



# STATEMENT

*Fair Work Act 2009*

s.156–4 yearly review of modern awards

## Family Friendly Work Arrangements

(AM2015/2)

JUSTICE ROSS, PRESIDENT

VICE PRESIDENT HATCHER

COMMISSIONER SPENCER

SYDNEY, 3 MAY 2018

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

[1] In a Decision issued 26 March 2018 (the March 2018 Decision), a Full Bench rejected the Australian Council of Trade Union’s (ACTU) claim seeking a variation of all modern awards to include an entitlement to part-time work or reduced hours for employees with parenting or caring responsibilities.<sup>1</sup>

[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 and concluded at [427]-[428]:

‘[427] 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.

[428] We emphasise that these views are provisional only. We propose to provide interested parties with an opportunity to make 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.
- (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] The provisional model term is set out at **Attachment A**.

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<sup>1</sup> [\[2018\] FWCFB 1692](#) at [412].

[4] A mention was held on 1 May 2018 to provide interested parties with an opportunity to make submissions about the directions for the filing of further submissions and the further hearing of this matter.

[5] Interested parties are invited to comment on the provisional model term and the other issues outlined at paragraph [428] of the March 2018 Decision.

[6] Comments are to be sent to [amod@fwc.gov.au](mailto:amod@fwc.gov.au) by no later than **4pm Friday 1 June 2018**. Any comments in reply are to be filed by **4pm Friday 15 June 2018**.

[7] Liberty to apply.

[8] A further mention/conference will be held on **Thursday 21 June** in **Sydney** at **10am**. Requests for video conference are to be directed to [chambers.ross.j@fwc.gov.au](mailto:chambers.ross.j@fwc.gov.au).

PRESIDENT

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## 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 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.