

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Further Reply Submission
Family Friendly Work Arrangements
(AM2015/2)

20 June 2018

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GROUP

4 YEARLY REVIEW OF MODERN AWARDS
AM2015/2 FAMILY FRIENDLY WORK ARRANGEMENTS

1. INTRODUCTION

1. Ai Group files these submissions in reply to the submissions of the ACTU and ACCI filed in relation to this matter earlier this month. In so doing we primarily address matters associated with whether the provisional model term is permitted under s.136 and, in particular, whether it contravenes s.55.

2. THE COMMISSION'S JURISDICTION TO INCLUDE THE PROVISIONAL MODEL TERM IN MODERN AWARDS

2. Both the ACTU and ACCI contend that the provisional model term is permitted under s.136. Ai Group has advanced a different view in our previous submission and remains concerned that the term, as currently drafted, would be prohibited by s.55.
3. Ai Group contends that the proposed clause would be contrary to s.55(1) because it excludes the scheme in s.65 as a whole. Put simply, it will in its operation negate the practical effect of the scheme by affording employees access to an alternate mechanism for securing flexible work arrangements that operates differently and in various respects more beneficially, from an employee's perspective.
4. Our contention in this regard partly rests upon the proposition that the clause establishes a separate regime to that established under the Act. We apprehend that this is the Full Bench's intent. However, in support of the proposition we observe that the regime flowing from s.65 of the Act varies from that which is proposed to be established by the model award clause in several respects. Relevantly, it is of narrower application in terms of the cohort of employees who are eligible to make a request, imposes additional obligations on employers and sets different requirements for the making of a request.

5. Crucially, the legislative scheme also operates subject to a very different enforcement regime to that which would govern the award derived scheme. Relevantly, the legislative scheme operates within the context of s.44(2) of the Act. This provides that an order cannot be made under Division 2 of Part 4-1 of the Act in relation to a contravention of s.65(5). No such protection is afforded to employers in relation to the proposed award derived scheme. This gives rise to a fundamental difference in the nature of the terms and conditions arising from the respective forms of regulation.
6. In light of our review of the submissions advanced by the ACTU and ACCI, we also now contend that the proposed clause may operate to directly exclude s.65(2).
7. Further, as we have already outlined, we are concerned that the proposed provisions are not permitted under s.55(4) and thus not saved by s.55(7). That is, we say that the proposed term is not a 'supplementary term', as contemplated by s.55(4)(b).

Is the provisional modern a supplementary term permitted by s.55(4)(b)?

8. Before addressing specific elements of the other parties' submissions, it is useful to consider the nature of what may constitute 'supplementary terms', for the purposes of s.55. We here note that the Full Bench's March decision¹ made the following observations regarding the task of statutory construction and the meaning of 'supplement' in the relevant section:

[135] The task of statutory construction must begin and end with the statutory text. The statutory text must be considered in its context, which includes the legislative history and extrinsic materials, but legislative history and extrinsic materials cannot displace the meaning of the statutory text. The text of s.55 is to be construed so that it is consistent with the language and purpose of the Act as a whole. The ability to construe s.55 in a manner that departs from the natural and ordinary meaning of its terms in the context in which they appear, is limited to construing the provision according to the meaning which, despite its terms, it was plain the Parliament intended it to have.

[136] The EM states the purpose of s.55:

¹ [2018] FWCFB 1692

‘206. Clause 55 sets out the relationship between the NES on the one hand and modern awards and enterprise agreements on the other.’

[137] The nature of the NES is central to the context in which s.55 is to be read. Section 61 introduces the NES. Subsection 61(1) provides:

61 The National Employment Standards are minimum standards applying to employment of employees

(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).

Note: Subsection 55(5) allows enterprise agreements to include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards.’

...

[156] Turning to the meaning of ‘supplement’ in s.55(4), on its ordinary meaning a supplementary term provides a supplement or something additional to the substantive provision – in this case the ‘right to request’ in s.65.

[157] Although notes do not form part of the Act, they may be considered to confirm that the meaning of a provision is the ordinary meaning conveyed by the text of the provision.

[158] Note 2 under s.55(4) (above) is expressed to provide examples of supplementary terms permitted by s.55(4). The examples respectively increase the quantum of leave an employee is entitled to in comparison to the NES, and increase the rate at which an employee is paid whilst on leave in comparison to the NES. These examples would seem to fall within the ordinary meaning of terms that ‘supplement’ the NES.

[159] In relation to some classes of employees, the practical effect of the Claim is to exclude the capacity of an employer to refuse an employee’s request for flexible working arrangements ‘on reasonable business grounds’ under s.65(5). That capacity would seem a central element of the scheme established by s.65. Seen in this way, there is considerable force in the view that the Claim does not ‘supplement’ s.65, but rather replaces it with something else entirely.

[160] We note, however, that the EM at paragraph 214 (reproduced at [154] above) states as an example of an ancillary, incidental or supplementary agreement term, a term in an enterprise agreement that would ‘provide a right to flexible working arrangements’.

9. In relation to the proper interpretation of s.55(4) the ACTU submits:²

The term “supplemental” is not defined in the FW Act, and so the words of the statute should be given their ordinary meaning.³ The Macquarie dictionary defines supplement as, “something added to complete a thing, supply a deficiency, or complete a whole”.⁴ The Full Bench has held that a term supplemented the NES entitlement to annual leave, because it “extended the circumstances on which an

² ACTU submissions at paragraph 11

³ See for example *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [69], [78]

⁴The Macquarie Dictionary (5th ed, 2009)

employer must comply with an employee's request to take paid annual leave".⁵ ACCI has suggested that the concept of 'supplementing' the NES "connotes the notion of building upon, increasing or extending..."⁶

10. The ACCI submission does not deal with the proper interpretation of s.55(4) in detail. However, ACCI has previously submitted that: (emphasis added)

"The concept of 'supplementing' the NES in the second limb of s.55(4) connotes the notion of building upon, increasing or extending rather than detracting, substitution or replacing.

Had the Parliament intended to adopt one of these latter phrases it could have done so."⁷

11. In response to these submissions, we reiterate our previously articulated view that a supplementary term must reflect some connection or interaction with the NES. We here emphasise the Macquarie Dictionary definition of "...something added to complete a thing, supply a deficiency, or complete a whole". Inherent in this definition is the notion that something which supplements a thing is somehow interconnected with the thing that it supplements. It is something which makes the supplemented thing whole or complete. Regardless, it cannot be said that the proposed clause somehow completes the NES or supplies some deficiency in the NES.

12. We also concur with the ACCI submission that supplementation does not equate to "*substitution or replacing*." Yet that is what the proposed clause would do. It would operate in substitution or replacement for the legislative scheme.

13. For completeness, we contend that the mere fact that there may be some overlap in the operation of the proposed scheme under an award and the scheme arising from s.65 is insufficient to establish that the legislative scheme supplements the NES. The two schemes would give rise to distinct and separate terms and conditions that may simply operate in parallel to some degree.

⁵ 4 Yearly Review of Modern Awards – Annual Leave [2015] FWCFB 5771, [129]

⁶ ACCI Closing Submissions dated 19 December 2017, [8.29]

⁷ ACCI's closing oral submissions, cited in [2018] FWCFB at 115

14. The second statutory note contained under s.55(4) reinforces the veracity of our contention that the ordinary meaning of the words, "...terms that supplement the National Employment Standards", as utilised in that section, refer to terms that build upon or interact with the NES rather than substituting an alternate scheme for the provision of the NES. The provision states:

Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:

- (a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or
- (b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

15. Each of the examples in the note relate to a term that impacts upon the operation of the NES. Each operates to either build upon, increase or extend an NES derived term or condition in a manner that is more beneficial for an employee. In each example there is a clear connection or interaction with a specific element of the NES.

16. It must also be observed that s.55(4) permits modern awards to include terms that supplement the NES, "*...only to the extent that the effect of those terms is not detrimental to an employee in any respect when compared to the National Employment Standards.*" The provision is a limitation on the type of supplementary terms that may be included in awards. This is necessary because, absent such a provision, an award term could build upon, increase or extend the national employment standards (as opposed to an entitlement flowing from them) by increasing or extending the limitations on the operation of a provision of the NES that served to limit access to an entitlement under the NES. It does not however follow that any term dealing with similar subject matter to the NES, but providing for a more beneficial entitlement, will necessarily be a supplementary term.

The Parties' Submissions Relating to the Model Term and s.55(4)

17. ACCI submits that the model term does not appear to exclude the NES.⁸ They nonetheless deal with the interaction with the NES and relevantly submit:

The Australian Chamber considers that the provisional model term interacts with the NES (specifically s 65) in two main ways:

*(a) it extends the class of employees who can make requests for family friendly arrangements by decreasing the relevant service threshold from 12 months to 6 months (**Service Threshold Extension**); and*

(b) it extends the obligations on employers who receive requests for family friendly arrangements to include:

*(i) a requirement that the employer confer with the employee and genuinely try to reach an agreement in respect of a change to working arrangements that will accommodate their circumstances (**Obligation to Confer**); and*

*(ii) a requirement that a written refusal of an employee's request include details for the reasons for the refusal, including the relevant business grounds, details of any agreed changes or if changes cannot be agreed, any changes in working arrangements that the employer can offer the employee so as to better accommodate the employee's responsibilities (**Additional Written Obligations**).*

18. ACCI further contends that the provisional model term, "...appears to aim itself at supplementing s.65 in order to facilitate meaningful engagement between employers and employees and to preclude arbitrary, cursory or perfunctory consideration of flexibility requests."⁹
19. The ACTU contends that the proposed terms supplements the NES. The broad tenor of their submissions appears to be that it therefore does not offend s.55(1) because it meets the requirements of the s.55(4). They do not appear to argue that it would not otherwise exclude the NES or a provision of the NES.
20. A key issue between the parties is consequently whether the proposed clause would constitute a supplementary term. In this regard we assert that a difficulty

⁸ ACCI submission at 3.7

⁹ Ibid at 3.9

with the ACCI and ACTU submission is that they assume that there is a degree of interaction between the Award term and the NES.

21. ACCI appears to erroneously suggest that the award term would extend the NES in certain respects. That is, they contend that it extends the class of employees who can make requests and that it extends the obligations on employers who receive requests for family friendly working arrangements.

22. Similarly, the ACTU submits:

[12] The changes which would be made by the provisional model term clearly add to, extend, build upon or increase the current provisions in s.65 of the FW Act, and therefore supplement the NES entitlement in s.65

[13]...The proposed model term would extend the number of employees who could access the entitlement to request flexible hours, marginally increase their right to be consulted and receive information, and provide additional (limited) additional access to dispute resolution. The provision model term therefore meets the requirements of s55(4), and does not offend s55(1)...¹⁰

23. Ai Group respectfully contends that the proposed award term does not extend the NES as the ACTU variably asserts. It does not extend the NES in any respect. Nor could it be said to expand an entitlement under the NES. Instead, it establishes a different, albeit similar, set of entitlements and obligations in relation to a different, yet overlapping, cohort of employees to those covered by the statutory scheme. There is no form of interconnectedness between the operation of the award provisions and statutory scheme.

24. Our contentions are best demonstrated by a consideration of the following specific elements of the proposed scheme:

- a. The Note states that, Clause X is additional to the provision to request a change in working arrangements in section 65 of the Act.
- b. Clause X.5 requires that the request must, "state that the request is made under this award".

¹⁰ ACTU submission at paragraph 13

- c. Clause X.11 limits the Commission’s power to deal with a dispute about whether an employer had reasonable business grounds to refuse a request under the clause. The Note contained in clause X.11 refers to the resolution of disputes about whether the employer has conferred with the employee as required by the clause.
25. At paragraph 11 the ACTU observes that the Full Bench has held that a term supplemented the NES entitlement to annual leave because it “*extended the circumstances in which an employer must comply with an employee’s request to take paid annual leave*”.¹¹ Ai Group agrees that such an award term falls within the ambit of s.55(4). However, such a provision is not analogous to what is now proposed. Such a term dealt with how an NES entitlement was accessed.
26. The short point is that the proposed clause does not supplement the scheme established under s.65, in the sense contemplated by s.55(4). Instead, it creates a separate scheme that covers very similar ground to that established by the statute.

Does the Proposed Expansion of the Group of Employees Eligible to make a Request Exclude a Provision of the NES?

27. In its March decision the Full Bench expressed a provisional view that the proposed model clause does not contradict s.55.¹² It also indicated that one of the ways that it would supplement the NES would be that:
- “The group of employees eligible to request a change in working arrangements relating to parental or caring responsibilities will be expanded to include ongoing and casual employees with at least six months’ service but less than 12 months service.
28. The ACTU contends, in effect, that the proposed model term supplements the NES by expanding the group of employees eligible to request a change.¹³

¹¹ ACTU submission at paragraph 11

¹² [2018] FWCFB 1692 at 427

¹³ ACTU submission at paragraph 10

29. The ACCI submits that the provisional model term interacts with the NES by extending the class of employees but does not expressly contend that it supplements the NES in this regard.¹⁴

30. In response, Ai Group submits that the extension of a right to request flexible work arrangements to a broader group of employees excludes s.65(2) of the NES and does not constitute a supplementary term as contemplated by s.55(4).

31. Section 65(2) expressly provides that certain employees are not entitled to make a request, as contemplated by s.65(1) or 65(1)(b). The provision states:

(2) The employee is not entitled to make the request unless:

(a) for an employee other than a casual employee--the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or

(b) for a casual employee--the employee:

(i) is a long term casual employee of the employer immediately before making the request; and

(ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

32. The Act does not merely leave a gap in relation to certain cohorts of employees. It does not, for example, limit the application of s.65 to certain classes of employees. Instead, the Act expressly deals with the circumstances of employees other than those contemplated by s.65(2)(a) and 65(2)(b) and specifies that they are not entitled to make the relevant request.

¹⁴ ACCI submission at paragraph

33. Section 65(2)(b) gives effect to a clear Parliamentary intent that short term employees and casual employees (other than those meeting the requirements of s.65(2)(b)) not have an entitlement to access the scheme established by s.65.
34. The exclusion of certain employees from the right to request pursuant to s.65(1) is a fundamental or central element of the statutory scheme.
35. The proposed award term would negate the practical effect of s.65(2). It would extend to employees who are excluded from the right to request under s.65 a right to request flexible work arrangements under a scheme which in various respects deliberately mirrors that established by s.65. It would consequently exclude this element or provision of the NES. We reiterate that s.55(1) provides that a modern award must not exclude the National Employment Standards or any provision of the National Employment Standards.
36. Ai Group doubts that an award term which seeks to reverse the situation established by s.65(2) by establishing an alternate scheme under the award which is available to employees expressly excluded from the statutory scheme could be said to ‘*supplement*’ s.65, either in general terms, or s.65(2) more specifically. Instead, the proposed clause is arguably just replacing the statutory regime with an award based regime that is more beneficial to certain employees. As already observed, the fact that an award provision may be more beneficial than an element of the NES does not of itself render the award provision a supplementary term.

Are all of the Proposed Terms of the Provisional Model Clause “Supplementary Terms”?

37. Even if, contrary to our submissions, the Full Bench maintains its view that the proposed model term would supplement the NES in some or all of the various ways identified in paragraph [423] of the March Decision, it does not follow that all of the terms of the proposed clause could be said to supplement the NES. Relevantly, the terms that do no more than effectively mirror elements of s.65 could not be argued to be supplementary terms. Indeed, they could not all be

said to be *necessary* to meet the modern awards objective. Ai Group contends that this would be especially true of the elements of the scheme that do little more than replicate elements of the NES.¹⁵

38. Accordingly, if the Full Bench proceeds with the view that modern awards should be varied to include a model term to facilitate flexible working arrangements, it should only include terms that do no more than facilitate supplementation of the NES in the manner contemplated by paragraph 424 of the March Decision. This could be achieved by drafting a clause that interacts with, and in certain respects, adds to the scheme established by the Act, rather than by replacing it with an alternate scheme.
39. Adopting this approach could also retain the important protection afforded to employers under s.44(2). This is a central and carefully crafted element of the statutory scheme that should not be excluded by the operation of a relevant award clause. It cannot be *necessary* for awards to indirectly circumvent the operation of such a provision in order to ensure that that the award together with the NES constitutes a fair and relevant safety of minimum terms and conditions. We here observe that circumvention of this protection for employers is not identified in the March Decision¹⁶ as one of the intended purposes of the clause developed by the Full Bench and it is an outcome which ought to be avoided.
40. Adopting the approach that we here propose may be a preferable to adopting the full raft of amendments that we suggested in our previous submissions would be *necessary*¹⁷ in order to strike a fair balance between the interest of employers and employees.

¹⁵ As contemplated by s.138

¹⁶ [2018] FWCFB 1692

¹⁷ In the sense contemplated by s 138