Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Further Submission

Family Friendly Work Arrangements
(AM2015/2)

20 September 2018

4 YEARLY REVIEW OF MODERN AWARDS

AM2015/2 FAMILY FRIENDLY WORK ARRANGEMENTS

REPLY TO THE ACCI AND ACTU SUBMISSIONS REGARDING THE SCOPE OF THE PROPOSED MODEL CLAUSE

1. Ai Group advances these submissions in reply to the submissions of ACCI and the ACTU in relation to the directions of the Full Bench issued on 30 August 2018.

2. Paragraphs 14 to 17 of the ACTU submissions address what we understand to be the issue about which parties have been invited to make submissions. That is, what should be the scope of the model term and, if the model term was amended to delete clauses X.7 and X.8, should it be confined to parents and carers? Our submissions primarily respond to matters arising from these paragraphs of the ACTU's submissions.

3. The ACTU submissions also addresses a number of broader matters that, to a large extent, have been the subject of previous written and oral submissions. These include:

    - the form of the employer proposed alternate clause;
    - jurisdictional objections;
    - the appropriate minimum service period; and
    - enforcement.

4. Ai Group does not accept the veracity of such ACTU submissions but does not seek to reengage with these matters given the extent to which they have been previously ventilated. We rely on our previous submissions.

5. Before addressing specific elements of the respective submissions, we observe that neither the ACTU or ACCI identify a compelling reason for expanding the scope of the proposed model term to include all categories of employees contemplated by s.65(1A). Certainly, neither party appears to identify a compelling reason why the expanded scope for the model term would be *necessary*, as contemplated by s.138.

6. The main thrust of ACCI's submission appears to be that, although it does not resile from its position that the existing statutory regime is functioning satisfactorily, it cannot identify a reason for not expanding the scope of the proposed model term. Moreover, it also maintains a concern about the potential effect of the model term on business, particularly small business, but it characterises this as being separate to the issue of scope.[1] It observes that the creation of additional administrative obligations under the proposed clause may, "…*inevitably ground increased 'technical' breaches by business, particularly small businesses, in a context where evidence suggests that the majority of requests are dealt with satisfactorily but informally*".[2]

7. Ai Group concurs with these concerns of ACCI and has itself raised similar concerns about the impact of the proposed clause in our previous submissions. Such factors are matters that weigh against granting any expanded scope for the proposed model clause. Without seeking to overstate the burden that the proposed provision will, of itself, impose upon employers, we note that the award system has a cumulative impact upon employers in terms of regulatory and administrative burden. Consequently, the Commission should not lightly add another layer to such a burden unless satisfied that it is *necessary* to maintain a fair and relevant safety net of minimum conditions.

8. The ACTU is squarely supportive of an expanded scope of the relevant clause. It argues that: "*If the Commission decides to amend awards to insert the Employer Model Term, then the scope should not be limited to parents and*

[1] ACCI submission at paragraph 5.12

[2] ACCI submission at paragraph 5.13

carers only – it should extend to all categories in s.65(1A).”[3] They further contend that there is no justification for limiting the scope of the scheme in s.65.[4]

9. The ACTU argues that the provision simply codifies existing good practice in relation to requests for flexible working arrangements. ACCI makes a similar point by arguing that the “…*ethos behind the obligations to confer and the Additional Written Obligations proposed by the Full Bench would already be embodied in the response to the vast majority of flexible requests currently made regardless of the reason they were made or the method of request and these provisions do appear to replicate what the evidence demonstrated was good practice.”*[5]

10. Again, the task before the Full Bench is to assess what is *necessary* to ensure that awards constitute a fair and relevant minimum safety net of terms and conditions. The promotion of “good practice” may be reasonably viewed as a *desirable* outcome, but should not, in and of itself, be viewed as sufficient justification to impose new obligations upon employers under the safety net.

11. The ACTU also argues that the evidence suggests that there will be fewer employees requesting access to flexible working arrangements for reasons other than parenting/caring, thus limiting the likely impact of extending the additional requirements.[6] ACCI makes a similar point.[7] In response we observe that the expanded scope of s.65 to include the range of circumstances now identified in s.65(1A) is a relatively recent development and, as such, awareness of the existence of rights under s.65 for an expanded group may still be developing within the community. Moreover, the specific reasons why employees in the various categories in s.65(1A) other than parents or carers may or may not make requests was not the subject of significant attention in the evidentiary stage of the proceedings, given the

[3] ACTU submission, paragraph 15

[44] ACTU submission, paragraph 15

[5] ACCI submission, pargraph 9

[6] ACTU submission, paragraph 17

[7] ACCI submission, paragraph 5.14

nature of the case. Accordingly, the Full Bench should not draw firm conclusions from such material about the impact of the proposed expansion of the model term to include other categories of employees. We also note that the existence of an award clause dealing with flexible work arrangements will act to promote awareness of the right.

12. The ACTU also argue that "…*while it is clear that parenting and caring responsibilities are the primary reasons employees need flexibility, there are a number of other valid reasons why employees need flexibility, including those set out in s.65(1A).*"[8]

13. We contend that it should not be simply *assumed* that a case for imposing additional obligations on employers in relation to all of the categories of employees in s.65(1A) is justified simply because it may be warranted in the context of parents or carers. It should not, for example, be assumed that an employee's need for flexibility in all such circumstances will be as acute as it might commonly be for employees with parental or caring responsibilities. For example, it should not be assumed that the circumstances of an employee who is over 55 years of age are necessarily relevantly analogous to an employee who has responsibility for the care of a very young child.

14. Many employees over the age of 55 may be completely capable of working their current arrangements but nonetheless have a preference for different or reduced hours given the stage of their life. This is understandable. However, the case for creating a new enforceable obligation on employers to engage in a formal consultation process with such employees (beyond what is required by s.65) and to genuinely try to reach agreement in relation to such matters is not apparent.

15. When considering the ACTU's submission regarding employees' need for flexibility, it is important to recognise that the test in s.65 is not whether an employee *needs* flexibility. It is merely whether an employee would *like* to change their working arrangements. Accordingly, while it may be argued that

[8] ACTU submission, paragraph 16

there is justification for doing more to assist certain parents and cares, given the weight of evidentiary material before the Commission, the same cannot necessarily be said of all categories identified in s.65(1A).

16. Ai Group does not here suggest that employers do not already very commonly respond to employee requests for flexibility in a reasonable and accommodating manner. Nor do we suggest that there is not merit in employers and employees engaging constructively with each other in relation to employee preferences around flexible working arrangements. However, the material before the Full Bench does not warrant it forming a view that it is *necessary* for *a minimum safety net* of terms and conditions to further formally regulate such matters in the context of all categories of employees caught by s.65(1A).

17. Finally, we again acknowledge that, given the nature of the 4 Yearly Review and the statutory framework governing the content of awards, the Commission is not confined to granting variations to awards in the terms proposed by parties or to only dealing with matters that have been raised by parties. However, in the current context very few parties have sought to engage with the proposal for an expansion of the model term. Consequently, there is limited material before Full Bench to guide its assessment of the extent to which the proposed expansion of the model term is necessary.

18. The ACTU has only dealt with the scope issue in a relatively superficial manner. ACCI has not called for the expansion of the proposed model clause but has conceded that there is sufficient material to permit the variation of awards in the manner now foreshadowed (if the Full Bench determines that it is appropriate to do so).[9] In response we observe that the evidence that was advanced and tested the context of proceedings dealing with a proposed new obligation relating only to parents and carers. There are accordingly limitations on the extent to which such evidence should be given weight in subsequent

[9] ACCI submission, paragraph 4.10

proceedings contemplating a change to the award system which is of a very different nature.

19. Ultimately, we contend that the material before the Full Bench does not enable it to properly assess the extent to which there is actually a need for further assistance to be provided to employees in each of the circumstances identified in s.65(1A) or to properly take into account the various matters referred to in s.134, including in particular the impact upon employers. Given this context we contend that it would be prudent for the Full Bench to only deal with the circumstances of parents and carers.

20. Notwithstanding the above submissions, Ai Group acknowledges that the modification of the proposed model clause to delete clauses X.7 and X.8 and to not extend the term to the broader class of employees in clause X.3 will ameliorate some of major stated concerns regarding the proposed provision. Importantly, it will, in certain respects, moderate the adverse impact of the claim on employers. It will also address our concern that the proposed model term would circumvent key elements of the current statutory scheme's intended operation. Accordingly, if contrary to these submissions, the Full Bench determines to align the scope of the model term with the full range of circumstances contemplated by s.65(1A), there is an even greater imperative to make such changes (or preferably to adopt the drafting approach in the joint employer proposals) given that the new obligations will apply in a greater range of circumstances.