



STATEMENT

Fair Work Act 2009

s.160—Variation of modern award to remove ambiguity or uncertainty or correct error

Variation on the Commission’s own motion – flexible work amendments and unpaid parental leave

(AM2023/8)

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT CATANZARITI
VICE PRESIDENT ASBURY

MELBOURNE, 26 MAY 2023

Variation on the Commission’s own motion – Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 – consequential amendments – flexible working arrangements – unpaid parental leave.

Background

[1] On 6 December 2022 the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (Secure Jobs Better Pay Act) received Royal Assent. The Secure Jobs Better Pay Act amends provisions of the National Employment Standards (NES) in Part 2-2 of the *Fair Work Act 2009* (Cth) (FW Act) relating to requests for flexible working arrangements in Division 4 and requests to extend unpaid parental leave in Division 5. These changes commence operation on 6 June 2023.

[2] The key changes to the NES provisions relating to flexible working arrangements can be summarised as follows:

- The group of people who can make a request for flexible work arrangements under s 65 of the FW Act is expanded to include pregnant employees.¹ The circumstances in which an employee may make a request are also amended to include where they, or a member of their immediate family or household, experience family or domestic violence.² This aligns eligibility to request a flexible working arrangement with the entitlement to family and domestic violence leave.
- The current provisions concerning when an employer must agree to a request or when an employer can refuse a request are repealed and a new provision (s 65A) is inserted dealing with the obligations on employers in responding to a request.³
- A new provision (s 65B) is inserted which deals with disputes about the operation of the division. It requires parties to attempt to resolve the dispute at the workplace

level in the first instance and, where discussions at the workplace level do not resolve the dispute, allows the dispute to be referred to the Commission. The Commission can deal with the dispute by arbitration but must first deal with the dispute by other means, such as conciliation, unless there are exceptional circumstances.⁴

- A new provision (s 65C) is inserted concerning the types of orders the Commission can make when arbitrating the dispute under new s 65B(4)(b), when the Commission may or may not make certain orders and relevant considerations.⁵

[3] From 6 June 2023 the Secure Jobs Better Pay Act will also introduce new provisions ss 76B and 76C into the FW Act providing for a dispute resolution jurisdiction in relation to disputes regarding employee requests to extend unpaid parental leave for a further period of up to 12 months.⁶ The new jurisdiction is similar to the dispute resolution provisions regarding flexible working arrangements, as the new ss 76B and 76C largely mirror the new ss 65B and 65C.

[4] We have initiated this matter to deal with the interaction between the amendments and the model modern award term concerning requests for flexible working arrangements (model flexible work term) and unpaid parental leave terms in modern awards.

[5] We set out below our *provisional* views in relation to these interaction issues and a proposal to address them, and seek the views of interested parties.

[6] We also set out *provisional* views concerning the interaction of both the flexible working arrangements and unpaid parental leave amendments with the model dispute resolution clause in modern awards.

Model flexible work term

[7] There are currently 122 modern awards which contain the model flexible work term.⁷ This term was inserted into modern awards during the 4 yearly review of modern awards (4 yearly review). The terms of the model flexible work term have largely been incorporated into the new s 65A which comes into operation on 6 June 2023. This raises a question as to whether the continued inclusion of the model flexible work term in modern awards is necessary and whether it may become a potential source of uncertainty. The model flexible work term is set out in **Annexure A**.

[8] To ensure consistency with the NES and to remove a potential source of uncertainty, our *provisional* view is that the 122 modern awards that contain the model flexible work term should be varied by removing the model term and replacing it with a reference to the NES, along with a note, as follows:

X. Requests for flexible working arrangements

Requests for flexible working arrangements are provided for in the NES.

NOTE: Disputes about requests for flexible working arrangements may be dealt with under clause X – Dispute resolution and / or under section 65B of the Act.

[9] The purpose of the note is to call attention to the two alternative and parallel avenues available in respect of disputes regarding flexible working arrangements.

Unpaid parental leave provisions in modern awards

[10] Consistent with our view that a note should be inserted in modern awards pertaining to the new flexible working arrangements dispute jurisdiction, and for the same reasons, we propose to insert a note pertaining to the new unpaid parental leave jurisdiction.

[11] Of the 121 industry and occupational awards (listed at **Annexure B**), 111 contain the following model parental leave clause:

X Parental leave and related entitlements

Parental leave and related entitlements are provided for in the NES.

[12] It is our *provisional* view that these 111 awards should be amended to include a note below the model clause referring to the new dispute resolution jurisdiction regarding extensions to unpaid parental leave, as follows:

NOTE: Disputes about requests for extensions to unpaid parental leave may be dealt with under clause X – Dispute resolution and / or under section 76B of the Act.

[13] Four industry and occupational awards do not contain any parental leave clause.⁸ It is our *provisional* view that the model parental leave clause with the above note should be inserted into these awards.

[14] The remaining six awards⁹ contain a parental leave clause differing from the model term, in that they contain additional employee entitlements related to parental leave that supplement those in the NES. Our *provisional* view is that the model parental leave clause, together with the note, should also be inserted into these awards, while retaining the supplementary parental leave entitlements.

Dispute resolution model terms

[15] In addition, it is also our *provisional* view that the following notes should be inserted into the dispute resolution model terms calling attention to the new statutory dispute resolution provisions as follows:

NOTE 1: In addition to clause X, a dispute resolution procedure for disputes regarding the NES entitlement to request flexible working arrangements is contained in section 65B of the Act.

NOTE 2: In addition to clause X, a dispute resolution procedure for disputes regarding the NES entitlement to request an extension to unpaid parental leave is contained in section 76B of the Act.

[16] Interested parties are invited to respond to our *provisional* views by **4:00 pm (AEST)** on **Friday, 16 June 2023**.

[17] In the absence of any submissions, final determinations amending 122 awards in accordance with our *provisional* views at paragraphs [8], [12], [13], [14] and [15] will be issued.



PRESIDENT

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Annexure A – Model flexible work term

XA. Requests for flexible working arrangements

XA.1 Employee may request change in working arrangements

Clause XA applies where an employee has made a request for a change in working arrangements under s.65 of the Act.

Note 1: Section 65 of the Act provides for certain employees to request a change in their working arrangements because of their circumstances, as set out in s.65(1A).

Note 2: An employer may only refuse a s.65 request for a change in working arrangements on 'reasonable business grounds' (see s.65(5) and (5A)).

Note 3: Clause XA is an addition to s.65.

XA.2 Responding to the request

Before responding to a request made under s.65, the employer must discuss the request with the employee and genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee's circumstances having regard to:

- (a) the needs of the employee arising from their circumstances;
- (b) the consequences for the employee if changes in working arrangements are not made; and
- (c) any reasonable business grounds for refusing the request.

Note 1: The employer must give the employee a written response to an employee's s.65 request within 21 days, stating whether the employer grants or refuses the request (s.65(4)).

Note 2: If the employer refuses the request, the written response must include details of the reasons for the refusal (s.65(6)).

XA.3 What the written response must include if the employer refuses the request

Clause XA.3 applies if the employer refuses the request and has not reached an agreement with the employee under clause XA.2.

- (a) The written response under s.65(4) must include details of the reasons for the refusal, including the business ground or grounds for the refusal and how the ground or grounds apply.
- (b) If the employer and employee could not agree on a change in working arrangements under clause XA.2, the written response under s.65(4) must:

- (i) state whether or not there are any changes in working arrangements that the employer can offer the employee so as to better accommodate the employee's circumstances; and
- (ii) if the employer can offer the employee such changes in working arrangements, set out those changes in working arrangements.

XA.4 What the written response must include if a different change in working arrangements is agreed

If the employer and the employee reached an agreement under clause XA.2 on a change in working arrangements that differs from that initially requested by the employee, the employer must provide the employee with a written response to their request setting out the agreed change(s) in working arrangements.

XA.5 Dispute resolution

Disputes about whether the employer has discussed the request with the employee and responded to the request in the way required by clause XA, can be dealt with under clause Y—Dispute Resolution.

Annexure B – List of 121 industry and occupational modern awards

- *Aboriginal and Torres Strait Islander Health Workers and Practitioners and Aboriginal Community Controlled Health Services Award 2020*
- *Aged Care Award 2010*
- *Air Pilots Award 2020*
- *Aircraft Cabin Crew Award 2020*
- *Airline Operations-Ground Staff Award 2020*
- *Airport Employees Award 2020*
- *Alpine Resorts Award 2020*
- *Aluminium Industry Award 2020*
- *Ambulance and Patient Transport Industry Award 2020*
- *Amusement, Events and Recreation Award 2020*
- *Animal Care and Veterinary Services Award 2020*
- *Aquaculture Industry Award 2020*
- *Architects Award 2020*
- *Asphalt Industry Award 2020*
- *Banking, Finance and Insurance Award 2020*
- *Black Coal Mining Industry Award 2020*
- *Book Industry Award 2020*
- *Broadcasting, Recorded Entertainment and Cinemas Award 2020*
- *Building and Construction General On-site Award 2020*
- *Business Equipment Award 2020*
- *Car Parking Award 2020*
- *Cement, Lime and Quarrying Award 2020*
- *Cemetery Industry Award 2020*
- *Children’s Services Award 2010*
- *Cleaning Services Award 2020*
- *Clerks—Private Sector Award 2020*
- *Coal Export Terminals Award 2020*
- *Commercial Sales Award 2020*
- *Concrete Products Award 2020*
- *Contract Call Centres Award 2020*
- *Corrections and Detention (Private Sector) Award 2020*
- *Cotton Ginning Award 2020*
- *Dredging Industry Award 2020*
- *Dry Cleaning and Laundry Industry Award 2020*
- *Educational Services (Post-Secondary Education) Award 2020*
- *Educational Services (Schools) General Staff Award 2020*
- *Educational Services (Teachers) Award 2020*
- *Electrical Power Industry Award 2020*
- *Electrical, Electronic and Communications Contracting Award 2020*
- *Fast Food Industry Award 2020*
- *Fire Fighting Industry Award 2020*
- *Fitness Industry Award 2020*
- *Food, Beverage and Tobacco Manufacturing Award 2020*
- *Funeral Industry Award 2020*
- *Gardening and Landscaping Services Award 2020*

- *Gas Industry Award 2020*
- *General Retail Industry Award 2020*
- *Graphic Arts, Printing and Publishing Award 2020*
- *Hair and Beauty Industry Award 2020*
- *Health Professionals and Support Services Award 2020*
- *Higher Education Industry-Academic Staff-Award 2020*
- *Higher Education Industry-General Staff-Award 2020*
- *Horse and Greyhound Training Award 2020*
- *Horticulture Award 2020*
- *Hospitality Industry (General) Award 2020*
- *Hydrocarbons Field Geologists Award 2020*
- *Hydrocarbons Industry (Upstream) Award 2020*
- *Joinery and Building Trades Award 2020*
- *Journalists Published Media Award 2020*
- *Labour Market Assistance Industry Award 2020*
- *Legal Services Award 2020*
- *Live Performance Award 2020*
- *Local Government Industry Award 2020*
- *Mannequins and Models Award 2020*
- *Manufacturing and Associated Industries and Occupations Award 2020*
- *Marine Tourism and Charter Vessels Award 2020*
- *Marine Towage Award 2020*
- *Maritime Offshore Oil and Gas Award 2020*
- *Market and Social Research Award 2020*
- *Meat Industry Award 2020*
- *Medical Practitioners Award 2020*
- *Mining Industry Award 2020*
- *Miscellaneous Award 2020*
- *Mobile Crane Hiring Award 2020*
- *Nursery Award 2020*
- *Nurses Award 2020*
- *Oil Refining and Manufacturing Award 2020*
- *Passenger Vehicle Transportation Award 2020*
- *Pastoral Award 2020*
- *Pest Control Industry Award 2020*
- *Pharmaceutical Industry Award 2020*
- *Pharmacy Industry Award 2020*
- *Plumbing and Fire Sprinklers Award 2020*
- *Port Authorities Award 2020*
- *Ports, Harbours and Enclosed Water Vessels Award 2020*
- *Poultry Processing Award 2020*
- *Premixed Concrete Award 2020*
- *Professional Diving Industry (Industrial) Award 2020*
- *Professional Diving Industry (Recreational) Award 2020*
- *Professional Employees Award 2020*
- *Racing Clubs Events Award 2020*
- *Racing Industry Ground Maintenance Award 2020*
- *Rail Industry Award 2020*

- *Real Estate Industry Award 2020*
- *Registered and Licensed Clubs Award 2020*
- *Restaurant Industry Award 2020*
- *Road Transport (Long Distance Operations) Award 2020*
- *Road Transport and Distribution Award 2020*
- *Salt Industry Award 2020*
- *Seafood Processing Award 2020*
- *Seagoing Industry Award 2020*
- *Security Services Industry Award 2020*
- *Silviculture Award 2020*
- *Social, Community, Home Care and Disability Services Industry Award 2010*
- *Sporting Organisations Award 2020*
- *State Government Agencies Award 2020*
- *Stevedoring Industry Award 2020*
- *Storage Services and Wholesale Award 2020*
- *Sugar Industry Award 2020*
- *Supported Employment Services Award 2020*
- *Surveying Award 2020*
- *Telecommunications Services Award 2020*
- *Textile, Clothing, Footwear and Associated Industries Award 2020*
- *Timber Industry Award 2020*
- *Transport (Cash in Transit) Award 2020*
- *Travelling Shows Award 2020*
- *Vehicle Repair, Services and Retail Award 2020*
- *Waste Management Award 2020*
- *Water Industry Award 2020*
- *Wine Industry Award 2020*
- *Wool Storage, Sampling and Testing Award 2020*

¹ *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) s 469A.

² *Ibid* ss 446-447.

³ *Ibid* s 459.

⁴ *Ibid* s 463.

⁵ *Ibid*.

⁶ *Ibid* Part 25B.

⁷ These are the 121 industry/occupational modern awards set out in **Annexure B** and one state-reference public sector modern award (the *Victorian Local Government Award 2015*).

⁸ *Aged Care Award 2010, Fitness Industry Award 2020, Social, Community, Home Care and Disability Services Industry Award 2010 and Children's Services Award 2010*.

⁹ *Higher Education Industry-Academic Staff-Award 2020, Higher Education Industry-General Staff-Award 2020, Airport Employees Award 2020, Educational Services (Post-Secondary Education) Award 2020, Fire Fighting Industry Award 2020 and State Government Agencies Award 2020*.