

Our Ref: 16/16141/34

5 April 2017

By email: chambers.ross.j@fwc.gov.au

Justice Iain Ross
President of the Fair Work Commission
11 Exhibition Street
MELBOURNE VIC 3000

Dear Justice Ross

RE: AM2015/1 PROPOSED FAMILY AND DOMESTIC VIOLENCE LEAVE

I am writing on behalf of our members in relation to the application to include paid family and domestic violence leave in the modern awards. While acknowledging that the deadline for providing formal submissions has passed, it would be remiss of the National Road Transport Association (**NatRoad**) to not make representations to the Fair Work Commission on this important issue.

Before commenting on the family and domestic violence leave proposal, I wanted to give you a brief background on our organisation and membership, and our industry more generally.

About NatRoad

NatRoad is a national member-based organisation with members in every Australian State and Territory. Despite receiving no funding from government or unions, in the eight decades since 1948, NatRoad has effectively represented the interests of the road transport industry. Our members have historically been drawn from both the big and small ends of town – from large national carriers, through small “mum & dad” businesses, to owner-drivers.

As such, we, and our members, are truly representative of the Australian road transport industry. Through our members, and the unique insights they provide, we are able to understand the impact of policy and regulatory changes on the industry. Without a successful road freight industry and without passionate and committed employers and employees working 24/7 to supply Australia with what it needs to survive and thrive, the nation would stop. This claim is no exaggeration. In the early 1950s, when governments seemed intent on wiping out the road transport industry in favour of rail, NSW was forced to temporarily remove a prohibitive road tax on long distance hauliers operating between Sydney and Brisbane after flooding on the NSW north coast prevented good trains from delivering north of Newcastle or into Queensland. Despite the road tax threatening to bring the road transport industry to its knees, the road transport industry rose to the task and did what the rail transport could not. At that time, the road transport industry employed some 400,000 Australians.

In 1954, our members were instrumental in having the Privy Council in London overturn the road tax as unconstitutional,¹ after two High Court of Australia challenges.

¹ *Hughes and Vale Pty Ltd v The State of New South Wales* (1954) 28 A.L.J. 385; (1954) 3 W.L.R. 824.

About the Road Transport Industry

In addition to being a major contributor to Australia's economic growth, transport also plays a crucial role in socially sustainable development by broadening access to health and education services, employment, improving the exchange of information, and promoting social cohesion.²

In the year ending 31 October 2014, freight vehicles travelled an estimated 203,295 million tonne-kilometres in Australia. Articulated trucks accounted for 79.0% (160,584 million) of total tonne-kilometres travelled followed by rigid trucks with 17.2% (35,035 million). Articulated trucks with a Gross Combination Mass (GCM) of over 40 tonnes accounted for 95.3% (153,109 million) of the total tonne-kilometres travelled by articulated trucks.³

As at 31 January 2016, there were 18.4 million registered motor vehicles in Australia, with the national vehicle fleet increasing by 2.1% in 2015-16. Light and heavy rigid vehicles, articulated vehicles, and buses, together accounted for a significant proportion of the growth in the national fleet,⁴ evidencing the fact that the national road freight task is increasing.

According to the Australian Bureau of Statistics (ABS), in 2014-15, the Australian Transport, Postal and Warehousing industry employed some 574,000 people, including 276,000 directly in road transport and 107,000 in road transport support services (excluding those involved in vehicle manufacturing and related services). During that same period, total labour costs in the road transport industry were \$15,177,000, and in transport support services sector, \$8,438,000. However, the percentage of road transport businesses that made a loss in 2014-15 was 13.3% up from 11.1% in 2013-14. Further, 10.8% of all businesses engaged in transport, postal and warehousing services made a loss in 2014-15, up from 9.8% in 2013-14.⁵

The Cost of Increasing the Regulatory Burden on Industry

Generalising from the data above, it is clear that the road transport industry is not only a key employer of Australian workers but also one which carries a significant labour costs burden (including substantial worker's compensation costs). The data also indicates that transport businesses are at significant risk of running at a loss, and therefore, ultimately, of failure, leading to job losses. Imposing any new regulatory burden or cost on an already heavily burdened industry (and particularly on small business), including by way of providing workers with access to additional entitlements, such as new forms of leave, is not something to be undertaken lightly or without proper care and analysis or economic impact studies.

The need for high-quality analysis and public discussion ahead of any change to workplace standards (which tend to adapt to and reflect community norms) was recognised by the Productivity Commission in its 2015 *Workplace Relations Framework: Productivity Commission Inquiry Report*. While the Productivity Commission acknowledged that the provision of a new form of leave to help address family and domestic violence, could be addressed by including a common clause on all modern awards, it equally recognised that there were other avenues to achieve this, including through the National Employment Standards (NES).⁶

Importantly, the Productivity Commission also observed that decisions about the scope of the workplace relations system to assist workers experiencing family or domestic violence needed to take into account several factors including **[emphasis added]**:

*Requiring additional financial obligations on employers (for example, to provide paid domestic violence leave) would have **cost impacts, especially for a smaller employer** facing a claim for the maximum leave entitlements favoured by some participants. **The information currently***

² United Nations Economic and Social Council, 71st session Geneva, 24-26 February 2009 Item 5 of the provisional agenda, *Report to the United Nations Economic Commission for Europe Executive Committee on Implementation of the Priorities of the UNECE Reform for Strengthening Some of the Activities of the Committee*.

³ ABS 9208.0 - Survey of Motor Vehicle Use, Australia, 12 months ended 31 October 2014.

⁴ ABS 9309.0 - Motor Vehicle Census, Australia, 31 Jan 2016.

⁵ ABS 81550DO002-201415, Table 4.

⁶ Australian Government Productivity Commission, *Workplace Relations Framework: Productivity Commission Inquiry Report Volume 1, No. 76, 30 November 2015*, 21-22. The NES are work-related entitlements that national systems employers must provide for their employees. They were introduced as part of the *Fair Work Act 2009* (Cth) and cover 10 matters including working hours, flexible working arrangements, public holidays, leave entitlements, and redundancy pay and procedures.

available does not provide a good indication of the likely magnitude of those costs and business risks, which would be relevant to the desirability and design of any legislated leave provision. As noted earlier, evidence on the actual use of leave provisions that are already included in some enterprise agreements would be particularly useful in this regard as would evidence on the use of other types of leave for purposes related to domestic violence.

...

There may be alternative instruments, such as government-funded initiatives (including financial assistance), noting that governments are playing a more significant role in this area (box 16.10). **An important factor in determining the party that should primarily bear the costs of addressing family and domestic violence is their capacity to reduce the risks.** Governments have a relatively strong capacity to reduce the risks because of the wide range of measures they can bring to bear (policing, information provisions, counselling, financial assistance, housing and other means). **Nevertheless, businesses may also be able to reduce risks through the adoption of guidelines and internal policies about supporting staff experiencing family or domestic violence.**⁷

In other words, if the available information does not provide a good indication of the likely magnitude of costs and the business risks of introducing any major change to business, including introducing new and additional types of leave entitlements (which bring with them new and additional costs as well as a further regulatory burden to business) then it is better to wait rather than act. Government needs to properly consult those who will be impacted by any proposed change (including business and workers), and to collect evidence which not only justifies any change, but which also offers a range of possible solutions and approaches.

In our view, the evidence provided to the Commission in the course of these proceedings does not properly establish (as it must) the likely impact of providing for a new form of leave to all workers across the board. The available evidence does not appear to indicate the likely impact on business (including on productivity, employment costs, and the regulatory burden) or on employment growth, inflation, or the sustainability, performance and competitiveness of the national economy.

Background to the Family and Domestic Violence (FDV) Leave Proposal

The Australian Council of Trade Unions (**ACTU**) is seeking to provide 10 days paid (and when that is exhausted, up to 2 days' unpaid family and domestic violence leave (**FDV leave**) for employees (including casual employees) in all modern awards, including two awards that are central to the operation of the road transport industry: The *Road Transport (Long Distance Operations) Award 2010* and the *Road Transport and Distribution Award 2010* (the **Road Transport Awards**).

Specifically, the ACTU is seeking FDV leave to enable employees to attend court appearances and related appointments, to seek legal advice, and to make re-location arrangements. The ACTU has also sought a right to request a change in working arrangements in connection with a disclosure of family and domestic violence. As you, in your capacity as President of the Fair Work Commission (the **Commission**), highlighted at paragraph 25 of your 1 December 2014 statement [2014] FWC 8583, the ACTU's original claim in respect of FDV also included incidental provisions to:

- address evidentiary and notice requirements for an FDV leave application;
- appoint a workplace contact for employees making FDV leave applications or requests for changes to working arrangements (accessing such measures would involve disclosure of domestic violence);
- clarify the role and responsibilities of the FDV contact person(s) to whom an employee discloses domestic violence;
- establish processes and procedures to ensure confidentiality for employees disclosing domestic violence;

⁷ Australian Government Productivity Commission, *Workplace Relations Framework: Productivity Commission Inquiry Report Volume 1, No. 76, 30 November 2015*, 550-551. References omitted.

- address any mandatory reporting and *Privacy Act 1988* (Cth) requirements if relevant;
- ensure adequate training and support is provided for the FDV contact person(s); and
- refer to the protections afforded by the *Fair Work Act 2009* (Cth) to persons who exercise or propose to exercise a workplace right (to access FDV leave, etc.).

Your 1 December 2014 statement indicated that the ACTU's FDV leave claims would be dealt with as a 'common issue' and that any preliminary and jurisdictional issues would be considered prior to commencing substantive merit proceedings.

A number of the employer parties involved in these proceedings, made jurisdictional objections to the ACTU's FDV leave application. These objections were considered in the Commission's 23 October 2015 Full Bench decision [\[2015\] FWCFB 5585](#) . In that decision, the Full Bench determined *inter alia* **[emphasis added]**:

[20] These matters by themselves indicate that the determination of the employer parties' jurisdictional objections at this preliminary stage would be premature. In addition however, we are not satisfied that the employer parties have discharged the "heavy burden" of demonstrating that even the discrete aspects of the amended ACTU claim which they have challenged are, in jurisdictional terms, without legal foundation.

...

[26] Because we are not satisfied that the impugned aspects of the ACTU's amended claim lack an arguable legal foundation, we are not prepared at this stage of the proceedings and without having heard any evidence to strike out those parts of the ACTU's amended claim. The matter will proceed to a final hearing before a Full Bench of this Commission. We emphasise that in reaching this conclusion we have not formed any final view about the employer parties' jurisdictional objections. Nor of course is anything we have stated in the decision to be taken as indicating any view about the merits of the ACTU's amended claim - in particular whether it would meet the modern awards objective in s.134(1).

The Commission's hearings into these proceedings (**AM2015/1**) were held from 14-18 November 2016, with closing submissions on 1 December 2016.

FDV and the Road Transport Industry

Transport is a traditionally male-dominated sector, both from an employment perspective and in relation to the values it embodies.⁸ Nationally, according to the ABS, women make-up just 21.5% of the full-time transport and logistics workforce, mainly working in executive or office roles. The scourge of family and domestic violence impacts significantly on women, but it also effects men and people of other genders.

While, there are two to four times as many female victims of (non-sexual) family and domestic violence assault as there are male victims, we consider that the impact on male victims, particularly those employed in the road transport industry, has largely been ignored in these proceedings. Men apparently make up about half of all family and domestic violence victims in NSW, one third in the ACT and WA, and a quarter in SA and NT.⁹ Given the 'blokey' culture of the road transport industry, the likelihood of any transport workers, male or female, even admitting they are being subjected to FDV, let alone, seeking FDV leave under an award to try and tackle the problems arising from FDV is minimal.

In the ACTU's proposal, family and domestic violence is defined as 'any violent, threatening or other abusive behaviour by a person against a member of the person's family or household (current or former).' However, FDV typically involves more than physical and sexual violence. As the [Australian Law Reform Commission \(2012\)](#) observed, abusers use 'violent, threatening, coercive or controlling'

⁸ UNECE website accessed at https://www.unece.org/trans/theme_gender.html.

⁹ ABS website accessed at <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4510.0~2014~Main%20Features~Experimental%20Family%20and%20Domestic%20Violence%20Statistics~10000>.

behaviour to exercise power and control over their victims and that such behaviour includes sexual, emotional, spiritual, physical, mental and financial abuse.¹⁰

Anecdotal evidence from within the road transport industry, suggests that truck drivers (who are predominantly male) are particularly vulnerable to family and domestic violence while they are *at work*, not only because of their isolated working environment (typically their vehicle), but also because of the safety risks that such violence poses to them and the wider community. By virtue of the nature of their work, drivers, particularly long distance drivers, are often away from their homes, family and significant others for extended periods of time. Given this, the type of FDV drivers are (anecdotally) subjected to when at work is more likely to be emotional, spiritual and mental abuse, rather than sexual or physical FDV.

Our members report that drivers tend to be subjected to remote FDV by way of stalking and frequent harassing telephone calls while they should be on fatigue and rest breaks – making them a safety risk to themselves and the wider community, when they resume work after a constantly interrupted ‘rest’ break.¹¹ This is clearly a work health and safety issue, and one that will not be addressed by merely including FDV leave in modern awards.

While the parties in these proceedings differ on whether FDV is a social issue or a workplace issue, it is clearly an issue that spills over into the workplace. This is reflected in *inter alia* by unfair dismissal case law (such as where an employer was found to have unfairly dismissed a worker who had taken time off work because of an FDV incident)¹² and also where FDV is perpetrated while a worker is at work (as may occur with drivers).

NatRoad’s Position

NatRoad has had the benefit of reviewing the submissions and the evidence provided in the course of these proceedings (including those pertaining to jurisdictional objections and the modern award objectives) made by those who support, and those who oppose the inclusion of FDV leave in all modern awards.

We note that the majority of non-government employer parties which have made submissions, communicated with the Commission, or provided evidence in relation to this issue (including the Australian Chamber of Commerce and Industry, the Accommodation Association of Australasia, Aged Care Services Australia Group Pty Ltd, the Australian Entertainment Industry Association, the Australian Federation of Employers and Industry, the Australian Pharmacy Guild, AiG, the Australian Retailers’ Association, MGA Independent Retailers, the National Farmers Federation, and Restaurant & Catering Industrial) do not support including the proposed FDV leave in modern awards.

As the employer parties have variously highlighted, since 1 July 2013, the NES have provided a mechanism to support those workers experiencing violence from a family member, or those who provide care or support to an immediate family or household member because they are experiencing violence from their family. NatRoad considers that the NES provisions certainly provide an appropriate industrial response to the issue of family and domestic violence.

NatRoad particularly supports the submissions made by AiG on 20 April 2015, 11 August 2015 and 19 September 2016 28 November 2016, and also the submissions made by the National Farmer’s Federation on 15 September 2016, including their arguments in support of jurisdictional objections and their commentary on the objectives of the modern awards. As alluded to above, we do not consider there is sufficient evidence of the likely impact of including FDV leave in the modern awards on business, productivity, employment costs and growth, inflation, sustainability, or the performance and competitiveness of the national economy to conclude that such a change would not be counter-productive. For this reasons, therefore, **NatRoad does not support the inclusion of FDV leave in the modern awards.**

¹⁰ Marian Baird, Ludo McFerran, Ingrid Wright, ‘An equality bargaining breakthrough: Paid domestic violence leave’, (2014) 56(2) *Journal of Industrial Relations* 190-207.

¹¹ This reflects the research of Swanberg et al (2005) where it was found that while victims are at work, perpetrators harass them through stalking-related behaviour such as visiting the workplace or the commuting route and contacting them or their co-workers via telephone and leaving messages (cited in Baird et al, note 11 above at 192).

¹² See *Ms Leyla Moghimi v Eliana Construction and Developing Group Pty Ltd* (U2015/2893) and *Eliana Construction and Developing Group Pty Ltd v Leyla Moghimi* (C2015/5674).

Summary

In our view, the evidence does not currently justify including FDV leave in all modern awards, and particularly not in the Road Transport Awards. At the very least, more work needs to be done by government to properly analyse the likely impact on employment, business, productivity, and the economy of introducing a new form of leave for Australian workers. Increasing the already excessive regulatory burden already placed on industry, and in particular, the road transport industry, without proper economic and other analysis is a flawed approach.

We consider that this issue is best addressed by initiatives which examine and address the root cause of FDV in Australia, and not simply applying a 'band aid' such as access to FDV leave in the modern awards after the fact. We support the use of other mechanisms, such as the flexible working arrangements already available under the NES, other workplace protections (such as access to remedies under unfair dismissal, discrimination, general protection and work health and safety legislation), and also exploring ways to address this issue through occupational health and safety laws.

Further, we consider that this very important issue should be addressed via a nationally representative forum such as the Council of Australian Governments (COAG) rather than by the Commission. Any comprehensive changes to workplace law in relation to FDV, should only be considered after extensive public consultation, something which, in our view, remains to be done.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'Allison Ballard', with a large, stylized flourish at the end.

Allison Ballard
Member Services Manager & Legal Advisor