DECISION

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

Family Friendly Working Arrangements
(AM2015/2)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER SPENCER MELBOURNE, 25 SEPTEMBER 2018

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

Background

[1] Section 156 of the *Fair Work Act 2009* (the Act) provides that the Commission must conduct a review of all modern awards every four years (the Review). As part of the Review the ACTU sought the variation of all modern awards to include an entitlement (i.e. an enforceable right) to part-time work or reduced hours for employees with parenting or caring responsibilities (the Claim). The ACTU contended that the existing regulation regarding family friendly working arrangements is inadequate and is failing to assist employees to balance their work and family responsibilities. In particular, it was submitted that there is a 'gap' in the safety net regarding flexible working arrangements because the 'right to request' in s.65 of the Act does not provide employees with an enforceable right. An employer's decision to refuse a s.65 request is not subject to review or appeal.

[2] If granted, the Claim would create a new set of employee entitlements, in particular:

- an employee with parenting or caring responsibilities will have a *right to access* family friendly working hours (FFWH) upon giving their employer 'reasonable notice'; and
- an employee with parenting responsibilities who is on FFWH will have *a right to revert* to their former working hours up until their child is school aged (or later by agreement); and
- an employee with caring responsibilities who is on FFWH will have *a right to revert to* their former working hours for a period of two years from the date they commence their FFWH (or later by agreement).

[3] The Employer parties opposed the Claim and contended that s.65 provides a suitable framework for dealing with requests for flexible working arrangements. They submitted that the Claim is fundamentally unfair and unworkable in that it does not provide employers with a capacity to refuse a request for flexible working hours. As ACCI put it, to grant the Claim would be to 'fundamentally alter the paradigm under which an employer operates a business'.[1]

[4] In a decision published on 26 March 2018[2] (the *March 2018 decision*) a differently constituted Full Bench rejected the Claim:

> '[406] We accept, as the ACTU contends, that s.65 lacks an effective enforcement or appeal mechanism. The right to request in s.65 has been characterised as a 'soft' regulatory approach, insofar as the employee is denied any effective means of challenging the employer's refusal to grant their request.[3] The Commission is unable to deal with a dispute to the extent it is about whether an employer had reasonable business grounds under s.65(5) unless the parties have agreed in a contract of employment, enterprise agreement or other written agreement to the Commission dealing with the matter.[4]
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> [407] Both s.65 and the Claim lack what Dr Stanford referred to as 'reciprocity in decision making power' …
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> [408] However, it seems to us that granting the ACTU's Claim would amount to replacing one flawed mechanism for facilitating workplace flexibility with another flawed mechanism. To grant the Claim would simply replace the 'side' that determines the outcome.
>
> [409] … If granted, the Claim would fundamentally alter the employment relationship. In effectively removing the ability of businesses to determine how to roster labour, the Claim plainly has the potential to have a substantial adverse impact on businesses …
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> [411] As ACCI submitted:
>
> > 'No coherent understanding of a fair and relevant minimum safety net could confer on an employee a unilateral right to determine their hours, regardless of the operational considerations of the employer.'[5]
>
> [412] We agree, and have decided to reject the Claim. We are not satisfied that the variation to modern awards in the terms sought is necessary to achieve the modern awards objective.'

[5] The Full Bench went on to say that the rejection of the ACTU's claim did not conclude the matter, noting (at [420]) that there is 'a significant *unmet* employee need for flexible working arrangements', and expressing (at [417]) the *provisional* view that modern awards should be varied to incorporate a model term to facilitate flexible working arrangements.

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[1] ACCI final submissions, 19 December 2017 at [1.11].

[2] [2018] FWCFB 1692.

[3] Skinner N & Pocock B (2014), *The persistent challenge: Living, working and caring in Australia in 2014 - The Australian work life index 2014*, Centre for Work + Life, University of South Australia at p.104.

[4] s.739(1)(a) *Fair Work Act 2009* (Cth).

[5] ACCI final submissions, 19 December 2017 at [1.11].

[6] The Full Bench proposed a 'model term' which would supplement the National Employment Standards (NES) in the following ways:

- The group of employees eligible to request a change in working arrangements relating to parental or caring responsibilities, will be expanded to include ongoing and casual employees with at least six months' service but less than 12 months' service.
- Before refusing an employee's request, the employer will be required to 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.
- If the employer refuses the request, the employer's written response to the request will be required to include a more comprehensive explanation of the reasons for the refusal. The written response will also be required to include the details of any change in working arrangements that was agreed when the employer and employee conferred, or, if no change was agreed, the details of any changes in working arrangements that the employer can offer to the employee.
- A note will draw attention to the Commission's (limited) capacity to deal with disputes.[6]

[7] The *provisional* model term is set out at **Attachment A**.

[8] The Full Bench expressed the *provisional* view (at [427]) 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 does not contravene s.55; and, consequently, it is a term permitted by s.136.

Submissions

[9] In a Statement[7] 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; 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.

[6] [2018] FWCFB 1692 at [424].

[7] [2018] FWCFB 2443.

[10] Submissions were received from:

- ACCI;
- ACTU;
- Ai Group;[8]
- G Schuster (an individual);
- National Farmers' Federation (NFF);
- National Road Transport Association (NatRoad);
- Pharmacy Guild of Australia (PGA); and
- The FlexAgility Group.

[11] At a Mention held on 21 June 2018[9] there was general agreement as to the following:

1. ACCI and Ai Group were 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 were to confer with the ACTU.

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

3. The joint report was to be lodged by no later than 4pm Monday, 16 July 2018.

[12] On 18 July 2018 Ai Group lodged a 'Draft Joint Employer Proposal — Provisional Model Term',[10] which was the product of discussions with various employer parties.

[13] A further Mention was held on 19 July 2018[11] and a Background paper was published by the Commission on 25 July 2018 which detailed 12 points of difference between the Joint Employers' proposed term and the *provisional* model term. In response to the Background paper, on 26 July 2018 Ai Group[12] filed an Amended Joint Employer proposed term (the Amended Joint Employer proposal), set out at **Attachment B**.

[14] A conference of interested parties was held on Thursday 26 July 2018,[13] but no agreement was reached in relation to the content of a model term and the parties were directed to file any further submissions by Thursday 9 August 2018. Submissions were received from the ACTU, ACCI, Ai Group and NatRoad. A hearing was held on 27 August 2018.[14]

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[8] Ai Group filed a further reply submission dated 20 June 2018.

[9] Transcript 21 June 2018.

[10] Ai Group submission 18 July 2018.

[11] Transcript 19 July 2018.

[12] Ai Group submission 26 July 2018.

[13] Transcript 26 July 2018.

[14] Transcript 27 August 2018.

[15] Ai Group opposed the *provisional* model term on jurisdictional and merit grounds. In essence, it contends that the *provisional* model term offends s.55 because it 'would negate the practical effect of s.65 by establishing an alternate regime for dealing with employee requests for flexible working arrangements', and the *provisional* model term was not a supplementary term (within the meaning of s.55(4)), and hence was not saved by s.55(7). Ai Group's merit arguments are summarised at [17] of its 10 August 2018 submission.

[16] Ai Group supports the Amended Joint Employer proposal, as an alternative to the *provisional* model term. This is also supported by NatRoad and the PGA.

[17] The Amended Joint Employer proposal is said to 'recast' the *provisional* model term so that it supplements and interacts with the NES instead of giving rise to a separate award-derived scheme dealing with requests for flexible working arrangements.

[18] ACCI does not support the *provisional* model term, on merit grounds. Two particular matters inform ACCI's position.

[19] First, the combined effect of clause X.7 of the *provisional* model term and ss.45 and 545 of the Act provide that an employee may seek orders challenging an employer's refusal, on reasonable business grounds, of a request for flexible working arrangements. ACCI submits that such an outcome is antithetic to the legislative framework:

> 'it is abundantly clear that the legislature intended that flexibility requests under the NES should be subject to a regulatory regime which does not provide an avenue for dispute or a right of review for employees under modern awards or through civil remedies (see ss 44, 146).
>
> Implicit in this framework is a legislative understanding that it is for an employer to determine how to deploy its labour and that it would be a 'step too far' to allow such decisions to be contestable by the Commission (or any other body).'[15]

[20] The second matter raised by ACCI concerns clause X.3 of the *provisional* model term, which extends the group of employees eligible to request a change in working arrangements relating to parenting or caring responsibilities to include ongoing and casual employees with at least six months' service but less than 12 months' service. ACCI submits that such an extension is unsupported by the evidence and is not necessary to achieve the modern awards objective:

> 'No rationale appears to emerge from the evidence presented in the proceedings or within the findings of the Full Bench as to why a service period of six months would satisfy the modern awards objective (but go no further)…
>
> Due to the nature of the evidentiary case advanced by the ACTU, it is questionable whether the Full Bench has been placed in a position to assess the relationship between an employee's period of service and requests for flexible work arrangements and the appropriate 'service threshold' for such entitlements. The Full Bench also does not appear to have made any relevant findings on this issue.
>
> The sole argument advanced by the ACTU in relation to an extension to the service threshold appears to have been that such a variation would be more favourable to the employee. While

[15] ACCI submissions 10 August 2018 (amended 22 August 2018) at 3.8 and 3.9.

> such an extension would increase employee access to a right to request, it would also increase obligations on employers, particularly having regard to the terms of the provisional model term.
>
> Given this lack of rationale, in circumstances where the contemporary safety net created by Parliament in the form of s 65 grants request entitlements only to employees with 12+ month service periods, it is not apparent to the Australian Chamber as to how a value judgment could be made to extend an entitlement to request flexible working arrangements to employees with between 6 to 12 months service. As such, the Australian Chamber submits that s 138 would compel the retention of a 12+ month service threshold.'[16]

[21] The ACTU presses its suggested amendment to clause X.10 (described in [5] and [6] of its submission of 13 June 2018) and submits that, subject to that amendment, the variation of modern awards to include the *provisional* model term is 'both justified and permitted'.[17] The ACTU responds to, and rejects, the jurisdictional and merit arguments advanced by the Employer parties.

[22] The various issues raised in the submissions were supplemented by oral submissions at the hearing on 27 August 2018.[18]

Consideration

[23] It seems to us that there is considerable force in the two merit arguments advanced by ACCI. We accept the proposition that an inadvertent consequence of the combination of clause X.7 of the *provisional* model term and ss.45 and 545 of the Act is that it would enable an employee to challenge an employer's decision to refuse a request, on reasonable business grounds.

[24] Clause X.7 of the provisional model term provides that 'The employer may refuse the request only on reasonable business grounds.'

[25] Section 45 of the Act relevantly states that:

> **Contravening a modern award**
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> A person must not contravene a term of a modern award.
>
> Note 1: This section is a civil remedy provision (see Part 4-1).
>
> Note 2: A person does not contravene a term of a modern award unless the award applies to the person: see subsection 46(1).

[16] Ibid at 5.11, 5.13-5.15.

[17] ACTU submissions 10 August 2018 at paragraph 2.

[18] Transcript 27 August 2018.

[26] Section 545 of the Act relevantly states:

> (1) The Federal Court or the Federal Circuit Court may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision.
>
> (2) Without limiting subsection (1), orders the Federal Court or Federal Circuit Court may make include the following:
>
> > (a) an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention;
> >
> > (b) an order awarding compensation for loss that a person has suffered because of the contravention;
> >
> > (c) an order for reinstatement of a person.
>
> Eligible State or Territory courts
>
> (3) An eligible State or Territory court may order an employer to pay an amount to, or on behalf of, an employee of the employer if the court is satisfied that:
>
> > (a) the employer was required to pay the amount under this Act or a fair work instrument; and
> >
> > (b) the employer has contravened a civil remedy provision by failing to pay the amount.
>
> ...
>
> When orders may be made
>
> (4) A court may make an order under this section:
>
> > (a) on its own initiative, during proceedings before the court; or
> >
> > (b) on application.
>
> Time limit for orders in relation to underpayments
>
> (5) A court must not make an order under this section in relation to an underpayment that relates to a period that is more than 6 years before the proceedings concerned commenced.

[27] A breach of clause X.7 would be a contravention of a civil remedy provision which would empower the Federal Court or Federal Circuit Court to make any order the court considers appropriate. We acknowledge that such an outcome would be a substantial change. As ACCI puts it:

> 'The Parliament has not only prevented the Commission from reviewing employers' decisions in relation to reasonable business grounds (except where there is an agreement to do so) but has also has prohibited any court from determining whether such a decision would constitute a breach of the NES.'

[28] In respect of the point raised by ACCI, s.44 of the Act provides:

> (1) An employer must not contravene a provision of the National Employment Standards.
>
> Note: This subsection is a civil remedy provision (see Part 4-1).
>
> (2) However, an order cannot be made under Division 2 of Part 4-1 in relation to a contravention (or alleged contravention) of subsection 65(5) or 76(4).
>
> Note 1: Subsections 65(5) and 76(4) state that an employer may refuse a request for flexible working arrangements, or an application to extend unpaid parental leave, only on reasonable business grounds.
>
> Note 2: Modern awards and enterprise agreements include terms about settling disputes in relation to the National Employment Standards (other than disputes as to whether an employer had reasonable business grounds under subsection 65(5) or 76(4)).

[29] Section 146 of the Act provides that a modern award must include a dispute settling term that provides a procedure for the settling of disputes under the modern award and NES. The section includes a note which refers to s.739, and that it provides that the Commission must not settle a dispute about whether the employer had reasonable business grounds under s.65(5) (i.e. the 'right to request') or s.76(4) (i.e. extending a period of parental leave).

[30] As noted at [4], the right to request in s.65 has been characterised as a 'soft' regulatory approach, insofar as the employee is denied any effective means of challenging the employer's refusal to grant their request.[19] An incident of this approach is that the Commission is unable to deal with a dispute to the extent it is about whether an employer had reasonable business grounds under s.65(5) unless the parties have agreed in a contract of employment, enterprise agreement or other written agreement to the Commission dealing with the matter.

[31] The effect of the *provisional* model term in its current form would provide the Federal Court and the Federal Circuit Court with jurisdiction to deal with the type of matter which Parliament has specifically sought to prohibit (i.e. disputes about whether an employer had reasonable business grounds for refusal). As ACCI observes, such disputes would be determined by courts in circumstances where the Commission, the specialist industrial tribunal, has been excluded from such involvement, and where those courts themselves are prevented from determining reasonable business grounds disputes in the context of s.65 requests.[20]

[32] Such a consequence was not within our contemplation when we framed the *provisional* model term; is at odds with the legislative framework; and, as we have noted, would be a substantial change. We are not persuaded that such a change is warranted on the basis of the material presently before us. In the circumstances, we think a more cautious regulatory response is appropriate. We propose to revisit this issue after the model term has been in operation for a reasonable period.

[33] We also acknowledge the force of ACCI's submissions concerning the proposed extension in coverage of the right to request in respect of employees with parenting or caring

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[19] Skinner et al at p.104.

[20] ACCI submission 19 December 2017 at 6.14 and 6.15.

responsibilities. In particular, we note the disconformity with the eligibility criteria in s.67 of the Act. This issue will also be revisited in the review of the model term.

[34] These matters have led us to reconsider the content and scope of the model term. In doing so we propose to return briefly to the findings in the *March 2018 decision* which informed the framing of the *provisional* model term.

[35] During the course of the proceedings on 21 December 2017, the Employer and Union parties confirmed their general agreement to a range of contextual matters which informed the findings in the *March 2018 decision*. The list of agreed matters was set out at Attachment F to the *March 2018 decision*. The desirability of employers and employees reaching agreement on flexible working arrangements is generally accepted, although the framework within which such matters are discussed is contested.

[36] In the *March 2018 decision*, the Full Bench made the following findings based on the material and evidence before it:

> ‘1. The accommodation of work and family responsibilities through the provision of flexible working arrangements can provide benefits to both employees and their employers.
>
> 2. Access to flexible working arrangements enhances employee well-being and work-life balance, as well as positively assisting in reducing labour turnover and absenteeism.
>
> 3. Some parents and carers experience lower labour force participation, linked to a lack of access to flexible working arrangements and to quality affordable child care.
>
> 4. Greater access to flexible working arrangements is likely to increase workforce participation, particularly among women. There are broad economic and social benefits associated with increased female workforce participation.
>
> 5. The most common reason for requesting flexible working arrangements is to care for a child or children; another significant group seek flexible working arrangements to care for disabled family members or elders.
>
> 6. The majority of employees who request flexible working arrangements seek a reduction in working hours. Parents (predominantly women) seek part-time work to manage parenting and caring responsibilities. The next most common type of flexibility sought is a change in start/finish times and a change in days worked.
>
> 7. There are strong gendered patterns around the rate of requesting and the kinds of alterations sought. Women make most of the requests for flexible working arrangements. Women do most of the unpaid care work and seek to adapt their paid work primarily by working part-time.
>
> 8. About one in five Australian workers requests flexible working arrangements each year. Only a small proportion of all such requests are made pursuant to s.65 of the Act (about 3 to 4 per cent of employees have made a s.65 request).
>
> 9. There has been an increase in awareness of the s.65 right to request over time, from 30 per cent in 2012 to over 40 per cent in 2014, with a similar rate of awareness between men and women. Despite this, there has been little change in the proportion of employees who request flexible working arrangements since the introduction of s.65.

> 10. The utilisation of IFAs [individual flexibility arrangements] for family friendly working arrangements is very low. Only about 2 per cent of employees report having an IFA with their employer. About 60 per cent of employees who have initiated an IFA did so in order to seek flexibility to better manage non-work commitments.
>
> 11. 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.
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> 12. Workplace culture and norms can play an important role in the treatment of requests for flexible working arrangements. Individual supervisor attitudes can be powerful barriers and enablers of flexibility.
>
> 13. Some employees change jobs or exit the labour force because they are unable to obtain suitable flexibility in their working arrangements.
>
> 14. A significant proportion of employees are not happy with their working arrangements but do not make a request for change (a group referred to as 'discontented non-requestors'), for various reasons including that their work environment is openly hostile to flexibility. Men are more likely to be discontented non-requestors than women.
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> 15. A lack of access to working arrangements that meet employees' needs is associated with substantially higher work-life interference (as measured by the AWALI work-life index). This is so whether a request is made and refused, or whether the employee is a 'discontented non-requestor'.
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> 16. The fact that a significant proportion of employees are 'discontented non-requestors' suggests that there is a significant *unmet* employee need for flexible working arrangements.
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> 17. The granting (in whole or in part) or refusal of employee requests for flexible working arrangements largely depends on the context in which the request is made, including the nature and size of the business and the role of the employee.
>
> 18. The main reasons given for refusing an employee's flexibility request are operational grounds, including the difficulty of finding another person to take up the time vacated by an employee moving to part-time work.
>
> 19. Employee requests for flexible working arrangements, specifically those seeking a reduction in hours, may require substitution of that employee. Depending on the nature of the business and the employee's role, the accommodation of flexible working requests which require the substitution of an employee may be difficult or impractical for a variety of reasons.
>
> 20. A modern award term which provides employees with parenting or caring responsibilities with the right to work on a part-time or reduced hours basis without their employer having the right to refuse or modify the employee's decision, would be likely to have adverse consequences for a significant proportion of businesses.'[21]

[37] In advancing the *provisional* model term, the Full Bench was responding to the fact that there is a significant *unmet* employee need for flexible working arrangements. Around one quarter of employees are not happy with their working arrangements but have not requested a change (referred to as 'discontented non-requesters' in the literature).[22] A lack of access to working arrangements that meet employees' needs is associated with substantially

[21] [2018] FWCFB 1692 at [392].

[22] Ibid at [273].

higher work-life interference (as measured by the Australian Work and Life Index (AWALI)).[23] Providing employees with access to flexible working arrangements can provide benefits to employees and employers. The Full Bench also noted that only about 40 per cent of employees were aware of the s.65 right to request and that increasing awareness of that right would facilitate access to such arrangements.[24]

[38] No party challenged the findings in the *March 2018 decision* or the observations summarised at [35] above. There is also a level of consensus about three key elements of the *provisional* model term:

(i) the obligation to try and reach agreement on a change in working arrangements;

(ii) the obligation to provide further details if an employer refuses a request; and

(iii) a cross-reference to the Commission's dispute resolution function.

[39] It was in this context that, during the hearing on 27 August 2018, we invited further submissions on the following issue:

> If the model term was amended in the manner contended by ACCI and Ai Group – that is, clauses X.7 and X.8 are deleted and the model term was not to extend to the broader class of employees specified in clause X.3 – then what should be the 'scope' of the model term?[25]

[40] This question arose because, as currently framed, the *provisional* model term is limited to employees who are either parents or have responsibility for the care of a child who is of school age or younger; or are carers within the meaning of the *Carer Recognition Act 2010*. Employees in such circumstances are a subset of the employees who may make a request for flexible working arrangements pursuant to s.65. Section 65(1A) provides that employees in the following circumstances may make a request for a change in working arrangements relating to their circumstances:

> '(a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;
>
> (b) the employee is a carer (within the meaning of the *Carer Recognition Act 2010*);
>
> (c) the employee has a disability;
>
> (d) the employee is 55 or older;
>
> (e) the employee is experiencing violence from a member of the employee's family;
>
> (f) the employee provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.'

[23] Ibid at [318] citing Skinner et al at p.110.

[24] Ibid at [418] and [420].

[25] Transcript 27 August 2018 at PN246.

[41] Directions were issued on 30 August 2018 inviting further submissions on this issue. In particular, parties were asked to comment on whether such a model term should be confined to parents and carers only, or should be extended to all of the categories of employees set out in s.65(1A). Submissions were received from:

- ACTU;
- ACCI;
- Ai Group; and
- PGA.

[42] The ACTU maintained that we can and should vary awards to include a clause in the form of the *provisional* model term. In the event that we decided to amend the *provisional* model term in the manner proposed by ACCI and Ai Group, then the ACTU submitted that the scope of the term should not be limited to parents and carers only – it should extend to all categories in s.65(1A). In support of its alternate position, the ACTU submitted:

> 'While it is clear that parenting and caring are the primary reasons employees need flexible working arrangements, there are a number of other valid reasons why employees need flexibility, including those set out in s 65(1A). The business benefits of accommodating flexibility in these broader circumstances, including increased staff retention and loyalty, are equally applicable. The Commission accepted evidence in the primary proceedings showing that the 'vast majority' of requests for flexible working arrangements are already approved by employers. As submitted by ACCI, the additional obligations in the Provisional Model Term simply codify existing good practice in relation to requests for flexible working arrangements. Research suggests that employers are already offering access to flexible working arrangements for broader reasons than family and caring responsibilities.
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> …
>
> Finally, the evidence suggests that there will be fewer employees requesting access to flexible working arrangements for reasons other than parenting/caring, limiting the likely impact of extending the additional requirements to the other categories in s 65(1A).'[26] (footnotes omitted)

[43] ACCI submits that the variation of modern awards to include the *provisional* model term amended in the manner contended by ACCI and Ai Group is permissible as a matter of jurisdiction, it being a term about 'the facilitation of flexible working arrangements' within the meaning of s.139(1)(b); it does not contravene s.55; and, consequently, it is a term permitted by s.136.[27] As to the merits of varying modern awards to include such a term, ACCI submits that the Full Bench's findings (see [36] above) 'could support, at least on their face', the extension of the model term to all of the categories of employees set out in s.65(1A).[28] In particular, ACCI submits:

> 'Having regard to the evidence heard in the substantive proceedings … the Australian Chamber concedes that there is sufficient material before the Full Bench ("analysis of the relevant legislative provisions and probative evidence") so as to permit the Full Bench to determine to

[26] ACTU submissions 10 September 2018 at [16]-[17].

[27] ACCI submissions 7 September 2018 at 2.

[28] Ibid at 3.5.

> vary modern awards to include the [amended model term] should it determine it appropriate to do so.'[29]

[44] ACCI does not resile from its previous position that it does not accept that the existing safety net in s.65 is failing to facilitate the creation of flexible working arrangements or that employers are engaging in arbitrary, cursory or perfunctory 'consideration' of flexibility requests under s.65. ACCI does, however, acknowledge that the Full Bench has found against its position in the *March 2018 decision* and accordingly addresses the 'scope' question as follows:

> 'Having regard to the Full Bench's provisional view, if a model term containing the Obligation to Confer and the Additional Written Obligations was to be inserted into modern awards, the Australian Chamber cannot identify any merit basis for restricting the scope of such a term to parents and carers.
>
> As such, having regard to the fact that the Full Bench has determined that the NES entitlement for parents and carers to request flexible working arrangement should be supplemented by the Obligation to Confer and the Requirement for Reasons, there does not appear to be any cogent reason not to extend those obligations to other categories of s 65 requests.'[30]

[45] Leaving aside the question of scope, ACCI maintains its concerns about the potential effect that a model term will have on business, particularly small business, but notes that:

- in aligning with the 12 month threshold and the eligibility criteria in s.65, the amended model term 'may arguably result in less scope for technical breaches' than the Full Bench's *provisional* model term;[31] and
- given that the vast majority of s.65 requests relate to parents and carers, extending the scope of the model term to all of the categories in s.65(1A) 'is unlikely to dramatically increase the burden on business that would have resulted' from the Full Bench's' *provisional* model term.[32]

[46] The PGA advanced a submission that was consistent with the position put by ACCI, noting that:

> 'The Guild has formed the view that there is no cogent reason why the provision should not extend to all the categories of employees set out in s.65(1A) if the obligation to confer and provide refusal reasons as referenced in s.65(5A) is contained in the model clause.'[33]

[47] The PGA goes on to raise what it characterises as 'a minor concern about the increased regulatory burden placed on small business … in regards to providing a written response when refusing an employee's request for family friendly working arrangements.'[34]

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[29] Ibid at 4.10.

[30] Ibid at 5.10 to 5.11.

[31] Ibid at 5.14.

[32] Ibid.

[33] PGA submissions 10 September 2018 at [4].

[34] Ibid at [5].

[48] As to the last matter, we note that the requirement to provide a written response to an employee's request for flexible working arrangements already exists in ss.65(4) and (6) of the Act. To that extent, the amended model term would not place an increased regulatory burden on small business, although we acknowledge that the extent of the reasons required under clause X.3 of the model term may be said to be broader than the existing requirement in s.65(6).

[49] Ai Group takes a contrary view to that put by the ACTU, ACCI and the PGA. While acknowledging that amending the *provisional* model term in the manner proposed would address 'the heart of our concerns about the proposed model term',[35] Ai Group submits that the scope of such a model term should be confined to parents and carers. In support of its position, Ai Group advances the following points (amongst others):

(i) Expanding the award provision to all of the s.65(1A) categories would mean that different obligations apply to award covered employees compared to award free employees.[36]

(ii) There has been no detailed consideration of the need to provide any greater assistance to employees covered by s.65(5) beyond parents and carers, nor has there been any analysis of the potential impact of a term that is broader in scope. These matters and the maintenance of a stable and sustainable award system weigh against such a change.[37]

(iii) Expanding the scope of the model term would significantly increase the regulatory burden on employers – a relevant consideration under s.134(1)(f).[38]

(iv) There is a risk that imposing additional obligations upon employers in relation to employees with particular characteristics will discourage employers from engaging such employees.[39]

(v) The Commission has only recently introduced a new award right to 5 days unpaid leave to employees experiencing family and domestic violence. There is merit in reviewing the operation of these provisions and a model flexibility term limited to parents and carers, before considering an extension of the model term to all s.65(1A) categories.[40]

(vi) If the model term was to be amended to include all categories of employees covered by s.65(1A)(e) and s.65(1A)(f), consideration would need to be given to whether this would cause confusion in relation to the application of award provisions dealing with flexible working arrangements and the provisions dealing with unpaid leave.[41]

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[35] Ai Group's further submission 10 September 2018 at [4].

[36] Ibid at [11].

[37] Ibid at [12].

[38] Ibid at [13] to [22].

[39] Ibid at [23].

[40] Ibid at [25], [26].

[41] Ibid at [27].

[50] In its reply submission of 20 September 2018 Ai Group reiterates its submissions as to the impact of extending the scope of the model term, in terms of regulatory and administrative burden, and submits that:

> 'neither the ACTU or ACCI identify a compelling reason for expanding the scope of the proposed model term to include all categories of employees contemplated by s.65(1A). Certainly, neither party appears to identify a compelling reason why the expanded scope for the model term would be *necessary*, as contemplated by s.138 … the task before the Full Bench is to assess what is *necessary* to ensure that awards constitute a fair and relevant minimum safety net of terms and conditions. The promotion of "good practice" may be reasonably viewed as a *desirable* outcome, but should not, in and of itself, be viewed as sufficient justification to impose new obligations upon employers under the safety net …
>
> Ai Group does not here suggest that employers do not already very commonly respond to employee requests for flexibility in a reasonable and accommodating manner. Nor do we suggest that there is not merit in employers and employees engaging constructively with each other in relation to employee preferences around flexible working arrangements. However, the material before the Full Bench does not warrant it forming a view that it is *necessary* for *a minimum safety net* of terms and conditions to further formally regulate such matters in the context of all categories of employees caught by s.65(1A).'[42]

[51] Notwithstanding the above submissions, Ai Group acknowledges that the modification of the proposed model clause to delete clauses X.7 and X.8 and to not extend the term to the broader class of employees in clause X.3 will ameliorate some of its major concerns regarding the proposed provision. Ai Group states that this 'will, in certain respects, moderate the adverse impact of the claim on employers' and 'will also address our concern that the proposed model term would circumvent key elements of the current statutory scheme's intended operation.'[43]

[52] ACCI advised it would rely on its submissions previously filed and did not make any further submissions[44] and the ACTU did not file any reply submissions.

[53] For the reasons given earlier (at [23] to [33]) we are persuaded to vary the *provisional* model term by deleting clauses X.7 and X.8, removing the proposed extension of the service threshold and making other related changes. These matters will be revisited when the model term is reviewed in three years.

[54] As to the scope of the amended model term, we have decided that it should extend to *all* of the s.65(1A) categories of employees. Contrary to Ai Group's submission, there is a sufficient evidentiary basis to vary modern awards to include the amended model term and extend it to all s.65(1A) categories of employees. A number of the findings in the *March 2018 decision* are not confined to the circumstances of parents and carers; a point acknowledged by ACCI.

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[42] Ai Group submission in reply 20 September 2018 at [5], [10] and [16].

[43] Ibid at [20].

[44] ACCI submission in reply 17 September 2018.

[55] Further, as acknowledged by ACCI, there is no cogent reason for not extending the obligations in the model term to all categories of s.65 requests. We agree with ACCI's submission that:

> 'the evidence heard in these proceedings demonstrates that where employers and employees engage in meaningful as opposed to transactional communication in respect of flexibility requests, mutually acceptable outcomes are produced either in the form of request approvals, mutually acceptable alternatives or the understanding of legitimate reasons for refusal.'[45]

[56] We now turn to the other points advanced by Ai Group (see [49] above). As to point (i), the same argument applies to *any* award supplementation of an NES provision and would also apply in the event that the amended model term only applied to parents and carers, as contended by Ai Group.

[57] As to point (ii), as noted above, there is a sufficient evidentiary basis for varying modern awards in the manner we propose. As ACCI notes, Dr Murray's report, in providing statistical data around the utilisation of s.65 including an analysis of the Australian Workplace Relations Survey (AWRS) and the AWALI 2014, is not restricted to a sample of parents and carers but rather to s.65 requests generally.

[58] As to point (iii), we reject the proposition that expanding the scope of the term would 'significantly' increase the regulatory burden on employers. We agree with ACCI's submission (at 5.14(c)) that extending the scope of the amended model term 'is unlikely to dramatically increase the burden on business that would have resulted'[46] from the *provisional* model term. We accept that there will be *some* increase in regulatory burden associated with expanding the scope of the amended model term, but do not consider that it would be significant. Two points may be made in this regard. First, the vast majority of s.65 requests relate to parents and carers. For example, the AWRS disclosed that 73% of employers who had received a s.65 request had received a request by reason of parenting responsibility and 28% by reason of caring responsibilities. By way of contrast, only 23% had received a request from an employee by reason of their age and only 3% of reported requests related to family and domestic violence.[47]

[59] Second, as ACCI acknowledges, the obligations in the amended model term replicate good management practice:

> 'Indeed in the consideration of the Australian Chamber, the ethos behind the Obligation to Confer and the Additional Written Obligations proposed by the Full Bench would already be embodied in the response to the vast majority of flexibility requests currently made regardless of the reason they were made or the method of request and these provisions do appear to replicate what the evidence demonstrated was good practice.'[48]

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[45] ACCI submission 7 September 2018 at paragraph 5.8.

[46] Ibid at 5.14.

[47] Bernadette O'Neill, *General Manager's report into the operation of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave under s.653 of the Fair Work Act 2009 (Cth) 2012-2015* (2015) at 23.

[48] ACCI submission 7 September 2018 at 5.9.

[60] The argument advanced in point (iv) lacks merit. The same proposition may be put in respect of parents and carers in the event the model term was confined in the manner proposed by Ai Group.

[61] As to point (v), the entitlement to 5 days' unpaid leave is to deal with the circumstance where an employee needs to do something to deal with the impact of the family and domestic violence and it is impractical for the employee to do that thing outside their ordinary hours of work. The flexibility term is a different, distinct, entitlement. Essentially the leave entitlement is event-based. We see no basis for excluding employees experiencing violence from a member of their family from the scope of the amended model term.

[62] As to point (vi), Ai Group submits (at [28]):

> 'We note that the terms "domestic violence" and "family member" are defined under the newly inserted award clauses dealing with unpaid domestic violence leave. This was part of the consensus position reached between the parties as to the content of such a provision. However, it is not clear that those definitions would necessarily align completely with the meaning of "violence" and "family" in section 65(1A).'

[63] Contrary to Ai Group's submission, we are not persuaded that extending the amended model term in the manner proposed will give rise to any confusion.

[64] The model term we propose to insert in all modern awards is as follows:

X Requests for flexible working arrangements

Employee may request change in working arrangements

X.1 This clause X applies where an employee has made a request for a change in working arrangements under s.65 of the Act.

NOTE: 1. Section 65 of the Act provides for certain employees to request a change in their working arrangements because of their circumstances, as set out in s.65(1A).

2. An employer may only refuse a s.65 request for a change in working arrangements on 'reasonable business grounds' (see s.65(5) and (5A)).

3. Clause X is an addition to s.65.

Responding to the request

X.2 Before responding to a request made under s.65, the employer must discuss the request 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 needs of the employee arising from their circumstances;

(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

NOTE: 1. The employer must give the employee a written response to an employee's s.65 request within 21 days, stating whether the employer grants or refuses the request (s.65(4)).

2. If the employer refuses the request, the written response must include details of the reasons for the refusal (s.65(6)).

X.3 Clause X.3 applies if the employer refuses the request and has not reached an agreement with the employee under clause X.2.

(a) The written response under clause X.2 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.2, the written response under clause X.2 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 circumstances; and

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

X.4 If the employer and the employee reached an agreement under clause X.2 on a change in working arrangements under clause X.2 that differs from that initially requested by the employee, the employer must provide the employee with a written response to their request setting out the agreed change(s) in working arrangements.

Dispute resolution

X.5 Disputes about whether the employer has discussed the request 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.

[65] The requirements in clause X.2 that the employer 'must discuss the request with the employee' is consistent with the language used in the consultation standard clauses in modern awards[49] and the model consultation term specified in schedule 2.3 to the *Fair Work Regulations 2009*.

[66] We are satisfied that the model term is a term about 'the facilitation of flexible working arrangements' within the meaning of s.139(1)(b); it does not contravene s.65; and, consequently, it is a permitted term under s.136.

[67] As mentioned in the *March 2018 decision*,[50] before varying a modern award the Commission must be satisfied that if it were varied in the manner proposed, then the modern award would only include terms necessary to achieve the modern awards objective.

[68] The modern awards objective is to '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' the particular considerations identified in ss.134(1)(a) to (h). We now turn to the s.134 considerations.

[49] See [2018] FWCFB 4704.

[50] See generally [2018] FWCFB 1692 at [36] to [70].

[69] Section 134(1)(a) requires that we take into account 'relative living standards and the needs of the low paid'. A threshold of two-thirds of median full-time wages provides a suitable benchmark for identifying the 'low paid' for the purpose of s.134(1)(a).[51]

[70] The majority of low paid employees are award-reliant[52] and some of these employees are likely to be in the circumstances covered by the model term (i.e. those referred to in s.65(1A)). The model term will increase awareness of the right to request flexible working arrangements, and by facilitating access to such arrangements, it will enable employees to better balance their work and other responsibilities. This consideration is a factor in favour of varying modern awards to include the model term.

[71] Section 134(1)(b) requires that we take into account 'the need to encourage enterprise bargaining'. There is no persuasive evidence before us which would lead us to conclude that inserting the model term in modern awards would have an adverse impact on the incentive to bargain in respect of this matter. However, we would also observe that the evidence does not persuade us that such a term would necessarily *encourage* enterprise bargaining.

[72] Section 134(1)(c) requires that we take into account 'the need to promote social inclusion through increased workforce participation'. The use of the conjunctive 'through' makes it clear that in the context of s.134(1)(c), social inclusion is a concept to be promoted exclusively '*through* increased workforce participation'. As the Expert Panel observed in the *2012-2013 Annual Wage Review decision*,[53] obtaining employment is the focus of this consideration. In our view, social inclusion may also be promoted by assisting employees to *remain* in employment.[54] One of the findings in the *March 2018 decision* (see [36] above at 2) was that 'Access to flexible working arrangements … positively [assists] in reducing labour turnover'.

[73] The consideration in s.134(1)(c) supports the variation of modern awards to include the model term.

[74] It is convenient to deal with ss.134(1)(d) and (f) together.

[75] Section 134(1)(d) requires that we take into account 'the need to promote flexible modern work practices and the efficient and productive performance of work' and s.134(1)(f) requires that we take into account 'the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden'. Section 134(1)(f) is expressed in very broad terms; it refers to the likely impact of any exercise of modern award powers 'on business, *including*' (but not confined to) the specific matters mentioned, that is, 'productivity, employment costs and the regulatory burden'.

[76] The extent of the impact of the model term on business is difficult to predict. On the one hand, we are satisfied that the model term will promote flexible modern work practices;

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[51] See *4 yearly review of modern awards – Penalty Rates – Hospitality and Retail sectors* [2017] FWCFB 1001 at [166]-[168].

[52] [2017] FWCFB 1001 at [167].

[53] [2012] FWCFB 4000 at [100]-[102].

[54] [2018] FWCFB 1691 at [283].

that providing employees with access to flexible working arrangements can provide benefits to *both* employees and employers, and, importantly, that the model term merely supplements the existing substantive rights in s.65. On the other hand, the variation of modern awards to insert the model term will also give rise to some, albeit not significant, increase in the regulatory burden upon business in administering the new arrangements.

[77] On balance, the considerations in ss.134(1)(d) and (f) tell slightly *against* varying modern awards to include the model term.

[78] Section 134(1)(da) requires that we take into account 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.

[79] This consideration is not relevant in the present context and no party contended to the contrary.

[80] Section 134(1)(e) requires that we take into account 'the principle of equal remuneration for work of equal or comparable value'. The expression 'equal remuneration for work of equal or comparable value' is defined in s.302(2) of the Act to mean 'equal remuneration for men and women workers for work of equal or comparable value'.

[81] We accept that the need to access flexible working arrangements is a gendered phenomenon, in that women make most of the requests for flexible work.[55] But s.134(1)(e) is concerned with the provision of equal *remuneration*, not the impact of an award term on women generally. This consideration is not relevant in the present context.

[82] Section 134(1)(g) requires that we take into account 'the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards'.

[83] The variation of modern awards to insert the model term will add a degree of complexity to modern awards insofar as it will give rise to employer obligations additional to those found in s.65. However, the decisions we have made in relation to the content of the model term are intended to make the provision simple and easy to understand. We accept that these considerations tell against the proposed variation to modern awards, albeit slightly.

[84] Section 134(1)(h) requires that we take into account 'the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy'. The matters mentioned in s.134(1)(h) focus on the aggregate (as opposed to sectorial) impact of an exercise of modern award powers.

[55] [2018] FWCFB 1692 at [273].

[85] As we have mentioned, the impact of the model term is difficult to predict. But we doubt that the variation of modern awards to insert the model term will give rise to any significant adverse impact on the national economy.

[86] We have taken into account the considerations in ss.134(1)(a) to (h) and it is our *provisional* view that the variation of modern awards to include the model term is necessary to ensure that such awards achieve the modern awards objective. As we have mentioned, providing employees with access to flexible working arrangements can provide benefits to *both* employees and employers.

Next steps

[87] It is our *provisional* view that all modern awards should be varied to insert the model term. That *provisional* view would only be displaced in respect of any particular award if it is demonstrated that there are matters or circumstances particular to that award which compel the conclusion that the achievement of the modern awards objective for that award does not necessitate the inclusion of the model term.

[88] This decision takes a cautious regulatory response to addressing the significant *unmet* employee need for flexible working arrangements. We propose to review the model term in June 2021. At that time we will consider whether any changes are needed to the model term and we will revisit the question of whether the group of employees entitled to make a request for flexible working arrangements should be expanded.

[89] Draft determinations giving effect to our *provisional* view will be published in the coming weeks. Interested parties will have 14 days from the date of publication of the draft determinations to comment and confirm whether any award-specific issues are pressed. In the absence of any comments in respect of a particular modern award, we will confirm our *provisional* view and vary the relevant modern award.

PRESIDENT

Appearances:

S Ismail for Australian Council of Trade Unions.

N Ward and *J Arndt* for Australian Chamber of Commerce and Industry.

B Ferguson for the Australian Industry Group.

D Johns for the National Road Transport Association.

S Harris for the Pharmacy Guild of Australia.

Final written submissions:

ACTU, 10 September 2018

ACCI, 7 September 2018
PGA, 10 September 2018
Ai Group, 20 September 2018

Hearing details:

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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 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.

ATTACHMENT B: Amended Joint Employer proposal

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 an employer and employee could not agree on a change in working arrangements under clause X.2 and, 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

NOTE: ***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.