect of inconsistency associated with the expression "covering the field" has not been free from criticism. There can be little doubt that indirect inconsistency involves "more subtle ... contrariety" than any "textual" or "direct collision" between the provisions of a Commonwealth law and a State law.

41. The crucial notions of "altering", "impairing" or "detracting from" the operation of a law of the Commonwealth have in common the idea that a State law conflicts with a Commonwealth law if the State law undermines the Commonwealth law. Therefore any alteration or impairment of, or detraction from, a Commonwealth law must be significant and not trivial.

42. Although the utility of accepted tests of inconsistency, based on recognising different aspects of inconsistency for the purposes of s 109, is well established as Mason J observed in *Ansett Transport Industries (Operations) Pty Ltd v Wardley*, it is not surprising that different tests of inconsistency directed to the same end are interrelated and in any one case more than one test may be applied in order to establish inconsistency for the purposes of s 109. All tests of inconsistency which have been applied by this Court for the purpose of s 109 are tests for discerning whether a "real conflict" exists between a Commonwealth law and a State law.

43. The appellants' case incorporated the language of the two propositions of Dixon J set out above and involved asserting the existence of both direct and indirect inconsistency between the Commonwealth Act as embodied in the federal instruments and the State Act.

44. With concurrent federal and State powers, the question of inconsistency does not involve the limits of constitutional powers under the respective Constitutions, but rather the operation of both Acts. As explained by Dixon J in *Wenn v Attorney-General (Vic)*:

> "There is no doubt great difficulty in satisfactorily defining the limits of the power to legislate upon a subject exhaustively so that s 109 will of its own force make inoperative State legislation which otherwise would add liabilities, duties, immunities, liberties, powers or rights to those which the Federal law had decided to be sufficient. ...
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> [W]hile s 109 invalidates State legislation only so far as it is inconsistent, the question whether one provision of a State Act can have any operation apart from some other provision contained in the Act must depend upon the intention of the State legislation, ascertained by interpreting the statute."

45. Similarly, in *Western Australia v The Commonwealth* (*Native Title Act Case*) it was recognised that the extent of any inconsistency "depends on the text and operation of the respective laws." A proper understanding of the policy and purpose of the State Act underpins the task of construing it and identifying its operation.

46. Because it was accepted by all parties that the 1998 Award covered employee entitlements and correlative employer obligations in respect of the grant of, and payment for, long service leave, the respondent conceded by reference to *Wenn*, that if, and to the extent that, the State Act scheme dealt with the grant of long service leave it would operate inconsistently with the federal instruments.

Given the similarity between s.16(1) of the WR Act and s.26 of the FW Act, the abovementioned High Court decisions are very relevant in understanding the intent and construction of s.26.

As an aside, given that the High Court upheld CoINVEST's argument that the *Construction Industry (Long Service Leave) Act 1997* (Vic) is not a law about long service leave (given that it does not provide an entitlement to any actual long service leave or payment in lieu of long service leave), ss.26 and 27 in the FW Act do not have any relevance in relation to such a State law. If an enterprise agreement included a provision about such a State law, the interaction rule in s.29(1) would apply and the enterprise agreement would override the State law to the extent of any inconsistency.

Different considerations apply under the FW Act to genuine long service leave laws which provide an actual entitlement to long service leave. For the reasons outlined below, the relevant provisions which determine the interaction between the FW Act and genuine State / Territory long service leave laws are ss.26, 27, 29 and 113.

What State and Territory long service leave laws would be excluded by s.26 were it not for the effect of s.27?

In its submission, the ACTU's argues that State and Territory long service leave laws do not fall within any of the descriptions in s.26(2)(b) to (h) and hence do not fall within any of the descriptions in s.26. The ACTU appears to have overlooked the fact that the *Industrial Relations Act 1999* (Qld) contains the main long service leave entitlements for employees in Queensland. This law is expressly identified in s.26 as a *"general State industrial law"* (s.26(1) and (3)(b)). Therefore, s.26 would exclude the Queensland State long service leave provisions were it not for s.27.

The effect of s.27, in respect of long service leave, is to prevent any State and Territory long service leave law, that would otherwise have been excluded by s.26, from being excluded. Paragraphs 27(1)(c) and (2)(g) prevent the long service leave provisions in the *Industrial Relations Act 1999* (Qld) from being excluded under s.26. Also, if any changes were made in the future to any other *"general State industrial law"* to include long service leave provisions, s.21(1)(c) and (2)(g) would operate to prevent the FW Act excluding those provisions.

With regard to the State and Territory laws that deal only with long service leave (i.e. the long service leave laws in all States and Territories other than Queensland), these are not excluded by s.26 because they do not fall within any of the descriptions of excluded laws in s.26. Accordingly, s.27(1)(c) and (2)(g) do not currently have any work to do in respect of those laws.

Does section 27 operate just as an exception to the rule established by section 26, and what does this mean for the interaction rule in s.29?

The ACTU has suggested that s.27 may operate only as an exception to the rule established by s.26. When constructed in this way, s.27(1)(c) and (2)(g) have very little work to do in respect of long service leave laws. As discussed above, currently s.27(1)(c) and 2(g) (as they relate to long service leave), only have work to do in respect of the Queensland long service leave provisions. A major consequence of this interpretation would appear to be that the interaction rule in s.29(2), which only applies to laws covered by s.27(1A) and (1), would not apply to State and Territory long service leave laws other than the Queensland laws. This would mean that enterprise agreements would

override those State and Territory long service leave laws to the extent of any inconsistency (see s.29(1)).

An alternative construction is that s.27 is to be given its full effect as a provision which identifies those State and Territory laws in their entirely that are not excluded by s.26. When considered in this way, the reference in s.27(2)(g) is not simply a reference to those State and Territory laws that fall within s.26 (i.e. the Queensland laws) but rather to all State and Territory long service leave laws. If this alternative construction is correct, s.29(2) would apply to long service leave terms in enterprise agreements and such terms would be unable to override State and Territory long service leave laws. The interaction rule in s.29(2) would of course operate subject to the qualification in s.27(2)(g) that "applicable award derived long service leave terms" under s.113 of the FW Act are not affected.

The effect of s.109 of the Australian Constitution

In its submission, the ACTU raises doubt about whether s.113 of the FW Act operates to the exclusion of State long service leave laws. Ai Group does not agree. There is no doubt that s.113 excludes State long service leave laws.

Section 109 of the Australian Constitution states:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Subsection 113(1) states that:

If there are applicable award-derived long service leave terms (see subsection (3)) in relation to an employee, the employer is entitled to long service leave in accordance with those terms.

For the purposes of s.109 of the Constitution, s.113(1) creates the relevant inconsistency with State long service leave laws and, accordingly, it is not necessary to rely upon ss.26 or 27 for this purpose.

In *Metal Trades Industry Association v Amalgamated Metal Workers' & Shipwrights Union*,[3] the High Court unanimously decided that there was inconsistency between the termination of employment provisions in the *Metal Trades Award 1971* and those in the *Employment Protection Act 1982* (NSW) and hence the State law was excluded. As stated in the joint judgment of Gibbs CJ, Wilson and Dawson JJ, the provisions of the State Act plainly interfered with the relationship of employer and employee with respect to termination of employment. For similar reasons, the metal industry long service leave provisions, which now operate as "applicable award derived long service leave terms" under s.113 of the FW Act, are inconsistent with State long service leave laws and exclude such laws.

Supplementary Explanatory Memorandum for the *Fair Work Bill 2008*

Substantial changes were made to the *Fair Work Bill 2008* during the Parliamentary process in relation to the interaction between State and Territory laws and long service leave provisions in enterprise agreements. Therefore, the commentary on long service leave matters in the main Explanatory Memorandum for the original Bill is not accurate.

[3] [1983] HCA 28; (1983) 152 CLR 632

The relevant commentary is found in the Supplementary Explanatory Memorandum for the Bill. The Supplementary Explanatory Memorandum includes the following lengthy section which explains the provisions of the FW Act which are of relevance to long service leave: (emphasis added)

"LONG SERVICE LEAVE

Item 1 – Clause 12

Item 7 – Clause 113

37. Item 7 amends the NES entitlement to long service leave. The amendment set out in this item replaces clause 113 in the Bill. Subclauses 113(1)-(3) are to the same effect as existing clause 113.

38. An employee is entitled to long service leave under clause 113 in accordance with applicable award-derived long service leave terms (subclause 113(1)).

39. This clause preserves the effect of long service leave terms in pre-modernised awards (i.e., awards as they stood immediately before commencement of the NES).

40. The legislative note after this subclause explains that the Bill does not exclude State and Territory laws dealing with long service leave, except in relation to employees entitled to long service leave under the NES.

41. To determine whether there are applicable award-derived long service leave terms, it is necessary to consider the award that would have applied to the employee's current employment if the employee had been in that employment immediately before commencement (paragraph 113(3)(a)). (This test applies to existing employees and employees that start employment after commencement of the NES.)

42. When making the assessment under paragraph 113(3)(a), the effect of the types of agreements, and other instruments, referred to in subclause 113(2) on the award-derived entitlement is ignored.

43. The fact that an employee's award-derived entitlement does not apply because of the operation of subclause 113(2) does not mean that the employee does not have an award-derived NES entitlement (and such an employee could not, for example, become covered by an agreement-derived NES entitlement under subclause 113(4)).

44. The legislative note after subclause 113(2) explains that where an agreement or instrument referred to in this subclause ceases to apply, the employee will be entitled to long service leave in accordance with any applicable award-derived long service leave terms.

45. Subclauses 113(4) to (6) are new provisions, and have been included to establish a process under which agreement-derived long service leave terms may be preserved as an employee's long service leave NES entitlement in certain limited circumstances.

46. The effect of clauses 27 and 29 of the Bill, in relation to long service leave, is that new enterprise agreements must comply with legislation in any State or Territory in which the agreement applies. This is a new requirement. Currently, long service leave can be dealt with in agreements in a way that is inconsistent with such legislation and the terms in the agreement prevail over the State/Territory legislation. The standards that have applied in State/Territory legislation have varied over the years.

47. Some employers that operate in more than one State or Territory have developed collective agreement-based long service leave arrangements, which have been able to operate nationally.

48. The new provisions inserted by this item are intended to allow existing collective agreement-based long service leave arrangements to form an employee's NES entitlement if:

    - the terms are included in a collective agreement that applies beyond a single State or Territory;
    - there are no award-derived long service leave terms for the employee (meaning that State or Territory long service leave legislation would otherwise apply); and

- FWA has made an order that it is satisfied that the long service leave arrangements in the agreement are, considered overall, no less beneficial to employees than the long service leave entitlements that would otherwise apply under State or Territory law – this is intended to be a global (rather than line by line) test.

49. This mechanism is only available where such a scheme exists in a collective agreement before commencement of the NES. This approach reflects the transitional nature of the NES long service leave arrangements, which will apply pending development of a national long service leave scheme.

50. Item 1 makes a consequential amendment to insert a definition of applicable agreement-derived long service leave terms that directs readers to subclause 113(5).

Item 7 – New clause 113A

51. Item 7 also inserts a new clause 113A. Clause 113A provides for the situation where an employee is covered by a collective or individual agreement, or other specified instrument (such as a workplace determination), on commencement of the NES that expressly excludes the employee's long service leave entitlements.

52. Long service leave entitlements are based on an employee's length of service – they do not allow for 'discounting' of any periods during which an agreement or other instrument excludes the entitlement. In effect, this means that where an agreement or other specified instrument that excluded long service leave ceases to operate, the terms of the scheme then begin to apply (e.g., under State or Territory legislation) and operate to provide a full entitlement to the employee, despite the purported period of exclusion.

53. Clause 113A provides a one-off opportunity for an enterprise agreement made after commencement of the NES (referred to in clause 113A as the 'replacement agreement') to recognise in an ongoing way the effect of the exclusion of long service leave in an agreement, or other specified instrument, that applied on commencement (referred to as the 'first instrument'). It does this by allowing a replacement agreement to provide that some or all of the period of service during which the first agreement applied does not count as service for the purposes of determining long service leave entitlements.

54. In relation to this provision:

- the ability for a replacement agreement to discount periods of service does not apply where long service leave entitlements may have been excluded by implication – the exclusion must be in express terms;
- the period of service that may be discounted in an enterprise agreement may not exceed the period during which the first instrument applied (i.e., the effect of previous agreements cannot be included);
- the replacement agreement must commence immediately after the first instrument for the exclusion to have effect.

55. Where an enterprise agreement includes such a provision, the period of service is taken not to count, and never to count, for the purpose of determining long service leave entitlements under either the NES or under State or Territory law, despite clauses 27 and 29 (which provide for the continued effect of State and Territory long service leave legislation). However, a period of service that is taken never to count for calculation of long service leave entitlements can be reinstated by subsequent agreement. This agreement need not be by way of an enterprise agreement but could occur, for example, through a contract of employment.

The following summarises the operation of the long service leave (LSL) NES and the rules for how LSL is dealt with in enterprise agreements after commencement of the NES.

The LSL NES preserves pre-commencement award-derived LSL entitlements.

The LSL NES also establishes a process under which employees' agreement-derived LSL entitlements may be preserved as their NES entitlements. (The intention is to enable parties to preserve genuine and fair agreement-based national LSL schemes.)

If an employee does not have an award or agreement-derived entitlement, then applicable State and Territory LSL legislation applies. (This is the effect of the coverage provisions in the Bill – see clauses 27 and 29.)

LSL terms in agreements that are in operation at the time the NES commences are not disturbed by the commencement of the NES and will continue to apply until the agreement is terminated or replaced.

Where an enterprise agreement is made after commencement of the NES:

- the agreement cannot exclude the LSL NES, but may supplement the NES subject to the requirement that such terms not cause any detriment to an employee (see clause 55 of the Bill);
- for employees without an award or agreement-derived entitlement, enterprise agreements will operate subject to State/Territory LSL laws (see clauses 27 and 29 of the Bill).

An enterprise agreement may include terms that 'discount' the period of service that is counted for the purposes of determining long service leave entitlements in limited circumstances, namely:

- where the enterprise agreement replaces an agreement (or other specified instrument) that applied when the NES came into operation;
- where the agreement being replaced expressly excluded long service leave.

The above extract from the Supplementary Explanatory Memorandum draws attention to the following Note after s.113(1):

Note: This Act does not exclude State and Territory laws that deal with long service leave, except in relation to employees who are entitled to long service leave under this Division (see paragraph 27(2)(g)), and except as provided in subsection 113A(3).

It appears from the explanation in the Supplementary Explanatory Memorandum that it was not the intention that enterprise agreements under the FW Act would be able to override State and Territory long service leave laws, other than in the very limited circumstances referred to in s.113(4), (5) and (6) of the Act, i.e. where the Commission has made an order creating "applicable agreement-derived long service leave terms".

The *Armacell* case

In its submission, the ACTU expresses doubt about certain conclusions reached by a Full Bench of the Commission in *Armacell Australia Pty Ltd & Others*[4] (***Armacell***) regarding the construction of ss.26, 27 and 29 of the FW Act, as these sections relate to long service leave matters.

[4] [2010] FWAFB 9985

The *Armacell* case related to appeals by three employers against three decisions of Commissioner Ryan to reject their enterprise agreements. All three of the agreements provided for the cashing out of annual leave (above four weeks of accrued leave), and two of the agreements provided for the cashing out of long service leave. Ai Group represented the three employers in the appeal.

In *Armacell*, Ai Group tendered the abovementioned extract from the Supplementary Explanatory Memorandum.

In its decision, the Full Bench stated: (emphasis added)

[23] We were informed on the appeal that the Armacell agreement, if approved, would apply to employees not only in Victoria, but also in New South Wales, Queensland and Western Australia. Some of the employees were previously covered by the long service leave provisions in Part IV of the *Metal, Engineering and Associated Industries Award 1998* (metal industry award). The other employees were previously covered by the long service leave legislation of the relevant State. The position in relation to employees covered by the DPS agreement is unclear.

[24] It is necessary to summarise some aspects of the manner in which long service leave is regulated in Australia. Section 26 of the Fair Work Act provides that it applies to the exclusion of State and Territory industrial laws. It is not necessary to set the section out. Section 27, however, provides that a number of State and Territory laws are not excluded by s.26. In particular s.27(1)(c) provides that State and Territory laws in relation to specified "non-excluded matters" are not excluded. Section 27(2)(g) deals with long service leave. It reads:

> "State and Territory Laws that are not excluded by Section 26
>
> ... ...
>
> (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 2-2 to long service leave;
>
> ... ..."

[25] In order to ascertain whether an employee is entitled to long service leave under Division 9 of Part 2–2 it is necessary to have regard to s.113. Section 113, which is in Division 9 of Part 2–2, 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.

[26] While the relevant terms of ss.26 and 27 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. 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 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.

[27] We were told that some of the relevant State laws permit cashing out of long service leave in certain circumstances. Cashing out is only permitted under the metal industry award in very limited circumstances.

[28] Dealing first with the position of employees to whom State long service leave laws apply, it is necessary to further examine the manner in which the Fair Work Act interacts with such laws. Section 29 is relevant. It reads:

> "29 Interaction of modern awards and enterprise agreements with State and Territory laws
>
> (1) A modern award or enterprise agreement prevails over a law of a State or Territory, to the extent of any inconsistency.
>
> (2) Despite subsection (1), a term of a modern award or enterprise agreement applies subject to the following:
>
> (a) any law covered by subsection 27(1A);
>
> (b) any law of a State or Territory so far as it is covered by paragraph 27(1)(b), (c) or (d).
>
> (3) Despite subsection (2), a term of a modern award or enterprise agreement does not apply subject to a law of a State or Territory that is prescribed by the regulations as a law to which modern awards and enterprise agreements are not subject."

[29] While s.29(1) provides that as a general rule enterprise agreements prevail over State laws to the extent of any inconsistency, s.29(2) provides an exception in relation to a term of an enterprise agreement which is inconsistent with, relevantly, a law of a State or Territory covered by s.27(1)(c). Section 27(1)(c), as we have already noted, refers to non-excluded matters, one of which is long service leave.

[30] The effect of these provisions is that in the event of inconsistency between a term of an enterprise agreement dealing with long service leave and State long service leave legislation the latter prevails. Accordingly, to the extent that a term in an enterprise agreement purports to permit cashing out of long service leave in circumstances where it would not be permitted under the relevant State legislation, the term is of no legal effect. In the cases in point, if the term in either the Armacell agreement or the DPS agreement purports to permit an employee to cash out long service leave in circumstances where the relevant State law does not permit it, the State law prevails and the term of the agreement is of no effect.

It appears from the above extract that the Full Bench adopted the second construction of s.26, 27 and 29 referred to earlier, rather than the one suggested by the ACTU in its submission in the current proceedings. That is, it appears that the Full Bench adopted the view that s.27 is to be given its full effect as a provision which identifies those State and Territory laws in their entirely that are not excluded by s.26. If this construction is correct, the Full Bench was correct in its conclusion that s.29(2) applies to long service leave terms in enterprise agreements and such terms are unable to override State and Territory long service leave laws.

We acknowledge that the alternative construction now suggested by the ACTU was not presented to the Full Bench in the *Armacell* case.

Modern Awards Review 2012 - Work Health and Safety Case

During the *Modern Awards Review 2012 – Work Health and Safety Case,*[5] there was debate between Ai Group and the unions about the correct construction of ss.26 and 27 of the FW Act. As is evident from the following extract from the Commission's decision of 12 December 2012, the Full Bench decided that it did not need to rule on the issues: (emphasis added)

[58] In relation to the question of power or lawfulness concerning the interaction rules in ss.26-29 of the Act, the Ai Group raised a broader interpretation question, submitting that the effect of ss.26-29 was that OHS provisions in modern awards prevailed over State and Territory OHS laws to the extent of any inconsistency.

[5] [2012] FWAFB 10080

The Ai Group argument was based on the proposition that OHS laws were not a "State or Territory industrial law" for the purposes of s.26 and the exclusion in s.27, such that the primacy of modern awards and enterprise agreements over State and Territory laws in s.29 had effect. That proposition was contested by some parties and not addressed by others on the basis that it was unnecessary to do so for the purpose of determining the issues before us.

[59] The Victorian Government corresponded with the Full Bench in relation to this contention of Ai Group, seeking an opportunity for it and other State and Territory Governments to put submissions if the Ai Group interpretation was relevant to the determination of the matter before us.

[60] At the commencement of the hearing on 30 November 2012, this Full Bench made the following statement (now edited) in relation to the Victorian Government correspondence:

> ". . . we received correspondence from the acting director of the Victorian Department of Business and Innovation suggesting that the AI Group submission raises a broader issue going to the construction of sections 26, 27 and 29 of the Act, which relates to the interaction between modern awards and enterprise agreements in State and Federal legislation, going to the relationship between State and Territory Work Health and Safety Laws and the definition of 'State and Territory Industrial Law' of section 26 of the Act.
>
> He suggests this issue appears to fall outside of the scope of the legal proposition we are required to determine but if we are inclined to deal with the broader issue the States and Territories should be given an opportunity to be heard. In respect of that, we can confirm the acting director's understanding of the issue appears to fall outside the scope of the legal proposition we have been asked to determine. Our remit only goes to the question of the interaction rules in Division 2 of Part 1-3 of the Act and to the extent it is suggested that they render certain modern award provisions unlawful.
>
> We have not been asked to address broader construction issues in respect of the interaction rules, accordingly we see no need to delay the matter before us at this stage to invite States and Territories to address us on any broader construction issue.
>
> If, in the course of our deliberations on our decision, we come to a view that it is necessary to deal with broader issues concerning the interaction rules in order to determine the matters before us we will afford the States and Territories an opportunity to put submissions on the broader point and, of course, an opportunity for other interested parties to these proceedings, an opportunity to respond.
>
> Finally, we would indicate that we have read each of the comprehensive submissions filed. We ask the parties to proceed on the basis that the submissions filed can be taken as read and limit their submissions this morning to points of emphasis in reply to the submissions of others where there has been no opportunity for reply and for questioning by the Full Bench.
>
> We do not want parties to simply repeat what is before us in written submissions, which the Bench has had the opportunity to digest. We will proceed on that basis."

[61] We now confirm that our preliminary view is that it is unnecessary to address or determine the broader construction issue raised by the Ai Group for the purposes of our decision. The effect of the Ai Group interpretation, if correct, is that the interaction rules in ss.26-29 of the Act raise no question of power or lawfulness of OHS provisions in modern awards. Given our finding to that effect, for different reasons, it is unnecessary, for the purposes of our decision, to determine whether or not the Ai Group interpretation is correct.

Modern Awards Review 2012 - Apprentices, Trainees and Juniors Case

During the *Modern Awards Review 2012 – Apprentices, Trainees and Juniors Case,*[6] once again there was debate between Ai Group and the unions about the correct construction of ss.26 and 27 of the FW Act. In a decision of 22 August 2013, the Full Bench made the following comments about the interaction issues: (emphasis added)

(iii) Interaction with State and Territory laws

[106] We next refer to what is described in the Act and the *Fair Work Regulations 2009* (the Regulations) as interaction provisions. They are ss.26 to 29 of the Act and regulations 1.13 to 1.15. They concern the way in which provisions in the Act and identified provisions in State and Territory legislation are to operate. The employers submitted that the provisions operated to constrain or limit the terms which the Commission is empowered to include in modern awards. We are not persuaded that they operate in such a manner. They do not limit either the jurisdiction or the power of the Commission to include the terms in an award as sought by the unions. However, they are very relevant for us to consider when exercising any discretion we have about whether a particular term should be included. We should refer to the relevant provisions of the Act and the regulations.

[107] Section 26(1) of the Act states as follows:

> "**26 Act excludes State or Territory industrial laws**
>
> (1) This Act is intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer."

[108] The section reflects the legislative intention that the Act "cover the field" in relation to industrial laws applicable to national system employees and employers, to the exclusion of State and Territory legislation. Section 26(2) defines the types of laws that are encompassed by the phrase "State or Territory industrial laws". Section 27 then provides for State and Territory laws that are not excluded by s.26. It saves the operation of laws identified in it. It reads as follows:

> **"27 State and Territory laws that are not excluded by section 26**
>
> ...
>
> (1) Section 26 does not apply to a law of a State or Territory so far as:
>
> (b) the law is prescribed by the regulations as a law to which section 26 does not apply; or
>
> (c) the law deals with any non-excluded matters; or
>
> (d) the law deals with rights or remedies incidental to:
>
> (i) any law referred to in subsection (1A); or
>
> (ii) any matter dealt with by a law to which paragraph (b) applies; or
>
> (iii) any non-excluded matters.
>
> Note: Examples of incidental matters covered by paragraph (d) are entry to premises for a purpose connected with workers compensation, occupational health and safety or outworkers.
>
> (2) The non-excluded matters are as follows:
>
> ...
>
> (f) training arrangements, except in relation to terms and conditions of employment to the extent that those terms and conditions are provided for by the National Employment Standards or may be included in a modern award;"

[6] [2013] FWCFB 5411

[109] The effect of ss.27(1) and 27(2) is to remove matters from the field of the intended exclusive coverage of the Act described in s.26. The Act is not intended to cover the field with respect to the State and Territory laws referred to in s.27(1) and (2).

[110] Section 27(1)(b) allows regulations to be made prescribing additional State and Territory laws that are saved. Regulation 1.13 is a regulation made as envisaged by s.27. It states:

> **"1.13 State and Territory laws that are not excluded by section 26 of the Act-prescribed laws**
>
> For paragraph 27(1)(b) of the Act, each of the following laws of a State or Territory is a law to which section 26 of the Act does not apply:
>
> (a) a law dealing with the suspension, cancellation or termination of a training contract;
>
> (aa) a law dealing with the suspension, cancellation or termination of a contract of employment that is:
>
> (i) associated with a training contract; and
>
> (ii) entered into as part of a training arrangement;
>
> (b) a law dealing with a period of probation of an employee that:
>
> (i) is part of a training arrangement; but
>
> (ii) is not a period of probationary employment; ...
>
> Note Under subsection 27 (1) of the Act, section 26 of the Act does not apply to a law of a State or Territory so far as the law is prescribed by the regulations as a law to which section 26 does not apply."

[111] The effect of s.27(1)(b) and regulation 1.13 is that State and Territory laws dealing with suspension, cancellation or termination of a training contract; or with the suspension, cancellation or termination of a contract of employment associated with a training contract and entered into as part of a training arrangement; or with or a period of probation under a training arrangement, are not excluded by s.26 and therefore can continue to operate. This is generally consistent with the way in which the effect of s.27 and regulation 1.13 is explained in the Explanatory Statement which accompanied the Regulations.

[112] The effect of s.27(1)(c) and s.27(2)(f) is that it is not intended that the Act operate to the exclusion of State and Territory legislation with respect to training arrangements (as qualified by the subsection). State and Territory laws dealing with training arrangements are saved under ss.27(1)(c) and 27(2)(f), but not to the extent that they deal with terms and conditions of employment that are provided for by the NES or may be included in a modern award.

[113] Section 28 of the Act allows for the Regulations to prescribe additional State and Territory laws that are excluded. Regulation 1.14 provides that:

> "**1.14 Act excludes prescribed State and Territory laws**
>
> For subsection 28(1) of the Act, each of the following laws of a State or Territory is prescribed: ...
>
> (b) a law relating to training arrangements, to the extent to which it deals with terms and conditions of employment that:
>
> (i) are provided for by the National Employment Standards; or
>
> (ii) may be included in a modern award; or
>
> (iii) may be included in an enterprise agreement under section 55 of the Act; ...
>
> Note Under subsection 28 (1) of the Act, the Act is intended to apply to the exclusion of a law of a State or Territory that is prescribed by the regulations."

[114] The effect of s.28 and regulation 1.14 is that the Act applies to the exclusion of State and Territory legislation relating to training arrangements to the extent that it deals with the terms and conditions of employment that may be included in a modern award, where there is a direct inconsistency between the

provisions of the Act and State or Territory legislation. If the Commission can provide for something in a modern award relating to training arrangements, a term about the type of employment of apprentices or about other matters that have been identified above, these provisions override any State or Territory law that deals with the same matter.

[115] Section 29 of the Act is in these terms:

> **"29 Interaction of modern awards and enterprise agreements with State and Territory laws**
>
> (1) A modern award or enterprise agreement prevails over a law of a State or Territory, to the extent of any inconsistency.
>
> (2) Despite subsection (1), a term of a modern award or enterprise agreement applies subject to the following: ...
>
> (b) any law of a State or Territory so far as it is covered by paragraph 27(1)(b), (c) or (d).
>
> (3) Despite subsection (2), a term of a modern award or enterprise agreement does not apply subject to a law of a State or Territory that is prescribed by the regulations as a law to which modern awards and enterprise agreements are not subject."

[116] Regulation 1.15 provides:

> **"1.15 Interaction of modern awards and enterprise agreements with State and Territory laws**
>
> For subsection 29(3) of the Act, each of the following laws of a State or Territory is prescribed: ...
>
> (b) a law relating to training arrangements, to the extent to which it deals with terms and conditions of employment that:
>
> (i) are provided for by the National Employment Standards; or
>
> (ii) may be included in a modern award; or
>
> (iii) may be included in an enterprise agreement under section 55 of the Act;
>
> Note Under subsection 29 (3) of the Act, a term of a modern award or enterprise agreement does not apply subject to a law of a State or Territory that is prescribed by the regulations as a law to which modern awards and enterprise agreements are not subject."

[117] The effect of ss.29(1) and 29(2) is that a modern award prevails over State and Territory legislation to the extent of any inconsistency. However, State and Territory legislation dealing with suspension, cancellation or termination of a training contract; or with the suspension, cancellation or termination of a contract of employment associated with a training contract and entered into as part of a training arrangement; or with or a period of probation under a training arrangement, is not excluded and therefore can operate alongside modern awards. Modern awards can therefore supplement the laws of a State or Territory insofar as the laws deal with those matters. The explanatory memorandum describes the effect of ss.27 and 29(2) as being "that a modern award or enterprise agreement is subject to any of the State or Territory laws that are saved by clause 27, as well as any State or Territory laws prescribed by the regulations. This means that a modern award or enterprise agreement cannot diminish, but may supplement, rights and obligations under these laws".

[118] Some of the interaction provisions were considered by a Full Bench in *Master Builders Australia Ltd re Award Modernisation Review*. That decision arose out of the Transitional Review of the Building Award. A large number of applications to vary the award had been made. One of the applications made by MBA was to remove provisions which regulated OHS on the ground that they were not lawful and accordingly should not be contained in a modern award. The Full Bench described the contention of MBA as being that the Act does not displace OHS laws of the States and Territories and that modern awards do not, and should not, have the function or purpose of directly regulating OHS. The Full Bench referred to MBA's argument relying as it had on the provisions of ss.27 and 29 for its proposal that "... the provisions of a modern award would apply subject to any OHS law of a State or Territory because OHS is mentioned in s.27(2)(c) which is a non-excluded matter as expressed in s.27(1)(c). Hence, the general provisions of the Act clearly do not contemplate that the Act's jurisdiction will encompass regulation of OHS but that State and Territory laws

will prevail." Similarly, a challenge was made to FWA's power to include consultation, representation and dispute settlement clauses in so far as they related to OHS matters. It was submitted that they cannot be included in modern awards. The Full Bench considered the provisions of ss.27 and 29 of the Act and said:

> "[55] Provided that a modern award term must or may be included in modern awards under Division 3 of Part 2-3 of the Act, its inclusion is lawful, even if it reduces an entitlement under the relevant State and Territory legislation saved by s.27. Division 2 of Part 1-3 of the Act does not render such a term unlawful, rather it renders the provision to be of no legal effect. Although it is unnecessary, we note for completeness, we are not persuaded that any of the provisions identified by the MBA in the On-site Award or other modern awards reduces an entitlement under the relevant State and Territory legislation saved by s.27.
>
> [56] It is clear that Division 2 of Part 1-3 of the Act does not deal with the lawfulness of the content in modern awards or any other instruments made under the Act. Its purpose is to provide interaction rules to operate in conjunction with ss.109 and 122 of The Constitution, with s.26 providing an express statement of an intention to cover a field and s.27 setting out the exceptions to that exclusivity set out in s.26. Sections 26 to 30 are not directed to nor have the effect of enlarging or confining the matters which may lawfully be contained in a modern award. They are concerned with resolving issues relating to inconsistency of laws under s.109 of The Constitution and have nothing to do with the lawfulness or otherwise of what may be contained in a modern award."

[119] We agree with those comments. Our interpretation of the various sections of the Act and the Regulations is consistent with them. We observe however that despite our finding that the interaction rules do not operate to preclude jurisdiction or power to entertain the subject matters of the variations sought by the unions, we acknowledge the force of the employers' submissions that these provisions require attention be given to significant discretionary considerations. We also accept that a cautious approach should be taken before including new terms concerning apprentices in a modern award which may have the effect of overriding State and Territory legislation.

Conclusion

Ai Group agrees with the ACTU's comment in the concluding paragraph of its submission; that is, it would be worthwhile for the Federal and State Governments to give a higher priority to the development of a national long service leave standard given the complexity associated with the existing arrangements under the FW Act.

The existing long service leave arrangements in the FW Act, when implemented, were only intended to operate for a limited period while a national long service leave standard was developed. The arrangements are too complex to provide an effective means of regulating long service leave on a permanent basis.