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AM2015/2 Family Friendly Case Submissions in Reply Background Papers

12 February 2018

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Chamber of Commerce
and Industry

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1. INTRODUCTION

1.1 On 12 January 2018, the Fair Work Commission (**Commission**) issued Statement [2018] FWCFB 99 (**Statement**).

1.2 The Statement attached three Background Papers and sought submissions in respect of the background papers by no later than 4pm on Friday 2 February 2018. The Australian Chamber filed submissions on that date (**Primary Submission**).

1.3 The Statement also sought any submissions in reply by 9 February 2018.

2. SUBMISSIONS IN REPLY TO THE ACTU

2.1 Submissions in reply to the ACTU's submissions filed 2 February 2018 can be dealt with briefly.

2.2 Relevantly, the ACTU submits:

(a) "*Section 65 of the Fair Work Act is arguably one of the weaker provisions when compared to the provisions in place in a number of other jurisdictions considered*"; and

(b) *"far from being "unique", the position taken by the ACTU in this application is consistent in a number of important aspects with frameworks already operating in various other jurisdictions.*"

2.3 We address these conclusions as follows.

The Relative Strength of Section 65

2.4 The Australian Chamber's Primary Submission outlines its position on the general relevance of Background Papers 2 and 3, and we do not wish to unnecessarily repeat these submissions here.

2.5 While an assessment of the existing provisions of the *Fair Work Act 2009* (Cth) (**Act**) are obviously an important aspect of these proceedings, the ultimate focus of the parties and the Full Bench must be one addressing the ACTU Claim as opposed to a comparative assessment of s 65 of the Act.

2.6 A finding relating to a comparison of the provisions of the Act and other jurisdictions appears to have a very limited bearing as to whether the ACTU has made out its case under the relevant principles of the 4 Yearly Review.

The Uniqueness of the ACTU Claim

2.7 Contrary to the submission of the ACTU, the ability of an employee under the ACTU Claim to unilaterally determine their hours of work regardless of the position of their employer does appear to be unique in the industrial world.

2.8 This is unsurprising.

2.9 A system in which an employer has no control whatsoever over the deployment of labour is unworkable in any practical sense given the nature of modern employment.

2.10 The ACTU also identifies 'core features' of the ACTU Claim which it alleges are consistent with other international jurisdictions including:

(a) *A right to reduced hours rather than merely a right to request reduced hours, and/or a presumption in favour of the employer granting the employee's proposal; and*

(b) *Access to dispute settlement in relation to the merits of an employee request and employer response (as opposed to simply the correctness of the process followed) if agreement cannot be reached.*

2.11 In respect of these features, it is relevant to note as follows.

2.12 While the ACTU places considerable emphasis on a 'right to reduced hours' rather than merely 'a right to request reduced hours', this distinction is far more complex than the ACTU's submissions suggest.

2.13 There is no doubt that the ACTU Claim represents a 'right to reduced hours' in that it appears that an eligible employee would have a unilateral and seemingly unfettered right to elect their hours under the Claim. In so much that an employer would ultimately be unable to place restraints on such a request, the ACTU Claim represents a true 'right to reduced hours'.

2.14 The position in the international jurisdictions outlined in the Background Papers is more complex.

2.15 For example, in jurisdictions where a 'right to reduced hours' is conditioned by an employer's ability to refuse on certain grounds, even where a presumption exists in favour of the employee and such a refusal is subject to review by a tribunal, a 'right to reduced hours' is no longer a absolute right. Such an entitlement can just as easily be categorised as a 'right to request', albeit a right of varying strengths.

2.16 The ACTU also points to the fact that the international jurisdictions share a core feature of the ACTU Claim, being '[a]*ccess to dispute settlement in relation to the merits of an employee request and employer response (as opposed to simply the correctness of the process followed) if agreement cannot be reached.*'[1]

2.17 This, with respect, is incorrect. The ACTU Claim does not contain any meaningful dispute mechanism in relation to the merits of an employee request if agreement cannot be reached.

2.18 The ACTU submits that its Claim would allow the Fair Work Commission to hear a dispute in relation to:[2]

(a) An employer's refusal to implement the arrangement;

(b) An employee's eligibility, including whether or not evidence provided is adequate;

(c) Whether or not 'reasonable' notice has been provided;

(d) Whether or not the required details have been included in the written notice;

(e) The practical details of the arrangement, including the employee's days and hours or work, the length of the arrangement and the date of reversion.

2.19 However in reality this scope would only deal with whether the request had in fact been complied with.

[1] See Submissions of ACTU 2 February 2018 at [6b]
[2] See Submissions of ACTU 9 May 2017 at [192]

2.20 This distinction was correctly identified during the hearing by Deputy President Gooley as follows:

> *Ultimately, given the nature of the dispute resolution provisions in modern award, it's the employees who would prevail.*[3]
>
> *....*
>
> *The employee's views of the hours that they wish to work would prevail.*[4]

2.21 On the assessment of the Australian Chamber, the dispute resolution procedures under the ACTU Claim and those outlined in the Background Papers' selected examples of international jurisdictions are not equivalent.

2.22 In any event, as submitted in our Primary Submission, the Australian Parliament has clearly identified its position in relation to disputes arising from flexibility requests in the form of a jurisdictional bar on the hearing of disputes arising from s 65(5) of the Act.[5]

2.23 Similarly the ACTU's comparison of the 'reasonable business grounds' test in s 65(5) against the various other formulations[6] is a matter for Parliament.

2.24 To conclude, the Australian Chamber submits that the comparisons made by the ACTU in no way demonstrate the insufficiency of the Australian safety net, nor do they make a case for the introduction of the ACTU Claim.

2.25 The ACTU claim should be dismissed.

[3] See Transcript at PN2790, 21 December 2017
[4] See transcript at PN2792, 21 December 2017
[5] Except where the parties agree to do so in a contract of employment, enterprise agreement or other written agreement
[6] See ACTU Submissions filed 2 February 2018 at [X]

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