

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Further Submission
Family Friendly Work Arrangements
(AM2015/2)

10 August 2018

Ai
GROUP

4 YEARLY REVIEW OF MODERN AWARDS
AM2015/2 FAMILY FRIENDLY WORK ARRANGEMENTS

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this submission in accordance with the directions issued by His Honour, Justice Ross, during proceedings on 19 July 2018.
2. The submissions:
 - Identify the relevance of our previous submissions.
 - Identify alternate proposals that are advanced by Ai Group and other employer parties. This includes setting out a further alternate clause that should be adopted in preference to the provisional model term if the Full Bench maintains its view that a relevant entitlement can and should be extended to an expanded cohort of employees.
 - Address the merits of Ai Group's amended version of the alternate model term advanced by various employer groups.

2. AI GROUP'S PREVIOUS SUBMISSION

3. Ai Group has filed two submissions in response to the proposed model clause. Notwithstanding the manner in which our position has evolved, both remain relevant to the Full Bench's consideration and are attached to these submissions.
4. Our first submission was dated 13 June 2018 and is attached at **Annexure A**. Part 2 of that submission outlined a jurisdictional objection to the proposed model term. Without seeking to demur from the detail of what we put in that submission, we observe that the heart of our contentions was that the proposed scheme would offend s.55 because it would negate the practical effect of s.65 by establishing an alternate regime for dealing with employee requests for flexible working arrangements and that, secondly, the provisions could not be properly regarded as supplementary terms caught by s.55(4) and thus saved by s.55(7).

5. Part 3 of our 13 June 2018 submission sets out a number of broader concerns regarding the content of the proposed model clause. We continue to press such concerns. In Attachment A to those submissions we also set out an alternate clause (**Ai Group's Initial Proposed Clause**) that was intended to address, or at least moderate, some of the concerns that we raised in Part 3. Ai Group remains of the view that the clause is more appropriate than the provisional model term proposed by the Commission.
6. Ai Group's Initial Proposed Clause would not negate the jurisdictional objection that we have raised in either our first or second submission. It was advanced in an effort to constructively engage with the review proceedings, notwithstanding our overarching concerns about the Full Bench's capacity to include such a provision within modern awards, given the operation of s.55.
7. The second Ai Group submission was dated 20 June 2018 (**Reply Submission**) and is attached at **Annexure B**. In the course of responding to ACTU and ACCI submissions, we further developed the basis for our contention that the proposed clause would be contrary to s.55. In so doing, we also raised a concern that the proposed scheme would exclude the operation of s.65(2).
8. Importantly, the Reply Submission also expressed a view that elements of the provisional model term that did little or nothing more than replicate elements of the NES could not properly be regarded as *supplementary terms*¹ or *necessary*² to meet to the modern awards objective.
9. At paragraph 38 of the Reply Submission, we suggested that some of our concerns regarding the provisional model term, including the jurisdictional objections that we have raised, could be addressed through the development of a clause that does no more than facilitate flexible working arrangements through supplementing the NES in the manner contemplated by the Full Bench's decision and that this could be achieved by "*drafting a clause that interacts with, and in certain respects, adds to the scheme established by the Act, rather than by*

¹ As contemplated by s.55(4).

² As contemplated by s.138.

replacing it with an alternate scheme.” The joint employer proposal, and a slightly amended version subsequently advanced by the Ai Group, were intended to reflect this approach.

10. The Reply Submission also observed that such an alternate approach would preserve the approach adopted under s.44 of the *Fair Work Act 2009 (Act)* of exempting employers from any penalty for decisions they make in relation to whether a refusal of a request under s.65 is based upon reasonable business grounds. In the submissions that follow we further identify the importance of the Full Bench not circumventing this element of the legislative scheme.

3. THE EMPLOYER / Ai GROUP’S PROPOSALS

11. The Commission has before it the following alternate proposed clauses:
 - Ai Group’s Initial Proposed Clause, filed on 13 June 2018.
 - A joint employer proposed clause (**Joint Employer Proposal**), filed on 18 July 2018.
 - A further version of the Joint Employer Proposal that incorporates amendments by Ai Group, filed on 26 July 2018 (**Amended Joint Employer Proposal**).
 - A further Ai Group proposal (**Ai Group Alternate Proposal**) which is attached to these submissions at **Annexure C**.
12. The context in which these proposals have been advanced is set out in the section below.
13. The Commission’s Background Paper of 25 July 2018 includes the Joint Employer Proposal. It also helpfully sets out a comparison between that proposal and the Commission’s provisional model term.
14. In response to the Background Paper, Ai Group filed the Amended Joint Employer Proposal. This was intended to address two unintended deficiencies in the Joint Employer Proposal that were revealed by the analysis undertaken by

the Commission. In a subsequent conference before the President we explained the intent underpinning the minor changes that we proposed.³

15. In short, the Amended Joint Employer Proposal is intended to add to the entitlement provided by s.65 in most of ways proposed by the Full Bench at paragraph [424] of its decision of 24 March 2018⁴. We deal with this issue in further detail in part 4 of these submissions. However, in essence, we have recast the clause so that it interacts with the NES instead of giving rise to an entirely separate and alternate award derived scheme dealing with requests for flexible working arrangements. We explain the reason for this approach in part 4 of these submissions.
16. Neither the Joint Employer Proposal, nor the Ai Group's Initial Proposed Clause, seeks to expand the cohort of employees who would eligible to make a request for a change to their working arrangements beyond those who would currently receive the benefits of s.65. That is, neither proposal includes a clause comparable to X.3 of the Commission's provisional model term. Ai Group contends that, based on both jurisdictional and broader merit based considerations, awards should not be amended in such a manner. Nonetheless, if the Full Bench does not accept such a position, we have included at Annexure C the Ai Group Alternate Proposal, which expands the cohort of employees to include permanent and casual employees with at least six months' service but less than 12 months' service but otherwise maintains the approach adopted in the Amended Joint Employer Proposal.

³ Transcript of proceedings on 26 July 2018.

⁴ *Family Friendly Working Arrangements* [2018] FWCFB 1692 at [424].

4. THE MERITS OF THE AMENDED JOINT EMPLOYER PROPOSAL

17. There are seven reasons why the Full Bench should adopt the Amended Joint Employer proposal advanced by the Ai Group, in preference to the Commission's provisional model term. Specifically, the proposed approach would:
- i. Overcome the jurisdictional objections advanced by the Ai Group (**Ai Group's Jurisdictional Objections**).
 - ii. Overcome the objections raised by ACCI regarding the expansion of the entitlement to a larger cohort of employees (**ACCI's Scope Objections**).
 - iii. Overcome various concerns that Ai Group has identified in part 3 of its submissions dated 13 June 2018 regarding the Commission's proposed clause (**Ai Group's Merit Concerns**).
 - iv. Reflect the Commission's general approach of not replicating NES obligations within awards (**NES Replication**).
 - v. Delivers the essential outcomes articulated by the Full Bench in its decision of 26 March 2018⁵ (**Essential Elements**).
 - vi. Appropriately reflect the approach of not facilitating third party intervention in the assessment of what constitutes 'reasonable business grounds' for refusing a request (**Third Party Intervention**).
 - vii. Overcome any argument that the proposed clause is inappropriate because of the extent to which it reflects an outcome that was outside the scope of the ACTU's claim and, consequently, matters properly considered in the initial proceedings (**Scope of the ACTU Claim**).
18. We deal with each of these arguments in turn.

⁵ *Family Friendly Working Arrangements* [2018] FWCFB 1692.

Ai Group’s Jurisdictional Objections

19. Ai Group’s submissions of 13 June 2018⁶ and 20 June 2018 raise various jurisdictional objections in relation to the Commission’s proposed model clause. Those jurisdictional objections would be negated by the adoption of the Amended Joint Employer Proposal.
20. The proposed clause would be permissible under s.139(1)(b). It would not be contrary to s.55(1) and it is consequently unnecessary to consider whether the proposed clause falls within the scope of s.55(4).

ACCI’s Scope Objections

21. In its earlier submissions, ACCI expressed its objection to the Commission’s model term to the extent that it “extends the class of employees who can make requests for family friendly work arrangements by decreasing the relevant service threshold from 12 months to 6 months”⁷. ACCI submitted that “[n]o 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 (but go no further)”⁸.
22. Ai Group concurs with ACCI’s submissions and the proposition that neither the material before the Commission nor its reasons for decision provide a basis for expanding the right to request family friendly work arrangements to employees who have been employed for 6 – 12 months.
23. Ai Group’s proposal addresses ACCI’s Scope Objections. This is because it does not purport to extend the scope of s.65 of the NES. In so doing, it also alleviates any jurisdictional concerns associated with the scope of the clause, as explained above.

⁶ Ai Group Further Submission dated 13 June 2018 at paragraphs [3] – [15].

⁷ ACCI Submissions in Response to Model Term dated 15 June 2018 at paragraph 3.6(a).

⁸ ACCI Submissions in Response to Model Term dated 15 June 2018 at paragraph 4.7.

Ai Group's Merit Concerns

24. The Joint Employer Proposal and Amended Joint Employer Proposal were developed in an attempt to deliver a mechanism for further facilitating employee access to flexible working arrangements by adding to the NES in the manner contemplated by paragraph [424] of the Full Bench's 26 March Decision (with the exception of expanding the cohort of employees who would be eligible to make a request). As already identified, they were also intended to negate Ai Group's jurisdictional objections (although that is not the only reason why we contend it is an approach that should be preferred by the Full Bench to the provisional model term).
25. Crucially, the proposals provide a process for employers to follow if they are proposing to refuse a request, and in such circumstances, require the employer to try to genuinely reach agreement with the employee on an appropriate change in working arrangements. They are also designed to deliver what we understand to be the Full Bench's desire to increase awareness of the right to request flexible working arrangements through both its mere presence in awards, and the express reference to (and explanation of) elements of s.65 contained in the detailed notes included within the proposed provision. Indeed, a clause that interacts with s.65, rather than largely replacing and/or replicating it in the manner adopted by the provisional model term, would likely be more effective in promoting employee and employer awareness of s.65 more broadly.
26. The Joint Employer Proposal and Amended Joint Employer Proposal does not address all of the concerns Ai Group raised about the provisional model term in part 3 of our 13 June 2018 submissions. In broad terms, such concerns relate to the following matters:
 - a) The nature of the connection between an individual's caring or parental responsibilities and the specific change in working arrangements requested;
 - b) The potential for the provision to inappropriately operate as a casual conversion clause;

- c) The meaning of the words 'part-time' as referred to within s.65 and the concept of part-time employment as contemplated under awards;
 - d) The need for an employee to provide evidence in support of a claim;
 - e) Anomalies in the interaction between clauses X.6, X.9 and X.10(b);
 - f) The need for clause X.9 to impose obligations upon both employers and employees;
 - g) The need to limit the number of requests that can be made; and
 - h) What should occur once an employee ceases to have responsibilities as a parent or carer.
27. It remains open to the Full Bench to address these issues in any award clause that is developed.
28. Nonetheless, we acknowledge that many of the issues that we have raised were intended to strike a fair balance between the interests of employers and employees in the context of a Full Bench proposal that would fundamentally alter the legislation's current emphasis on facilitating discussions between the relevant parties to one which would impose penalties upon an employer in relation to the exercise of their judgment as to whether a refusal of a request was warranted on reasonable business grounds. There is consequently less imperative to grapple with such matters if the substantive obligation to only refuse the request on the relevant limited grounds remains an obligation that arises under the legislation, rather than the award, and is subject to the operation of s.44(2) of the Act. Given this context, the Joint employer proposal might reasonably be argued to strike a fair balance between the interests of employers and employees.
29. Relevantly, we also contend that the relative brevity of the Joint Employer Proposal and Amended Joint Employer Proposal also assist to ensure that the provision is simple and easy to understand. We do not think that the need for parties to refer to the NES in order to understand their entitlements will cause

any particular difficulty. All awards require that employers make the NES available to employees.

NES Replication

30. The Amended Joint Employer Proposal ensures that various elements of s.65 of the NES are not replicated in modern awards. This is consistent with the Commission's general approach to avoid such replication.

31. For instance, when the modern awards were made, the AIRC gave express consideration to whether the NES should be replicated in modern awards. It said: (emphasis added)

[34] We received a number of helpful suggestions concerning the access to the award provision contained in the exposure drafts. We have decided to extend the requirement so that the employer is also required to provide access to the NES. Because employees' minimum conditions will be contained partly in the award and partly in the NES, reference to the terms of the NES may be necessary in order to fully understand an award provision. For that reason we think it is necessary to ensure that a copy of the NES, as well as a copy of the award, is made available to employees. The clause will provide that the employer is under an obligation to make a copy of the NES available to employees as well as a copy of the award. We have resisted suggestions that the terms of the NES should be included in the awards. As we understand it we are obliged by the terms of the consolidated request not to simply repeat the terms of the NES in modern awards. Nevertheless the provision will ensure that employees are in a position to find out, at the workplace, what their minimum conditions of employment are. ...⁹

32. Consistent with that approach, modern awards do not generally repeat terms and conditions contained in the NES. For example, in respect of personal/carer's leave and compassionate leave, awards generally simply refer to the NES without more. Similarly, in relation to annual leave, save for award provisions that *supplement* the NES or provisions that are expressly permitted by the NES (such as provisions permitting the cashing out annual leave or provisions concerning the taking of leave), modern awards do not repeat NES provisions regarding annual leave.

⁹ *Award Modernisation* [2008] AIRCFB 1000 at [34].

The Essential Elements

33. The Amended Joint Employer Proposal delivers the essential elements of the Commission's decision of 26 March 2018¹⁰.
34. Specifically:
- a) The proposals may increase awareness of the right to request flexible working arrangements;¹¹
 - b) The proposal sets out a process which an employer must follow if it is proposing to refuse a request. The employer must confer with the employee and genuinely try to agree on changes in working arrangements.¹²
 - c) The proposal would render the process subject to a degree of Commission supervision.¹³
 - d) The proposal would, where relevant, require an employer to provide a more comprehensive explanation of the reasons for refusing an employee's request.¹⁴

Third Party Intervention

35. The Commission's decision does not identify any intent to circumvent the operation of s.44(2) by creating an award derived scheme that in various respects replicates or covers the same grounds as s.65. Indeed, there is no reference to the section in the decision. Nonetheless, this appears to a consequence of the approach adopted by the Full Bench.

¹⁰ *Family Friendly Working Arrangements* [2018] FWCFB 1692.

¹¹ *Family Friendly Working Arrangements* [2018] FWCFB 1692 at [418].

¹² *Family Friendly Working Arrangements* [2018] FWCFB 1692 at [422].

¹³ *Family Friendly Working Arrangements* [2018] FWCFB 1692 at [422].

¹⁴ *Family Friendly Working Arrangements* [2018] FWCFB 1692 at [424].

36. An award scheme that requires an employer to grant a request for flexible working arrangements in the absence of reasonable business grounds leaves an employer susceptible to being the subject of an order issued by the Courts for contravening a modern award if they err in a decision that they make in relation to such matters.¹⁵ As explained in our submission of 20 June 2018, by virtue of s.44 of the FW Act, an employer who refuses to grant a request for reasons other than reasonable business grounds cannot be the subject of an order in relation to a contravention of section 65(5).¹⁶
37. Section 44 of the FW Act, along with ss.739 and 740(2) (which limit the Commission's capacity to deal with a dispute arising from s.65) reflect the legislature's clear intent that employers not be penalised for decisions they make in relation to this issue. The insertion of the Commission's model term would circumvent the legislature's intent, which was explained in the Discussion Paper that accompanied an exposure draft of the NES in 2008:
60. The Government considers that implementing family friendly arrangements is best dealt with at the workplace level. Whether a particular flexible working arrangement requested by an employee can be accommodated by an employer will vary depending on the circumstances of the particular business.
61. Whether a business has reasonable business grounds for refusing a request for flexible working arrangements will not be subject to third party involvement under the NES. The United Kingdom experience has demonstrated that simply encouraging employers and employees to discuss options for flexible working arrangements has been very successful in promoting arrangements that work for employers and employees.¹⁷
38. Respectfully, the Commission should not create an award clause that would have the effect of indirectly enabling an outcome that the legislature has deliberately not imposed.

¹⁵ See s.45 of the *Fair Work Act 2009*, which is a civil remedy provision.

¹⁶ Ai Group Further Reply Submission dated 20 June 2018 at paragraph [5] and [39].

¹⁷ Department of Education, Employment and Workplace Relations, *Discussion Paper, National Employment Standards Exposure Draft* (2008) at paragraphs 60 – 61.

39. We note in particular that the evidence called in these proceedings did not lead the Commission to find¹⁸ (nor could it have grounded a finding) that requests made for flexible working arrangements under s.65 of the FW Act are being refused in the absence of reasonable business grounds. Consequently, a departure from the approach reflected in s.44(2) is unjustifiable.
40. Further, Ai Group concurs with the above cited Labor Government assessment that implementing workplace arrangements is best dealt with at the workplace level. We do not here develop this point further as we are uncertain as to whether this is an intended outcome. No rationale for altering the current legislative approach has been identified by the Full Bench.

Issues Arising from the Specific Scope of the ACTU Claim

41. The ACTU's original claim sought to remove any employer capacity to refuse an employer's request for flexible working arrangements. It was not directed to altering the penalty that may or may not apply in relation to an employer's exercise of their judgment regarding whether there are reasonable business grounds for refusing a relevant request.
42. Given the nature of the claim advanced by the ACTU, the operation of s.44(2) was not the subject of significant attention in the proceedings.
43. Moreover, the material before the Full Bench, be it submissions or evidence, was advanced either in response to, or support for, the ACTU's specific claim. It should not be regarded as a being capable of forming a reliable basis for intruding an award clause that deviates so fundamentally from the approach adopted within the safety net and the ACTU claim.
44. Ai Group accepts that in the context of award review proceedings the Commission is not bound to grant a remedy in the terms sought. However, the operation of section 44(2) and the extent to which third parties (such as a relevant court) should properly be able to impose a penalty upon an employer in relation to their refusal of an employee request for flexible work arrangements is a very

¹⁸ *Family Friendly Working Arrangements* [2018] FWCFB 1692 at [392].

significant matter. It is not a matter that should be altered as an incidental product of the implementation of a model clause that is stated to be directed at achieving other objectives. Adopting such a course would be both unsound from a policy perspective, in that the Full Bench could not be properly satisfied that all potentially relevant considerations have been properly ventilated, and procedurally unfair to parties opposed to such a change.

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AM2015/2 FAMILY FRIENDLY WORK ARRANGEMENTS**

1. INTRODUCTION

1. In a Decision issued on 26 March 2018 (the **March Decision**), a Full Bench expressed a provisional view that modern awards should be varied to incorporate a model term to facilitate flexible working arrangements. A Statement issued on 3 May 2018 set out the proposed term and invited submissions on the following issues:
 - (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; and
 - (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.

2. This submission is filed by Ai Group in response to the Statement of 3 May 2018.

2. THE COMMISSION'S JURISDICTION TO INCLUDE THE PROVISIONAL MODEL TERM IN MODERN AWARDS

3. Ai Group contends that the proposed clause would be contrary to s.55(1) because it excludes the scheme in s.65 as a whole.
4. Further, we are concerned that the provision is not permitted under s.55(4) and thus is not saved by s.55(7). That is, we say that it is not a supplementary term, as contemplated by s.55(4).

Does the Proposed Clause Exclude the NES?

5. In *4 yearly review of modern awards—Alleged NES Inconsistencies*¹, the Full Bench reached the following relevant conclusions in respect of a number of award clauses that excluded the NES right of the 'second employer', in a transfer of business scenario, to not recognise an employee's service with the 'first employer': (emphasis added)

[32] The effect of s.91(1) is that, upon a transfer of employment (as defined in s.22(7)) of a national system employee between two non-associated entities occurring, the employee's period of service with the first employer will not count as part of the employee's period of service with the second employer for the purpose of ascertaining annual leave entitlements if the second employer decides not to recognise the employee's service with the first employer.

[33] Notwithstanding this, a number of modern award provisions applicable to the situation just described deem the employee's service with the first employer to be service with the second employer for annual leave purposes. For example, clause 34.10 of the *Food, Beverage and Tobacco Manufacturing Award 2010* provides:

"34.10 Transfer of business

Where a business is transferred from one employer to another, the period of continuous service that an employee had with the old employer must be deemed to be service with the new employer and taken into account when calculating annual leave. However an employee is not entitled to leave or payment instead for any period in respect of which leave has been taken or paid for."

...

[37] We consider that the modern award provisions in question generally are clearly inconsistent with s.91(1). Section 55(1) requires, relevantly, that a modern award "*not exclude the National Employment Standards or any provision of the National*

¹ [2015] FWCFB 3023.

Employment Standards". Section 91(1) is a provision of the NES (being contained within Division 6, Annual Leave, of Part 2-2, The National Employment Standards), and the modern award provision excludes s.91(1) in the sense that in their operation they negate the effect of the subsection. A provision which operates to exclude the NES will not be an incidental, ancillary or supplementary provision authorised by s.55(4). Nor do we consider that the provisions in question are to be characterised as dealing with the taking of paid annual leave such as to be authorised by s.93(4); they are rather concerned with the quantum of the annual leave entitlement for which the second employer is liable.²

6. As held by the Full Bench in the above decision, a provision of the NES is excluded if award terms "in their operation ... negate the effect of" an NES provision.³
7. The starting point for considering whether the proposed award clause would exclude s.65, or any a part of it, is a consideration of the nature of s.65 and the entitlements or benefits that it establishes. Section 65 provides a legislative scheme that regulates the making of requests and the handling of such requests by employers. It creates a right for certain employees, in certain specified circumstances, to make a request to their employer for a change in working arrangements relating to those circumstances. It also creates an obligation on an employer to respond within a certain timeframe and in a certain manner.
8. The intended objective of s.65 is to create a process whereby an employee may request a change and an employer is afforded a limited right to refuse it. Crucially, it is designed to facilitate discussion and compromise between the parties. Such discussions are intended to occur within a carefully and deliberately constructed regulatory context.
9. Ai Group contends that the proposed clause will negate the effect of s.65 because it will provide a mechanism by which certain employees seeking a certain type of change to their working arrangements can circumvent the operation of s.65. Put simply, it will provide an alternate means by which such employees can access changed hours of work. The operation of the award clause will, at least in some circumstances, negate the effect of s.65 by

² [2015] FWCFB 3023 at [32] – [37].

³ [2015] FWCFB 3023 at [37].

undermining the extent to which the scheme that it establishes will be utilised.
As the Full Bench accepted in its decision: (emphasis added)

[155] It has been suggested that a modern award or enterprise agreement term might be considered to ‘practically exclude’ a provision of the NES, it would result in employees utilising the award or agreement term rather than the provision of the NES. We note that any entitlement under an award or agreement that is more beneficial to employees than a minimum standard under the NES is likely to have that result. ...⁴

10. The proposed clause is more beneficial to employees than the minimum standard set by s.65 of the Act in various ways:

- Pursuant to clause X.3(a), a permanent employee can make a request after 6 months of continuous service (as compared to the requirement for at least 12 months of continuous service under the NES).
- Pursuant to clause X.3(b), a casual employee can make a request after 6 months of continuous service if they meet the relevant criteria at clauses X.3(b)(i) and (ii) (as compared to the requirement for at least 12 months of continuous service under the NES).
- Before refusing a request, an employer must confer with the employee and genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee’s circumstances. The NES does not contain such an obligation.
- If an employer refuses a request, the employer’s written response must include:
 - A more comprehensive explanation of the refusal; and
 - If no change to the employee’s working arrangements was agreed; the details of any alternate changes in working arrangements that the employer can offer the employee.

⁴ [2018] FWCFB 1692 at [155].

11. As identified in the Explanatory Memorandum for the *Fair Work Bill 2008* (at paragraph 258), the intention of s.65 of the Act is “to promote discussion between employers and employees about the issue of flexible working arrangements”. The right of an employee to request flexible work arrangements and the right of an employer to refuse a request on reasonable business grounds are the key aspects of the scheme which promote discussions between employers and employees. In many cases, the statutory provisions will have the effect of promoting discussions between an employer and an employee about flexible work arrangements, without the need to invoke the formal procedure in s.65 of the Act. The mere fact that *most* employees do not ultimately need to utilise the provisions of s.65 does not detract from our contention that the proposed clause would negate the effect of s.65.

Is the Proposed Clause a Supplementary Term?

12. Ai Group contends that the proposed clause does not supplement the NES. That is, it does not supplement s.65.
13. Instead, the clause provides employees with a separate and distinct scheme for accessing a particular type of change to their working arrangements. It does not “supplement” the NES, as relevantly contemplated.
14. The concept of ‘supplementing’ means adding to or building on, not taking away or detracting from, as identified at paragraph 13 of the ACTU Submission: (emphasis added)
 13. The term “supplemental” is not defined terms in the FW Act. Consistent with the principles of statutory interpretation, it is appropriate that the words of the statute be given their ordinary or natural meaning. The *Macquarie* dictionary defines ‘supplement’ as “something added to complete a thing, supply a deficiency, or complete a whole”. This definition appears to have been followed in *4 Yearly Review of Modern Awards – Annual Leave* [2015] FWCFB 5771, where the Full Bench held that a proposed clause could properly be characterised as a term which 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*”. The ACCI submissions suggest that the concept of ‘supplementing’ the NES “connotes the notion of building upon, increasing

or extending". These concepts are not inconsistent with the Macquarie definition.

15. The proposed clause does not build upon or add to the entitlement under s.65. Nor does it directly interact with the legislative scheme. It instead provides a separate entitlement and scheme for providing an employee with flexibility in the relevant circumstances. It is drafted so as to operate entirely of its own force and independently of s.65. The proposed clause does not build upon, increase or extend the statutory scheme. It simply establishes a different scheme for delivering a change that is more beneficial to employees.

3. THE TERMS OF THE PROVISIONAL MODEL TERM

16. Ai Group here raises a number of concerns relating to the form of the proposed model term. In broad terms these relate to the following matters:
- a) The nature of the connection between an individual's caring or parental responsibilities and the specific change in working arrangements requested;
 - b) The potential for the provision to inappropriately operate as a casual conversion clause;
 - c) The meaning of the words 'part-time' as referred to within s.65 and the concept of part-time employment as contemplated under awards;
 - d) The need for an employee to provide evidence in support of a claim;
 - e) Anomalies in the interaction between clauses X.6, X.9 and X.10(b);
 - f) The need for clause X.9 to impose obligations upon both employers and employees;
 - g) The need to limit the number of requests that can be made; and
 - h) What should occur once an employee ceases to have responsibilities as a parent or carer.

17. Before addressing these specific matters, we acknowledge that elements of the proposed model term largely mirror the statutory scheme established by s.65. At a superficial level, this approach may be said to assist to ensure that the modern awards system is simple and easy to understand. Nonetheless, we suggest that there are limitations on the extent to which such an approach is appropriate, given the very different enforcement regime applicable in the statutory context. Our overarching contention in this regard is that while the approach adopted by s.65 may be appropriate in the context of a legislative scheme which, when viewed as a whole, is primarily intended to facilitate discussion between the relevant parties, it is not appropriate in the context of an award based scheme that must be applied in strict or absolute terms.
 18. Similarly, adopting the approach contained within the legislative scheme is also inappropriate in circumstances where it will be accessed by an expanded cohort of employees.
 19. These observations colour the comments we make in the remainder of this submission.
 20. In the remainder of this section we suggest various amendments to the proposed model term. A consolidated term is set out in **Attachment A**.
- A) The nature of the connection between an individual’s caring or parental responsibilities and the specific change in working arrangements requested**
21. The March Decision suggests that a core rationale for the development of the proposed model terms is to assist employees to align their working arrangements with their caring and family responsibilities and to assist employees to access arrangements that are tailored to their *needs* in this regard.
 22. Relevantly, the Full Bench has found that, “...*access to flexible working arrangements which enable employees to accommodate their work and family responsibilities can provide benefits to both employees and employers, and is*

*likely to increase workforce participation...*⁵ It has also held that: “*Consistent with the Claim and scope of evidence presently before us in this matter, the proposed model term will be confined to requests for changes in working arrangements relating to parental or caring responsibilities.*”⁶ (Emphasis added)

23. Without conceding that any further award provision is warranted, we do contend that any new provision ought to be limited to dealing with, or providing for, changes to work arrangements that are *necessary* to enable the employee to undertake their parental or caring *responsibilities*. The proposed clause appears to adopt a much broader basis for requesting and accessing changes.
24. Relevantly, the substantive provisions of the proposed clause provide for a more tenuous link between an employee’s parenting or carer’s responsibilities and their eligibility to make a request than the note at the beginning of the proposed clause suggests.
25. The primarily relevant provisions are clauses X.1, X.2 and X.3.
26. Clause X.1 provides that the employee is eligible to make a request for a change in their working arrangements relating to the employee’s circumstances as a parent of carer if the following three criteria are met:
 - (a) any of the circumstances referred to in clause X.2 apply to the employee; and
 - (b) the employee would like to change their working arrangements because of those circumstances; and
 - (c) the employee has completed the minimum employment period referred to in clause X.3.

⁵ [2018] FWCFB 1692 at 418

⁶ Ibid at 423

27. We deal firstly with the requirement that a change in working arrangements must be a variation “...relating to the employee’s circumstances as a parent or carer.”⁷ A requirement that the arrangement relate to a person’s *circumstances* as a parent or carer falls well short of a requirement that the arrangement be connected to their parenting or carer’s *responsibilities*, as contemplated by paragraph 423 of the March Decision.
28. In relation to the requirement in clause X.1(a), it is sufficient to note that clause X.2 provides that the employee is a parent, or has responsibility for the care of a child or that the employee is a carer (within the meaning of the *Carer Recognition Act 2010*). The provision does not require that the employee is experiencing circumstances that actually impact upon their ability to work their current hours.
29. Clause X.1(b) sets out a requirement that the employee “...would like to change their working arrangements because of the circumstances specified in clause X.2. Accordingly, the essential basis for eligibility to make a request is that the employee possesses a certain type of preference or desire. There is no requirement that they *need* the proposed change in order to accommodate their relevant responsibilities. Moreover, there is not even a requirement that the employee ‘would like’ the alternate arrangement because of the particular requirements of their parenting or caring responsibilities (such as commitments to look after a person at particular times of days).
30. Instead of adopting the approach outlined above, Ai Group contends that the provisional model term should be amended so that it clearly requires that an employer is only obliged to consider or implement requests for flexible working arrangements if the specific arrangement proposed is *necessary* in order to enable an employee to accommodate their work and family/caring responsibilities. An employee should not have enhanced rights to access preferred working arrangements simply because they have family or caring responsibilities and would *like* to change their working arrangements. This

⁷ Articulated in the first line of X.1.

would not constitute a *necessary* element of a fair and relevant minimum safety net of terms and conditions.⁸

31. For all of the above reasons, the provisional model term should be amended to include the following additional clause:

X.5 The requested change in working arrangements referred to in clause X.1 must be necessary in order to enable the employee to accommodate their parental or caring responsibilities arising from their circumstances referred to in clause X.2.

B) The Proposed clause should not operate as a ‘casual conversion clause’

32. Ai Group is concerned that the model term may unfairly operate to afford employees an additional right to conversion from casual to permanent employment.
33. The problem that we here identify arises from the wording of clauses X.1 and X.4. It is arguable that the wording of clause X.1 is broad enough to capture a change from casual to permanent or full-time employment. Indeed the wording of clause X.4 arguably removes any doubt as to whether this is possible.
34. The extent and manner in which awards should extend casual conversion rights for employees has been the subject of detailed consideration in the casual and part-time employment common issues proceedings. Although such proceedings are not yet concluded, it appears likely that they will result in nearly all modern awards shortly providing for casual conversion. Given this context, is not appropriate for award clauses dealing with flexible work arrangements to operate as de facto casual conversion provisions.
35. In the current proceedings, no serious case in support of enhanced casual conversion rights for employees with caring or parental responsibilities has been advanced. Nor has the potential impact of a clause that operates to deliver such an outcome been identified. The ACTU’s claim was purportedly

⁸ Section 138

directed towards enabling employees to obtain reduced hours of work. It was not directed towards affording employees access to a different type of employment. We respectfully contend that what the Commission is now proposing arguably extends in a substantive way beyond the scope of the claim advanced by the ACTU and the subject matter of the contested proceedings more broadly.

36. Converting an employee from casual to permanent employment can have significant ramifications for an employer. For example, many awards regulate the use of part-time employment in an extremely restrictive manner. There are also various additional entitlements that flow to permanent employees, such as entitlements to paid and unpaid leave and additional entitlements in relation to notice of termination, severance pay and protection from unfair dismissal. The various impacts of a casual conversion clause on employers, employees and other matters that must be considered pursuant to s.134(1) have not been the focus of the case before the Full Bench as currently constituted.
37. We do not here contend that the Full Bench lacks the capacity to grant a remedy in terms that differ from those sought by the ACTU. However, the Full Bench should not grant a right that has not been the subject of detailed consideration in the primary proceedings.
38. We also here note that Ai Group contends that numerous mandatory considerations contemplated by s.134(1) weigh against affording employees with another avenue for converting from casual to permanent employment. These include:
 - The need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d));
 - The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f)).

39. Another reason why the model clause should not provide for casual conversion is that it does not have any mechanism for addressing what occurs once an employee ceases to have parental or caring responsibilities. It would not be fair to require to an employer to convert a casual employee to permanent employment on an ongoing basis as a result of their temporary parental or caring responsibilities.

C) The meaning of the words ‘part-time’ as referred to within s.65 and the concept of part-time employment as contemplated under awards

40. The proposed terms of clause X.4 are similar to those of s.65(1)(b) but not identical. The order in which various words are utilised has been changed but it seems plain enough that the drafting of the award clause is based on that of the Act.

41. The proposed transplantation of wording from the statute into an award gives rise to a need to consider whether terminology used in the Act necessarily has the same meaning as it does within an award. In this regard we point to the use of the words “part-time” in the respective forms of regulation.

42. Section 65(1)(b) uses the words “part-time”. There is no definition for such words within the Act. In the context of the award system part-time employment is generally conceived of as a type of employment that is distinct from casual or full-time employment. There are differences or inconsistencies in the definition of ‘part-time employment’ contained within individual awards

43. In the context of the 2 Year Review of Modern Awards, Harrison SDP questioned whether the reference to “part-time” as contemplated in s.65(1)(B) necessarily equated to part-time employment as contemplated in awards. This arose in the context of an Ai Group proposal to vary the *Road Transport (Long Distance Operations) Award 2010* to permit part-time employment and an associated submission essentially asserting that the absence of such a provision potentially served to exclude elements of s.65. Her Honour relevantly held: (emphasis added)

[61] An employee in circumstances as identified in s.65(1A) may request a change in working arrangements under s.65(1). Nothing in the Award compromises that right. The more difficult issue arises in respect of the particular employee in the circumstances referred to in s.65(1B) that is the parent returning to work, who may request to work part-time to care for their child. Under the Award, the employer will be able to allow that employee to work fewer or different hours than they had prior to the birth or adoption of a child but arguably, would still be obliged to engage them either on a full-time or casual basis. In my opinion, a request to work part-time is not necessarily the same as a request to be engaged as a part-time employee.⁹

44. We do not here express a definitive view as to Her Honour's opinion. Nonetheless, the Senior Deputy President's reasoning highlights the point that, when included within an award context, the same terms can *potentially* have a different effect to that which might arguably have been intended within the legislative context. For this reason alone, the Full Bench should not proceed on the presumption that it is appropriate to simply replicate the statute's provisions within the award context.
45. Regardless of such technicalities, the more important point is that part-time employment is often regulated in a very restrictive manner within the award system. Different requirements typically apply to part-time employees when compared to either full-time or casual employees in relation to the regularity with which hours must be worked, the manner in which rostering provisions apply and the circumstances in which overtime rates apply.
46. The structure of award regulation of part-time employment may directly prohibit an employer from acceding to a particular request for a change in working arrangements without given rise to a situation of non-compliance with an award. To take an obvious example, an employee may request to work for only 2 hours a day in circumstances where the applicable award may provide for a minimum engagement period of 4 hours. In other cases, the award may not directly prohibit the relevant arrangement but it may provide a reasonable basis for the employer refusing to convert the employee to part-time employment. For example, even if an employer is able to accommodate a reduced number of hours of work for an employee (i.e. in the context of a shift from full-time to part-time employment), the employer's operations may

⁹ [2014] FWC 3529

necessitate that there be a greater degree of flexibility regarding starting and finishing times than the award permits in the context of part-time employment.

47. Having regard to these issues, Ai Group is concerned that a limited capacity to refuse a request on “reasonable business grounds” may not be broad enough to capture the kind of circumstances stated above. This wording suggests a contemplation of the commercial circumstances of the employer rather than the requirements of the regulatory regime. At the very least it may not be obvious to the parties that business grounds include the requirements of other provisions of the relevant award.

48. For all of the above reasons, proposed clause X.4 should be deleted and an additional subclause, in the following terms, should be included in the model provision:

X.X This clause does not require an employer to convert an employee from casual to part-time or full-time employment.

49. Also, the proposed clause X.8 should be amended to identify that the structures of the award may be a reasonable basis for an employer refusing a request for flexible working arrangements. A potentially suitable provision would be as follows:

“X.8(f) The other provisions of this award.”

D) The need for reasonable evidentiary requirements

50. The proposed model clause does not impose any evidentiary requirements upon an employee making a request for a change in working arrangements.

51. It is unreasonable to impose an obligation on an employer to implement a change in a person’s working arrangements in order to accommodate their parental or caring responsibilities without obliging an employee to provide to their employer reasonable evidence of the need for such a change. An employee’s mere assertion that they face such circumstances should not be a sufficient basis for an employer being *required* to make such changes.

52. In advancing this submission we also acknowledge that in many instances employers will (and indeed already do) respond to requests for flexible working arrangements in a cooperative way and may not seek such evidence from an employee. We are also conscious that the clause should not result in a process that imposes an unreasonable or unnecessary administrative burden upon parties. For these reason, we suggest that this evidence should only need to be produced by an employee upon request by their employer. This is not dissimilar to the approach taken in relation to various other entitlements.¹⁰
53. In terms of the subject matter that the evidence should establish, we suggest it should confirm the requirement or necessity for the implementation of the flexible work arrangements. It should also establish that the employee is experiencing the circumstances contemplated by clause X.2 and the various factual matters than an employer is required to have regard to in accordance with clause X.9.
54. We also suggest that the evidence that should potentially be able to be required to be produced should only be that which, “...*would satisfy a reasonable person*” of the relevant matter. This is consistent with the approach adopted in the NES in relation to various other safety net entitlements.¹¹
55. We have set out below a potentially suitable clause dealing with this issue:

X.X An employee who makes a request under this clause must, if requested by their employer, give the employer evidence that would satisfy a reasonable person:

- a) that the employee is in the circumstances contemplated by clause X.1(a);
- b) the consequences for the employee if changes in working arrangements are necessary;
- c) of the nature of the employee’s responsibilities as a parent or carer; and

¹⁰ See section 107(3) in relation to paid personal/carer’s leave, unpaid carer’s leave and compassionate leave

¹¹ See section 107(3)

- d) that the requested change in working arrangements is necessary to enable the employee to accommodate their responsibilities arising from their circumstances as referred to in clause X.2.

56. The clause should also be amended to only require an employer to provide a response to a request once the employee has provided any relevant evidence. This could be achieved by replacing clause X.6 of the provisional model term with the following clause:

X.X The employer must give the employee a written response to the request stating whether the employee grants or refuses the request. This response must be provided within 21 days of the latter of either the date on which the employee makes the request or the date the employee provides the employer with evidence required by the employer in accordance with clause X.6.

E) Anomalies in the interaction between clauses X.6, X.9 and X.10(b)

57. There is an anomaly in the interaction between clauses X.6, X.9 and X.10 that should be addressed. This arises from an assumption (and indeed a requirement) under the clause that an employer will either accept or refuse the initial employee request and the separate requirement on the parties to attempt to reach agreement on a change to an employee's working arrangements.

58. Clause X.6 of the model clause contemplates that an employer will issue a notice in writing indicating whether the employer grants or refuses the relevant request. Clause X.9 requires the parties to confer and genuinely try to reach agreement on a change to working arrangements that will reasonably accommodate the employee's circumstances, before refusing a request. However, the current clause X.10, which deals with what the written response issued by the employer must include, only applies if an employer refuses a request.

59. If, consistent with clause X.9, both parties genuinely try to reach agreement on a relevant change, there will likely be many circumstances where a mutually agreeable outcome is reached which differ from the originally requested change. In such circumstance, it would not make sense for an

employer to be put to the task of providing an employee with a written response either granting or refusing the original request. Accordingly, such an employer should be relieved of the obligation contained in clause X.6. It would also not make sense for the details of the change in working arrangements to be set out in a notice issued pursuant to clause X.6, as is currently contemplated by clause X.10(b), given clause X.10(b) only applies if the employee refuses the request.

60. To address this issue, clause X.10(b) of the provisional model term could be deleted and the following new clause should potentially be included elsewhere in the provisional model term:

X.X If an employer and employee reach agreement on a change in working arrangements that reasonably accommodates the employee's parenting or caring responsibilities, an employer is not required to give a response as contemplated by clause X.6, but must instead set out the agreed change in writing and provide a copy of this agreement to the employee.

F) The need for clause X.9 to impose obligations upon both employers and employees.

61. Clause X.9 requires that, before an employer refuses a request, they must seek to confer with the employee and genuinely try to reach agreement on a change to working arrangements that will reasonably accommodate the employee's circumstances, having regard to certain specified factors.
62. There is merit in any proposed clause promoting the parties reaching a mutually agreeable outcome. However, as drafted, the provisional clause only imposes an obligation on an employer to genuinely try to reach agreement. Imposing a reciprocal obligation upon an employee would logically enhance the prospects of agreement being reached and is an inherently fair approach.
63. Further, while the provision understandably directs the employer to try to reach an agreement that will accommodate the employee's circumstances, it should also expressly encourage the parties to reach an agreement that accommodates an employer's circumstances as well.

64. A potentially appropriate alternate provision would be as follows:

X.9 Before refusing a request, the employer must seek to confer with the employee and, if this occurs, both the employer and employee must genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee and employer's circumstances, having regard to:

- (a) The nature of the employee's responsibilities as a parent or carer; and
- (b) The consequences for the employee if changes in working arrangements are not made; and
- (c) The consequences for the employer if the changes in working arrangements are made; and
- (d) Any reasonable business grounds for refusing the request.

G) The need to limit the potential for repetitive requests

65. The proposed model clause does not impose any limitation on the number of occasions on which an employee may make a request to change their working arrangements. Moreover, it does not prevent an employee who makes a request that is refused from simply re-agitating that request at another point in time.

66. The potential burden upon an employer who may be faced with multiple requests for changes to working arrangements as a result of the proposed new clause is not insubstantial.

67. Given the Full Bench's intention that the requirements will operate in addition to the scheme established under s.65 there is also the potential for an employee to make a request under one scheme and to then make a further request under the alternate scheme.

68. There should be some sensible limitation on the capacity for employees to repeatedly utilise the proposed new provision. At the very least, an employer should not be put to the task of being expected to frequently reconsider a decision they have made in relation to a particular change to an individual's working arrangements. A clause to the following effect should be included:

X.X An employee who has issued a request under this clause which has been refused is not entitled to make a further request under this clause seeking the same change in working arrangements, unless:

- a) the reasons for the refusal of the request provided by the employer are no longer relevant; or
- b) a period of 12 months has elapsed since the last request was issued.

H) What should occur upon cessation of caring or parental responsibilities?

69. The need to accommodate an employee's personal circumstances by implementing alternate working arrangements may impose some disruptions or other relevant disadvantages or difficulty upon an employer. The proposed clause only contemplates an employer refusing a request on 'reasonable business grounds', not *any* business ground.

70. Even if it is accepted that this is a *necessary* element of a fair and relevant minimum safety net of terms and conditions, it does not follow that is fair or *necessary*¹² for an award clause to afford an employee a right to permanently access altered working arrangements. It is trite to observe that some employees will only have parental or caring responsibilities which are either temporary in nature or will only temporarily prevent an employee from meeting their responsibilities at work. The obvious example is that a person's responsibilities to a child will of course change and typically reduce over time.

71. The proposed clause should afford an employer a right to require that the employee resume their original working arrangements if the need for the changed working arrangements dissipates. A provision to the following effect may suffice:

X.X If a change to an employee's working arrangements has been implemented pursuant to this clause;

- a) the employee must immediately notify the employer if they cease to have responsibilities which would prevent them from working their previously applicable working arrangements,

¹² As contemplated by s.138

- b) the employee must comply with any reasonable request by their employer to provide evidence that would satisfy a reasonable person that they continue to have parental and/or careering responsibilities which prevent them from working their previously applicable working arrangements, and
- c) the employer may require that the employee revert to their previously applicable working arrangements if the employee ceases to have parental or caring responsibilities.

72. We here acknowledge that the proposed clause would only operate to afford an *employer* the *opportunity* to require an employee to revert to the former working arrangements. We advance this approach because there may undoubtedly be many instances where both parties are content to leave the modified working arrangements in place once the relevant change is made. Moreover, an employer should fairly be afforded some certainty that they will not need to revert to the formerly applicable arrangement at some unspecified period of time. This will often assist employers to put in place permanent arrangements to accommodate the changed availability of the employee and will serve to moderate the adverse impact of the proposed provision upon an employer.

73. We also adopt this approach because an employee would be free under the proposed arrangement to make a request for a change in working arrangements that is temporary in nature. The temporary nature of such a request may in turn be a factor that is weighed in any consideration of whether there are reasonable business grounds for refusing the request. Accordingly, there is no need to consider whether a separate mechanism affording an employee a right to revert to previously applicable working arrangements is necessary.

4. WHETHER THE INCLUSION OF THE PROVISIONAL MODEL TERM WILL RESULT IN MODERN AWARDS THAT ONLY INCLUDE TERMS TO THE EXTENT NECESSARY TO ACHIEVE THE MODERN AWARDS OBJECTIVE

74. For all of the reasons set out in these submissions, the proposed model term would not be necessary to achieve the modern awards objective.

75. Therefore, its inclusion within awards would be inconsistent with s.138.

ATTACHMENT A

PROVISIONAL MODEL TERM (INCORPORATING Ai GROUP'S PROPOSED AMENDMENTS)

X Requests for flexible working arrangements

NOTE: Clause X provides for certain employees to request a change in working arrangements because of their circumstances as parents or carers. Clause X is additional to the provision to request a change in working arrangements in section 65 of the Act.

Employee may request change in working arrangements

X.1 An employee may request the employer for a change in working arrangements relating to the employee's circumstances as a parent or carer if:

- (a) any of the circumstances referred to in clause X.2 apply to the employee; and
- (b) the employee would like to change their working arrangements because of those circumstances; and
- (c) the employee has completed the minimum employment period referred to in clause X.3.

NOTE: Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.

X.2 For the purposes of clause X.1 the circumstances are:

- (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*).

X.3 For the purposes of clause X.1 the minimum employment period is:

- (a) for an employee other than a casual employee—the employee has completed at least 6 months of continuous service with the employer immediately before making the request; or
- (b) for a casual employee—the employee:
 - (i) has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 6 months immediately before making the request; and
 - (ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

X.4 This clause does not require an employer to convert an employee from casual to part-time or full-time employment.

X.5 The requested change in working arrangements referred to in clause X.1 must be necessary in order to enable the employee to accommodate their parental or caring responsibilities arising from their circumstances referred to in clause X.2.

X.6 An employee who has issued a request under this clause which has been refused is not entitled to make a further request under this clause seeking the same change in working arrangements, unless:

- a) the reasons for the refusal of the request provided by the employer are no longer relevant; or
- b) a period of 12 months has elapsed since the last request was issued.

Formal requirements for the request

X.7 The request must:

- (a) be in writing; and
- (b) state that the request is made under this award; and
- (c) set out details of the change sought and of the reasons for the change.

Evidence

X.8 An employee who makes a request under this clause must, if requested by their employer, give their employer evidence that would satisfy a reasonable person:

- (a) that the employee is in the circumstances contemplated by clause X.1(a);
- (b) the consequences for the employee if changes in working arrangement are necessary;
- (c) of the nature of the employee's responsibilities as a parent or carer; and
- (d) that the requested change in working arrangements is necessary to enable the employee to accommodate their responsibilities arising from their circumstances as referred to in clause X.2.

Responding to the request

X.9 The employer must give the employee a written response to the request stating whether the employee grants or refuses the request. This response must be provided within 21 days of the latter of either the date on which the employee makes the request or the date the employee provides the employer with evidence required by the employer in accordance with clause X.8.

X.10 The employer may refuse the request only on reasonable business grounds.

X.11 Without limiting what are reasonable business grounds for the purposes of clause X.10, reasonable business grounds include the following:

- (a) that the new working arrangements requested by the employee would be too costly for the employer;
- (b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;
- (c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;
- (d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;
- (e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service;
- (f) the other provisions of this award.

X.12 Before refusing a request, the employer must seek to confer with the employee and, if this occurs, both the employer and employee must genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee and employer's circumstances, having regard to:

- (a) The nature of the employee's responsibilities as a parent or carer; and
- (b) The consequences for the employee if changes in working arrangements are not made; and
- (c) The consequences for the employer if the changes in working arrangements are made; and
- (d) Any reasonable business grounds for refusing the request

X.13 if an employer and employee reach agreement on a change in working arrangements that reasonably accommodates the employee's parenting or caring responsibilities, an employer is not required to give a response as contemplated by clause X.9, but must instead set out the agreed change in writing and provide a copy of this agreement to the employee.

What the written response must include if the employer refuses the request

X.14 Clause X.14 applies if the employer refuses the request.

- (a) The written response under clause X.9 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 could not agree on a change in working arrangements under clause X.12, the written response under clause X.9 must:

(i) state whether or not 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.

Dispute resolution

X.13 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.

Cessation of parenting or carer's responsibilities

X.X If a change to an employee's working arrangements has been implemented pursuant to this clause;

(a) the employee must immediately notify the employer if they cease to have responsibilities which would prevent them from working their previously applicable working arrangements,

(b) the employee must comply with any reasonable request by their employer to provide evidence that would satisfy a reasonable person that they continue to have parental and/or careering responsibilities which prevent them from working their previously applicable working arrangements, and

(c) the employer may require that the employee revert to their previously applicable working arrangements if the employee ceases to have parental or caring responsibilities.

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Further Reply Submission
Family Friendly Work Arrangements
(AM2015/2)

20 June 2018

4 YEARLY REVIEW OF MODERN AWARDS
AM2015/2 FAMILY FRIENDLY WORK ARRANGEMENTS

1. INTRODUCTION

1. Ai Group files these submissions in reply to the submissions of the ACTU and ACCI filed in relation to this matter earlier this month. In so doing we primarily address matters associated with whether the provisional model term is permitted under s.136 and, in particular, whether it contravenes s.55.

2. THE COMMISSION'S JURISDICTION TO INCLUDE THE PROVISIONAL MODEL TERM IN MODERN AWARDS

2. Both the ACTU and ACCI contend that the provisional model term is permitted under s.136. Ai Group has advanced a different view in our previous submission and remains concerned that the term, as currently drafted, would be prohibited by s.55.
3. Ai Group contends that the proposed clause would be contrary to s.55(1) because it excludes the scheme in s.65 as a whole. Put simply, it will in its operation negate the practical effect of the scheme by affording employees access to an alternate mechanism for securing flexible work arrangements that operates differently and in various respects more beneficially, from an employee's perspective.
4. Our contention in this regard partly rests upon the proposition that the clause establishes a separate regime to that established under the Act. We apprehend that this is the Full Bench's intent. However, in support of the proposition we observe that the regime flowing from s.65 of the Act varies from that which is proposed to be established by the model award clause in several respects. Relevantly, it is of narrower application in terms of the cohort of employees who are eligible to make a request, imposes additional obligations on employers and sets different requirements for the making of a request.

5. Crucially, the legislative scheme also operates subject to a very different enforcement regime to that which would govern the award derived scheme. Relevantly, the legislative scheme operates within the context of s.44(2) of the Act. This provides that an order cannot be made under Division 2 of Part 4-1 of the Act in relation to a contravention of s.65(5). No such protection is afforded to employers in relation to the proposed award derived scheme. This gives rise to a fundamental difference in the nature of the terms and conditions arising from the respective forms of regulation.
6. In light of our review of the submissions advanced by the ACTU and ACCI, we also now contend that the proposed clause may operate to directly exclude s.65(2).
7. Further, as we have already outlined, we are concerned that the proposed provisions are not permitted under s.55(4) and thus not saved by s.55(7). That is, we say that the proposed term is not a 'supplementary term', as contemplated by s.55(4)(b).

Is the provisional modern a supplementary term permitted by s.55(4)(b)?

8. Before addressing specific elements of the other parties' submissions, it is useful to consider the nature of what may constitute 'supplementary terms', for the purposes of s.55. We here note that the Full Bench's March decision¹ made the following observations regarding the task of statutory construction and the meaning of 'supplement' in the relevant section:

[135] The task of statutory construction must begin and end with the statutory text. The statutory text must be considered in its context, which includes the legislative history and extrinsic materials, but legislative history and extrinsic materials cannot displace the meaning of the statutory text. The text of s.55 is to be construed so that it is consistent with the language and purpose of the Act as a whole. The ability to construe s.55 in a manner that departs from the natural and ordinary meaning of its terms in the context in which they appear, is limited to construing the provision according to the meaning which, despite its terms, it was plain the Parliament intended it to have.

[136] The EM states the purpose of s.55:

¹ [2018] FWCFB 1692

‘206. Clause 55 sets out the relationship between the NES on the one hand and modern awards and enterprise agreements on the other.’

[137] The nature of the NES is central to the context in which s.55 is to be read. Section 61 introduces the NES. Subsection 61(1) provides:

61 The National Employment Standards are minimum standards applying to employment of employees

(1) This Part sets minimum standards that apply to the employment of employees which cannot be displaced, even if an enterprise agreement includes terms of the kind referred to in subsection 55(5).

Note: Subsection 55(5) allows enterprise agreements to include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards.’

...

[156] Turning to the meaning of ‘supplement’ in s.55(4), on its ordinary meaning a supplementary term provides a supplement or something additional to the substantive provision – in this case the ‘right to request’ in s.65.

[157] Although notes do not form part of the Act, they may be considered to confirm that the meaning of a provision is the ordinary meaning conveyed by the text of the provision.

[158] Note 2 under s.55(4) (above) is expressed to provide examples of supplementary terms permitted by s.55(4). The examples respectively increase the quantum of leave an employee is entitled to in comparison to the NES, and increase the rate at which an employee is paid whilst on leave in comparison to the NES. These examples would seem to fall within the ordinary meaning of terms that ‘supplement’ the NES.

[159] In relation to some classes of employees, the practical effect of the Claim is to exclude the capacity of an employer to refuse an employee’s request for flexible working arrangements ‘on reasonable business grounds’ under s.65(5). That capacity would seem a central element of the scheme established by s.65. Seen in this way, there is considerable force in the view that the Claim does not ‘supplement’ s.65, but rather replaces it with something else entirely.

[160] We note, however, that the EM at paragraph 214 (reproduced at [154] above) states as an example of an ancillary, incidental or supplementary agreement term, a term in an enterprise agreement that would ‘provide a right to flexible working arrangements’.

9. In relation to the proper interpretation of s.55(4) the ACTU submits:²

The term “supplemental” is not defined in the FW Act, and so the words of the statute should be given their ordinary meaning.³ The Macquarie dictionary defines supplement as, “something added to complete a thing, supply a deficiency, or complete a whole”.⁴ The Full Bench has held that a term supplemented the NES entitlement to annual leave, because it “extended the circumstances on which an

² ACTU submissions at paragraph 11

³ See for example *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [69], [78]

⁴The Macquarie Dictionary (5th ed, 2009)

employer must comply with an employee's request to take paid annual leave".⁵ ACCI has suggested that the concept of 'supplementing' the NES "connotes the notion of building upon, increasing or extending..."⁶

10. The ACCI submission does not deal with the proper interpretation of s.55(4) in detail. However, ACCI has previously submitted that: (emphasis added)

"The concept of 'supplementing' the NES in the second limb of s.55(4) connotes the notion of building upon, increasing or extending rather than detracting, substitution or replacing.

Had the Parliament intended to adopt one of these latter phrases it could have done so."⁷

11. In response to these submissions, we reiterate our previously articulated view that a supplementary term must reflect some connection or interaction with the NES. We here emphasise the Macquarie Dictionary definition of "...something added to complete a thing, supply a deficiency, or complete a whole". Inherent in this definition is the notion that something which supplements a thing is somehow interconnected with the thing that it supplements. It is something which makes the supplemented thing whole or complete. Regardless, it cannot be said that the proposed clause somehow completes the NES or supplies some deficiency in the NES.

12. We also concur with the ACCI submission that supplementation does not equate to "*substitution or replacing*." Yet that is what the proposed clause would do. It would operate in substitution or replacement for the legislative scheme.

13. For completeness, we contend that the mere fact that there may be some overlap in the operation of the proposed scheme under an award and the scheme arising from s.65 is insufficient to establish that the legislative scheme supplements the NES. The two schemes would give rise to distinct and separate terms and conditions that may simply operate in parallel to some degree.

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

⁶ ACCI Closing Submissions dated 19 December 2017, [8.29]

⁷ ACCI's closing oral submissions, cited in [2018] FWCFB at 115

14. The second statutory note contained under s.55(4) reinforces the veracity of our contention that the ordinary meaning of the words, "...terms that supplement the National Employment Standards", as utilised in that section, refer to terms that build upon or interact with the NES rather than substituting an alternate scheme for the provision of the NES. The provision states:

Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:

- (a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or
- (b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

15. Each of the examples in the note relate to a term that impacts upon the operation of the NES. Each operates to either build upon, increase or extend an NES derived term or condition in a manner that is more beneficial for an employee. In each example there is a clear connection or interaction with a specific element of the NES.

16. It must also be observed that s.55(4) permits modern awards to include terms that supplement the NES, "*...only to the extent that the effect of those terms is not detrimental to an employee in any respect when compared to the National Employment Standards.*" The provision is a limitation on the type of supplementary terms that may be included in awards. This is necessary because, absent such a provision, an award term could build upon, increase or extend the national employment standards (as opposed to an entitlement flowing from them) by increasing or extending the limitations on the operation of a provision of the NES that served to limit access to an entitlement under the NES. It does not however follow that any term dealing with similar subject matter to the NES, but providing for a more beneficial entitlement, will necessarily be a supplementary term.

The Parties' Submissions Relating to the Model Term and s.55(4)

17. ACCI submits that the model term does not appear to exclude the NES.⁸ They nonetheless deal with the interaction with the NES and relevantly submit:

The Australian Chamber considers that the provisional model term interacts with the NES (specifically s 65) in two main ways:

*(a) it extends the class of employees who can make requests for family friendly arrangements by decreasing the relevant service threshold from 12 months to 6 months (**Service Threshold Extension**); and*

(b) it extends the obligations on employers who receive requests for family friendly arrangements to include:

*(i) a requirement that the employer confer with the employee and genuinely try to reach an agreement in respect of a change to working arrangements that will accommodate their circumstances (**Obligation to Confer**); and*

*(ii) a requirement that a written refusal of an employee's request include details for the reasons for the refusal, including the relevant business grounds, details of any agreed changes or if changes cannot be agreed, any changes in working arrangements that the employer can offer the employee so as to better accommodate the employee's responsibilities (**Additional Written Obligations**).*

18. ACCI further contends that the provisional model term, "...appears to aim itself at supplementing s.65 in order to facilitate meaningful engagement between employers and employees and to preclude arbitrary, cursory or perfunctory consideration of flexibility requests."⁹
19. The ACTU contends that the proposed terms supplements the NES. The broad tenor of their submissions appears to be that it therefore does not offend s.55(1) because it meets the requirements of the s.55(4). They do not appear to argue that it would not otherwise exclude the NES or a provision of the NES.
20. A key issue between the parties is consequently whether the proposed clause would constitute a supplementary term. In this regard we assert that a difficulty

⁸ ACCI submission at 3.7

⁹ Ibid at 3.9

with the ACCI and ACTU submission is that they assume that there is a degree of interaction between the Award term and the NES.

21. ACCI appears to erroneously suggest that the award term would extend the NES in certain respects. That is, they contend that it extends the class of employees who can make requests and that it extends the obligations on employers who receive requests for family friendly working arrangements.

22. Similarly, the ACTU submits:

[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]...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 s55(4), and does not offend s55(1)...¹⁰

23. Ai Group respectfully contends that the proposed award term does not extend the NES as the ACTU variably asserts. It does not extend the NES in any respect. Nor could it be said to expand an entitlement under the NES. Instead, it establishes a different, albeit similar, set of entitlements and obligations in relation to a different, yet overlapping, cohort of employees to those covered by the statutory scheme. There is no form of interconnectedness between the operation of the award provisions and statutory scheme.

24. Our contentions are best demonstrated by a consideration of the following specific elements of the proposed scheme:

- a. The Note states that, Clause X is additional to the provision to request a change in working arrangements in section 65 of the Act.
- b. Clause X.5 requires that the request must, "state that the request is made under this award".

¹⁰ ACTU submission at paragraph 13

- c. Clause X.11 limits the Commission’s power to deal with a dispute about whether an employer had reasonable business grounds to refuse a request under the clause. The Note contained in clause X.11 refers to the resolution of disputes about whether the employer has conferred with the employee as required by the clause.
25. At paragraph 11 the ACTU observes that 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*”.¹¹ Ai Group agrees that such an award term falls within the ambit of s.55(4). However, such a provision is not analogous to what is now proposed. Such a term dealt with how an NES entitlement was accessed.
26. The short point is that the proposed clause does not supplement the scheme established under s.65, in the sense contemplated by s.55(4). Instead, it creates a separate scheme that covers very similar ground to that established by the statute.

Does the Proposed Expansion of the Group of Employees Eligible to make a Request Exclude a Provision of the NES?

27. In its March decision the Full Bench expressed a provisional view that the proposed model clause does not contradict s.55.¹² It also indicated that one of the ways that it would supplement the NES would be that:
- “The group of employees eligible to request a change in working arrangements relating to parental or caring responsibilities will be expanded to include ongoing and casual employees with at least six months’ service but less than 12 months service.
28. The ACTU contends, in effect, that the proposed model term supplements the NES by expanding the group of employees eligible to request a change.¹³

¹¹ ACTU submission at paragraph 11

¹² [2018] FWCFB 1692 at 427

¹³ ACTU submission at paragraph 10

29. The ACCI submits that the provisional model term interacts with the NES by extending the class of employees but does not expressly contend that it supplements the NES in this regard.¹⁴

30. In response, Ai Group submits that the extension of a right to request flexible work arrangements to a broader group of employees excludes s.65(2) of the NES and does not constitute a supplementary term as contemplated by s.55(4).

31. Section 65(2) expressly provides that certain employees are not entitled to make a request, as contemplated by s.65(1) or 65(1)(b). The provision states:

(2) The employee is not entitled to make the request unless:

(a) for an employee other than a casual employee--the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or

(b) for a casual employee--the employee:

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

(ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

32. The Act does not merely leave a gap in relation to certain cohorts of employees. It does not, for example, limit the application of s.65 to certain classes of employees. Instead, the Act expressly deals with the circumstances of employees other than those contemplated by s.65(2)(a) and 65(2)(b) and specifies that they are not entitled to make the relevant request.

¹⁴ ACCI submission at paragraph

33. Section 65(2)(b) gives effect to a clear Parliamentary intent that short term employees and casual employees (other than those meeting the requirements of s.65(2)(b)) not have an entitlement to access the scheme established by s.65.
34. The exclusion of certain employees from the right to request pursuant to s.65(1) is a fundamental or central element of the statutory scheme.
35. The proposed award term would negate the practical effect of s.65(2). It would extend to employees who are excluded from the right to request under s.65 a right to request flexible work arrangements under a scheme which in various respects deliberately mirrors that established by s.65. It would consequently exclude this element or provision of the NES. We reiterate that s.55(1) provides that a modern award must not exclude the National Employment Standards or any provision of the National Employment Standards.
36. Ai Group doubts that an award term which seeks to reverse the situation established by s.65(2) by establishing an alternate scheme under the award which is available to employees expressly excluded from the statutory scheme could be said to 'supplement' s.65, either in general terms, or s.65(2) more specifically. Instead, the proposed clause is arguably just replacing the statutory regime with an award based regime that is more beneficial to certain employees. As already observed, the fact that an award provision may be more beneficial than an element of the NES does not of itself render the award provision a supplementary term.

Are all of the Proposed Terms of the Provisional Model Clause “Supplementary Terms”?

37. Even if, contrary to our submissions, the Full Bench maintains its view that the proposed model term would supplement the NES in some or all of the various ways identified in paragraph [423] of the March Decision, it does not follow that all of the terms of the proposed clause could be said to supplement the NES. Relevantly, the terms that do no more than effectively mirror elements of s.65 could not be argued to be supplementary terms. Indeed, they could not all be

said to be *necessary* to meet the modern awards objective. Ai Group contends that this would be especially true of the elements of the scheme that do little more than replicate elements of the NES.¹⁵

38. Accordingly, if the Full Bench proceeds with the view that modern awards should be varied to include a model term to facilitate flexible working arrangements, it should only include terms that do no more than facilitate supplementation of the NES in the manner contemplated by paragraph 424 of the March Decision. This could be achieved by drafting a clause that interacts with, and in certain respects, adds to the scheme established by the Act, rather than by replacing it with an alternate scheme.
39. Adopting this approach could also retain the important protection afforded to employers under s.44(2). This is a central and carefully crafted element of the statutory scheme that should not be excluded by the operation of a relevant award clause. It cannot be *necessary* for awards to indirectly circumvent the operation of such a provision in order to ensure that that the award together with the NES constitutes a fair and relevant safety of minimum terms and conditions. We here observe that circumvention of this protection for employers is not identified in the March Decision¹⁶ as one of the intended purposes of the clause developed by the Full Bench and it is an outcome which ought to be avoided.
40. Adopting the approach that we here propose may be a preferable to adopting the full raft of amendments that we suggested in our previous submissions would be *necessary*¹⁷ in order to strike a fair balance between the interest of employers and employees.

¹⁵ As contemplated by s.138

¹⁶ [2018] FWCFB 1692

¹⁷ In the sense contemplated by s 138

X Requests for Flexible Work Arrangements (Ai Group's alternate proposal)

NOTE: Section 65 of the Act provides for certain employees to request a change in working arrangements because of their circumstances as parents or carers. It also sets out formal requirements for making and either agreeing to, or refusing, such requests. Clause X expands the categories of employees that may make such requests and sets out additional processes relating to the handling of such requests.

Application of additional obligations

X.1 This clause applies when an employee who is:

- (a)** a parent, or has responsibility for the care, of a child who is of school age or younger; or
- (b)** a carer (within the meaning of the Carer Recognition Act 2010),

meets the minimum employment requirements in clause X.2 and makes a request under section 65(1) of the Act for a change in working arrangements.

Minimum employment period required in order to make a request under s.65(1)

X.2 An employee who would not be eligible to make a request under section 65 because they do not meet the requirements of s.65(2), may nonetheless make such a request if they meet the following minimum employment period requirements:

- (a)** for an employee other than a casual employee—the employee has completed at least 6 months of continuous service with the employer immediately before making the request; or
- (b)** for a casual employee—the employee:
 - (i)** has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 6 months immediately before making the request; and
 - (ii)** has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

Obligation to try to reach agreement on a change in working arrangements

X.3 Before refusing a request, the employer must 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, having regard to the:

- (a)** nature of the employee's responsibilities as a parent or carer;

- (b)** consequences for the employee if changes in working arrangements are not made; and
- (c)** consequences for the employer if the changes in working arrangements are made.

X.4 If the employer and employee reach agreement on a change in working arrangements that differs from that initially requested by the employee, the employer must set out the agreed change in writing and provide a copy of this agreement to the employee.

Obligation to provide further details if an employer refuses a request

NOTE: If pursuant to section 65 of the Act, an employer refuses an employee request for a change in working arrangements, the employer must provide an employee with a written response stating that the employer refuses the request and including details of the reason for the refusal. Clause X.5 requires an employer to include additional information in the response.

X.5 If an employer and employee could not agree on a change in working arrangements under clause X.3 and, pursuant to section 65 of the Act, the employer provides an employee written notice refusing a request in accordance with s 65 of the Act, the employer must provide in their written response:

- (a)** the business ground or grounds for the refusal and how the ground or grounds apply;
- (b)** an indication as to whether or not there are any changes in working arrangements that the employer can reasonably offer the employee so as to better accommodate the employee's responsibilities as a parent or carer; and
- (c)** (if the employer can offer such changes) what those changes would be.

Dispute resolution

Note: Disputes about whether the employer has conferred with the employee and responded to the request in the way required by clause X.3, can be dealt with under clause Y—Consultation and Dispute Resolution.

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 section 65 of the Act, unless the employer and employee have agreed in a contract of employment or other written agreement to the Commission dealing with the matter.