IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 – Four Yearly Review of Modern Awards

AM2015/2 - Family Friendly Work Arrangements

SUBMISSIONS OF
THE AUSTRALIAN COUNCIL OF TRADE UNIONS

DATE: 6 June 2018

D No: **123/2017**

Lodged by:	The Australian Council of Trade Unions
Address for service:	Level 4, 365 Queen Street Melbourne VIC 3000
Tel:	03 9664 7333
Fax:	03 9600 0050
Email:	sismail@actu.org.au

Introduction

1. These submissions are filed pursuant to a Statement of the Fair Work Commission (**the Commission**) dated 3 May 2018.

2. On 26 March 2018, a Full Bench dismissed the ACTU's claim seeking a variation of all modern awards to include an entitlement to part-time work or reduced hours for employees with parenting and/or caring responsibilities, but expressed a provisional view that modern awards should incorporate a term to facilitate flexible working arrangements.

3. On 3 May 2018, the Commission issued a Statement attaching a provisional model term and inviting submissions on:

    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;*

    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.*

4. These matters are addressed below.

The terms of the provisional model term

5. The ACTU has reviewed the provisional model term at Attachment A of the 3 May 2018 Statement. Subject to the comments below, the ACTU considers that the proposed model term is consistent with the Full Bench decision dated 26 March 2018, and appropriate for insertion into all modern awards.

6. Clause X.10 attempts to cover two different scenarios and has the potential to cause confusion. The ACTU suggests the relocation of sub-clause X.10(b) to a new clause, as follows:

    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.*~~

(b) 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.

X.11 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.

Dispute resolution

X.12 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.

Jurisdiction

7. The Commission has jurisdiction to vary all modern awards to include a new provision in the form of the provisional model term.

8. Subdivision A of Division 3 of Part 2-3 of the *Fair Work Act 2009* (**FW Act**) sets out the requirements regarding terms which must, may, or may not, be included in modern awards by the Commission during the four yearly review. Section 136(1)(a) provides that a modern award may include terms about any of the matters in s. 139(1). The provisional model term is clearly about '...the facilitation of flexible working arrangements, particularly for employees with family responsibilities' and 'arrangements for when work is performed, … including variations to working hours', within the meaning of ss.139(1)(b) and (c). There is therefore little doubt that the proposed model term is 'permitted' within the meaning of s 136(a) of the FW Act.

9. As noted by the Full Bench,[1] the only question requiring consideration is whether the proposed clause offends s 136(2), which provides that a modern award must only include terms permitted or required by s 55. Section 55(1) provides that a modern award must not exclude the NES or any provision of the NES. A term will not offend s 55(1) where it is permitted by s 55(4) of the Act. Section 55(4)(b) provides that a modern award may include terms that *supplement* the NES, to the extent that the effect of those terms is not detrimental to an employee when compared to the NES.

10. The proposed model term supplements the NES by:

    a. Expanding the group of employees eligible to request a change in hours to those with 6 months service or more (currently only those with at least 12 months service can request a change to working arrangements);

    b. Requiring an employer to not only provide a written response, but also 'confer' with an employee and 'genuinely try to reach agreement';

    c. Requiring an employer who refuses a request to give a more comprehensive written explanation than it is required to give under s 65 currently;

    d. Authorising the Commission to deal with a dispute about whether an employer has 'conferred' and 'genuinely tried to reach agreement' with an employee.

11. The term "supplemental" is not defined in the FW Act, and so the words of the statute should be given their ordinary or natural meaning.[2] The *Macquarie* dictionary defines 'supplement' as "*something added to complete a thing, supply a deficiency, or complete a whole*".[3] The Full Bench has held that a term 'supplemented' the NES entitlement to annual leave, because it "*extended the circumstances in which an employer must comply with an employee's request to take paid annual leave*".[4] ACCI has suggested that the concept of 'supplementing' the NES "*connotes the notion of building upon, increasing or extending… "*.[5]

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1 *Four Yearly Review of Modern Awards - Family Friendly Working Arrangements* [2018] FWCFB 1692 at [99]

2 See for example *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [69], [78].

3 The *Macquarie Dictionary* (5th ed, 2009).

4 *4 Yearly Review of Modern Awards – Annual Leave* [2015] FWCFB 5771, [129].

5 ACCI Closing Submissions dated 19 December 2017, [8.29].

12. The changes which would be made by the provisional model term clearly add to, extend, build upon or increase the current provisions in s. 65 of the FW Act, and therefore supplement the NES entitlement in s 65.

13. Further, no aspect of the changes in the provisional model term could be described as 'detrimental' to an employee when compared with their NES entitlement. The proposed model term would extend the number of employees who could access the entitlement to request flexible hours, marginally increase their right to be consulted and receive information, and provide additional (limited) additional access to dispute resolution. The provision model term therefore meets the requirements of s 55(4), and does not offend s 55(1). The model term does not contravene s.136(2) of the FW Act and is a permitted term within the meaning of s. 136(1).

Necessity

14. Even if a term is 'permitted' by s 136(1), it cannot be included in a modern award unless the term is 'necessary' to achieve the modern award objective.

15. The 'necessity' of the ACTU's proposed term was the subject of detailed evidence and submissions from the ACTU, the Australian Industry Group and the Australian Chamber of Commerce and Industry over five hearing days. The ACTU called evidence from four expert witnesses and 10 lay witnesses. All of the ACTU's expert witnesses and a number of its lay witnesses were required for cross-examination.

16. The Commission made a number of findings based on the evidence and material it considered, including the following which support the necessity of the provisional model term:

    e. Female labour force participation is generally lower than males and this is the case across the working age population;

    f. Caring for children is the most common reason for females aged 25 to 44 years (in contrast to studying among younger people (15 to 24 years) and that part-time hours are preferred, for people aged 45 years and above);

    g. New mothers are more likely to remain out of paid work than all women and are more likely to move from full-time work to either part-time work or out of paid work. Part-time employment becomes more common among women once their children become older, however, so does staying out of employment. In contrast, men are more likely to remain employed full-time whether or not they have children;

h. Females, on average, tend to have lower lifetime earnings, with some of the above general propositions likely to contribute to this outcome;

i. The accommodation of work and family responsibilities through the provision of flexible working arrangements can provide benefits to both employees and their employers;

j. Access to flexible working arrangements enhances employee well-being and work-life balance, as well as positively assisting in reducing labour turnover and absenteeism;

k. 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;

l. 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;

m. 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;

n. 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);

o. 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;

p. Some employees change jobs or exit the labour force because they are unable to obtain suitable flexibility in their working arrangements;

q. 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;

r. 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';

s. 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 ACTU submits that the above findings demonstrate that additional measures to promote flexible modern work practices in Australian workplaces are not only necessary, but urgent. Existing regulation regarding family friendly working arrangements is inadequate and is failing to assist enough employees to balance their work and family responsibilities. While the limited improvements contained in the provisional model term fall well short of what is required to meaningful address the problem of work/life collision, they represent a small step in the right direction. In the absence of a meaningful enforcement mechanism, the extent to which the changes in the provisional model term are capable of raising greater awareness of the right to request flexible hours or facilitating greater access to flexible working arrangements, including for 'discontented non-requestors', is uncertain.

18. The ACTU remains committed to ensuring that all Australian workers have a guaranteed and enforceable right to flexible working hours which enables them to effectively manage their work and caring responsibilities.

13 June 2018

Australian Council of Trade Unions