STATEMENT

Fair Work Act 2009
ss.202(5), 205(3), 737(1), 768BK(1A)—Commission to determine model terms for enterprise agreements and the copied State instrument model term for settling disputes

Model terms for enterprise agreements and copied State instruments
(AG2024/3500, AG2024/3501, AG2024/3502, AG2024/3503)

JUSTICE HATCHER, PRESIDENT SYDNEY, 17 SEPTEMBER 2024

Commencement of process to make model terms for enterprise agreements and the copied State instrument model term for settling disputes – Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024 – proposed timetable and background paper.

Introduction

[1] The *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Closing Loopholes No 2 Act) received Royal Assent on 26 February 2024. Part 5 of Schedule 1 to the Closing Loopholes No 2 Act amends provisions of the *Fair Work Act 2009* (FW Act) such as to require the Commission to make new model terms for enterprise agreements and a new model disputes resolution term for copied State instrument. These terms are currently prescribed in the *Fair Work Regulations 2009* (Cth) (FW Regulations).

[2] Part 5 of Schedule 1 commences 12 months after Royal Assent, or earlier by proclamation.

[3] The amendments require the Commission to make the following model terms:

- a flexibility term for enterprise agreements;
- a consultation term for enterprise agreements;
- a term about dealing with disputes for enterprise agreements; and
- a term for settling disputes about matters arising under a copied State instrument for a transferring employee.

[4] My statement of 27 February 2024 outlined the Commission's approach to implementing the Closing Loopholes No 2 Act amendments, including the making of model terms. I noted that these matters will require extensive consultation with stakeholders and the constitution of a Full Bench to consider the content of the new model terms. This statement provides an overview of the legislative changes relating to model terms and sets out a draft timetable for the consultation and engagement process.

[5] In order to assist the consultation and engagement process, Commission staff have prepared a background paper, which is published with this statement. The background paper:

- provides an overview of the relevant legislative provisions relating to model terms in enterprise agreements;
- analyses data from the Workplace Agreements Database on the types of flexibility and dispute resolution terms (model or otherwise) incorporated into enterprise agreements approved between 1 January 2020 and 31 March 2024;
- identifies where flexibility, consultation and dispute resolution terms found in enterprise agreements commonly depart from the existing model terms and provides examples of such terms; and
- examines the standard clauses found in all modern awards in relation to individual flexibility arrangements, consultation about major workplace change, consultation about changes to rosters or hours of work and dispute resolution.

Existing requirements

[6] Division 5 of Part 2-4 of the FW Act deals with mandatory terms of enterprise agreements. Relevantly, these include a flexibility term (s 202(1)) and a consultation term (s 205(1)).

Flexibility term

[7] Section 202(1) of the FW Act provides:

> (1) An enterprise agreement must include a term (a ***flexibility term***) that:
>
> (a) enables an employee and his or her employer to agree to an arrangement (an ***individual flexibility arrangement***) varying the effect of the agreement in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer; and
> (b) complies with section 203.

[8] Section 203 sets out the requirements a flexibility term must meet. Section 202(4) provides that if an enterprise agreement does not include a flexibility term, the model flexibility term is taken to be a term of the agreement.

Consultation term

[9] Section 205(1) of the FW Act provides:

> (1) An enterprise agreement must include a term (a ***consultation term***) that:
>
> (a) requires the employer or employers to which the agreement applies to consult the employees to whom the agreement applies about:

(i) a major workplace change that is likely to have a significant effect on the employees; or
(ii) a change to their regular roster or ordinary hours of work;[1] and

(b) allows for the representation of those employees for the purposes of that consultation.

[10] Section 205(2) provides that if an enterprise agreement does not include a consultation term, or if the consultation term is an objectionable emergency management term (defined in s 195A), the model consultation term is taken to be a term of the agreement.

Term about dealing with disputes

[11] Division 4 of Part 2-4 of the FW Act deals with the approval of enterprise agreements. Section 186(6) requires that before approving an enterprise agreement, the Commission must be satisfied that it includes a term:

(a) that provides a procedure that requires or allows the FWC, or another person who is independent of the employers, employees or employee organisations covered by the agreement, to settle disputes:
(i) about any matters arising under the agreement; and
(ii) in relation to the National Employment Standards; and
(b) that allows for the representation of employees covered by the agreement for the purposes of that procedure.

Term for copied State instruments about dealing with disputes

[12] Part 6-3A of the FW Act provides for the transfer of certain terms and conditions of employment when there is a transfer of business from a State public sector employer to a national system employer. The transfer of terms and conditions is achieved by the creation of a new instrument, a 'copied State instrument', for each transferring employee. The new instrument is a federal instrument and is enforceable under the FW Act.[2]

[13] Division 8 of Part 6-3A sets out special rules for copied State instruments. Existing s 768BK provides:

(1) If a copied State instrument for a transferring employee does not include a term that provides a procedure for settling disputes about matters arising under the instrument, then the instrument is taken to include the model term that is prescribed by the regulations for settling disputes about matters arising under a copied State instrument for a transferring employee.

Note: This section deals with the situation where the original State award or original State agreement for the copied State instrument did not include a term about settling disputes about matters arising under the award or agreement.

(2) For the purposes of subsection (1), the model term prescribed for a copied State award for a transferring employee may be the same or different from the model term prescribed for a copied State employment agreement for a transferring employee.

Changes made by the amendments

[14] The FW Act (at ss 202(5), 205(3), 737 and 768BK(1)) currently requires each of the model terms to be prescribed in the FW Regulations.

[15] Part 5 of Schedule 1 amends the FW Act to provide instead that the Commission must determine each model term (new ss 202(5), 205(3), 737(1) and 768BK(1A)). New s 616(4A) requires a Full Bench of the Commission to determine each of these model terms.

[16] Determinations of model terms will be legislative instruments. However, they will not be subject to disallowance under s 42 of the *Legislation Act 2003* (Cth) (new ss 202(7), 205(6), 737(3) and 768BK(4)).

[17] The Revised Explanatory Memorandum (EM) for the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* describes the amendments in Part 5 as follows at [71]:

> The amendments empowering the FWC to determine the model terms for enterprise agreements and copied State instruments require the FWC to consider 'best practice' workplace relations and whether all persons and bodies have had a reasonable opportunity to be heard and make submissions before making the determinations. It is intended that this would ensure the ongoing relevancy of the model terms as well as facilitating greater public consultation in the determination of the model terms.

[18] New ss 202(6)(b), 205(4)(b), 737(2)(b) and 768BK(3) set out the matters the Commission must take into account in determining the model terms. These are:

- whether the model term is broadly consistent with comparable terms in modern awards;
- best practice workplace relations as determined by the Commission;
- whether all persons and bodies have had a reasonable opportunity to be heard and make submissions to the Commission for consideration in determining the model term;
- the object of the Act (see s 3);
- for the model flexibility and consultation terms, the objects of Part 2-4 (see s 171);
- 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);
- 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
- any other matters the Commission considers relevant.

[19] The Commission must also ensure that:

- the model flexibility term is consistent with s 202(1) (see s 202(6)(a));
- the model consultation term is consistent with ss 205(1) and (1A) (see s 205(4)(a)); and
- the model term for dealing with disputes is consistent with the requirements in s 186(6) (see s 737(2)(a)).

Transitional provisions

[20] Clause 107 of Schedule 1 to the Closing Loopholes No 2 Act provides that the existing provisions will continue to apply to an enterprise agreement if:

- before the commencement of Part 5 of Schedule 1, the employer asks the employees to vote to approve the agreement; and
- by that vote, the employees approve the agreement; and
- the Commission approves the agreement.

[21] In relation to copied State instruments, existing section 768BK will apply in relation to a model term that is taken, before commencement, to be a term of a copied State instrument (cl 108).

Proposed timetable for determining model terms

[22] The timetable proposed below aims to facilitate a comprehensive and inclusive consultation process, ensuring all stakeholders have an opportunity to contribute to the development of the model terms. In preparing the timetable, I have considered the timetable for the gender undervaluation – priority awards review.

Date	Task or event
Fortnight beginning 14 October 2024	Consultations with peak councils
1 November 2024	Parties to lodge submissions on proposed model terms
22 November 2024	Parties to lodge submissions in reply
3 December 2024	Public consultation session with interested parties
20 December 2024	Draft model terms published for comment
31 January 2025	Comments on draft model terms due
Not later than 17 February 2025	Final determinations
26 February 2025 (or earlier by proclamation)	Commencement

[23] Any comments on the draft timetable should be sent to chambers.hatcher.j@fwc.gov.au by **5:00 pm (AEST) on Monday, 23 September 2024**. I propose to issue a further statement in the week commencing 23 September 2024 finalising the timetable based on the comments received.

[24] Once the timetable has been finalised, this matter will be allocated to a Full Bench comprising Vice President Gibian, Deputy President Dobson and Deputy President Butler.

PRESIDENT

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[1] Section 205(1A) of the FW Act sets out what a consultation term must require of an employer for a change to the employees' regular roster or ordinary hours of work.

[2] FW Act s 768AA.