

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Further Submission
Family Friendly Work Arrangements
(AM2015/2)

13 June 2018

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GROUP

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

1. INTRODUCTION

1. In a Decision issued on 26 March 2018 (the **March Decision**), a Full Bench expressed a provisional view that modern awards should be varied to incorporate a model term to facilitate flexible working arrangements. A Statement issued on 3 May 2018 set out the proposed term and invited submissions 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; and
 - (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.
2. This submission is filed by Ai Group in response to the Statement of 3 May 2018.

2. THE COMMISSION'S JURISDICTION TO INCLUDE THE PROVISIONAL MODEL TERM IN MODERN AWARDS

3. Ai Group contends that the proposed clause would be contrary to s.55(1) because it excludes the scheme in s.65 as a whole.
4. Further, we are concerned that the provision is not permitted under s.55(4) and thus is not saved by s.55(7). That is, we say that it is not a supplementary term, as contemplated by s.55(4).

Does the Proposed Clause Exclude the NES?

5. In *4 yearly review of modern awards—Alleged NES Inconsistencies*¹, the Full Bench reached the following relevant conclusions in respect of a number of award clauses that excluded the NES right of the 'second employer', in a transfer of business scenario, to not recognise an employee's service with the 'first employer': (emphasis added)

[32] The effect of s.91(1) is that, upon a transfer of employment (as defined in s.22(7)) of a national system employee between two non-associated entities occurring, the employee's period of service with the first employer will not count as part of the employee's period of service with the second employer for the purpose of ascertaining annual leave entitlements if the second employer decides not to recognise the employee's service with the first employer.

[33] Notwithstanding this, a number of modern award provisions applicable to the situation just described deem the employee's service with the first employer to be service with the second employer for annual leave purposes. For example, clause 34.10 of the *Food, Beverage and Tobacco Manufacturing Award 2010* provides:

"34.10 Transfer of business

Where a business is transferred from one employer to another, the period of continuous service that an employee had with the old employer must be deemed to be service with the new employer and taken into account when calculating annual leave. However an employee is not entitled to leave or payment instead for any period in respect of which leave has been taken or paid for."

...

[37] We consider that the modern award provisions in question generally are clearly inconsistent with s.91(1). Section 55(1) requires, relevantly, that a modern award "*not exclude the National Employment Standards or any provision of the National*

¹ [2015] FWCFB 3023.

Employment Standards". Section 91(1) is a provision of the NES (being contained within Division 6, Annual Leave, of Part 2-2, The National Employment Standards), and the modern award provision excludes s.91(1) in the sense that in their operation they negate the effect of the subsection. A provision which operates to exclude the NES will not be an incidental, ancillary or supplementary provision authorised by s.55(4). Nor do we consider that the provisions in question are to be characterised as dealing with the taking of paid annual leave such as to be authorised by s.93(4); they are rather concerned with the quantum of the annual leave entitlement for which the second employer is liable.²

6. As held by the Full Bench in the above decision, a provision of the NES is excluded if award terms "in their operation ... negate the effect of" an NES provision.³
7. The starting point for considering whether the proposed award clause would exclude s.65, or any a part of it, is a consideration of the nature of s.65 and the entitlements or benefits that it establishes. Section 65 provides a legislative scheme that regulates the making of requests and the handling of such requests by employers. It creates a right for certain employees, in certain specified circumstances, to make a request to their employer for a change in working arrangements relating to those circumstances. It also creates an obligation on an employer to respond within a certain timeframe and in a certain manner.
8. 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. Crucially, it is designed to facilitate discussion and compromise between the parties. Such discussions are intended to occur within a carefully and deliberately constructed regulatory context.
9. Ai Group contends that the proposed clause will negate the effect of s.65 because it will provide a mechanism by which certain employees seeking a certain type of change to their working arrangements can circumvent the operation of s.65. Put simply, it will provide an alternate means by which such employees can access changed hours of work. The operation of the award clause will, at least in some circumstances, negate the effect of s.65 by

² [2015] FWCFB 3023 at [32] – [37].

³ [2015] FWCFB 3023 at [37].

undermining the extent to which the scheme that it establishes will be utilised.
As the Full Bench accepted in its decision: (emphasis added)

[155] It has been suggested that a modern award or enterprise agreement term might be considered to ‘practically exclude’ a provision of the NES, it would result in employees utilising the award or agreement term rather than the provision of the NES. We note that any entitlement under an award or agreement that is more beneficial to employees than a minimum standard under the NES is likely to have that result. ...⁴

10. The proposed clause is more beneficial to employees than the minimum standard set by s.65 of the Act in various ways:

- Pursuant to clause X.3(a), a permanent employee can make a request after 6 months of continuous service (as compared to the requirement for at least 12 months of continuous service under the NES).
- Pursuant to clause X.3(b), a casual employee can make a request after 6 months of continuous service if they meet the relevant criteria at clauses X.3(b)(i) and (ii) (as compared to the requirement for at least 12 months of continuous service under the NES).
- Before refusing a request, an employer must confer with the employee and genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee’s circumstances. The NES does not contain such an obligation.
- If an employer refuses a request, the employer’s written response must include:
 - A more comprehensive explanation of the refusal; and
 - If no change to the employee’s working arrangements was agreed; the details of any alternate changes in working arrangements that the employer can offer the employee.

⁴ [2018] FWCFB 1692 at [155].

11. As identified in the Explanatory Memorandum for the *Fair Work Bill 2008* (at paragraph 258), the intention of s.65 of the Act is “to promote discussion between employers and employees about the issue of flexible working arrangements”. The right of an employee to request flexible work arrangements and the right of an employer to refuse a request on reasonable business grounds are the key aspects of the scheme which promote discussions between employers and employees. In many cases, the statutory provisions will have the effect of promoting discussions between an employer and an employee about flexible work arrangements, without the need to invoke the formal procedure in s.65 of the Act. The mere fact that *most* employees do not ultimately need to utilise the provisions of s.65 does not detract from our contention that the proposed clause would negate the effect of s.65.

Is the Proposed Clause a Supplementary Term?

12. Ai Group contends that the proposed clause does not supplement the NES. That is, it does not supplement s.65.
13. Instead, the clause provides employees with a separate and distinct scheme for accessing a particular type of change to their working arrangements. It does not “supplement” the NES, as relevantly contemplated.
14. The concept of ‘supplementing’ means adding to or building on, not taking away or detracting from, as identified at paragraph 13 of the ACTU Submission: (emphasis added)
13. The term “supplemental” is not defined terms in the FW Act. Consistent with the principles of statutory interpretation, it is appropriate that the words of the statute be given their ordinary or natural meaning. The *Macquarie* dictionary defines ‘supplement’ as “something added to complete a thing, supply a deficiency, or complete a whole”. This definition appears to have been followed in *4 Yearly Review of Modern Awards – Annual Leave* [2015] FWCFB 5771, where the Full Bench held that a proposed clause could properly be characterised as a term which supplemented the NES entitlement to annual leave, because it “*extended the circumstances in which an employer must comply with an employee’s request to take paid annual leave*”. The ACCI submissions suggest that the concept of ‘supplementing’ the NES “connotes the notion of building upon, increasing

or extending". These concepts are not inconsistent with the Macquarie definition.

15. The proposed clause does not build upon or add to the entitlement under s.65. Nor does it directly interact with the legislative scheme. It instead provides a separate entitlement and scheme for providing an employee with flexibility in the relevant circumstances. It is drafted so as to operate entirely of its own force and independently of s.65. The proposed clause does not build upon, increase or extend the statutory scheme. It simply establishes a different scheme for delivering a change that is more beneficial to employees.

3. THE TERMS OF THE PROVISIONAL MODEL TERM

16. Ai Group here raises a number of concerns relating to the form of the proposed model term. In broad terms these relate to the following matters:
- a) The nature of the connection between an individual's caring or parental responsibilities and the specific change in working arrangements requested;
 - b) The potential for the provision to inappropriately operate as a casual conversion clause;
 - c) The meaning of the words 'part-time' as referred to within s.65 and the concept of part-time employment as contemplated under awards;
 - d) The need for an employee to provide evidence in support of a claim;
 - e) Anomalies in the interaction between clauses X.6, X.9 and X.10(b);
 - f) The need for clause X.9 to impose obligations upon both employers and employees;
 - g) The need to limit the number of requests that can be made; and
 - h) What should occur once an employee ceases to have responsibilities as a parent or carer.

17. Before addressing these specific matters, we acknowledge that elements of the proposed model term largely mirror the statutory scheme established by s.65. At a superficial level, this approach may be said to assist to ensure that the modern awards system is simple and easy to understand. Nonetheless, we suggest that there are limitations on the extent to which such an approach is appropriate, given the very different enforcement regime applicable in the statutory context. Our overarching contention in this regard is that while the approach adopted by s.65 may be appropriate in the context of a legislative scheme which, when viewed as a whole, is primarily intended to facilitate discussion between the relevant parties, it is not appropriate in the context of an award based scheme that must be applied in strict or absolute terms.
 18. Similarly, adopting the approach contained within the legislative scheme is also inappropriate in circumstances where it will be accessed by an expanded cohort of employees.
 19. These observations colour the comments we make in the remainder of this submission.
 20. In the remainder of this section we suggest various amendments to the proposed model term. A consolidated term is set out in **Attachment A**.
- A) The nature of the connection between an individual’s caring or parental responsibilities and the specific change in working arrangements requested**
21. The March Decision suggests that a core rationale for the development of the proposed model terms is to assist employees to align their working arrangements with their caring and family responsibilities and to assist employees to access arrangements that are tailored to their *needs* in this regard.
 22. Relevantly, the Full Bench has found that, “...*access to flexible working arrangements which enable employees to accommodate their work and family responsibilities can provide benefits to both employees and employers, and is*

*likely to increase workforce participation...*⁵ It has also held that: “*Consistent with the Claim and scope of evidence presently before us in this matter, the proposed model term will be confined to requests for changes in working arrangements relating to parental or caring responsibilities.*”⁶ (Emphasis added)

23. Without conceding that any further award provision is warranted, we do contend that any new provision ought to be limited to dealing with, or providing for, changes to work arrangements that are *necessary* to enable the employee to undertake their parental or caring *responsibilities*. The proposed clause appears to adopt a much broader basis for requesting and accessing changes.
24. Relevantly, the substantive provisions of the proposed clause provide for a more tenuous link between an employee’s parenting or carer’s responsibilities and their eligibility to make a request than the note at the beginning of the proposed clause suggests.
25. The primarily relevant provisions are clauses X.1, X.2 and X.3.
26. Clause X.1 provides that the employee is eligible to make a request for a change in their working arrangements relating to the employee’s circumstances as a parent or carer if the following three criteria are met:
 - (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.

⁵ [2018] FWCFB 1692 at 418

⁶ Ibid at 423

27. We deal firstly with the requirement that a change in working arrangements must be a variation “...relating to the employee’s circumstances as a parent or carer.”⁷ A requirement that the arrangement relate to a person’s *circumstances* as a parent or carer falls well short of a requirement that the arrangement be connected to their parenting or carer’s *responsibilities*, as contemplated by paragraph 423 of the March Decision.
28. In relation to the requirement in clause X.1(a), it is sufficient to note that clause X.2 provides that the employee is a parent, or has responsibility for the care of a child or that the employee is a carer (within the meaning of the *Carer Recognition Act 2010*). The provision does not require that the employee is experiencing circumstances that actually impact upon their ability to work their current hours.
29. Clause X.1(b) sets out a requirement that the employee “...would like to change their working arrangements because of the circumstances specified in clause X.2. Accordingly, the essential basis for eligibility to make a request is that the employee possesses a certain type of preference or desire. There is no requirement that they *need* the proposed change in order to accommodate their relevant responsibilities. Moreover, there is not even a requirement that the employee ‘would like’ the alternate arrangement because of the particular requirements of their parenting or caring responsibilities (such as commitments to look after a person at particular times of days).
30. Instead of adopting the approach outlined above, Ai Group contends that the provisional model term should be amended so that it clearly requires that an employer is only obliged to consider or implement requests for flexible working arrangements if the specific arrangement proposed is *necessary* in order to enable an employee to accommodate their work and family/caring responsibilities. An employee should not have enhanced rights to access preferred working arrangements simply because they have family or caring responsibilities and would *like* to change their working arrangements. This

⁷ Articulated in the first line of X.1.

would not constitute a *necessary* element of a fair and relevant minimum safety net of terms and conditions.⁸

31. For all of the above reasons, the provisional model term should be amended to include the following additional clause:

X.5 The requested change in working arrangements referred to in clause X.1 must be necessary in order to enable the employee to accommodate their parental or caring responsibilities arising from their circumstances referred to in clause X.2.

B) The Proposed clause should not operate as a ‘casual conversion clause’

32. Ai Group is concerned that the model term may unfairly operate to afford employees an additional right to conversion from casual to permanent employment.

33. The problem that we here identify arises from the wording of clauses X.1 and X.4. It is arguable that the wording of clause X.1 is broad enough to capture a change from casual to permanent or full-time employment. Indeed the wording of clause X.4 arguably removes any doubt as to whether this is possible.

34. The extent and manner in which awards should extend casual conversion rights for employees has been the subject of detailed consideration in the casual and part-time employment common issues proceedings. Although such proceedings are not yet concluded, it appears likely that they will result in nearly all modern awards shortly providing for casual conversion. Given this context, is not appropriate for award clauses dealing with flexible work arrangements to operate as de facto casual conversion provisions.

35. In the current proceedings, no serious case in support of enhanced casual conversion rights for employees with caring or parental responsibilities has been advanced. Nor has the potential impact of a clause that operates to deliver such an outcome been identified. The ACTU’s claim was purportedly

⁸ Section 138

directed towards enabling employees to obtain reduced hours of work. It was not directed towards affording employees access to a different type of employment. We respectfully contend that what the Commission is now proposing arguably extends in a substantive way beyond the scope of the claim advanced by the ACTU and the subject matter of the contested proceedings more broadly.

36. Converting an employee from casual to permanent employment can have significant ramifications for an employer. For example, many awards regulate the use of part-time employment in an extremely restrictive manner. There are also various additional entitlements that flow to permanent employees, such as entitlements to paid and unpaid leave and additional entitlements in relation to notice of termination, severance pay and protection from unfair dismissal. The various impacts of a casual conversion clause on employers, employees and other matters that must be considered pursuant to s.134(1) have not been the focus of the case before the Full Bench as currently constituted.
37. We do not here contend that the Full Bench lacks the capacity to grant a remedy in terms that differ from those sought by the ACTU. However, the Full Bench should not grant a right that has not been the subject of detailed consideration in the primary proceedings.
38. We also here note that Ai Group contends that numerous mandatory considerations contemplated by s.134(1) weigh against affording employees with another avenue for converting from casual to permanent employment. These include:
 - The need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d));
 - The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f)).

39. Another reason why the model clause should not provide for casual conversion is that it does not have any mechanism for addressing what occurs once an employee ceases to have parental or caring responsibilities. It would not be fair to require to an employer to convert a casual employee to permanent employment on an ongoing basis as a result of their temporary parental or caring responsibilities.

C) The meaning of the words ‘part-time’ as referred to within s.65 and the concept of part-time employment as contemplated under awards

40. The proposed terms of clause X.4 are similar to those of s.65(1)(b) but not identical. The order in which various words are utilised has been changed but it seems plain enough that the drafting of the award clause is based on that of the Act.

41. The proposed transplantation of wording from the statute into an award gives rise to a need to consider whether terminology used in the Act necessarily has the same meaning as it does within an award. In this regard we point to the use of the words “part-time” in the respective forms of regulation.

42. Section 65(1)(b) uses the words “part-time”. There is no definition for such words within the Act. In the context of the award system part-time employment is generally conceived of as a type of employment that is distinct from casual or full-time employment. There are differences or inconsistencies in the definition of ‘part-time employment’ contained within individual awards

43. In the context of the 2 Year Review of Modern Awards, Harrison SDP questioned whether the reference to “part-time” as contemplated in s.65(1)(B) necessarily equated to part-time employment as contemplated in awards. This arose in the context of an Ai Group proposal to vary the *Road Transport (Long Distance Operations) Award 2010* to permit part-time employment and an associated submission essentially asserting that the absence of such a provision potentially served to exclude elements of s.65. Her Honour relevantly held: (emphasis added)

[61] An employee in circumstances as identified in s.65(1A) may request a change in working arrangements under s.65(1). Nothing in the Award compromises that right. The more difficult issue arises in respect of the particular employee in the circumstances referred to in s.65(1B) that is the parent returning to work, who may request to work part-time to care for their child. Under the Award, the employer will be able to allow that employee to work fewer or different hours than they had prior to the birth or adoption of a child but arguably, would still be obliged to engage them either on a full-time or casual basis. In my opinion, a request to work part-time is not necessarily the same as a request to be engaged as a part-time employee.⁹

44. We do not here express a definitive view as to Her Honour's opinion. Nonetheless, the Senior Deputy President's reasoning highlights the point that, when included within an award context, the same terms can *potentially* have a different effect to that which might arguably have been intended within the legislative context. For this reason alone, the Full Bench should not proceed on the presumption that it is appropriate to simply replicate the statute's provisions within the award context.
45. Regardless of such technicalities, the more important point is that part-time employment is often regulated in a very restrictive manner within the award system. Different requirements typically apply to part-time employees when compared to either full-time or casual employees in relation to the regularity with which hours must be worked, the manner in which rostering provisions apply and the circumstances in which overtime rates apply.
46. The structure of award regulation of part-time employment may directly prohibit an employer from acceding to a particular request for a change in working arrangements without given rise to a situation of non-compliance with an award. To take an obvious example, an employee may request to work for only 2 hours a day in circumstances where the applicable award may provide for a minimum engagement period of 4 hours. In other cases, the award may not directly prohibit the relevant arrangement but it may provide a reasonable basis for the employer refusing to convert the employee to part-time employment. For example, even if an employer is able to accommodate a reduced number of hours of work for an employee (i.e. in the context of a shift from full-time to part-time employment), the employer's operations may

⁹ [2014] FWC 3529

necessitate that there be a greater degree of flexibility regarding starting and finishing times than the award permits in the context of part-time employment.

47. Having regard to these issues, Ai Group is concerned that a limited capacity to refuse a request on “reasonable business grounds” may not be broad enough to capture the kind of circumstances stated above. This wording suggests a contemplation of the commercial circumstances of the employer rather than the requirements of the regulatory regime. At the very least it may not be obvious to the parties that business grounds include the requirements of other provisions of the relevant award.

48. For all of the above reasons, proposed clause X.4 should be deleted and an additional subclause, in the following terms, should be included in the model provision:

X.X This clause does not require an employer to convert an employee from casual to part-time or full-time employment.

49. Also, the proposed clause X.8 should be amended to identify that the structures of the award may be a reasonable basis for an employer refusing a request for flexible working arrangements. A potentially suitable provision would be as follows:

“X.8(f) The other provisions of this award.”

D) The need for reasonable evidentiary requirements

50. The proposed model clause does not impose any evidentiary requirements upon an employee making a request for a change in working arrangements.

51. It is unreasonable to impose an obligation on an employer to implement a change in a person’s working arrangements in order to accommodate their parental or caring responsibilities without obliging an employee to provide to their employer reasonable evidence of the need for such a change. An employee’s mere assertion that they face such circumstances should not be a sufficient basis for an employer being *required* to make such changes.

52. In advancing this submission we also acknowledge that in many instances employers will (and indeed already do) respond to requests for flexible working arrangements in a cooperative way and may not seek such evidence from an employee. We are also conscious that the clause should not result in a process that imposes an unreasonable or unnecessary administrative burden upon parties. For these reason, we suggest that this evidence should only need to be produced by an employee upon request by their employer. This is not dissimilar to the approach taken in relation to various other entitlements.¹⁰
53. In terms of the subject matter that the evidence should establish, we suggest it should confirm the requirement or necessity for the implementation of the flexible work arrangements. It should also establish that the employee is experiencing the circumstances contemplated by clause X.2 and the various factual matters than an employer is required to have regard to in accordance with clause X.9.
54. We also suggest that the evidence that should potentially be able to be required to be produced should only be that which, “...*would satisfy a reasonable person*” of the relevant matter. This is consistent with the approach adopted in the NES in relation to various other safety net entitlements.¹¹
55. We have set out below a potentially suitable clause dealing with this issue:

X.X An employee who makes a request under this clause must, if requested by their employer, give the employer evidence that would satisfy a reasonable person:

- a) that the employee is in the circumstances contemplated by clause X.1(a);
- b) the consequences for the employee if changes in working arrangements are necessary;
- c) of the nature of the employee’s responsibilities as a parent or carer; and

¹⁰ See section 107(3) in relation to paid personal/carer’s leave, unpaid carer’s leave and compassionate leave

¹¹ See section 107(3)

- d) that the requested change in working arrangements is necessary to enable the employee to accommodate their responsibilities arising from their circumstances as referred to in clause X.2.

56. The clause should also be amended to only require an employer to provide a response to a request once the employee has provided any relevant evidence. This could be achieved by replacing clause X.6 of the provisional model term with the following clause:

X.X The employer must give the employee a written response to the request stating whether the employee grants or refuses the request. This response must be provided within 21 days of the latter of either the date on which the employee makes the request or the date the employee provides the employer with evidence required by the employer in accordance with clause X.6.

E) Anomalies in the interaction between clauses X.6, X.9 and X.10(b)

57. There is an anomaly in the interaction between clauses X.6, X.9 and X.10 that should be addressed. This arises from an assumption (and indeed a requirement) under the clause that an employer will either accept or refuse the initial employee request and the separate requirement on the parties to attempt to reach agreement on a change to an employee's working arrangements.

58. Clause X.6 of the model clause contemplates that an employer will issue a notice in writing indicating whether the employer grants or refuses the relevant request. Clause X.9 requires the parties to confer and genuinely try to reach agreement on a change to working arrangements that will reasonably accommodate the employee's circumstances, before refusing a request. However, the current clause X.10, which deals with what the written response issued by the employer must include, only applies if an employer refuses a request.

59. If, consistent with clause X.9, both parties genuinely try to reach agreement on a relevant change, there will likely be many circumstances where a mutually agreeable outcome is reached which differ from the originally requested change. In such circumstance, it would not make sense for an

employer to be put to the task of providing an employee with a written response either granting or refusing the original request. Accordingly, such an employer should be relieved of the obligation contained in clause X.6. It would also not make sense for the details of the change in working arrangements to be set out in a notice issued pursuant to clause X.6, as is currently contemplated by clause X.10(b), given clause X.10(b) only applies if the employee refuses the request.

60. To address this issue, clause X.10(b) of the provisional model term could be deleted and the following new clause should potentially be included elsewhere in the provisional model term:

X.X If an employer and employee reach agreement on a change in working arrangements that reasonably accommodates the employee's parenting or caring responsibilities, an employer is not required to give a response as contemplated by clause X.6, but must instead set out the agreed change in writing and provide a copy of this agreement to the employee.

F) The need for clause X.9 to impose obligations upon both employers and employees.

61. Clause X.9 requires that, before an employer refuses a request, they must seek to confer with the employee and genuinely try to reach agreement on a change to working arrangements that will reasonably accommodate the employee's circumstances, having regard to certain specified factors.
62. There is merit in any proposed clause promoting the parties reaching a mutually agreeable outcome. However, as drafted, the provisional clause only imposes an obligation on an employer to genuinely try to reach agreement. Imposing a reciprocal obligation upon an employee would logically enhance the prospects of agreement being reached and is an inherently fair approach.
63. Further, while the provision understandably directs the employer to try to reach an agreement that will accommodate the employee's circumstances, it should also expressly encourage the parties to reach an agreement that accommodates an employer's circumstances as well.

64. A potentially appropriate alternate provision would be as follows:

X.9 Before refusing a request, the employer must seek to confer with the employee and, if this occurs, both the employer and employee must genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee and employer'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) The consequences for the employer if the changes in working arrangements are made; and
- (d) Any reasonable business grounds for refusing the request.

G) The need to limit the potential for repetitive requests

65. The proposed model clause does not impose any limitation on the number of occasions on which an employee may make a request to change their working arrangements. Moreover, it does not prevent an employee who makes a request that is refused from simply re-agitating that request at another point in time.

66. The potential burden upon an employer who may be faced with multiple requests for changes to working arrangements as a result of the proposed new clause is not insubstantial.

67. Given the Full Bench's intention that the requirements will operate in addition to the scheme established under s.65 there is also the potential for an employee to make a request under one scheme and to then make a further request under the alternate scheme.

68. There should be some sensible limitation on the capacity for employees to repeatedly utilise the proposed new provision. At the very least, an employer should not be put to the task of being expected to frequently reconsider a decision they have made in relation to a particular change to an individual's working arrangements. A clause to the following effect should be included:

- X.X An employee who has issued a request under this clause which has been refused is not entitled to make a further request under this clause seeking the same change in working arrangements, unless:
- a) the reasons for the refusal of the request provided by the employer are no longer relevant; or
 - b) a period of 12 months has elapsed since the last request was issued.

H) What should occur upon cessation of caring or parental responsibilities?

69. The need to accommodate an employee's personal circumstances by implementing alternate working arrangements may impose some disruptions or other relevant disadvantages or difficulty upon an employer. The proposed clause only contemplates an employer refusing a request on 'reasonable business grounds', not *any* business ground.
70. Even if it is accepted that this is a *necessary* element of a fair and relevant minimum safety net of terms and conditions, it does not follow that is fair or *necessary*¹² for an award clause to afford an employee a right to permanently access altered working arrangements. It is trite to observe that some employees will only have parental or caring responsibilities which are either temporary in nature or will only temporarily prevent an employee from meeting their responsibilities at work. The obvious example is that a person's responsibilities to a child will of course change and typically reduce over time.
71. The proposed clause should afford an employer a right to require that the employee resume their original working arrangements if the need for the changed working arrangements dissipates. A provision to the following effect may suffice:
- X.X If a change to an employee's working arrangements has been implemented pursuant to this clause;
- a) the employee must immediately notify the employer if they cease to have responsibilities which would prevent them from working their previously applicable working arrangements,

¹² As contemplated by s.138

- b) the employee must comply with any reasonable request by their employer to provide evidence that would satisfy a reasonable person that they continue to have parental and/or careering responsibilities which prevent them from working their previously applicable working arrangements, and
- c) the employer may require that the employee revert to their previously applicable working arrangements if the employee ceases to have parental or caring responsibilities.

72. We here acknowledge that the proposed clause would only operate to afford an *employer* the *opportunity* to require an employee to revert to the former working arrangements. We advance this approach because there may undoubtedly be many instances where both parties are content to leave the modified working arrangements in place once the relevant change is made. Moreover, an employer should fairly be afforded some certainty that they will not need to revert to the formerly applicable arrangement at some unspecified period of time. This will often assist employers to put in place permanent arrangements to accommodate the changed availability of the employee and will serve to moderate the adverse impact of the proposed provision upon an employer.

73. We also adopt this approach because an employee would be free under the proposed arrangement to make a request for a change in working arrangements that is temporary in nature. The temporary nature of such a request may in turn be a factor that is weighed in any consideration of whether there are reasonable business grounds for refusing the request. Accordingly, there is no need to consider whether a separate mechanism affording an employee a right to revert to previously applicable working arrangements is necessary.

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

74. For all of the reasons set out in these submissions, the proposed model term would not be necessary to achieve the modern awards objective.

75. Therefore, its inclusion within awards would be inconsistent with s.138.

ATTACHMENT A

PROVISIONAL MODEL TERM (INCORPORATING Ai GROUP'S PROPOSED AMENDMENTS)

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 This clause does not require an employer to convert an employee from casual to part-time or full-time employment.

X.5 The requested change in working arrangements referred to in clause X.1 must be necessary in order to enable the employee to accommodate their parental or caring responsibilities arising from their circumstances referred to in clause X.2.

X.6 An employee who has issued a request under this clause which has been refused is not entitled to make a further request under this clause seeking the same change in working arrangements, unless:

- a) the reasons for the refusal of the request provided by the employer are no longer relevant; or
- b) a period of 12 months has elapsed since the last request was issued.

Formal requirements for the request

X.7 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.

Evidence

X.8 An employee who makes a request under this clause must, if requested by their employer, give their employer evidence that would satisfy a reasonable person:

- (a) that the employee is in the circumstances contemplated by clause X.1(a);
- (b) the consequences for the employee if changes in working arrangement are necessary;
- (c) of the nature of the employee's responsibilities as a parent or carer; and
- (d) that the requested change in working arrangements is necessary to enable the employee to accommodate their responsibilities arising from their circumstances as referred to in clause X.2.

Responding to the request

X.9 The employer must give the employee a written response to the request stating whether the employee grants or refuses the request. This response must be provided within 21 days of the latter of either the date on which the employee makes the request or the date the employee provides the employer with evidence required by the employer in accordance with clause X.8.

X.10 The employer may refuse the request only on reasonable business grounds.

X.11 Without limiting what are reasonable business grounds for the purposes of clause X.10, 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;
- (f) the other provisions of this award.

X.12 Before refusing a request, the employer must seek to confer with the employee and, if this occurs, both the employer and employee must genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee and employer'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) The consequences for the employer if the changes in working arrangements are made; and
- (d) Any reasonable business grounds for refusing the request

X.13 if an employer and employee reach agreement on a change in working arrangements that reasonably accommodates the employee's parenting or caring responsibilities, an employer is not required to give a response as contemplated by clause X.9, but must instead set out the agreed change in writing and provide a copy of this agreement to the employee.

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

X.14 Clause X.14 applies if the employer refuses the request.

- (a) The written response under clause X.9 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 could not agree on a change in working arrangements under clause X.12, the written response under clause X.9 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.13 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.

Cessation of parenting or carer's responsibilities

X.X If a change to an employee's working arrangements has been implemented pursuant to this clause;

(a) the employee must immediately notify the employer if they cease to have responsibilities which would prevent them from working their previously applicable working arrangements,

(b) the employee must comply with any reasonable request by their employer to provide evidence that would satisfy a reasonable person that they continue to have parental and/or careering responsibilities which prevent them from working their previously applicable working arrangements, and

(c) the employer may require that the employee revert to their previously applicable working arrangements if the employee ceases to have parental or caring responsibilities.