IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 – Four Yearly Review of Modern Awards

AM2015/2

SUBMISSIONS
OF
THE AUSTRALIAN COUNCIL OF TRADE UNIONS

DATE: 10 August 2018

D No: **169/2018**

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Introduction

1) In a decision issued on 26 March 2018[1] (**the Decision**), a Full Bench considered the ACTU's claim for an award variation providing an enforceable right to family friendly working hours for parents and carers, with a right to revert to former hours on request. While the Full Bench accepted much of the ACTU's evidence regarding the importance of increased labour force participation by parents and carers through the facilitation of family friendly working arrangements, it ultimately declined to accept the ACTU's claim. However, the Full Bench expressed a *provisional view* that modern awards should be varied to incorporate a term to facilitate flexible working arrangements (the **Provisional Model Term**).

2) The ACTU submits that a decision by the Full Bench to vary awards to include a clause in the form of the Provisional Model Term would be both justified and permitted. The employer parties oppose the inclusion of the Provisional Model Term on jurisdictional and/or merit grounds. The differences between the parties were not resolved at a Conference on 26 July 2018. On 25 July 2018, the Full Bench directed interested parties to file any further submissions by 9 August 2018 and listed the matter for hearing on 27 August 2018.

3) The ACTU has previously filed submissions in relation to the Provisional Model Term in accordance with a direction made by the Full Bench on 3 May 2018.[2] The ACTU presses the suggested amendment to Clause X.10 described in paragraphs 5 and 6 of those submissions, but in all other respects these submissions replace those submissions.

History of ACTU claim

4) On 28 October 2014, in response to a Statement and Directions issued by the President of the Fair Work Commission (**the Commission**) on 1 October 2014, the ACTU filed an outline of claim in relation to family friendly work arrangements.

5) In summary, the claim sought to supplement the existing 'right to request flexible working arrangements' in s 65 of the *Fair Work Act 2009* (**FW Act**) in three key ways. Firstly, by requiring employers to agree to flexible working arrangements for working parents unless there were 'serious countervailing business grounds' (a higher threshold than 'reasonable business grounds'). Secondly, by providing employees with access to an appeal mechanism when requests were

[1] [2018] FWCFB 1692
[2] ACTU submissions 13 June 2018

refused, and thirdly, by providing employees with a right to revert to their pre-parental leave position for up to two years after the birth or placement of the child.

6) On 13 February 2015 the ACTU filed a submission attaching a draft clause reflecting the outline of claim filed in October 2014, and including:

   i) A requirement on the employee to give reasonable notice of their intention to access part-time/reduced hours, or a former position;

   ii) An entitlement to safe work arrangements during pregnancy;

   iii) An entitlement to 2 days leave for pre-natal, pre-adoption or permanent care orders purposes, and an additional right to access personal/carer's leave once this entitlement was exhausted.

7) On 2 March 2015 the ACTU filed a draft determination reflecting this claim.

8) On 15 June 2015, the ACTU filed a revised draft clause in response to Directions made by the Commission on 23 February 2015 regarding jurisdictional matters raised by the employer parties. The revised clause:

   i) Granted working parents a right to part-time work or reduced hours, rather than simply a *right to request* such arrangements;

   ii) Effectively limited working parents' access to part-time work or reduced hours (along with their right to revert to their former position) to a 2 year period following the birth or placement of the child;

   iii) Removed the entitlement to safe work arrangements;

   iv) Removed the entitlement to personal/carer's leave for pre-natal, pre-adoption or permanent care orders purposes.

9) In March 2017, following further consultation with affiliates and consideration of evidence regarding work-family conflict in modern workplaces, the ACTU sought leave to file a further (final) revised draft clause which:

i) Extended the entitlement to family friendly working hours to employees with caring responsibilities for a person with a disability, a medical condition, a mental illness or someone who is frail and aged;

ii) Extended the time-limit for parents to revert to former working hours to up to 2 years, until the child is school aged;

iii) Re-introduced a requirement that employees give reasonable notice of their intention to access part-time work or reduced hours and/or revert to their former working hours;

iv) Clarified that the rights in the clause extend to casual employees;

v) Clarified that a parent or carer does not have to exhaust existing leave entitlements before they can access family friendly working hours;

vi) Required employers to advise replacement employees of the temporary nature of their engagement;

vii) Withdrew the claim for ante-natal leave.

Past consideration of family friendly working arrangements in the Commission

10) Many entitlements to family friendly work arrangements in Australia have originated in the Commission or its predecessor tribunal, including:

(a) Parental leave, including for casual employees – now in Division 5 of Part 2-2 of Chapter 2 of the FW Act.[3]

(b) The extension of sick leave and annual leave for use by parents and carers, now in s. 97(b) of the FW Act.[4]

[3] Per *Federated Miscellaneous Workers Union of Australia v ACT Employers Federation* (*Maternity Leave Case)* (1979) 218 CAR 120; *Re Clothing and Allied Trades Union of Australia (Clothing Trades Adoption Leave)* (1985) 298 CAR 321; the *Parental Leave Case* (1990) 36 IR 1; and the *Parental Leave – Casual Employees – Test Case (Re Vehicle Industry – Repair, Services and Retail Award 1981)* (2001) 107 IR 71.

[4] Ibid.

(c) A right to refuse overtime on the grounds of family responsibilities,[5] now in s. 62 of the FW Act.

11) In the *Parental Leave Test Case*[6], a Full Bench of the Australian Industrial Relations Commission (**AIRCFB**) heard extensive evidence and argument in relation to similar matters in issue in the current proceedings. In that case, the ACTU had sought a number of variations to awards aimed at assisting workers to better manage their family responsibilities, including a provision that entitled an employee to work part-time following a period of parental leave until their child reached school age.[7] This claim was supported by State and Territory governments (with modifications), but opposed by the Commonwealth government and employer parties including the Australian Chamber of Commerce and Industry (**ACCI**), the National Farmers' Federation (**NFF**) and the Australian Industry Group (**AIG**).

12) In addition to the ACTU claim, a number of employer groups made claims for award variations regarding flexible work. Relevantly, ACCI and the NFF sought variations permitting agreement between employees and employers about variation to hours of work on the basis of family responsibilities,[8] and AIG sought a variation permitting employees to work additional hours and 'bank' them for future time off. The rationale for these employer proposals was to assist employees to better balance their work and family responsibilities.[9]

13) On 8 August 2005, the AIRCFB handed down its decision in the *Parental Leave Test Case*, determining that it should 'take a positive step by way of award provision to assist employees to reconcile work and family responsibilities' and that it was 'necessary to go beyond simply providing for agreement' between employers and employees.[10] Ultimately, the AIRCFB decided on a provision substantially in the form proposed by the State and Territory governments, which was based on legislation operative in the United Kingdom. The provision determined by the AIRCFB read:

P. Right to request

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[5] *Re Working Hours Case July 2002* (2002) 114 IR 390.

[6] (2005) 143 IR 245

[7] *Parental Leave Test Case*, [243].

[8] *Parental Leave Test Case*, [257]. The claim was rejected by the AIRCFB on the basis that it would allow parties to opt out of various award obligations.

[9] *Parental Leave Test Case,* [307].

[10] *Parental Leave Test Case*, [393] and [395].

> P.1 An employee entitled to parental leave pursuant to the provisions of clause [ ] may request the employer to allow the employee:
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> P.1.1 to extend the period of simultaneous unpaid parental leave provided for in clause [ ] up to a maximum of eight weeks;
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> P.1.2 to extend the period of unpaid parental leave provided for in clause [ ] by a further continuous period of leave not exceeding 12 months;
>
> **P.1.3 to return from a period of parental leave on a part-time basis until the child reaches school age, to assist the employee in reconciling work and parental responsibilities.**
>
> P.2 The employer shall consider the request having regard to the employee's circumstances and, provided the request is genuinely based on the employee's parental responsibilities, may only refuse the request on reasonable grounds related to the effect on the workplace or the employer's business. Such grounds might include cost, lack of adequate replacement staff, loss of efficiency and the impact on customer service.
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> (emphasis added)

14) The AIRCFB intended that this new provision would operate for a reasonable period and then be reviewed, preferably assisted by the results of a bipartisan survey.[11] However, on 27 March 2006, the *Workplace Relations Amendment (WorkChoices) Act 2005 (Cth)* (**Work Choices**) became law. Under Work Choices, the right to request to part-time work following a period of parental leave was no longer an allowable award matter. This meant that the provision adopted by the AIRCFB was only available for incorporation into awards for just over seven months, and neither the survey nor the review was ever undertaken.

15) Until the National Employment Standards (**NES**) commenced in the FW Act on 1 January 2010, there was no provision in the employment safety net entitling employees to family friendly working hours. From 1 January 2010, s 84 of the FW Act provided 'a return to work guarantee' for employees returning from unpaid parental leave, and s. 65 established a 'right to request' a change in working arrangements for employees with a minimum of 12 months continuous service (including casuals with a reasonable expectation of ongoing employment), in various circumstances. Initially, s. 65 applied only to employees responsible for the care of a child under school age and/or a child under 18 with a disability. Amendments made in 2013 extended coverage to a range of new circumstances, including where the employee is a carer within the meaning of the *Carer Recognition Act 2010*.

[11] Parental Leave Test Case, [399]

16) Section 65 of the FW Act (as it applies to parents returning from leave) is similar in effect to the clause briefly introduced by the AIRCFB, with the significant exception that no cause of action arises if an employer refuses an employee's request under s. 65(5).[12] The Commission is prohibited from dealing with a dispute about whether or not an employer had reasonable business grounds for refusing a request under s 65(5), unless the parties have authorised it to do so in an enterprise agreement or other written contract, or an enterprise agreement contains a term similar in effect to s. 65(5). Under s 44(2), a court is prohibited from making orders in relation to a contravention of s 65(5). By contrast, the enforcement mechanism in federal awards applied in the usual manner to the 'right to request' clause inserted by the AIRCFB.

17) The ACTU has argued throughout these proceedings that while the introduction of s 65 was an improvement, it did not go far enough and has not been effective enough in promoting flexible modern working arrangements in Australian workplaces. A significant (although not the only) reason for this is the absence of an effective enforcement mechanism.

Is the Provisional Model Term permitted by the Fair Work Act?

18) AIG contends that the Provisional Model Term 'excludes' s 65 in whole or in part and therefore offends s 55(1) of the FW Act. AIG contends further that the Provisional Model Term is not supplementary to the NES and therefore not saved by s 55(4). ACCI submits that the Provisional Model Term does not exclude any provision of the NES and does not contravene s 55 of the FW Act.[13] The ACTU concurs with ACCI's submission on this matter. The Commission is permitted to vary modern awards to include the Provisional Model Term for the reasons set out below.

19) In the four yearly review of modern awards, the Commission can make one or more determinations varying modern awards under s 156(2)(b)(i) of the FW Act. The four yearly review is a regulatory function. The Commission is not settling an *inter partes* industrial dispute[14] and is not constrained by the terms of a particular application.[15] Subdivision A of Division 3 of Part 2-3 of the FW Act

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[12] Or s. 76(4), which provides a right to request additional unpaid parental leave. See ss. 44(2), 146, 186(6), 739(2) and 740(2) of the FW Act. See also *Brow v National Offshore Petroleum Safety and Environmental Management Authority* [2016] FWC 4416

[13] ACCI submissions dated 15 June 2018, [3.7] and [3.8]

[14] *4 Yearly Review of Modern Awards – Annual Leave* [2015] FWCFB 3406, [156] (Ross P, Harrison SDP, Hampton C).

[15] *4 Yearly Review of Modern Awards – Fire Fighting Industry Award* [2016] FWCFB 8025, [21] (Ross P, O'Callaghan SDP, Wilson C).

sets out the requirements regarding terms which must, may, or may not, be included in modern awards by the Commission during the four yearly review.

The Provisional Model Term is allowable within the scope of s 139(1) of the Fair Work Act

20) Section 136(1)(a) provides that a modern award may include terms about any of the matters in s 139(1) of the Act. Sections 139(1)(b) and (c) provide:

> **139 Terms that may be included in modern awards--general**
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> (1) A modern award may include terms about any of the following matters:
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> …
>
> (b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities;
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> (c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours.

21) No party disputes that the Provisional Model Term is about '...the facilitation of flexible working arrangements, particularly for employees with family responsibilities' and 'arrangements for when work is performed, … including variations to working hours', within the meaning of ss.139(1)(b) and/or (c). The Provisional Model Term is clearly allowable within the scope of s 139(1)(b) and/or (c).

The Provisional Model Term does not exclude the NES and does not breach s 55(1) of the Fair Work Act

22) Section 55 of the FW Act deals with the interaction between the NES and a modern award. A modern award must only include terms that are permitted or required by s 55 of the FW Act. Section 55(1) provides that a modern award must not exclude the NES or any provision of the NES. Section 55(7) provides that a term will not offend s 55(1) where it is permitted by s 55(4) of the Act. Section 55(4)(b) provides that a modern award may include terms that *supplement* the NES, to the extent that the effect of those terms is not detrimental to an employee in any respect when compared to the NES. Section 55(6) provides that, if a modern award includes a term permitted by s 55(4), then to the extent that the term gives an employee an entitlement that is the same as an NES entitlement, the terms operate 'in parallel' but not so as to give an employee a double benefit, and the provisions of the NES apply as a minimum standard.

23) AIG's contention that the Provisional Model Term 'excludes the scheme in s 65 as a whole' and therefore 'negates the effect' of it, cannot be sustained. The proposed clause does not exclude or negate the effect of s 65, or any provision of s 65, of the NES.

24) Consistent with the principles of statutory interpretation, the words of a statute should be given their ordinary or natural meaning. The text of the statute must be the starting point:

> *This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.* [16]

25) It is well established that a statutory provision must be construed in the context of the whole Act. In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69], McHugh, Gummow, Kirby and Hayne JJ observed:

> *"The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In Commissioner for Railways (NSW) v Agalianos, Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed."*
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> (Footnotes omitted.)

26) The NES are beneficial provisions aimed at providing minimum employment standards for employees. The interaction rules set out in s 55 of the FW Act are intended to protect these minimum employment standards for employees by prohibiting provisions that attempt to 'provide lesser entitlements than those provided by the NES'.[17]

27) The meaning of 'exclude' in s 55(1) of the FW Act was considered by a five-member Full Bench in *Canavan Building Pty Ltd* [2014] FWCFB 3202 (***Canavan***). The Full Bench considered whether an enterprise agreement contravened s 55(4) of the FW Act by including a clause providing for

[16] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27, [47]
[17] EM 2008, [209]

annual leave to be paid 'progressively in advance' and 'incorporated into the [hourly] wage rate' prescribed by the agreement.[18] The Full Bench held that an offending term need not expressly exclude the NES in order to fall foul of s 55(1). The ordinary meaning of the language used in s 55(1) of the FW Act meant that if the provisions of an agreement '*would in their operation result in an outcome whereby employees do not receive (in full or at all) a benefit provided for by the NES'* then the provision would constitute a prohibited exclusion of the NES.[19] The Full Bench found that the specific clause proposed by Canavan Pty Ltd contravened s 55(1) of the FW Act because it excluded the entitlement to 'paid annual leave' in s 87, and the requirement in s 90(1) that payment be made at the base rate of pay for the employee's ordinary hours of work 'in the period' at which the employee takes annual leave.[20] In subsequent applications of *Canavan*, the test has been described as an assessment of whether the proposed term will '*negate the effect*' of the NES entitlement.[21]

28) It is important to note that s 65 of the FW Act is broader in scope than the Provisional Model Term. It is available in a wider range of circumstances, including where employees are over 55 or have a disability. Therefore, AIG's argument can only relate to the entitlement in s 65 of the FW Act that applies to parents and/or carers seeking flexible working arrangements.

29) At paragraph [426] of the Decision, the Full Bench explains in detail the content of Provisional Model Term as it relates to and compares with s 65 of the FW Act. The Full Bench explains that the Provisional Model Term is 'based on' s 65, but 'departs from' s 65 in some aspects. In summary:

(1) Clauses X.1 and X.2 limit the application of the Provisional Model Term to two categories of employee: 1) employees who are parents or have responsibility for the care of a child of school age or younger, and 2) employees who are carers within the meaning of the *Carer Recognition Act 2010*. The wording of these two categories in X.2 is identical to the wording of ss 65(1A)(a) and (b) of the FW Act;

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[18] Clause 41 of the agreement is set out in full in *Re Canavan Buiding Pty Ltd* [2014] FWCFB 3202, [6].

[19] Canavan, [36].

[20] Although the decision in *Canavan* concerned a proposed term in an enterprise agreement, the principles are equally applicable to a term proposed in modern awards, because ss 55(1) and 55(4) of the FW Act apply to both enterprise agreements and modern awards. See also *4 Yearly Review of Modern Awards – Real Estate Industry Award 2010* [2017] FWCFB 3543, where the Full Bench stated that *Canavan* was also applicable to the terms of modern awards: at [118].

[21] Per *Re 4 Yearly Review of Modern Awards – Alleged NES Inconsistencies* (2015) 249 IR 358, [37].

(2) Clause X.3 extends the group of eligible employees beyond those in s 65 to include casual and non-casual employees with at least six months service but less than 12 months service;

(3) Clauses X.4, X.6, X.7 and X.8 provide entitlements that are the same as those in ss 65(1B), 65(4), 65(5) and s 65(5A) of the FW Act;

(4) Clause X.5 requires an employer to state in its written response that the employee's request has been made under an award (as opposed to under s 65);

(5) Clause X.9 introduces a new, additional obligation on an employer to, before refusing a request, 'seek to confer' and 'genuinely try to reach agreement' with the employee on a change in working arrangements that will reasonably accommodate the employee's circumstances, having regard to the employee's parenting or caring responsibilities and the consequences for the employee of refusal, as well as any reasonable business grounds for refusal;

(6) Clauses X.10(a) and (c) introduce new requirements on an employer to include further details in their written reasons for refusal in addition to those required by ss 65(4) and ss 65(6);

(7) Clause X.10(b) introduces a requirement on an employer to commit any agreed change in working arrangements to writing;

(8) Clause X.11 confirms that the Commission is prohibited from dealing with a dispute about reasonable business grounds, but can deal with a dispute about whether the employer has complied with the requirements to confer and respond.

30) It can be seen from the above that the Provisional Model Term *replicates* the NES in a number of aspects, and *supplements* the NES in the following ways:

(a) Expanding the group of employees eligible to request a change in hours to those with 6 months service or more;

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

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

(d) Requiring an employer who agrees to a request to commit the changed working arrangement to writing;

(e) Authorising the Commission to deal with a dispute about whether an employer has 'conferred' and 'genuinely tried to reach agreement' with an employee and provided an appropriate written response.

31) It is not the case that the Provisional Model Term will exclude or negate the effect of s 65 as a whole. At [7]-[11] of its 13 June 2018 submissions, AIG purports to describe the intention and effect of the scheme in s 65. AIG states (at [8]) that 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*. This is not an accurate or sufficient description of the object and effect of the scheme in s 65. The NES contain beneficial minimum standards for employees, not rights for employers.[22] The clear and stated intention of s 65 is to provide *increased access* to flexible working arrangements *for employees*. The *Fair Work Bill 2008* Explanatory Memorandum (**EM 2008**) explains that 'increased access to flexible working arrangements is designed to assist employees to balance their work and personal lives'. A (limited) ability for employers to refuse requests is allowed in order to 'minimise the disruption' of s 65 to business.[23] The *Fair Work Amendment Act 2013* Explanatory Memorandum (**EM 2013**) (which expanded access to the right to request flexible working arrangements to more groups of employees) explains that the amendments 'provide greater flexibility in working arrangements for modern families. This includes greater flexibility in parental leave, increased rostering protections and broader rights to request flexible working arrangements.' EM 2013 goes on to explain that the amendment 'further enhances the ability of parents to utilise flexible work arrangements in order to better care for their children and is in line with Australia's obligations under the CRC.'[24]

32) Section 65 attempts to achieve increased access to flexible working arrangements for employees by promoting 'discussion between employers and employees about the issue of flexible working arrangements'.[25] An employee has always been permitted to request a change to their working arrangements at any time and for any reason and, as noted by the Full-Bench in the *Parental Leave Test Case*, there has never been anything preventing an employer discussing flexible working

[22] FW Act s 61(1)
[23] EM 2008, r.11
[24] 'CRC' refers to the *UN Convention on the Rights of the Child*
[25] EM 2008, [258]

arrangements and reaching agreement with an employee.[26] However, an employer has been able to refuse to agree to, or to even discuss, an employee's request for flexible working arrangements with little effective recourse available to the employee.[27] Section 65 attempts to remedy this situation by placing limitations and obligations on employers and providing protections and rights to employees, for the purpose of 'promoting discussion' and increasing access to flexible working arrangements *for employees*.

33) It is therefore more accurate to describe the effect of s 65 as:

i) placing limitations on an employer's ability to refuse an eligible employee's request;

ii) requiring an employer to provide a written response within a defined timeframe;

iii) protecting an eligible employee exercising their right to request from adverse action (per s 340 of the FW Act);

iv) providing an employee with a (limited) right to review an employer's compliance with the requirement to provide a written response.[28]

34) If the Full Bench decides to vary modern awards as proposed, the effect of s 65 as described above will not be excluded or negated in any way. The Provisional Model Term will not in its operation in any circumstances 'result in an outcome whereby employees do not receive (in full or at all) a benefit provided for by the NES'.[29] If an eligible employee wishes to make a request under s 65, they will still be permitted to do so. If an employee meets the (narrower) requirements of the Provisional Model Term and wishes to make a request under an applicable award instead, they will be permitted to do so. Every employer that is currently required, at a minimum, to comply with the limitations and obligations in s 65 will still be required to do so. Every employee that is currently entitled, at a minimum, to the protections and rights in s 65 will still be entitled to those protections and rights. The only effect of the implementation of the Provisional Model Term is that eligible

[26] Parental Leave Test Case, [395]

[27] While an employee may be able to commence legal action if a refusal breaches discrimination, unfair dismissal or general protections laws, these avenues are remedial and do not operate effectively to promote discussion or agreement in workplaces; see ACTU reply submissions 27 November 2017 at [29] to [40] and ACTU final submissions 19 December 2017 at [52]

[28] *Poppy v Service to Youth Council Incorporated* [2014] FCA 656 at [139]–[149] and [173]–[179]; *Stanley v Service to Youth Council Incorporated* [2014] FCA 643 at [169]–[178] and [234]–[241].

[29] Canavan, [36]

employees who decide to make a request under the award clause will be entitled to the benefit of some additional rights and protections as outlined above at [30].

35) Finally, the Full Bench has accepted evidence showing that as a matter of practice, only a tiny proportion of all requests for flexible working arrangements are made pursuant to s 65 of the FW Act.[30] Accordingly, the practical operation of s 65 is unlikely to be disturbed by the Provisional Model Term.

36) If implemented, the Provisional Model Term will not exclude or negate the effect of s 65, it will simply *replicate* aspects of s 65 as permitted by s 55(6), and *supplement* other aspects of s 65 as permitted by s 55(4).

The Provisional Model Term is 'supplemental' within the meaning of s 55(4) of the Fair Work Act

37) Section 55(4) of the FW Act provides that awards can contain terms supplementing NES provisions, as long as they are not detrimental to employees in any respect. Section 55(7) provides that a supplemental term within the meaning of s 55(4) does not breach s 55(1). No party contends that any aspect of the Provisional Model Term could be described as 'detrimental' to an employee when compared with their NES entitlements.

38) However, AIG contends that the Provisional Model Term is not 'supplemental' because it does not have a required connection with the NES, and because it 'substitutes or replaces' the scheme in s 65, rather than extending or building upon it. AIG also argues that the reduction of the minimum service period specifically 'excludes' s 65(2) of the FW Act and therefore is not supplementary.

39) The term 'supplemental' is not defined in the FW Act. In the Decision, the Full Bench observed that on its ordinary meaning, a supplementary term provides 'a supplement or something additional' to the substantive provision. [31] In *4 Yearly Review of Modern Awards – Annual Leave* [2015] FWCFB 5771, 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*'.[32] ACCI

[30] [2018] FWCFB 1692 at [392.8]

[31] *4 yearly review of modern awards - Family Friendly Working Arrangements* [2018] FWCFB 1602 at [156]

[32] [2015] FWCFB 5771, [129]

submissions suggest that the concept of 'supplementing' the NES '*connotes the notion of building upon, increasing or extending'*.[33]

40) EM 2008 explains that the intention of s 55(4) is to allow modern awards (and enterprise agreements) to deal with *machinery issues* (the example of the timing of payment for leave is provided) and to provide *more beneficial* entitlements than the NES. The examples of more beneficial payment arrangements for leave and the extension of redundancy provisions to a small business are provided. Relevantly, EM 2008 states that 'an agreement could provide a right to flexible working arrangements. The term about a dispute settlement procedure would also apply to that right.'

41) ACCI submits[34] 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'*. The ACTU agrees with this characterisation of the Provisional Model Term. The connection between the Provisional Model Term and the NES is clear. As outlined above, parts of the Provisional Model Term replicate - either verbatim or in effect - provisions of s 65, and parts of the Provisional Model Term extend the rights and protections for employees contained in s 65. ACCI correctly submits that the Provisional Model Term interacts with the NES in two main ways; 1) it extends the class of employees who can make a request for family friendly arrangements and 2) it extends the obligations on employers who receive requests for family friendly arrangements.[35] In this way, the Provisional Model Term provides more beneficial entitlements than the NES and is therefore 'supplemental'. As argued above, the Provisional Model Term does not 'replace' or 'substitute' s 65, it simply *replicates* aspects of s 65 as permitted by s 55(6), and *supplements* other aspects of s 65 as permitted by s 55(4).

42) AIG argues that the Provisional Model Term's extension of the rights in s 65 to employees with more than six but less than 12 months service is not supplementary because it operates to 'exclude' s 65(2) in contravention of s 55(1) of the FW Act. However, this argument is inconsistent with EM 2008, which expressly contemplates the extension of existing rights to new employees (i.e. the provision of redundancy entitlements to employees of small business employers) as an example of

[33] ACCI submissions, [8.5]
[34] ACCI submissions 15 June 2018 at [3.9]
[35] ACCI submissions 15 June 2018, [3.6]

supplementation within the meaning of s 55(4) of the FW Act.[36] Section 119 entitles employees to redundancy pay, subject to exclusions set out in ss 121, 122 and 123. Section 121(1)(a) excludes employees with less than 12 months continuous service and s 121(1)(b) excludes employees of small business employers. If a term extending an NES entitlement to employees of small businesses is supplemental, then it must be the case that a term extending an NES entitlement to employees with less than 12 months continuous service would also be supplemental.

43) By expanding the rights and protections in s 65 and extending rights and protections to new employees, the Provisional Model Term builds upon, increases or extends the entitlements in s 65 as permitted by s 55(4).

44) The Provisional Model Term also arguably supplements the return to work guarantee in s 84 of the FW Act, which entitles an employee who has taken parental leave under s 70 to return to their pre-parental leave position, or if that position no longer exists, an available position for which they are qualified and suited nearest in status and pay to their pre-parental leave position. People returning from parental leave (predominantly women) are often unable to avail themselves of their right to return to their pre-parental leave position in s 84 because of their new caring responsibilities. As outlined above, the Provisional Model Term provides additional rights for employees seeking to access to flexible working arrangements.

45) The fact that the Provisional Model Term 'supplements' s 65 and s 84 and is not detrimental to any employee in any respect, means that even if the Full Bench accepts that the Provisional Model Term would exclude a provision or provisions of s 65, s 55(7) operates to ensure that s 55(1) would not be contravened. In *4 Yearly Review of Modern Awards – Family and Domestic Violence Clause & Family Friendly Work Arrangements Clause* [2015] FWCFB 5585 (**Jurisdictional Decision**), the Full Bench (Hatcher VP, Acton SDP and Spencer C) declined to strike out the ACTU's claim (as it then was) on a preliminary jurisdictional basis.[37] On the issue of s 55(7), the Full Bench said:

> … we consider that it is reasonably arguable that the effect of s.55(7) is that a modern award term which, under s.55(4), is supplementary to a NES provision and does not result in any detriment to an employee when compared to the NES as a whole, does not contravene s.55(1) *even if it excludes* some other provision of the NES. If so, clause X.1 would be a permissible modern award term even if it excludes s.65(5).[38]

[36] EM 2008, [214]
[37] See [22]
[38] Jurisdictional Decision, [24]

(emphasis added)

46) This aspect of the Jurisdictional Decision has not been challenged by any of the employer parties.

47) The Provisional Model Term therefore meets the requirements of s 55(4) and does not offend s 55(1). The model term does not contravene s.136(2) of the FW Act and is a permitted term within the meaning of s. 136(1).

Necessity

48) Even if a term is 'permitted' by s 136(1), it cannot be included in a modern award unless the term is 'necessary' to achieve the modern award objective. The necessity of the award variation proposed by the ACTU was the subject of detailed evidence and submissions from the ACTU, AIG and ACCI and other parties over five hearing days. The ACTU called evidence from four expert witnesses and 10 lay witnesses. All of the ACTU's expert witnesses and a number of its lay witnesses were required for cross-examination. The Commission made a number of findings based on the evidence and material it considered, including the following which are directly relevant to and support the necessity of the Provisional Model Term:

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

b. Caring for children is the most common reason for working part-time, particularly for females aged 25-44 years;

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

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

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

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

g. Some parents and carers experience lower labour force participation, linked to a lack of access to flexible working arrangements and to quality affordable child care;

h. Greater access to flexible working arrangements is likely to increase workforce participation, particularly among women. There are broad economic and social benefits associated with increased female workforce participation;

i. There are strong gendered patterns around the rate of requesting and the kinds of alterations sought. Women make most of the requests for flexible working arrangements. Women do most of the unpaid care work and seek to adapt their paid work primarily by working part-time;

j. About one in five Australian workers requests flexible working arrangements each year. Only a small proportion of all such requests are made pursuant to s.65 of the Act (about 3 to 4 per cent of employees have made a s.65 request);

k. Workplace culture and norms can play an important role in the treatment of requests for flexible working arrangements. Individual supervisor attitudes can be powerful barriers and enablers of flexibility;

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

m. A significant proportion of employees are not happy with their working arrangements but do not make a request for change ('discontented non-requestors'), for various reasons including that their work environment is openly hostile to flexibility. Men are more likely to be discontented non-requestors than women;

n. A lack of access to working arrangements that meet employees' needs is associated with substantially higher work-life interference (as measured by the AWALI work-life index). This is so whether a request is made and refused, or whether the employee is a 'discontented non-requestor';

o. The fact that a significant proportion of employees are 'discontented non-requestors' suggests that there is a significant *unmet* employee need for flexible working arrangements.

49) The above findings demonstrate that additional measures to promote flexible modern work practices in Australian workplaces are not only necessary, but urgent. The FW Act has not effectively provided for flexible working arrangements for all employees who require them. The conclusions of the AIRCFB in the *Parental Leave Case* in 2005 remain relevant:[39]

> *We think it likely that most employers are sensitive to the family responsibilities of their employees and do their best to accommodate those needs by adopting a flexible approach to working hours, leave and other arrangements whenever they can. There are some employers, however, who are unlikely to accommodate the family responsibilities of their employees, even where it is practicable to do so. It is with those employers particularly in mind that we have concluded that the awards should contain provisions which provide employees with a better opportunity than they now have to obtain their employer's agreement to a change in working arrangements.*

50) The obligation to ensure that modern awards promote or provide for flexible working arrangements is significant in the scheme of the FW Act. This is evidenced by the fact that it is one of the seven overarching objects of the FW Act and one of the nine matters the Commission must take into account in relation to the modern awards objective:

(1) Section 578 of the FW Act requires the Commission to take into account the objects of the FW Act in performing its functions and exercising its powers. Section 3(d) provides that one of the seven objectives of the FW Act is 'assisting employees to balance their work and family responsibilities by providing for flexible working arrangements';

(2) Section 134(1)(d) requires the Commission to ensure that modern awards, together with the NES, provide a fair and relevant safety net of terms and conditions, taking into account nine broad social policy objectives, one of which is the need to 'promote flexible modern work practices and the efficient and productive performance of work'.

51) Significantly, the obligation in s 134(1)(d) is not simply to take into account the need to *allow for* or *facilitate* flexible working arrangements, but the need to 'promote' them. The ordinary meaning of 'promote' implies the taking of positive or additional steps to support, actively encourage or

[39] At [393]

further the progress of something. While the Provisional Model Term falls short of what the ACTU considers to be necessary to meaningfully assist employees to balance their work and family responsibilities, the supplementary aspects of the Provisional Model Term constitute a positive step towards promoting flexible modern work practices and assisting employees to balance their work and family responsibilities. The insertion of the Provisional Model Term into awards is necessary to achieve the modern award objective, and in particular the need to 'promote flexible modern work practices and the efficient and productive performance of work' in s 139(1)(d), and to meet the FW Act's objective in s 3(d) of 'assisting employees to balance their work and family responsibilities by providing for flexible working arrangements'.

Minimum Service Period

52) ACCI submits that the merit case for the reduction of the minimum service period for access to flexible working arrangements has not been made out, and therefore the Commission cannot be satisfied that it is necessary within in the meaning of s 138.[40]

53) The ACTU submits that there are sound reasons, supported by evidence, for removing entirely (or at least significantly reducing) the minimum qualifying period for access to flexible working arrangements. In its initial submissions dated 9 May 2017, the ACTU states:

> *There is a six month minimum service requirement for access to FFWH under the ACTU's proposed clause, compared with a 12 month minimum service requirement for s. 65. Employees are working for increasingly shorter periods of time with their employer, which means that employees in need of FFWH may be precluded from accessing them where overly long minimum service requirements apply.*

54) The ACTU's submissions reference the Australian Human Rights Commission's (**AHRC**) 2014 Report, *Supporting Working Parents*, which recommends the removal of the minimum service requirement in s 65 entirely. In its submission to the post-implementation review of the FW Act dated 12 March 2012, the AHRC argued that 'the right to request flexible working arrangements does not apply to employees unless they have at least 12 months continuous service and also, in the case of casual employees, a reasonable expectation of continuing employment. These qualification requirements disproportionately impact on employment categories dominated by women with family responsibilities. As Sara Charlesworth and Iain Campbell observe: *This qualification*

[40] ACCI submissions 15 June 2018 at [4.7] – [4.11]

requirement will exclude many of the working parents of pre-school age children who are most likely to make requests. In 2006 for example, 21% of working women of child bearing age (25-44 years) and 44% of women employed on a casual basis had less than 12 months service with their current employer.'

55) The complete removal of the minimum service requirements for access to flexible working arrangements is also recommended in the 2013 AHRC report: *Investing in care: Recognising and valuing those who care*.

56) The exclusion of a group of employees who are particularly likely to require access to the Provisional Model Term is not consistent with the requirement to ensure that the safety net is fair and relevant, taking into account the need to promote flexible modern work practices and assist employees to balance their work and family responsibilities. Further, in light of the disproportionate effect of the 12 month qualifying period on employment categories dominated by women with family responsibilities, the reduction of the qualifying period is also consistent with the Commission's obligation to help to prevent and eliminate discrimination on the basis of sex and family or carer's responsibilities in s 578(c) of the FW Act.

Technical breaches

57) ACCI accepts that the additional obligations on employers in the Provisional Model Term appear 'to replicate what the evidence demonstrated was good practice' and that the obligations imposed 'may not by themselves impose extraordinarily oppressive administrative burden on business (as they likely reflect good practice)…' However, ACCI raises concerns that the Provisional Model Term may give rise to 'a greater occurrence of technical (rather than substantive or meaningful) breaches of modern awards' which may in turn impose a burden on employers, particularly small businesses. These concerns are speculative and unsupported by the evidence. The 'technical' provisions of s 65 (namely the written response requirements) are the only aspects of the scheme that are currently able to be enforced by employees. Despite this, there has been far from a flood of litigation claiming technical breaches. Additionally, in the very small number of cases that have proceeded to a hearing, penalties imposed on employers for technical breaches have been minor.[41]

Enforcement regime

[41] *Poppy v Service to Youth Council Incorporated* [2014] FCA 656 at [139]–[149] and [173]–[179]; *Stanley v Service to Youth Council Incorporated* [2014] FCA 643 at [169]–[178] and [234]–[241].

58) AIG contends that the 'protection afforded to employers under s 44(2)' is a 'central and carefully crafted' element of the statutory scheme and that the inclusion of the Provisional Model Term would give rise to 'a fundamental difference in the nature of the terms and conditions arising from the respective forms of regulation'. AIG submits that 'circumvention of this protection for employers' is not 'necessary' within the meaning of s 138.

59) The first point is that the safety net of minimum terms and conditions contained in the NES and modern awards, and the enforcement regimes that apply to those terms and conditions, are different things. A difference in the enforcement regime does not of itself give rise to difference in the terms and conditions themselves. This does not mean that the enforcement of terms and conditions in the employment safety net is not a central and significant issue. The ACTU has argued in these proceedings that the lack of an adequate enforcement regime in relation to s 65 means that the terms and conditions in s 65 cannot properly be described as part of the employment safety net, because they are neither guaranteed nor enforceable. This gap in the safety net is one of the key reasons for the ACTU's claim. No party during these proceedings has (until now) contended that an award provision dealing with flexible working arrangements should be excluded from the usual enforcement regime applicable to other award entitlements.

60) A note in the Provisional Model Term confirms that the Commission would be unable to deal with a dispute about reasonable business grounds due to the operation of s 739(2) of the FW Act, but would not be prevented from dealing with a dispute about the additional employer obligations contained the Provisional Model Term. In addition, an employee would not be prevented from seeking orders from a court for a breach of the Provisional Model Term. The ACTU submits that there would be no justification for the Full Bench amending the Provisional Model Term to prevent an employee from accessing the enforcement regime applicable to every other award-based entitlement. As previously submitted, central to the task of the Commission in conducting the four yearly review is the notion that modern awards, together with the NES, form part of the 'safety net' of minimum terms and conditions of employment. The safety net is protective in nature. It is an inherent component of the concept of a 'safety net' that minimum terms and conditions are guaranteed and enforceable, and this is reflected in the words of s. 134 of the FW Act. Minimum standards without enforcement mechanisms are not properly protective.

61) Finally, the right to request clause inserted by the AIRCFB in 2005 in the *Parental Leave Test Case* was subject to the usual enforcement mechanism in federal awards. It was never intended that the

'right to request' would not be an enforceable award right. In fact, access to dispute settlement was an important aspect of the scheme.[42]

Australia's international labour obligations

62) The objects of the FW Act include "*providing workplace relations laws that … take into account Australia's international labour obligations*".[43]

63) For the reasons outlined at [195] – [210] of the ACTU's initial submissions dated 9 May 2017, the implementation of the Provisional Model Term would be consistent with Australia's international labour obligations, including because it would assist in:

i) creating equality of opportunity between men and women workers with family responsibilities, as well as between men and women with those responsibilities and those without; and

ii) preventing and eliminating discrimination against women and workers who have family and caring responsibilities.

Conclusion

64) The value of flexible working arrangements in assisting employees to balance their work and family responsibilities is not disputed. In the *Parental Leave Test Case*, ACCI and the NFF submitted that there is 'near universal recognition of the critical role that non-full-time work plays in allowing family responsibilities with paid work' (at [288]), and AIG called evidence supporting 'the practicality and value' of job-sharing arrangements in enabling employees to continue working while managing their personal and family circumstances (at [316]). However, the quality and security of such non-full-time work and (relatedly) the framework within which such arrangements are discussed in the workplace, remains contested.

65) The ACTU submits that the merit case for a new award provision promoting flexible working arrangements - supported by detailed and probative expert and lay evidence - has now been made out twice. More than twelve years ago, the AIRC observed that '*achieving a balance between work and family is fundamental to Australia's national interest and to a cohesive, productive society*'.[44]

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[42] Parental Leave Test Case, [347] and [348]

[43] FW Act, s. 3(a).

[44] Parental Leave Test Case, [76]

The AIRC determined after hearing all the evidence in the *Parental Leave Test Case* that it should 'take a positive step' to assist employees to balance their work and family responsibilities and that it was 'necessary to go beyond simply providing for agreement' between employers and employees.[45] The ACTU submits that the importance of balancing work and family to Australia's national economic interest, and to the interests of employees and employers, has only increased since then. While the Provisional Model Term falls short of what the ACTU considers to be necessary, it constitutes a positive step towards promoting flexible modern work practices and assisting employees to balance their work and family responsibilities. The Commission can and should vary modern awards to insert the Provisional Model Term.

[45] Parental Leave Test Case, [393] and [395]