



1 June 2018

Justice Ross, President
Vice President Hatcher
Commissioner Spencer
Fair Work Commission

By email: amod@fwc.gov.au

Dear Sirs

Response to 4 yearly review of modern awards – family friendly working arrangements – provisional model term.

I have taken time to draft a response to your request for submissions for 3 key reasons.

1. I am the founder of international [Flexible Working Day](#) and share the views of many people around Australia. Last year was our first year (21 June 2017) and the day generated a national conversation reaching more than 1 million Australians working across corporate, government and non-profit organisations. With a very organic approach in the first year, the campaign generated overwhelming coverage, reaching over 1 million people. From mum and dads wanting to spend more time with their children, carers, people with disability, to millennials reshaping the workforce of today, people transiting to retirement, many embracing flex to support their health and wellness, flexible working was on the agenda. The conversation range from radio journalists asking “the secrets to flexibility” to CEOs celebrating their organisation’s commitment to flexibility, and everyday Australians saying “I want more flex”. This year the national day is being held on 6 June 2018, which is officially supported from large organisations, government and senior leaders across the country, with many companies using the day to ‘launch’ their internal flexible work campaigns.
2. I am a parent of 3 children (2, 12, 14) and my husband and I have no other option than to work flexibly, as we have no family around. Our youngest has a disability and is on medication that often makes her very sick and has many appointments at the doctor / hospital that are always during the week. Between us we have 4 elderly parents interstate, which has required us in the last year to ‘drop everything’ and travel to attend to their health needs. This “sandwich generation” that we find our self in is becoming more pronounced as our parents age. We are both very fortunate to be able to access flexibility, however believe that it shouldn’t be a privilege but a right.
3. I had a disability (which has been rectified by surgery only recently) which required me to work flexibly. As a career senior executive, managing large geographically dispersed teams, I do recognise some of the barriers and challenges that organisations and managers face in managing flexible teams. However that is no longer an excuse, the world has moved on a flexible working is a part of the new workforce and workplace. The senior leaders stepping us this Flexible Working Day are all sharing their story about how flexibility benefits them and their organisations – they believe that it should be for anyone for any reason, and I couldn’t agree more.

Please find attached our comments related to each the clauses in Attachment A of Fair Work Commission Statement (FWCFB 2443). (Comments in red.)

If you would like further information, data or to discuss please contact me on 0448 207 056.

Best wishes

Vanessa Vanderhoek

CEO, The FlexAgility Group
Founder, Flexible Working Day

Attachment A

Provisional Model Term

X Requests for flexible working arrangements

NOTE: Clause X provides for certain employees to request a change in working arrangements because of their circumstances as parents or carers. Clause X is additional to the provision to request a change in working arrangements in section 65 of the Act.

Employee may request change in working arrangements

X.1 An employee may request the employer for a change in working arrangements relating to the employee's circumstances as a parent or carer if:

- (a) any of the circumstances referred to in clause X.2 apply to the employee; and
- (b) the employee would like to change their working arrangements because of those circumstances; and
- (c) the employee has completed the minimum employment period referred to in clause X.3.

NOTE: Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.

X.2 For the purposes of clause X.1 the circumstances are:

- (a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger; or
- (b) the employee is a carer (within the meaning of the *Carer Recognition Act 2010*).
 - The reasons for requesting flexible working arrangements should not be restricted to the current conditions (is a carer, has a disability, is 55 years or older, is experiencing domestic violence).
 - Any employee should have the right to request flexible working arrangements, for any reason; and that the reason should not need to be provided.
 - Ultimately, it should not be up to an employer to determine if someone else's needs are important or not. What should matter is the process of making it work. Much in the way that a hiring manager can't ask about someone's relationship or children, this should be the case in requesting flexibility so that the employer doesn't have the opportunity to discriminate.
 - For example, an employer may be more open to a mother asking for flexibility than they would to a father because of gender biases (not considering a father to be a 'primary carer') – and this is to the detriment of gender equality.
 - Also, things like having mental health issues are not covered (unless they are considered a disability); and a plethora of other reasons, as life is not homogeneous or predictable, and flexibility can be required in many different situations.
 - If the focus is more on making it work, then the reason doesn't matter.

X.3 For the purposes of clause X.1 the minimum employment period is:

- (a) for an employee other than a casual employee—the employee has completed at least 6 months of continuous service with the employer immediately before making the request; or
- (b) for a casual employee—the employee:



(i) has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 6 months immediately before making the request; and

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

- Employees should have the right to request flexible working arrangements from the very beginning of employment rather than waiting for some arbitrary amount of time (where flexibility is 'earned' as a 'privilege').
- The needs of people who require flexibility may already be present at the beginning of an employment period (e.g., a father who has two young children and starts a new job may need to start work later in the mornings to drop the kids at childcare – straight away, not after 6 months of employment).
- If it can be shown, as in X.8, that an arrangement can be agreed upon that doesn't result in a significant loss in productivity or efficiency, there should be no reason for a person not being able to begin employment with a flexible arrangement.

X.4 To avoid doubt, and without limiting clause X.1, an employee may request to work part-time to assist the employee to care for a child if the employee:

(a) is a parent, or has responsibility for the care, of the child; and

(b) is returning to work after taking leave in relation to the birth or adoption of the child.

Formal requirements for the request

X.5 The request must:

(a) be in writing; and

(b) state that the request is made under this award; and

(c) set out details of the change sought and of the reasons for the change.

Responding to the request

X.6 The employer must give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request.

X.7 The employer may refuse the request only on reasonable business grounds.

X.8 Without limiting what are reasonable business grounds for the purposes of clause X.7, reasonable business grounds include the following:

(a) that the new working arrangements requested by the employee would be too costly for the employer;

(b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;

(c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;

(d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;

- The ‘loss in efficiency or productivity’ could be based on subjective ideas about how flexibility will affect productivity. For instance, managers who are opposed to flexibility have their own biases about what employees will do with said flexibility (and assume that productivity will decrease).
- There is much evidence that points to productivity increasing with flexible work arrangements (e.g., [Stanford University](#) study found 13% increase in productivity with employees able to work from home).
- One condition could be that in ‘genuinely reaching an agreement’, the employer and employee should seek to trial over a certain period, thereby proving one way or another whether it will result in a loss. An example may be an employer being required to at least trial for 4–8 weeks when met with a request (or this could be placed as a strong example of ‘genuinely trying to reach an agreement’).

(e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

- As with the previous point, trialling and working with technology can show that customer service levels can be maintained or improved with flexible work.

X.9 Before refusing a request, the employer must seek to confer with the employee and genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee’s circumstances having regard to:

(a) the nature of the employee’s responsibilities as a parent or carer; and

(b) the consequences for the employee if changes in working arrangements are not made; and

(c) any reasonable business grounds for refusing the request.

- We agree with this clause, and it is a basis for the suggestions in X.2 and X.3 about requesting flexibility *for any reason and from the beginning of employment*. If employees and employers are genuinely listening to each other and working together, there is a higher chance that it will result in a positive outcome for both and decrease initial biases against flexibility from employers.

What the written response must include if the employer refuses the request

X.10 Clause X.10 applies if the employer refuses the request.

(a) The written response under clause X.6 must include details of the reasons for the refusal, including the business ground or grounds for the refusal and how the ground or grounds apply.

(b) If the employer and employee agreed on a change in working arrangements under clause X.9, the written response under clause X.6 must set out the agreed change in working arrangements.

(c) If the employer and employee could not agree on a change in working arrangements under clause X.9, the written response under clause X.6 must:

(i) state whether or not there are any changes in working arrangements that the employer can offer the employee so as to better accommodate the employee’s responsibilities as a parent or carer; and

(ii) if the employer can offer the employee such changes in working arrangements, set out those changes to working arrangements.

Dispute resolution



X.11 The Commission cannot deal with a dispute to the extent that it is about whether the employer had reasonable business grounds to refuse a request under clause X, unless the employer and employee have agreed in writing to the Commission dealing with the matter.

NOTE: Disputes about whether the employer has conferred with the employee and responded to the request in the way required by clause X, can be dealt with under clause Y—Consultation and Dispute Resolution.

- There should be harsher penalties for employers who do not adhere to these conditions.
- There should be financial penalties for employers who are found to have broken these conditions. If any employer breaches and award term they are subject to fines of up to \$54,000 per breach.
- The Commission should have the jurisdiction to order penalties.
- We also do not agree that both employer and employee are required to agree in writing for the Commission to deal with the matter. The employer should have to front the Commission if an employee believes they are not following the conditions, regardless of whether they agree.
- The Commission should also be able to consider evidence by both employees and employers about whether the requested arrangements will be significantly detrimental to business activities and costs, and decide on whether they are reasonable or not.
- They should also have consideration for the efforts to which the employee has gone to create a plan and address concerns raised by the employer (i.e., if the employer keeps setting up different reasons for refusing, even if the employee finds suitable solutions).
- If employers are not held to these conditions, this leaves space for those employers who may have prejudices against flexibility to simply refuse flexible work arrangements without showing genuine effort; and the employee is not truly protected.