Australian Industry Group

# Model Terms for Enterprise Agreements and Copied State Instruments

## Submission

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**MODEL TERMS FOR ENTERPRISE AGREEMENTS**

**AND COPIED STATE INSTRUMENTS**


| | Section | Page |
|---|---|---|
| 1. | Introduction | 3 |
| 2. | Background | 4 |
| 3. | Matters to be taken into Account | 7 |

# 1. INTRODUCTION

1. This submission of the Australian Industry Group (**Ai Group**) is filed in response to the statement issued by the Fair Work Commission (**Commission**) on 26 September 2024[1] (per Justice Hatcher, President). The submission also responds to certain aspects of the Background Paper published by the Commission on 17 September 2024.

2. In summary, it is Ai Group's position that the new model terms to be developed by the Commission (**New Model Terms**) should reflect the model terms presently found in the *Fair Work Regulations 2009* (**Regulations**) (**Current Model Terms**) and ought not materially depart from them.

3. In this submission, references to the Act are references to the *Fair Work Act 2009* (**Act**) unless stated otherwise.

[1] [2024] FWC 2676.

## 2. BACKGROUND

4. In the Commission's statement of 17 September 2024[2], (**17 September Statement**) Justice Hatcher, President, explained the circumstances by which the Commission is now required to make the New Model Terms. In short, the requirement is a consequence of amendments to the Act by the *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024.*

5. The Commission is required to make model terms of the following kinds:

   (a) A flexibility term for enterprise agreements,

   (b) A consultation term for enterprise agreements,

   (c) A term dealing with disputes for enterprise agreements,

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

6. As explained in the 17 September Statement at [6] - [16], the current position under the Act is that enterprise agreements must include a flexibility term, a consultation term and a term about dealing with disputes in accordance with various requirements prescribed by the Act; and in the absence of any of these terms, the agreement is taken to include the applicable Current Model Term. In the case of a copied State instrument, if there is no term dealing with disputes, then the prescribed model term is taken to apply.

7. Once determined by the Commission, the New Model Terms will be legislative instruments and will replace the Current Model Terms on 25 February 2025 or earlier by proclamation (subject to certain transitional arrangements).

[2] [2024] FWC 2520.

8. Importantly, in determining the New Model Terms, the Commission must take into account particular matters, namely:

   (a) Whether the New Model Terms are broadly consistent with comparable terms in modern awards;

   (b) Best practice workplace relations as determined by the Commission;

   (c) Whether all persons and bodies have had a reasonable opportunity to be heard and make submissions to the Commission;

   (d) The object of the Act (see s.3);

   (e) For the model flexibility and consultation terms, the objects of Part 2-4 (see s.171);

   (f) For the model consultation term, whether the model term would, or would be likely to have, the effect referred to in ss.195A(1)(a), (b), (c) or (d) (objectionable emergency management terms);

   (g) For the model term for dealing with disputes and the model term for copied State instruments about dealing with disputes, the operation of ss.739(3), (4), (5) and (6) and ss.740(3) and (4); and

   (h) Any other matters the Commission considers relevant.[3]

9. The Commission is required by the legislature to take the aforementioned matters *'into account'*. None of these matters are to be given primacy over others. Rather, they identify a series of countervailing considerations, that must be appropriately balanced, having regard to the legislative scheme as a whole and the broader context in which this proceeding is being conducted – matters that we return to later in this submission.

[3] Sections 206(6)(b), 205(4)(b), 737(2)(b) and 768BK(3).

10. The Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (**EM**) is also relevant. It is cited at paragraphs [40] – [41] of the Background Paper. Relevantly, it states: (emphasis added)

> The amendments in Part 5 of Schedule 1 would be compatible with and promote the right to just and favourable working conditions of work and collective bargaining. <u>The model terms act as a safety net ensuring that compliant terms dealing with consultation, flexibility and dispute resolution are included in all enterprise agreements, and a compliant term dealing with dispute settlement is included in copied State instruments.</u> The model terms would not override terms agreed to between the parties to an agreement or instrument where the terms meet the requirements of the FW Act, minimising any concern that the model terms would limit the capacity of employees to determine just and favourable conditions.[4]

11. The conferral of powers on the Commission to develop the New Model Terms was not intended to necessarily result in provisions that depart materially from the Current Model Terms, nor was it precipitated by identified deficiencies in the Current Model Terms. Certainly nothing in the EM suggests or demonstrates this. Indeed, the EM expressly states that the New Model Terms are to act *'as a safety net'* and that they will simply ensure that *'compliant terms'* are contained in all enterprise agreements and that a compliant dispute settlement procedure is included in copied State instruments.

[4] EM at [67].

# 3. MATTERS TO BE TAKEN INTO ACCOUNT

12. In the submissions that follow, we deal with a number of the matters that must be taken into account by the Commission in this proceeding and set out the associated factors that support our position in this matter.

**Consistency with Modern Award Terms**

13. All modern awards contain model flexibility, consultation and dispute terms (**Award Model Terms**) (subject to minor modifications that appear in a small number of modern awards). The New Model Terms should be broadly consistent with those clauses.

14. We observe firstly that there are numerous similarities between the Award Model Terms and the Current Model Terms. For example:

    (a) In the context of the model flexibility clauses:

        (i) The matters about which an individual flexibility arrangement may be made are the same;

        (ii) Various requirements concerning the form of the written agreement between the parties are the same or substantially similar; and

        (iii) Both provisions refer to the application of the *'better off overall'* test.

    (b) In relation to the model consultation clauses:

        (i) The obligation to consult arises in broadly the same circumstances;

        (ii) Both clauses impose substantially similar obligations on employers as to the manner in which the consultation process is to be undertaken; and

        (iii) Both clauses contain similar obligations in relation to any matters raised by employees during the consultation phase.

(c) In relation to the model dispute settlement clause:

(i) Both provisions apply to despites arising under the relevant instrument or the National Employment Standards;

(ii) Neither provision prescribes a detailed enterprise-level process for endeavouring to resolve the dispute;

(iii) Both provisions permit a party to the dispute to refer it to the Commission; and

(iv) Under both clauses, whilst parties are trying to resolve a dispute, employees must continue to perform their work, unless there is an imminent health and safety risk.

15. Generally, the Award Model Terms strike a careful balance between various competing considerations. For example, whilst various elements of the model consultation term concerning *'major changes'* impose onerous obligations to provide written information to employees and their representatives about the relevant change, those obligations are appropriately confined to circumstances in which the employer has made a *'definite decision'* to implement the change and the change is likely to have *'significant effects'* on the affected employees. Similarly, whilst the consultation term concerning rosters and hours of work requires consultation wherever an employer *'proposes'* to implement changes, the clause does not impose a requirement to provide information in writing or to follow a detailed consultation process.

16. This approach is also apposite to the creation of the New Model Terms. Like the Award Model Terms, they may apply in a broad range of circumstances, including, for example:

(a) Small, medium and large enterprises;

(b) Workplaces at which there is little union representation, through to those at which one or more unions represent a significant proportion of the workforce; and

(c) Workplaces that generally enjoy cooperative employer-employee relations, with limited if any disputation or conflict, as well as those at which there is frequent or ongoing industrial turmoil.

17. Accordingly, it would not be appropriate for the New Model Terms to be overly prescriptive or detailed. They must be fit for a broad range of circumstances, that cannot be conclusively or comprehensively identified for the purposes of this proceeding. We note in this regard that the EM refers to the New Model Terms as constituting a kind of safety net.

18. Despite their existence in the awards system over many years, the Award Modern Terms have not been substantially varied – either on the Commission's own motion or on application. This is despite the conduct of three major reviews of the modern awards system since its implementation. The Award Model Terms appear to have been accepted by the Commission as reflecting a fair and relevant part of the minimum safety net. This too lends support for adopting an approach that is broadly consistent with those terms.

**Best Practice Workplace Relations**

19. In the course of this proceeding, the Commission is to *'take into account … best practice workplace relations as determined by the Commission'*. This consideration proceeds on the basis that the Commission will first make a determination as to what constitutes *'best practice'*.

20. Reasonable minds may differ as to what constitutes *'best practice'* and of course there is likely to be a difference of position between the parties participating in this proceeding in this regard.

21. Respectfully, the Commission should not implement any departure from the current wording of the model clauses based on a determination as to what comprises *'best practice'* unless it has had the benefit of detailed submissions and evidence in relation to what constitutes the 'best practice'. Specifically, it would be necessary for the Commission to consider how any proposed measures would facilitate *'best practice workplace relations'* and the impact that

they would have on employers and employees. It would in turn also be necessary to consider whether any such *'best practices'* are in fact appropriate for inclusion in the New Model Terms, noting their purpose and the circumstances in which they may operate.

22. The nature of this proceeding, and the timeframe within which it is required to be completed, does not lend itself to a proper and robust consideration of the aforementioned matters. The Commission's directions do not contemplate the filing of evidence and in any event, the imperative to conclude the proceedings before the New Model Terms are legislated to commence operation necessarily limits the extent to which a detailed examination of the relevant issues is feasible.

23. In the circumstances, the Commission should not adopt any bare assertions advanced by parties in support of proposals that depart from the Current Model Terms or the Award Model Terms on the basis that they constitute *'best practice'*. To do so would risk the imposition of unfair or unreasonable requirements or obligations on employers, that in fact undermine the purpose of the model terms and are inconsistent with the scheme of the Act more generally (which we turn to below).

24. Further, the Commission should not rely on the analysis contained in the Background Paper of flexibility, consultation and dispute resolution terms in enterprise agreements[5] to make any findings as to what constitutes best practice. The popularity of certain features of those clauses does not of itself establish that they reflect best practice. In many cases, they are merely a product of the respective industrial strength of the parties to the agreements, as well as the preferences and objectives of any unions covered by the agreements. Many of the differences between approved enterprise agreement terms and the Current Model Terms represent matters that are commonly and persistently pursued by unions in the context of enterprise bargaining.

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[5] Background Paper at pages 15 – 20.

25. Finally, whilst the Commission is required to take into account best practice, it is not *compelled* to adopt any such practices (or purported practices) in the New Model Terms. Put another way, the Act does not require that the New Model Terms must reflect best practice.

**The Object of the Act and the Objects of Part 2-4**

26. Section 3 expresses the principal object of the Act as follows:

> The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians …

27. The principal object is a mandatory consideration. This is because s.578(a) requires that, in the performance of its powers and functions, the Commission must take the object of the Act into account.

28. The adoption of an approach that broadly reflects the Current Model Terms would be consistent with the object of the Act. It would constitute a balanced approach that would result in the creation of model terms that would:

    (a) Facilitate and promote cooperation and productivity at the workplace level;

    (b) Be flexible for business;[6]

    (c) Assist employees balance their work and family responsibilities by providing for flexible working arrangements;[7]

    (d) Enable fairness and representation at work and provide accessible and effective procedures to resolve grievances and disputes;[8] and

    (e) Retain an emphasis on enterprise-level collective bargaining.[9]

[6] Section 3(a).

[7] Section 3(d).

[8] Section 3(e).

[9] Section 3(f).

29. The final matter is particularly relevant in the context of this proceeding, in addition to s.171, which sets out the objects of Part 2-4 of the Act. These objects are also mandatory considerations by reason of s.578(a).

30. It is apparent from s.171(a) that Part 2-4 seeks to achieve, *inter alia*, a collective bargaining framework which is *'simple, flexible and fair'* and which enables bargaining for enterprise agreements that '*deliver productivity benefits'.*

31. The adoption of New Model Terms that reflect the Current Model Terms would be consistent with the object of the Act and s.171(a). Specifically, the adoption of an approach that is not overly prescriptive and does little more than to create terms that comply with the relevant requirements of the Act would ensure that a genuine emphasis on enterprise-level collective bargaining is maintained.

32. In practice, the Current Model Terms commonly serve as a *'floor'* or set of minimum conditions that underpin and colour bargaining over alternate terms that may be preferred by unions. Indeed, this is often a subject matter that unions strongly prioritise in their bargaining efforts and bargaining over such matters commonly culminates in a compromise being achieved as part of a broader agreement. The reflection of 'union preferred terms' in the New Model Terms through this proceeding would likely undermine or stifle genuine attempts to strike an enterprise-specific bargain about such matters. It would also run counter to the objective of providing a framework for bargaining that is simple, flexible and fair.

**Sections 739(3), (4), (5) and (6) and Sections 740(3) and (4)**

33. The model terms for dealing with disputes must comply with the aforementioned provisions. The Current Model Terms so comply.

**Any Other Relevant Matters**

34. The Current Model Terms and the Award Model Terms in various ways reflect long-standing test case standards and / or are consistent with arbitrated outcomes.

35. For example, the Termination, Change and Redundancy Case is the genesis of various aspects of the model consultation clause about major change.

36. In a decision issued on 2 August 1984, the Australian Conciliation and Arbitration Commission (**ACAC**) relevantly said as follows: (emphasis added)

> <u>This case has been of mammoth proportions.</u> Not only did the hearing cover a considerable period of time but the Commission had <u>tendered to it a vast array of material</u> both Australian and International for its consideration.
>
> …
>
> On 24 May 1983 the ACTU commenced its detailed submissions.
>
> The details of the claim made by the ACTU were amended in a number of respects during the proceedings. They are included in their final form in Appendix "B" to this decision, but in general terms the claim seeks to establish in Federal awards … <u>obligations on employers to notify and consult with employees about the introduction of new technology and in redundancy situations</u>, …
>
> …
>
> The claim was opposed by the CAI, who appeared for employers generally, on numerous grounds. …
>
> <u>The employers also submitted substantial material going to the cost of the union claim</u> and contended that Australia cannot afford the substantial increase in labour costs involved in acceding to them. …
>
> …
>
> In Part B of its claim the ACTU seeks to ensure that employees and their unions are notified, provided with information, and consulted about changes that are likely to have significant effects on workers.
>
> The proposed clause settles the scope for consultations, namely about the employment effects of such changes and, in particular, outlines measures to deal with any adverse effects of the changes on employees.
>
> The clause also sets out a timetable for ongoing consultations which are to commence as early as possible and at least six months before the change, except in exceptional circumstances. In addition, the proposed clause seeks to ensure that employers provide adequate information about changes to the union.
>
> The clause covers not only technological change, but any change in an enterprise which is likely to significantly affect employment, irrespective of the cause of that change.
>
> …

> We have previously stated that, in our opinion, there is a need to hasten slowly in the setting of new standards and we are particularly concerned at the possible ramifications of the ACTU's proposals in relation to introduction of change.
>
> …
>
> We are aware that procedures for notification, consultation and provision of information have generally been settled by negotiation and agreement and we are of the view that, generally speaking, they are not matters which lend themselves to effective legislation or award prescription.
>
> However, at this stage, we are prepared to include in an award a requirement that consultation take place with employees and their representatives as soon as a firm decision has been taken about major changes in production, program, organization, structure or technology which are likely to have significant effects on employees.
>
> We have decided also that the employer shall provide in writing to the employees concerned and their representatives all relevant information about the nature of the changes proposed, the expected effect of the changes on employees and any other matters likely to affect employees. However, we will not require an employer to disclose confidential information.[10]

37. In a supplementary decision issued shortly afterwards, the ACAC considered submissions made in response to its above decision and a draft order it had published. This decision again canvassed aspects of the proposed consultation clause. For instance:

> The employers submitted that:
>
> 1. the obligation to notify employees and their union or unions should only apply when an employer had made a firm decision to make major changes;
>
> …
>
> We also believe that the obligation to notify employees and their union or unions should only apply when an employer has made a definite decision to make major changes. Such a provision is more appropriate than the expression we used in our draft order "where an employer proposes to make major changes"[11]

38. The above passages demonstrate that the ACAC had the benefit of a wealth of material before it regarding the proposed consultation clause. Having regard to that material, the ACAC determined to introduce a consultation clause and in doing so, dealt with various contested issues between the parties. The ACAC's decision in numerous respects (including those extracted above) considered key

[10] *Termination, Change and Redundancy Case* (1984) 8 IR 34 at 34 – 35, 37, 51 – 53.

[11] *Termination, Change and Redundancy Case* (1984) 9 IR 115 at 126.

aspects of the clause, which are also features of the relevant Current Model Term and Award Model Term (as emphasised via underlining in the passages above).

39. By way of another example, more recently, the Commission determined the terms of the Award Model Term concerning consultation about hours of work. In so doing, it considered various proposals advanced by participating parties. For example:

> **[75]** The ACTU and a number of individual unions submitted that the information required to be provided to the affected employees and their representatives should be provided 'in writing'. It was proposed that the words 'in writing' be inserted after the word 'provide' in draft clause X(b)(i). Further, it was submitted that in certain circumstances the employer should be required to translate such information into an appropriate language. …[12]

40. At [76] – [82], the Commission dismissed submissions advanced by the Australian Council of Trade Unions in support of the proposals, before concluding as follows: (emphasis added)

> **[83]** We are not persuaded to include the provisions sought. The relevant term is intended to operate in a range of circumstances and across different industries and businesses. The requirements proposed would impose an unwarranted regulatory burden on business (see s.134(1)(f)) and would be particularly burdensome for small and medium sized businesses (see s.3(g)).[13]

41. The Current Model Term concerning consultation about hours of work is in relevantly similar terms to the Award Model Term.

42. In the circumstances, the Commission should not in this proceeding depart from such elements of the existing model terms, absent a compelling and cogent case for change. In any event, as a consequence of the timeframe within which this proceeding is required to be concluded and the nature of the process, it will not be practicable for parties to present the requisite nature of material necessary to establish a proper basis for adopting any such proposals and by extension, for the Commission to properly consider them.

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[12] *Consultation clause in modern awards* [2013] FWCFB 10165 at [75].

[13] *Consultation clause in modern awards* [2013] FWCFB 10165 at [83].

43. It is also relevant that the New Model Terms, as determined by the Commission at the conclusion of this proceeding, may be varied over time. If a need for change arises or can be established at a later stage, the Commission would have the capacity to carefully evaluate the relevant issues at that time – absent the existing imperative to determine the model clause within a relatively short period of time.

44. Accordingly, the Commission should adopt a cautious and conservative approach to the development of the New Model Term, that does not depart from existing test case standards or previously arbitrated outcomes.