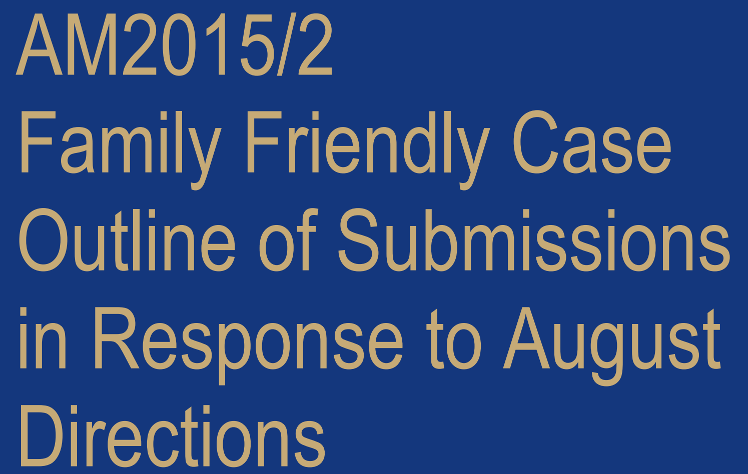
Working for business.
Working for Australia



AM2015/2 Family Friendly Case Outline of Submissions in Response to August Directions

7 September 2018

Australian
Chamber of Commerce
and Industry

Working for business.
Working for Australia
Telephone 02 6270 8000
Email info@acci.asn.au
Website www.acci.asn.au

Canberra Office
Commerce House
Level 3, 24 Brisbane Avenue
Barton ACT 2600 PO BOX 6005
Kingston ACT 2604

Melbourne Office
Level 2, 150 Collins Street
Melbourne VIC 3000
PO BOX 18008
Collins Street East
Melbourne VIC 8003

Sydney Office
Level 15, 140 Arthur Street
North Sydney NSW 2060
Locked Bag 938
North Sydney NSW 2059

ABN 85 008 391 795
© Australian Chamber of Commerce and Industry 2017

This work is copyright. No part of this publication may be reproduced or used in any way without acknowledgement to the Australian Chamber of Commerce and Industry.

Disclaimers & Acknowledgements
The Australian Chamber of Commerce and Industry has taken reasonable care in publishing the information contained in this publication but does not guarantee that the information is complete, accurate or current. In particular, the Australian Chamber is not responsible for the accuracy of information that has been provided by other parties. The information in this publication is not intended to be used as the basis for making any investment decision and must not be relied upon as investment advice. To the maximum extent permitted by law, the Australian Chamber disclaims all liability (including liability in negligence) to any person arising out of use or reliance on the information contained in this publication including for loss or damage which you or anyone else might suffer as a result of that use or reliance.

Australian Chamber of Commerce and Industry

1. BACKGROUND

1.1 In its Decision [2018] FWCFB 1692 (**March Decision**) the Full Bench:

(a) considered that modern awards should be varied to incorporate a model term to facilitate flexible working arrangements relating to parental or caring responsibilities;[1]

(b) sought to create a model term setting out a *process* which an employer must follow if it is proposing to refuse a request. The Full Bench noted that by making this process subject to a degree of Commission supervision, this may facilitate agreement on changes in working arrangements that are tailored and reasonable having regard to the needs of the employee and the impact on the business;[2]

(c) intended to create an entitlement which went further than the existing NES entitlement in four ways (**Supplementary Elements**)[3]:

(i) the group of employees eligible to request a change in working arrangements relating to parental or caring responsibilities, was expanded to include ongoing and casual employees with at least six months' service but less than 12 months' service (**Service Threshold Extension**);

(ii) before refusing an employee's request, the employer would 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 (**Obligation to Confer**);

(iii) if the employer refuses the request, the employer's written response to the request would be required to include a more comprehensive explanation of the reasons for the refusal. The written response would 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 could offer to the employee (**Additional Written Obligations**); and

(iv) a note was included to draw attention to the Commission's (limited) capacity to deal with disputes.

1.2 On 30 August 2018 the Full Bench relevantly issued the following directions:

1. Submissions are invited 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. *Interested parties are to file submissions in relation to the above matters by 4.00pm on Friday 7 September 2018.*

1.3 For ease of expression, these submissions will refer to an amended model term which removed the Service Threshold Extension (i.e. X.3), removed clauses X.7 and X.8 and extended to all of the categories of employees set out in s 65(1A) as the 'Award Flexible Arrangements Term' (**AFA Term**).

1.4 The AFA Term would apply to requests made by:

[1] [417] of the March Decision
[2] [422] of the March Decision
[3] [424] of the March Decision

(a) employees other than casual employees-- employees who have completed at least 12 months of continuous service with the employer immediately before making the request; or

(b) casual employees--employees:

(i) who are a long term casual employee of the employer immediately before making the request; and

(ii) who have a reasonable expectation of continuing employment by the employer on a regular and systematic basis,

where

(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*); or

(c) the employee has a disability; or

(d) the employee is 55 or older; or

(e) the employee is experiencing violence from a member of the employee's family; or

(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.

(**Extended Categories**)

1.5 These submissions address the following questions:

(a) Is the variation of modern awards to include the AFA Term permissible as a matter of jurisdiction under the *Fair Work Act 2009* (Cth) (**FW Act**)?

(b) Do the findings of the Full Bench in the March Decision support the inclusion of the AFA Term in modern awards?

(c) What is the relevant merit test to be applied by the Full Bench?

(d) What is the Australian Chamber's position in respect of the insertion of the AFA Term into all modern awards?

2. IS THE VARIATION OF MODERN AWARDS TO INCLUDE THE AFA TERM PERMISSIBLE AS A MATTER OF JURISDICTION?

2.1 Two questions arise in addressing whether the AFA Term is permitted under s 136 of the FW Act:

(a) does the AFA Term fall within the scope of s 139 which identifies terms that may be included in modern awards; and

(b) is the AFA Term prohibited by s 136(2).

2.2 With respect of the first question, s 139(1)(b) of the FW Act permits the inclusion in modern awards of terms about *'the facilitation of flexible working arrangements, particularly for employees with family responsibilities'*.

2.3 While the AFA Term is broader in scope than the model term previously proposed by the Commission which dealt only with employees with family and caring responsibilities, s 139(1)(b) is not limited to this scope. The Australian Chamber therefore accepts that the AFA Term would be about the facilitation of flexible working arrangements.

2.4 The AFA Term must then be assessed as being permissible having regard to s 55 of the FW Act.

2.5 Section 55(1) of the Act provides that a term of a modern award or enterprise agreement must not exclude any provision of the NES.

2.6 The Australian Chamber accepts that the AFA Term would not operate to exclude the NES.

2.7 The Australian Chamber therefore considers that the inclusion of the AFA Term in modern awards is within the scope of s 136 of the FW Act and is permitted.

3. DO THE FINDINGS OF THE FULL BENCH IN THE MARCH DECISION SUPPORT THE INCLUSION OF THE AFA TERM IN MODERN AWARDS?

3.1 The Full Bench in the March Decision made a number of findings at [392] as follows:

> *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 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.*
>
> *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.*
>
> *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'.*
>
> *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.*
>
> *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.*

3.2 A number of relevant observations need to be made about these findings.

3.3 The basis of many of these findings appears to be the evidence Dr Jan Murray (ACTU 5).

3.4 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 Australian Work and Life Index 2014 (AWALI), is not restricted to a sample of parents and carers but rather to s 65 requests generally.

3.5 As such, the Full Bench's findings, which were used to support the provisional model term issued with the March Decision in respect of parents and carers, could support, at least on their face, the inclusion of the Extended Categories within the AFA Term.

3.6 By way of example, findings 2, 4, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18 and 19 could be applied to all of the Extended Categories, not just parents and carers.

3.7 As would be expected, the evidence brought in the substantive proceedings primarily concerned the position of parents and carers. This should be unsurprising, not only having regard to the subject matter of the proceedings but also because the evidence disclosed that the substantial majority of s 65 requests were requests by parents and carers. By way of 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.

4. WHAT IS THE RELEVANT MERIT TEST TO BE APPLIED BY THE FULL BENCH?

4.1 The principles applying to the Full Bench's determination in the Four Yearly Review have been repeated many times. It is convenient for the purposes of these submissions to refer to [50]-[51] of the March Decision:

> ***[50]*** *The Review is to be distinguished from inter partes proceedings. The Review is conducted on the Commission's own motion and is not dependent upon an application by an interested party. Nor is the Commission constrained by the terms of a particular application. The Commission is not required to make a decision in the terms applied for (s.599) and, in the Review, may vary a modern award in whatever terms it considers appropriate, subject to its obligation to accord interested parties procedural fairness and the application of relevant statutory provisions as outlined above.*
>
> ***[51]*** *In 4 Yearly Review of Modern Awards – Penalty Rates – Hospitality and Retail Sectors the Full Bench summarised the general propositions applying to the Commission's task in the Review, as follows:*
>
>> *'1. The Commission's task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are 'necessary to achieve the modern awards objective' (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission's consideration is upon the terms of the modern award, as varied.*
>>
>> *2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.*
>>
>> *3. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. For example, the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made. The particular context in which those decisions were made will also need to be considered.*
>>
>> *4. The particular context may be a cogent reason for not following a previous Full Bench decision, for example:*
>>
>> - *the legislative context which pertained at that time may be materially different from the FW Act;*
>> - *the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision; or*
>> - *the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.'*
>>
>> [References omitted]

4.2 Two aspects of the above extract warrant particular consideration.

4.3 Firstly, it should be uncontroversial that it is not necessary for a party to 'apply' for a variation to a modern award in the 4 Yearly Review for a variation to be made (subject to parties being given procedural fairness).

4.4 This appears to be the course contemplated by the Full Bench in issuing its latest Directions, given that no party has run a case concerning a scope wider than parenting or caring responsibility.

4.5 This fact provides no bar to the Commission varying modern awards to include the AFA Term.

4.6 Secondly, as noted by the Full Bench in the above extract, the extent of the merit argument required to support a particular variation will depend on the circumstances.

4.7 In respect of quantifying the merit argument required to support the insertion of the AFA Term into modern awards, the Australian Chamber submits as follows:

4.8 In of itself, a proposal to insert the AFA Term into all modern awards is not "*obvious as a matter of industrial merit*".

4.9 As such, the proposal to insert the AFA Term into modern awards is not one which could be undertaken without having regard to an assessment of probative evidence supporting the variation.

4.10 Having regard to the evidence heard in the substantive proceedings however (which has gone to supporting the findings of the Full Bench) 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 vary modern awards to include the AFA Term, should it determine it appropriate to do so.

5. THE AUSTRALIAN CHAMBER'S POSITION ON THE INSERTION OF THE AFA TERM INTO ALL MODERN AWARDS

5.1 Section 138 of the FW Act states as follows:

> ***Achieving the modern awards objective***
>
> *A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.*

5.2 As noted by the Full Bench in the 2017 Penalty Rates Case, when assessing the statutory test, the focal point of the Commission's consideration is upon the terms of the modern award as varied, although regard may be had to the terms of any proposed variation.

5.3 Whether a term is necessary or merely desirable in relation to s 138 is a question, as noted by the Full Bench in [2018] FWCFB 1692 at [58], as one on which reasonable minds may differ.

5.4 In respect of the application of s 138 of the FW Act, the Australian Chamber does not resile from its previous position that it does not accept that (absent the provisional model term - regardless of scope) the existing minimum safety net is failing to facilitate the creation of flexible work arrangements or that employers are engaging in arbitrary, cursory or perfunctory 'consideration' of flexibility requests under the regime created by s 65.

5.5 As previously submitted, the evidence in this case demonstrates that the existing statutory regime is functioning satisfactorily and that employers operating under the existing statutory regime take flexibility requests seriously and approve an overwhelming majority of requests.

5.6 We acknowledge that the Commission has found against this position in its March Decision.

5.7 Notwithstanding this threshold view, the Australian Chamber has been asked in these submissions to address the question as to why the scope of AFA Term should not extend to all categories of employees listed in s 65(1A).

5.8 The Australian Chamber considers 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.

5.9 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.

5.10 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.

5.11 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.

5.12 Separate to the question of scope, the Australian Chamber maintains its concerns in respect of the potential effect that a model term will have on business, particularly small business.

5.13 The creation of additional administrative elements within the request process may inevitably ground increased 'technical' breaches by businesses, particularly small businesses, in a context where evidence suggests that the majority of requests are dealt with satisfactorily but informally at present.

5.14 In maintaining this submission, the Australian Chamber notes however that:

(a) in aligning with the 12 month threshold of s 65, the AFA Term may arguably result in less scope for technical breaches than the Full Bench's model term issued with the March Decision;

(b) in aligning with the eligibility criteria of the current s 65 regime, the AFA Term may arguably result in less scope for technical breaches than the Full Bench's model term issued with the March Decision; and

(c) given the vast majority of s 65 requests relate to parents and carers, the inclusion of the Extended Categories in the AFA Term is unlikely to dramatically increase the burden on business that would have resulted from the Full Bench's model term issued with the March Decision.

Australian Chamber Members

AUSTRALIAN CHAMBER MEMBERS: **BUSINESS SA** CANBERRA BUSINESS CHAMBER **CHAMBER OF COMMERCE NORTHERN TERRITORY** CHAMBER OF COMMERCE & INDUSTRY QUEENSLAND **CHAMBER OF COMMERCE & INDUSTRY WESTERN AUSTRALIA** NEW SOUTH WALES BUSINESS CHAMBER **TASMANIAN CHAMBER OF COMMERCE & INDUSTRY** VICTORIAN CHAMBER OF COMMERCE & INDUSTRY MEMBER NATIONAL INDUSTRY ASSOCIATIONS: **ACCORD – HYGIENE, COSMETIC & SPECIALTY PRODUCTS INDUSTRY** AGED AND COMMUNITY SERVICES **ANIMAL MEDICINES AUSTRALIA** AUSTRALIA ARAB CHAMBER OF COMMERCE AND INDUSTRY AIR CONDITIONING & MECHANICAL CONTRACTORS' ASSOCIATION **ASSOCIATION OF FINANCIAL ADVISERS** ASSOCIATION OF INDEPENDENT SCHOOLS OF NSW **AUSTRALIAN SUBSCRIPTION TELEVISION AND RADIO ASSOCIATION** AUSTRALIAN BEVERAGES COUNCIL LIMITED **AUSTRALIAN DENTAL ASSOCIATION** AUSTRALIAN DENTAL INDUSTRY ASSOCIATION **AUSTRALIAN FEDERATION OF EMPLOYERS & INDUSTRIES** AUSTRALIAN FEDERATION OF TRAVEL AGENTS **AUSTRALIAN HOTELS ASSOCIATION** AUSTRALIAN INTERNATIONAL AIRLINES OPERATIONS GROUP **AUSTRALIAN MADE CAMPAIGN LIMITED** AUSTRALIAN MINES & METALS ASSOCIATION **AUSTRALIAN PAINT MANUFACTURERS' FEDERATION** AUSTRALIAN RECORDING INDUSTRY ASSOCIATION **AUSTRALIAN RETAILERS' ASSOCIATION** AUSTRALIAN SELF MEDICATION INDUSTRY **AUSTRALIAN STEEL INSTITUTE** AUSTRALIAN TOURISM INDUSTRY COUNCIL **AUSTRALIAN VETERINARY ASSOCIATION** BUS INDUSTRY CONFEDERATION **BUSINESS COUNCIL OF CO-OPERATIVES AND MUTUALS** CARAVAN INDUSTRY ASSOCIATION OF AUSTRALIA **CEMENT CONCRETE AND AGGREGATES AUSTRALIA** CHIROPRACTORS' ASSOCIATION OF AUSTRALIA **CONSULT AUSTRALIA** CUSTOMER OWNED BANKING ASSOCIATION **CRUISE LINES INTERNATIONAL ASSOCIATION** DIRECT SELLING ASSOCIATION OF AUSTRALIA **EXHIBITION AND EVENT ASSOCIATION OF AUSTRALASIA** FITNESS AUSTRALIA **HOUSING INDUSTRY ASSOCIATION** HIRE AND RENTAL INDUSTRY ASSOCIATION LTD **LARGE FORMAT RETAIL ASSOCIATION** LIVE PERFORMANCE AUSTRALIA **MASTER BUILDERS AUSTRALIA** MASTER PLUMBERS' & MECHANICAL SERVICES ASSOCIATION OF AUSTRALIA **MEDICAL TECHNOLOGY ASSOCIATION OF AUSTRALIA** MEDICINES AUSTRALIA **NATIONAL DISABILITY SERVICES** NATIONAL ELECTRICAL & COMMUNICATIONS ASSOCIATION **NATIONAL EMPLOYMENT SERVICES ASSOCIATION** NATIONAL FIRE INDUSTRY ASSOCIATION **NATIONAL RETAIL ASSOCIATION** NATIONAL ROAD AND MOTORISTS' ASSOCIATION **NSW TAXI COUNCIL** NATIONAL ONLINE RETAIL ASSOCIATION **OIL INDUSTRY INDUSTRIAL ASSOCIATION** OUTDOOR MEDIA ASSOCIATION **PHARMACY GUILD OF AUSTRALIA** PHONOGRAPHIC PERFORMANCE COMPANY OF AUSTRALIA **PLASTICS & CHEMICALS INDUSTRIES ASSOCIATION** PRINTING INDUSTRIES ASSOCIATION OF AUSTRALIA **RESTAURANT & CATERING AUSTRALIA** RECRUITMENT & CONSULTING SERVICES ASSOCIATION OF AUSTRALIA AND NEW ZEALAND **SCREEN PRODUCERS AUSTRALIA** THE TAX INSTITUTE **VICTORIAN AUTOMOBILE CHAMBER OF COMMERCE**