

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Further Submission
Family Friendly Work Arrangements
(AM2015/2)

10 September 2018

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GROUP

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

1. INTRODUCTION

1. Further to the hearing conducted on 27 August 2018 in relation to the proposed model term dealing with family friendly work arrangements, the Full Bench issued directions inviting submissions in response to the following question:

“If the model term were amended in the manner contended by the Australian Industry Group and the Australian Chamber of Commerce and Industry, that is, to delete clauses X.7 and X.8 and not extend the model term to the broader class of employees specified in X.3, then what should be the scope of the model term? In particular, if the model term was amended in this way should it be confined to parents and carers only or be extended to all categories of employees set out in s.65(1A)?”

2. In short, Ai Group’s view is that if there is to be a new provision reflecting the approach outlined above, it should be limited to addressing the needs of parents and carers. These submissions set out our reasoning.

2. THE APPROPRIATE SCOPE OF THE PROPOSED MODEL TERM

4. At the outset, Ai Group acknowledges that the approach set out in the Full Bench's statement of 3 May 2018 would address the heart of our concerns about the proposed model term. This includes our opposition to a provision that negates the work of s.44(2) by exposing employers to civil remedies in relation to decisions they make in respect of whether there are reasonable business grounds for refusing a request for flexible working arrangements. It also addresses a concern of Ai Group and other employer parties that the proposed clause inappropriately and unjustifiably expands the category of employees beyond those caught by s.65.
5. We further acknowledge that we have not raised objections to central elements of the proposed award-derived obligation upon employers to comply with a particular process for dealing with, and potentially rejecting, an employee request for flexible work arrangements relating to a person's responsibilities as a parent or carer,¹ since the Commission's March 2018 decision. Such a position has been adopted by Ai Group in light of the Full Bench's conclusions and factual findings as articulated in the March decision.²
6. Given the above context, Ai Group accepts that there is a reasonable basis for the Full Bench to exercise its discretion to vary awards to address the circumstance of such employees in the manner contemplated by the provisional model term. We adopt this position notwithstanding our primary view, as outlined in earlier proceedings, that s.65 reflects an appropriate regulatory response to the challenge of facilitating access to flexible working arrangements.

¹ Although we have raised a number of suggestions about the form of the clause and aspects of its operation.

² [2018] FWCFB 1692

7. Put simply, although we have not called for further regulation of the implementation of flexible work arrangements, we have sought to engage constructively with the Full Bench's provisional view, by proposing what we perceive to be improvements to the Commission's provisional model rather than re-agitating points that were contested in previous iterations of these proceedings.
8. However, our position is also based on the premise that such new obligations would only apply in the context of a subset of those employees covered by s.65. Different considerations would arise if the categories of employees who are able to make a request are dramatically expanded as proposed in the directions of 30 August 2018.

The need for simplicity

9. In support of the proposition that the provisional model term should not be expanded to include employees with less than 12 months' service, we observe that expanding the scope of the provisional model term introduces a level of complexity to the system that is apt to confuse. Put simply, establishing a system where an employer has certain obligations to one group of employees with parenting or caring responsibilities under the legislation and separate (and different) award derived obligations to a different group of employees with responsibilities as a parent or carer would be inherently confusing.
10. We here acknowledge that it might be argued that aligning the application of the proposed award provisions with the application of s.65 more broadly could make the safety net simpler and easier to understand. However, any relative benefits are outweighed by factors such as the administrative or regulatory burden that the scheme would impose upon employers. Moreover, the potential complexity associated with providing parents or carers with additional entitlements to employees in other circumstances should not be overstated. Until relatively recently the benefits of s.65 only flowed to parents or carers.

11. Moreover, adopting the approach of expanding the award provision so that it applies to all categories of employees covered by s.65 would mean that different obligations apply to award covered employees when compared to award free employees. This would simply give rise to a different form of complexity. On one view, if simplicity is to be pursued as an objective, the best course of action would be to leave s.65 to regulate matters related to requests for flexible work arrangements. Ultimately, any departure from such a situation should only occur to the extent that it has been established that is *necessary* to ensure that awards achieve the modern awards objective.³ In our view, such a conclusion cannot be safely reached in relation to the potential expansion of the provisional model term's application to a broader range of employees, on the material currently before the Commission.
12. There has, in the context of these proceedings, been no detailed consideration of the need to provide any greater assistance to employees covered by s.65(5) beyond parents and carers. Nor has there been any analysis of the potential impact of a term that is broader in scope. Given this context, the maintenance of a stable and sustainable award system would weigh against the Full Bench making such a change.

Section 143(1)(f)

13. Ai Group's primary concern over the expansion of the obligations so that they apply to categories of employees set out in s.65(1A) relates to considerations flowing from s.134(1)(f); "*the likely impact of any exercise of modern award powers on business including on productivity, employment costs and the regulatory burden.*"
14. In order to assess such matters it is necessary to consider the nature of the new requirement that the proposed provisions would impose upon employers. Relevantly, an employer would essentially have new obligations to:
 - seek to confer with an employee who has made a relevant request;

³ As contemplated by s.138

- Genuinely try to reach agreement on a change in working arrangements that accommodates the employee's needs;
 - Set out a more comprehensive written explanation of the reason for any refusal than is required under the Act;
 - Indicate in writing whether the employer can offer any change in working arrangements so as to better accommodate the employee's responsibilities;
 - If the employer can offer a change in arrangements, set out in writing all such changes (x.10(c)(ii)); and
 - Set out, in writing, any mutually agreed change in working arrangements (x.10(b)).
15. The new obligations are not trivial. They would significantly increase the regulatory burden upon employers.
16. It is difficult to provide a particularly detailed assessment of the impact upon industry of the proposed provision in the timeframe afforded. There has obviously been limited scope for engagement with industry about such matters. Nonetheless, certain apparent implications warrant mention.
17. **Firstly**, the burden associated with an obligation to consult with employees about flexible work arrangements will vary from employer to employer. It will depend in part upon the resources of the relevant employer and also upon the characteristics of the relevant workforce. In the context of industries (or indeed individual enterprises) where the composition of the workforce is particularly skewed towards a high proportion of employees falling into one of the categories covered by s.65(1A) the impact of the proposed variation would be more pronounced. This might mean, for example, that the impact upon an industry that has an ageing workforce is particularly disproportionate.

18. **Secondly**, the burden of an obligation to set matters out in writing should not be underestimated. Many employers, particularly small employers, are not well resourced. Obviously, many small employers do not have the benefit of personnel with human resources expertise. In such instances, the need to implement formal processes for handling workplace relations matters can be a distraction from the productive performance of work.
19. It has been Ai Group's experience that, in practice, many employers do find it difficult to accurately set out matters in writing. The Commission should not lightly extend the model provisional term to apply in the context of all the relevant categories of employees.
20. **Fourthly**, the Full Bench's central conclusions in its March decision were in part based upon matters specific to the circumstances of parents and carers.⁴ This is entirely appropriate as this was the focus of the case. Both the submissions and evidentiary material before it were focussed on these categories of employees. Relevantly, the potential for family friendly work arrangements to facilitate greater workforce participation by women and the associated benefits for the Australian economy appear to be central considerations underpinning the Full Bench's conclusions in its March Decision. Accordingly, the extent to which there is a case for providing additional assistance to other categories of employees has not been properly ventilated before the Commission. There certainly hasn't been evidence of the need for such a change presented to the Commission.
21. **Fifthly**, expanding the categories of employees who would be covered by the model clause magnifies the burden that each award imposes upon employers. The cumulative impact of such a step should be properly assessed and taken into account before any decision to widen the scope of the model term is made. It is not possible to properly identify the impact of the proposed award term on the material before the Commission. Absent such clarity, the clause should not be expanded beyond application to parents and carers.

⁴ [2018] FWCFB 1692

22. **Sixthly**, the modification of the model term to delete clauses X.7 and X.8 is not, of itself, a justification for expanding the scope of the model term.

Specific considerations relating to employees with a disability and employees over the age of 55.

23. There is a risk that imposing additional obligations upon employers in relation to employees with particular characteristics will discourage employers from engaging such persons. In considering whether to expand the scope of the provisional model term the Full Bench should assess the prospect that implementing enhanced rights for employees with disabilities or who are over the age of 55, as contemplated by the Full Bench's Statement, will generate a perception amongst some employers that the employment of such individuals will be potentially problematic. This, in turn, could disadvantage such individuals in the labour market.
24. Employer attitudes and responses to such regulation are significant matters that warrant detailed consideration before further regulation is implemented.

Special considerations relating to employees covered by s.65(1A)(e) and s.65(1A)(f)

25. In assessing whether to expand the scope of the provisional model term to include employees covered by s.65(1A)(a), it should also be borne in mind that the Commission has only very recently amended all awards to include new obligations upon employers to provide unpaid leave to employees experiencing domestic violence. This reform builds upon what was the relatively recent expansion of s.65 to include categories of persons beyond parents or carers.
26. Ai Group suggests that there is merit in reviewing the operation of the newly implemented award provisions relating to unpaid domestic violence leave, any new award provisions that may be implemented in relation to parents and carers as a product of these proceedings and the application of s.65 in the context of persons other than parents and carer's, after an appropriate period

of time has elapsed and before any further steps are taken to address the needs of employees in other circumstances contemplated by s.65(1A).

Need for greater clarity around the certain terms utilised in s.65

27. If the model term was to be amended to include all categories of employees covered by s.65(1A)(e) and s.65(1A)(f), consideration would need to be given to whether this would cause confusion in relation to the application of award provisions dealing with flexible work arrangements and the provisions dealing with unpaid leave.
28. We note that the terms “domestic violence” and “family member” are defined under the newly inserted award clauses dealing with unpaid domestic violence leave. This was part of the consensus position reached between the parties as to the content of such a provision. However, it is not clear that those definitions would necessarily align completely with the meaning of “violence” and “family” in section 65(1A).