

IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 – Four Yearly Review of Modern Awards

AM2015/1

**SUBMISSIONS OF THE AUSTRALIAN COUNCIL OF TRADE UNIONS
REGARDING THE NECESSITY FOR, AND CONTENT OF, A MODERN AWARD TERM
PROVIDING UNPAID FAMILY AND DOMESTIC VIOLENCE LEAVE**

DATE: 1 September 2017

D No: 104/2017

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1. These submissions are filed in accordance with the directions of the Full Bench made on 3 August 2017 that the parties file written submissions addressing the issues set out in Attachment B to the directions.¹

A Unpaid Domestic Violence Leave

A1 Should there be an entitlement to unpaid domestic violence leave in modern awards?

2. The Full Bench of the Fair Work Commission has formed a preliminary view that it is necessary to make provision for unpaid family and domestic violence leave in modern awards.²
3. The decision of the Full Bench followed an application by the ACTU for paid family and domestic violence leave. While the Full Bench accepted much of the evidence of the ACTU as to the necessity of family and domestic violence leave, the majority declined to allow the ACTU's proposal in full, preferring to take a "cautious approach" to the introduction of family and domestic violence leave.³ The ACTU remains committed to the provision of paid family and domestic violence leave for Australian workers.
4. The merits of the ACTU's proposal were the subject of extensive and detailed evidence and submissions from the ACTU and two principal employer parties, the Australian Industry Group and the Australian Chamber of Commerce and Industry. The matter was heard over five days. The ACTU called evidence from six expert witnesses and 18 lay witnesses, nine of whom were required for cross-examination.⁴ The Full Bench also heard evidence and submissions from Price Waterhouse Coopers, and the Victorian Government, about those organisations' paid family and domestic violence leave entitlements, and received a further 15 written submissions both for and against the ACTU's proposal. At the conclusion of the evidentiary hearing, the parties filed written submissions addressing the evidence, and the Full Bench heard final oral submissions over two days.
5. On the basis of this material, the majority of the Full Bench in *4 Yearly Review of Modern Awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 found that the existing safety net was inadequate and that some provision should be made for family and

¹ [2017] FWCFB 4047.

² *4 Yearly Review of Modern Awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 (**Majority Decision**), [119].

³ Majority Decision, [99].

⁴ All of the expert witnesses called by the ACTU were cross-examined.

domestic violence leave to affected employees. The following are the key findings of the majority Full Bench relied on by the ACTU in support of an entitlement to unpaid leave:

- (a) Family and domestic violence is a significant problem which has a significant impact on affected individuals and the community,⁵ and which has a real and tangible impact on employees and employers in the workplace.⁶
- (b) The evidence established that circumstances faced by employees who experience family and domestic violence, by contrast with other forms of interpersonal crime or hardship, requires a special response.⁷
- (c) Existing entitlements, such as the right to request a flexible working arrangement, personal leave, and annual leave, are insufficient to meet all the circumstances faced by employees who experience family and domestic violence.⁸
- (d) Existing remedies such as rights to sue for unfair dismissal and adverse action are insufficient to protect employees from adverse workplace outcomes as a result of domestic violence. Unpaid leave would “*confirm the significance of family and domestic violence leave as a workplace right*” and provide an “*employment protection in circumstances where there is a need to access such leave.*”⁹
- (e) For some employees affected by family and domestic violence, resignation is the only option. The provision of unpaid leave would mean employees would not have to make this choice.¹⁰

6. Although the Full Bench expressed their view as to the need for unpaid leave as a preliminary view, the conclusions set out above were not reached on a preliminary basis. These findings are a solid foundation on which to construct a workplace right to family and domestic violence leave.

7. The Full Bench also formed a preliminary view that there is a need for access to personal leave in a wider range of circumstances to enable affected employees to access paid leave. For the reasons set out in Part B of these submissions, the FWC does not have jurisdiction to extend the circumstances in which personal/carer’s leave can be used. However, the ACTU

⁵ Majority Decision, [49], [56], [116].

⁶ Majority Decision, [54], [116].

⁷ Majority Decision, [51].

⁸ Majority Decision, [42]–[46], [55].

⁹ Majority Decision, [45], [119].

¹⁰ Majority Decision, [61].

welcomes the preliminary view that paid leave should be part of the safety net.¹¹ It follows that if the Full Bench holds the view that paid leave should be part of the safety net, then a lesser entitlement of unpaid leave should also be available.

8. Consistent with each of the findings of the majority Full Bench, which proceeded from a consideration of the evidence and submissions of all parties to the ACTU's application, it is both necessary within the meaning of s 138 of the FW Act, and appropriate that there be an entitlement to unpaid family and domestic violence leave in modern awards.

2.1 The quantum of unpaid leave

9. Unpaid family and domestic violence leave should be available to eligible employees to meet the needs of a particular situation.
10. The ACTU's application sought the inclusion of 10 days paid leave for affected employees. The majority of the Full Bench observed that there is little existing evidence about the amount of leave that has been taken by employees in reliance on family and domestic violence leave entitlements, and that there was insufficient evidence to support a conclusion that 10 days paid family and domestic violence leave was necessary to meet the modern award objective.¹² Due at least in part to the relatively recent nature of the entitlement,¹³ there is a lack of large-scale quantitative data or research on the use of existing clauses and policies. However, the available evidence consistently suggests that uptake rates are low,¹⁴ which supports the notion that the impact on employers is likely to be correspondingly small.
11. The ACTU does not wish to re-litigate the matters relating to paid leave which were the subject of the hearing. However, for the purposes of assessing the appropriate quantum of an unpaid leave entitlement, it is necessary to revisit some of the evidence before the Full Bench. An entitlement of 10 days paid leave has developed over a number of years as a consequence of the input of experts in the field and negotiations at the workplace level between employers and employees. The evidence of Debra Eckersley of PWC, who appeared of its own motion, was that 10 days is an industrial norm among the many workplaces which already provide access to paid family and domestic violence leave. Under cross-examination, Ms Eckersley explained that PWC's decision to provide 10 days leave was informed by their own research

¹¹ In his dissenting opinion, Watson VP stated that there was "much to commend" in the approach by the Victorian Government to the Council of Australian Governments to include paid domestic violence leave in the NES: [2017] FWCFB 1133, [13].

¹² Majority Decision, [65]–[66].

¹³ To the best of our knowledge, the clause contained in the *Surf Coast Shire Enterprise Agreement 2010* was the first of its kind.

¹⁴ See the table in the ACTU final submissions dated 28 November 2016 at [219].

which had revealed a “common standard” of 10 days, as well as the advice of experts in the field of family and domestic violence.¹⁵

12. Paid leave is an entirely different entitlement to unpaid leave, and accordingly, different considerations are relevant to an assessment of the impact of the provision of leave on employers, employees and the national economy. Unpaid leave does not accrue and is not paid out on termination. Employers bear no liability if leave is not accessed in a year, and the costs to employers where leave is access relate only to the need to source replacement staff-members (which employers already deal with when employees are not fit for work due to personal injury or illness). For this reason, the ACTU submits that it is more appropriate to focus on the eligibility requirements for access to unpaid leave, rather than the number of days available. A person’s need for leave for reasons related to family and domestic violence can be unpredictable and varied. It is important that there be sufficient flexibility to enable an employee to take time off as needed. For example, Confidential Witness 3 gave evidence that she required leave during the course of the abusive relationship, as well as to be involved in court proceedings after her ex-partner was arrested for threatening her life, and again to temporarily relocate after her partner was granted bail.
13. In light of these matters, the ACTU submits that there is no justification for capping the amount of unpaid leave available to an employee who meets the eligibility, notice and evidence requirements of the model award term.

2.2(a) The definition of ‘family and domestic violence’

14. The modern award term must include a definition of family and domestic violence to identify those employees who are eligible to access family and domestic violence leave. The definition proposed by the ACTU in its application for paid family and domestic violence leave was:

... any violent, threatening or abusive behaviour by a person against a current or former partner or member of the person’s family or household.

15. The majority of the Full Bench indicated that it was considering limiting access to any new modern award entitlement to employees experiencing repeated violence from a current intimate partner, or a family member who resides with them. The ACTU submits that there is no justification for limiting the term in these ways. Such limitations would exclude many employees with a pressing and legitimate need for time off work for reasons related to their experience of family and domestic violence.

¹⁵ Transcript, 17 November 2016, PN 1890, 1893.

16. Family and domestic violence occurs when a perpetrator engages in a certain type of conduct in relation to a person with whom the perpetrator has a certain kind of relationship. A workable definition should therefore describe both the type of conduct and the type of relationship which characterises a situation of family and domestic violence.
17. There are a number of existing definitions of family and domestic violence to which the Full Bench should have regard when considering the scope of any model term for inclusion in modern awards. In particular, all criminal jurisdictions in Australia set out the grounds on which a court can make a protection order in relation to a person experiencing, or at risk of experiencing, family or domestic violence. While there are some differences in the definitions adopted across jurisdictions, the types of conduct and relationships that constitute situations of domestic and/or family violence are broadly similar.
18. Further, a number of existing enterprise agreements and workplace policies define family and domestic violence for the purpose of providing support and entitlements to affected employees, including paid and unpaid leave.¹⁶ Again, while there are some differences, there are fundamental similarities in both the relationship and conduct aspects of the definitions adopted.
19. Existing definitions of family and domestic violence across various jurisdictions are generally consistent with the definition proposed by the ACTU, in that they cover:
 - (a) a wide range of relationships, including at least intimate partners (of any gender), as well as people usually regarded as relatives (including traditional Indigenous kinship relationships) whether or not they reside in the same household; and
 - (b) a broad range of conduct, including both physical and non-physical forms of abuse (such as economic and emotional abuse, as well as damage to property), coercion and threats to cause harm and damage.
20. An employee experiencing violence or abuse from a family member who does not reside with the employee, or from a non-relative member of the employee's household, regardless of whether the violence or abuse occurs only once, should not be excluded from being able to access family and domestic violence leave. If such violence or abuse gives rise to a need for the employee to be absent from work to attend court or other relevant appointments, they should be eligible for family and domestic violence leave. Most criminal definitions of family and domestic violence do not require violence to be ongoing; cover a one-off violent or

¹⁶ See, eg, the *Victorian Public Service Enterprise Agreement 2016*; Telstra's *Family and Domestic Violence Support* policy; and PWC's *Family and Domestic Violence and Sexual Assault* policy.

abusive incident; and do not require a family member to be residing in the same household. A number of existing enterprise agreements and workplace policies extend access to leave to employees experiencing members of a household, without requiring that person to also be a relative.¹⁷

21. For the above reasons, limiting access to the entitlement is inconsistent with widely-accepted, well-established and workable definitions of family and domestic violence, and would exclude employees with a pressing and legitimate requirement to access time off work for reasons directly related to their experience of family and domestic violence.

2.2(b) The circumstances in which leave may be accessed

Eligibility

22. The ACTU proposes that the unpaid family and domestic violence leave be available to eligible employees in the following circumstances:

An employee experiencing family and domestic violence is entitled to leave without pay when required for the purposes of:

- (a) Attending legal proceedings;
 - (b) Attending appointments with counsellors or medical, financial or legal professionals;
 - (c) Making relocation or other safety arrangements; or
 - (d) Any other activities related to the effects of family and domestic violence.
23. This term has been drafted with regard to the comments by the majority Full Bench that the original wording proposed by the ACTU¹⁸ should be narrowed to ensure that family and domestic violence leave is available in circumstances where it is necessary for the affected employee to deal with the “immediate impact” of such violence.¹⁹
 24. On 5 October 2016, the ACTU filed an amended proposed clause to address concerns raised by employer parties about the circumstances in which the leave may be accessed.²⁰ The amended proposed clause clarified the need for a causal connection between the employee’s experience of family and domestic violence and the purpose for which the leave is requested,

¹⁷ See, eg, the *ABC Enterprise Agreement 2016-2019*, *Australian Catholic University Staff Enterprise Agreement 2013-2017*, *Lismore Foods (NSW Operations) Employee Collective Agreement 2016-2019*.

¹⁸ The clause proposed by the ACTU made family and domestic violence leave available to employees for the purposes of “attending to activities related to the experience of being subjected to family and domestic violence”.

¹⁹ Majority Decision, [114].

²⁰ ACTU Reply Submissions dated 5 October 2016, Annexure A – Proposed Amended Clause

by replacing a requirement that the leave be “associated with” the experience of family and domestic violence with the arguably stronger requirement that the leave be “related to” the experience of family and domestic violence.

25. A number of current enterprise agreement clauses and policies grant employees paid leave for activities “related to” family and domestic violence, including the *Victorian Public Service Enterprise Agreement 2016* (20 days paid leave, cl 48), Telstra’s *Family and Domestic Violence Support* policy (10 days paid leave) and PWC’s *Family and Domestic Violence and Sexual Assault* policy (10 days paid leave). Both the Victorian Government and PWC appeared during the hearing of this matter in December 2016. Neither party indicated that any difficulties had been experienced with uncertainty in regards to the scope of these respective entitlements. On the contrary, both organisations gave evidence to the Full Bench that the process regarding access to the leave had been largely problem-free.²¹
26. Both past and current violence may give rise to a need for leave to attend activities “related to” that experience. Deputy President Gooley and Commissioner Spencer observed that employees’ experiences of family and domestic violence can have long-term effects both physically and psychologically, and expressed the view that employers should be required to provide leave only for the “immediate impact of violence.”²² While there does not appear to be any dispute that family and domestic violence can produce long-term effects, the ACTU agrees that where the violence has ceased, the necessity for time off work, particularly to deal with logistical matters such as court proceedings and relocations, is likely to reduce over time. This is supported by evidence presented during the hearing that the need for leave is likely to be more acute at the time when violence is experienced, the risk of which often escalates at or around the time when a person seeks to leave a violent relationship.
27. In relation to any long-term physical and/or psychological effects of family and domestic violence, the ACTU agrees that employees who are unfit for work due to physical or psychological injury can access paid personal leave for such purposes.
28. The ACTU accepts that to be eligible for family and domestic violence leave, an employee must *require* leave during working hours to attend to an activity sufficiently connected with the effects of family and domestic violence. The ACTU’s draft term further clarifies the need for a direct connection between the requirement for leave and the effect of family and domestic violence on an employee. The ACTU submits that the amendments in the draft term

²¹ See evidence of Debra Eckersley, Transcript 17 November 2016, PN1898, PN1854, and PN1926; Witness Statement of Debra Eckersley dated 20 June 2016, at [33]; Submissions of the Victorian Government, Transcript 1 December 2016, PN2773–2775.

²² Majority Decision, [114].

provide sufficient certainty, and there is no need to expressly limit access to the entitlement to the “immediate impact” of violence only.

Duration of leave

29. The model term should include a provision to the effect that leave may be taken in consecutive or single days, or as a portion of a day.

2.2(c) Who may access the entitlement

30. Family and domestic violence leave should be available to employees who are affected by family and domestic violence, as defined in the term, and who require leave for the purposes set out in paragraph 22 above.

31. For the avoidance of doubt, the ACTU repeats its submission that family and domestic violence leave should not be available to a perpetrator of family and domestic violence.²³

2.3 Accrual issues, in particular whether the leave entitlement is available in full at the start of the year or accrues

32. The purpose of family and domestic violence leave is to enable employees to be absent from work, on an authorised basis, to meet their needs as a result of experiencing violence. It is not a reward for service, but a needs-based entitlement. In this respect it is similar to the NES entitlement to unpaid carer’s leave in s 102 of the FW Act, access to which does not depend on the employee having completed a minimum service period.

33. There is no principled justification for limiting access to unpaid leave to employees who have completed a period of service.

34. It is not necessary to make provision for the accrual of unpaid leave where the entitlement is properly needs-based.

2.4 Notice and evidentiary requirements

35. The ACTU submits that the notice and evidentiary requirements in its proposed clause are appropriate and should be included in the draft award term. The ACTU’s proposed clause read:

X.3.1 The employee shall give his or her employer notice as soon as reasonably practicable of their request to take leave under this clause.

²³ See ACTU reply submissions dated 5 October 2016, [107]–[108].

X.3.2 If required by the employer, the employee must provide evidence that would satisfy a reasonable person that the leave is for the purpose as set out in clauses [tbc] and [tbc]. Such evidence may include a document issued by the police service, a court, a doctor (including a medical certificate), district nurse, maternal and child health care nurse, a family violence support service, a lawyer or a statutory declaration.

36. The ACTU repeats and relies on its submissions in support of the proposed notice and evidentiary clause.²⁴ In particular, the ACTU repeats its submission that the proposed notice and evidence terms are based on s 107 of the FW Act, with appropriate adjustments. Section 107 of the FW Act, which deals with the notice and evidentiary requirements for personal/carer's leave, requires an employee to provide 'notice as soon as practicable' and expressly states that the notification may be at a time *after* the leave has started.
37. Family and domestic violence leave is likely to operate in a similar manner to paid personal leave. The purpose of the requirement for notification in the ACTU's proposed clause was to enable the employer to make arrangements to cover the employee's absence. As with personal leave, it is expected that family and domestic violence leave may be accessed both for activities that are urgent and unpredictable (including relocation and safety arrangements) as well as for events that are scheduled in advance (such as court dates).
38. While it is correct that the employee is entitled to provide a statutory declaration outlining the reasons for their leave request (as well as other forms of evidence such as letter from police, a lawyer or a family violence service), the employer is entitled to refuse to accept it where they are not reasonably satisfied that the statutory declaration demonstrates that the leave is for a purpose covered by the clause. If a dispute arises and the matter cannot be resolved at the workplace level, the question of whether or not the evidence is reasonable then becomes the subject of a dispute before the Commission.

A2.5 The availability of leave for part-time and casual employees

39. Unpaid family and domestic violence leave should be available to all employees, regardless of whether they are full-time, part-time, or casual employees.
40. There is no sound reason to deny casual employees a right to be absent from work for the purpose of attending to matters associated with family and domestic violence (however the term is expressed). The existence of the casual loading is irrelevant, because the loading is intended to compensate, in monetary terms, casual employees for the *paid* entitlements which they would receive if they were employed on a permanent basis.

²⁴ See ACTU Reply Submissions dated 5 October 2016 at [136]–[138], and ACTU Final Submissions dated 28 November 2016 at [183]–[187].

41. Although casual employees do not receive paid leave entitlements, the NES does provide unpaid leave entitlements to casual employees. In particular, long-term casuals are entitled to unpaid parental leave of up to 24 months;²⁵ numerous other forms of unpaid leave relating to pregnancy and birth such as no safe job leave; unpaid carer's leave;²⁶ and community service leave.²⁷ Some casual employees may be eligible for long service leave.²⁸ The extension of unpaid leave entitlements to casual employees provides a vital workplace protection to a group of employees who may otherwise put their employment at risk by taking leave.

A2.6 Confidentiality matters

42. Confidentiality is essential to ensure the proper operation of the entitlement. The ACTU proposes that the confidentiality clause in its proposal before the original Full Bench is appropriate and should be included in the model award term. The ACTU's proposed clause reads:

X.3.3 Sensitive personal information provided by the employee to the employer for the purposes of seeking leave under this clause will be kept confidential to the extent possible, except where disclosure is required by law or to prevent a serious threat to the life, health and safety of any individual.

43. 'Sensitive personal information' was defined in the proposed clause to mean:

X.1 ... information provided by the employee to the employer for the purposes of seeking leave under this clause that identifies the employee and discloses their experience of family and domestic violence.

44. No criticism was made of the need for a confidentiality clause, or the form proposed by the ACTU, in the majority and the minority reasons of the Full Bench. To the extent confidentiality was addressed in the reasons, the decision of Watson VP summarised, without criticism, the evidence of PWC (which appeared of its own motion at the hearing), and of a number of witnesses called by the ACTU as to the need for confidentiality (which was not the subject of cross-examination).²⁹

45. Some employer parties raised objections about the FWC's jurisdiction to include a confidentiality clause as part of a modern award term dealing with family and domestic violence leave. It is not clear if the objections as to jurisdiction are pressed, but in the event that they remain, the ACTU relies on its submissions as to jurisdiction in its reply submissions

²⁵ Per FW Act s 67(2), s 70 and s 76.

²⁶ Per FW Act s 102.

²⁷ Per FW Act s 108.

²⁸ See, eg, *Flinders Port Pty Ltd v Woolford* (2015) 121 SASR 485.

²⁹ See decision of Watson VP [2017] FWCFB 1133, [43], [59], [72], [74].

dated 5 October 2016 at paragraphs 140–154, and its final submissions dated 28 November 2016 at paragraphs 188–192.

46. As to the merits of the proposed confidentiality clause, the ACTU repeats and relies on its submissions to the Full Bench at paragraphs 148 and 155–159 of its reply submissions dated 5 October 2016, and paragraphs 190–192 of its final submissions dated 28 November 2016.

A2.7 Continuity of service

47. Continuity of service is governed by s 22 of the FW Act. Terms in modern awards relating to length of service are not permissible terms under s 139 of the FW Act.
48. Section 22(1) of the FW Act provides that a period of service for a national system employee is the period of employment, but does not include an excluded period. An excluded period includes a period of unpaid leave, per s 22(2)(b). An excluded period does not break the employee’s period of continuous service, although it does not count towards the length of service, per s 22(3).
49. On the application of s 22 of the FW Act, an employee who is absent from work on unpaid family and domestic violence leave for a period will not have that period counted towards her length of service. However, the period of absence will not break her period of continuous service to the employer. The assessment of the length of service of a casual employee will continue to be undertaken by reference to the facts in each case, consistent with the applicable authorities.³⁰

A2.8 Relationship with other forms of leave

50. One of the purposes of family and domestic violence leave is the provision to employees of an authorised form of absence from work. The need for an authorised form of leave arises in part because of the inadequacy of existing workplace entitlements. In this regard, the ACTU repeats and relies on its reply submissions dated 5 October 2016 at paragraphs 32–46, and its final submissions dated 28 November 2016 at paragraphs 145–154.
51. The ACTU acknowledges that in certain circumstances, employees can access existing paid leave entitlements, for the purposes of dealing with family and domestic violence leave, and where an employee is eligible to take paid leave, they may do so. Family and domestic violence leave should be additional to existing entitlements.

³⁰ See, eg, *Shortland v The Smiths Snackfood Co Ltd* [2010] FWAFB 5709, [10]–[13].

B Extension of the NES Entitlement to Personal/Carer's Leave

B1 Does the Full Bench have jurisdiction to extend the NES entitlement to personal/carers' leave to incorporate domestic violence leave?

52. The majority of the Full Bench has formed a preliminary view that there was a need for employees experiencing family and domestic violence to be able to access personal leave in a wider range of circumstances than presently permitted.³¹ The Full Bench has further observed that s 55(4)(b) of the FW Act provides that a modern award may include terms which supplement the National Employment Standards (NES).³²
53. Further to the decision of the Full Bench, the parties are now asked to address whether the Full Bench has jurisdiction to extend the NES entitlement to personal/carers' leave to incorporate domestic violence leave.³³
54. It is not open to the Full Bench to extend the NES entitlement to paid personal/carers' leave to incorporate domestic violence leave because:
- (a) the inclusion of a term in modern awards which expands the right of access to personal/carers' leave for purposes other than personal injury or illness potentially excludes, within the meaning of s 55(1) of the FW Act, the minimum NES entitlement to 10 days personal or carer's leave;
 - (b) a term in modern awards which expand the right of access to personal/carers' leave for purposes other than personal injury or illness is not 'ancillary' or 'incidental' or 'supplemental' to the NES entitlement within the meaning of s 55(4) of the FW Act;
 - (c) even if the proposed term did not exclude the NES, or was properly characterised as ancillary, incidental, or supplemental to a NES entitlement, the operational effect of the term would be detrimental to employees in that the minimum entitlement to 10 days paid personal/carers' leave would be reduced.

Jurisdiction

55. In the four yearly review of modern awards, the FWC will have jurisdiction to vary a modern award or awards under s 156(2)(b)(i) of the FW Act where it is satisfied that:
- (a) the proposed term is a permitted term within the meaning of s 139 of the FW Act,³⁴ and

³¹ Majority Decision, [116], [119].

³² Majority Decision, [15]–[17].

³³ [2017] FWCFB 4047, Attachment B, Issue B.

(b) the proposed term does not contravene s 55 of the FW Act.³⁵

56. In addition to these matters, the FWC must also ensure that modern awards, together with the NES, meet the modern awards objective in s 134(1), and that the modern award contains only terms which are necessary to meet the modern awards objective, per s 138. Sections 136(1)(b)–(d) and 136(2)(a) provide further guidance on what terms may be included in modern awards. Given the ACTU’s position that the proposed supplementary term would contravene s 55 of the FW Act, we have not addressed these additional statutory criteria.
57. The first criteria identified in paragraph 55 above is easily dealt with. Section 139(1)(h) provides that a modern award may include terms about leave and arrangements for taking leave. Accordingly, the inquiry shifts to whether the proposed term contravenes s 55 of the FW Act.

The legislative provisions

Statutory construction

58. An assessment of whether the FWC has jurisdiction to vary a modern award to expand the circumstances in which an employee can access personal/carer’s leave involves the exercise of statutory construction.
59. The principles concerning statutory construction are uncontroversial. Legislation should be interpreted consistently with the intention of Parliament in enacting it. This is achieved by beginning with a consideration of the text itself and applying the literal, or ordinary and natural, meaning of the words³⁶ unless that interpretation would produce an absurd result, or a result inconsistent with the rest of the instrument. In cases where the literal approach would produce such an absurdity, inconsistency or ambiguity, the common law method entails identification of the purpose of the legislation³⁷ and interpretation of the words of the statute in a way consistent with that purpose.
60. The use of extrinsic materials is permissible in the interpretation of legislation either to confirm the ordinary meaning of the provision taking into account the purpose of the legislation; or to determine the meaning of the provision where the text is obscure, ambiguous

³⁴ Per s 136(1)(a) of the FW Act.

³⁵ Per s 136(2)(b) of the FW Act.

³⁶ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27, [45]–[51]; see also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [69], [78].

³⁷ Consistent with s 15AA of the *Acts Interpretation Act 1901* (Cth).

or may lead to an absurdity.³⁸ What this means in practice is that where the meaning of a provision is ascertainable by reference to the natural and ordinary meaning of the words employed without the use of extrinsic materials, then the use of extrinsic material is limited to confirming that interpretation.³⁹

The relevant provisions

61. Access to personal and carer's leave is provided for in the NES. An employee other than a casual employee is entitled to paid personal/carer's leave of 10 days per year for each year of service.⁴⁰ The entitlement to take personal or carer's leave arises if any of the circumstances in s 97 are met:

97 Taking paid personal/carer's leave

An employee may take paid personal/carer's leave if the leave is taken:

- (a) because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee; or
- (b) to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of:
 - (i) a personal illness, or personal injury, affecting the member; or
 - (ii) an unexpected emergency affecting the member.

but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

62. Further, an employee is entitled to two days of unpaid carer's leave for each occasion when a member of the employee's immediate family, or a member of the employee's household, requires care or support for the same reasons set out in s 97(b) of the FW Act.⁴¹
63. The interaction between modern awards and the National Employment Standards are governed by ss 55–56 of the FW Act. Section 55 sets out the rules concerning the interaction between the NES and modern awards and enterprise agreements. A term of a modern award that contravenes s 55 has no effect.⁴²

A modern award must not exclude the NES: s 55(1)

64. Section 55(1) of FW Act provides:

55(1) A modern award ... must not exclude the National Employment Standards or any provision of the National Employment Standards.

³⁸ *Acts Interpretation Act 1901* (Cth) s 15AB.

³⁹ See *Re Australian Federation of Construction Contractors; Ex parte Billing* (1986) 68 ALR 416, 420.

⁴⁰ FW Act, s 96(1).

⁴¹ FW Act, s 102.

⁴² FW Act, s 56.

65. The meaning of “exclude” in s 55(1) of the FW Act was considered by a five-member Full Bench in *Canavan Building Pty Ltd* [2014] FWCFB 3202 (*Canavan*). The Full Bench considered whether an enterprise agreement contravened s 55(4) of the FW Act by including a clause providing for annual leave to be paid “progressively in advance” and “incorporated into the [hourly] wage rate” prescribed by the agreement.⁴³
66. The Full Bench held that an offending term need not expressly exclude the NES in order to fall foul of s 55(1). The ordinary meaning of the language used in s 55(1) of the FW Act meant that if the provisions of an agreement “*would in their operation result in an outcome whereby employees do not receive (in full or at all) a benefit provided for by the NES*”, then the provision would constitute a prohibited exclusion of the NES.⁴⁴ The Full Bench found that the specific clause proposed by *Canavan Pty Ltd* contravened s 55(1) of the FW Act because it excluded the entitlement to ‘paid annual leave’ in s 87, and the requirement in s 90(1) that payment be made at the base rate of pay for the employee’s ordinary hours of work ‘in the period’ at which the employee takes annual leave.⁴⁵ In subsequent applications of *Canavan*, the test has been described as an assessment of whether the proposed term will “negate the effect” of the NES entitlement.⁴⁶ On either iteration, the assessment is the same: will the minimum entitlement be reduced by the operation of the proposed term?
67. Applying *Canavan* to the question presently before the FWC reveals that any expansion of the circumstances in which an employee can access paid personal/carer’s leave would have the effect of reducing the minimum NES entitlement to 10 days paid personal/carer’s leave and therefore deny the employee the full benefit of the NES entitlement in s 97 of the FW Act.⁴⁷ For example, assume that a full-time employee is subject to domestic violence. She accesses three days of her personal leave to move house and seek an intervention order against her former partner. Later that year, she has the flu and takes four days off; her children then get sick and she needs to stay at home with them for six days. Her minimum entitlement is to 10 days paid personal/carer’s leave, but she is unable to receive the full benefit of the minimum

⁴³ Clause 41 of the agreement is set out in full in *Re Canavan Building Pty Ltd* [2014] FWCFB 3202, [6].

⁴⁴ *Canavan*, [36].

⁴⁵ Although the decision in *Canavan* concerned a proposed term in an enterprise agreement, the principles are equally applicable to a term proposed in modern awards, because ss 55(1) and 55(4) of the FW Act apply to both enterprise agreements and modern awards. See also *4 Yearly Review of Modern Awards – Real Estate Industry Award 2010* [2017] FWCFB 3543, where the Full Bench stated that *Canavan* was also applicable to the terms of modern awards: at [118].

⁴⁶ Per *Re 4 Yearly Review of Modern Awards – Alleged NES Inconsistencies* (2015) 249 IR 358, [37].

⁴⁷ Although the Full Court did not refer to *Canavan* in its decision, this is consistent with the approach of the Full Court of the Federal Court in *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union* (2015) 231 FCR 298, [38].

entitlement because her leave balance has been depleted by circumstances which would not otherwise meet the criteria in s 97 of the FW Act.

A modern award can include ancillary, incidental, or supplementary terms to the NES: s 55(4)

68. In case we are wrong about the exclusionary effect of the proposed term, we have also considered whether the proposed term can be characterised as a permissible term within the meaning of s 554(a) and (b), and if so, whether the term would have a detrimental effect when compared with the NES entitlement.

69. Section 55(4) of the FW Act relevantly provides:

55(4) A modern award ... may also include the following kinds of terms:

- (a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;
- (b) terms that supplement the National Employment Standards,

but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

70. The terms “ancillary”, “incidental”, and “supplemental” are not defined terms in the FW Act. Consistent with the approach to statutory interpretation set out in paragraph 59 above, it is appropriate that the words of the statute be given their ordinary or natural meaning.

71. Applying the *Macquarie* dictionary⁴⁸ definitions in each instance, a term will be “ancillary” to the operation of an entitlement of an employee under the NES if it is subsidiary or subordinate or in some way ‘helps’ the operation of the NES entitlement. A term will be “incidental” to the operation of a NES entitlement if it is “liable to happen in connection with” the operation of the term or is “naturally appertaining to” the operation of the term. A term which expands the circumstances in which an employee can access personal/carer’s leave does not sit comfortably with the meaning of “ancillary or incidental to the operation of” s 97 of the FW Act.

72. A term will “supplement” a NES entitlement where it adds to complete a particular entitlement, supplies a deficiency, or reinforces or extends an entitlement. It is arguable that a term expanding the circumstances in which personal/carer’s leave can be deployed could be characterised as supplementary to the NES. There is some support for this interpretation. In *4 Yearly Review of Modern Awards – Annual Leave* [2015] FWCFB 5771, the Full Bench held that a proposed clause could properly be characterised as a term which supplemented the NES entitlement to annual leave, because it “*extended the circumstances in which an*

⁴⁸ The *Macquarie Dictionary* (5th ed, 2009).

employer must comply with an employee’s request to take paid annual leave’.⁴⁹ But that is not the end of the matter; the supplementary term must not be detrimental in operation to the employee.

A modern award may not include supplementary terms where the effect of such terms is detrimental to the employee when compared to the NES: s 55(4)

73. The proper approach to the assessment of whether a supplementary term of a modern award is ‘detrimental’ to an employee within the meaning of s 55(4) is to measure the modern award term against the specific NES entitlement which the term is said to supplement.⁵⁰ Once the relatively straightforward step of identifying the correct comparator has been taken, the assessment of whether the modern award term has a detrimental effect to the employee is undertaken by applying the *Canavan* test, per *Australian Federation of Air Pilots v HNZ Australia Pty Ltd* [2015] FWCFB 3124. In that case, the Full Bench considered a clause in an enterprise agreement which mandated that a touring pilot take annual leave during part of a roster cycle. Section 88 of the FW Act provides that employees and employers may agree when an employee will take annual leave, and that an employer must not reasonably refuse an employee’s request. The Full Bench cited *Canavan* in support of its finding that the proposed clause “*was not a term permitted by ... s 55(4) of the Act*”, because it had the effect of depriving a touring pilot of the opportunity of reaching agreement with HNZ about when annual leave may be taken, which in turn denied employees the full benefit of s 88 of the Act.⁵¹
74. Taking the same example described in paragraph 67 above, it follows that the a modern award term which expands the circumstances in which an employee can use their personal/carer’s leave beyond that prescribed by s 97 of the FW Act offends the prohibition in s 55(4) of the FW Act.

The proposed term

75. At the hearing of the ACTU’s application before the original Full Bench, the ACTU acknowledged that employees affected by family and domestic violence who had an entitlement to paid personal leave could take personal leave if they were not fit for work because of a personal injury or personal illness. The inadequacy of existing entitlements

⁴⁹ [2015] FWCFB 5771, [129]. Emphasis added.

⁵⁰ *Australian Rail, Tram and Bus Industry Union; Australian Municipal, Administrative, Clerical and Services Union v Australian Rail Track Corporation* [2013] FWC 6861, [47], [50].

⁵¹ *Australian Federation of Air Pilots v HNZ Australia Pty Ltd* [2015] FWCFB 3124, [29]–[30] and see [6], [14].

identified by the ACTU arose where an employee affected by family and domestic violence needed time away from work for reasons other than personal injury or illness – moving into emergency accommodation or attending court being the two most obvious examples. We have proceeded here on the basis that any proposed clause to allow access to personal or carer’s leave for persons affected by family and domestic violence would (putting to one side any issues about the form of words) operate by extending the circumstances in which an employee could access personal/carer’s leave *beyond* the employee’s unfitness for work due to a personal injury or illness.

76. There are some difficulties in construing the concept of access to a NES entitlement rather than the precise terms proposed. For example, if the proposed clause *required* employees (or permitted employers to require employees) to utilise their personal or carer’s leave for non-illness FDV purposes, then the proposed clause would almost certainly offend s 55(1) of the FW Act, because the employee would not be able to avoid the requirement to deplete her or his personal leave balance, which would be inconsistent with the entitlement under the NES.⁵² Should it be necessary, the ACTU reserves its rights to make further submissions on the question of jurisdiction with respect to any terms proposed by the parties or the Fair Work Commission.

B2–B3 The content of a proposed supplementary term

77. Because our answer to the question of jurisdiction is ‘no’, we have not addressed the additional questions in this part of the List of Issues.

1 September 2017

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⁵² See *Construction, Forestry, Mining and Energy Union v Ron Southon Pty Ltd* [2016] FWCFB 8413, [45].