

4 Yearly Review of Modern Awards – Family Friendly Work Arrangements

Submissions of the National Road Transport Association (NatRoad)

Introduction

1. These submissions are filed on behalf of the National Road Transport Association (NatRoad) in response to the Statement of the Full Bench dated 3 May 2018¹ (**the Statement**) and the Direction made by His Honour, Justice Ross at the conference held on 19 July 2018² (**the Direction**).
2. The Statement invited interested parties to file submissions on three points:
 - (i) *The terms of the provisional model term.*
 - (ii) *Whether the provisional model term is permitted under s.136 and, in particular, whether it contravenes s.55.*
 - (iii) *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. NatRoad's interests arise principally from members' coverage of the *Road Transport and Distribution Award 2010* and the *Road Transport (Long Distance Operations) Award 2010*. We also have an interest in several other awards that regulate our members' employment arrangements, namely:
 - the *Clerks—Private Sector Award 2010*;
 - the *Manufacturing and Associated Industries and Occupations Award 2010*;
 - the *Passenger Vehicle Transportation Award 2010*;
 - the *Transport (Cash in Transit) Award 2010*; and
 - the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*.
4. NatRoad is a not for profit industry association. It represents the interests of more than 1100 contract carriers, employing contractors, owner drivers and other businesses that operate in the road transport industry throughout Australia. Most of NatRoad's members are small businesses.
5. NatRoad welcomes the opportunity to make submissions to the Full Bench in relation to matter AM2015/2 – Family Friendly Work Arrangements³.

Draft model term

6. NatRoad has considered the 'Provisional Model Term' set out in Attachment A of the Statement.

¹ [2018] FWCFB 2443 <https://www.fwc.gov.au/documents/decisionssigned/html/2018fwcfb2443.htm>

² Transcript 26 July 2018, at PN59 <https://www.fwc.gov.au/sites/awardsmodernfouryr/260718-am20152.htm>

³ [2018] FWCFB 1692 <https://www.fwc.gov.au/documents/decisionssigned/html/2018fwcfb1692.htm>

Filed on behalf of:	Members of the National Road Transport Association
By:	The National Road Transport Association
Address:	Level 3, Minter Ellison Building, 25 National Circuit, Forrest, ACT, 2603
Email:	david.johns@natroad.com.au
Telephone:	(02) 6295 3000

7. It is noted that the provisional model term, while largely based on s.65, introduces an expansive range of additional requirements, such as:
- before refusing an employee's request, a requirement for the employer to seek to confer with the employee and genuinely try to reach agreement on a change in working arrangements;
 - the additional content requirements for the written response that an employer must provide if refusing the request;
 - the employer's written response to provide a comprehensive explanation of the reasons for the refusal; and
 - the employer's written response must state whether or not there are any changes in working arrangements that the employer can offer the employee, and, if there are, the written response must also set out those changes.
8. We note that at paragraph [427] of the Decision the Full Bench states:
- '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.'*
9. We agree with the Full Bench 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).
10. However, NatRoad does not see that the provisional model can be properly considered a term permitted by s.55.
11. The intended objective of s.65 is to create a process whereby an employee may request a change and an employer is afforded a limited right to refuse it.
12. When considered in context clause X.9 and X.10 would operate to exclude s.65 in that they would negate the employer's right under s.65(5) to refuse an employee's request for altered working arrangements on reasonable business grounds. In fact, it would provide a mechanism by which an employee seeking a change to their working arrangements could avoid the operation of s.65 as enacted.
13. Additionally, consistent with the Decision of the Full Bench in the Alleged NES Inconsistencies case (Inconsistencies Case)⁴, the provisional model term excludes the requirement proscribed in s.65(2)(a) that the employee will have completed at least 12 months of continuous service with the employer before making the request, reducing the timeframe to 6 months thereby negating an NES provision. In the Inconsistencies case the following was said:
- 'A provision which operates to exclude the NES will not be an incidental, ancillary or supplementary provision authorised by s.55(4).'*⁵
14. The consequence of the matters raised in paragraph 11 to 13 above, is that the provisional model term offends s.55(1) and s.55(5) and is therefore not a term permitted to be included in any modern award under s.136(2)(b).

⁴ [2015] FWCFB 3023 <https://www.fwc.gov.au/documents/decisionssigned/html/2015fwcfb3023.htm>

⁵ Ibid, at para [37]

Terms that may be included in modern awards

15. A modern award must only include terms that are permitted or required by Part 2-3, Division 3, Subdivisions B and C (respectively), of the Act⁶. Further to these terms, incidental terms may be included, but only to the extent that they are essential for the purpose of making a particular term operate in a practical way⁷.
16. 'Essential' is defined in the Macquarie Concise Dictionary as meaning '*absolutely necessary, indispensable*'.
17. The provisions provisionally proposed add substantially to the entitlement under s.65. But they cannot be argued to be essential for s.65 to operate in a practical way; they simply provide for different entitlements than s.65 as drafted.
18. In the Decision, the Full Bench found⁸ that 'The vast majority of requests for flexible working arrangements (both informal and those made pursuant to s.65) are approved in full, some requests are approved with amendments and small a proportion (about 10 per cent) are rejected outright.' Therefore s.65 does not require the additional provisions provisionally proposed in order to operate in a practical way.
19. On this basis, NatRoad contends that the aforementioned additional requirements in the provisional model term are not fundamental or central to delivering greater access to flexible work arrangements. Clearly, the facilitation of workplace flexibility has occurred without the terms provisionally proposed.
20. A further point of consideration is that s.138 limits the permitted or required terms that may be included in a modern award to that which is necessary to achieve the modern awards objective.

The modern awards objective

21. The modern awards objective is proscribed at s.134(1) of the Act, specifically:

'The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) *relative living standards and the needs of the low paid; and*
- (b) *the need to encourage collective bargaining; and*
- (c) *the need to **promote social inclusion through increased workforce participation**; and*
- (d) *the need to **promote flexible modern work practices** and the efficient and productive performance of work; and*
- (da) *the need to provide additional remuneration for:*
 - (i) *employees working overtime; or*
 - (ii) *employees working unsocial, irregular or unpredictable hours; or*
 - (iii) *employees working on weekends or public holidays; or*
 - (iv) *employees working shifts; and*
- (e) *the principle of equal remuneration for work of equal or comparable value; and*
- (f) *the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and **the regulatory burden**; and*

⁶ *Fair Work Act 2009* (Cth), s.136

⁷ *Ibid*, s.142(1)(b)

⁸ para [392], point 11

- (g) *the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and*
- (h) *the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.*

This is the modern awards objective. [emphasis added]

- 22. The modern awards objective⁹ speaks of the ‘*need to promote social inclusion through increased workforce participation*’¹⁰; and ‘*the need to promote flexible modern work practices*’¹¹; and ‘*the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden*’¹².
- 23. The proposed material changes included in the provisional model term that are in addition to the current requirements of s.65 in requiring the employer ‘to confer with the employee and genuinely try to reach agreement on a change in working arrangements’ and to identify ‘working arrangements that the employer can offer the employee’, must be construed in context. Currently employers have an unconstrained power, but the proposed requirements seek to place a constraint on the employer’s ability to refuse a request on reasonable business grounds conferred by s.65(5) which will significantly increase the regulatory burden imposed on a business, and in particular, a small business.
- 24. Evidence submitted by Ai Group¹³, demonstrates that the granting of flexible working arrangements is not without consequence for a business. As a result of granting a request, an employer may need to implement measures to facilitate the relevant employee’s changed working hours, but there may nonetheless be a reduction in efficiency.
- 25. On this basis, we submit that the inclusion of the provisional model term in modern award is contrary to the Modern Awards Objective and is therefore not permitted under s.136.

Conclusion

- 26. As invited in the Statement and in accordance with the Direction, we submit for the Full Bench’s consideration our response to the three points set out in paragraph 2 of this submission as follows:
 - (i) The provisional model term, while largely based on s.65, introduces an expansive range of additional requirements that do not add to the entitlement under s.65, nor are they essential for s.65 to operate in a practical way; they simply provide for a different entitlement.
 - (ii) For the reasons set out in this submission, we contend that the provisional model term contravenes s.55 and is not permitted under s.136.
 - (iii) For the reasons set out in this submission, we submit that the inclusion of the provisional model term in modern awards is contrary to the Modern Awards Objective.

National Road Transport Association

9 August 2018

⁹ *Fair Work Act 2009* (Cth), s.134(1)

¹⁰ *Ibid*, s.134(1)(c)

¹¹ *Ibid*, s.134(1)(d)

¹² *Ibid*, s.134(1)(f)

¹³ Ai Group Final Submissions, Family Friendly Work Arrangements, 19 December 2017 – section 5