BACKGROUND PAPER

Fair Work Act 2009
s.156–4 yearly review of modern awards

Family Friendly Work Arrangements

(AM2015/2)

25 JULY 2018

Note: This is a background paper only. It has been prepared by the Commission's research area and does not represent the view of the Commission on any issue.

Background

[1] This background paper has been prepared to facilitate the conference to be held at 2pm on Thursday 26 July 2018 in Melbourne.

In a Decision issued 26 March 2018[1] (the March 2018 Decision) a Full Bench rejected the ACTU's claim to vary all modern awards to include an entitlement to part-time work or reduced hours for employees with parenting or caring responsibilities.

[2] The Full Bench went on to express a *provisional* view that modern awards should be varied to incorporate a model term to facilitate flexible working arrangements. The *provisional* model term is set out at **Attachment A**.

[3] In a Statement[2] issued on 3 May 2018 interested parties were invited to comment on the following issues:

(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.

[4] Submissions were received from:

- Australian Chamber of Commerce and Industry (ACCI);

[1] [2018] FWCFB 1692 at [412].

[2] [2018] FWCFB 2443.

- Australian Council of Trade Unions (ACTU);
- Australian Industry Group (Ai Group);
- G Schuster (an individual);
- National Farmers' Federation (NFF);
- National Road Transport Association (NatRoad);
- Pharmacy Guild of Australia; and
- The FlexAgility Group.

[5] A Mention was held in relation to this matter on 21 June 2018. A transcript[3] is available on the 4 yearly review section of the Commission's website. The following parties attended the mention:

- Ai Group;
- ACCI;
- ACTU;
- NatRoad; and
- NFF.

[6] At the mention, there was general agreement as to the following:

1. ACCI and Ai Group are to discuss a range of issues with a number of other employer organisations with a view to reaching a common position which may obviate the need for an extensive debate about jurisdiction. Following the discussion amongst the various employer organisations, they will confer with the ACTU.

2. ACCI and Ai Group are to facilitate the preparation of a joint report regarding the outcome of the discussions.

3. The joint report is to be lodged (to amod@fwc.gov.au) by no later than **4pm Monday, 16 July 2018**.

4. A further mention will be held on **Thursday 19 July 2018 at 9:30am**. A Notice of Listing will be issued in due course.

5. Liberty to apply.

[7] On 18 July 2018 Ai Group lodged a 'Draft Joint Employer Proposal — Provisional Model Term', which was the product of discussions with various employer parties (the Joint Employers' proposed term). The Joint Employers' proposed term is set out at **Attachment B**.

[8] A further Mention in relation to this matter was held on 19 July 2018.[4] Arising out of that Mention a conference of interested parties is to be held on **Thursday 26 July 2018 at 2pm in Melbourne**. Interested parties were directed to file any further submissions by **Thursday 9 August 2018**. The matter will be listed for hearing on **Monday 27 August 2018 at 10.00am in Sydney**.

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[3] Transcript 21 June 2018.

[4] Transcript 19 July 2018.

Comparison between Joint Employers' proposed term and *provisional* model term

[9] There are 12 points of difference between the Joint Employers' proposed term and the *provisional* model term:

1. The note at the commencement of the two terms is different. In part this is because the Joint Employers' proposed term is read with s.65 of the *Fair Work Act 2009* (Act) and applies to a request for a change in working arrangements made under s.65, whereas the *provisional* model term is self-contained. The changes made to the note in the *provisional* model term are shown in mark-up below:

   > NOTE: ~~Clause X~~ Section 65 of the Act provides for certain employees to request a change in working arrangements because of their circumstances as parents or carers. It also sets out formal requirements for making and either agreeing to, or refusing, such requests. ~~Clause X is additional to the provision to request a change in working arrangements in section 65 of the Act.~~ Clause X sets out additional processes relating to the handling of such requests.

   The note in the Joint Employers' proposed term addresses s.65 of the Act, but like the note in the *provisional* model term only refers to employees who are parents or carers (and not to the other employee circumstances covered by s.65).

2. Clause X.1 of the Joint Employers' proposed term confines the term to a parent or carer who has made a request under s.65(1) of the Act. As a result, the 12 month minimum employment period in s.65(2) of the Act applies. In contrast, cls.X.1, X.2 and X.3 of the *provisional* model term extend the operation of that term to a parent or carer who has completed 6 or more months' employment.

3. As the Joint Employers' proposed term is read with s.65 of the Act whereas the *provisional* model term is self-contained, the Joint Employers' proposed term does not contain any equivalent to the following provisions of the *provisional* model term:

   (i) cl.X.1 (which combines in one subclause the 3 requirements in s.65 for eligibility to request a change in working arrangements);

   (ii) the note under cl.X.1 (which reproduces the note under s.65(1));

   (iii) cl.X.4 (which rearranges s.65(1B) without altering its effect);

   (iv) cls.X.5(a) and (c) (which reproduce s.65(3));

   (v) cl.X.6 (which reproduces s.65(4));

   (vi) cl.X.7 (which reproduces s.65(5)); and

   (vii) cl.X.8 (which essentially reproduces s.65(5A)).

4. The Joint Employers' proposed term does not include a provision equivalent to cl.X.5(b) of the *provisional* model term (which provides that the employee's request must state that it is made under the award).

5. While cls.X.2(a) and (b) of the Joint Employers' proposed term are essentially the same as cls.X.9(a) and (b) of the *provisional* model term, the wording of cl.X.2(c) is different to cl.X.9(c). Clause X.2(c) of the Joint Employers' proposed term requires regard to be had to the 'consequences for the employer if

the changes in working arrangements are made' whereas cl.X.9(c) of the *provisional* model term requires regard to be had to 'any reasonable business grounds for refusing the request.'

6. While cl.X.3 of the Joint Employers' proposed term and cl.X.10(b) of the *provisional* model term are differently arranged and worded, they are of similar effect. Where the employer and employee agree on a change in working arrangements that differs from that initially requested by the employee, cl.X.3 requires the employer to 'set out the agreed change in writing and provide a copy of this agreement to the employee.' In contrast, cl.X.10(b) of the *provisional* model term requires the employer's written response to the employee's initial written request (as per s.65(4)) to include any agreed change in working arrangements.

7. The note above cl.X.4 of the Joint Employers' proposed term does not correspond to any note in the *provisional* model term. The note relates that s.65 requires an employer to provide an employee with a written response (including certain details), if the employer refuses an 'employee request' for a change in working arrangements. In contrast, cls.X.6 and X.10(a) of the *provisional* model term reproduce the requirements in s.65(4) for a written response to be given whether the employee's written request is refused or granted, and for the written response to be given within 21 days.

8. While cl.X.4(a) of the Joint Employers' proposed term is arranged and worded differently to cl.X.10(a) of the *provisional* model term, it appears to be to the same effect when read with ss.65(4) and (6) of the Act. In particular, it appears that cl.X.4(a) requires an employer to give an employee a written response stating that the employer refuses the employee's written request for a change in working arrangements (including additional details about the business grounds for that refusal) even if some different change in working arrangements has been agreed after conferring with the employee under cl.X.2.

9. Paragraph (b) in cl.X.4 of the Joint Employers' proposed term contains some changes to the wording of subparagraph (c)(i) in cl.X.10 of the *provisional* model term, as shown in mark-up below (with prefatory words within square brackets):

> ~~[the written response … must] state~~ [the employer must provide in their written response] an indication as to whether or not there are any changes in working arrangements that the employer can reasonably offer the employee so as to better accommodate the employee's responsibilities as a parent or carer

Further, if the reading of cl.X.4(a) of the Joint Employers' proposed term suggested at point 8 above is correct, then it appears if the employer refuses the employee's written request pursuant to s.65(4), that cl.X.4(b) requires information about changes in working arrangements that could be offered by the employer to be given to an employee even if some different change to working arrangements has been agreed pursuant to cl.X.2. In contrast, cl.X.10(c)(i) of the *provisional* model term only requires such information to be given if there was no agreement on a change in working arrangements pursuant to cl.X.9.

10. While paragraph (c) of cl.X.4 of the Joint Employers' proposed term is worded differently to subparagraph (c)(ii) of cl.X.10 of the *provisional* model term, the wording is of similar effect. However, again, if the reading of cl.X.4(a) of the

Joint Employers' proposed term suggested at point 8 above is correct, then cl.X.4(c) applies even if some different change in working arrangements has been agreed pursuant to cl.X.2.

11. As well as being given substantive effect as a clause in the Joint Employers' proposed term, the wording of cl.X.5 of the Joint Employers' proposed term contains one change to the wording of the note under cl.X.11 of the *provisional* model term. The change is that cl.X.5 refers to responding to an employee's request in the way required by 'clause X.2' whereas the note in the *provisional* model term refers to responding to an employee's request in the way required by 'clause X'.

    Being confined to responses under 'clause X.2', cl.X.5 of the Joint Employers' proposed term does not encompass disputes about whether an employer has responded to an employee's request in a way required by cls.X.3 and X.4 of the Joint Employers' proposed term. In contrast, the note in the *provisional* model term encompasses all requirements to respond to a request under the *provisional* model term.

12. The note under cl.X.5 of the Joint Employers' proposed term makes some changes to the wording of cl.X.11 of the *provisional* model term. The changes to the wording of cl.X.11 are shown in mark-up below:

    > 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~~ section 65 of the Act, unless the employer and employee have agreed in ~~writing~~ a contract of employment or other written agreement to the Commission dealing with the matter.

    The wording changes in the Joint Employers' proposed term reflect the operation of the Joint Employers' proposed term as applying to a request for a change in working arrangements made under s.65 of the Act, and pick up some additional wording from the limitation on dispute resolution in s.739(2). Clause X.11 of the *provisional* model has substantive effect so as to make it clear that the limitation in s.739(2) applies to a request for a change in working arrangements made under the *provisional* model term (an issue that does not arise under the Joint Employers' proposed term).

Conference on 26 July 2018

[10] At the commencement of the conference on 26 July 2018, Ai Group will be invited to identify any errors or omissions in the comparison at [10] above. Ai Group will also be invited to identify the particular ways in which it is said that the Joint Employers' proposed clause supplements s.65 of the Act.

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*).

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.

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;

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

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.

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 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.

Draft Joint Employer Proposal
Provisional Model Term

X Requests for Flexible Work Arrangements

NOTE: *Section 65 of the Act provides for certain employees to request a change in working arrangements because of their circumstances as parents or carers. It also sets out formal requirements for making and either agreeing to, or refusing, such requests. Clause X sets out additional processes relating to the handling of such requests.*

Application of additional obligations

X.1 This clause applies when an employee who is:

(a) a parent, or has responsibility for the care, of a child who is of school age or younger; or

(b) a carer (within the meaning of the Carer Recognition Act 2010),

makes a request under section 65 (1) of the Act for a change in working arrangements.

Obligation to try to reach agreement on a change in working arrangements

X.2 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 the:

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

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

(c) consequences for the employer if the changes in working arrangements are made.

X.3 If the employer and employee reach agreement on a change in working arrangements that differs from that initially requested by the employee, the employer must set out the agreed change in writing and provide a copy of this agreement to the employee.

Obligation to provide further details if an employer refuses a request

NOTE: *If pursuant to section 65 of the Act, an employer refuses an employee request for a change in working arrangements, the employer must provide an employee with a written response stating that the employer refuses the request and including details of the reason for the refusal. Clause X.4 requires an employer to include additional information in the response.*

X.4 If pursuant to section 65 of the Act, the employer provides an employee written notice refusing a request in accordance with s 65 of the Act, the employer must provide in their written response:

(a) the business ground or grounds for the refusal and how the ground or grounds apply;

(b) an indication as to whether or not there are any changes in working arrangements that the employer can reasonably offer the employee so as to better accommodate the employee's responsibilities as a parent or carer; and

(c) (if the employer can offer such changes) what those changes would be.

Dispute resolution

X.5 *Disputes about whether the employer has conferred with the employee and responded to the request in the way required by clause X.2, can be dealt with under clause Y—Consultation and Dispute Resolution.*

NOTE: 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 section 65 of the Act, unless the employer and employee have agreed in a contract of employment or other written agreement to the Commission dealing with the matter.