From: Julian Arndt [mailto:Julian.Arndt@ablawyers.com.au]
Sent: Wednesday, 22 August 2018 11:36 AM
To: Chambers - Ross J
Cc: Nigel Ward; 'Brent Ferguson'; Sophie Ismail
Subject: AM2015/2 - Family Friendly Working Arrangements - Submissions of Australian Chamber [ABLAW-ImanageDocs.FID168089]

Dear Associate

It has come to my attention this morning that the Submissions of the Australian Chamber filed in these proceedings on 10 August 2018 contains a transcription error which requires correction.

In summary, the submissions erroneously refer to submissions filed 12 February 2018 ('February Submissions') when the relevant submissions which were intended to be referenced were those filed 15 June 2018 (**June Submissions**).

While we doubt that this transcription error has caused any undue confusion, for the abundance of caution:

- Paragraph 1.8 should read:

  > *"In accordance with the comments of the President during the conference on 19 July 2018 , these submissions entirely replace the ~~February Submissions~~ submissions filed 15 June 2018.*

- All references to the February Submissions should be taken to mean those filed 15 June 2018 (**June Submissions**).

We have attached an updated submission reflecting this change.

If you would like to discuss, please contact me directly.

Yours faithfully

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AM2015/2 Family Friendly Case Outline of Submissions in Response to Model Term

10 August 2018

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and Industry

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Australian Chamber of Commerce and Industry

1. BACKGROUND

1.1 The Full Bench issued a Decision [2018] FWCFB 1692 on 26 March 2018 (**March Decision**) in AM2015/2 Family Friendly Work Arrangements.

1.2 The March Decision rejected the Australian Council of Trade Union's (**ACTU**) claim seeking a variation of all modern awards to include an entitlement to part-time work or reduced hours for employees with parenting or caring responsibilities.

1.3 The March Decision expressed a *provisional* view that modern awards should be varied to incorporate a model term to facilitate flexible working arrangements concluding at [427]:

> *It is our provisional view that the provisional model term is a term about 'the facilitation of flexible working arrangements, particularly for employees with family responsibilities' within the meaning of s.139(1)(b). It is also our provisional view that the provisional model term does not contravene s.55 and consequently that it is a term permitted under s.136. Of course, any such term may only be included in a modern award to the extent necessary to achieve the modern awards objective.*

1.4 Interested parties were invited by the Statement [2018] FWCFB 99 (**Statement**) to make submissions in respect of the following issues:

(a) the terms of the provisional model term included at Attachment A of the Statement;

(b) whether the provisional model term is permitted under s 136 of the *Fair Work Act 2009* (Cth) (**FW Act**) and, in particular, whether it contravenes s 55; and

(c) 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.

1.5 The Australian Chamber filed submissions on 15 June 2018 (**June Submissions**).

1.6 Following the filing of the June Submissions, two conferences were held between interested parties and the Australian Chamber, AiG and the ACTU engaged in discussions as to how to address issues that were raised in submissions filed in response to the Statement. These discussions resulted in the filing of a 'Proposed Alternative Clause' by a number of employers on 19 July 2018.

1.7 On 25 July 2018, the Commission issued a Background Paper which identified that interested parties were directed to file any further submissions by Thursday 9 August 2018 with the matter being listed for hearing on Monday 27 August 2018 at 10.00am in Sydney.

1.8 In accordance with the comments of the President during the conference on 19 July 2018[1], these submissions entirely replace the June Submissions and address the following issues relevant to the Full Bench's determination of the provisional model term:

(a) the Australian Chamber's understanding of the intended effect of the March Decision;

(b) the Australian Chamber's understanding of the effect of the provisional model term;

(c) the permissibility of the provisional model term under s 136 of the FW Act and s 55;

(d) 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'; and

(e) the Australian Chamber's comments in respect of the provisional model term.

1.9 In filing updated submissions, the Australian Chamber notes that, having undertaken further consideration of the provisional model term, its position has advanced and refined from the June Submissions.

[1] See PN59

Australian Chamber of Commerce and Industry

2. THE EFFECT OF THE MARCH DECISION

2.1 The Australian Chamber's reconsideration of its position following the filing of the June Submissions has centred around a consideration of the intent of the Full Bench in the March Decision and how that intent has been translated in the provisional model term.

2.2 Reviewing the March Decision, it is apparent that 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;[2]

(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;[3]

(c) intended to create an entitlement which went further than the existing NES entitlement in four ways (**Supplementary Elements**)[4]:

(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.

2.3 Respectfully, two matters remain unclear to the Australian Chamber with regard to the intent of the Full Bench in the March Decision.

2.4 Firstly, with respect, reviewing the March Decision, it is not entirely apparent whether the Full Bench intends the provisional model term to be a stand-alone entitlement, separate from s 65 of the FW Act or whether the provisional model term is a term incorporating the s 65 entitlement, and then supplementing it.

2.5 In favour of a reading which suggests the Full Bench intended the provisional model term to be a separate stand-alone entitlement to s 65 is the fact that:

(a) the provisional model term can be read independently from s 65, and 'reproduces'[5] rather than refers to elements of the s 65 entitlement;

(b) the provisional model term, on its face, is expressed to be "*additional to the provision to request a*

[2] [417] of the March Decision
[3] [422] of the March Decision
[4] [424] of the March Decision
[5] See [426] of the March Decision

change in working arrangements in section 65 of the Act"[6]; and

(c) the provisional model term is expressed at [426] of the March Decision to be "*based on s.65 of the Act, but departs from the arrangement of s.65 in some respects*."

2.6 Against the proposition that the Full Bench intended the provisional model term to be a separate stand-alone entitlement to s 65, and intends merely to supplement the existing NES entitlement, are two factors.

2.7 Firstly at [426] of the March Decision, in outlining the provisional model term, the Full Bench uses language which suggests elements of the provisional model term which differ from the existing provisions of s 65 are 'building upon' or 'supplementing' the existing s 65 regime:

(a) clause X.3 'expands';

(b) clause X.5 'adds to'; and

(c) clause X.9 'introduces a new'.

2.8 Secondly, as noted at [426] of the March Decision:

> *Clause X.11 picks up the limitation on the Commission's dispute resolution jurisdiction in s.739(2) of the Act. Clause X.11 also draws to the attention of the reader that the Commission can deal with a dispute (under the dispute resolution provisions of the award) as to whether an employer has 'reasonable business grounds' to refuse a request for the purposes of cl.X.7, if the employer and employee have agreed in writing to the Commission doing so. It is intended that this would include an employer and employee agreeing in writing to seek the assistance of the Commission on an ad hoc basis when a dispute has arisen.*

2.9 Presumably if the provisional model term existed as a stand-alone entitlement separate from s 65, the limitation in s 739 would not apply (given it only relates to disputes "*about whether an employer had reasonable business grounds under subsection 65(5)*"... .)

2.10 The Australian Chamber accepts of course that the Full Bench would have power to limit its jurisdiction to deal with disputes under the provisional model term regardless of whether s 739 applies or not to the provisional model term. This matter is not addressed however within the reasons of the Full Bench. Neither is the question of whether s 55(4) has been engaged in contemplating the drafting of the provisional model term.

2.11 The intent of the Full Bench in drafting the provisional model term as a separate entitlement or a supplementation of s 65 is critical when assessing the second (and more serious) matter which remains unclear to the Australian Chamber following the March Decision. Namely, does the Full Bench intend for an employer's decision to refuse a flexibility request on reasonable business grounds to be contestable by way of civil remedy?

3. THE CREATION OF AN AWARD CONTRAVENTION AND RIGHT OF REVIEW?

3.1 Notwithstanding the reasons of the Full Bench in the March Decision do not appear to evince any intention to create a right for an employee to contest an employer refusal on reasonable business grounds, the provisional model term appears to do exactly that.

3.2 On first reflection, the provisional model term appears to merely duplicate the existing provisions of s 65 with the inclusion of the Supplementary Elements. On further reflection, the inclusion of a substantive award provision (in the form of X.7) which allows an employer to refuse a flexibility request only on reasonable business grounds, creates, in effect, an ability to dispute, contest and seek orders in relation to a business' decision to refuse a request on reasonable business grounds.

3.3 X.7 of the provisional model term states that "*The employer may refuse the request only on reasonable business grounds*."

[6] See Note above X.1 in provisional model term

3.4 Section 45 of the FW Act relevantly states that:

> *Contravening a modern award*
>
> *A person must not contravene a term of a modern award.*
>
> *Note 1: This section is a civil remedy provision (see Part 4-1).*

3.5 Section 545 of the FW Act relevantly states:

> ***Section 545***
>
> *(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.*

3.6 Taken together, the combined effect of X.7 and sections 45 and 545 of the FW Act is that an employee would be able to seek orders against an employer in circumstances where the employee disagrees that the employer had reasonable business grounds for refusing a flexibility request.

3.7 The effect of this change from the status quo should not be understated.

3.8 As was canvassed repeatedly during the hearing of the substantive proceedings, on any reading of the relevant sections of the FW Act, 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).

3.9 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).

3.10 Section 146 of the FW 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 identifying that the Commission (see s 739 of the FW Act), or another person (see s 740 of the FW Act), 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).

3.11 The drafting of these sections makes it clear that the Parliament did not intend to include as part of the minimum safety net a review mechanism on the ability of an employer to determine flexibility requests. As noted in the Government's NES Discussion Paper[7]:

> *Can Fair Work Australia impose a flexible working arrangement on an employer? No. The proposed flexible working arrangements NES sets out a process for encouraging discussion between employees and employers. The NES recognises the need for employers to be able to refuse a request where there are 'reasonable business grounds'. Fair Work Australia will not be empowered to impose the requested working arrangements on an employer.*

3.12 This is also apparent from the Explanatory Memorandum to the Fair Work Bill 2008, which explained that "*the intention of these provisions is to promote discussion between employers and employees about the issue of flexible working arrangements*".[8]

3.13 This position was reviewed and maintained by the Fair Work Act Review 2012 where it was noted:

> *The Panel has considered the question of whether a decision to refuse a request for flexible working arrangements should be able to be appealed. Section 146 outlines the requirements for dispute settling terms under modern awards and includes a note that FWA or a person must not settle a dispute about whether an employer had reasonable business grounds to refuse a request for flexible working arrangements under s. 65(5) or a request for extending unpaid parental leave under s. 76(4). While providing an appeal mechanism may help ensure that a request for flexible working arrangements is given proper consideration and that a refusal is indeed due to reasonable business grounds, this still would not provide a guarantee that a right to request would eventually succeed.*
>
> *FWA's previously noted survey results indicate that employers are taking requests seriously and that in most cases employees can negotiate flexible arrangements despite the absence of an appeal mechanism. Given that the policy rationale of the provision is to facilitate discussion about flexible working arrangements, the Panel is not convinced on the weight of evidence that the policy is currently not meeting its objective and therefore does not recommend that such an appeal mechanism is adopted. In this regard the Panel is also mindful that employees may negotiate for a right to appeal a refusal of a request for flexible working arrangements under an enterprise agreement dispute settling procedure.*[9]

3.14 Critically, the Parliament has not only prevented the Commission from reviewing employers' decisions in relation to reasonable business grounds (except where there is agreement to) but has also has prohibited any court from determining whether such a decision would constitute a breach of the NES. Clause 44 of the FW Act states as follows:

> *(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).*

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[7] See "National Employment Standards Exposure Draft – Discussion Paper" released by the Federal Government in February 2008.

[8] See Explanatory Memorandum to the Fair Work Bill 2008 at [258]

[9] "Towards more Productive and equitable workplaces: An evaluation of the Fair Work Legislation accessed at https://docs.employment.gov.au/system/files/doc/other/towards_more_productive_and_equitable_workplaces_an_evaluation_of_the_fair_work_legislation.pdf at page 98

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)).*

3.15 It must be stressed, as identified during the substantive proceedings, that there are long standing and powerful legislative protections applicable to employees requesting flexible working arrangements arising under existing anti-discrimination laws. These protections apply in the absence of a legislative right to contest a decision of an employer to refuse a request for flexibility on reasonable business grounds.

3.16 The provisional model term fundamentally disturbs this position.

3.17 In drafting the provisional model term, at least in respect of the involvement of the Commission, the Full Bench appears to have sought to reflect parliamentary intent through the inclusion of Clause X.11.

3.18 The effect of the proposed model term in its current form would however place within jurisdiction of the Federal Court, Federal Circuit Court and lower state Courts (particularly in the context of small claims matters) the type of proceedings which the legislature has specifically sought to prohibit[10] (i.e. disputes about whether an employer had reasonable business grounds for refusal).

3.19 These award-based industrial disputes would need to be determined by courts in circumstances where the Commission, which is the specialist industrial tribunal, has largely been prevented by the legislature from becoming involved, and where those courts themselves are prevented by the legislature from determining breaches of s 65 reasonable business grounds disputes.

3.20 While estimating the amount of claims that may be made under s 545 should the provisional model term be adopted is entirely speculative, the Australian Chamber suggests that the potential number of claims would be considerable. The threat of legal proceedings contesting 'reasonable business grounds' decisions may also force businesses to accommodate requests which would ordinarily be resolved through workplace discussion and compromise as opposed to legal 'threats'.

3.21 This, with respect, appears to be such an extreme outcome and reversal of the current status quo that it would warrant considerable attention in any relevant determination on the matter, which, with respect, is absent from the March Decision. The Australian Chamber submits that the above matters present an extremely persuasive statutory presumption against the implementation of the provisional model term in its current form.

3.22 In the submission of the Australian Chamber, no case was made out during the proceedings to create a right to contest an employer's reasonable business grounds decision (indeed even the ACTU's claim did not seek to create a reviewable right, leaving the determination of flexibility entirely in the hands of employees).

3.23 Accordingly, as a matter of merit, the Australian Chamber does not support the making of the provisional model term. The Australian Chamber's position on jurisdiction is discussed below.

3.24 The Australian Chamber notes that it does not consider this aspect of the provisional model term to be essential to the stated purposes of the March Decision and the introduction of the 'Supplementary Elements' into Modern Awards. The Australian Chamber identifies the 'Proposed Alternative Clause' filed by a number of employers on 19 July 2018 as a form of clause which would not present this issue, while appearing to give effect to the Full Bench's March Decision.

[10] Subject to a contract of employment, enterprise agreement or other written agreement expressly identifying that the Commission (or another 3rd party) deal with the matter

4. IS THE PROVISIONAL MODEL TERM IS PERMITTED UNDER S 136 OF THE FW ACT AND, IN PARTICULAR, DOES IT CONTRAVENE S 55?

4.1 Two questions arise in addressing this issue:

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

(b) is the provisional model term prohibited by s 55.

4.2 The first question can be resolved briefly.

4.3 The Commission in its March Decision identified its provisional view that the provisional model term is a term about 'the facilitation of flexible working arrangements, particularly for employees with family responsibilities' within the meaning of s 139(1)(b) of the FW Act. This is not contested by the Australian Chamber.

4.4 The provisional model term must then be assessed as being permissible having regard to s 55 of the FW Act.

4.5 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.

4.6 As noted above, it is not clear whether the provisional model term is intended to be a stand-alone provision which is separate from the operation of s 65.

4.7 In reproducing large sections of the s 65 regime in addition to the Supplementary Elements, it is certainly arguable that the provisional model term is an entirely separate entitlement to the s 65 regime.

4.8 It is not apparent to the Australian Chamber however that the creation of a separate entitlement to s 65 which may reduce the utilisation of the s 65 regime would necessarily operate to exclude the NES.

4.9 Whether considered a separate and stand-alone entitlement to s 65 or not, the provisional model term appears to aim itself at (in effect at least) supplementing the existing regime mandated by s 65 in order to facilitate meaningful engagement between employers and employees and to preclude arbitrary, cursory or perfunctory 'consideration' of flexibility requests.

4.10 Notwithstanding the jurisdictional position, the Australian Chamber does not accept that (absent the provisional model term) 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.

4.11 Indeed, 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, compromises or the understanding of legitimate reasons for refusal.

4.12 The Australian Chamber submits that 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. WILL THE INCLUSION OF THE PROVISIONAL MODEL TERM IN MODERN AWARDS RESULT IN MODERN AWARDS THAT ONLY INCLUDE TERMS TO THE EXTENT NECESSARY TO ACHIEVE THE MODERN AWARDS OBJECTIVE.'

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 As noted by the Full Federal Court of Australia in *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123:

> *[29] … it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern award objective. Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.*

5.4 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.

5.5 In the submission of the Australian Chamber, if the effect of the provisional model term is to create a right to contest an employer's decision to refuse a flexibility request on reasonable business grounds, the provisional model term goes beyond what is necessary to achieve the modern awards objective.

5.6 With particular regard to s 134(1)(f) of the FW Act; '*the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden'*, the potential impact to business should the provisional model term create an avenue for employees to dispute 'business grounds decisions' in court is considerable.

5.7 Without diverging into hyperbole, the opening up of an entirely new jurisdiction, potentially involving the making of injunctions and the awarding of damages against employers for making decisions on business grounds will fundamentally change the landscape of Australian business in relation to flexibility requests.

5.8 With respect, no case has been run on this point and having regard to the evidentiary case advanced in the proceedings, it is difficult to arrive at a 'value judgment' that a modern award which included the provisional model term satisfies the modern awards objective but goes no further.

5.9 In the submission of the Australian Chamber, the clear statutory presumption against the involvement of the courts and the Commission in reviewing decisions relating to refusals on reasonable business grounds should prevail. With respect, the circumvention of the existing prohibition on the review of such decisions goes too far and well beyond the satisfaction of the modern awards objective.

5.10 An assessment of the Supplementary Elements against s 138 is separate to the issue of whether the provisional model term should create an avenue for employees to pursue civil remedies. In relation to the Supplementary Elements, the Australian Chamber submits as follows.

The Service Threshold Extension

5.11 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).

5.12 This is the case despite the fact that the ACTU's claim was advanced on the basis of a six month service threshold.

5.13 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.

5.14 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 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.

5.15 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.

The Obligation to Confer and Additional Written Obligations

5.16 As noted above, the Australian Chamber considers that the evidence in these proceedings demonstrates that where employers and employees meaningfully engage with one another in respect of flexibility requests, mutually acceptable outcomes are produced.

5.17 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 flexibility requests currently made (independent of an award provision, whether under s 65 or otherwise).

5.18 As such, the Australian Chamber retains its position that it is not necessary to include the Obligation to Confer or Additional Written Obligations in modern awards in order to satisfy the modern awards objective. This being said we acknowledge that these provisions do appear to replicate what the evidence demonstrated was good practice.

5.19 Addressing the relevant statutory test however is more difficult.

5.20 The Australian Chamber acknowledges that the Full Bench has made findings that 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 and that that there is a significant unmet employee need for flexible working arrangements.

5.21 In such circumstances, it would be available for the Full Bench to conclude that modern awards inclusive of the provisional model term including the Obligation to Confer and Additional Written Obligations would satisfy the modern awards objective.

5.22 That being said, and notwithstanding that the Obligation to Confer and the Additional Written Obligations appear to replicate what the evidence demonstrated was good practice, the Australian Chamber has concerns in respect of the potential effect that the provisional model term will have on business, particularly small business.

5.23 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.

5.24 While the obligations imposed by the provisional model term may not by themselves impose extraordinarily oppressive administrative burden on business (as they likely reflect good practice), when imposed in conjunction with existing administrative obligations (including those progressively being produced by the 4 Yearly Review), the confirmation of the provisional model term has the potential to negatively affect business (particularly small business) and may ground a greater occurrence of technical (rather than substantive or meaningful) breaches of modern awards.

5.25 The potential for a broad interpretation of the scope of the additional obligations also gives rise to a legitimate anxiety for the Australian Chamber, particularly in relation to the Additional Written Obligations, with businesses potentially being required to exhaustively list any and every working arrangement which could conceivably accommodate the employee's responsibilities. Should such an interpretation be taken, increased technical (rather than substantive or meaningful) breaches of modern awards could result.

5.26 In circumstances where no substantive case was made out for the specific obligations imposed by the provisional model term in the hearing, exercising its own value judgement as to the operation of s 134 and the limits imposed by s 138, the Australian Chamber considers that the provisional model term goes further

than that is necessary to satisfy the modern awards objective.

5.27 This said, we are not antagonistic to the notion of meaningful discussion but rather the administrative execution of this as proposed (see s 134(1)(g) and s 134(1)(h)).

6. COMMENTS ON THE TERMS OF THE PROVISIONAL MODEL TERM

6.1 Having regard to our above comments concerning the provisional model term, the Australian Chamber submits that:

(a) the Full Bench should adopt a form of drafting which gives effect to the March Decision without creating a entitlement to bring an action for a contravention of an award clause which states that an employer may only refuse a request on reasonable business grounds. The Proposed Alternative Clause' filed 19 July 2018 may provide an example of drafting which achieves this end; and

(b) no basis has been advanced for the Service Threshold Extension and therefore references in X.3 to 'six months' should be replaced with '12 months'.

Australian
Chamber of Commerce
and Industry

Australian Chamber Members

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