STATEMENT

Fair Work Act 2009
ss.202(5), 205(3), 737(1), 768BK(1A) - Commission to determine model terms for enterprise agreements and the copied State instrument model term for settling disputes

Model terms for enterprise agreements and copied State instruments
(AG2024/3500, AG2024/3501, AG2024/3502, AG2024/3503)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT DOBSON
DEPUTY PRESIDENT BUTLER

SYDNEY, 20 DECEMBER 2024

Commission to determine model terms for enterprise agreements and the copied State instrument model term for settling disputes – draft model terms published for comment.

Introduction

[1] The *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) (the **Closing Loopholes No 2 Act**) amended the *Fair Work Act 2009* (Cth) (the **Act**) to require the Fair Work Commission (the **Commission**) to make new model terms for enterprise agreements and a new model disputes resolution term for copied State instruments.[1] At present, the model terms are prescribed in the *Fair Work Regulations 2009* (Cth).

[2] The amendments require the Commission to make the following model terms:

(a) a flexibility term for enterprise agreements;

(b) a consultation term for enterprise agreements;

(c) a term about dealing with disputes for enterprise agreements; and

(d) a term for setting disputes about matters arising under a copied State instrument for a transferring employee.

[3] In a statement issued on 26 September 2024, the President of the Commission issued a timetable to facilitate a comprehensive and inclusive consultation process to ensure that all stake holders have an opportunity to contribute to the development of the model terms.[2] In accordance with those directions, consultations were conducted by members of the Full Bench with the Australian Council of Trade Unions (the **ACTU**), Australian Chambers of Commerce and Industry (the **ACCI**), Australian Industry Group (**Ai Group**) and the Council of Small

[1] Part 5, Schedule 1 of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth).

[2] [2024] FWC 2676.

Business Organisations Australia (**COSBOA**) on 25 October 2024; initial written submissions and submissions in reply were received from various interested parties during November 2024; and a public consultation was conducted on 3 December 2024.

[4] In accordance with the timetable issued by the President, this Full Bench is to publish the draft model terms for comment by 20 December 2024.

[5] Following the consultation process and taking into account the views of the peak councils and other interested parties who have made submissions during that process, the Commission has developed draft model terms. The draft model terms are attached to this statement.

[6] **Attachment A** to this statement is the draft flexibility term for enterprise agreements.

[7] **Attachment B** to this statement is a draft consultation term for enterprise agreements.

[8] **Attachment C** to this statement is a term about dealing with disputes for enterprise agreements.

[9] **Attachment D** to this statement is a term for settling disputes about matters arising under a copied State instrument for a transferring employee.

[10] The draft model terms do not represent the final views of the Full Bench and are published for the purpose of permitting interested parties to submit comments for the Full Bench to consider. Interested parties are encouraged to make submissions on any aspects of the draft model terms.

[11] With respect to the draft model consultation term, a significant issue raised in the submissions of the peak councils and interested parties concerns whether the trigger for consultation should be the making of a "definite decision" by the employer or whether consultation should be required when an employer "proposes" to introduce a major change that is likely to have a significant effect on employees. The draft model consultation term published by the Full Bench retains the "definite decision" trigger at this stage. However, in relation to that issue, the Full Bench in particular invites submissions in relation to three matters:

Question 1

[12] 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.[3] Interested parties are invited to comment on whether these authorities should inform the consideration of the necessary and/or desirable

[3] See, for example, *Sinfield v London Transport Executive* [1970] Ch 550 at 558 (Sachs LJ); *Construction, Forestry, Mining & Energy Union v Newcastle Wallsend Coal Co Ltd* (1998) 88 IR 202 at 217-218; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited* [2010] FCA 591; (2010) 198 IR 382 at [44]-[45] (Logan J); *Re consultation clause in modern awards* [2013] FWCFB 10165; (2013) 238 IR 282 at [34]-[38]; *Construction, Forestry, Mining and Energy Union v Port Kembla Coal Terminal Limited (No. 2)* [2015] FCA 1088; (2015) 253 IR 391 at [274]-[277] (Murphy J); *Tomvald v Toll Transport Pty Ltd* [2017] FCA 1208 at [211] (Flick J); *Construction, Forestry, Maritime, Mining and Energy Union v Mt Arthur Coal Pty Ltd (t/as Mt Arthur Coal)* [2021] FWCFB 6059 at [108].

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.[4]

Question 2

[13] 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.

Question 3

[14] 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.[5]

Next steps

[15] This statement and the draft model terms attached to it will be available on the Commission's website here: [Model terms for enterprise agreements and copied State instruments | Fair Work Commission].

[16] Any comments on the draft model terms are to be sent to the Chambers of Vice President Gibian at chambers.gibian.vp@fwc.gov.au by **4:00pm (AEDT) on Friday, 31 January 2025**.

[17] The final determinations will be made not later than 17 February 2025 and the new model terms will commence on 26 February 2025 or earlier by proclamation.

---

[4] *Termination, Change and Redundancy Case* (1984) 8 IR 34; *Termination, Change and Redundancy Case* (1984) 9 IR 115.

[5] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited* [2010] FCA 591; (2010) 198 IR 382 at [44] (Logan J).

VICE PRESIDENT

Printed by authority of the Commonwealth Government Printer

<PR782694>

<u>Attachment A – Model Flexibility Term for enterprise agreements</u>

(1) An employer and employee covered by this enterprise agreement may agree to make an individual flexibility arrangement to vary the effect of terms of the agreement if:

- (a) the arrangement deals with 1 or more of the following matters:
    - (i) arrangements about when work is performed;
    - (ii) overtime rates;
    - (iii) penalty rates;
    - (iv) allowance;
    - (v) leave loading; and
- (b) the arrangement meets the genuine needs of the employer and employee in relation to the matters it deals with; and
- (c) the arrangement is genuinely agreed to by the employer and employee, without coercion or duress.

(2) An individual flexibility arrangement may only be made after the individual employee has commenced employment with the employer.

(3) An employer who wishes to initiate the making of an individual flexibility arrangement must:

- (a) give the employee a written proposal; and
- (b) 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.

(4) If the employer proposes to enter into an individual flexibility arrangement with an employee:

- (a) the employer must meet with the employee to discuss the proposal prior to entering the individual flexibility arrangement if the employee requests such a meeting; and

(b) the employee may appoint a person or employee organisation to provide the employee with support or representation in relation to any discussions concerning a proposed individual flexibility arrangement.

(5) The employer must ensure that the terms of the individual flexibility arrangement:

(a) are about permitted matters under section 172 of the *Fair Work Act 2009*; and

(b) are not unlawful terms under section 194 of the *Fair Work Act 2009*; and

(c) result in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed to.

(6) The employer must ensure that the individual flexibility arrangement:

(a) is in writing; and

(b) includes the name of the employer and employee; and

(c) is signed by the employer and employee and, if the employee is under 18 years of age, is signed by a parent or guardian of the employee; and

(d) includes details of:

(i) the terms of the enterprise agreement that will be varied by the arrangement; and

(ii) how the arrangement will vary the effect of the terms; and

(iii) how the employee will be better off overall in relation to the terms and conditions of his or her employment as a result of the arrangement; and

(e) states the day on which the arrangement commences; and

(f) describes how the individual flexibility arrangement can be terminated.

(7) The employer must give the employee a copy of the individual flexibility arrangement within 14 days after it is agreed to.

(8) The employer or employee may terminate the individual flexibility arrangement:

(a) at any time, by agreement in writing between the employer and the employee; or

(b) by the employer or the employee giving 28 days written notice to the other party.

(9) An individual flexibility arrangement terminated in accordance with clause (8)(b) ceases to have effect at the end of the period of notice required under that clause.

(10) The employer or employee may use the dispute settlement procedure in this enterprise agreement to deal with disputes that may arise concerning the matters dealt with in the individual flexibility arrangement.

Note: In addition to this clause, the National Employment Standards of the *Fair Work Act 2009* give some employees the right to request flexible working arrangements in certain circumstances.

Attachment B – Model consultation term for enterprise agreements

Application of consultation term

(1) This term applies if the employer:

(a) has made a definite decision to introduce a major workplace change 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.

(2) The employer must consult with any employees affected by the change referred to in subclause (1), as well as representatives (if any) of those employees.

Consultation in relation to major workplace change

(3) For a major change referred to in subclause (1)(a):

(a) the employer must notify the relevant employees of the decision to introduce the major change; and

(b) subclauses (4) to (10) apply.

(4) The relevant employees may advise the employer that a person or employee organisation is the employee or employees' representative for the purposes of the procedures in this clause in relation to major workplace change.

(5) If:

(a) a relevant employee advises, or relevant employees advise, the employer that a person or employee organisation is their representative for the purposes of consultation; and

(b) the employee or employees advise the employer of the identity of the representative;

the employer must recognise the representative.

(6) The employer must notify the relevant employees and their representatives (if any) of the decision to introduce the change.

(7) As soon as practicable after making its decision, the employer must:

(a) discuss with the relevant employees and their representatives (if any):

(i) the introduction of the change; and

(ii) the effect the change is likely to have on the employees; and

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

(b) for the purposes of the discussion—provide, in writing, to the relevant employees and their representatives (if any):

(i) all relevant information about the change including the nature and expected duration of the change proposed; and

(ii) the reasons or justification for the change; and

(iii) information about the expected effects of the change on the employees; and

(iv) any other matters likely to affect the employees.

(8) However, the employer is not required to disclose confidential or commercially sensitive information to the relevant employees.

(9) The employer must give prompt and genuine consideration to matters raised about the major change by the relevant employees and their representatives (if any), prior to the implementing of the change.

(10) The employer will take reasonable steps to communicate the outcome of the consultation process including the consideration given to matters raised about the major workplace change by the relevant employees and their representatives (if any).

(11) Where information is provided as part of the consultation process, if the employer is aware that an employee has, or reasonably should be aware that the employee may

have, limited understanding of written or spoken English, take reasonable steps to ensure that the employee understands the information provided.

(12) If a term in this agreement provides for the introduction of a major workplace change in-relation to the enterprise of the employer, the requirements to consult contained in clauses (3) to (10) are taken not to apply.

(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.

Consultation in relation to change to regular roster or ordinary hours of work

(14) For a change referred to in subclause (1)(b):

(a) the employer must notify the relevant employees and their representatives (if any) in writing of the proposed change; and

(b) subclauses (14) to (18) apply.

(15) An employee may advise the employer that a person or employee organisation is the employee or employees’ representative for the purposes of the procedures in this clause in relation to changes to their regular rosters or ordinary hours of work.

(16) If:

(a) An employee advises the employer that a person or employee organisation is their representative for the purposes of consultation; and

(b) the employee advises the employer of the identity of the representative;

the employer must recognise the representative.

(17) As soon as practicable after proposing to introduce the change, the employer must:

(a) discuss with the relevant employees and their representatives (if any) about the introduction of the change; and

(b) for the purposes of the discussion—provide to the relevant employees and their representatives (if any):

(i) all relevant information about the change, including the nature and expected duration of the change; and

(ii) information about what the employer reasonably believes will be the effects of the change on the employees (including any effect on the employee's remuneration); and

(iii) information about any other matters that the employer reasonably believes are likely to affect the employees; and

(c) invite the relevant employees and their representatives (if any) to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities).

(18) However, the employer is not required to disclose confidential or commercially sensitive information to the relevant employees and their (representatives (if any).

(19) The employer must give prompt and genuine consideration to matters raised about the change by the relevant employees and their representatives (if any).

(20) The employer will take reasonable steps to communicate the outcome of the consultation process including the consideration given to matters raised about the change to the regular roster or ordinary hours of work of employees by the relevant employees and their representatives (if any).

(21) Where information is provided as part of the consultation process, if the employer is aware that an employee has, or reasonably should be aware that the employee may

have, limited understanding of written or spoken English, take reasonable steps to ensure that the employee understands the information provided.

<u>Attachment C – Model term for dealing with disputes for enterprise agreements</u>

(1) If a dispute relates to:

(a) a matter arising under the agreement; or

(b) the National Employment Standards;

this term sets out procedures to settle the dispute.

(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.

(3) An employee who is a party to the dispute may advise the employer that a person or employee organisation is their representative for the purposes of the procedures in this term.

(4) In the first instance, the parties to the dispute must try to resolve the dispute at the workplace level, by discussions between the relevant employee or employees, relevant supervisors and/or management and any relevant employee organisation.

(5) If the discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the matter to the Fair Work Commission.

(6) The FWC may deal with a referral made under clause 4 even if the requirement for discussions in subclauses (4) and (5) has not been complied with if the FWC is satisfied that it is appropriate in all the circumstances to do so.

(7) The Fair Work Commission may deal with the dispute in 2 stages:

(a) the Fair Work Commission will first attempt to resolve the dispute in such manner as it considers appropriate, including by mediation, conciliation, expressing an opinion or making a recommendation; and

(b) if the Fair Work Commission is unable to resolve the dispute at the first stage, the Fair Work Commission may then:

(i) arbitrate the dispute; and

(ii) make a determination that is binding on the parties.

(8) If the Fair Work Commission arbitrates the dispute:

(a) it may also use any of the powers that are available to it under the Act, including, but not limited to, the power to grant interim relief; and

(b) a decision that the Commission makes when arbitrating a dispute is a decision for the purposes of Division 3 of Part 5-1 of the *Fair Work Act 2009* and a person aggrieved by the decision may appeal the decision as provided for in the Act.

(9) Subject to any order made by the Fair Work Commission under subclause (8)(a), while the parties are trying to resolve the dispute using the procedures in this term:

(a) an employee must continue to perform their work as they would normally unless they have a reasonable concern about an imminent risk to their health or safety; and

(b) an employee must comply with a direction given by the employer to perform other available work at the same workplace, or at another workplace, unless:

(i) the work is not safe; or

(ii) applicable occupational health and safety legislation would not permit the work to be performed; or

(iii) the work is not appropriate for the employee to perform; or

(iv) there are other reasonable grounds for the employee to refuse to comply with the direction.

(10) The parties to the dispute agree to be bound by a decision made by the Fair Work Commission in accordance with this term.

Note: In addition to this clause, the Act contains dispute resolution procedures as follows:

For a dispute about rights under the Act to	Section
Request flexible working arrangements	65B
Change casual employment status	66M
Request an extension to unpaid parental leave	76B
Exercise an employee’s right to disconnect	333N

Attachment D – Model term for dealing with disputes for copied State instruments

(1) This term sets out procedures to settle a dispute about a matter arising under a copied State instrument.

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

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

(b) the employer or employers covered by the copied State instrument; 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 copied State instrument and entitled to the benefit of, or has a role or responsibility with respect to, the matter in dispute.

(3) An employee who is a party to the dispute may advise the employer that a person or employee organisation is their representative for the purposes of the procedures in this term.

(4) In the first instance, the parties to the dispute must try to resolve the dispute at the workplace level, by discussions between the relevant employee or employees, relevant supervisors and/or management and any relevant employee organisation.

(5) If the discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the matter to the Fair Work Commission.

(6) The FWC may deal with a referral made under clause 5 even if the requirement for discussions in subclauses (4) and (5) has not been complied with if the FWC is satisfied that it is appropriate in all the circumstances to do so.

(7) The Fair Work Commission may deal with the dispute in 2 stages:

(a) the Fair Work Commission will first attempt to resolve the dispute in such manner as it considers appropriate, including by mediation, conciliation, expressing an opinion or making a recommendation; and

(b) if the Fair Work Commission is unable to resolve the dispute at the first stage, the Fair Work Commission may then:

(i) arbitrate the dispute; and

(ii) make a determination that is binding on the parties.

(8) If the Fair Work Commission arbitrates the dispute:

(a) it may also use any of the powers that are available to it under the Act, including, but not limited to, the power to grant interim relief; and

(b) a decision that the Commission makes when arbitrating a dispute is a decision for the purposes of Division 3 of Part 5-1 of the *Fair Work Act 2009* and a person aggrieved by the decision may appeal the decision as provided for in the Act.

(9) Subject to any order made by the Fair Work Commission under subclause (8)(a), while the parties are trying to resolve the dispute using the procedures in this term:

(a) an employee must continue to perform their work as they would normally unless they have a reasonable concern about an imminent risk to their health or safety; and

(b) an employee must comply with a direction given by the employer to perform other available work at the same workplace, or at another workplace, unless:

(i) the work is not safe; or

(ii) applicable occupational health and safety legislation would not permit the work to be performed; or

(iii) the work is not appropriate for the employee to perform; or

(iv) there are other reasonable grounds for the employee to refuse to comply with the direction.

(10) The parties to the dispute agree to be bound by a decision made by the Fair Work Commission in accordance with this term.

Note: In addition to this clause, the Act contains dispute resolution procedures as follows:

For a dispute about rights under the Act to	Section
Request flexible working arrangements	65B
Change casual employment status	66M
Request an extension to unpaid parental leave	76B
Exercise an employee's right to disconnect	333N