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AM2015/2 Family Friendly Case Submissions in Response to Additional Fair Work Commission Background Papers: Statement

2 February 2018



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1. INTRODUCTION

- 1.1 On 12 January 2018, the Fair Work Commission (**Commission**) issued Statement [2018] FWCFB 99 (**Statement**).
- 1.2 The Statement attached three Background Papers and seeks submissions in respect of the background papers by no later than 4pm on Friday 2 February 2018.

2. BACKGROUND PAPER ONE

- 2.1 As noted in the Statement, Background Paper 1 (**Paper 1**) identifies the uncontested and contested issues in the proceedings and seeks to summarise the parties' submissions.
- 2.2 The Statement identifies the following issues which parties should address:
- (a) the draft summary of the Commission's approach to the review (see Attachment C to Paper 1);
 - (b) the accuracy of the summaries of the parties' submissions on jurisdiction and merit (see sections 2.2 and 2.3 to Paper 1);
 - (c) the list of witnesses (see Attachment D to Paper 1) and the references to the parties' submissions on the evidence (see paragraph [70]); and
 - (d) any other corrections or additions to the Background Document.

Summary of Approach to the Four Yearly Review

- 2.3 In respect of [12], we note that while we concur that s 156(5) would not *confine* the conduct of the review of a modern award to a 'single holistic assessment of all of its terms', the Australian Chamber submits that the operation of ss 134,138 and 156 *Fair Work Act 2009* (Cth) (**FW Act**) does require, prior to the conclusion of the Review, a single holistic assessment of all of the terms of each modern award to ensure that each modern award, in its own right, satisfies the modern awards objective only to the extent necessary to achieve the modern awards objective.

Summaries of Submissions on Jurisdiction and Merit

- 2.4 We have no comments on this summary.

The list of witnesses and the references to the parties' submissions on the evidence

- 2.5 In respect of [70] of the Statement, the Australian Chamber notes that:
- (a) Mr Jae Fraser is not an ACTU Lay Witness but rather is a witness for the Australian Chamber.
 - (b) Ms Cleaver's first name is Lauren, not Laura.
 - (c) Mr Mark Rizzardo's statement has been omitted from the summary at [70].

3. BACKGROUND PAPER 2

- 3.1 Background Paper 2 (**Paper 2**) outlines the statutory provisions in respect of flexible working arrangements in some OECD countries.
- 3.2 It is unclear as to what relevance the Commission wishes to ascribe to this material in relation to these proceedings.

- 3.3 Acknowledging that Paper 2 is, as its name would suggest, by way of background, the Australian Chamber submits that such material can only be of limited utility or relevance to the ACTU's application within the context of the 4 Yearly Review. This is particularly so given the wide divergence of economic, industrial, social and legislative conditions pertaining to the named countries and Australia. Variables which relate directly to the issue of flexibility in employment for parents and carers include access to childcare, social security, retirement income and paid parental leave.
- 3.4 More broadly, the most obvious variable between nations is the statutory scheme under which industrial laws can be developed. Many of the flexible work scheme or systems listed in Paper 2 would not be permissible under the FW Act. This makes a straightforward comparison of flexibility entitlements between countries an interesting yet relatively superficial exercise.
- 3.5 This also makes it impossible to form reliable or relevant conclusions from the materials.
- 3.6 Notwithstanding this considerable reservation, the Australian Chamber observes as follows:
- (a) Paper 2 outlines that Australia has engaged in a similar legislative exercise as a number of other countries in seeking to legislate entitlements for certain employees to request certain kinds of flexible work arrangements, obligations on employers to respond to these requests and an ability to refuse an employee's request in whole or in part on certain (ordinarily 'business' or 'operational') grounds.
 - (b) These entitlements vary from country to country.
 - (c) Paper 2 affirms previous submissions put by the Australian Chamber that the imposition of the ACTU claim, in effect a unilateral right to demand a preferred personal pattern of work, would be unique in the industrial world¹.
 - (d) Paper 2 samples an incomplete selection of OECD countries, with a heavy Eurocentric emphasis.
 - (e) To the extent that some of the named countries include a 'right of review' in their specific context, these rights vary. The Australian Chamber has made extensive submissions in respect of the Australian Parliament's position on this issue, specifically an express prohibition on the Fair Work Commission being able to determine disputes around flexibility. We have also made extensive submissions as to the workability of the current Australian system, including the effective operation of discrimination law².

4. BACKGROUND PAPER 3

- 4.1 Paper 3 outlines the UK system concerning flexible working arrangements.
- 4.2 The reservations expressed above at 3.2-3.4 above are apposite here, albeit less pronounced.
- 4.3 At [2] of Paper 3, the Commission notes that the UK Legislation is 'similarly drafted' to the FW Act however 'extends' the FW Act in two respects by broadening the scope of employees who may

¹ Australian Chamber of Commerce and Industry, AM2015/2 Family Friendly Working Hours Final Submissions, 19 December 2017 at paragraph 10.1.

² Ibid at paragraph 6.1 - 6.46.

request flexible working conditions and providing the ability for an employee to make a claim to an employment tribunal.

- 4.4 The latter entitlement is detailed extensively in Paper 3 including the ‘policy background of the right of appeal to a tribunal.’
- 4.5 For reasons which have been extensively canvassed in the substantive proceedings, given the nature of the FW Act, the Commission is not permitted as part of these proceedings to implement an ability for an employee to make a claim to an employment tribunal to contest a refusal of a s 65 flexibility request³.
- 4.6 As already submitted, and as extracted in [34] of Paper 1, the scope of section 65 of the FW Act should be seen as a proper contemporary expression of what the parliament believe is appropriate and by definition what the community believe is appropriate.
- 4.7 An extract from the 2008 National Employment Standards Exposure Draft Discussion Paper is particularly relevant here:

Whether a business has reasonable business grounds for refusing a request for flexible working arrangements will not be subject to third party involvement under the NES. The United Kingdom experience has demonstrated that simply encouraging employers and employees to discuss options for flexible working arrangements has been very successful in promoting arrangements that work for both employers and employees.⁴

- 4.8 This intention is manifest in the current provisions of the FW Act, which specifically prohibits the Commission from dealing with disputes arising from s 65(5) of the FW Act.

³ Ibid at paragraph 6.17- 6.27.

⁴ Department of Education, Employment and Workplace Relations, National Employment Standards Exposure Draft – Discussion Paper at [58]-[61].

Australian Chamber Members

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