



DECISION

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

SYDNEY, 30 JUNE 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 – provisional views confirmed – additional variations to TOIL clauses.

[1] On 26 May 2023, we issued a statement¹ (May 2023 statement) in which we proposed several variations to modern awards in response to amendments to the *Fair Work Act 2009* (Cth) (FW Act) made by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (Amending Act). Relevantly, the Amending Act amended provisions of the National Employment Standards (NES) in Part 2-2 of the FW Act concerning requests for flexible working arrangements and requests to extend unpaid parental leave.

[2] We expressed the *provisional* view that, to ensure consistency with the NES and to remove a potential source of uncertainty, the 122 modern awards which contain a model term concerning requests for flexible working arrangements (the model flexible work term) should be varied by removing the model term and replacing it with a term referring to the NES, along with a note referring to the new dispute resolution jurisdiction under s 65B of the FW Act.²

[3] We also expressed *provisional* views to vary the 121 industry and occupational awards in respect of parental leave provisions as follows:

- In the 111 industry and occupational awards which contain a model term referring to parental leave provisions in the NES — by including a note in the clause which refers to the new dispute resolution jurisdiction regarding requests for extensions to unpaid parental leave under s 76B of the FW Act.
- In the four industry and occupational awards with no parental leave clause — by inserting the model term referring to the NES and the note.
- In the remaining six awards, which contain additional employee entitlements related to parental leave that supplement those in the NES — by inserting the model parental leave term referring to the NES, together with the note, while retaining the supplementary entitlements.³

[4] We further expressed the *provisional* view that notes should be inserted into the dispute resolution terms in modern awards to call attention to the new statutory dispute resolution provisions in ss 65B and 76B of the FW Act.⁴

[5] Interested parties were invited to respond to our provisional views by 4:00 pm (AEST) on Friday, 16 June 2023. In the absence of any submissions, we stated that final determinations amending 122 awards in accordance with our provisional views would be issued.

[6] The Australian Higher Education Industrial Association and the Australian Chamber of Commerce and Industry filed submissions in support of our provisional views. We received no other submissions in response.

[7] We confirm our *provisional* views and will vary the awards accordingly.

Model TOIL clause

[8] Since issuing the May 2023 statement, we have identified further provisions that require variation to ensure modern awards are consistent with the NES as amended by the Amending Act. The provisions concern requests for flexible working arrangements in modern awards which provide for time off in lieu of overtime (TOIL).

[9] During the 4 yearly review of modern awards (4 yearly review), a model TOIL clause was inserted into most modern awards. The model clause includes a provision stating that an employee may, under s 65 of the FW Act, request to take time off instead of being paid for overtime worked and that where an employer agrees to such a request, the terms of the model TOIL clause apply. The precise drafting of the provision varies between awards, but in all cases bar the three dealt with at paragraph [15] below, it is accompanied by the following note:

NOTE: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Act).

[10] The Full Bench decided to include the provision with its accompanying note in the model TOIL clause ‘out of an abundance of caution’, to make the relationship between an award TOIL clause and s 65 of the FW Act clear and to avoid any uncertainty about an employer’s obligations where a request for TOIL is made in circumstances where s 65 also applied.⁵

[11] The note references s 65(5) of the FW Act, which the Amending Act repealed.⁶ Section 65(5) had provided that an employer may refuse a request for flexible working arrangements on reasonable business grounds. The Amending Act also inserted s 65A,⁷ which sets out the obligations now applicable to employers when responding to requests for flexible working arrangements. Section 65A(3) provides the following as to when an employer may refuse a request:

- (3) The employer may refuse the request only if:
 - (a) the employer has:
 - (i) discussed the request with the employee; and
 - (ii) genuinely tried to reach an agreement with the employee about making changes to the employee’s working arrangements to accommodate the circumstances mentioned in subsection (1); and

- (b) the employer and the employee have not reached such an agreement; and
- (c) the employer has had regard to the consequences of the refusal for the employee; and
- (d) the refusal is on reasonable business grounds.

Note: An employer's grounds for refusing a request may be taken to be reasonable business grounds, or not to be reasonable business grounds, in certain circumstances: see subsection 65C(5).

[12] Thus, an employer may still refuse a request for flexible work arrangements on reasonable business grounds (s 65A(3)(d)). However, the employer must first have discussed the request with the employee and have genuinely tried to reach an agreement (s 65A(3)(a)) and must now also have regard to the consequences of any refusal for the employee (s 65A(3)(c)).

[13] We have determined to vary all 109 modern awards containing the note by replacing the reference to repealed s 65(5) with a reference to s 65A(3) of the FW Act.⁸ This includes the *Journalists Published Media Award 2020*, which does not contain the model TOIL clause but contains at cl 18.3(b) a similar TOIL clause that includes the note. This variation removes a potential source of confusion and uncertainty — a reference to a provision of the FW Act that no longer exists — and instead directs the readers to the current provision.

[14] We observe that while employers now have additional obligations before they can refuse a request for flexible working arrangements, we do not propose to make any further variations to the note that explicitly state these requirements. The note is not intended to be a complete reflection of the NES provisions concerning requests for flexible work arrangements and we do not consider further variations to be necessary to remove the uncertainty identified.

[15] The TOIL clauses in the *Fast Food Industry Award 2020*, *Hair and Beauty Industry Award 2020*, and *General Retail Industry Award 2020* contains a modified version of the note which includes a cross-reference to the model flexible work term in the award:

NOTE: Clause X—Requests for flexible working arrangements contains additional provisions to section 65 of the Act relating to requests for flexible working arrangements. If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Act).

[16] The cross-reference was inserted into the awards during the plain language re-drafting process in the 4 yearly review, with the Full Bench commenting that 'where a section of the Act is mentioned, it is prudent to provide a cross-reference to any related award clause'.⁹ However, to ensure consistency with the NES and remove a potential source of uncertainty, we have decided to remove the model flexible work term in each of these awards and to replace it with a reference to the NES. As a result, the cross-referenced clause will no longer contain 'additional provisions' to section 65 of the FW Act relating to requests for flexible working arrangements.

[17] We consider that the cross-reference to the flexible work term is therefore no longer desirable and may create confusion and uncertainty as to what additional provisions are set out. We have decided to vary the note in these awards by removing the cross-reference to the model

flexible work term and replacing the reference to s 65(5) with a reference to s 65A(3), so that it will be identical to the notes in the 109 other awards mentioned above, as follows:

NOTE: ~~Clause X Requests for flexible working arrangements contains additional provisions to section 65 of the Act relating to requests for flexible working arrangements.~~ If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section ~~65(5)~~ 65A(3) of the Act).

[18] Determinations varying the 122 awards as described above will be issued shortly. The operative date of the determinations will be 1 August 2023.



PRESIDENT

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Attachment A

- *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*
- *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*
- *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*
- *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*
- *Graphic Arts, Printing and Publishing Award 2020*
- *Health Professionals and Support Services Award 2020*
- *Higher Education Industry-General Staff-Award 2020*
- *Horse and Greyhound Training Award 2020*
- *Horticulture Award 2020*
- *Hospitality Industry (General) 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*
- *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*
- *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 and Distribution Award 2020*
- *Salt Industry Award 2020*
- *Seafood Processing 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*
 - *Victorian Local Government Award 2015*
 - *Waste Management Award 2020*
 - *Water Industry Award 2020*
 - *Wine Industry Award 2020*
 - *Wool Storage, Sampling and Testing Award 2020*
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¹ [2023] FWCFB 76.

² Ibid at [8].

³ Ibid at [12]-[14].

⁴ Ibid at [15].

⁵ [\[2015\] FWCFB 4466](#) at [111].

⁶ *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) Sch 1 item 458.

⁷ Ibid Sch 1 item 459.

⁸ The *Pastoral Award 2020* contains three instances of the note (at cls 35.6(j), 43.9(j) and 49.2(j)) and the *Clerks—Private Sector Award 2020* contains it twice (at cls 23.10 and 29.10). A list of all 109 awards containing the note is provided at Attachment A.

⁹ [\[2019\] FWCFB 1202](#) at [24].