


Working for business.
Working for Australia



AM2015/1 and
AM2015/2
Domestic Violence
Leave Case and
Family Friendly Case
Submissions in
Response to Model
Terms

15 June 2018



Australian
Chamber of Commerce
and Industry

**WORKING FOR BUSINESS.
WORKING FOR AUSTRALIA**
Telephone 02 6270 8000
Email info@acci.asn.au
Website www.acci.asn.au

CANBERRA OFFICE
Commerce House
Level 3, 24 Brisbane Avenue
Barton ACT 2600 PO BOX 6005
Kingston ACT 2604

MELBOURNE OFFICE
Level 2, 150 Collins Street
Melbourne VIC 3000
PO BOX 18008
Collins Street East
Melbourne VIC 8003

SYDNEY OFFICE
Level 15, 140 Arthur Street
North Sydney NSW 2060
Locked Bag 938
North Sydney NSW 2059

ABN 85 008 391 795
© Australian Chamber of Commerce and Industry 2017

This work is copyright. No part of this publication may be reproduced or used in any way without acknowledgement to the Australian Chamber of Commerce and Industry.

Disclaimers & Acknowledgements

The Australian Chamber of Commerce and Industry has taken reasonable care in publishing the information contained in this publication but does not guarantee that the information is complete, accurate or current. In particular, the Australian Chamber is not responsible for the accuracy of information that has been provided by other parties. The information in this publication is not intended to be used as the basis for making any investment decision and must not be relied upon as investment advice. To the maximum extent permitted by law, the Australian Chamber disclaims all liability (including liability in negligence) to any person arising out of use or reliance on the information contained in this publication including for loss or damage which you or anyone else might suffer as a result of that use or reliance.

These submissions respond to two recent statements of the Fair Work Commission ([2018] FWCFB 2440 and [2018] FWCFB 2443).

1. FAMILY AND DOMESTIC VIOLENCE LEAVE MODEL TERM

- 1.1 On 3 May 2018 the Commission issued statement [2018] FWCFB 2440 in AM2015/1 Family and Domestic Violence Leave Case.
- 1.2 At Attachment A of that statement, the Commission included a provisional model term drafted to give effect to its decision [2018] FWCFB 1691 that all employees should have access to unpaid family and domestic violence leave.
- 1.3 Interested parties were invited to comment on the provisional model term with such comments directed to whether the model term accurately reflects the outcome of the decision.
- 1.4 The Australian Chamber has no comments on the proposed model term and considers that it appears to reflect the outcome of the Commission's decision and the conferences.

2. FAMILY FRIENDLY WORKING ARRANGEMENTS CLAUSE

- 2.1 On 3 May 2018 the Commission issued Statement [2018] FWCFB 2443 (**Statement**) in AM2015/2 Family Friendly Work Arrangements.
- 2.2 The Statement followed the Full Bench's Decision [2018] FWCFB 1692 issued 26 March 2018 (**March Decision**) which rejected the Australian Council of Trade Union's claim seeking a variation of all modern awards to include an entitlement to part-time work or reduced hours for employees with parenting or caring responsibilities.
- 2.3 That Decision expressed a *provisional* view that modern awards should be varied to incorporate a model term to facilitate flexible working arrangements concluding at [427]:

It is our provisional view that the provisional model term is a term about 'the facilitation of flexible working arrangements, particularly for employees with family responsibilities' within the meaning of s.139(1)(b). It is also our provisional view that the provisional model term does not contravene s.55 and consequently that it is a term permitted under s.136. Of course, any such term may only be included in a modern award to the extent necessary to achieve the modern awards objective.

- 2.4 Interested parties are invited by the Statement to make submissions in respect of the following issues:
 - (a) the terms of the provisional model term included at Attachment A of the Statement;
 - (b) whether the provisional model term is permitted under s 136 of the Fair Work Act 2009 (Cth) (**FW Act**) and, in particular, whether it contravenes s 55; and
 - (c) whether the inclusion of the provisional model term in modern awards will result in modern awards that only include terms to the extent necessary to achieve the modern awards objective.

3. IS THE PROVISIONAL MODEL TERM IS PERMITTED UNDER S 136 OF THE FW ACT AND, IN PARTICULAR, DOES IT CONTRAVENE S 55?

- 3.1 Two questions arise in addressing this issue:
 - (a) does the provisional model term fall within the scope of s 139 which identifies terms that may be included in modern awards; and
 - (b) is the provisional model term prohibited by s 55.
- 3.2 The first question can be resolved briefly.

- 3.3 The Commission in its March Decision identified its provisional view that the provisional model term is a term about 'the facilitation of flexible working arrangements, particularly for employees with family responsibilities' within the meaning of s 139(1)(b) of the FW Act. This is not contested by the Australian Chamber.
- 3.4 The provisional model term must then be assessed as being permissible having regard to s 55 of the FW Act.
- 3.5 Section 55(1) of the Act provides that a term of a modern award or enterprise agreement must not exclude any provision of the NES.
- 3.6 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**).
- 3.7 Unlike the ACTU's claim, the provisional model term does not appear to exclude any provision of the NES.
- 3.8 The provisional model term is therefore permitted under s 136 of the FW Act and does not contravene s 55.
- 3.9 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.
- 3.10 As noted previously, the Australian Chamber does not accept that (absent the provisional model term) the existing minimum safety net is failing to facilitate the creation of flexible work arrangements or that employers are engaging in arbitrary, cursory or perfunctory 'consideration' of flexibility requests under the regime created by s 65.
- 3.11 Indeed, the Australian Chamber considers that the evidence heard in these proceedings demonstrates that where employers and employees engage in meaningful as opposed to transactional communication in respect of flexibility requests, mutually acceptable outcomes are produced either in the form of request approvals, compromises or the understanding of legitimate reasons for refusal.
- 3.12 The Australian Chamber submits that the evidence in this case demonstrates that the existing statutory regime is functioning satisfactorily and that employers operating under the existing statutory regime take flexibility requests seriously and approve an overwhelming majority of requests.
- 3.13 The Australian Chamber also notes by way of completeness that the provisional model term appears to be an effective act of supplementation within the meaning of s 55(4)(b).

3.14 As already advanced by the Australian Chamber in these proceedings¹, the Service Threshold Extension would add to the classes of employees referred to in s 65(1A) while the Obligation to Confer and Additional Written Obligations would constitute additional conditions on the employer embellishing those already existing under s 65.

4. WILL THE INCLUSION OF THE PROVISIONAL MODEL TERM IN MODERN AWARDS RESULT IN MODERN AWARDS THAT ONLY INCLUDE TERMS TO THE EXTENT NECESSARY TO ACHIEVE THE MODERN AWARDS OBJECTIVE.'

4.1 Section 138 of the FW Act states as follows:

Achieving the modern awards objective

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

4.2 As noted by the Full Bench in the 2017 Penalty Rates Case, when assessing the statutory test, the focal point of the Commission's consideration is upon the terms of the modern award as varied, although regard may be had to the terms of any proposed variation.

4.3 As noted by the Full Federal Court of Australia in *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123:

[29] ... it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern award objective. Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.

4.4 Whether a term is necessary or merely desirable in relation to s 138 is a question, as noted by the Full Bench in [2018] FWCFB 1692 at [58], as one on which reasonable minds may differ.

4.5 In the submission of the Australian Chamber, having regard to the evidentiary case advanced in these proceedings, it is difficult to make a meaningful assessment and 'value judgment' of whether a modern award which included the provisional model term satisfies the modern awards objective but goes no further.

4.6 Notwithstanding this difficulty, it is perhaps most useful to consider the three aspects of the provisional model term which supplement the existing entitlements under s 65:

- (a) the Service Threshold Extension;
- (b) the Obligation to Confer; and
- (c) the Additional Written Obligations.

The Service Threshold Extension

4.7 No rationale appears to emerge from the evidence presented in the proceedings or within the findings of the Full Bench as to why a service period of six months would satisfy the modern awards objective (but go no further).

4.8 This is the case despite the fact that the ACTU's claim was advanced on the basis of a six month service threshold.

¹ Transcript, 21 December 2017 at [3030] and [3032]-[3036]

- 4.9 Due to the nature of the evidentiary case advanced by the ACTU, it is questionable whether the Full Bench has been placed in a position to assess the relationship between an employee's period of service and requests for flexible work arrangements and the appropriate 'service threshold' for such entitlements. The Full Bench also does not appear to have made any relevant findings on this issue.
- 4.10 The sole argument advanced by the ACTU in relation to an extension to the service threshold appears to have been that such a variation would be more favourable to the employee. While such an extension would increase employee access to a right to request, it would also increase obligations on employers, particularly having regard to the terms of the provisional model term.
- 4.11 Given this lack of rationale, in circumstances where the contemporary safety net created by Parliament in the form of s 65 grants request entitlements only to employees with 12+ month service periods, it is not apparent to the Australian Chamber as to why a value judgment could be made to extend an entitlement to request flexible working arrangements to employees with between 6 to 12 months service. As such, the Australian Chamber submits that s 138 would compel the retention of a 12+ month service threshold.

The Obligation to Confer and Additional Written Obligations

- 4.12 As noted above, the Australian Chamber considers that the evidence in these proceedings demonstrates that where employers and employees meaningfully engage with one another in respect of flexibility requests, mutually acceptable outcomes are produced.
- 4.13 Indeed in the consideration of the Australian Chamber, the ethos behind the Obligation to Confer and the Additional Written Obligations proposed by the Full Bench would already be embodied in the response to the vast majority flexibility requests currently made (independent of an award provision, whether under s 65 or otherwise).
- 4.14 As such, the Australian Chamber retains its position that it is not necessary to include the Obligation to Confer or Additional Written Obligations in modern awards in order to satisfy the modern awards objective. This being said we acknowledge that these provisions do appear to replicate what the evidence demonstrated was good practice.
- 4.15 Addressing the relevant statutory test however is more difficult.
- 4.16 The Australian Chamber acknowledges that the Full Bench has made findings that the granting (in whole or in part) or refusal of employee requests for flexible working arrangements largely depends on the context in which the request is made and that there is a significant unmet employee need for flexible working arrangements.
- 4.17 In such circumstances, it would be available for the Full Bench to conclude that modern awards inclusive of the provisional model term would satisfy the modern awards objective.
- 4.18 That being said, and notwithstanding that the Obligation to Confer and the Additional Written Obligations appear to replicate what the evidence demonstrated was good practice, the Australian Chamber has concerns in respect of the potential effect that the provisional model term will have on business, particularly small business.
- 4.19 The creation of additional administrative elements within the request process may inevitably ground increased 'technical' breaches by businesses, particularly small businesses, in a context where evidence suggests that the majority of requests are dealt with satisfactorily but informally at present.
- 4.20 While the obligations imposed by the provisional model term may not by themselves impose extraordinarily oppressive administrative burden on business (as they likely reflect good practice), when imposed in conjunction with existing administrative obligations (including those progressively being produced by the 4 Yearly Review), the confirmation of the provisional model term has the potential to negatively affect

business (particularly small business) and may ground a greater occurrence of technical (rather than substantive or meaningful) breaches of modern awards.

- 4.21 The potential for a broad interpretation of the scope of the additional obligations also gives rise to a legitimate anxiety for the Australian Chamber, particularly in relation to the Additional Written Obligations, with businesses potentially being required to exhaustively list any and every working arrangement which could conceivably accommodate the employee's responsibilities. Should such an interpretation be taken, increased technical (rather than substantive or meaningful) breaches of modern awards could result.
- 4.22 In circumstances where no substantive case was made out for the specific obligations imposed by the provisional model term in the hearing, exercising its own value judgement as to the operation of s 134 and the limits imposed by s 138, the Australian Chamber considers that the provisional model term goes further than that is necessary to satisfy the modern awards objective.
- 4.23 This said, we are not antagonistic to the notion of meaningful discussion but rather the administrative execution of this as proposed (see s 134(1)(g) and s 134(1)(h)).

5. COMMENTS ON THE TERMS OF THE PROVISIONAL MODEL TERM INCLUDED AT ATTACHMENT A OF THE STATEMENT

- 5.1 Having regard to our above comments concerning the provisional model term, the Australian Chamber submits that no basis has been advanced for the Service Threshold Extension and therefore in X.3 references to 'six months' should be replaced with '12 months'.

Australian Chamber Members

AUSTRALIAN CHAMBER MEMBERS: BUSINESS SA CANBERRA BUSINESS CHAMBER CHAMBER OF COMMERCE NORTHERN TERRITORY CHAMBER OF COMMERCE & INDUSTRY QUEENSLAND CHAMBER OF COMMERCE & INDUSTRY WESTERN AUSTRALIA NEW SOUTH WALES BUSINESS CHAMBER TASMANIAN CHAMBER OF COMMERCE & INDUSTRY VICTORIAN CHAMBER OF COMMERCE & INDUSTRY **MEMBER NATIONAL INDUSTRY ASSOCIATIONS:** ACCORD – HYGIENE, COSMETIC & SPECIALTY PRODUCTS INDUSTRY AGED AND COMMUNITY SERVICES ANIMAL MEDICINES AUSTRALIA AUSTRALIA ARAB CHAMBER OF COMMERCE AND INDUSTRY AIR CONDITIONING & MECHANICAL CONTRACTORS' ASSOCIATION ASSOCIATION OF FINANCIAL ADVISERS ASSOCIATION OF INDEPENDENT SCHOOLS OF NSW AUSTRALIAN SUBSCRIPTION TELEVISION AND RADIO ASSOCIATION AUSTRALIAN BEVERAGES COUNCIL LIMITED AUSTRALIAN DENTAL ASSOCIATION AUSTRALIAN DENTAL INDUSTRY ASSOCIATION AUSTRALIAN FEDERATION OF EMPLOYERS & INDUSTRIES AUSTRALIAN FEDERATION OF TRAVEL AGENTS AUSTRALIAN HOTELS ASSOCIATION AUSTRALIAN INTERNATIONAL AIRLINES OPERATIONS GROUP AUSTRALIAN MADE CAMPAIGN LIMITED AUSTRALIAN MINES & METALS ASSOCIATION AUSTRALIAN PAINT MANUFACTURERS' FEDERATION AUSTRALIAN RECORDING INDUSTRY ASSOCIATION AUSTRALIAN RETAILERS' ASSOCIATION AUSTRALIAN SELF MEDICATION INDUSTRY AUSTRALIAN STEEL INSTITUTE AUSTRALIAN TOURISM INDUSTRY COUNCIL AUSTRALIAN VETERINARY ASSOCIATION BUS INDUSTRY CONFEDERATION BUSINESS COUNCIL OF CO-OPERATIVES AND MUTUALS CARAVAN INDUSTRY ASSOCIATION OF AUSTRALIA CEMENT CONCRETE AND AGGREGATES AUSTRALIA CHIROPRACTORS' ASSOCIATION OF AUSTRALIA CONSULT AUSTRALIA CUSTOMER OWNED BANKING ASSOCIATION CRUISE LINES INTERNATIONAL ASSOCIATION DIRECT SELLING ASSOCIATION OF AUSTRALIA EXHIBITION AND EVENT ASSOCIATION OF AUSTRALASIA FITNESS AUSTRALIA HOUSING INDUSTRY ASSOCIATION HIRE AND RENTAL INDUSTRY ASSOCIATION LTD LARGE FORMAT RETAIL ASSOCIATION LIVE PERFORMANCE AUSTRALIA MASTER BUILDERS AUSTRALIA MASTER PLUMBERS' & MECHANICAL SERVICES ASSOCIATION OF AUSTRALIA MEDICAL TECHNOLOGY ASSOCIATION OF AUSTRALIA MEDICINES AUSTRALIA NATIONAL DISABILITY SERVICES NATIONAL ELECTRICAL & COMMUNICATIONS ASSOCIATION NATIONAL EMPLOYMENT SERVICES ASSOCIATION NATIONAL FIRE INDUSTRY ASSOCIATION NATIONAL RETAIL ASSOCIATION NATIONAL ROAD AND MOTORISTS' ASSOCIATION NSW TAXI COUNCIL NATIONAL ONLINE RETAIL ASSOCIATION OIL INDUSTRY INDUSTRIAL ASSOCIATION OUTDOOR MEDIA ASSOCIATION PHARMACY GUILD OF AUSTRALIA PHONOGRAPHIC PERFORMANCE COMPANY OF AUSTRALIA PLASTICS & CHEMICALS INDUSTRIES ASSOCIATION PRINTING INDUSTRIES ASSOCIATION OF AUSTRALIA RESTAURANT & CATERING AUSTRALIA RECRUITMENT & CONSULTING SERVICES ASSOCIATION OF AUSTRALIA AND NEW ZEALAND SCREEN PRODUCERS AUSTRALIA THE TAX INSTITUTE VICTORIAN AUTOMOBILE CHAMBER OF COMMERCE