ARA SUBMISSION ON FWC MODEL TERMS FOR ENTERPRISE AGREEMENTS

31 January 2025

INTRODUCTION

The Australian Retailers Association (ARA) welcomes the opportunity to respond to the draft model terms developed by the Fair Work Commission (Commission), following the consultations with peak councils and other interested parties.

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.

On 1 November 2024, the ARA filed its initial submission in response to the request for consultation on Model Terms for Enterprise Agreements and Copied State Instruments by the Commission, advocating for the model terms to be preserved in their current form. Following that, we had the opportunity to review the recommendations put forward by other interested parties and made submissions in reply on 28th November 2024, maintaining our initial position.

On 3 December 2024, a public consultation was held, wherein the Australian Council of Trade Unions (ACTU) was directed by the Commission to file a short note on the effect of the Energy Australia Case on the model terms. The ARA filed a short note in reply on 13 December 2024.

Following that, and in accordance with the timetable provided by the Commission, the Full Bench published the draft model terms on 20 December 2024 for comment. The ARA seeks to provide comments on the draft terms.

The ARA still maintains its position to preserve the model terms in the form currently contained in the Fair Work Regulations 2009 Cth (Regulations) and broadly opposes any amendments. This submission will address particular concerns that the ARA has with the draft model terms. The ARA submits that the draft model terms should not create further complexities by expanding workplace obligations beyond what is necessary.

FLEXIBILITY TERM

Under s202(1) of the Fair Work Act 2009 (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.

The ability for an employer and employee 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 draft model flexibility term does not provide an adequate balance between business productivity and employee entitlements.

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

The ARA submits that Clause 3(b) of the draft model flexibility term does not provide an adequate balance between business productivity and mutually beneficial employment arrangements because it significantly increases the regulatory burden on employers beyond what is necessary and reasonable.

Clause 3(b)

The draft *Clause 3(b) states:*

> *if the employer is aware that the employee has or should reasonably be aware that the employee may have, limited understanding of written English, take reasonable steps to ensure that the employee understands the proposal.*

The ARA's position is that Clause 3(b) is too onerous and significantly broadens the responsibility of employers beyond what is necessary and reasonable. The requirement for the employer to 'reasonably be aware that the employee may have limited understanding of written English' places an implicit expectation on the employer to assess the employee's level of comprehension, which may involve making subjective judgments or assumptions about the employee's language abilities. This could be interpreted as requiring the employer to anticipate or infer the employee's understanding, which may not always be evident or straightforward. Consequently, determining whether an employee has a 'limited understanding of English' is a subjective process that can be difficult to navigate without clear guidelines, potentially leading to disputes or accusations of discrimination. It is unclear whether asking an employee verbally whether they have understood the proposal is enough or whether there is a further process required. As such, the phrase "reasonable steps" is vague and open to interpretation. Employers may struggle to determine what constitutes "reasonable" in different circumstances, leading to uncertainty and misinterpretation. Furthermore, in a diverse workplace with employees speaking multiple languages, accommodating all language needs could be logistically complex, especially for smaller businesses with limited resources.

The ARA notes that although such a term exists in modern awards and the new model terms requires a consideration of whether the model terms are broadly consistent with comparable terms in modern awards, the ARA submits that the Commission should review the draft terms on their merits. Therefore, the ARA's position is that Clause 3(b) should be removed entirely from the draft flexibility term or be replaced with the following:

- *If the employee informs the employer that the employee does not understand the proposal, meet with the employee to discuss the proposal.*

The above clause gives employees the opportunity to raise any points regarding an IFA to their employer to seek clarification. It is not for the employer to assess whether their employees' level of English is above a 'limited understanding' in order to take reasonable steps to ensure that the employee understands the proposal.

Additionally, the model terms are very explicit about the rights afforded to employees but the same is not true for employer rights. For consistency, the ARA recommends being explicit about the rights afforded to employers also. For example, Clause 4(b) does not provide a reciprocal right for an employer to appoint representation for discussions about IFAs. As such, clarity is required to ensure employers are not inadvertently disadvantaged.

CONSULTATION TERM

Clause 1

The ARA strongly advocates for a major workplace change to be in relation to "production, program, organisation, structure or technology". This provides very clear parameters for the kinds of activities that may potentially constitute major workplace change. The deletion of the actions to which major change relates in the new draft consultation term prevents employers from definitively understanding matters for which consultation is required. Without clear categories, employers might inadvertently overlook consultation obligations for certain changes, potentially leading to disputes. This could result in costly and time-consuming litigation or the need for remedial action to address grievances.

Additionally, the lack of specific examples in the draft model consultation clause might increase the risk of inconsistent application across the business. Different managers or departments could interpret what qualifies as a "major workplace change" in varying ways, leading to inconsistent decision-making and potential conflicts with employees. As such the ARA provides the following recommendation (amendment in red):

- In relation to Clause 1:

  (1) This term applies if the employer:

  (a) has made a definite decision to introduce a major workplace change to production, program, organisation, structure or technology in relation to its enterprise that is likely to have a significant effect on employees to which this enterprise agreement applies; or

  (b) proposes to introduce a change to the regular roster or ordinary hours of work of employees.

Clause 13

The removal of a major workplace change being in relation to "production, program, organisation, structure or technology" is particularly significant when considering the addition of new categories of what will constitute "likely to have a significant effect on employees" in Clause 13. The "*alteration to hours of work*" has not historically constituted a major workplace change. Given there is the separate consultation avenue relating to the change to regular roster or ordinary hours of work in Clause 14, it would seem that the proposed Clause 13(e), covers a much narrower spectrum of issues. However, since a major workplace change is not linked to production, program, organisation, structure or technology, it is unclear what separate issues are captured by this new category. When Clauses 1 and 13 are read together, it results in ambiguity with the potential to derail business productivity. Further, there will be significant difficulties for employers to assess whether a workplace change truly reduces job security in a clear and consistent way under clause 13(d). Job security is a subjective and variable factor that can differ widely between employees, departments, or roles. What might be seen as a reduction in job security by one employee may not be perceived the same way by another, depending on their tenure, skillset, or position. This makes it challenging for employers to objectively assess the extent of any change's impact on job security and could lead to inconsistent interpretations. As such, the ARA recommends the following amendments to clause 13:

(13) In this term, a major workplace change is "likely to have a significant effect on employees" if it results in:

(a) the termination of the employment of employees; or

(b) major change in the composition, operation or size of the employer's workforce or to the skills required of employees; or

(c) the loss of, or reduction in, job or promotion opportunities; or
(d) the loss of, or reduction in, job tenure ~~or job security~~; or
~~(e) the alteration of hours of work; or~~
(f) the need for employees to be retrained or transferred to other work or locations; or
(g) job restructuring.

Furthermore, and as above with the draft flexibility term, the ARA recommends the removal of Clause 21 of the draft consultation term in its entirety. Alternatively, the following replacement is recommended:

- *Where information is provided as part of the consultation process, if the employee informs the employer that the employee does not understand the information provided, meet with the employee to discuss any issues.*

Clause 7

The substitution of "avert" and "mitigate" with "avoid" and "reduce" in the new clause 7 increases the burden on employers by setting more stringent expectations. "Avert" implies preventing adverse effects entirely, while "avoid" suggests an unrealistic obligation to eliminate any negative impact. Similarly, "mitigate" allows for reducing the severity of impacts, offering employers flexibility, whereas "reduce" could be seen as requiring further effort to lessen impacts beyond reasonable limits. This shift could create ambiguity, raise legal risks, and introduce practical challenges, as fully avoiding adverse effects is often not feasible in many workplace changes. As a result, the new wording could impose excessive responsibility, leading to potential compliance difficulties and administrative burdens for employers. As such the ARA recommends the following amendment to clause 7(a)(iii):

- (iii) measures to ~~avoid~~ avert or ~~reduce~~ mitigate any adverse effect of the change on the employees; and

Additionally, the requirement to provide reasons or justification for the change under clause7(b) creates a number of issues for employers. Firstly, employee and their representatives are not likely to understand the full context and imperatives of a decision without the disclosure of sensitive commercial information. Additionally, the Full Bench has previously noted that consultation does not confer a power for employees to veto a business decision[2]. Requiring employers to provide reasons and justification arguably provides a power of veto as employees or representatives may disagree with the rationale provided, resulting in unnecessary legal challenges. As such, the ARA recommends the removal of clause 7(b)(ii).

Clause 10

The introduction of clause 10 is problematic for employers because it imposes a significant administrative burden by requiring them to communicate not only the outcome of the consultation process but also the specific "consideration" given to each concern raised by employees and their representatives. The subjective nature of "reasonable steps" and "consideration" opens the door for potential disputes, as employees may feel their concerns were not adequately addressed, even if the employer acted in good faith. This creates unnecessary legal risks, dissatisfaction, or even claims of non-compliance. Furthermore, the emphasis on justifying every decision can hinder the employer's ability to make timely, necessary changes, as they may feel compelled to over-explain or delay actions to satisfy the requirement, ultimately undermining operational efficiency. As such the ARA recommends the deletion of clause 10 of the draft model consultation terms.

DISPUTE TERM

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

Clause 2(a)(b)(i)

Clause 2(a)(b)(i) of the draft dispute term aims to include unions as parties to disputes under an enterprise agreement, without being covered by the enterprise agreement. The ARA submits that section 53(2) of the FW Act is a prerequisite for acquiring rights and responsibilities under an enterprise agreement. A union has no legal or contractual connection to the agreement and cannot enforce its terms or participate in its dispute resolution processes if they are not covered by that enterprise agreement. Without such a limitation, employee organisations would have unilateral workplace rights in all Australian workplaces, with the ability to initiate disputes of their own volition. Allowing unions not covered by an enterprise agreement to initiate disputes would contradict the industrial and statutory objectives of enterprise agreements. Furthermore, Clause 2(a)(b)(i) renders section 53(2) of the FW Act redundant as unions can obtain rights under the enterprise agreement without any approval by the Commission. Consequently, the ARA recommends the following amendment:

(2) The parties to a dispute referred to in this procedure may include:

(a) an employee or employees covered by the agreement who are, or will be, affected by the dispute;

(b) the employer or employers covered by the agreement; and (c) an employee organisation who is:

~~(i) entitled to represent the industrial interests of an employee or employees referred to in (a); or~~

(ii) covered by the enterprise agreement and entitled to the benefit of, or has a role or responsibility with respect to, the matter in dispute.

Clause 6

The ARA strongly recommends the removal of Clause 6 of the draft dispute terms. An approach to dispute resolution that promotes collaboration at the workplace level is fundamental to avoiding crippling litigation that benefit no one. As such, a staged approach to dispute resolution that includes discussions at the workplace level is conducive to harmonious workplace relations. Clause 6 of the draft model terms promotes a litigious approach to disputes which disrupts the relationship between employees and employers. Further, the draft model dispute term as currently constructed would allow a union who is not party to an agreement to commence an action directly with the Commission without having raised any issues with an employer. This promotes a very litigious approach to dispute resolution and presents a glaring loophole that must be addressed to prevent exploitation that ultimately impacts business productivity. Dispute resolution could be weaponised to significantly disrupt business operations.

QUESTIONS

Question 1 - A number of authorities addressing the meaning of the word "consult" or "consultation" suggest that, for consultation to be genuine, it must generally occur before a decision has been made, including in the context of s 145A of the Act. Interested parties are invited to comment on whether these authorities should inform the consideration of the necessary and/or desirable trigger point for the consultation obligation under the model term and how these authorities are to be understood in the context of the Termination, Change and Redundancy Case.

The current clause on consultation allows employers to reach an internal decision on change and consult with employees and their representatives prior to implementation. The ARA acknowledges that there is authority which suggests that for consultation to be considered genuine, it should happen before a final decision has been reached, ensuring that employees have an opportunity to contribute meaningfully to the process.

However, this expectation may conflict with the practical needs of employers. Employers need to reach a definite decision on the direction of change before they can meaningfully consult employees on the specifics or implications of that change. For example, in the context of workplace restructuring or technology changes, employers often need to assess the full scope of the change, including its feasibility and potential impact, before engaging employees in consultation. Premature consultation without a clear, well-defined decision can lead to confusion and inefficiencies, as it may be difficult to provide employees with concrete details or alternatives at an early stage. Importantly, we note that Full Bench has found that consultation does not amount to joint decision making[3]

In the context of the Termination, Change and Redundancy Case, the trigger point for consultation under the model term should align with the point at which a definite decision is made. This allows employers to ensure that the consultation process is informed, focused, and productive. While genuine consultation should certainly occur, it should also be recognised that it may not be feasible or realistic to consult before a decision is fully made, especially if consultation at an earlier stage could undermine the decision-making process or lead to unnecessary disruptions. As such, the model term should allow for a practical balance, where consultation is triggered once a definite decision has been made, but prior to implementation, ensuring that both the employer's need for clarity and the employees' right to be heard are appropriately balanced.

Question 2 - In response to the submissions of the ACTU, a number of interested parties made submissions to the effect that a trigger for consultation that operated whenever an employer "proposed" to introduce a major change would be uncertain as to its content and would create an obligation to consult at too early a stage in the development of a plan or proposal for change. Interested parties are invited to comment on whether there is any alternative wording that could be considered by the Full Bench that would require consultation prior to a "definite decision" but only where a proposal or plan is sufficiently advanced or firm such that consultation would then be appropriate and useful.

Requiring consultation whenever an employer "proposes" a major change would introduce significant uncertainty and impose the obligation to consult too early in the planning process. The term "proposal" is vague and can encompass early, untested ideas that may never be implemented. At this stage, the specifics of the change are often still unclear, making it difficult for both employers and employees to engage in meaningful consultation. Employees would not have enough information to provide informed feedback, and employers may struggle to address concerns based on incomplete or speculative details.

Additionally, triggering consultation at an earlier stage could disrupt the employer's decision-making process. Employers need time to assess the feasibility and impact of a proposed change before finalizing any plans. Premature consultation could lead to unnecessary disruptions, force employers to share incomplete ideas, and divert valuable resources. It could also create unnecessary anxiety among employees about changes that may not occur, eroding trust and leading to frustration.

[3] Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 (Cth)

Furthermore, an earlier trigger to consult may be inconsistent with an employer's ability to withhold confidential or commercially sensitive information during the consultation process. As an example, property negotiations (and any impact on site relocations) are highly commercially sensitive until lease agreements are signed. Therefore, the only viable option is to keep the trigger for consultation obligation after a definite decision has been made but before implementation, ensuring both meaningful employee input and efficient decision-making.

Question 3 If the obligation to consult in the model consultation term were to arise at an earlier point to a "definite decision", it may be necessary to consider whether explicit provision should be made to ensure that the consultation obligation does not reduce an employer's ability to respond effectively to crises or urgent circumstances. The parties are invited to comment on whether it would be appropriate to make such provision or whether it is sufficient to rely on existing authority to the effect that the nature of required consultation will vary according to the nature and circumstances of each case.

The ARA supports maintaining an obligation to consult after a 'definite decision' has been made. However, the ARA supports the introduction of an explicit provision to ensure that the consultation obligation does not reduce an employer's ability to respond effectively to crises or urgent circumstances. The current high cost of doing business demonstrate the need for flexibility for businesses in order to respond quickly to external factors and ensure their ongoing viability.

It is important to ensure that an employer's ability to respond effectively to crises or urgent circumstances is not limited by the consultation obligation, especially if the consultation requirement arises before a definite decision is made. In times of crisis or emergency, such as a sudden financial downturn, natural disaster, or urgent health and safety concerns, employers must act swiftly to protect the business, its employees, and its operations. Delaying action to consult with employees at the early stages of decision-making could lead to significant risks, such as escalating the crisis, failing to meet regulatory obligations, or losing business opportunities.

In these circumstances, an employer may need to make rapid decisions without the usual time and resources available for formal consultation. Requiring consultation before a definite decision could lead to unnecessary delays, causing harm to the business and its workforce. It is crucial that employers retain the flexibility to make timely, well-informed decisions during emergencies or crises, without being hindered by procedural obligations that could be impractical or counterproductive. Therefore, ensuring that consultation obligations do not interfere with an employer's ability to act swiftly in such situations is essential for both business continuity and employee safety.

CONCLUSION

In conclusion, the ARA strongly recommends preserving the model terms in the form currently contained in the Regulations and urges the Full Bench to carefully consider the broader implications of the draft model terms on employers. While the intention behind these terms is to promote fairness and employee rights, the ARA believes that some provisions could inadvertently create burdens that may hinder business productivity and efficiency. The ARA recommends adjustments to the draft model terms to ensure clarity, practicality, and a balanced approach that accommodates both the needs of employers and the rights of employees. A fair and effective framework is essential for fostering positive industrial relations and supporting the ongoing success of Australian businesses.