

FWC Model Terms for Enterprise Agreements and Copied State Instruments

01 November 2024

INTRODUCTION

The Australian Retailers Association ('ARA') welcomes the opportunity to make a submission to the Fair Work Commission ('the Commission') in respect of Model Enterprise Agreement Terms.

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, in all states and territories and in all categories - from food to fashion, hairdressing to hardware, and everything in between.

As a representative of the retail sector, we feel it is deeply important to advise on government policy decisions that may alter, affect or transform the retail workplace.

In Justice President Hatcher's [Statement](#), dated 17 September 2024, it was acknowledged the Commission is required to make new model terms for enterprise agreements and a new model disputes resolution term for copied State Instruments pursuant to the amendments to the Fair Work Act 2009 (Cth) ('the Act') prescribed by way of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth).

The Full Bench of the Fair Work Commission per s616(4A) of the Act is required to determine each the following model terms:

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

In making the model terms, ss 202(6)(b), 205(4)(b), 737(2)(b) and 768BK(3) of the Act set out the matters the matters must take into account in determining the model terms.

The Commission must also ensure that the model flexibility term, consultation term and disputes term is consistent with other requirements within the Act (including s202 (1), ss 205 (1), ss205 (1A) (a); and s 186 (6)).

ARA'S POSITION

The ARA submits, in uniformity with the Australian Chamber of Commerce and Industry ('ACCI'), that the current model enterprise agreement terms prescribed by the Fair Work Regulations (2009) ('Regulations') should be, as far as is possible, retained, subject to one minor, non-substantive variation.

The current model terms are broadly consistent with the objectives of the Act and comply with the requirements of the Closing Loopholes No.2 Amendments.

We share deep concern that any proposed reconstruction of the model terms would result in further confusion for all parties, heighten the risk of non-compliance for businesses and expand workplace obligations beyond what businesses can endure and what the process necessitates.

The ARA notes that the Commission's central role is to ensure that the model EA terms are broadly consistent with comparable terms in modern awards. With consideration to this responsibility, we maintain the current terms are closely aligned to the relevant comparable terms in modern awards.

RATIONALE

Varying Factors to be taken into account

The Closing Loopholes No.2 amendments requires that the Commission must take into account a range of varying factors with regard to each model term. Among them, lies the consideration of whether the model term is 'broadly consistent' with the comparable terms within modern awards.

As it currently stands, the EA model terms within the Regulations are closely aligned to modern award terms in terms of content, language and material effect, save but for few small non-substantive variances (see Appendix 1: Comparison of Dispute Resolution Terms).

For example, the dispute resolution model term significantly mirrors the comparable term in the General Retail Industry Award 2020 ('GRIA') clause 26, with the exception of a 'NOTE' which acknowledges different dispute procedures that have arisen by way of recent legislative amendments.

This demonstrates that the current model EA terms within the Regulations are broadly consistent with modern award terms, and therefore, largely remain fit-for-purpose.

Greater Business Context

Since 2022, the Australian workplace relations landscape has changed drastically, leading to significant impacts for businesses within workplace structures. As businesses continue to navigate a wide-range of changes to bargaining processes by way of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth), and *Fair Work Legislation Amendments (Closing Loopholes) Act 2023* (Cth) and the *Fair Work Legislation Amendments (Closing Loopholes No.2) Act 2024* (Cth), it is imperative for businesses to have a reprieve from significant, overzealous regulatory changes.

Legislative changes must promote consistency, clarity, and reflect industry views, to prevent causing further instability and ambiguity for businesses when bargaining. Legal complexities, and workplace instrument ambiguity are among the key drivers of employer-employee disputes. For this significant reason, the EA model terms should not significantly depart from the EA model terms prescribed by the Regulations.

Another significant impact for businesses when workplace regulations change is the effect on compliance, costs and productivity. When workplace regulations unnecessarily change, this can unduly impose substantial financial burdens on organisations while simultaneously hindering business productivity and growth.

The model EA terms prescribed in the Regulations, and the comparable terms within modern awards, share substantive alignment in their content, design and operation. There is the real risk if this was to change, and the terms in Awards and EAs were to significantly diverge, this would impede or discourage collective bargaining.

Having consideration to the above, it is imperative the Commission proceed cautiously when settling on any changes to the EA model terms, as any real divergence from the substantive nature of the current EA model terms prescribed by the Regulations, would have a significant impact for business.

Changes to the model terms are not wholly necessitated

The [Commissions' Background paper](#) at paragraph [19] and [28] notes that there has been no change to the requirements for the flexibility and consultation model term (s203 & s205 (1)) by way of the Closing Loopholes No.2 Amendment.

As these requirements remain unchanged, the current model EA Terms within the Regulations, to the extent of the flexibility and consultation term, meet the requirements under the Act, and therefore, remain legitimate, relevant and fit-for-purpose.

ARA Proposed Variations

The ARA affirms that the current EA model terms contained within the Regulations should be substantively preserved.

We do however co-currently acknowledge that one small non-substantive variation, with alignment to ACCI's position, should be made to the dispute resolution model term.

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:

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

We believe this small amendment would clarify existing alternative dispute resolution procedures within the Act.

This amendment would also make the current EA model terms and comparable terms within modern awards even greater aligned, a key factor to be taken into account by the FWC in settling on model terms.

Importantly, we also recognise this proposed change would not expand entitlements or obligations but rather recognise those that already exist.

SUMMARY OF POSITION

The ARA recognises that the Full Bench of the FWC must make new model terms for enterprise agreements and a new model disputes resolution term for copied State Instruments. Simultaneously, we recognise in undertaking this process, the Commission must take into consideration a range of factors, including whether the model term is 'broadly consistent' with the comparable terms within modern awards.

The ARA also acknowledges that there has been no change to the requirements for the flexibility and consultation model term (s203 & s205 (1)) by way of the Closing Loopholes No.2 Amendment. With consideration to these key elements, and an extensive understanding of the possible impacts for business, we maintain that the EA Model Terms contained within the regulations should be preserved, subject to the singular small variance proposed herein.

Appendix 1: Comparison of Dispute Resolution Terms (summarised version)

EA Model Clause	Modern Award Clause								
<p>Per Fair Work Regulations 2009, regulation 6.01:</p> <p>Dispute Resolution Model Term</p> <p>(1) Procedures are relative to a dispute about a matter that arises under the agreement or National Employment Standards.</p> <p>(2) An employee may appoint a representative for purposes of dispute procedure.</p> <p>(3) Parties must try and resolve the dispute at the workplace level first through relevant supervisors and/or management.</p> <p>(4) If the matter cannot be resolved at the workplace level, a party may refer the dispute to the FWC.</p> <p>(5) FWC may deal with dispute in 2 stages; as commission deems appropriate by mediation, conciliation, expressing an opinion or recommend and then, if unresolved, arbitrate the dispute and make a determination that is binding on the parties.</p> <p>(6) While the parties are trying to resolve the dispute using the procedures in this term: Employee must continue to perform work, comply with lawful direction by employer, unless there are work safe or reasonable grounds to not comply with direction.</p> <p>(7) Parties agree to be bound by FWC decision.</p>	<p>Per General Retail Industry Award 2020 clause 36:</p> <p>Dispute resolution</p> <p>36.1 This clause sets out the procedures to be followed if a dispute arises about a matter under this award or in relation to the NES.</p> <p>36.2 The parties to the dispute must first try to resolve the dispute at the workplace level between relevant employees and supervisor.</p> <p>36.3 If the dispute is not resolved through discussion per clause 36.2, the parties must try and resolve through discussion with relevant employees and more senior levels of management, as appropriate.</p> <p>36.4 If the dispute is unable to be resolved at the workplace, and appropriate steps pursuant to clause 36.2 & 36.3, a party may refer it to the FWC.</p> <p>36.5 The parties may agree on the process to be followed by the FWC, including mediation, conciliation and consent arbitration.</p> <p>36.6 If the dispute remains unresolved, the Fair Work Commission may use any method of dispute resolution it is permitted by the Act to use.</p> <p>36.7 A party to the dispute may appoint a person, organisation or association to support or represent them at any process in clause 36.</p> <p>36.8 While procedures are being followed under clause 36, work must continue in accordance with the Act, and an employee must not unreasonably fail to comply with a direction given by the employer about performing work that is safe and appropriate for the employee to perform.</p> <p>36.9 Clause 38 is subject to any applicable health and safety legislation.</p> <p>NOTE: In addition to clause 36, the Act contains dispute resolution procedures as follows:</p> <table border="1" data-bbox="852 1532 1449 1715"> <tbody> <tr> <td>Request Flexible Work Arrangements</td> <td>S65B</td> </tr> <tr> <td>Change casual employment status</td> <td>66M</td> </tr> <tr> <td>Request an extension to unpaid parental leave</td> <td>76B</td> </tr> <tr> <td>Right to disconnect</td> <td>333N</td> </tr> </tbody> </table>	Request Flexible Work Arrangements	S65B	Change casual employment status	66M	Request an extension to unpaid parental leave	76B	Right to disconnect	333N
Request Flexible Work Arrangements	S65B								
Change casual employment status	66M								
Request an extension to unpaid parental leave	76B								
Right to disconnect	333N								

The ARA thanks the FWC for an opportunity to make a submission. Any questions in relation to this submission should be directed to policy@retail.org.au.