DECISION

Fair Work Act 2009
ss.202(5), 205(3), 737(1), 768BK(1A) - Commission to determine model consultation term 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)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT DOBSON
DEPUTY PRESIDENT BUTLER

SYDNEY, 20 FEBRUARY 2025

Determination of model terms with respect to flexibility arrangements, consultation and dealing with disputes for enterprise agreements and dealing with disputes for copied State instruments under ss 202(5), 205(3), 737(2) and 768BK(1A) of the Fair Work Act 2009 (Cth) – Whether broadly consistent with comparable terms in modern awards – Best practice workplace relations – Opportunity of interested person and bodies to be heard and make submissions – Consideration of the objects of the Act and the objects of Part 2-4 – Determination of model terms.

Introduction and background

[1] The *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) (**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* (Cth) (the **Act**) so as to require the Fair Work Commission (the **Commission**) to make new model terms for enterprise agreements and a new model disputes resolution term for copied State instruments. These model terms are currently prescribed in the *Fair Work Regulations 2009* (Cth) (the **Regulations**).[1]

[2] Part 5 of Schedule 1 commences 12 months after Royal Assent, or earlier by proclamation. No such proclamation has been made such that the new provisions will commence on 26 February 2025.

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

(a) a flexibility term for enterprise agreements;
(b) a consultation term for enterprise agreements;
(c) a term about dealing with disputes for enterprise agreements; and
(d) a term for settling disputes about matters arising under a copied State instrument for a transferring employee.

[4] Section 616(4A) of the Act, which is also enacted by the Closing Loopholes No 2 Act, requires that a determination of any of those model terms must be made by a Full Bench of the Commission. The Commission initiated a major case for the purpose of enabling consultation with relevant stakeholders and the constitution of a Full Bench to consider the content of the new model terms.[2] On 17 September 2024, these matters were allocated to this Full Bench.

[5] In order to assist the consultation and engagement process, Commission staff prepared a background paper which was published together with a statement of the President of the Commission on 17 September 2024.[3] The background paper:

(a) provided an overview of the relevant legislative provisions relating to model terms in enterprise agreements;
(b) analysed 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;
(c) identified 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
(d) examined 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.

[6] The statement issued by the President dated 17 September set out a proposed timetable for consultation with stakeholders in relation to the new model terms required to be made by the Commission.[4] The timetable was prepared in order to ensure that new model terms would be able to be made by the Commission on 26 February 2025 when the relevant amendments commence.

[7] In accordance with the timetable proposed by the President, the Full Bench conducted consultation with peak councils on 25 November 2025. Representatives of the Australian Council of Trade Unions (**ACTU**), the Australian Industry Group (**Ai Group**), the Australian Chamber of Commerce and Industry (**ACCI**) and the Council of Small Business Organisations Australia (**CoSBOA**) attended the consultation.

[8] Interested parties were invited to file submissions on or before 1 November 2024. On or around 1 November 2024, the Commission received written submissions from the following groups/organisations:

(a) Ai Group;
(b) ACCI;
(c) National Electrical and Communications Association (**NECA**);
(d) Australian Retailers Association (**ARA**);
(e) The Business Council of Australia (**BCA**);
(f) ACTU;
(g) Australian Manufacturing Workers' Union (**AMWU**);

(h) Australian Nursing and Midwifery Federation (**ANMF**);
(i) United Workers' Union (**UWU**);
(j) Community and Public Sector Union - PSU-Group (**CPSU (PSU-Group)**); and
(k) CoSolve.

[9] Submissions in reply were invited to be filed on or before 22 November 2025. The Commission received written submissions in reply from the following groups/organisations on or around 22 November 2024:

(a) Construction, Forestry and Maritime Employees Union (Construction & General Division);
(b) Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**);
(c) AMWU;
(d) CPSU (PSU-Group);
(e) ANMF;
(f) ACTU;
(g) BCA;
(h) ACCI;
(i) CoSBOA;
(j) ARA;
(k) Ai Group; and
(l) Australian Resources & Energy Employer Association (**AREEA**).

[10] The Full Bench conducted a public consultation session attended by interested parties on 3 December 2024. Parties appeared both before the Full Bench in person in Sydney and remotely using Microsoft Teams and the Full Bench received oral submissions from some interested groups and organisations to supplement the written submissions that had been filed with the Commission.

[11] On 20 December 2024, the Full Bench published a statement.[5] Annexed to the statement were a draft model flexibility term for enterprise agreements, a draft model consultation term for enterprise agreements, a draft model term for dealing with disputes for enterprise agreements and a draft model term for settling disputes about matters arising under a copied State instrument for a transferring employee. The statement indicated that the draft model terms did not represent the final views of the Full Bench and were being published for the purpose of permitting interested parties to submit comments for the Full Bench to consider. Interested parties were encouraged to make submissions on any aspects of the draft model terms. In addition, the Full Bench specifically invited submissions with respect to the trigger for a consultation obligation to arise in the model consultation term.

[12] Written submissions were invited in response to the draft model terms published with the statement of 20 December 2024. On or around 31 January 2025, submissions in response to the draft model terms were received from:

(a) The Mining and Energy Union (**MEU**);
(b) ACCI;
(c) ACTU;
(d) Ai Group;
(e) AMWU;
(f) ANMF;
(g) ARA;
(h) AREEA;
(i) Australian Services Union (**ASU**);
(j) BCA;
(k) Business New South Wales and Australian Business Industrial;
(l) CEPU;
(m) CFMEU (Construction & General Division)
(n) Clubs Australia;
(o) CoSBOA; and
(p) CPSU (PSU-Group).

[13] The Full Bench has considered all of the submissions which have been filed. The Commission appreciates the work which has been put into the submissions it has received and has benefited from the written submissions and the public consultation.

[14] The process of consultation and submissions has been conducted in a relatively short timeframe as a result of the impending commencement of Part 5 of Schedule 1 to the Closing Loopholes No 2 Act. As we will discuss further below, the model flexibility term and model consultation term for enterprise agreements are taken to be a term of an enterprise agreement if the agreement does not contain a flexibility term or consultation term which complies with the requirements of the Act.[6] Further, if a copied State instrument for transferring employees does not include a term that provides a procedure for setting disputes about matters arising under the instrument, the instrument will be taken to include the model term determined by the Commission in that respect after 26 February 2025.[7]

[15] The Closing Loopholes No 2 Act added clause 107 to Schedule 1 to the Act to make transitional provisions for the amendments made with respect to the determination of the model terms. Clause 107 of Schedule 1 provides:

> **107 Model terms and enterprise agreements**
>
> (1) Despite the amendments made by Part 5 of Schedule 1 to the amending Act, sections 202, 205 and 737, as in force immediately before the commencement of that Part, continue to apply in relation to an enterprise agreement if:
>
> (a) before that commencement, the employer concerned asks the employees to approve the agreement by voting for it; and
> (b) by that vote, the employees approve the agreement; and

> (c) the FWC approves the agreement.
>
> (2) In deciding, after the commencement of that Part, whether to approve the agreement mentioned in subclause (1) (in that form), the FWC must disregard the amendments made by that Part.

[16] The consequence is that ss 202, 205 and 737 of the Act as they existed before the amendments will continue to apply to an enterprise agreement if the employer concerned asked the employees to approve the agreement prior to their commencement. Clause 108 of Schedule 1 also provides that s 768BK, as in force before the amendments, continues to apply in relation to a model term that is taken to be a term of a copied State instrument prior to the amendments. Otherwise, the new model terms to be determined by the Commission will apply with respect to enterprise agreements where the employer asks employees to approve the agreement after the amendments and to copied State instruments which are taken to come into existence after the commencement of the amendments.

[17] In those circumstances, it is important that the Commission determine the model terms such that they can operate from the commencement of the amendments on 26 February 2025. The Full Bench has made determinations to ensure that is the case. One consequence of the function of determining the relevant model terms being conferred on the Commission is that the Commission can vary the model terms over time. That course is available at least by reason of s 33(3) of the *Acts Interpretation Act* 1901 (Cth). The Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) indicated, among other things:[8]

> The FWC would have the power to vary its determinations. Responsibility for maintaining the currency of the model terms will be vested in the FWC and the ability to vary the terms in line with developments in workplace relations will ensure their ongoing relevancy.

[18] The Commission will be in a position to review the model terms it has determined over time either of its own initiative or on application by any interested party. If interested parties detect that the model terms the Full Bench has determined are not operating consistently with the object of the Act, or other considerations the Commission is required to take into account in determining the model terms, that is a matter that can be considered by the Commission in due course.

Statutory context

[19] The model flexibility term, model consultation term and model term for dealing with disputes for enterprise agreements and the model term for settling disputes about matters arising under a copied State instrument for transferring employees perform somewhat different functions. It is useful to set out the existing provisions of the Act and the relevant amendments made by the Closing Loopholes No 2 Act to confer the function of determining the model terms on the Commission.

Flexibility term for enterprise agreements

[20] Division 5 of Part 2-4 of the Act deals with mandatory terms of enterprise agreements. Relevantly, these include what is known as a flexibility term and a consultation term. Section 202(1) requires that an enterprise agreement must include a flexibility term as follows:

> (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.

[21] Section 202(2) and (3) address the effect of an individual flexibility arrangement made under a flexibility term as follows:

> (2) If an employee and employer agree to an individual flexibility arrangement under a flexibility term in an enterprise agreement:
>
> (a) the agreement has effect in relation to the employee and the employer as if it were varied by the arrangement; and
>
> (b) the arrangement is taken to be a term of the agreement.
>
> (3) To avoid doubt, the individual flexibility arrangement:
>
> (a) does not change the effect the agreement has in relation to the employer and any other employee; and
>
> (b) does not have any effect other than as a term of the agreement.

[22] Section 203 sets out the requirements in relation to the content of the flexibility term which must be met. Those requirements are as follows:

> *Flexibility term must meet requirements*
>
> (1) A flexibility term in an enterprise agreement must meet the requirements set out in this section.
>
> *Requirements relating to content*
>
> (2) The flexibility term must:
>
> (a) set out the terms of the enterprise agreement the effect of which may be varied by an individual flexibility arrangement agreed to under the flexibility term; and
>
> (b) require the employer to ensure that any individual flexibility arrangement agreed to under the flexibility term:
>
> (i) must be about matters that would be permitted matters if the arrangement were an enterprise agreement; and
>
> (ii) must not include a term that would be an unlawful term if the arrangement were an enterprise agreement.
>
> (2A) If, in accordance with this Part, the enterprise agreement includes terms that would be outworker terms if they were included in a modern award, the flexibility term must not allow the effect of those outworker terms to be varied.
>
> *Requirement for genuine agreement*

(3) The flexibility term must require that any individual flexibility arrangement is genuinely agreed to by the employer and the employee.

Requirement that the employee be better off overall
(4) The flexibility term must require the employer to ensure that any individual flexibility arrangement agreed to under the term must result in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed to.

Requirement relating to approval or consent of another person
(5) Except as required by subparagraph (7)(a)(ii), the employer must ensure that the flexibility term does not require that any individual flexibility arrangement agreed to by an employer and employee under the term be approved, or consented to, by another person.

Requirement relating to termination of individual flexibility arrangements
(6) The flexibility term must require the employer to ensure that any individual flexibility arrangement agreed to under the term must be able to be terminated:

(a) by either the employee, or the employer, giving written notice of not more than 28 days; or

(b) by the employee and the employer at any time if they agree, in writing, to the termination.

Other requirements
(7) The flexibility term must require the employer to ensure that:

(a) any individual flexibility arrangement agreed to under the term must be in writing and signed:

(i) in all cases—by the employee and the employer; and

(ii) if the employee is under 18—by a parent or guardian of the employee; and

(b) a copy of any individual flexibility arrangement agreed to under the term must be given to the employee within 14 days after it is agreed to.

[23] 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. Prior to the commencement of the amendments made by the Closing Loopholes No 2 Act, s 202(5) required that the regulations must prescribe the model flexibility term for enterprise agreements.

[24] The Closing Loopholes No 2 Act amended s 202 to repeal subsection (5) and add new subsections (5), (6) and (7) as follows:

(5) The FWC must determine the ***model flexibility term*** for enterprise agreements.

(6) In determining the model flexibility term, the FWC must:

(a) ensure that the model term is consistent with the requirements set out in subsection (1); and

(b) take into account the following matters:

(i) whether the model term is broadly consistent with comparable terms in modern awards;

(ii) best practice workplace relations as determined by the FWC;

(iii) whether all persons and bodies have had a reasonable opportunity to be heard and make submissions to the FWC for consideration in determining the model term;

> (iv) the object of this Act (see section 3), and the objects of this Part (see section 171);
> (v) any other matters the FWC considers relevant.
>
> Note 1: The FWC must be constituted by a Full Bench to make the model flexibility term (see subsection 616(4A)).
> Note 2: For the variation of a determination, see subsection 33(3) of the *Acts Interpretation Act 1901*.
>
> (7) A determination under subsection (5) is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the determination.

[25] As will be apparent, the Commission is required to determine a model flexibility term for enterprise agreements by s 202(5). In determining the model flexibility term, s 202(6) requires that the Commission must ensure that the model term is consistent with the requirements that apply to a flexibility term in enterprise agreements generally in subsection (1) and take into account the matters in subsection (6)(b).

Consultation term for enterprise agreements

[26] Section 205(1) and (1A) requires that an enterprise agreement must include a consultation term as follows:

> (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; and
> (b) allows for the representation of those employees for the purposes of that consultation.
>
> (1A) For a change to the employees' regular roster or ordinary hours of work, the term must require the employer:
> (a) to provide information to the employees about the change; and
> (b) to invite the employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities); and
> (c) to consider any views given by the employees about the impact of the change.

[27] 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. Prior to commencement of the amendments made by the Closing Loopholes No 2 Act, s 202(3) required that the regulations prescribe the model consultation term for enterprise agreements.

[28] The Closing Loopholes No 2 Act amended s 205 to repeal subsection (3) and add new subsections (3), (4), (5) and (6) as follows:

> (3) The FWC must determine the ***model consultation term*** for enterprise agreements.

(4) In determining the model consultation term, the FWC must:

(a) ensure that the model term is consistent with the requirements set out in subsections (1) and (1A); and

(b) take into account the following matters:

(i) whether the model term is broadly consistent with comparable terms in modern awards;

(ii) best practice workplace relations as determined by the FWC;

(iii) whether all persons and bodies have had a reasonable opportunity to be heard and make submissions to the FWC for consideration in determining the model term;

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

(v) the object of this Act (see section 3), and the objects of this Part (see section 171);

(vi) any other matters the FWC considers relevant.

Note 1: The FWC must be constituted by a Full Bench to make the model consultation term (see subsection 616(4A)).
Note 2: For the variation of a determination, see subsection 33(3) of the *Acts Interpretation Act 1901*.

(5) To avoid doubt, subsections (1) and (1A) do not limit the matters the model consultation term may deal with.

(6) A determination under subsection (3) is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the determination.

[29] The Commission is required by s 202(3) to determine a model consultation term for enterprise agreements. The Commission must ensure the model consultation term is consistent with the minimum requirements for a consultation term in subsections (1) and (1A) and take into account the matters in s 205(4)(b). Section 205(5) makes clear that the model consultation term is not limited to the requirements set out in subsections (1) and (1A).

Term for dealing with disputes for enterprise agreements

[30] The model term for dealing with disputes for enterprise agreements operates in a different manner. Division 4 of Part 2-4 of the Act deals with the approval of enterprise agreements. Section 186(6) provides that to approve an enterprise agreement the Commission must, among other things, be satisfied the agreement includes a term about settling disputes as follows:

(6) The FWC must be satisfied that the agreement 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.

[31] Prior to commencement of the amendments made by the Closing Loopholes No 2 Act, s 737 of the Act required the regulations to prescribe a model term for dealing with disputes for enterprise agreements.

[32] The Closing Loopholes No 2 Act repealed s 737 and replaced it with the following:

737 Model term about dealing with disputes

(1) The FWC must determine a model term for dealing with disputes for enterprise agreements.

(2) In determining the model term, the FWC must:

(a) ensure that the model term is consistent with the requirements set out in subsection 186(6); and

(b) take into account the following matters:

(i) whether the model term is broadly consistent with comparable terms in modern awards;

(ii) best practice workplace relations as determined by the FWC;

(iii) whether all persons and bodies have had a reasonable opportunity to be heard and make submissions to the FWC for consideration in determining the model term;

(iv) the operation of subsections 739(3), (4), (5) and (6) and 740(3) and (4);

(v) the object of this Act (see section 3);

(vi) any other matters the FWC considers relevant.

Note 1: The FWC must be constituted by a Full Bench to make the model term dealing with disputes (see subsection 616(4A)).
Note 2: For the variation of a determination, see subsection 33(3) of the *Acts Interpretation Act 1901*.

(3) A determination under subsection (1) is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the determination.

[33] In a similar manner to that which applies to the model flexibility term and model consultation term, s 737(1) requires the Commission to determine a model term for dealing with disputes for enterprise agreements. Subsection (2) requires that the Commission ensure the model term is consistent with the requirements in s 186(6) and to take into account the matters listed in subsection (2)(b).

[34] Unlike the provisions dealing with the model flexibility term and model consultation term, the model disputes term is not taken to be included in an enterprise agreement that fails to include a term which the Commission is satisfied meets the requirements set out in s 186(6) of the Act.[9] If the Commission is not satisfied that an enterprise agreement includes a term about settling disputes that complies with the requirements of s 186(6), the agreement may nonetheless be approved if the Commission accepts an undertaking that meets the concern under s 190. Otherwise, the agreement could not be approved. The model term is not automatically included. The role of the model term for dealing with disputes for enterprise

agreements is to provide a model that those drafting an enterprise agreement may elect to include or not.

Term for settling disputes for copied State instruments

[35] Part 6-3A of the Act provides for the transfer of certain terms and conditions of employment where there is a transfer of business from a State public sector employer to a national system employer to which the Act applies more generally. In brief terms, an instrument known as a copied State instrument for a transferring employee is taken to come into operation where an employee's employment with a State public sector employer terminates and the employee become employed by a new national system employer.[10]

[36] Division 8 of Part 6-3A sets out certain special rules with respect to copied State instruments for transferring employees. Prior to the commencement of the amendments made by the Closing Loopholes No 2 Act, s 768BK provided that a copied State instrument which does not include a term providing a procedure to settling disputes is taken to include a model term prescribed by the regulations for that purpose. The section provided:

> **768BK Where no term dealing with disputes**
>
> (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.

[37] The Closing Loopholes No 2 Act amended s 768BK to add a new subsection (1A) to require the Commission to determine a model term, to add new subsections (3) and (4) and consequential amendments to subsection (2). The amendments add the following subsections to s 768BK:

> *Model term determined by FWC*
> (1A) The FWC must determine a model term for the purposes of subsection (1).
>
> (3) In determining the model term, the FWC must take into account the following matters:
> (a) whether the model term is broadly consistent with comparable terms in modern awards;
> (b) best practice workplace relations as determined by the FWC;
> (c) whether all persons and bodies have had a reasonable opportunity to be heard and make submissions to the FWC for consideration in determining the model term;
> (d) the operation of subsections 739(3), (4), (5) and (6) and 740(3) and (4);
> (e) the object of this Act (see section 3);

> (f) any other matters the FWC considers relevant.
>
> Note 1: The FWC must be constituted by a Full Bench to make the model term for settling disputes (see subsection 616(4A)).
> Note 2: For the variation of a determination, see subsection 33(3) of the *Acts Interpretation Act 1901*.
>
> (4) A determination under subsection (1A) is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the determination.

[38] The section will now require the Commission to determine a model term for settling disputes about matter arising under a copied State instrument and, in doing so, to take into account the matters set out in subsection (3).

Task of the Commission

[39] It is appropriate to make some initial observations in relation to the task of the Commission in determining the content of the model terms for enterprise agreements and the model disputes term for copied State instruments for transferring employees.

[40] The Commission is conferred with a broad power to determine the content of the model terms by ss 202(5), 205(3), 737(1) and 768BK(1A) of the Act. The apparent intention of conferring on the Commission the role of determining the model terms is to utilise the independence and expertise of the Commission and to enable a process whereby the Commission can consider best practice in workplace relations and engage in consultation with interested persons so as to ensure that the model terms are current and appropriate. The Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) said:

> 15. Part 5 of Schedule 1 would change the process for determining the model flexibility, consultation and dispute resolution terms for enterprise agreements and the model term for settling disputes arising under a copied State instrument. Currently, these model terms are prescribed in the *Fair Work Regulations 2009* (FW Regulations). The proposed amendments would replace the existing requirements with requirements that the FWC, as Australia's expert and independent workplace relations tribunal, determine the model terms.

[41] The Revised Explanatory Memorandum later explained:

> 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.
>
> 72. In mandating considerations of best practice workplace relations and public participation in the process of determining model terms, individuals are empowered to participate in the determination of up-to-date and relevant terms that may form part of the terms and conditions

> of their employment. In doing so, the amendments support the right to just and favourable conditions of work.

[42] The power is confined in at least three respects. With respect to the model flexibility term, model consultation term and model disputes term for enterprise agreements, ss 202(6)(a), 205(4)(a) and 737(2)(a) require that the Commission must ensure that the model terms are consistent with the minimum requirements for flexibility, consultation and disputes settlement terms for enterprise agreements generally. That is unsurprising. The intention of the requirement to determine the model terms is that those terms could become terms of enterprise agreements as a result of the parties choosing to include the model terms in an agreement or as a result of the model flexibility or consultation terms being taken to be a term of an agreement by operation of ss 202(4) or 205(2).

[43] The Commission is required to take into account the matters listed respectively in ss 202(6)(b), 205(4)(b), 737(2)(b) and 768BK(3). As is well-known, a requirement that a judicial or administrative decision-maker take into account a matter in the course of making a discretionary decision requires that those matters be treated as a matter of significance in the decision-making process.[11] To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors.[12] However, a requirement to "have regard to" or "take into account" a set of considerations leaves open what weight or influence each of the particular matters is to have in the decision to be made.[13] Sections 202(6)(b), 205(4)(b), 737(2)(b) and 768BK(3) do not dictate the content of the model terms required to be made by the Commission. Those sections specify matters to be taken into account.

[44] Further, even where a broad discretion is conferred on the Commission, the power is to be exercised in a manner that is within and consistent with the subject matter and object of the legislation which confers the discretion.[14] That principle may add little in this context. The Commission is expressly required to take into account either or both the object of the Act set out in s 3 and the objects of Part 2-4 of the Act (in the case of the model flexibility clause and model consultation clause). However, to the extent that the Commission is entitled to take into account any other matters the Commission considers relevant, we have taken into account that the nature of any additional considerations we might consider relevant should be shaped in the context provided by the subject matter and object of the Act as a whole.

[45] The submissions of the interested parties raised a number of issues of general application across each of the model terms. Firstly, many of the submissions the Commission has received are framed by reference to the existing prescribed model terms contained in the regulations and made submissions as to what changes (if any) should be made to the existing model terms. That course is understandable in the circumstances. The existing model terms have existed in the regulations since 2010, and their terms are, no doubt, familiar to the industrial parties. It represented a useful approach to make submissions as to the content of the model terms by reference to the existing terms.

[46] However, that is not to suggest that the Commission should determine the content of the new model terms by commencing with an assumption that the existing model terms should necessarily be continued in their current form. Some of the submissions received suggested that some, albeit unspecified, evidentiary threshold is required to be satisfied to justify any departure

from the content of the existing model terms.[15] Other submissions question whether there were considerations in the matters required to be taken into account by the Commission that "necessitated" change from the existing terms.[16] We do not believe the amended provisions justify that approach. The matters listed in ss 202(6)(b), 205(4)(b), 737(2)(b) and 768BK(3) that the Commission must take into account do not include the content of the existing terms. There is otherwise nothing in the statutory scheme that justifies that approach. The extracts from the Revised Explanatory Memorandum to which we have referred indicate that the intention of conferring the function of determining the content of the model terms on the Commission was that the Commission could utilise its own expertise and respond to the submissions it receives to ensure that the model terms are contemporary and relevant.

[47] We accept that there is potential benefit in stability in the content of the model terms for employers, employees and industrial organisations and we have taken that matter into account in determining the content of the model terms. The object to the Act includes, in s 3(f):

> (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and

[48] To the extent it is relevant to the content of the model flexibility term and the model consultation term, the objects of Part 2-4 include, in s 171(a):

> (a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and

[49] Although the model terms do not directly concern the good faith bargaining requirements or, directly at least, the process of collective bargaining, simplicity is a benefit. We acknowledge that the formulation of model terms that are simple and easy to understand is both relevant to the object to the Act (and, to the extent relevant, objects of Part 2-4) and, in any event, a matter that is relevant for the purposes of ss 202(6)(b)(v), 205(4)(b)(vi), 737(2)(b)(vi) and 768BK(3)(f). The goal of producing model terms that are simple and easy to understand is, to some extent, aided by consistency and minimising change.

[50] Secondly, a number of the submissions suggest that the model terms are intended to represent part of the "safety net" of terms and conditions of employment established by the Act and that the Commission should determine the content of the model terms on the basis that those terms are intended to represent minimum standards.[17] In that respect, reference was made to the following part of the Revised Explanatory Memorandum (emphasis added):

> 70. 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. ***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.*** 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.

[51] The reference to the model terms acting as a "safety net" in the Revised Explanatory Memorandum needs to be understood in context. The Revised Explanatory Memorandum is, in our opinion, referring to the model terms acting as a safety net in the sense that the model flexibility term and model consultation term are taken to be a term of an enterprise agreement if the agreement fails to include a compliance term of that nature. In that sense, the model terms represent a safety net. Notably, the Revised Explanatory Memorandum appears to erroneously assumes that model disputes term for enterprise agreements has the same function.

[52] However, the model terms do not form part of the safety net of minimum terms and conditions of employment to which the Act more generally refers. The safety net of minimum terms and conditions for which the Act more generally provides is constituted, at least so far as employees are concerned, by the National Employment Standards, modern awards and national minimum wage orders. The object of the Act includes, in s 3(b):

> (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; …

[53] When making or varying modern awards, the Commission is required to be satisfied that doing so is necessary to achieve the modern awards objective.[18] The modern awards objective, set out in s 134(1), is that the Commission "must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions". The minimum wages objective, set out in s 284(1), is that the Commission "must establish and maintain a safety net of fair minimum wages". The model terms do not form part of that safety net of minimum terms and conditions and the provisions presently being considered do not require the Commission to be satisfied that the content of the model terms is necessary to establish a minimum safety net of conditions.

[54] The operation of the model terms differs from minimum terms and conditions prescribed by the National Employment Standards, modern awards or national minimum wage orders. The model terms with which the Full Bench is currently concerned only have potential application in the event that an employer chooses to make an enterprise agreement or, by a transfer of business, comes to be covered by a copied State instrument. Although there are procedures through which an employer might be compelled to engage in bargaining,[19] in most instances an enterprise agreement can only be made if the employer proposes to the employees to make an agreement and the agreement is approved by a vote of the employees. Even if an enterprise agreement is made, it is open to the parties to formulate a flexibility term, consultation term or disputes term that departs from the model terms so long as those terms satisfy the minimum content required by the Act. The model terms are not mandatory. The only circumstance in which any of the model terms will become terms of an industrial instrument is if an enterprise agreement fails to contain a flexibility or consultation term which meets the requirements of the Act or a copied State instrument does not contain a term dealing with settling disputes.

[55] It is correct to regard the model terms as a safety net in the sense that the expression is used in the Revised Explanatory Memorandum. The model flexibility and consultation terms are taken to be included in an enterprise agreement without a compliant term of that type and

the disputes term for copied State instruments becomes a term of such an instrument if it lacks a dispute settlement provision. It is also relevant to our consideration that the model terms might come to be applied, and are intended to be capable of applying, in enterprise agreements or copied State instruments which apply to a myriad of types of businesses or employers throughout Australia in every industry. Both the potential default role of some of the model terms and the fact they might come to operate in a range of contexts are relevant to the Commission's consideration of the content of the model terms. However, it is not apt to describe the model terms as a safety net of minimum conditions of employment. That is underlined by the requirement imposed on the Commission to take into account not only whether the model terms are broadly consistent with comparable terms in modern awards, but also "best practice workplace relations" as determined by the Commission.[20]

[56] Thirdly, in many of the submissions the Commission has received, considerable emphasis is placed on aligning the content of the model terms with the comparable modern award provisions and whether departure from the content of the common form of the comparable modern award term is justified.[21] Sections 202(6)(b)(i), 205(4)(b)(i), 737(2)(b)(i) and 768BK(3)(a) each require that, in determining the respective model terms, the Commission must take into account whether the model term is broadly consistent with the comparable terms in modern awards. That is a consideration which the Commission must give weight and treat as a matter of significance in its decision-making in the manner we have discussed above.

[57] Two observations can be made in that regard. The matter referred to in ss 202(6)(b)(i), 205(4)(b)(i), 737(2)(b)(i) and 768BK(3)(a) suggests that the Parliament regards at least broad consistency between the content of the model terms for enterprise agreements and copied State instruments and comparable terms in modern awards as desirable. That is unsurprising. The comparable terms in modern awards have been considered by the Commission over a substantial period of time and are intended to reflect the accumulated wisdom of the Commission and various industrial parties in relation to the content of that type of clause. The Parliament presumably discerns that there are benefits in ensuring broad consistency between the content of relevant modern award terms and the model terms being dealt with in this decision. With respect to the model consultation term, for example, the Revised Explanatory Memorandum said:[22]

> 547. The FWC would be required to consider whether the model term generally accords with comparable terms in modern awards. New subparagraph 205(4)(b)(i) would require consideration of common features of consultation terms in modern awards, rather than a detailed examination of all consultation terms found in awards, or the selection of a single consultation term to be used as a comparator. This would promote consistency across enterprise agreements and modern awards.

[58] The history of the model terms prescribed by regulations indicates that, from the commencement of the Act, it was intended those terms would draw from model award terms that had previously been developed by the then Australian Industrial Relations Commission (the **AIRC**). For example, the Explanatory Memorandum to the *Fair Work Bill 2009* (Cth) indicated that "it is intended that the model term to be prescribed will be based upon the model flexibility term developed by the AIRC for inclusion in modern awards".[23] The same

observations were made with respect to the model consultation term which was intended to be made by regulation.[24]

[59] Equally, the legislation does not require that the Commission slavishly follow the content of comparable terms of modern awards generally or any particular modern award in determining the content of the model terms. Whether the model term is consistent with comparable terms in modern awards is a matter to be taken into account among others, including best practice workplace relations, the object of the Act and submissions received from relevant persons and bodies. We have taken into account the desirability of the model terms being broadly consistent with comparable modern award terms. However, it would be an error to elevate that consideration above all others or apply any particular test to justify departure from the content of comparable modern awards terms.

[60] Fourthly, sections 202(6)(b)(ii), 205(4)(b)(ii), 737(2)(b)(ii) and 768BK(3)(b) require that the Commission must take into account "best practice workplace relations as determined by the Commission". The definition of the term "best practice" in the Macquarie Dictionary is as follows:[25]

> **best practice** n. 1. The set of operations achieving the best results in quality and customer service, flexibility, timeliness, innovations, cost and competitiveness, especially from cooperation of management and employees in all key processes of the business.
> 2. World's best practice, the best practice at a world wide standard.

[61] We believe that definition encapsulates, at least in part, what is intended by the reference to "best practice" in this context. That is, in our view, the relevant subsections intend to refer to the practice of workplace relations which is achieving the best results or reflect the best of current practice evident across industry.

[62] Sections 202(6)(b)(ii), 205(4)(b)(ii), 737(2)(b)(ii) and 768BK(3)(b) refer to best practice workplace relations as determined by the Commission. It is plainly intended that the Commission should deploy their own expertise and experience in assessing what, relevantly, it considers to constitute best practice workplace relations. The Revised Explanatory Memorandum states with respect to the model flexibility term:[26]

> 534. New subparagraph 202(6)(b)(ii) would require the FWC to take into account what it considers is 'best practice' workplace relations. This would allow the FWC to exercise its expert judgement, supplemented by submissions, to determine a model term that reflects the current best approach.

[63] Three further issues arise with respect to the concept of "best practice workplace relations". The research conducted by the staff of the Commission, among other things, collated information as to the common content of terms of enterprise agreements which have been approved by the Commission.[27] The Ai Group, among other groups, submitted that the Commission should not rely on the analysis of the terms that actually appear in enterprise agreements in considering what constitutes best practice. It submits that the popularity of certain features of the flexibility, consultation or disputes terms appearing in enterprise agreements

"are merely a product of the respective industrial strength of the parties to the agreements, as well as the preferences or objectives of any unions covered by the agreements".[28]

[64] We agree that the popularity or commonality of a term is not, in itself, evidence that it represents best practice. The relevant subsections contemplate that the Commission will assess for itself what constitutes best practice and, to consider that matter, that is the approach we have adopted. The material contained in the background paper prepared by Commission staff is not, as suggested by the Ai Group, irrelevant to the assessment we have undertaken.[29] The suggestion that the prevalence of terms containing particular provisions is "merely" the product of the industrial strength of the parties is no more than an assertion. Although in some instances, the industrial strength the parties are able to bring to bear in bargaining might affect the content of terms dealing with flexibility, consultation or dispute resolution, Ai Group provided no basis upon which the Commission should assume that is always, or predominantly, the case.

[65] The ACTU relied, in various respects, on "Best Practice Guides" published by the Fair Work Ombudsman (**FWO**) in support of particular content being included in the model terms.[30] The Ai Group submits that the FWO Best Practice Guides do not establish that a particular approach represents best practice, that the publications are not preceded by a robust evidence-based process for the purposes of assessing what constitutes best practice and that the Best Practice Guides do not necessarily suggest that the approach they recommend should be included as enforceable obligations in enterprise agreements.[31]

[66] Obviously enough, Best Practice Guides published by the FWO do not bind the view the Commission might take of what constitutes, relevantly, best practice in relation to matters dealt with in any of the model terms. The Commission must form its own view in relation to that matter. The Best Practice Guides which are produced by the FWO are reflective of its statutory function. The functions of the FWO set out in s 682(1)(a) of the Act include to promote harmonious, productive and cooperative workplace relations and compliance with this Act and fair work instruments including by, among other things, "producing best practice guides to workplace relations or workplace practices". The Best Practice Guides which were put before the Commission as part of the consultation process in these proceedings do not set out the process which was engaged in by the FWO to prepare the guides. However, although not binding on the Commission, given the statutory role of the FWO, the Commission can legitimately have regard to the guides published by the FWO in the context of other submissions it has received.

[67] Finally, the Ai Group submits that reasonable minds might differ on what constitutes best practice workplace relations and the Commission "should not implement any departure from the current wording of the model clauses based on a determination as to what constitutes 'best practice' unless it has had the benefit of detailed submissions and evidence in relation to what constitutes 'best practice'".[32] The relevant amended provisions of the Act contemplate that interested persons and bodies will have the opportunity to be heard and make submissions in relation to the model terms. The standard of evidence or other material the Commission will required to be satisfied that it is appropriate to include any element in one of the model terms will depend on the circumstances. The Commission is also entitled to make an assessment, including as to best practice, based on its own experience and expertise.

Determination of model terms

[68] In light of these general observations in relation to the task before the Commission in these proceedings, we turn to consider the content of the four model terms the Full Bench is required to determine. The members of the Full Bench have read and closely considered all of the submissions which have been received by the Commission in the course of the consultation process. In deference to the manner in which the submissions had been advanced, we will concentrate in these reasons on the significant areas in which we have determined to make model terms which depart from the existing model terms in the regulations. We have adopted that course because, in substantial part, employer and industry representatives who made submissions adopted the position that the Commission should make few, if any, changes to the existing model terms. The ACTU, substantially supported by a number of unions, contended that a range of changes should be made to the existing model terms which were opposed by employer and industry groups.

Model flexibility term

Clause 1: Content and process

[69] The Full Bench has substantially adopted the present clause 1 of the existing model flexibility term subject to relatively minor adjustments. The list of matters that are capable of being subject of an individual flexibility arrangement in clause 1(a) is maintained. The wording of clause 1(b) has been adjusted to make clear that the arrangement must meet the genuine needs of the employer and employee in relation to the matters it deals with. That change is a matter of clarification. The ACCI suggested that the proposed change would create inconsistency with clause 1(a) and lead to the perverse consequence that one matter would be unable to satisfy the requirement that it meet the genuine needs of the employer and employee.[33] We have adjusted the wording to avoid that potential.

[70] In relation to clause 1(c), we have decided to include provision that an individual flexibility arrangement is to be genuinely agreed to by the employer and employee without coercion or duress. The addition of the words "coercion or duress" was opposed only to the extent it was said that the absence of coercion or duress was implicit in the requirement for genuine agreement.[34] The wording we have adopted aligns with the model flexibility term for modern awards. The explicit reference is appropriate to emphasise that coercion or duress must not be involved in the making of an individual flexibility arrangement. We emphasise that the addition of this explicit reference is not intended to give rise to any limitation in relation to the phrase "genuinely agreed to". An individual flexibility arrangement might not be "genuinely agreed to" for reasons which do not amount to coercion or duress.

Clause 2: Prior to employment

[71] The Full Bench has determined to include a new clause 2 to make clear that an individual flexibility arrangement can only be made with an employee after the employee has commenced employment with the employer. That proposal was advanced by the ACTU.[35] The addition of

such a new clause was opposed by some parties substantially on the basis that it was unnecessary or superfluous because it is inherent in the requirement that an individual flexibility arrangement can only be made between an employer and employee that it can only occur after employment has commenced.[36]

[72] We note that the model flexibility term for modern awards includes express provision that an individual flexibility arrangement under an award can only be made after employment. When the Full Bench of the then AIRC originally set out a model flexibility term for modern awards, it made plain that it contemplated that individual flexibility arrangements could only be made after the commencement of employment. In *Re Request from the Minister for Employment and Industrial Relations — 28 March 2008* (2008) 175 IR 120, the Full Bench said:[37]

> We next consider whether the model clause ought permit an agreement to be made prior to the commencement of employment. The terms of cl.10 suggest that an agreement ought be available only after employment has commenced. Had it been intended that an agreement be permitted between an employer and a prospective employee that could have been made clear. By way of contrast to the language of cl.10, s 326(5) specifically provides that an interim transitional employment agreement may be made prior to the commencement of employment. The absence of such direct language in cl.10 is telling. We recognise that this interpretation may limit the flexibility available under the clause in some circumstances. On the other hand it is consistent with the statutory concept of awards as a safety net that the parties should initially be bound by the award provisions, which then form the base from which a flexibility agreement might be made.

[73] The express requirement that individual flexibility arrangements under modern awards can only be made after the commencement of employment was introduced in the model term in 2013. Then, the Full Bench referred to evidence that such arrangements were commonly being entered into prior to employment commencing.[38] In that respect, the Full Bench concluded:[39]

> In addition to these variations one further variation is proposed in order to improve the level of compliance with the requirements of the model flexibility term. As we have mentioned the evidence suggests that a significant proportion of IFAs are entered into before the individual employee has commenced employment, contrary to the intent of the model flexibility term and the FW Act (see [73]-[77] above). To address this issue we propose to insert the following words at the end of clause 7.2:
>
> > An agreement under this clause can only be entered into after the individual employee has commenced employment with the employer.

[74] The Full Bench has not received, in the course of the present consultations, direct evidence of the prevalence or otherwise of individual flexibility arrangements under enterprise agreements being made prior to the commencement employment. We nonetheless consider that it is a prudent and appropriate step to include provision in the model flexibility term that make plain individual flexibility arrangements can only be entered into after employment has commenced.

Clause 3: Written proposal and explanation

[75] The Full Bench has determined to include a new clause 3 in the model flexibility term. The new clause would serve two functions. It will require that an employer who wishes to make an individual flexibility arrangement with an employee gives the employee a written proposal to that effect and that, if the employee is aware, or reasonably should be aware, that the employee has a limited understanding of written English, take reasonable steps to ensure the employee understands the proposal.

[76] The proposal is opposed by various organisations and bodies. The requirement for a written proposal to be provided to an employee is resisted on the basis it is unnecessary and duplicates the requirement that which otherwise appears in the existing model term that the arrangement ultimately be "in writing".[40] It is submitted that the proposal that an employer should be obliged, if aware that an employee has limited English language skills to take reasonable steps to ensure the employee understands the proposal would impose an unreasonable burden on employers to comprehend the language skills of an employee and to take steps which are required to "ensure" the employee understands the arrangement that is proposed.[41]

[77] We do not accept those submissions. A requirement for an employer to make a written proposal and to take reasonable steps to ensure an employee with limited English language skills understands the proposal is a feature of the model flexibility term for modern awards. No submission has been advanced by any organisation or body that the modern award provisions have created an unreasonable burden on employers. There is no evidence of which we are aware that the modern award provisions have been unworkable or had undesirable consequences. Consideration of whether the model terms are broadly consistent with comparable modern award terms favours inclusion of these requirements.

[78] A requirement that a written proposal be made to an employee does not simply replicate the provision that the final arrangement be in writing. The requirement to provide a written proposal is intended to arise at an earlier time and ensure that an employee has the opportunity to consider a proposal in written form prior to the time when the employee is asked to make the arrangement by signing a written document. Given the potential significance of an individual flexibility arrangement, we consider that is a practical step and do not consider it would impose an unreasonable burden on an employer that wishes to make such an arrangement and is consistent with best practice workplace relations.

[79] Similarly, a requirement to take reasonable steps to ensure an employee with limited English language skills is able to understand the proposal does not, in our opinion, impose an unreasonable burden on employers. We note, in that respect, that the clause we have determined is not to take any particular step, but to take reasonable steps to ensure the employee is able to understand the proposal. As we have observed, no suggestion has been raised that the same obligation in the context of modern award flexibility terms has given rise to difficulties. The research conducted by staff of the Commission indicates that the insertion of protections for employees with limited English language skills is a common feature of enterprise agreement

provisions which depart from the existing model term. Such a requirement is, in our opinion, consistent with best practice workplace relations.

Clause 4: Meeting with employee

[80] The Full Bench has determined to include a new clause 4 in the model flexibility term to the effect that an employer must meet with the employee to discuss a proposal to enter into an individual flexibility arrangement if the employee requests. This proposal was opposed by a number of organisations and bodies. In substance, it was suggested that such an obligation was an unnecessary addition to the requirement which otherwise exists for an individual flexibility arrangement to be "genuinely agreed" and would be unduly prescriptive.[42]

[81] We have considered the submissions which have been received. We consider that it is appropriate to include in the model flexibility term that an employer meet with an employee to discussed a proposed flexibility arrangement is the employee so requests. We note that the Fair Work Ombudsman's "Use of Individual Flexibility Arrangements Best Practice Guide" includes the following:[43]

> IFAs are intended to be beneficial for both the employee and employer. Best practice employers meet with their employees to discuss individual circumstances that meet the needs of both the business and the employee. That means you both must understand what each other's needs are so you can reach a genuine agreement.

[82] We agree that, at least if an employee requests, it is consistent with best practice workplace relations for an employer to meet with the employee to discuss a proposed individual flexibility arrangement. This aspect of the model flexibility term we have determined departs from the model term for modern awards. We have taken that into account. However, we do not believe that the requirement to have a meeting means that the model term we have determined is not broadly consistent with comparable terms in modern award.

[83] The draft model flexibility term for enterprise agreements the Full Bench published in December 2024 included provision for an employee to appoint a person or employee organisation to provide support or representation in relation to discussions concerning a proposed individual flexibility arrangement. We have considered the further submissions advanced in relation to this question. We have concluded that it is not necessary or appropriate to include that prescription in the model flexibility term we have determined.

Clauses 5, 6 and 7: Content and provision of a copy of arrangement

[84] Clauses 5, 6 and 7 of the model flexibility term we have determined are substantially consistent with the existing model term and few submissions were made with respect to those parts of the model term. Having considered the submissions the Commission has received, we consider that those terms are broadly consistent with comparable modern award terms and with best practice workplace relations and are otherwise appropriate to be made.

Clause 8 and 9: Termination of individual flexibility arrangement

[85] The Full Bench has determined to include in the model flexibility term provisions permitting an employer or employee to terminate an individual flexibility arrangement either at any time by agreement in writing or unilaterally by giving 28 days written notice. Section 203(6) of the Act provides:

> (6) The flexibility term must require the employer to ensure that any individual flexibility arrangement agreed to under the term must be able to be terminated:
>
> (a) by either the employee, or the employer, giving written notice of not more than 28 days; or
>
> (b) by the employee and the employer at any time if they agree, in writing, to the termination.

[86] The existing model flexibility term indicates, in clause 5(a), that an individual flexibility arrangement can be terminated by giving "no more than 28 days' notice to the other party to the arrangement". The draft model flexibility term published by the Full Bench in December included provision that, absent agreement, the employer or employee could terminate an arrangement by "giving 28 days written notice". The ACTU submits that this provision had the effect of lengthening the period of notice required and should not be adopted. It submits that the existing reference to "no more than 28 days" should be retained.[44]

[87] It is correct to say that s 203(6) of the Act prescribes a maximum period of notice of 28 days. A term which complies with the requirements in s 203(6) could provide for a shorter period of notice for one party to unilaterally terminate individual flexibility arrangement. However, in our view, the model term should specify a particular minimum period of notice. A requirement to give no more than 28 days' notice does not provide for any particular notice period at all. Arguably, the provision would, strictly construed or at least as a matter of practicality, permit termination on no notice at all. We do not consider that to be appropriate or workable.

[88] If a specific minimum period of notice is to be included within the model flexibility term, no interested party made submissions to the effect that a different period to 28 days is appropriate. The model flexibility term for modern awards initially set at a minimum of four weeks notice. In *Re Request from the Minister for Employment and Industrial Relations — 28 March 2008* (2008) 175 IR 120, the Full Bench concluded:[45]

> There was significant debate concerning the term or duration of flexibility agreements, how they might be brought to an end and related matters. It would not be appropriate that the model clause prescribe the duration of flexibility agreements. On the other hand it would not be right to leave these matters entirely to the parties. Unforeseen developments can render a flexibility agreement not only unacceptable to one of the parties but also substantially unfair. If that circumstance occurs the agreement ceases to be one which meets the needs of the parties. We shall provide that an agreement might be terminated at any time by agreement or by one party giving 4 weeks' notice in writing to the other. The provision for termination on notice will provide some protection for employees who through ignorance or for some other reason make an agreement which materially disadvantages them. In this way the provision will also assist in ensuring that employees are not disadvantaged by the operation of the model clause. We are conscious of employer concerns that provision for termination of the agreement on notice will lead to an unsatisfactory level of uncertainty for employers. We have balanced that

> consideration against the other matters to which we have just referred. Given the individual nature of the arrangements that are contemplated we do not think the problem will be too onerous. Where significant numbers of employees are involved the employer can obtain greater certainty by entering into a collective agreement should that course be a practical one.

[89] The minimum notice period to be given to unilaterally terminate an individual flexibility arrangement under a modern award was later increased to 13 weeks.[46]

[90] Given the existence of s 203(6) of the Act, the period of notice to terminate an individual flexibility arrangement can be no more than four weeks. We consider that the model flexibility term should provide for termination at any time by agreement and for a fixed period equal to four weeks' notice in the event of unilateral termination by one party. That provision balances the interests of employers and employees in stability and certainty, on the one hand, and a capacity to terminate an arrangement which one party or the other considers is not operating to their benefit. That provision ensures that, to the extent possible, the model term is broadly consistent with comparable modern award terms and with best practice workplace relations.

Clause 10 and note: Alternative mechanisms.

[91] The Full Bench has determined to include provision in the model flexibility term a clause making clear that disputes in relation to an individual flexibility arrangement can be dealt with under the dispute settlement procedures in an agreement. That provision was opposed by some parties on the basis that it was unnecessary.[47] We consider that the proposal has merit and should be adopted. We have also determined to include a note at the end of the model term to refer to the fact that procedures exist in the National Employment Standards to enable employees to request flexible work arrangements.

Other proposals

[92] The Full Bench has determined not to adopt a range of other proposals made by interested organisations or bodies. It is appropriate to address two proposals. *Firstly*, the ACTU proposed that the model flexibility clause include a requirement that employers review an individual flexibility arrangement in a number of circumstances as follows:[48]

> (9) The employer will review the individual flexibility arrangement to ensure that the employee remains better off overall in relation to the terms and conditions of the employee's employment as a result of the arrangement. A review shall be conducted:
>
> (a) where the employee changes classification;
> (b) where an employee paid junior rates has a birthday;
> (c) where there is a wage increase in this enterprise agreement;
> (d) otherwise, no less than annually.

[93] The ACTU acknowledged that the Full Bench did not accept a proposal to include a requirement to conduct an annual review of individual flexibility arrangements under modern awards on the basis it lacked merit and would increase the regulatory burden on business.[49] We accept that it is good practice for employers to conduct regular reviews of individual flexibility

arrangements. However, at this stage, we do not believe there is material before the Full Bench which suggests it is appropriate to include a general provision in the model flexibility term requiring employers to review individual flexibility arrangements.

[94] *Secondly*, the ACTU proposed that a set of provisions be included in the model flexibility term requiring certain businesses to retain deidentified records of the various information in relation to individual flexibility arrangements entered into with employees.[50] It was proposed that provision be made for that information to be given annually to the Commission for the purposes of the General Manager conducting research required by s 653 of the Act and, upon request, to employees or their representatives. It is suggested that the proposal would apply to employers who are "relevant employers" for the purposes of the *Workplace Gender Equality Act 2012* (Cth).[51]

[95] The Full Bench does not consider it appropriate to include those provisions. The Act requires the General Manager to conduct research concerning the extent to which individual flexibility arrangements are agreed to and the content of those arrangements.[52] However, we do not consider the model flexibility term is the appropriate mechanism to facilitate that research and there is no basis, on the material before the Full Bench, to consider that such provision constitutes best practice workplace relations.

Model consultation term

Clause 1: Application of clause

[96] A major issue addressed by the submissions received by the Commission in relation to the model consultation term concerned whether the trigger for the consultation obligation in relation to major workplace change should remain once a "definite decision" has been made or whether an employer should be required to consult when it is "proposing" such a change. In light of the submissions initially received by the Commission, the Full Bench sought further submissions from the parties in relation to the issue in its statement dated 20 December 2024. The statement sought submissions as follows (footnotes omitted):[53]

> **Question 1**
>
> **[12]** A number of authorities addressing the meaning of the word "consult" or "consultation" suggest that, for consultation to be genuine, it must generally occur before a decision has been made, including in the context of s 145A of the Act. Interested parties are invited to comment on whether these authorities should inform the consideration of the necessary and/or desirable trigger point for the consultation obligation under the model term and how these authorities are to be understood in the context of the Termination, Change and Redundancy Case.
>
> **Question 2**
>
> **[13]** In response to the submissions of the ACTU, a number of interested parties made submissions to the effect that a trigger for consultation that operated whenever an employer "proposed" to introduce a major change would be uncertain as to its content and would create an obligation to consult at too early a stage in the development of a plan or proposal for change. Interested parties are invited to comment on whether there is any alternative wording that could

> be considered by the Full Bench that would require consultation prior to a "definite decision" but only where a proposal or plan is sufficiently advanced or firm such that consultation would then be appropriate and useful.
>
> **Question 3**
>
> **[14]** If the obligation to consult in the model consultation term were to arise at an earlier point to a "definite decision", it may be necessary to consider whether explicit provision should be made to ensure that the consultation obligation does not reduce an employer's ability to respond effectively to crises or urgent circumstances. The parties are invited to comment on whether it would be appropriate to make such provision or whether it is sufficient to rely on existing authority to the effect that the nature of required consultation will vary according to the nature and circumstances of each case.

[97] The statement attracted a number of submissions. Given the approach we have decided to adopt, it is unnecessary to describe the submissions at length. It is sufficient to note that the ACTU, and various unions, supported the view that the obligation to consult in relation to workplace change should arise when an employer is proposing to introduce such a change.[54] Those parties suggested that, if consultation is intended to allow the potential for employees and their representatives to contribute in a manner that might change the course of action the employer decides to take, the requirement to consult must arise before a definite decision has been made. Employer and industry groups, for their part, universally expressed concern (or even alarm) at the potential change and pointed to the long history of provisions linking the requirement to consult in relation to workplace change to a definition decision having been made to introduce a change.[55] Those submissions pointed to the fact that the model consultation term has its origin in the Termination Change and Redundancy cases which adopted the "definite decision" terminology.[56]

[98] Having reviewed the submissions, the Full Bench has determined to retain reference to the obligation to consult with respect to major workplace change arising when a "definite decision" has been made to introduce such a change at this stage. It is intended that the Commission will give further consideration in subsequent proceedings to be programmed at a convenient time later this year to the question of whether a consultation obligation should arise, at least under the model term, when an employer is proposing to introduce, or contemplated, major workplace change.

[99] On the one hand, there appears to us that there is much to be said for the proposition that, for consultation to be genuine, it must generally occur before a decision has been made so as to provide the potential that those being consulted might have an opportunity to influence the course of action an employer decides to adopt. A range of authorities which have been decided in a variety of contexts provide support for that view. For example, in *Re Consultation clause in modern awards* [2013] FWCFB 10165; (2013) 238 IR 282 consider the obligation imposed by s 145A of the Act to include in modern awards a term that requires an employer to consult about a change to a regular roster or ordinary hours of work for employees. The Full Bench said, in part:[57]

> 35. The ordinary meaning of the word "consult" and the legislative context and purpose leads us to conclude that the requirement in s 145A is to consult employees about proposed changes

to "their regular roster or ordinary hours of work". It is said against such a construction that the word "proposed" does not condition the word "consult" in s 145A. But it is implicit in the obligation to consult that a genuine opportunity be provided for the affected party to attempt to persuade the decision maker to adopt a different course of action. If a change has already been implemented or if the employer has already made a definite or irrevocable decision to implement a change then subsequent "consultation" is robbed of this essential characteristic. As Sachs LJ observed in a case concerning the statutory obligation to consult in relation to decisions regarding variations in public transport routes:

> Consultations can be of very real value in enabling points of view to be put forward which can be met by modifications of a scheme and sometimes event by its withdrawal. I start accordingly from the viewpoint that any right to be consulted is something that is indeed valuable and should be implemented by giving those who have the right an opportunity to be heard at the formative stage of proposals — before the mind of the executive becomes unduly fixed.

36. The legislative purpose and context is also important. The provision which inserts s 145A into the FW Act appears in Sch 1 of the 2013 Amendment Act. Schedule 1 is titled "Family Friendly measures". The insertion of s 145A into the FW Act is one of a number of measures intended to assist employees to balance their work and family or caring responsibilities. So much is clear from the title to Sch 1, the nature of the other measures contained in that schedule and the reference in s 145A(2)(b) to providing employees with an opportunity to give their views about the impact of the change in their regular roster or ordinary hours of work, "including any impact in relation to their family or caring responsibilities".

37. Interpreting s 145A such that the obligation to consult could be satisfied after a definite decision has been made or after a change had been implemented would be antithetical to its legislative purpose. Once a change has been implemented the disruption to family or caring responsibilities has already occurred. Section 145A is intended to provide an opportunity to inform the employer of the impact of a change to an employee's regular roster or ordinary hours of work and so that the employer may consider those views. As submitted by the Australian Retailers Association:

> It is implicit from the requirements of s 145A of the FW Act that consultation needs to occur prior to the proposed change being implemented and with sufficient time for employees to raise any concerns, and for employers to give consideration to those concerns.

38. The clear intent of the provision is that the employer be provided with the employee's views about the impact of the change so that those views may be considered before the change is implemented or a definite decision is made.

[100] In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited* [2010] FCA 591; (2010) 198 IR 382, Logan J considered whether QR Limited had failed to consult with employees in contravention of an obligation arising under an enterprise agreement. His Honour said:

> … A key element of that content [of an obligation to consult] is that the party to be consulted be given notice of the subject upon which that party's views are being sought before any final decision is made or course of action embarked upon. Another is that while the word always

> carries with it a consequential requirement for the affording of a meaningful opportunity to that party to present those views. What will constitute such an opportunity will vary according the nature and circumstances of the case. In other words, what will amount to "consultation" has about it an inherent flexibility. Finally, a right to be consulted, though a valuable right, is not a right of veto.
>
> To elaborate further on the ordinary meaning and import of a requirement to "consult" may be to create an impression that it admits of difficulties of interpretation and understanding. It does not. Everything that it carries with it might be summed up in this way. There is a difference between saying to someone who may be affected by a proposed decision or course of action, even, perhaps, with detailed elaboration, "this is what is going to be done" and saying to that person "I'm thinking of doing this; what have you got to say about that?". Only in the latter case is there "consultation. …

[101] These authorities give rise to important questions as to the necessary content of a term that complies with the requirement in s 205(1)(a)(i) of the Act and as to the merits of an obligation to consult arising at a point prior to a definite decision having been made.[58]

[102] On the other hand, the submissions received by the Commission have raised a range of concerns in relation to the implementation, in the model consultation term, of an obligation to consult at the stage of a proposal being made to introduce a major workplace change. Those submissions included that the change would cause uncertainty as to when the requirement to consult would arise, that it would impede the development of business plans and ideas, that it would conflict with the disclosure obligations of public companies and that it departs, without a sufficient evidentiary foundation, from the long-standing provision in awards and statutory provisions that consultation in relation to major workplace change should occur after a definite decision has been made to introduce the change.

[103] We have concluded that such a change should be the subject of a more detailed and extended consideration than has been possible as part of the current process of consultation in relation to the model terms. Five considerations are significant in that respect. First, the present process of considering the changes to the model terms has been constrained as a result of the requirement to have new model terms in place by 26 February 2025. Second, the Commission's consideration of the nature of the term required to be included in enterprise agreements by s 205(1)(a)(i) of the Act might, on one view, have implications for the permissibility of provisions of existing enterprise agreements which should be properly considered. Third, as we have indicated, the submissions the Full Bench has received have raised a range of considerations as to the potential consequences of having to consult prior to a "definite decision" being made, which might be properly the subject of evidence. Fourth, it may be appropriate to further consider consultation obligations which arise in other jurisdictions, including under international conventions to which Australia is party.[59] Fifth, if there were to be a change to the stage of a decision-making process at which an obligation to consult arises, consideration may need to be given to whether other aspects of the consultation process contemplated by the model consultation term might need to be adjusted.

[104] For these reasons, the Full Bench has determined to retain reference to a "definite decision" as the trigger for consultation about major workplace change in the model

consultation term. It is intended that the Commission will give further consideration to this question in subsequent proceedings to be programmed later in the year.

[105] The draft model consultation term published in December 2024 also removed reference in the existing model term to consultation being required where a major change is to be made to "to production, program, organisation, structure or technology". The ACTU submits that the model consultation term should not limit the obligation to consult to certain types of major change that are likely to have significant effects on employees.[60] It is not appropriate to express a final view on that question at this stage. The Full Bench has determined to include reference to major change "to production, program, organisation, structure or technology" in the model term. The Commission will receive further submissions on this aspect of the model term when it comes to consider the "definite decision" issue.

General obligation to consult

[106] The ACTU has sought that the model consultation term should include what it described as an "express and direct requirement to consult".[61] It referred to the oddity of the existing model consultation term not itself imposing an obligation, in terms, to consult employees. The ACTU made clear that it did not intend that the general term it sought would replace the specific incidents of consultation set out in the current model term. The term proposed by the ACTU is as follows:

> **General Requirement to Consult**
> (2) The employer must consult with any employees affected by the proposed change referred to in (1), as well as their representatives (if any). When consulting the employer must afford the employees and their representatives (if any) a genuine opportunity to contribute to and influence the proposed change.
>
> (3) The employer must not introduce the change prior to meeting the requirement to consult in clause (2).

[107] We included in the draft model consultation term published in December 2024 a term to this effect. A number of the submissions subsequently received suggested that the wording was likely to produce uncertainty, and it was unclear whether any discrete obligation was imposed by a general reference to a requirement to "consult".[62] We have determined to remove the separate clause referring to an obligation to consult. The concern of the ACTU and other unions is, in our view, better addressed by a reference to "consult" being included in clauses 6 and 16 of the model term (referrable to the obligation to consult in relation to major workplace change and changes to regular rosters or ordinary hours of work respectively).

Clauses 2 to 7: Consultation obligations

[108] Clauses 2 to 7 of the model consultation term the Full Bench has determined set out the obligations on an employer to consult with respect to major workplace change. Those clauses substantially reflect the provisions of the existing model consultation term with relatively minor adjustments. The provisions also substantially reflect the comparable provisions in modern awards.

[109] The wording of clause 4, in dealing with the nomination of a representative for the purposes of consultation, refers to an employee "advising" the employer of a representative rather than referring to the "appointment" of a representative. The adjustment of the wording is intended to make clear that no formal process of appointment is required. We have determined to change the reference to an obligation on an employer to only "discuss" the workplace change with employees and their representatives to a reference to "consult" to make clear that the obligation is intended to include discussion, receipt of feedback and consideration of contributions made by employees and their representatives.

[110] The obligations to notify employees of a relevant workplace change and consult in relation to the change which arise under clauses 6 to 8 have been adjusted to make clear that the obligations arise with respect to employees and their representatives. Further, the exception to the obligation to provide relevant information to employees and their representatives relating to confidential or commercially sensitive information should explicitly extend to the provision of information to employee representatives.

[111] We have also determined to include, in clause 6(b)(ii), an obligation on an employer who has decided to introduce a major workplace change to provide information to employees and their representatives about the "reasons or justification" for the change. That additional wording was opposed by some organisations and bodies.[63] We consider that the provision of information about the reasons or justification for a change will facilitate consultation. That course will permit employees and their representatives to better understand what is sought to be achieved by the workplace change and potentially permit exploration of alternative methods of achieving the same outcomes in a manner that might avoid or have minimum impacts on employees. That provision is, in our opinion, consistent with best practice workplace relations.

Clauses 8 to 11: Outcome of consultation

[112] The model consultation term the Full Bench has determined will incorporate provisions requiring an employer to give prompt and genuine consideration to matters raised by employees and their representatives, to communicate the outcome of the consultation and to take reasonable steps to ensure that information provided in the course of the consultation is able to be understood by employees, including those who have a limited understanding of written or spoken English.

[113] A requirement for an employer to give prompt and genuine consideration to matters raised by employees and their representatives is a matter already dealt with in the existing model consultation term and comparable modern award terms. An obligation to communicate the outcome of a consultation process goes beyond the existing model term and comparable terms of modern awards. We are, however, satisfied it is appropriate to include that provision, that it is consistent with best practice workplace relations and that the provision will not lead to the model consultation term not still being broadly consistent with comparable modern award provisions.

[114] We note that, in considering the model term to be incorporated in modern awards with respect to changes to regular rosters, the Full Bench has previously said the proposal has some merit. The Full Bench said:[64]

> We do, however, see some merit in a provision requiring the employer to inform the affected employee and their representative, if any, of the outcome of their consideration of the views provided to them regarding the impact of the proposed change. However, a provision in those terms was only the subject of limited argument in the proceedings before us and given the time constraint imposed by the transitional provision it is not practical to seek the views of interested parties before we are obliged to make a determination. In the circumstances we propose to give this issue further consideration in the context of the 4 yearly review.

[115] We do not accept that a requirement to communicate the outcome of a consultation process would impose an overly onerous obligation on employers as contended by some organisations and bodies.[65] If an employer has given genuine consideration to matters raised by employees and their representatives, it should not be a considerable additional task to communicate the outcome of that consideration. That process is also consistent with the Fair Work Ombudsman Best Practice Guide on Cooperation and Consultation.[66] We emphasise that the requirement we have determined to include in the model term is only to take reasonable steps to communicate the outcome of a consultation process. What is required will vary depending on the circumstances of the case and the nature of the workplace change being introduced.

[116] We have determined not to include general provision requiring that reasonable steps to be taken to communicate information as part of a consultation process in a manner that enables employees to understand the information where employees have limited understanding of written or spoken English. Unlike a proposal to make an individual flexibility arrangement which is directed at an individual employee, consultation in relation to major workplace change may involve and require communication with large groups of employees. Whilst employers should generally be encouraged to endeavour to ensure that communications are able to be understood by all employees, on the material available to us, we are not able to be satisfied that such a requirement is appropriate or practicable as a general provision.

Clause 12: Definition of significant effect

[117] The model consultation term the Full Bench has determined will incorporate a definition of when a workplace change will have a "significant effect" on employees so as to trigger the obligation to consult. The definition is substantially based on the definition contained in the existing model term and is broadly consistent with comparable terms in modern awards.

[118] The ACTU submits that the definition of "significant effects" should be amended to indicate that a "significant effect" on employees includes, but is not limited to, the list of identified effects.[67] It says that the requirement, in s 205(1)(a)(i) of the Act, that an enterprise agreement must include a term that requires a relevant employer or employees to consult about "a major workplace change that is likely to have a significant effect on employees" extends to any significant effects on employees. It cannot, according to this submission, be limited to certain effects.

[119] The ACTU also submits that this change would be consistent with the common form of consultation terms in modern awards, which include changes that "includes any of the following". The model consultation term for modern awards contains the following definition:

> **B.5** In clause B significant effects, on employees, includes any of the following:
> (a) termination of employment; or
> (b) major changes in the composition, operation or size of the employer's workforce or in the skills required; or
> (c) loss of, or reduction in, job or promotion opportunities; or
> (d) loss of, or reduction in, job tenure; or
> (e) alteration of hours of work; or
> (f) the need for employees to be retrained or transferred to other work or locations; or
> (g) job restructuring.

[120] We are not persuaded that it is appropriate to make this change to the model consultation term. The intention of the definition of the expression "significant effect" is to indicate what types of effects give rise to the obligation to consult about a major workplace change. Providing for a definition that is non-exhaustive has the potential to introduce uncertainty and imprecision in the operation of the clause.

[121] We do not accept that the definition we propose would fail to provide for consultation about a major workplace change that is likely to have significant effects on employees as required by s 205(1)(a)(ii) of the Act. It may be that an enterprise agreement which defined the expression "significant effects" in a manner that was unduly narrow, or excluded matters that would obviously give rise to a significant effect on employees, might fail to make provision as required by s 205(1)(a)(ii). It is unnecessary to express a final view on that question. However, with the exception of a small number of adjustments sought to the wording of the definition, no party suggested the list provided in the current model term excluded types of change that should be considered "significant".

[122] It is also unclear whether the definition of "significant effects" in the model consultation term for modern awards provides only a non-exhaustive list of such effects. In many circumstances, the use of the word "includes" in a statutory definition will indicate that the identified matters are non-exhaustive. However, that is not always the case. In some cases, the language or the context may suggest that the word "includes" is used to provide an exhaustive definition of the matters that fall within the defined term.[68] It appears to us that the use of the expression "includes any of the following" in the model consultation term for modern awards suggests that the list of identified effects is intended to be exhaustive.

[123] We are persuaded it is appropriate to make two changes to the wording of the definition of "significant effects" for the purposes of the model consultation term. The definition will include reference to the "loss of, or reduction, in job or promotion opportunities" rather than "the elimination or diminution of job opportunities". The alternation in wording is, in our opinion, consistent with plain language drafting. The addition of reference to promotion opportunities is also consistent with the comparable term in modern awards. We have also

included reference to "job security" as well as "job tenure" in clause 12(d). This change is consistent with reference to "job security" in the object to the Act set out in s 3(a) and, in our opinion, is an effect which should properly give rise to a consultation obligation under the model consultation term consistent with best practice workplace relations.

Clause 13 to 20: Consultation in relation to change to regular roster or ordinary hours of work

[124] The model consultation term the Full Bench has determined will include provision for consultation in relation to changes to the regular roster or ordinary hours of work of an employee or employees as required by s 205(1)(a)(ii). Clauses 13 to 20 of the model term will substantially reflect the existing model term. We have made certain adjustments consistent with our determinations with respect to consultation concerning major workplace change, including with respect to the appointment of representatives, the communication of the outcome of a consultation process and provision of information to employees with a limited understanding of written or spoken English.

[125] We are also persuaded it is appropriate to include reference to a requirement that an employer provide information in relation to the nature and expected duration of the change and in relation to the expected effects of the change on the remuneration of employees. We consider that information as to the expected duration of a change to the regular roster or ordinary hours of work of an employee, and the likely effect on remuneration, would have already been required by the existing model term. However, in our opinion, there is merit in express specification of the requirement to provide information in relation to those matters.

Model term for dealing with disputes for enterprise agreements

Clause 1: Subject of dispute

[126] The Full Bench has determined that the model disputes term for enterprise agreements should operate with respect to disputes that relate to a matter arising under the agreement or the National Employment Standards. The ACTU and a number of unions proposed that the model disputes term be expanded to include any matter that is capable of being agreed to in an enterprise agreement approved under the Act.[69] Other proposals included to expand the potential subject of a dispute to "any matter pertaining to the relationship between the employer and an employee or employees covered by the agreement". [70]

[127] In our opinion, there is much to be said for any employment dispute being subject to a structured dispute resolution process. It is desirable that mechanisms exist for disputes to be addressed and hopefully resolved rather than being permitted to fester or produce disgruntlement or disputation in another form. However, s 186(6)(a) of the Act requires only that an enterprise agreement contain a term that provides for a procedure to settle disputes about any matters arising under the agreement and in relation to the National Employment Standards. The existing model disputes term is limited in its operation in that manner.

[128] Whilst it would be open to the Commission to determine a model disputes term for enterprise agreements which addressed a broad scope of disputes, we do not consider it is

appropriate to do so at this time. We do see potential merit in the proposal. In the course of this process, however, the Full Bench has not had sufficient opportunity to consider the extent to which expanding the scope of the model disputes clause might make it necessary to adjust other aspects of the dispute settlement process for which the model term provides or other ramifications it may have.

Clauses 2 and 3: Parties to a dispute

[129] The Full Bench has determined that the model disputes term for enterprise agreements should include a clause setting out the potential parties to a dispute to which the term applies. The draft model disputes term published by the Full Bench in December 2024 included reference to an employee or employees affected by the dispute, the employers or employees covered by the agreement and an employee organisation. There does not appear to be controversy that the parties to a dispute can and should be able to include an employee or employees covered by the agreement who are affected by the dispute and the employer or employers covered by the agreement for the purposes of proposed clause 2(a) and (b).

[130] Some parties opposed the inclusion of reference to an employee organisation being a party to a dispute in proposed clause 2(c).[71] Clause 2(c) in the draft model disputes term provided that the parties to a dispute could include an employee organisation that was either entitled to represent the industrial interests of an employee or employees who were affected by the dispute or an employee organisation covered by the agreement and entitled to the benefit or, or has a role or responsibility with respect to, the matter in dispute. A number of parties particularly opposed the reference to an employee organisation entitled to represent the industrial interests of a relevant employee, but which may not be "covered" by the agreement.

[131] To comply with s 186(6), a dispute settlement term of an enterprise agreement must include the capacity for an industrial organisation to be party to a dispute at least where the organisation is covered by the agreement. The issue was considered by the Full Court in *Energy Australia Yallourn Pty Ltd v Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union* [2018] FCAFC 146; (2018) 264 FCR 342 (***Energy Australia Yallourn***). Energy Australia contended that the relevant unions could not initiate a dispute under the dispute resolution provision of an enterprise agreement. The Full Court rejected the submission. One reason for rejecting the submission was that, if the unions who were covered by the agreement could not raise a dispute, the dispute resolution clause would not comply with s 186(6).[72] Rares and Barker J explained, in part:

> 65. As s 172(1) of the Act provides, an enterprise agreement can be "about" matters pertaining to the relationship "between the employer … and the employee organisation or employee organisations, that will be covered by the agreement". A dispute about, or involving, that relationship is a subject-matter for which s 186(6) requires a dispute resolution process to be included in an enterprise agreement. However, neither cl 28.1(a) nor para (3) of the model term, in Sch 6.1 to the Regulations, expressly addresses whether a dispute that any of the five unions may have with Energy Australia, arising under the Yallourn agreement as to its interpretation or Energy Australia's compliance with its terms, can be addressed only by discussions between the employer and one or more employees, without the involvement of the union(s) concerned.

> 66. Clearly enough, the literal phrasing of each of para (3) of the model term and steps 1 and 2 in cl 28.1(a) is apposite to cover a dispute that involves only the employer and one or more employees. However, both the model term and cl 28 are intended to provide, as s 186(6)(a)(i) requires, "a procedure that requires or allows [the Commission] … to settle disputes … about any matters arising under the agreement" (emphasis added). Therefore, a literal construction of cl 28 that precluded any of the five unions that are parties to the Yallourn agreement from initiating a dispute about a matter arising under it for which it has a workplace right, would defeat the purpose which the first three paragraphs of cl 28 (preceding cl 28.1) and ss 186(6) and 341(1) required the dispute resolution process in the clause to serve.
>
> 67. Energy Australia's argument that the Yallourn agreement did not provide any basis for any of the five unions to raise a dispute under cl 28 must be rejected. That is because, if the five unions themselves could never raise or pursue a dispute about their workplace rights, as employee organisations, covered by the Yallourn agreement within the meaning of ss 53(2), 172(1)(b) and 186(6)(a)(i), then cl 28 would not provide a procedure to settle a class of category 1 matters that could arise under the enterprise agreement. Accordingly, cl 28 would not comply with s 186(6).

[132] There was disagreement between the parties who made submissions in these proceedings as to whether the reasoning of the Full Court applied only with respect to organisations that are themselves covered by an agreement or any organisation that was entitled to represent the industrial interests of employees covered by the agreement. The ACTU submits that the reasoning applied to any organisation that was entitled to enforce entitlements through litigation at least by reason of a contravention of s 323(1) of the Act or the National Employment Standards.[73] The ACCI, BCA and ARA all submitted that the reasons of the Full Court only applied with respect to industrial organisations that are covered by an enterprise agreement.[74]

[133] The reasoning of the Full Court certainly concentrated, in part, on the fact that the relevant unions involved in those proceedings were covered by the enterprise agreement in question. One reason that was given as to why the dispute resolution clause should be construed as permitting the unions to initiate, and be party to, a dispute was that, as a consequence of being covered by the agreement, the agreement provided the terms and conditions that governed the rights and obligations of the unions.[75] If the unions could not be parties to a dispute, the clause would not provide a procedure "to settle disputes … about any matters arising under the agreement" for the purposes of s 186(6).

[134] However, there were other reasons for preferring that construction. If the unions were not able to be parties to a dispute being dealt with under the dispute resolution process, the unions would not be bound by the outcome. It would always remain open to any of the unions to commence proceedings in relation to the same question which had been resolved under the dispute resolution process. A union that wished to resolve a dispute through the dispute settlement process could not do so and would be forced to engage in litigation in the courts. Such outcomes would defeat the object and purpose of the dispute clause being to assist in resolving disputes.[76] Further, Rares and Barker JJ noted the capacity of industrial organisations to bring proceedings in their own right including with respect to contraventions of s 323(1) of the Act and the National Employment Standards.[77] Proceedings with respect to some of those contraventions can be brought by an industrial organisation even if not itself covered by the

agreement so long as it is entitled to represent the industrial interests of an employee affected by the contravention.[78]

[135] In determining a model disputes term, the Full Bench is required to ensure that the model term is consistent with the requirements set out in s 186(6).[79] It is accepted by all organisations and bodies who made submissions on the question, that this means the model disputes term must at least permit organisations that are covered by an agreement to be parties to a dispute dealt with in accordance with the term. It is unnecessary for us to resolve the question of whether s 186(6) requires that the model term permit organisations not directly covered by an agreement to be party to a dispute dealt with under the term. That is because, having regard to what we believe is best practice and to the object of the Act and the objects of Part 2-4, we consider it appropriate to include such provision. In the absence of the capacity of an industrial organisation to be party to a dispute, the only option to resolve at least certain disputes would be through litigation in the Federal Court or the Federal Circuit Court. Such an arrangement would defeat the intention of a dispute term to permit an alternative method of resolving disputes either directly at the workplace or through conciliation or arbitration in the Commission. We further consider that this provision will aid the resolution of disputes in circumstances in which employees might be reluctant to themselves initiate a dispute as a result of concern (rightly or wrongly) for their employment or potential repercussions they might face by reason of doing so.

[136] It is appropriate to make clear that the model disputes term we have determined to make permits an organisation not covered by an agreement to be party to a dispute subject to two conditions. First, consistent with the capacity to bring proceedings in relation to a contravention, the organisation must be entitled to represent the industrial interests of an employee affected by the dispute. Second, there must be a dispute affecting an employee or employees covered by the agreement which the organisation initiates or is party to. An organisation not covered by the agreement does not itself have rights or obligations under the agreement. It could only be party to a dispute where the dispute exists and affects an employee or employees that it is entitled to represent. This will be made clear by adoption of wording indicating that an employee organisation can be party to a dispute if it "has a member who it is entitled to represent and who is an employee referred to in (a)".

Clauses 3 and 4: Resolution at the workplace

[137] The Full Bench has determined that the model disputes term for enterprise agreements should include provision for employees to nominate a representative and for a requirement that, in the first instance, the parties endeavour to resolve a dispute through discussions at the workplace level. The provision we have determined to make substantially reflects the terms of the existing model disputes term. We have determined to adjust the wording of clause 3 which permits the nomination of a representative to refer to an employee "advising" the employer of a representative rather than referring to the "appointment" of a representative. The adjustment of the wording is intended to make clear that no formal process of appointment is required.

Clauses 5 and 6: Referral

[138] The Full Bench has determined to make a model disputes term which incorporates provision for a party to a dispute to refer a dispute to the Commission if it is not resolved by discussions at the workplace. In that respect, the model term we have determined to make reflects the existing model term. To be consistent with the requirements of s 186(6) of the Act, the clause must provide for a person independent of the parties to settle disputes. No organisation or body suggested that person should not be the Commission.

[139] We have also determined to include a new clause 6. The effect of the clause is to confer a discretion on the Commission to deal with a dispute even if the parties have not complied with the requirement to engage in discussions at the workplace. There should be no misunderstanding. The Commission expects that parties will endeavour to resolve disputes at the workplace before they are referred to the Commission. Parties who, without compelling reasons, fail to do so should not expect the Commission will deal with their dispute until such discussions have occurred. However, having taken into account what we consider to be best practice and the object of the Act and the objects of Part 2-4, we consider it is desirable for the Commission to have a discretion to deal with a dispute notwithstanding an allegation that a party has not sought to resolve the dispute at the workplace.

[140] The Commission would need to be satisfied it is "appropriate to do so in all the circumstances". It is not appropriate to seek to define when a member of the Commission might consider it appropriate to deal with a dispute notwithstanding an alleged failure to try to resolve a dispute at the workplace. It sufficient to say that a member of the Commission may consider it appropriate to do so, for example, because of the significance or urgency of the dispute or because interim relief is sought; if one party has, through their conduct, impeded or delayed discussions occurring; to avoid a protracted jurisdictional argument which will likely distract the parties from resolving the substance of a dispute; or because the nature of the dispute is of a character that is unlikely to be capable of resolution at the workplace level.

Clauses 7, 8, 9 and 10: Resolution by the Commission

[141] The model disputes term the Full Bench has determined to make will include provision for the Commission to deal with the dispute by conciliation or, if necessary, by arbitration and making a determination binding on the parties. Clause 7 to 10 will substantially replicate the existing model term.

[142] We have determined to include a new clause 8 which will have two functions. The clause will make clear that the Commission may exercise the powers available to it under the Act, including with respect to the grant of interim relief, and that a decision of the Commission made in arbitration of a dispute can be appealed in accordance with the provisions of the Act. This is likely to reflect the implied operation of the term in any event. Where the parties confer a function of conciliation or arbitration on the Commission, it is generally assumed that the parties intended to take the Commission as they find it.[80] We consider it is nonetheless instructive to include express reference to the powers able to be exercised by the Commission when conciliating or arbitrating a dispute under the model term.

[143] The ACTU and a number of unions submit that the model disputes term should include a status quo provision requiring the status quo that existed before the event or circumstance that led to the dispute.[81] We do not consider that clause should be included in the model disputes clause. A status quo provision may be sensible in particular workplaces or industries and may appropriately be the subject of bargaining. However, on the material available to us, we do not consider at this stage that it is appropriate to include a general status quo provision in the model term. We observe that the Commission has the capacity to make interim orders which would include the capacity to make interim status quo orders once a dispute is referred to the Commission.

[144] Finally, we have determined to include a note at the end of the model disputes term to refer to other mechanisms provided for in the Act to resolve disputes. The note was suggested by the ACTU,[82] and not opposed by other organisations or bodies who made submissions.

Model term for dealing with disputes about matters arising under copied State instruments

[145] The Full Bench has determined to make a model term for dealing with disputes about matters arising under copied State instruments. This model term attracted few discrete submissions. Accordingly, the Full Bench has determined to make a model term for disputes relating to copied State instruments that reflects the determination it has made with respect to the model disputes term for enterprise agreements subject to necessary wording changes.

Conclusion

[146] The Full Bench has determined a model flexibility term, a model consultation term and a model term about dealing with disputes for enterprise agreements and a model term for dealing with disputes about matters arising under copied State instruments as required by ss 202(5), 205(3), 737(1) and 768BK(1A) of the Act as amended by the Closing Loopholes No 2 Act. In determining each of the model terms, the Full Bench has ensured that the terms are consistent with the requirements in ss 202(1), 205(1) and (1A) and 186(6) (as applicable) and has taken into account each of the matters required by ss 202(6)(b), 205(4)(b), 737(2)(b) and 768BK(3) of the Act.

[147] The model terms will be published together with this decision and will operate from 26 February 2025.

VICE PRESIDENT

Appearances (Public Consultation):

A Kentish, Senior Industrial Officer, appearing for the Australian Council of Trade Unions.
R Bhatt, Principal Advocate, appearing for the Australian Industry Group.
J Tinsley, General Counsel, appearing for the Australian Chamber of Commerce and Industry.
M Sommerton, Head of Industrial Relations, appearing for the Council of Small Business Organisations Australia.
K Eather, General Counsel, appearing for the Business Council of Australia.
M Hathaway, D Doherty and H Glew, appearing for the Office of the Commissioner for Public Employment, Northern Territory Government.
A Tandel and S Spivak, appearing for the Community and Public Sector Union.
L Amoresano, National Legal Officer, appearing for the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union.
Y Abousleiman and E Skelding, appearing for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia.
N Retmock, Industrial Officer, appearing for the Australian Nursing and Midwifery Federation.

Hearing details:

Private Consultation: 28 October 2024 (Sydney).
Public Consultation: 3 December 2024 (Sydney and by video using Microsoft teams).
Final written submissions: 4 February 2025.

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[1] As currently required by ss 202(5), 205(3), 737 and 768BK(1) of the *Fair Work Act 2009* (Cth).

[2] Statement of the President of the Commission dated 27 February 2024, *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024*, at [29].

[3] *Model terms for enterprise agreements and copied State instruments* [2024] FWC 2520.

[4] Ibid at [22].

[5] *Model terms for enterprise agreements and copied State instruments* [2024] FWCFB 466.

[6] *Fair Work Act 2009* (Cth), ss 202(4) and 205(2).

[7] *Fair Work Act 2009* (Cth), s 768BK(1)

[8] Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) at [526].

[9] *Australian Municipal, Administrative, Clerical and Services Union v City of Darebin* [2024] FWCFB 381 at [38].

[10] *Fair Work Act 2009* (Cth), ss 768AI(1) and 768AK(1).

[11] *Edwards v Giudice* (1999) 94 FCR 561 at [5] (Moore J); *National Retail Association v Fair Work Commission* [2014] FCAFC 118; (2014) 225 FCR 154 at [56] (Collier, Bromberg and Katzmann JJ); *Re 4 yearly review of modern awards* [2019] FWCFB 6067 at [13].

[12] *Nestle Australia Ltd v Federal Commissioner of Taxation* (1987) 16 FCR 167 at 184 (Wilcox J); *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd (t/as Richmond Oysters)* [2018] FWCFB 901; (2018) 273 IR 156 at [19].

[13] *Friends of Hinchinbrook Society Inc v Minister for Environment (No 3)* (1997) 77 FCR 153 at 187-188 (Hill J); *Application by Construction, Forestry and Maritime Employees Union – The Maritime Union of Australia Division for an entry permit for Shane Reside* [2024] FWC 3409 at [7].

[14] *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504-505 (Dixon J); *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 49; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 149 at [19] (Gleeson CJ, Gaudron and Hayne JJ).

[15] Ai Group Submissions dated 4 November 2024 at [10]-[11].

[16] ARA Submissions dated 1 November 2024 at 1.

[17] Ai Group Submissions dated 4 November 2024 at [10]-[11]; ACCI Submissions dated 1 November 2024 at [16].

[18] *Fair Work Act 2009* (Cth), s 157(1). See also *Shop, Distributive and Allied Employees Association v National Retail Association and Another (No 2)* [2012] FCA 480; (2012) 205 FCR 227 at [35] (Tracey J) and *Re Treves* [2023] FWCFB 98 at [66].

[19] For example, through the making of a majority support determination or single interest employer authorisation.

[20] *Fair Work Act 2009* (Cth), ss 202(6)(b)(i)-(ii), 205(4)(b)(i)-(ii), 737(2)(b)(i)-(ii) and 768BK(3)(a)-(b).

[21] ACCI Submissions dated 1 November 2024 at [9]-[12]; Ai Group Submissions dated 4 November 2024 at [17]-[18].

[22] Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) at [547]. See also at [533], [564] and [580] with respect to the other model terms.

[23] Explanatory Memorandum to the *Fair Work Bill 2009* (Cth) at [864].

[24] Ibid at [878].

[25] Referred to in the ACTU Reply submissions dated 22 November 2024 at [9].

[26] Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) at [534]. See also at [548], [565] and [581] with respect to the other model terms.

[27] *Background Paper: Model terms for enterprise agreements*, 17 September 2024 at Section 4 (p18-19).

[28] Ai Group submissions dated 4 November 2024 at [24].

[29] Ai Group submissions dated 4 November 2024 at [24].

[30] See, for example, ACTU submissions dated 1 November 2024 at p16, p30 and p43-44.

[31] Ai Group reply submissions dated 29 November 2024 at [8]-[9].

[32] Ai Group submissions dated 4 November 2024 at [21].

[33] ACCI reply submissions dated 28 November 2024 at [40].

[34] Ai Group reply submissions dated 29 November 2024 at [11].

[35] ACTU submissions dated 1 November 2024 at p15.

[36] ACCI reply submissions dated 28 November 2024 at [41]; Ai Group reply submissions dated 29 November 2024 at [12]-[13].

[37] *Re Request from the Minister for Employment and Industrial Relations — 28 March 2008* (2008) 175 IR 120 at [165].

[38] *Re Modern Awards Review 2012 — Award Flexibility* [2013] FWCFB 2170; (2013) 232 IR 159 at [73]-[77].

[39] Ibid at [209].

[40] ACCI reply submissions dated 28 November 2024 at [43]; Ai Group reply submissions dated 29 November 2024 at [14].

[41] ACCI reply submissions dated 28 November 2024 at [43]; Ai Group reply submissions dated 29 November 2024 at [14]-[19]; BCA reply submissions dated 28 November 2024 at p2.

[42] ACCI reply submissions dated 28 November 2024 at [44]-[48]; Ai Group reply submissions dated 29 November 2024 at [22]-[27].

[43] Fair Work Ombudsman, *Use of Individual Flexibility Arrangements Best Practice Guide* at p6.

[44] ACTU submission regarding draft terms dated 31 January 2025 at [10]-[18].

[45] *Re Request from the Minister for Employment and Industrial Relations — 28 March 2008* (2008) 175 IR 120 at [184].

[46] *Re Modern Awards Review 2012 — Award Flexibility* [2013] FWCFB 2170; (2013) 232 IR 159 at [187].

[47] ACCI reply submissions dated 28 November 2024 at [54]; Ai Group reply submissions dated 29 November 2024 at [37].

[48] ACTU submission dated 1 November 2024 at p12.

[49] *Re Modern Awards Review 2012 — Award Flexibility* [2013] FWCFB 2170; (2013) 232 IR 159 at [203]-[206].

[50] ACTU submission dated 1 November 2024 at 13-14.

[51] ACTU submission dated 1 November 2024 at 18-21.

[52] *Fair Work Act 2009* (Cth), s 653(1)(b).

[53] *Model terms for enterprise agreements and copied State instruments – Statement* [2024] FWCFB 466 at [12]-[14].

[54] ACTU submission dated 31 January 2025 at [34]; AMWU submission dated 31 January 2025 at [20]; ANMF submission dated 31 January 2025 at [3]; ASU submission dated 31 January 2025 at 1; CEPU submission dated 31 January 2025 at [4]; CFMEUCG submission dated 31 January 2025 at [19]; CPSU submission dated 31 January 2025 at [16].

[55] ACCI submission dated 31 January 2025 at [15]; Ai Group submission dated 31 January 2025 at [21]; AREEA submission dated 31 January 2025 at [42]-[74].

[56] See, in particular, *Termination Change and Redundancy Case* (1984) 9 IR 115 at 126.

[57] *Re Consultation clause in modern awards* [2013] FWCFB 10165; (2013) 238 IR 282 at [35]-[38].

[58] See also *Construction, Forestry, Mining & Energy Union v Newcastle Wallsend Coal Co Ltd* (1998) 88 IR 202 at 217-218; *Construction, Forestry, Mining and Energy Union v Port Kembla Coal Terminal Limited (No. 2)* [2015] FCA 1088; (2015) 253 IR 391 at [274]-[277] (Murphy J); *Tomvald v Toll Transport Pty Ltd* [2017] FCA 1208 at [211] (Flick J); *Construction, Forestry, Maritime, Mining and Energy Union v Mt Arthur Coal Pty Ltd (t/as Mt Arthur Coal)* [2021] FWCFB 6059 at [108].

[59] See, for example, Article 13 of the *Convention Concerning Termination of Employment at the Initiative of the Employer, 1982* (No. 158) of the Intentional Labour Organisation.

[60] ACTU submissions dated 1 November 2024 at p29-30.

[61] ACTU submissions dated 1 November 2024 at p30.

[62] Ai Group comments on draft model terms dated 5 February 2025 at [25] – [26]; ACCI submissions in reply dated 28 November 2024 at [69] – [70].

[63] ACCI comments on draft model terms dated 31 January 2025 at [44]; Ai Group comments on draft model terms dated 5 February 2025 at [37].

[64] *Re Consultation clause in modern awards* [2013] FWCFB 10165; (2013) 238 IR 282 at [101].

[65] ACCI reply submissions dated 28 November 2024 at [81]-[83]; Ai Group reply submissions dated 29 November 2024 at [67]-[68]; ARA comments on draft model terms dated 31 January 2025 at pg4.

[66] Fair Work Ombudsman, *Consultation and Cooperation in the Workplace Best Practice Guide* at p11.

[67] ACTU submissions dated 1 November 2024 at p36-37.

[68] See, for example, *YZ Finance Pty Ltd v Cummings* (1964) 109 CLR 395 at 399 (McTiernan J), 401 (Kitto J) and 405 (Menzies J); *Caltex Australia Petroleum Pty Ltd v Federal Commissioner of Taxation* [2019] FCA 1849 at [27] (Davies J).

[69] ACTU submissions dated 1 November 2024 at p43-44.; CPSU submissions dated 1 November 2024 at [42]-[43]; UWU submissions dated 1 November 2024 at [29]-[32]; AMWU comments on draft model terms dated 31 January 2025 at [13]; ASU comments on draft model terms dated 31 January 2025 at p1.

[70] AMWU submissions dated 1 November 2024 at [13d].

[71] ACCI submissions dated 28 November 2024 at [115] – [117]; ARA submissions dated 28 November 2024 at p5-6; Ai Group submissions dated 29 November 2024 at [90] – [91]; AREEA comments on draft model terms dated 31 January 2025 at [83]-[90]; BCA supplementary submissions dated 13 December 2024 at p2.

[72] *Energy Australia Yallourn Pty Ltd v Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union* [2018] FCAFC 146; (2018) 264 FCR 342 [65]-[67] and [70]-[72] and [79] (Rares and Barker JJ). See also *Construction, Forestry, Maritime, Mining and Energy Union v Mechanical Maintenance Solutions Pty Ltd* [2019] FWCFB 3585 at [37]-[38].

[73] ACTU supplementary submissions re Energy Australia Yallourn case dated 6 December 2024 at [13]-[29].

[74] ACCI reply submissions dated 28 November 2024 at [116]-[177]; BCA reply submission on Energy Australia Yallourn dated 13 December 2024 at p1; ARA reply submission on Energy Australia Yallourn dated 13 December 2024 at p1-2.

[75] *Energy Australia Yallourn* at [59] and [75] (Rares and Barker JJ).

[76] Ibid at [72]-[73] (Rares and Barker JJ) and [130]-[133] (Flick J).

[77] Ibid at [62] (Rares and Barker JJ).

[78] *Fair Work Act 2009* (Cth), s 540(2), (5) and (6).

[79] *Fair Work Act 2009* (Cth), s 737(2)(a).

[80] *DP World Brisbane Pty Ltd v Maritime Union of Australia* [2013] FWCFB 8557; (2013) 237 IR 180 at [47]-[48]; *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* [2015] FCAFC 123; (2015) 235 FCR 305 at [58]; *Clinical Laboratories Pty Ltd T/A Australian Clinical Labs v Health Services Union* [2024] FWCFB 296 at [15]-[16].

[81] ACTU submissions dated 1 November 2024 at p45; AMWU submissions dated 1 November 2024 at [13](b); ANMF submissions dated 1 November 2024 at [7]; CPSU submissions dated 1 November 2024 at [44]-[46]; CEPU submissions in reply dated 22 November 2024 at [23].

[82] ACTU submissions dated 1 November 2024 at p46.