

IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 – Four Yearly Review of Modern Awards

AM2015/2

**SUBMISSIONS
OF
THE AUSTRALIAN COUNCIL OF TRADE UNIONS**

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Introduction

- 1) These submissions are filed in accordance with the direction of the Fair Work Commission made on 30 August 2018 inviting submissions from interested parties on the following proposition:

If the model term were amended in the manner contended by the Australian Industry Group and the Australian Chamber of Commerce and Industry, that is, to delete clauses X.7 and X.8 and it not extend the model term to the broader class of employees specified in clause X.3, then what should be the scope of the model term? In particular, if the model term was amended in this way should it be confined to parents and carers only or be extended to all of the categories of employees set out in s.65(1A)?

- 2) These submissions should be read in conjunction with the ACTU's submissions dated 13 June and 13 August 2018.

Employer Model Term

- 3) On 26 July 2018, Ai Group (**AIG**) filed a revised proposed alternate clause dealing with family friendly work arrangements (**Employer Model Term**).
- 4) The Employer parties contend that the Fair Work Commission (**Commission**) should adopt the Employer Model Term instead of the Provisional Model Term because it addresses the jurisdictional and merit objections they have raised. Their objections can be summarised as follows:
 - i) The Provisional Model Term creates an alternate or substitute scheme dealing with family friendly working arrangements, rather than supplementing the existing scheme in s 65, and therefore it excludes the NES in breach of s 55(1);
 - ii) The Provisional Model Term extends the right to request flexible working arrangements to new employees (namely those with more than 6 months but less than 12 months continuous service), which excludes s 65(2) in breach of s 55(1), and/or is not a variation supported by probative evidence and therefore not 'necessary' within the meaning of s 138;
 - iii) The Provisional Model Term would include the right to apply to the court for orders in relation to the question of reasonable business grounds, which is contrary to the scheme in s 65.

- 5) The ACTU maintains that the Full-Bench can and should vary awards to include a clause in the form of the Provisional Model Term, not the Employer Model Term. In the ways set out below, the Employer Model Term is inconsistent with the modern award objective:
- i) It is not simple or easy to understand. In contrast to the self-contained Provisional Model Term, it requires parties to look at two different instruments to determine their rights and obligations;
 - ii) It limits access to employees with more than 12 months of service, which is inconsistent with the obligation to promote flexible modern work practices and assist employees to balance their work and family responsibilities. In contrast, the Provisional Model Term extends access to employees with more than 6 months but less than 12 months of service;
 - iii) It fails to provide an effective enforcement mechanism, which is inconsistent with the object of the Fair Work Act to provide a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards and modern awards. Under the Employer Model Term, an employee would not be permitted to ask the Commission or a Court to consider the reasonableness of an employer's decision to refuse a request for flexible working arrangements. While dispute resolution would be available for the additional obligation to confer, it would not be available for the additional written response obligations. In contrast, under the Provisional Model Term, the Commission would be able to deal with disputes about the additional obligations to respond in writing as well as confer, and an employee would be able to ask a court to consider the reasonableness of a decision to refuse a request.

An 'alternate or substitute' scheme

- 6) The employer parties' jurisdictional objections to the Provisional Model Term are addressed in detail in the ACTU's submissions dated 13 June and 13 August 2018, and there is no need for repetition here. However, by way of summary, the contention that the Provisional Model Term 'excludes the scheme in s 65 as a whole' and therefore 'negates the effect' of it, cannot be sustained. The Provisional Model Term supplements the NES by setting out additional processes regarding the handing of requests for flexible working arrangements. To the extent that the Provisional Model Term replicates provisions of s 65, this is permitted by s 55(6). In no sense is the Provisional Model Term detrimental to any employee in any respect, and in no way does it negate the effect of s 65 in the sense prohibited by s 55(1).

- 7) The Provisional Model Term does not ‘replace’ or ‘substitute’ s 65, it simply *replicates* aspects of s 65 as permitted by s 55(6), and *supplements* other aspects of s 65 as permitted by s 55(4). Even if the Commission finds that the Provisional Model Term does provide for a ‘separate and distinct scheme’ as argued by AIG, this does not mean that the proposed clause replaces, excludes or negates the effect of s 65, or any provision of s 65, within the meaning of s 55. The small percentage of employees that make a formal request under s 65 will either continue to do so, or use the award clause instead. Either way, at a minimum, they will not lose the benefit of the terms and conditions provided by the regime in s 65.

Minimum service period

- 8) While the ACTU’s claim was rejected, the merit case for taking *some* additional steps to promote family friendly working arrangements has been accepted by the Commission. There can be no doubt that the class of employees with more than 6 months but less than 12 months service will include some people who have a need for flexible working arrangements. In fact, available data indicates that a significant proportion of working women of child-bearing age employed on a casual basis have less than 12 months service with their current employer.¹ This suggests that the reduction of the qualifying period is not only consistent with the modern award objective, but important to reduce discrimination. Either way, extending access to the Provisional Model Term to a greater number of employees is entirely consistent with the requirement to promote flexible modern work practices. A number of countries have a qualifying period of less than 12 months service, including the UK regime, on which the Australian right to request regime is closely based.²
- 9) ACCI has suggested that extension of the class will create a ‘material misalignment’ with the scheme in the NES because of the operation of s 67.³ This is an overstatement. It is correct that an employee with less than 12 months service would not be eligible for parental leave under the NES, and therefore would be eligible to request flexible working arrangements before they became eligible to take parental leave. However, this does not present any significant operational problem. Parents returning from unpaid parental leave under the NES provisions will have completed at least 12 months of service by virtue of the eligibility requirements of s 67 and s 70. All this means is that the reduced service period in the Provisional Model Term will have little practical impact in relation

¹ Australian Bureau of Statistics, Labour Mobility Australia, 2006, Cat No 6209.0; Australian Bureau of Statistics, Australian Labour Market Statistics, July 2009, Cat No 6105

² Also Finland, Germany, The Netherlands, Sweden, and New Zealand have lesser qualifying periods.

³ Transcript, Mr Ward, PN168 and PN169

to this particular category of employee. However, parents returning from parental leave comprise only one section of the employee population who may make requests under the Provisional Model Term. For example, a new father with more than 6 but less than 12 months service who did not take unpaid parental leave, but who wishes to reduce his working hours in order to meet more of the parenting responsibilities for a newborn baby in order to enable his female partner to return to work, would be eligible under the Provisional Model Term to request this change. Similarly, an employee with caring responsibilities within the meaning of the Carer Recognition Act with more than 6 but less than 12 months service would be eligible to request a change in arrangements to meet those responsibilities under the Provisional Model Term. The eligibility requirements in ss 67 and 70 mean simply that the reduced service period in the Provisional Model Term will have little practical impact in relation to parents returning from unpaid parental leave.

Enforcement

- 10) The central concern of the employer parties is the potential application of civil penalties to an employer's capacity to refuse a request on reasonable business grounds. The evidence in the primary case establishes that while most requests for flexible working arrangements are granted, some are not, and in those circumstances employees do not have access to an effective enforcement mechanism.
- 11) The employer parties argue in essence that the Commission should not 'circumvent' Parliament's intention to exclude third party review of the reasonableness of an employer's decision to refuse a request for flexible working arrangements. However, to the extent that Parliament's intention in relation to the enforcement of s 65(5) is relevant to the Full-Bench's decision in the current matter, it is difficult to discern that intention with any certainty or clarity. For example, while the Discussion Paper relied on by the employer parties⁴ states that reasonable business grounds for refusing a request would not be subject to 'third party involvement' under the NES, the *Fair Work Bill 2008* Explanatory Memorandum says that it is expected that the Commission *would* provide guidance on what comprise 'reasonable business grounds'.⁵ It is not clear how the Commission could be expected to provide guidance on this matter other than through the hearing and determination of disputes about it.

⁴ For example, see AIG Submissions dated 10 August, at [67]

⁵ *Fair Work Bill 2008* Explanatory Memorandum at [267] and [268]

- 12) The UK regime on which the right to request is closely based allows a Tribunal to review an employer's decision for both procedural and factual defects. This allows the Tribunal to 'examine the evidence as to the circumstances surrounding the situation to which the application gave rise'; but does not permit a full examination of the reasonableness of the employer's decision. By contrast, the Commission is prohibited from considering *any* aspect of an employer's decision to refuse a request. An employee may bring a claim before the Federal Court in relation to a breach of the procedural requirements of s 65 only. This means that in practice, all an employer has to do is state their reasons for refusal in writing within the timeframes required - no investigation into the correctness or accuracy or truthfulness of those reasons is permitted. This is inconsistent with the requirement for a guaranteed and enforceable minimum set of terms and conditions. The fact that most requests are granted does not justify the removal of rights of appeal for those employees who are unreasonably refused. In addition, the high agreement rate supports an argument that the application of a meaningful enforcement regime would be unlikely to be overly burdensome for employers.
- 13) The enforcement issue does not give rise to any jurisdictional issue under s 55(1), because the prohibition on court orders in s 44(2) is not part of the National Employment Standards. There is a question as to whether the enforcement regime applicable to a term or condition affects its ability to be 'the same' as another term or condition as contemplated by s 55(6). A term or condition of employment is separate to the enforcement regime applicable to that term or condition. While it is correct that a term or condition with no meaningful enforcement mechanism does not have the same effect as an enforceable term or condition, s 55(6) simply talks about *an entitlement* that is the same, it does not refer to the *effect* of the entitlement. In any event, even if a term cannot be 'the same' as another term within the meaning of s 55(6) in circumstances where the enforcement regimes for those terms are different, the extension of the enforcement regime falls within the definition of s 55(4), in that it supplements s 65 by providing additional rights to appeal in a way that is not detrimental to any employee.

Scope of Employer Model Term

- 14) Subsection 65(1A) of the Fair Work Act sets out the range of circumstances in which an employee can request flexible working arrangements, namely where the employee:
- i) is the parent, or has responsibility for the care, of a child who is of school age or younger;
 - ii) is a carer (within the meaning of the *Carer Recognition Act 2010*);

- iii) has a disability;
 - iv) is 55 or older;
 - v) is experiencing violence from a member of the employee's family; or
 - vi) provides care or support to a member of his or her immediate family or a member of his or her household who requires care or support because the member is experiencing violence from the member's family.
- 15) If the Commission decides to amend awards to insert the Employer Model Term, then the scope should not be limited to parents and carers only – it should extend to all categories in s 65(1A). The Provisional Model Term creates a self-contained scheme setting out additional requirements for employers to confer and respond in writing; and extends access to the scheme to employees with at least 6 months service and provides access to civil remedies for unreasonable refusals. By contrast, the Employer Model Term simply has the effect of ‘bolting on additional requirements’⁶ to the existing scheme in s 65. If this is the model ultimately adopted by the Commission, there is no justification for limiting the scope of the existing scheme in s 65. The additional requirements should be ‘bolted on’ to the scheme in s 65 as it is.
- 16) The ACTU's original claim was significantly narrower in scope than s 65, in that it applied to employees with parenting and/or caring responsibilities only, and only to requests for reduced working hours. These limits on eligibility were imposed in recognition of the stronger rights that would be granted under the ACTU's claim, and the evidence that the first and second most common reasons for requesting flexible working arrangements are care for a child or children, or care for a family member other than a child, and that the majority of employees request a reduction in working hours. 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.⁷ As submitted by ACCI, the additional obligations in the Provisional Model Term simply codify existing good

⁶ Transcript 27 August 2018, PN48 - Brent Ferguson, PN 65 - Mr Ward

⁷ [2018] FWCFB 1692 at [392], point 11

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.⁸ For example, several Australian employers and the New South Wales and Victorian State governments have adopted ‘All Roles Flex’ policies, entitling any employee to request flexibility for any reason.⁹ Internationally, the UK *Employment Rights Act 1996* does not limit the right to request flexible working conditions to any particular category or categories of employee - *all* employees who have been continuously employed for a period of at least 26 weeks (other than an agency worker or an office holder) may apply for flexible working conditions, which includes a change to the hours, times and location of work. In France, Germany, the Netherlands and New Zealand all employees have a right to request flexible working arrangements for any reason.

- 17) 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).¹⁰

⁸ See for example: Barbara Pocock, Natalie Skinner and Reina Ichii, *Work, Life and Workplace Flexibility: The Australian Work and Life Index 2009*, Centre for Work + Life, University of South Australia, 2009, 54-62; Natalie Skinner and Barbara Pocock, ‘Flexibility and Work-Life Interference in Australia’ (2011) 53 *Journal of Industrial Relations* 65; CCH, ‘Results of Flexible Work 2010 – A Pulse Survey’ (June 2010) 184 *Equal Opportunity Alert* 1, 3.

⁹ See for example, Telstra, ANZ, Westpac, Australian Stock Exchange, Origin Energy, and Price Waterhouse Coopers.

¹⁰ Murray Report, [38]–[43].