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AM2015/1
4 Yearly Review of
Modern Awards -
Family and Domestic
Violence Leave

Response to Statement
[2019] FWCFB 3262

22 May 2019



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Chamber of Commerce
and Industry

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BACKGROUND

1. On 11 February 2019, the Full Bench in this matter published Statement [2019] FWC 767 (**February Statement**) concerning the interaction between the 'leave to deal with family and domestic violence' model term included in all modern awards in July 2018 and the NES entitlement to 'unpaid family and domestic violence leave' included in the Fair Work Act 2009 (the **Act**) by the Fair Work Amendment (Family and Domestic Violence Leave) Act 2018.
2. The February Statement expressed the provisional view that:
 - a. the model term should be deleted from exposure drafts produced as part of the 4 yearly review and replaced with the following:

X. Unpaid family and domestic violence leave

Unpaid family and domestic violence leave is provided for in the NES
 - b. the model term should remain in modern awards until they are replaced by the exposure drafts later this year.
3. In response to the February Statement, the Australian Council of Trade Unions (**ACTU**) filed a submission (**ACTU Submission**) opposing the Full Bench's provisional view on the basis that:
 - a. the NES entitlement has no equivalent to the Note under cl X.7 which deals with confidentiality;
 - b. the NES entitlement has no equivalent to the Note under cl X.6 which deals with evidence;
 - c. the coverage of de facto partners is narrower in the NES entitlement than the model term; and
 - d. the model term has no equivalent of s106E of the Act.
4. On 10 May 2019, the Full Bench in this matter published Statement [2019] FWC 3262 (May Statement) seeking a response to the ACTU Submission.
5. This document is the Australian Chamber's response in accordance with the May Statement.

AUSTRALIAN CHAMBER RESPONSE

6. The Australian Chamber supports the Full Bench's provisional view expressed in the February Statement and opposes the ACTU Submission. It does so on the following bases.

The NES should not be simply reproduced in modern awards

7. As set out at [7]-[8] of the February Statement, the Commission has historically refrained from merely repeating the terms of the NES in modern awards. There are a number of reasons why this is a sound approach including that it facilitates a simple, easy to understand, stable and sustainable modern award system and that it ensures that modern awards only include terms only to the extent necessary to achieve the modern awards objective.
8. There is no cogent reason to depart from this practice in relation to this matter.

The model term and the effect of the NES entitlement are substantially the same

9. As set out at [5] of the February Statement, there are differences between the drafting of the model term and NES entitlement. These differences do not appear to be substantive so as to warrant the maintenance of the model term in modern awards. It is also relevant, as outlined at [3] of the February Statement, that the manifest intention of the NES entitlement was to be consistent with the model term.
10. As noted above, the ACTU identify three allegedly meaningful differences between the model term and the NES.

The NES entitlement has no equivalent to the notes under cl x.7 which deals with confidentiality and cl x.6 which deals with evidence (ACTU Argument)

11. Obviously the inclusion of a note, as opposed to an actual clause or subclause, does not give rise to a difference in the substantive underlying entitlement.
12. Whatever the continued utility of these notes, the factors in favour of removing the model term outweigh this utility. Notwithstanding any confusion as to other aspects of the NES, the Australian Chamber is unaware of the inclusion of any other notes in other modern awards which seek to explain or assist in the implementation of NES entitlements.
13. In the submission of the Australian Chamber, consistent with the approach outlined above at 9, it is not the role of modern awards to act as explanatory documents for NES entitlements.

The coverage of de facto partners is narrower in the NES entitlement than the model term (ACTU argument)

14. The ACTU submit that the NES entitlement excludes non-resident, current de facto partners, while the model term does not.

15. As noted above, there is no discernible intent from the legislature to depart from the scope of the model term on this issue.
16. Secondly, it is not apparent that the definitions differ in any case.
17. The Act at s 12 defines de facto partner of a national system employee as:
 - (a) a person who, although not legally married to the employee, lives with the employee in a relationship as a couple on a genuine domestic basis (whether the employee and the person are of the same sex or different sexes); and
 - (b) includes a former de facto partner of the employee.
18. In the view of the Australian Chamber, using the ACTU's description, a 'current de facto partner' who no longer lives with their partner would fall within the coverage of 'former de facto partner'.
19. With respect to, again using the ACTU's description, 'current de facto partners' who have never lived with their partner, it is not clear that those persons would fall within coverage of either clause (i.e. fall within the meaning of a 'de facto').
20. Regardless of the interplay between definitions, in the submission of the Australian Chamber, any discrepancy between definitions would not be sufficient to warrant the retention of the model term when weighed against the reasons for its removal. Assuming the ACTU are correct, there does not appear to be any cogent reason as to why award covered employees would be entitled to a form of leave very slightly broader than that held by non-award employees. It is certainly the case that the necessity to include 'de factos' who have never lived with their partners within the meaning of the clause did not form a substantial part of the proceedings before the full bench. It is therefore doubtful that this slight extension of scope would be consistent with the requirements of s 138 now that the NES entitlement has been introduced.
21. Should the Commission determine there to be a substantive difference between the scope of the two entitlements which warrants retention of a term in modern awards which is different from the NES, the model term in modern awards should be reduced to a form which would only reflect that difference and not reproduce large sections of the NES. this would be consistent with an easy to understand, stable and sustainable modern award system for Australia' within the meaning of s 134(1)(g) of the Act.

The model term has no equivalent of s106e of the Act (ACTU argument)

22. The ACTU submit that the meaning of a 'day' in the context of paid personal/carers leave in s 96(1) of the Act, including the effect (if any) of s 106e, remains the subject of ongoing federal court proceedings in *Mondelez Australia Pty Ltd v AMWU and Ors* VID731/2018. Section 106E provides that 'what constitutes a day of leave for the purposes of this subdivision is taken to be the same as what constitutes a day of leave for the purposes of section 85 and Subdivisions B and C'.
23. It is not clear why these ongoing proceedings are relevant or why that could justify the maintenance of the model term in the current circumstances.

CONCLUSION

24. The matters raised by the ACTU do not form a basis to disturb the Full Bench's provisional view.
25. Even if established, the slight technical differences between the model term and the NES entitlement do not override the compelling reasons for the removal of the model term.
26. Should the Full Bench consider that slight technical differences between the model term and the NES entitlement are worth retaining, the Australian Chamber would endorse an approach whereby the model term is amended to remove any duplication with the NES entitlement such that it merely refers to the NES entitlement and then specifically identifies matters which are different to the underlying NES entitlement. This would be consistent with the requirements of s 138 of the Act.
27. The specificity and exceptionally tight scope of such a clause suggests in fact that the better course would be to remove the model term and merely refer to the NES entitlement in accordance with the Full Bench's provisional view.

ABOUT THE AUSTRALIAN CHAMBER

The Australian Chamber of Commerce and Industry is the largest and most representative business advocacy network in Australia. We speak on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses are also able to be members of our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, employing over 4 million Australian workers.

The Australian Chamber strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

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