# ARA SUBMISSION ON FAIR WORK COMMISSION MODEL TERMS FOR ENTERPRISE AGREEMENTS AND COPIED INSTRUMENTS

28 November 2024

## INTRODUCTION

The Australian Retailers Association (ARA) welcomes the opportunity to make a reply submission to the Fair Work Commission (the Commission) in respect of Model Terms for Enterprise Agreements and Copied State Instruments.

The ARA is the oldest, largest and most diverse national retail body. We represent a $430 billion sector that employs 1.4 million Australians – making retail the largest private sector employer in the country. Our members operate across the country and in all categories - from food to fashion, hairdressing to hardware, and everything in between. For this reason, we have a vested interest in multiple awards across retail, hospitality, restaurants, fast food, pharmacy, and hair and beauty.

In a statement dated 17 September 2024, Justice Hatcher commenced the process for the Commission to make model terms for enterprise agreements and copied state instruments pursuant to amendments to the Fair Work Act 2009 (Cth) (FW Act) by way of the Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024 (Cth). Consequently, the Full Bench of the Commission is required to make the following model terms pursuant to sections 202, 205, 737 and 768BK of the FW Act as amended:

- a flexibility term for enterprise agreements (section 202(5))
- a consultation term for enterprise agreements (section 205(3))
- a term about dealing with disputes for enterprise agreements (section 737(1)); and
- a term for settling disputes about matters arising under a copied State instrument for a transferring employee (section 768BK(1A)).

In making the model terms, sections 202(6)(b), 205(4)(b), 737(2)(b) and 768BK(3) of the FW Act set out the matters the Commission must consider. The Commission must also ensure that the model flexibility term, consultation term and disputes term are consistent with other requirements within the Act (including sections 202(1), 205(1), 205(1A)(a) and 186(6)).

## BACKGROUND

On 1 November 2024, the ARA filed its initial submission in response to the Commission's request for consultation on Model Terms for Enterprise Agreements and Copied State Instruments. Since that initial submission, we have had the opportunity to review the recommendations put forward by other industry groups and interested parties.

There is distinct divergence in the views advanced by employer associations and those by union groups. There is alignment between the ARA's position and that of other employer groups to broadly preserve the model terms as currently contained in the Fair Work Regulations 2009 (Cth) (FW Regulations). In contrast, the Australian Council of Trade Unions (ACTU), as supported by other union groups, proposes significant changes to the model terms in their submission.

The ARA maintains its position to preserve the model terms in their current form. We oppose the changes proposed by the ACTU on the basis that they will expand workplace obligations beyond what

the process necessitates and create further complexities for all parties in navigating their rights and obligations in the workplace.

This submission will address key points of opposition to the ACTU's proposed amendments as they are broadly inconsistent with comparable terms in modern awards and are contrary to the objects of the FW Act, as contained in section 3 and the objects of Part 2-4 of the FW Act contained in section 171.

## FLEXIBILITY TERM

Under section 202(1) of the FW Act, an enterprise agreement must include a flexibility term that complies with section 203. This term allows an employer and an employee to agree to an individual flexibility arrangement (IFA) to vary the effect of the agreement in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer.

If an enterprise agreement does not include a flexibility term, or the flexibility term does not meet the requirements of the FW Act, the model flexibility term is taken to be a term of the enterprise agreement. The model flexibility term is contained in Schedule 2.2 of the FW Regulations.

The ability for employers and employees to negotiate individual flexibility arrangements within the scope of the model flexibility term was designed to increase productivity and provide for mutually beneficial employment arrangements.[1] The ARA submits that the amendments proposed by the ACTU do not provide an adequate balance between business productivity and mutually beneficial employment arrangements because they significantly increase the regulatory burden on businesses beyond what is necessary and reasonable and are not in line with best practice procedures.

### ACTU amendments increase regulatory burden on businesses

IFAs provide a mechanism for flexibility in the workplace. However, consultation with our members and data from the Commission show that the use of IFAs is not particularly widespread. The regulatory burden imposed on employers has been cited by our members as one of the main factors preventing their proliferation. The proposals advanced by the ACTU further compound this burden.

In their amendments inserting new clauses 13-17, the ACTU proposes overly prescriptive, onerous and complicated reporting obligations that are unwarranted. The justification provided by the ACTU is that the additional regulatory burden would be lesser because the information proposed is directly relevant to the mandatory reporting already imposed on employers. The ARA respectfully submits that this reasoning is flawed. Further reporting beyond what is required by current legislation, will increase the administrative burden on businesses. This would be particularly detrimental for small and medium sized enterprises (defined by the Commonwealth Procurement Rules as enterprises with two hundred employees or less[2]).

If it is the case that the information proposed in the new clauses would be directly relevant to the mandatory reporting already imposed on employers, that supports the notion that the ACTU's proposals are unnecessary duplicative prescriptions. The mandatory reporting information should be sufficient.

The ARA submits that the increased regulatory requirements proposed by the ACTU are contrary to the objects of the FW Act as they will adversely impact productivity for small and medium sized

[1] Standing Committee on Education, Employment and Workplace Relations, Fair Work Bill: Report: Fair Work Bill 2008 [Provisions] (aph.gov.au) at 3.13.

[2] Commonwealth Procurement Rules 2024 at page 34 | https://www.finance.gov.au/sites/default/files/2024-06/Commonwealth_Procurement_Rules-1-July-2024.pdf

enterprises as well as further reducing the adoption of IFAs to assist employees in balancing their work and family responsibilities.

### ACTU recommendations are not best practice

The amendments proposed by the ACTU also create additional avenues for conflict, further straining the employment relationship. This is highlighted by the insertion of a new clause 5 into the model terms allowing an employee to appoint a person or employee organisation to provide support or representation in IFA discussions. The justification provided by the ACTU for this proposal is that it is in line with the Fair Work Ombudsman's Use of Individual Flexibility Arrangements Best Practice Guide (FWO Best Practice Guide). However, a closer inspection of the FWO Best Practice Guide reveals that its recommendation is for a 'support person' and not a 'representative'. Access to representation is a significant part of fairness under the FW Act. However, introducing representatives where there is no dispute will only serve to make IFA discussions litigious and introduce conflict into what would otherwise be amiable discussions about flexible working arrangements that benefit both employees and employers.

Central to some of the ACTU's proposed amendments is the notion of keeping the model terms in line with best practice. However, a key part of the operation of the FWO Best Practice Guide is the recognition that the way to achieve best practice will vary between businesses because of factors such as the number of employees, industry and the business environment. As such, prescribing the best practice guidelines as the standard in the model terms fails to recognise that organisations have other tailored and fit for purpose flexible work arrangement policies in place that provide a range of flexibility avenues for their employees.

The ARA asserts that if the ACTU's amendments were implemented, it would have the unintended consequences of further limiting the usage of IFAs as a viable mechanism for flexibility in the workplace. Therefore, the ARA submits that the proposals should be rejected on the basis that they do not strike the right balance between business productivity and beneficial employment arrangements. Further, they are contrary to the objects of the FW Act because they do not promote harmonious workplace relations.

## CONSULTATION TERM

Under the current model terms in Schedule 2.3 of the FW Regulations, the need to consult arises where an employer has made a definite decision to introduce a major change to production, program, organisation, structure or technology in relation to its enterprise that is likely to have a significant effect on the employees. Consultation is also required where the employer proposes to introduce a change to the regular roster or ordinary hours of work of employees.

If an enterprise agreement does not include a consultation term, the consultation term does not meet the requirements of the FW Act, or if the consultation term is an objectionable emergency management term, the model consultation term is taken to be a term of the agreement.[3]

The ACTU proposes changes to the trigger for consultation as well as expanding the parameters for consultations. This presents a significant deviation from the term developed by the Australian Industrial Relations Commission since its introduction into the FW Act on commencement. The ARA submits that these proposed changes terms are antithetical to the objects of the FW Act as they are extremely inflexible for business and will stifle growth and innovation by placing barriers around critical decision-making that ensure ongoing financial viability of businesses.

[3] Fair Work Act 2009 s.205(2).

### Changing the trigger for consultation

The ACTU proposes significant changes to the model consultation term. Notably, the ACTU proposes to alter the trigger point for consultation from when an employer has made a 'definite decision' to when an employer 'proposes to introduce a major change'.

This increases the likelihood of conflict as parties dispute over whether consultation is required at the initial thought stage, evolved concept stage, or when there is a formal proposal. This will detract from the substance of major change which may further impede productivity and efficiency gains sought by employers via major change programs. If this proposal is adopted, it is certainly arguable that the need to consult would arise when a single staff member raises a suggestion in a team meeting, even though that point of view has not been adopted by the organisation.

The current model term provides a clear starting point for consultation and ensures that when the business is ready to consult, all factors including how employees will be affected have been considered and productive discussions can be undertaken about impact on employees and minimising that impact. The ACTU's changes would result in employers being forced to consult prematurely, prior to undertaking a thorough analysis to ascertain whether the change is viable and to what extent employees are affected. As such, there may be unnecessary anxiety and trepidation among employees where the framework of any change may not even be fully established.

The ACTU's amendment would also introduce circumstances where employees and their representatives are able to block key business decisions. This would place employers in circumstances where necessary and critical decision can be blocked, delayed or used by employees and their representatives as bargaining tactics. This would significantly affect business autonomy and place employers at their mercy of their employees and their representatives.

As noted by the Full Bench of the Commission, the right to be consulted is a substantive right but it does not confer a power of veto.[4] Additionally, consultation does not amount to joint decision making.[5] The changes proposed by the ACTU undermine the findings of the Full Bench and place employees and their representatives in position to dictate business decision-making.

### Consultation parameters

The ACTU proposes significant amendment to issues for which consultation is required. This is firstly through the amendment to clause 1(a) to remove the fact that the change must be related to production, program, organisation, structure or technology. Secondly, through broadening the meaning of 'significant effect' by introducing the words "but is not limited to", further blurring the meaning of a major change that is likely to have a significant effect on employees.

When considered in light of the proposed change to the trigger for consultation, it is clear the ACTU's proposals place blockades around all business decisions. Employers would effectively have no ability to make any decision about their business without having prolonged consultation with their employees. This is contrary to the objects of the FW Act which includes ensuring that workplace laws are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity.[6]

The ACTU's amendments to the model consultation term are contrary to the objects of the FW Act as they will adversely impact business productivity and economic viability. They represent a significant

[4] Consultation clause in modern awards [2013] FWCFB 10165, at [30]-[32].

[5] ibid

6 Fair Work Act 2009 s.3

deviation from the decision made by the Full Bench in its consultation clause for modern awards in 2013.[7] As such, the ARA submits that the ACTU's proposals should be rejected.

## DISPUTES TERM

The current model disputes term provides a mechanism for parties to resolve disputes relating to matters arising under an enterprise agreement or the National Employment Standards (NES). A dispute resolution procedure is required in all enterprise agreements and must allow for the Commission or another independent third party to settle disputes.

If an enterprise agreement does not include a dispute resolution term or the dispute resolution term does not meet the requirements of the FW Act, the Commission may either refuse to approve the agreement or approve the agreement with undertakings if a satisfactory undertaking is given.[8]

If a copied State instrument for a transferring employee does not include a term that provides a procedure for settling disputes about matters arising under the instrument, then. the instrument is taken to include the model term for settling disputes.[9]

The ACTU proposes a number of changes to the model disputes term which include extending the application of the term to any other matter that is capable of being agreed to in an enterprise agreement approved under the FW Act. Such an amendment is extremely problematic as it widens the scope of issues to which formal dispute mechanisms would be utilised beyond matters contemplated by the NES and agreement. In agreeance with the Business Council of Australia, the ARA submits that matters to which the model term applies should align with the statutory requirements for a dispute resolution, which is to settle disputes about any matters arising under the agreement or in relation to NES.

### Referrals to the Commission

The ACTU proposes a new clause 4 which would allow disputes to be referred to the Commission prior to discussions taking place at the workplace level. The ARA vehemently opposes this proposal and respectfully submits that it should be rejected. A staged approach to dispute resolution that includes discussions at the workplace level is conducive to harmonious workplace relations. The ACTU's proposal promotes a litigious approach to disputes which prolongs disputes, disrupts productivity and negatively impacts the relationship between employees and employers.

### Maintaining the status quo

The ACTU proposes a new clause 9 requiring the maintenance of status quo in a workplace while there is an ongoing dispute. This creates an unjustifiable barrier for employers seeking to introduce change where a dispute has been raised. If this change were accepted by the Commission along with the amendment the ACTU seeks to clause (1)(c), it could prevent an employer from taking the most inconsequential disciplinary or performance management action with respect to individual employees any time a dispute was raised in relation to those steps, until such time as the dispute is resolved. This could require arbitration by the Commission in each case. Given the potential of this clause to be used to frustrate and delay a wide range of matters at the workplace level, it is contrary to fair and expeditious resolution of disputes. As such, it should be rejected by the Commission.

### Parties to a dispute

Clause 2 of the ACTU's proposed amendments aims to include employee organisations as parties to disputes under the model terms. The ARA submits that an employee may nominate a representative in

[7] Consultation clause in modern awards [2013] FWCFB 10165
[8] Fair Work Act 2009 s.190(2).
[9] Fair Work Act 2009 s.768BK.

any dispute as currently outlined in the model terms. However, granting representatives of any kind broad standing in all disputes is not conducive to promote harmonious workplace relations and productive dispute resolution processes. In the same way a lawyer provides representation but is not a party to the proceedings, equally, the employee and employer organisations can provide representation but should have broad standing as parties to disputes.

### ARA Proposal to Dispute Term

The ARA maintains the amendment proposed in our initial submission. We propose the insertion of a 'NOTE' at the end the dispute resolution term as follows:

In addition to clause x, the Act contains additional dispute procedures as follows:

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| Request Flexible Work Arrangements | S65B |
| Change casual employment status | 66M |
| Request an extension to unpaid parental leave | 76B |
| Right to disconnect | 333N |

Therefore, the ARA submits that the amendments proposed by the ACTU are broadly inconsistent with comparable terms in modern awards and should be rejected to the extent of the inconsistencies. The Commission should instead consider the implementation of the above proposal as it aligns with the modern awards. The proposals also undermine the objects of the FW Act as they undermine productivity and economic growth.

## SUMMARY OF POSITION

The ARA recognises that the Full Bench of the Commission must make new Model Terms for Enterprise Agreements and Copied State Instruments. The ARA maintains that the model terms contained within the regulations should be preserved, subject to the singular small variance proposed to the model dispute term.

As demonstrated throughout this submission, the proposals advanced by the ACTU significantly depart from the current model flexibility, consultation and dispute resolution terms. In so doing, they undermine the objects of the FW Act as contained in section 3, the objects of Part 2-4 of the FW Act contained in section 171 as well as decisions by the Full Bench of the Commission. Consequently, the ARA submits that the Commission should preserve the model terms in their current form and reject overzealous proposal amendments.