Fair Work (Model Terms) Determination 2025

EXPLANATORY STATEMENT

(issued by the authority of the Fair Work Commission as constituted by the Full Bench comprising Vice President Gibian, Deputy President Dobson and Deputy President Butler)

Authority

Part 5 of Schedule 1 to the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) (Amending Act) amends the *Fair Work Act 2009* (Cth) (Fair Work Act) so as to require a Full Bench of the Fair Work Commission (FWC) to determine, by legislative instrument, the following terms (model terms):

- model flexibility term for enterprise agreements (section 202(5) of the Fair Work Act as amended)
- model consultation term for enterprise agreements (section 205(3) of the Fair Work Act as amended)
- model term for dealing with disputes for enterprise agreements (section 737(1) of the Fair Work Act as amended), and
- model term for settling disputes about matters arising under a copied State instrument for a transferring employee (section 768BK(1A) of the Fair Work Act as amended).

The amendments commence on 26 February 2025 (unless proclaimed earlier).

Section 4(1) of the *Acts Interpretation Act 1901* (Cth) (AI Act) as in force on 25 June 2009, provides that where an Act that does not come into operation immediately is expressed to confer a power to make an instrument, unless the contrary intention appears, the power may be exercised, and anything may be done for the purpose of enabling exercise of the power, before the Act comes into operation as if it had come into operation.

Section 42 (disallowance) of the *Legislation Act 2003* (Cth) (Legislation Act) does not apply to the determination of a model term—see clause 109 of Schedule 1 to the Fair Work Act and sections 202(7), 205(6), 737(3) and 768BK(4) of the Fair Work Act as amended.

Purpose of the Fair Work (Model Terms) Determination 2025

Under the Fair Work Act:

- if an enterprise agreement does not include a 'flexibility term' as defined in section 202(1), the model flexibility term for enterprise agreements is taken to be a term of the agreement (section 202(4))
- if an enterprise agreement does not include a 'consultation term' as defined in section 205(1) or the consultation term is an objectionable emergency management term, the model consultation term for enterprise agreements is taken to be a term of the agreement (section 205(2))
- the model term for dealing with disputes for enterprise agreements is required to be determined (but is not given effect under the Act) (section 737), and

- if a copied State instrument for a transferring employee does not include a procedure for settling disputes about matters arising under the instrument, the model term for settling disputes about matters arising under a copied State instrument for a transferring employee is taken to be a term of the instrument (section 768BK(1)).

Presently, the model terms are prescribed respectively in Schedules 2.2, 2.3, 6.1 and 6.1A to the *Fair Work Regulations 2009*.

Part 5 of the amending Act amends the Fair Work Act to require a Full Bench of the FWC to determine the model terms, by legislative instrument. The matters the Full Bench must ensure and must take into account in determining each of the model terms are set out respectively in sections 202(6), 205(4), 737(2) and 768BK(3) of the Fair Work Act as amended.

The *Fair Work (Model Terms) Determination 2025* (Determination) determines the model terms, which are at Schedules 1–4 of the Determination.

Details

Details of the Determination are in **Attachment A**.

Consultation on the Determination

In accordance with section 17 of the Legislation Act, the FWC has consulted with persons having expertise in fields that are relevant to the model terms and has given persons likely to be affected by the model terms an adequate opportunity to comment on their proposed content.

The consultation process has included:

- on 17 September 2024 the President of the FWC published a Statement that included a proposed timetable for determining the model terms
- on 17 September 2024 the FWC published a 'Background Paper: Model terms for enterprise agreements' prepared by FWC staff to promote discussion and facilitate consultations
- on 26 September 2024 the President of the FWC published a Statement confirming the timetable for determining the model terms
- in the fortnight beginning 14 October 2024 the FWC held consultations with stakeholder peak councils—the Australian Council of Trade Unions (ACTU), Australian Industry Group, Australian Chamber of Commerce and Industry, and Council of Small Business Organisations Australia
- interested persons were invited to lodge written submissions by 1 November 2024. Some 11 submissions were lodged
- interested persons were invited to lodge written submissions in reply by 28 November 2024. Some 12 submissions in reply were lodged
- on 3 December 2024, the FWC held an in-person public consultation sessions with interested persons in Sydney and an online session for those unable to attend in person
- following these consultations and taking into account the views of the peak councils and other interested persons received during this process, the FWC developed draft model terms and published them for comment on 20 December 2024, and

- interested persons were invited to comment on the draft model terms by 31 January 2025. Some 16 written submissions were received.

Throughout the consultation process updates have been published on the FWC's website on a dedicated webpage and via the FWC's general announcements subscription service.

Some amendments were made to the draft model terms in response to comments received through the consultation process. In determining the model terms, the FWC has taken into account the views of all interested persons that it received during the consultation process.

The FWC is satisfied that the appropriate and reasonably practicable consultation has been undertaken.

Impact Analysis

As required by the Australian Government's best practice regulation requirements, the Office of Impact Assessment was consulted on 14 August 2024 as to whether an Impact Analysis in respect of the Determination was required.

The Office of Impact Assessment advised that a detailed analysis was not required because the proposal did not represent a significant difference from the status quo, based on the likely costs or benefits per annum to Australian businesses, community organisations and/or individuals (reference number OIA24-07930).

Statement of compatibility with human rights

No statement of compatibility in respect of the Determination is required, as section 42 of the Legislation Act does not apply—see section 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

ATTACHMENT A

Details of the Fair Work (Model Terms) Determination 2025

Clause 1 Name

This clause provides that the name of the instrument is the *Fair Work (Model Terms) Determination 2025.*

Clause 2 Commencement

This clause provides that the Determination commences on the later of: the day after the determination is registered, and the day on which Part 5 of Schedule 1 to the Amending Act commences.

Clause 3 Authority

This clause notes that the Determination is made under sections 202(5), 205(3), 737(1) and 768BK(1A) of the Fair Work Act as amended.

Clause 4 Definitions

This clause contains definitions used in the Determination.

Clause 5 Model flexibility term for enterprise agreements

This clause provides that for the purposes of section 202(5) of the Fair Work Act as amended, the model flexibility term for enterprise agreements is set out in Schedule 1 to the Determination.

Clause 6 Model consultation term for enterprise agreements

This clause provides that for the purposes of section 205(3) of the Fair Work Act as amended, the model consultation term for enterprise agreements is set out in Schedule 2 to the Determination.

Clause 7 Model term for enterprise agreements about dealing with disputes

This clause provides that for the purposes of section 737(1) of the Fair Work Act as amended, the model term for dealing with disputes for enterprise agreements is set out in Schedule 3 to the Determination.

Clause 8 Model term for copied State instruments about dealing with disputes

This clause provides that for the purposes of section 768BK(1A) of the Fair Work Act as amended, the model term for settling disputes about matters arising under a copied State instrument for a transferring employee is set out in Schedule 4 to the Determination.

Schedule 1—Model flexibility term for enterprise agreements

Paragraphs 1 to 10

These paragraphs deal with individual flexibility arrangements agreed between an employer and employee that will vary the effects of the enterprise agreement.

Paragraph 1 provides the five matters that can be dealt with by agreement between an employer and employee in an individual flexibility arrangement that meets the genuine needs of both. The five matters are:

- arrangements about when work is performed
- overtime rates
- penalty rates
- allowances, and
- leave loading.

Paragraph 1 also provides that an individual flexibility arrangement must be genuinely agreed to by the employer and employee, without coercion or duress.

Paragraph 2 states that an individual flexibility arrangement may only be made after the employee has commenced employment with the employer.

Paragraph 3 provides the steps to be taken when an employer wishes to initiate an individual flexibility arrangement with an employee. The employer must give the employee a written proposal and take reasonable steps to ensure the employee understands the proposal if the employee may have a limited understanding of written English.

Paragraph 4 provides that where the employer proposes an individual flexibility arrangement and an employee requests a meeting with the employer to discuss the proposal, the employer must agree to such a meeting.

Paragraph 5 provides that the employer has the responsibility to ensure that the terms proposed in an individual flexibility arrangement are permitted and not unlawful under sections 172 and 194 of the Fair Work Act, respectively, and that the employee will be better off overall under the arrangement than if there was no arrangement agreed.

Paragraph 6 provides a list of requirements the employer must ensure are met in the individual flexibility arrangement. The arrangement must:

- be in writing
- include the names and signatures of the employer and employee, and signature of a parent or guardian if the employee is under 18 years of age
- include details of the terms of the enterprise agreement that are varied, the effect of the variation and explain how the employee is better off overall as a result of the arrangement
- state the day on which the arrangement commences, and
- how the arrangement can be terminated in accordance with paragraph 8 of the Model term.

Paragraph 7 states that the employer must give a copy of the agreed individual flexibility arrangement to the employee within 14 days of the agreement.

Paragraph 8 provides how an individual flexibility arrangement may be terminated. Termination may occur by agreement in writing between the employer and employee or by either party giving 28 days written notice to the other party.

Paragraph 9 confirms that where the arrangement is to be terminated under paragraph 8 by giving 28 days written notice, the arrangement ceases at the end of the 28 day notice period.

Paragraph 10 provides that if there is a dispute about a matter dealt with in the individual flexibility arrangement, the dispute settlement procedure in the enterprise agreement may be used.

The Note to these paragraphs draws attention to the additional right for some employees to request flexible working arrangements in certain circumstances under the National Employment Standards of the Fair Work Act.

Schedule 2—Model consultation term for enterprise agreements

Paragraphs 1 to 19

These paragraphs deal with the consultation obligations of employers.

Paragraph 1 states that this term will apply when an employer has decided to introduce a major change in the workplace that is likely to have a significant effect on employees. The change may be to the production, program, organisation, structure or technology of the workplace. This term also applies if the employer proposes to change the regular roster or ordinary hours of work.

Paragraphs 2 to 11 deal with the consultation required by the employer where there is major workplace change. Paragraphs 12 to 18 deal with the consultation required where there is a proposed change to the regular roster or ordinary hours of work.

Paragraph 2 provides that when an employer has decided to introduce a major change in the workplace, the employer must notify the decision to the relevant employees, and that paragraphs 3 to 9 of this Schedule will apply.

Paragraph 3 enables the relevant employee or employees to advise the employer that they have a representative for the purposes of the consultation procedures in relation to a major workplace change. The representative can be a person or employee organisation.

Paragraph 4 provides that if an employer is advised that there is an identified employee representative of a relevant employee or employees, then the employer must recognise the representative.

Paragraph 5 states that the employer must notify relevant employees and any representatives of the decision to introduce the major workplace change.

Paragraph 6 outlines the requirements for employee and representative consultation by the employer, as soon as practicable after the decision is made. The employer must consult with employees and any representatives, including by discussing with them: the introduction of the change; the effect it is likely to have on employees; and the measures to avoid or reduce any adverse effect of the change on the employees. The employer must provide relevant employees and their representatives written information about:

- the nature of the change
- the reasons for the change
- the expected effects of the change on employees, and
- any other matter that is likely to affect the employees.

Paragraph 7 states the employer is not required to disclose confidential or commercially sensitive information to the relevant employees or any representatives as part of the consultation process.

Paragraph 8 provides an obligation on employers to give consideration in a prompt and genuine manner to matters raised by the employees and any representatives about the major workplace change.

Paragraph 9 provides that the employer needs to take reasonable steps to communicate the outcome of the consultation process with the employees and any representatives. This

communication is to include the consideration that the employer gave to matters that were raised by the employees and any representatives.

Paragraph 10 provides that the consultation requirements in paragraphs 3 to 9 do not apply if the enterprise agreement provides for the introduction of a major workplace change in relation to the employer's enterprise.

Paragraph 11 defines a major workplace change that is "likely to have a significant effect on employees" as involving:

- termination of employment
- major change in composition, operation or size of the employer's workforce
- major change to the skills required of employees
- loss or reduction in job or promotion opportunities
- loss of or reduction in job tenure or job security
- alteration of hours of work
- the need for retraining or transfer to other work or locations, or
- job restructuring.

Paragraph 12 provides that where there is a proposed change in relation to the regular roster or ordinary hours of work of employees, the employer must notify the relevant employees and any representatives in writing of the proposed change. The consultation process outlined in paragraphs 13 to 18 of this Schedule will apply.

Paragraph 13 repeats paragraph 3 and provides for employee representation advice to the employer.

Paragraph 14 repeats paragraph 4 to require the employer to recognise an identified representative of an employee or employees.

Paragraph 15 provides that as soon as practicable after introducing the proposed change, the employer must consult with relevant employees and any representatives about the introduction of the change, including discussing the change with them. The employer is to provide the relevant employees and any representatives with:

- all relevant information about the change, including the nature and duration of the change
- the employer's reasonable belief as to the effects of the change on employees, including any effect on employee remuneration
- information about any other matter that the employer reasonably believes might impact the employee, and
- an invitation for employees and any representatives to give their views about the impact of the change, including any impact on the employees' family or caring responsibilities.

Paragraph 16 repeats paragraph 7 to exclude confidential or commercially sensitive information from having to be disclosed to employees and any representatives as part of the consultation process.

Paragraph 17 repeats paragraph 8 in relation to the employer's obligation to give prompt and genuine consideration to any matters raised by employees or any representatives about the proposed change.

Paragraph 18 essentially repeats paragraph 9 and provides that the employer will take reasonable steps to communicate the outcome of the consultation process involving the proposed change to the regular roster or ordinary hours of work. This communication will include the consideration given by the employer to the matters raised by the employees and any representatives in response to the proposed change.

Paragraph 19 defines “relevant employees” to be employees who may be affected by a major workplace change or a proposed change to the regular roster or ordinary hours of work as outlined in Paragraph 1.

Schedule 3—Model term for enterprise agreements about dealing with disputes

Paragraphs 1 to 10

These paragraphs outline the procedures to settle a dispute that might arise between parties to an enterprise agreement.

Paragraph 1 provides that these procedures will apply if a dispute relates to a matter arising under the enterprise agreement or relates to the National Employment Standards.

Paragraph 2 describes who can be a party to a dispute under these procedures. These include:

- an employee or employees covered by the agreement who are or will be affected by the dispute
- the employer or employers covered by the agreement, and
- an employee organisation who has a member it is entitled to represent that is or will be affected by the dispute or who is covered by the enterprise agreement and is entitled to the benefit of, or has a role or responsibility in relation to, the matter in dispute.

Paragraph 3 provides that an employee party to a dispute may advise the employer of their representative, who can be another person or employee organisation.

Paragraph 4 provides that the parties to a dispute must first try and resolve the dispute at the workplace. This is to occur by discussion between the relevant employee(s), relevant supervisors and/or management and any relevant employee organisation.

Paragraph 5 provides for referral to the FWC if the discussions at the workplace level required in paragraph 4 do not resolve the dispute.

Paragraph 6 allows the FWC to deal with the dispute even if discussions did not occur at the workplace level first as set out in paragraph 4 if the FWC is satisfied it is appropriate for it to deal with the dispute.

Paragraph 7 permits the FWC to deal with the dispute before it in two stages. The first stage is to attempt to resolve the dispute in a manner the FWC considers appropriate, which may be through mediation, conciliation, the expression of an opinion or the making of a recommendation. The second stage is only available if the dispute cannot be resolved by the FWC at the first stage. The second stage enables the FWC to arbitrate the dispute and make a binding determination.

Paragraph 8 outlines the process for FWC arbitration of the dispute. The FWC may use any of the powers available to it under the Fair Work Act, including granting interim relief, and any decision made by it is a decision for the purposes of Division 3 of Part 5-1 of the Fair Work Act. Accordingly, a person aggrieved by the decision on arbitration may seek to appeal the decision as provided for in the Fair Work Act.

Paragraph 9 provides that unless an order is made by the FWC under paragraph 8 of this Schedule, whilst the dispute is being resolved under these procedures, the employee must:

- continue to perform work as they normally would unless the employee has a reasonable concern about an imminent risk to health and safety, and

- comply with a direction from the employer to perform other available work at the same workplace or another workplace, unless:
    - the work is not safe
    - the work is not permitted to be performed under applicable occupational health and safety legislation
    - the work is inappropriate for the employee to perform, or
    - the refusal to comply is based on other reasonable grounds.

Paragraph 10 provides that the parties to a dispute agree to be bound by the FWC's decision.

The Note to this Schedule draws attention to additional dispute resolution procedures in the Fair Work Act in relation to a request for flexible working arrangements under section 65B, change in casual employment status under section 66M, a request for an extension to unpaid parental leave under section 76B and the exercise of an employee's right to disconnect under section 333N.

Schedule 4—Model term for copied State instruments about dealing with disputes

Paragraphs 1 to 10

Paragraph 1 outlines that these are the procedures to use to settle a dispute that arises under a copied State instrument. These paragraphs reflect those in the Model term for enterprise agreements set out in section 7 and Schedule 3 of the Determination.

Paragraph 2 outlines who can be a party to a dispute under these procedures. The parties can be:

- the employee(s) covered by the copied State instrument who are or will be affected by the dispute
- the employer(s) covered by the copied State instrument, and
- an employee organisation who has a member it is entitled to represent that is or will be affected by the dispute or who is covered by the State instrument and is entitled to the benefit of, or has a role or responsibility in relation to, the matter in dispute.

Paragraph 3 enables an employee party to a dispute to advise the employer of their representative for the purposes of the dispute.

Paragraphs 4 to 10 outline the dispute resolution processes.

Paragraph 4 provides that the parties to a dispute must first try and resolve the dispute at the workplace. This is to occur by discussion between the relevant employee(s), relevant supervisors and/or management and any relevant employee organisation.

Paragraph 5 provides for referral to the FWC if the discussions at the workplace level required in paragraph 4 do not resolve the dispute.

Paragraph 6 allows the FWC to deal with the dispute even if discussions did not occur at the workplace level first as set out in paragraph 4 if the FWC is satisfied it is appropriate for it to deal with the dispute.

Paragraph 7 permits the FWC to deal with the dispute before it in two stages. The first stage is to attempt to resolve the dispute in a manner the FWC considers appropriate, which may be through mediation, conciliation, the expression of an opinion or the making of a recommendation. The second stage is only available if the dispute cannot be resolved by the FWC at the first stage. The second stage enables the FWC to arbitrate the dispute and make a binding determination.

Paragraph 8 outlines the process for FWC arbitration of the dispute. The FWC may use any of the powers available to it under the Fair Work Act, including the power to grant interim relief, and any decision made by it is a decision for the purposes of Division 3 of Part 5-1 of the Fair Work Act. Accordingly, a person aggrieved by the decision on arbitration may seek to appeal the decision as provided for in the Fair Work Act.

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- continue to perform work as they normally would unless the employee has a reasonable concern about an imminent risk to health and safety, and

- comply with a direction from the employer to perform other available work at the same workplace or another workplace, unless:
    - the work is not safe
    - the work is not permitted to be performed under applicable occupational health and safety legislation
    - the work is inappropriate for the employee to perform, or
    - the refusal to comply is based on other reasonable grounds.

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The Note to this Schedule draws attention to additional dispute resolution procedures in the Fair Work Act in relation to a request for flexible working arrangements under section 65B, change in casual employment status under section 66M, a request for an extension to unpaid parental leave under section 76B and the exercise of an employee's right to disconnect under section 333N.