

26 May 2016

Associate
Vice President Watson
Fair Work Commission

BY EMAIL: chambers.watson.vp@fwc.gov.au

Dear Associate,

AM2015/1 – Family and domestic violence clause – Confidentiality Matters

We write in relation to abovementioned award review matter.

Firstly, we thank the Commission for allowing the ACTU the further opportunity to resolve these matters by making necessary adjustments to the original Directions.

In our correspondence dated 16 May 2016, we foreshadowed that the ACTU and relevant employer representatives were in discussions, with a view to reaching a consent position about certain confidentiality matters. We are pleased to report that we have been successful in those discussions and make this application with the consent of ACCI, ABI and AIG.

There are a few confidentiality matters which we seek to bring to the attention of the Commission:

- 1 Confidential Evidence and Hearing Orders;
- 2 Request for redactions to lay witness statements; and
- 3 Embargoed Report by Dr Natasha Cortis.

1. Confidential Evidence and Hearing Orders

The ACTU, ACCI, AIG and ABI have agreed in principle to the following process with respect to Confidentiality matters.

Attached to this application are draft Confidential Evidence Orders and Confidential Hearing Orders. The draft Confidential Evidence Orders will only apply to lay witnesses who disclose information about their personal experience of domestic violence.

The ACTU's application, as part of the 4-Yearly Review of Modern Award, presents some difficulties in light of the highly sensitive nature of the evidence. As such, the ACTU has sought to put in place a process to ensure that the privacy of these witnesses can be protected as much as possible, whilst ensuring that the Commission can be satisfied that their evidence is reliable.

In simple terms, the agreed process will be as follows:

- (a) The ACTU will provide a copy of the unredacted statements to the Commission.
- (b) The ACTU will further provide a copy of the unredacted statements to the relevant legal representative who has carriage of the matter for the following organisations; ACCI,

ABI and AIG. Those organisations will confirm with the ACTU whom the relevant representative(s) is, and they will provide to the ACTU a Confidentiality Undertaking in the form set out in the Confidentiality Orders.

- (c) The legal representatives will then determine whether they wish to cross examine the witnesses.
- (d) If they do not, they will inform the ACTU as soon as practicable.
- (e) If the employer representatives wish to cross examine the witness, the following will apply:
 - I. The representative will confirm whether any other legal representative will need to assist (and therefore have access to the unredacted statement), and if so, that person will provide a Confidentiality Undertaking.
 - II. The ACTU and employer representatives will discuss to determine whether cross examination can be avoided by way of interrogatories.
 - III. If the employer representative wish to contact the current or former employer of the witness, they will first discuss with the ACTU how they will proceed, including who they will contact in the relevant organisation. Further, if in order to seek instructions, the employer representative need to give their member/client access to the confidential statement, the member/client must also provide a Confidentiality Undertaking.

The ACTU request that no version, redacted or unredacted, be made publically available (via the Commission's AMOD website).

To the extent that any other person wishes to assert an interest in accessing the witness statements, provision has been made in the draft orders for a right of application to the Commission where the merits of disclosure to that person can be adjudicated on a case by case basis by the Commission.

In the event that cross examination of these witnesses is required, we further request that it will be conducted during private hearing and only those persons who have signed a confidentiality undertaking are to be in attendance.

Finally, we note that all parties have agreed to this process in good faith and as such liberty to apply should be granted generally in the event that an issue arises that has not been contemplated as part of this in principle agreement.

2. Other evidence

In addition, there are two further witness statements where aspects of their statements will need to be redacted for the purpose of public use (i.e. AMOD website). These aspects refer to sensitive case studies. We propose to provide unredacted copies to the Commission, ACCI, ABI, AIG, and other parties by request.

3. Embargoed Expert Report

We foreshadowed in our outline of expert evidence filed on 5 May 2016 that the expert report of Dr Natasha Cortis will need to be embargoed from public use until publication by ANROWS (anticipated publication date late June/early July 2016).

Dr Cortis' report will draw on data used under license from the Department of Social Services, Commonwealth of Australia (DSS), and will rely on a report to be published by Australia's National

Research Organisation for Women's Safety Ltd (ANROWS). Accordingly, all recipients of Dr Cortis' report will be asked prior to receipt of the report, to comply with the terms of the DSS license, and the ANROWS embargo. The embargo means that the parties are not permitted to distribute the report or cite any of the research contained therein in any public forum.

We would therefore request that this expert report is not made available on the AMOD website. The ACTU will provide a copy of the embargoed report to the Commission, ACCI, ABI and AIG and by request, to any other organisation who are participating in the proceedings.

We are in the hands of the Commission as to whether you wish for this matter to be relisted for mention about the making of these Orders, or in the alternative whether the Commission can deal with the matter on the papers.

If you have any questions, please contact Gabrielle Starr on (03) 9664 7333 or gstarr@actu.org.au.

Yours sincerely, .



Gabrielle Starr

Industrial and Legal Officer

THE FAIR WORK COMMISSION

Matter No: AM2015/1

FOUR YEARLY REVIEW OF MODERN AWARDS – FAMILY AND DOMESTIC VIOLENCE CLAUSE

DRAFT CONFIDENTIAL HEARING ORDERS

1. The Fair Work Commission (Commission) makes orders pursuant to section 593(3) of the Fair Work Act that:
 - (a) Any part of the hearing that relates to the evidence of a witness who has disclosed an experience of family or domestic violence, or a family member or friend's experience of family or domestic violence, will be heard in private hearing.
 - (b) During the evidence of such witnesses, attendance at the private hearing will be limited to the ACTU (and its legal representatives), an employee or official of an affiliate of the ACTU, and the employees and legal representatives of the Australian Industry Group, Australian Chamber of Commerce and Industry, NSW Business Chamber or Australian Business Industrial who have signed a Confidentiality Undertaking as set out in Schedule A to this Order.
 - (c) Any other persons or party who wishes to attend the hearing may apply to the Commission and the application shall be determined following a hearing involving the affected parties.
 - (d) Subject to the terms of the Confidential Evidence Orders made in these proceedings, the disclosure or publication of any evidence given in private hearing (including transcripts) and any matters contained in documents before the Commission in relation to the private hearing will be prohibited.
 - (e) such other orders as the Commission thinks fit.
2. The parties are at liberty, in the course of the hearing when oral evidence is being given touching upon these matters, to make an application under s.593 of the Act for confidentiality in respect of the particular evidence.
3. At the conclusion of the proceedings, the parties have liberty to apply to the Commission for permanent confidentiality orders in relation to the confidential documents.
4. This order will remain in effect until further order of the Commission.

Schedule 'A' to Draft Confidential Hearing Orders

Confidentiality Undertaking

I, _____ [name], undertake on behalf of the _____ [employer party/identified employer] that I will treat the confidential documents (as defined in the Confidential Evidence Orders) as strictly confidential. This includes not providing the *confidential documents* or any information arising from the *confidential documents* to any other person, other than a barrister who has been engaged to act for the _____ [employer party/identified employer], save in circumstances where the other person has been granted access to the *confidential documents* by the Fair Work Commission.

Signed

Date

THE FAIR WORK COMMISSION

Matter No: AM2015/1

FOUR YEARLY REVIEW OF MODERN AWARDS – FAMILY AND DOMESTIC VIOLENCE CLAUSE

DRAFT CONFIDENTIAL EVIDENCE ORDERS

1. The Commission makes orders pursuant to section 594 of the Fair Work Act that:
 - (a) Any document that contains *sensitive information* about an individual whose identity is apparent, or can reasonably be ascertained will be marked as confidential (*confidential documents*).
 - (b) *Sensitive information* means any information that pertains to a person's experience of family or domestic violence, whether experienced by that person, or by another person including a family member or friend.
 - (c) *Confidential document(s)* will include the following:
 - (i) documents provided to the Commission by the Australian Council of Trade Unions (ACTU) under any Order Requiring Production of Documents etc. to the Fair Work Commission;
 - (ii) witness statements, affidavits, written materials, and submissions filed by any party in the proceedings;
 - (iii) documents or things tendered into evidence by any party in the proceedings;
 - (iv) transcripts of the hearing of the proceedings,
 - (d) Any *confidential document* will be retained and filed by the Commission in such a way as to ensure the confidentiality of the document(s) is maintained.
 - (e) Any *confidential document* will not be published on the Fair Work Commission website or otherwise.
 - (f) Access to any *confidential document* will be limited to:
 - (i) Vice President Watson and members of the Full Bench, and the employees of the Commission who need to deal with the documents in the ordinary course of their duties and the proceedings;

- (ii) The employees or legal representatives of Australian Industry Group, Australian Business Industrial, NSW Business Chamber and Australian Chamber of Commerce and Industry (*employer parties*) with direct responsibility for or involvement in the conduct of the proceedings, provided that the ACTU is notified of the names of each such person who have been given access to the documents and that person has signed a Confidentiality Undertaking as set out in Schedule A to this Order.
 - (iii) Any employer identified in the *confidential documents* (*identified employer*) who the *employer parties* wish to contact for purposes of the proceedings with such disclosure being subject to:
 - (A) the *employer parties* first discussing with the ACTU how they intend to proceed, including who they will contact at the *identified employer*;
 - (B) the ACTU being notified of the names of each person at the *identified employer* who the *employer parties* intend to give access to the *confidential documents*; and
 - (C) the execution by any person provided with the *confidential documents* of the Confidentiality Undertaking as set out in Schedule A to this Order.
 - (iv) Any other persons or party who wishes to view the material may apply to the Fair Work Commission and the application shall be determined following a hearing involving the affected parties.
 - (g) Copies of any *confidential document*, or any part of the *confidential document* which are produced, filed or tendered by the ACTU in or in relation to the proceedings and are obtained by the *employer parties* by virtue of the proceedings will:
 - (i) be kept confidential by the *employer parties* (this means that the disclosure, use, reproduction, dissemination or publishing, in whole or in part is prohibited);
 - (ii) not be copied by the *employer parties* (except for the purpose of briefing counsel or as required by the representative in order to conduct of the proceedings); and
 - (iii) be returned to the ACTU at the conclusion of the proceedings or destroyed;
 - (h) such other orders as the Fair Work Commission thinks fit.
2. The parties are at liberty, in the course of the hearing when oral evidence is being given touching upon these matters, to make an application under s.594 of the Act for confidentiality in respect of the particular evidence.

3. At the conclusion of the proceedings, the parties have liberty to apply to the Commission for permanent confidentiality orders in relation to the confidential documents.
4. This order will remain in effect until further order of the Commission.
5. Leave is granted to apply generally.

Schedule 'A' to Draft Confidential Orders

Confidentiality Undertaking

I, _____ [name], undertake on behalf of the _____ [employer party/identified employer] that I will treat the *confidential documents* (as defined in the Confidential Evidence Orders) as strictly confidential. This includes not providing the *confidential documents* or any information arising from the *confidential documents* to any other person, other than a barrister who has been engaged to act for the _____ [employer party/identified employer], save in circumstances where the other person has been granted access to the *confidential documents* by the Fair Work Commission.

Signed

Date