Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission in Response to Background Papers

Family Friendly Work Arrangements (AM2015/2)

5 February 2018

Ai GROUP

4 YEARLY REVIEW OF MODERN AWARDS

AM2015/2 FAMILY FRIENDLY WORK ARRANGEMENTS

1. INTRODUCTION

1. On 12 January 2018, the Fair Work Commission (**Commission**) issued three background papers in relation to the Family Friendly Work Arrangements Common Issues proceedings.

2. The Australian Industry Group (**Ai Group**) files this submission pursuant to paragraph [2] of the Commission's statement of 12 January 2018. It addresses Background Paper 2 and Background Paper 3. It does not raise any concerns in relation to Background Paper 1.

2. BACKGROUND PAPER 2

3. Background Paper 2 purports to "[provide] information on statutory rights, and rights to request, reduced-hours arrangements and flexibility in scheduling work hours in OECD countries"[1].

4. We do not propose to deal with the various systems in any detail because, put simply, in our view a consideration of the means by which employees in other countries can access flexible working arrangements is of limited relevance to the task that the Commission must here discharge; that is, to determine whether the provision proposed by the ACTU is *necessary* to ensure that each of the modern awards it seeks to have varied provides a fair and relevant minimum safety net.

5. As recently observed by the Federal Court of Australia in *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd*[2], the Commission's task in this review involves the "review of [a] modern award as a whole"[3]. This is because, in our submission, a consideration as to

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[1] Background Paper 2 at paragraph [1].

[2] [2017] FCAFC 123.

[3] *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123 at [28].

whether a proposed term is *necessary* in the relevant sense inevitably involves a consideration of other pertinent terms of the award and their operation.

6. For example, if an interested party sought to have an award varied such that employees were given greater control over when they take annual leave, the Commission's determination as to whether the proposed clause satisfies s.138 of the Act would necessarily involve a consideration of the operation of the annual leave provisions in the relevant award (including the recently introduced excessive leave clause which, in some circumstances, gives an employee the right to take annual leave) and the NES. An examination of annual leave provisions internationally would, in our view, be of little if any probative value to the Commission. It would not assist the Commission in ascertaining the extent to which the proposed term is, having regard to the award as a whole, necessary to ensure that the award together with the NES provides a fair and relevant minimum safety net.

7. The same can be said of the matter here for consideration before the Commission. As identified at chapter 10 of our submission dated 31 October 2017, there are numerous existing award provisions contained in some or all awards that provide avenues for flexible working arrangements. The existence and efficacy of those award clauses is of obvious relevance to these proceedings. The submissions were made by Ai Group to assist the Commission to ascertain the extent to which employees are already able to achieve the flexibility necessary to facilitate their caring responsibilities. This is also true of those elements of the NES that we have there pointed to.

8. By contrast, a consideration of the avenues for flexible working arrangements that prevail in other countries carries, in our submission, little if any weight.

9. Significant reliance on international material of the nature contained in Background Paper 2 would be misplaced because:

   a) There is no material before the Commission that goes to the broader context in which the statutory frameworks there summarised operate. For example, the material does not establish important matters such as:

i. The framework within which employment relationships are regulated (e.g. the existence of a minimum safety net, the form of such a safety net, its application, the extent to which employees in fact rely on that safety net etc).

ii. The definition of 'full-time employment' or 'part-time employment', the basis upon which such employees may be engaged, the manner in which their hours of work are determined and so on.

iii. Other available forms of employment, the existence of any restriction or regulation on their engagement and the manner in which they may be required to work (e.g. the ability to employ 'casual' employees/labour hire employees/contractors and the minimum terms and conditions applying to their employment such as minimum engagement periods or a premium payable in addition to their minimum wage in the form of a loading or penalty).

iv. Other forms of flexibility (including types of leave) available to employees that enable them to access flexible working arrangements.

v. Protections against the unfair dismissal of and/or discrimination against employees with caring responsibilities.

vi. Restrictions on an employer's ability to change employees' hours of work, including those with and without caring responsibilities (e.g. an inability to change part-time employees' hours absent agreement or a requirement to consult with employees before altering their ordinary hours or regular roster).

vii. The costs associated with engaging new employees (e.g. recruitment and training) and terminating employees (e.g. severance pay and the management of risks associated with employees contesting their dismissal).

b) There is no evidence before the Commission that goes to the practical operation of the various statutory schemes, including the impact that they have on business. It cannot reasonably be assumed that their mere existence necessarily renders them a fair or appropriate means of providing employees with access to flexible working arrangements. In order to assess whether or not that is so, it would be necessary for evidence to be called of their actual operation. It is trite to observe that such evidence is not before the Commission in these proceedings.

10. In the absence of any information or evidence regarding these vital considerations, the Commission cannot confidently rely on the various international schemes referenced in Background Paper 2 as a basis for granting the ACTU's claim, or any modification of it.

3. BACKGROUND PAPER 3

11. Background Paper 3 deals with various matters associated with the statutory right to request a contract variation to enable flexible working in the United Kingdom ("the UK system")

12. The observations that we have made in relation to Background Paper 2 regarding the limited utility of an examination of the operation of overseas systems must of course also be noted in any examination of the UK system.

13. However, a consideration of the UK system and the policy considerations underpinning its establishment are not irrelevant to the Full Bench's task. The existence and operation of the UK system influenced the establishment of the statutory right to request as articulated in s.65 of the Act. This is evident from the similarities between the UK system and Australian legislative regime, as observed in the Background Paper 3.[4] Indeed the success of the UK system was expressly acknowledged in the Department of Education, Employment and Workplace Relations' Discussion Paper accompanying the National Employment Standards Exposure Draft as a reason for adopting a model in

[4] At paragraph 2

the Australian system which avoids third party involvement and which instead emphasised the facilitation of discussions between employers and employees regarding flexible working arrangements. The paper relevantly provided:

> 59. The Government recognises that working families can find it particularly difficult to balance work and family responsibilities when a child is not old enough to attend school. It is for this reason that the proposed NES will include a right for certain employees to request flexible work arrangements from their employer until their child reaches school age. An employer can only refuse a request on reasonable business grounds.
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> 60. The Government considers that implementing family friendly arrangements is best dealt with at the workplace level. Whether a particular working arrangement requested by an employee can be accommodated by an employer will vary depending on the circumstances of a particular business.
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> 61. Whether a business has reasonable business grounds for refusing a request for flexible working arrangements will not be the subject of third party involvement under the NES. The United Kingdom experience has demonstrated that simply encouraging employers and employees to discuss options for flexible working arrangements has been very successful in promoting arrangements that work for both employers and employees.[5]

14. The ACTU proposal would represent a marked departure from the approach intentionally adopted by the Legislature. It would be a retrograde step that would undermine the policy objective of promoting engagement between employees and employers and the determination of such matters at the workplace level. The framework of the *Fair Work Act 2009* (**FW Act**) and the objects of specific elements of it are relevant to the Full Bench's consideration of what constitutes a 'fair and relevant minimum safety net of terms and terms and conditions'.[6] The Commission should not entertain a proposal to vary awards in a manner that would undermine the objective of s.65, as it is currently cast.

15. A review of the Work and Parents Taskforce Report to the UK Government leading to the establishment of the UK system, and refenced in Background Paper 3, provides compelling justifications for the adoption of a system for

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[5] Department of Education, and Workplace Relations Discussion Paper – National Employment Standards Exposure Draft 2008

[6] As contemplated pursuant to s.134(1)

facilitating flexible work arrangements based upon a "right to request" rather than a simplistic right to access reduced hours of work.[7] Whilst we do not propose to canvas the contents of this report in detail, it is particularly notable that the report provides an insight into why an approach akin to that now sought by the ACTU was not implemented in the UK. The report states:

> 1.1 The extent of parent's desire to work flexibly emerged during last year's 'Work and Parents' review by the Government, which led to the parents publication in December 2000 of the Green Paper Work and Parents: Competitiveness and Choice. In the consultations that preceded and followed the Green Paper, flexible working was raised as a key issue. Parents repeatedly told the Government that if they have the opportunity to, say, arrive fifteen minutes later for work, allowing them to drop their child off at childcare, it would significantly ease the pressures they face and help their participation in the labour market.
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> 1.2 Parents and employers also told the Government that the option it explored in the Green Paper, to give some parents an automatic right to work reduced hours, was not what they wanted. Parents said such an option was not always their desired solution, especially given the corresponding reduction in pay. And employers said an automatic right to reduced hours for anyone was a step too far.[8]

16. The adoption of the ACTU proposal would likely lead, by default, to the implementation of an undesirable solution to the challenges of balancing work and family commitments of employees, through employees simplistically cutting their working hours, rather than promoting the kind of engagement between the parties that might facilitate the identification and implementation of alternate and potentially mutually beneficial arrangements.

17. Notwithstanding the above submissions, we acknowledge that there are differences between the workplace relations systems in place within Australia and the UK which mean that the adoption of the UK system, in its entirety, is not appropriate in the Australian context.

Right of appeal to an Employment Tribunal

18. Part 4 of Background Paper 3 addresses the policy background for the right of appeal to a Tribunal that exists under the UK system. Part 5 sets out the

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[7] Work and Parents Taskforce, Report to the UK Government 20 November 2001

[8] Ibid, at pg. 1.

approach adopted by the relevant Tribunal under the UK system by reference to a small number of leading decisions.

19. A detailed consideration of such matters is of limited relevance to the current proceedings. The ACTU proposal, which is the specific focus of these proceedings, has not sought to establish a comparable role for the Fair Work Commission to that which is undertaken by a Tribunal under the UK system. Consequently, we do not propose to here address the merits of the right of appeal under the UK system in any detail.

20. Suffice it to say, Ai Group contends that it would not be desirable, appropriate or even feasible to establish an equivalent system in the Australian context.

21. The Australian Legislature has expressly and significantly limited the capacity for a party to intervene in a decision taken by an employer to refuse a request pursuant to s.65. The Act also prevents orders being made against a party in relation to a contravention of s.65(5).[9] This is consistent with the stated view of the Labor Government, at the time when the NES was developed, that flexible work arrangements are best dealt with at the workplace level and without third party intervention.[10] The overarching scheme of the Act, and the Legislature's intent when establishing it, are relevant to the Full Bench's review of modern awards.

22. We do however note that the FW Act does not completely prevent the Fair Work Commission, or another third party, from playing a role in dealing with disputes about such matters. Instead, the Act has been framed so as to generally only expressly permit this to occur where it has been agreed to by the parties in a contract of employment, enterprise agreement or other written agreement. Relevantly, s.738 provides;

> (2) The FWC must not deal with a dispute to the extent that the dispute is about whether an employer had reasonable business grounds under subsection 65(5) or 76(4), unless:

[9] Section 44

[10] As articulated in the 2008 NES Exposure Discussion Paper, at paragraphs 59 to 61.

(a) the parties have agreed in a contract of employment, enterprise agreement or other written agreement to the FWC dealing with the matter; or

(b) a determination under the *Public Service Act 1999* authorises the FWC to deal with the matter.

Note: This does not prevent the FWC from dealing with a dispute relating to a term of an enterprise agreement that has the same (or substantially the same) effect as subsection 65(5) or 76(4) (see also subsection 55(5)).

23. As alluded to in the statutory note cited above, the Act also permits enterprise agreements to include provisions regulating the implementation of flexible work arrangements. This could include provisions that mirror those of s.65. If such terms are included in an agreement, the Commission would be empowered to deal with disputes arising from such provisions (in accordance with the agreement's dispute resolution term) and parties would be exposed to orders should they not comply with such provisions. This approach is entirely consistent with that element of the object of the Act which speaks to, "…*achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action*;"[11] It is also consistent with the requirement under s.134(1)(b) for the Commission to take into account the need to encourage collective bargaining.

24. The differing and in some respects more limited capacity for third party intervention in the implementation of flexible work arrangements under the Australian system, when compared to that which operates in the UK, is reflective of the broad framework and objectives of the legislation. The Full Bench should not undermine this approach by either implementing award provisions that more prescriptively regulate the manner in which flexible work arrangements may be implemented, or by facilitating a greater role for the Commission in dealing with disputes concerning such matters.

[11] s.3(f)

Recognition of the need to support employers and employers to implement flexible arrangements

25. As already identified, Background Paper 3 makes reference to a report by a Government appointed Work and Parents Taskforce that considered the introduction of right to request flexible working arrangements in the UK.

26. Recommendation 5 of the Taskforce's report called for a varied and comprehensive package of support for employers and parents to accompany the duty to consider requests to work flexible working hours. It identified the limited extent to which legislation alone can change the culture of organisations

27. Relevantly, the report states:

> 5.1 As indicated in Chapter 2, many of the existing barriers to flexible working tend to be based on a lack of awareness of the different forms it can take and the benefits that it can bring to an organisation. Despite organisations increasingly being prepared to state how flexible working has improved their productivity, prejudices and stereotyping about the type of employee likely to work flexibly continues to hinder its widespread adoption.
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> 5.2 In essence, there is a need for a change in organisational culture if the duty to consider is to be accepted fully and implemented effectively. Legislation alone will not achieve this. And neither will a single guidance booklet, no matter how well it is written. It is evident to us that the duty to consider needs to be accompanied by a package of support that will not only describe how the duty works but also encourage acceptance of it.

28. Recommendation 5 provides a useful articulation of the kinds of measures that could be implemented to enhance the effectiveness of s.65 in delivering greater access to flexible work arrangements (albeit that these are framed by reference to the UK context).To the extent that there has been limited formal utilisation of s.65, it may be that this can be addressed through relevant stakeholders, including Government, employer bodies and unions providing greater education and support to employers and employees.

29. Limited utilisation of s.65, or even the imperfect application of the provision, should not be viewed as justifying the adoption of alternate mechanisms for delivering greater flexible work arrangements to employees covered by the awards.

30. Regardless, the proceedings currently before the Commission have been directed towards the relative merits of the ACTU claim. They have not constituted an inquiry into operation of s.65 of the FW Act. In the present context, the immediate task before the Full Bench is to consider whether the proposed variation to awards sought by the ACTU *is necessary* in order to ensure that awards, together with the NES, constitute a fair and relevant minimum safety net of terms and conditions.

31. We submit that there is no persuasive evidence establishing that there is any significant deficiency in the operation of the current safety net, or other compelling justification, to warrant a recalibration of the balance between the interests of employers and employees that been clearly, carefully and consciously struck through the current legislative regime.