



DECISION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Family & Domestic Violence Leave

Clause

(AM2015/1)

DEPUTY PRESIDENT GOOLEY
COMMISSIONER SPENCER

MELBOURNE, 3 JULY 2017

4 yearly review of modern awards – Family & Domestic Violence Leave Clause.

The claim

[1] The Australian Council of Trade Unions (ACTU) has made a claim as part of the 4 yearly review of modern awards to include in all modern awards an entitlement for employees to take family and domestic violence leave.

[2] The ACTU claim defines family and domestic violence leave as follows:

“Family and domestic violence is any violent, threatening or other abusive behaviour by a person against a current or former partner or member of the person’s family or household.”

[3] The ACTU claim seeks family and domestic violence leave be included in all modern awards. A copy of the draft claim can be found at Annexure A to this decision.

[4] The effect of the ACTU’s claim would be to provide all employees with a right to ten days paid family and domestic violence leave per year which does not accumulate and, if the leave is exhausted, up to two days of unpaid family and domestic violence leave on each occasion. The leave is for the “*purpose of attending to activities related to the experience of being subjected to family and domestic violence.*” The clause also deals with notice and evidentiary requirements.

The Full Bench’s task

[5] The task before the Full Bench is to determine if it is necessary for the purpose of ensuring that modern awards, together with the NES, provide a fair and relevant minimum safety net to include in all modern awards, an entitlement for employees to take family and domestic violence leave.

[6] We have formed the preliminary view that it is necessary to make provision for family and domestic violence leave but for reasons explained in this decision, have decided to

dismiss the ACTU's application because we are not satisfied, at this time, that it is necessary to provide ten days paid family and domestic violence leave to all employees covered by modern awards. We have however, formed the preliminary view that all employees should have access to unpaid family and domestic violence leave and in addition we have formed the preliminary view that employees should be able to access personal/carer's leave for the purpose of taking family and domestic violence leave. We note that the parties have not had an opportunity to make submissions or call evidence on these matters and we intend to provide the parties with such an opportunity prior to finalising our decision.

[7] These are our reasons for dismissing the ACTU's claim.

The legislative framework - Variations to the modern award and the modern awards objective (MAO)

[8] Section 156 of the *Fair Work Act 2009* (the Act) requires the Commission conduct a 4 yearly review of modern awards. Pursuant to s.134 of the Act:

“134 The modern awards objective

What is the modern awards objective?

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid; and
- (b) the need to encourage collective bargaining; and
- (c) the need to promote social inclusion through increased workforce participation; and
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
- (e) the principle of equal remuneration for work of equal or comparable value; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the modern awards objective.

When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of the FWC’s modern award powers, which are:

- (a) the FWC’s functions or powers under this Part; and
- (b) the FWC’s functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).”

[9] The Full Bench in the *4 Yearly Review of Modern Awards – Fire Fighting Industry Award 2010*¹ stated that the word “relevant” in s.134(1) of the Act “*is intended to convey that a modern award should be suited to contemporary circumstances.*”²

[10] In setting the framework for the four yearly review, the Full Bench in its decision dealing with Preliminary Jurisdictional Issues³ said as follows:

“[23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a ‘stable’ modern award system (s.134(1)(g)). The need for a ‘stable’ modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI’s submission that some proposed changes may be self-evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.

[24] In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the *Workplace Relations Act 1996* (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the

¹ [2016] FWCFB 8025.

² Ibid at [29].

³ *4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [23] – [27].

Review the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time that it was made.

[25] Although the Commission is not bound by principles of *stare decisis* it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in *Nguyen v Nguyen*:

“When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see *Queensland v The Commonwealth* (1977) 139 CLR 585 per Aickin J at 620 *et seq.*”

[26] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in *Cetin v Ripon Pty Ltd (T/as Parkview Hotel)* (*Cetin*):

“Although the Commission is not, as a non-judicial body, bound by principles of *stare decisis*, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so.”

[27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.” (references omitted).

[11] As noted by the Full Bench in the *4 Yearly Review of Modern Awards – Fire Fighting Industry Award 2010*⁴, the Commission is not constrained by the terms of the application. It is important to note that the Review is different to *inter partes* proceedings. The Commission is obliged to review all modern awards and each modern award must be reviewed in its own right. The Commission may vary a modern award in whatever terms it considers appropriate. Of course the views of interested parties need to be taken into account prior to making any variation.

[12] Section 138 of the Act emphasises the importance of the modern awards objective in these terms:

⁴ [2016] FWCFB 8025 at [21].

“A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.”

[13] In its Preliminary decision⁵ the Full Bench said:

“[38] Under s.157(1) the Commission must be satisfied that ‘a determination varying a modern award ... is *necessary* to achieve the modern awards objective’ (emphasis added). In *Shop, Distributive and Allied Employees Association v National Retail Association (No 2) (SDA v NRA (No 2))* Tracey J considered the proper construction of s.157(1). His Honour held:

“The statutory foundation for the exercise of FWA’s power to vary modern awards is to be found in s 157(1) of the Act. The power is discretionary in nature. Its exercise is conditioned upon FWA being satisfied that the variation is “necessary” in order “to achieve the modern awards objective”. That objective is very broadly expressed: FWA must “provide a fair and relevant minimum safety net of terms and conditions” which govern employment in various industries. In determining appropriate terms and conditions regard must be had to matters such as the promotion of social inclusion through increased workforce participation and the need to promote flexible working practices.

The subsection also introduced a temporal requirement. FWA must be satisfied that it is necessary to vary the award at a time falling between the prescribed periodic reviews.

The question under this ground then becomes whether there was material before the Vice President upon which he could reasonably be satisfied that a variation to the Award was necessary, at the time at which it was made, in order to achieve the statutory objective . . .

In reaching my conclusion on this ground I have not overlooked the SDA’s subsidiary contention that a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action. Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable. It was open to the Vice President to form the opinion that a variation was necessary.”

[39] We are satisfied that s.138 is relevant to the Review. We also accept that the observations of Tracey J in *SDA v NRA (No.2)*, as to the distinction between that which is “necessary” and that which is merely desirable, albeit in a different context, are apposite to any consideration of s.138.” (References omitted)

⁵ 4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues [2014] FWCFB 1788 at [38].

[14] Relevantly, for the purpose of this decision s.139 provides as follows:

“(1) A modern award may include terms about any of the following matters:

...

(h) leave, leave loadings and arrangements for taking leave;”

[15] The National Employment Standards (NES) deal with certain forms of leave namely personal/carer’s leave, parental leave, compassionate leave, community service leave, and long service leave. Section 55(4)(b) provides that a modern award may include terms which supplement the NES.

[16] The notes give some guidance as to what is meant by supplementary terms:

“Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:

- (a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or
- (b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

Note 3: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74.”

[17] It is clear that the Commission may include terms in a modern award that provide for leave other than those currently provided in the NES as well as supplement the leave provisions in the NES.

Consideration

[18] A summary of the evidence and extracts of the submissions of the parties, who appeared at the hearing, was provided in the earlier decision.⁶ We do not intend to reproduce that in this decision. A range of parties made submissions in support of and in opposition to the ACTU’s application. Whilst we have not repeated those submissions in this decision, we have had regard to all of those in our deliberations.

[19] It was submitted that the Commission should not include family and domestic violence leave in modern awards for a number of reasons apart from the merits of the claim.

⁶ 4 yearly review of modern awards—Family & Domestic Violence Leave Clause [2017] FWCFB 1133.

Leave entitlements should be dealt with by legislation

[20] The Australian Industry Group (AIG) submitted that leave should be dealt with by legislation not awards, as has occurred since 2006. AIG acknowledges that modern awards contain some supplementary leave provisions which, for example require a higher rate of pay for annual leave; contain unpaid ceremonial leave; or contain dispute resolution procedure training leave.⁷

[21] The AIG submitted that this is the first time the Commission has been asked to consider the imposition of a new form of leave for all award covered employees. This is the role of Parliament not the Commission. AIG acknowledges that awards may include terms about leave loadings and arrangements for taking leave but submit that that does not make it appropriate for all awards to contain a new universal leave entitlement.⁸

[22] We do not accept this submission. Had Parliament intended that all leave was to be dealt with by the NES, it could have made this clear in the legislation but it did not. Section 139(1)(h) expressly provides that modern awards may include terms about leave. Additionally, s.55(4)(b) permits modern awards to include terms that supplement the NES. There is nothing in the Explanatory Memoranda or Parliamentary speeches would support the contention that Parliament intended that all leave matters be determined by it. Further no submissions were made to the Full Bench by the Government to that effect.

Parliament has already addressed family and domestic violence and did not include leave provisions.

[23] The AIG submitted that the Legislature has elected not to provide for family and domestic violence leave notwithstanding its understanding of the issue. For example, the Parliament amended⁹ s.65(1) of the Act to expressly deal with this issue. The Commission should not supplant the Parliament by developing a further general leave entitlement.¹⁰

[24] The AIG submitted that had Parliament seen the need to create a special category of leave to address family violence, it would have varied the NES to provide for this at this time. To date no political party has introduced a Bill to provide for family and domestic violence leave although it should be noted that in the lead up to the last election the Australian Labor Party announced that if it won government, it would provide for five days paid family and domestic leave for full-time employees and five days of unpaid leave for casuals.¹¹

[25] We were advised by the Victorian Government that this issue would be considered by the Council of Australian Governments (COAG) at its December meeting. The COAG communique for the December meeting stated as follows:

⁷ Final Submissions of the Australian Industry Group dated 28 November 2016 at [427].

⁸ Ibid at [423] – [433].

⁹ *Fair Work Amendment Act 2013* s.3 and Sch 1 item 17.

¹⁰ Final Submissions of the Australian Industry Group dated 28 November 2016 at [31].

¹¹ Ibid at [377] – [379].

“COAG noted the importance of encouraging employers to provide appropriate workplace support to employees experiencing family violence. COAG noted that the independent Fair Work Commission (FWC) is currently considering an application to include an entitlement to ten days of paid domestic violence leave in all modern awards and is expected to report in early 2017. COAG agreed that this issue will be considered at the first COAG meeting following the FWC decision.”

[26] There is nothing in this communicate that supports a finding that Australian Governments take the view that the current provisions available to employees who have experienced family and domestic violence are adequate or that the matter should be determined by governments.

The AIRC award modernisation Full Bench decisions

[27] It was further submitted that we should adopt the approach of the AIRC award modernisation Full Bench. The AIG submitted that the AIRC in the initial award modernisation process gave consideration to what leave provisions should be included in modern awards.¹² In deciding to retain dispute resolution training leave in an award, the Full Bench stated that it had decided to maintain dispute resolution training leave where it was a prevailing industry standard.¹³

[28] The AIG submitted that family and domestic violence leave is not a prevailing industry standard in any award.

[29] In rejecting proposals to include parental leave and jury leave entitlements in all awards, the AIRC award modernisation Full Bench said that this would be the creation of a new minimum standard rather than mere supplementation. In relation to community service leave, the Full Bench said, “*If we were to maintain an unlimited entitlement it would be necessary to supplement the NES in every modern award. Such a course would be inconsistent with the NES and tend to undermine it.*”¹⁴

[30] The AIG noted that the AIRC award modernisation Full Bench decided not to include “pressing domestic need leave” in the *Black Coal Mining Industry Award 2010* on the basis that such an entitlement was not appropriate in an award intended to provide a fair minimum safety net of enforceable terms and conditions of employment for employees.¹⁵

[31] The AIRC award modernisation Full Bench in response to the ACTU submission that it had taken an overly restrictive view when determining its power to supplement the terms of the NES, said, “*We think we should give proper weight to the Parliament’s decision to regulate minimum standards in relation to matters covered by the NES. It cannot have been Parliament’s intention that the Commission could make general provision for higher standards. We accept, however, that there may be room for argument about what constitutes supplementation in a particular case.*”¹⁶

¹² Ibid at [434] – [435].

¹³ Ibid at [436].

¹⁴ Ibid at [437] – [438].

¹⁵ Ibid [439].

¹⁶ Ibid at [447].

[32] The AIRC declined to include “pressing necessity leave” in the *Fire Fighting Industry Award 2010* on the basis that the provision seemed, “*excessive or inappropriate as part of a minimum safety net*”. The AIRC refused to include, “*pressing necessity leave, special leave and study leave provisions*”, in the award.¹⁷

[33] The AIG submitted that we should not depart from this approach consistent with previous authorities.¹⁸

[34] We do not accept this submission. The AIRC was tasked with modernising all federal awards. That task occurred in the context of the Award Modernisation Request. Given the Request and the time constraints placed on the AIRC, there was no considering of new applications for additional entitlements. Importantly there was no application for the inclusion of family and domestic violence leave in modern awards before the AIRC. While it is true that employees experiencing family and domestic violence may have been able to apply for pressing necessity leave, there is no evidence that this was argued before the AIRC. We note that since the making of the modern awards there have been significant variations to some of those awards including matters which were expressly considered and rejected by the AIRC award modernisation Full Bench.

[35] The approach to earlier decisions was dealt with in the Preliminary decision as part of the 4 yearly review. It recognised that previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.

[36] The application before us has not previously been considered by a Full Bench of the Commission. It must be assessed on its merits having regard to the statutory requirements. To the extent that the AIRC expressed the view at the time about the appropriateness of including certain leave provisions in particular modern awards or about supplementing the NES, we do not consider that it intended by those comments to make any rulings of general application. So much is clear from the fact that some modern awards included terms dealing with dispute resolution training leave and ceremonial leave.

[37] Our focus in this review must be the statutory framework and the case before the Commission.

[38] As the Full Bench said in *Re Security Services Industry Award 2010* recently observed:

“[8] While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes.

¹⁷ Ibid at [448] – [452].

¹⁸ Ibid at [454].

Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.”¹⁹

Existing Statutory Employment Protections and Entitlements

[39] The AIG submitted that the Act already provides substantial protections and entitlements for employees who experience family and domestic violence which include:

- The right to request flexible work arrangements;
- Various types of paid leave;
- Continuity of service where paid leave or unpaid leave is granted by the employer;
- Protection against unfair dismissal;
- Protection against adverse action;
- Protection against unlawful termination.²⁰

[40] Further the AIG submitted that workplace health and safety laws require employers to address the risk caused by violent members of the employee’s family who may visit the workplace.²¹

[41] The AIG submitted that regard should be had to these NES entitlements as modern award should not be viewed in a vacuum.²²

[42] We accept the AIG submission that the right to request flexible work arrangements would be applicable to deal with some circumstances faced by employees who experience family and domestic violence. However, we are not satisfied that that it is sufficient to meet all the circumstances faced by employees who experience family and domestic violence.

[43] Employees who experience family and domestic violence often need to respond to incidents on short notice. Section 65 of the Act requires the request for flexible working arrangements to be in writing and the employer has 21 days to respond to the request. Further, that request may be refused on reasonable business grounds. An employee needing to attend court for the purpose of obtaining interim family court orders or interim apprehended violence orders or who needs to find alternative accommodation cannot afford to wait 21 days to see if her or his request for flexible working arrangements has been approved.

¹⁹ [2015] FWCFB 620 at [8].

²⁰ Final Submissions of the Australian Industry Group dated 28 November 2016 at [366].

²¹ Ibid at [367].

²² Ibid at [369].

[44] We also accept that employees, other than casual employees, who experience family and domestic violence, may be able to use personal/carer's leave, annual leave or long service leave to enable them to deal with the consequences of the violence. An employee who is unfit for work because of either a physical or psychological injury can take personal leave. However, an employee cannot take such leave to attend court or to find alternative accommodation. Employees can use their annual leave for any purpose. However, an employee can only take annual leave at a time agreed by the employer and, while an employer may not unreasonably refuse to agree to such a request, we do not consider that there is sufficient flexibility around the taking of annual leave for it to be of sufficient assistance for employees facing the need for urgent leave. For the same reason we do not consider that being able to take long service leave will necessarily meet the employee's needs.

[45] While we accept that employees who experience family and domestic violence will have some protection from unfair dismissal, unlawful dismissal and adverse action we do not consider this to be sufficient. If employees have a right to family and domestic violence leave then that would be a workplace right. Employees would gain an additional protection against dismissal because an employee took family and domestic violence leave or proposed to take family and domestic violence leave would be prohibited under the Act. Currently unless the employee has such an entitlement under an enterprise agreement, the employee has no such right unless their circumstances fit the current protections. For example, there is no workplace right to be absent from work to attend court proceedings or to find alternative accommodation.

[46] We are therefore, not satisfied that the existing entitlements meet the needs of employees who experience family and domestic violence.

The merits of the ACTU's claim

[47] We have reached the conclusion that the inclusion of the ACTU's clause is not necessary to meet the modern award objective.

[48] This is not to say we reject the ACTU's submissions and the evidence called to support those submissions that family and domestic violence is a workplace issue which requires a workplace response.

[49] Further, we accept the evidence that family and domestic violence is a significant problem and that its incidence has significant impacts on those who experience family and domestic violence and their families. We further accept that family and domestic violence has significant economic impacts both for the individual and the general community. We further accept that whilst men can experience family and domestic violence, family and domestic violence is a gendered phenomenon which means it disproportionately affects women.

[50] We do not accept the submissions²³ that the impact on those employees who experience family and domestic violence is no different to impact on employees who experience other forms of violence. While it may be true that a person who experiences a physical assault has the same physical injuries irrespective of the identity of the assailant we

²³ Ibid at [45].

are satisfied that the relationship that the employee has to the assailant when the assailant is an intimate partner or was a former intimate partner adds an extra complexity not found in other assaults.

[51] While we also accept that there are other matters which might impact on employees in a significant way²⁴ we are satisfied that the evidence established that the circumstances faced by employees who experience family and domestic violence require a special response.

[52] So much has been recognised by the Australian Government. In the *National Plan to Reduce Violence against Women and their Children* it was said that there needed to be a national plan because, “*domestic violence and sexual assault are the most pervasive forms of violence experienced by women in Australia, and require an immediate and focused response.*”²⁵

[53] The Australian Law Reform Commission report on *Family Violence and Commonwealth Laws – Improving Legal Frameworks* said:

“Family violence is not simply a private or individual issue, but rather a systematic one arising from wider social, economic and cultural factors. Accordingly, effective measures to address family violence need to operate in both the private and public spheres.”²⁶

[54] We accept in a holistic sense, the expert evidence advanced by the ACTU. Domestic and other forms of violence have real and tangible impacts on employees and employers in the workplace. It has been estimated that violence against women in particular costs the national economy \$21.7 billion per year.²⁷ This includes the cost of delivering health services, the loss of productivity on businesses and the increased demand on the criminal justice system. This is notwithstanding the manifestly unquantifiable psychological impact that family and domestic violence may have on victims, and the loss of life.

[55] It is accepted that the processes in dealing with family and domestic violence (such as preparing for and attending court proceedings) are time consuming. In this regard, we refer to our previous comments surrounding the inadequacies of the current leave provisions for victims of family and domestic violence.

[56] The evidence before the Commission, demonstrates that the effects of domestic violence are far reaching and extend beyond the individual. We accept that the effect on victims’ families and the community at large cannot be understated. Further, we accept that the problem must be addressed by the community, by confirming the issue as a community matter, rejecting offending conduct and petitioning authorities, such as Parliament and, in this case, the Commission. In that regard the ACTU is commended for the social utility of its application.

²⁴ Ibid at [50] – [64].

²⁵ *National Plan to Reduce Violence against Women and their Children* at page 1.

²⁶ Australian Law Reform Commission report on *Family Violence and Commonwealth Laws* at pages [36] – [37].

²⁷ Final Submissions of the Australian Council of Trade Unions dated 28 November 2016 at [67].

[57] We have had evidence of employers who have understood the significance of the issue, and voluntarily implemented domestic violence leave provisions in response.

[58] We also accept that it has been difficult without a reporting mechanism or a defined provision to capture the full impact of domestic violence on employees.

[59] However, we are not satisfied that the ACTU has made out a case for ten days paid leave to all employees. We have also formed the view that the ACTU's proposed definition is too broad in scope and would be difficult to apply. Those conclusions however do not negate the need for a protective unpaid provision.

10 days paid leave

[60] We accept the evidence that the provision of paid leave would assist employees who experience family and domestic violence. It would obviously reduce the financial impact of the consequences of the violence. We accept the evidence that employees who experience family and domestic violence face financial difficulties as a result of the family and domestic violence such as relocation costs or becoming a sole parent. Having to lose pay at the same time because of the need to attend to the consequences of family and domestic violence would add to the financial burden faced by these employees. We therefore, would have no difficulty in concluding that the provision of paid leave would be a desirable outcome.

[61] Further we accept the evidence that employees who experience family and domestic violence suffer economic harm as a result of disruption to workforce participation. However, we are not satisfied that paid leave is necessary to overcome this disruption. Without the availability of leave we accept that employees may see resignation as the only option. However the provision of unpaid leave would mean that employees would not have to make this choice.

[62] We note that where employers have introduced family and domestic violence leave, either through enterprise bargaining or by policy, paid leave has been provided. Further, a number of Australian governments have introduced paid domestic violence leave for their own full time and part time employees and unpaid leave for casual employees, or in the case of Queensland, for all employees within the scope of its industrial relations system. Such decisions are to be applauded.

[63] We note that the number of days paid leave provided range from between 2 and 20 days paid family and domestic violence leave.

[64] Ms Ludo McFerran, who gave expert evidence on behalf of the ACTU, found the following:

“The PWC estimate the cost to productivity may be high as to include higher leave rates (7-10 days) than have been found in practice. A survey conducted by the Gendered Violence Research Network (UNSW) in 2015 of 102 employees who had domestic violence clauses in their enterprise agreement found that the average paid domestic violence leave taken in the past 12 months was 43 hours, with a range of between 8-202 hours. Per incident, where time off was requested, most employees took two – three days or less off work. According to Telstra, the inclusion of 10 days paid domestic violence leave in their Enterprise Agreement 2015-2018 has not opened the

floodgates as 22 out of a workforce of 32,000 have accessed leave in six months taking an average of 2.3 days.”²⁸

[65] The ACTU has not provided a satisfactory explanation as to how it arrived at ten days and the evidence does not support a finding that ten days paid leave is necessary.

[66] Given that paid leave for this purpose has only been made available in recent times, it is not surprising that there is little evidence about the amount of leave that has been taken by employees in reliance on such provisions.

[67] Further, given the lack of availability of leave for this purpose there is little evidence about how much actual unpaid leave is being taken by employees which would, if the clause was in operation, now be paid leave.

[68] Therefore, we are not satisfied that the ACTU has made out a case that ten days paid leave for all award covered employees is necessary to meet the modern award objective.

The modern awards objective

[69] We are required to have regard in making our decision to the modern awards objective.

(a) relative living standards and the needs of the low paid;

[70] The ACTU submitted that the majority of award reliant employees are probably also low paid. It submitted that it can be assumed that these low paid employees may be affected by family and domestic violence. Paid leave would prevent these employees from being further disadvantaged by being required to take unpaid leave.²⁹

[71] Australian Chamber of Commerce and Industry (ACCI) submitted that given the evidence is not disaggregated by socio-economic status it is difficult to assess this criterion. It submitted that the evidence did not support a finding that socio-economic status does not affect the likelihood of experiencing family and domestic violence.³⁰

[72] The AIG submitted that the ACTU had not undertaken the necessary analysis that is required under this criterion. It submitted that the ACTU’s proposed entitlement would apply to all employees not just the low paid.³¹

[73] We accept the submission that the majority of low paid employees are award dependent. We accept the submission that some of these employees are likely to be impacted by family and domestic violence. We also accept that low paid employees are likely to have fewer financial resources such that the impact of a loss of pay arising from the need to take unpaid leave will have a disproportionate impact on these employees. We do not accept that just because the entitlement would flow to all employees means that it would not

²⁸ Exhibit B6 at 6.2

²⁹ Final Submissions of the Australian Council of Trade Unions dated 28 November 2016 at [237] – [238].

³⁰ Further Submissions of the Australian Chamber of Commerce and Industry dated 28 November 2016 at [12.3-12.4].

³¹ Final Submissions of the Australian Industry Group dated 28 November 2016 at [758] – [760].

disproportionately benefit the low paid. We therefore accept that the provision of paid leave would assist the relative living standards and the needs of the low paid.

(b) the need to encourage collective bargaining;

[74] The ACTU submitted that the evidence established that it was difficult for unions to convince employers to include family and domestic violence leave in agreements. It submitted that employers would be more likely to bargain around family and domestic violence leave if there was a clear and consistent minimum benchmark.³² It relied on the decision of the Full Bench in its review of the *Fire Fighting Industry Award 2010* to support this submission. The Full Bench had found that the prohibition on part-time work in the modern award was a disincentive for the UFU to bargain on this issue.³³

[75] It further submitted that there was no evidence before the Commission which would support the proposition that the inclusion of paid family and domestic violence leave in awards would discourage collective bargaining.

[76] The AIG submitted that the inclusion of paid family and domestic violence leave in awards would discourage collective bargaining because this is the very entitlement unions are seeking in bargaining and once achieved they would have little incentive to bargain. It was further submitted that employers will be less likely to bargain as they will have less room to bargain. Employers, it submitted, may take the view that this is a fair and relevant standard and cease to provide any additional entitlements.³⁴

[77] ACCI submitted that introduction of a uniform entitlement would remove the impetus of employers to bargain for the entitlement.³⁵

[78] There is no evidence before us that would lead us to conclude that the provision of paid family and domestic violence leave would discourage collective bargaining. We note that the inclusion of parental leave in the NES has not been a disincentive for bargaining about superior entitlements in collective agreements. However, we are unable to conclude that the inclusion of such an entitlement would encourage collective bargaining. We consider this to be a neutral factor in our consideration.

(c) the need to promote social inclusion through increased workforce participation;

[79] The ACTU submitted that the evidence demonstrates that family and domestic violence disrupts employment and precludes workforce participation. Social inclusion means more than having a job. It submitted that having a job with inadequate safety net protections against employment disruption that can occur as a result of needing time away from work to attend to matters arising from family and domestic violence can contribute to social exclusion.³⁶

³² Final Submissions of the Australian Council of Trade Unions dated 28 November 2016 at [240].

³³ Ibid at [242].

³⁴ Final Submissions of the Australian Industry Group dated 28 November 2016 at [761] – [769].

³⁵ Further Submissions of the Australian Chamber of Commerce and Industry dated 28 November 2016 at [12.8] – [12.10].

³⁶ Final Submissions of the Australian Council of Trade Unions dated 28 November 2016 at [244] – [246].

[80] The AIG submitted that the ACTU's own evidence found that employed women and unemployed women experience similar levels of family and domestic violence. It further submitted that the evidence showed that the majority of women who experienced family or domestic violence were employed. It submitted that there is no evidence that the experience of family and domestic violence precludes employees from participating in the workforce. It further submitted that there is an insufficient evidentiary basis that the inclusion of the clause would increase workforce participation. It said that given that some employers do provide such entitlements such evidence should have been available.³⁷

[81] ACCI submitted that there is no evidence in this matter that a lack of paid domestic violence leave entitlements prevents participation in the workforce and results in social exclusion.³⁸

[82] We accept the ACTU's submission that the provision of paid family and domestic violence leave would promote social inclusion. We accept the evidence which was largely unchallenged about the impact of family and domestic violence on employees' workforce participation and, in particular on women's workforce participation.

(d) the need to promote flexible modern work practices and the efficient and productive performance of work;

[83] The ACTU submitted that this is a neutral consideration.³⁹

[84] AIG submitted that the taking of leave will have an adverse impact on the need to promote flexible modern work practices and the efficient and productive performance of work. Employers may find it difficult to engage relief staff and the relief staff may lack the necessary skills, knowledge or experience to perform the work. This is exacerbated it was submitted by the lack of discretion available to employers to manage the leave.⁴⁰

[85] ACCI submitted that employees will either lose output due to the absence or additional costs if they are required to fund replacements.⁴¹

[86] We accept that employers will incur additional costs due to the absence of employees. However we are not satisfied that this is what this criterion is addressing. The provision of leave will not impact on the manner in which work is performed and as such we consider this to be a neutral consideration.

³⁷ Final Submissions of the Australian Industry Group dated 28 November 2016 at [770] – [781].

³⁸ Further Submissions of the Australian Chamber of Commerce and Industry dated 28 November 2016 at [8.39] – [8.43].

³⁹ Final Submissions of the Australian Council of Trade Unions dated 28 November 2016 at [247].

⁴⁰ Final Submissions of the Australian Industry Group dated 28 November 2016 at [589] – [592].

⁴¹ Further Submissions of the Australian Chamber of Commerce and Industry dated 28 November 2016 at [12.16].

(e) the need to provide additional remuneration for:

- (i) employees working overtime; or**
- (ii) employees working unsocial, irregular or unpredictable hours; or**
- (iii) employees working on weekends or public holidays; or**
- (iv) employees working shifts;**

[87] It is agreed that this is a neutral consideration.

(f) the principle of equal remuneration for work of equal or comparable value;

[88] The ACTU submitted that family and domestic violence disproportionately affects women. It says that as a consequence women are more likely to have to deplete their personal and annual leave entitlements. It suggests therefore that as a result women are subject to additional indirect discrimination with respect to the treatment of leave. The ACTU submitted that women are not receiving leave entitlements on equal terms to men.⁴² Even if we accept that submission, we fail to see how providing paid family and domestic violence leave would ensure that employees receive equal remuneration for work of equal or comparable value. We agree with the submissions of the AIG⁴³ and ACCI⁴⁴ that this is a neutral consideration.

(g) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;

[89] The ACTU submitted that the evidence established the significant negative impact on productivity and employment costs and on the national economy. The ACTU acknowledged that the provision of paid leave will increase employment costs. It submitted that those costs will be between \$2.96 and \$29.6 million. It submitted that these costs are reasonable and proportionate having regard to the evidence that the cost of family and domestic violence to the national economy is estimated to accumulate to \$323.4 billion over a 30 year period to 2045.⁴⁵

[90] It submits that the provision of leave will assist employees to leave violent relationships and this will result in a reduction in family and domestic violence and hence the disruption it causes to workplaces.⁴⁶

[91] The AIG submitted that there is insufficient material before the Commission to properly assess the impact of the claim. There is insufficient evidence to determine the number of employees who experience family and domestic violence and the amount of leave they may take. This is compounded by the fact that much of the evidence concentrates on women's experiences and there is little evidence about the extent of men's experience of family and domestic violence. Further, we do not know what employers currently do when asked by employees for leave. We do not know the extent to which employers currently grant paid leave either by permitting employees to take personal leave, annual leave or other paid

⁴² Final Submissions of the Australian Council of Trade Unions dated 28 November 2016 at [249] – [251].

⁴³ Final Submissions of the Australian Industry Group dated 28 November 2016 at [787] – [790].

⁴⁴ Further Submissions of the Australian Chamber of Commerce and Industry dated 28 November 2016 at [12.18]

⁴⁵ Final Submissions of the Australian Council of Trade Unions dated 28 November 2016 at [253].

⁴⁶ Ibid at [252]-[255].

leave. It submits that the creation of a new entitlement will increase employment costs. It further submitted that the regulatory burden will increase.⁴⁷

[92] It submitted that microeconomic impact on businesses including small businesses will be significant. AIG notes that in performing its functions, the Commission must take into account the special circumstances of small and medium businesses.⁴⁸

[93] The AIG submitted that a much higher proportion of employees of small businesses are award reliant. As such, small businesses will be hit particularly hard by the claim. Further, it submitted that it is more difficult for small businesses to manage leave as there are fewer remaining employees to cover the absent employees.⁴⁹

[94] ACCI submitted that the ACTU had not put forward credible evidence about the costs of the claim. It submitted that the claim will impact business and administrative costs. Because of the lack of evidence, the Full Bench cannot assess or understand the impact of these costs.⁵⁰

[95] We accept that we are unable to assess the impact of the clause on employment costs. It is unfortunate that none of the studies to date have uncovered the extent to which employers informally or formally provide such leave or the extent to which employees access existing entitlements for family and domestic violence leave.

[96] We accept that providing paid leave to employees who experience family and domestic violence may assist employees to leave violent relationships and hence reduce the disruption to the workplace and increase the productivity of those who experience family and domestic violence. The provision of such paid leave would send a message to employees that family and domestic violence is an important workplace issue and encourage those who experience family and domestic violence to take preventative action earlier and thereby reduce the disruption to the workplace and hence improve the productivity of those employees.

[97] However, we accept that it is difficult to measure these impacts in circumstances where such leave has only recently been introduced and the informal provision of such leave has not been measured.

[98] We accept that the provision of paid leave will increase costs to employers and that given the lack of data, the impact on employers of that increase in costs is difficult to assess.

[99] This supports our conclusion that we should take a cautious approach to the introduction of family and domestic violence leave, particularly paid family and domestic violence leave.

⁴⁷ Final Submissions of the Australian Industry Group dated 28 November 2016 at [791] – [797].

⁴⁸ *Fair Work Act 2009* s.3(g).

⁴⁹ Final Submissions of the Australian Industry Group dated 28 November 2016 at [798] – [807].

⁵⁰ Further Submissions of the Australian Chamber of Commerce and Industry dated 28 November 2016 at [12.19] – [12.21].

(h) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

[100] We set out below our concerns about the clause and do not repeat them here. We consider that the proposed clause is not simple or easy to understand.

[101] The AIG submitted that the inclusion of the provision would result in a significant expansion of the safety net. It submitted that we cannot assume the costs can be absorbed. Further it submits that its inclusion may encourage applications for leave from employees who face different types of adversity.⁵¹

[102] ACCI submitted that the introduction of a new and complex benefit is the opposite of simplicity and the more added to the safety net by definition increases the likelihood of instability.⁵²

[103] The arguments put forward by the AIG and ACCI would, if accepted, see the modern award system stagnate over time. To be relevant, modern awards must respond to changing circumstances.

[104] While we have not accepted the ACTU's claim, that does not preclude a finding in the future that the provision of paid family and domestic violence leave is necessary to meet the modern awards objective. That will depend on the evidence before the Commission at that time.

(i) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

[105] The ACTU relies on its submissions in relation to s.134(1)(f). It submits that the provision of family and domestic violence leave will contribute to a reduction in the impact of family and domestic violence and hence a reduction in productivity losses and employment costs.

[106] The AIG submitted that the claim may undermine employment growth, inflation and the sustainability, performance and competitiveness of the national economy. It relies upon the submissions it made in relation to s.134(1)(b), (d), (f) and (g).⁵³

[107] ACCI submitted that there was insufficient evidence before the Commission to make an assessment of any impact on the broader economy.⁵⁴

[108] We accept the submission that there is insufficient evidence before us that would enable us to determine the impact on these factors if paid family and domestic violence leave was included in all modern awards.

⁵¹ Final Submissions of the Australian Industry Group dated 28 November 2016 at [810] – [816].

⁵² Further Submissions of the Australian Chamber of Commerce and Industry dated 28 November 2016 at [12.22] – [12.23].

⁵³ Final Submissions of the Australian Industry Group dated 28 November 2016 at [817].

⁵⁴ Further Submissions of the Australian Chamber of Commerce and Industry dated 28 November 2016 at [12.24] – [12.25].

The scope of the clause

[109] The ACTU clause is directed at violence by a person against a current or former partner or member of the person's family or household. Leave is available for the purpose of "*attending activities related to the experience of being subjected to family and domestic violence.*"

[110] The ACTU rejected the submission its definition is too broad and does not require the behaviour to have an impact or an effect on employees. It submitted that this is not relevant because the employer is not required to "*inquire into the circumstances of the violence the employee is being subjected, rather the purpose for which the leave is requested.*"⁵⁵ It is submitted that all the employer is required to do is enquire of the purpose for which they need to be absent from work.⁵⁶ The ACTU further rejected the submission that there was no requirement that the leave be necessary, i.e. an employee may be able to arrange the activities for a time he or she was not rostered to be at work. It submitted that there was nothing in its proposal that would prevent an employer negotiating with an employee about this.⁵⁷

[111] We accept the submission that the current clause is too broad and uncertain in its operation.

[112] For example, there is no requirement that the family member who is the perpetrator of the violence reside with the employee who is applying for the leave or that the employee is at risk of repeated violence. So for example, an employee who was assaulted by his or her brother would be entitled to family and domestic violence leave even if the future contact with the brother was unlikely. Further the definition would capture violence committed by a member of the person's household towards her or him even if no relationship existed between the household member and the employee other than they shared a house. We accept the submission that this is too broad a scope.

[113] Further, we consider that the leave must be necessary to deal with the family and domestic violence. We accept the submission that the expression "*attending activities related to the experience of being subjected to family and domestic violence*" is too uncertain.

[114] Employees' experiences of domestic violence can have long term effects both physically and psychologically. An employee whilst fit for work may need on-going counselling or a child may need on-going counselling. We accept the submission that while employers have a role in supporting employees who have experienced family and domestic violence, the provision of leave for family and domestic violence should be limited to dealing with the immediate impact of such violence such as finding alternative accommodation or attending urgent court hearings.

[115] We accept that these difficulties could be overcome by a narrower and more certain clause but given our conclusion about the provision of paid leave it is not necessary for us to include in this decision a re-drafted clause. However, given our preliminary view about the

⁵⁵ Submissions of the Australian Council of Trade Unions dated 5 October 2015 at [92] – [94]; Final Submissions of the Australian Council of Trade Unions dated 28 November 2016 at [181].

⁵⁶ Ibid at [103].

⁵⁷ Final Submissions of the Australian Council of Trade Unions dated 28 November 2016 at [183].

provision of unpaid leave we propose to provide the parties with a proposed clause for their consideration in the next stage of the review.

Conclusion

[116] In rejecting the ACTU's proposal we have not rejected the view that family and domestic violence is a significant community issue, and that there needs to be a workplace response to family and domestic violence. So much is confirmed by our preliminary view that there is a need for unpaid family and domestic violence leave and access to personal leave in a wider range of circumstance. Our decision must be seen in the context of the legislative framework and the scope of the ACTU's proposed clause.

[117] In making our decision we are not free to decide on the merits what would be desirable to include in modern awards. We are required to determine what is necessary to achieve the modern award objective. However we accept that what is necessary may change over time.

[118] A review of modern awards is not an *inter partes* application and hence the rejection of the ACTU's proposal does not necessarily end the matter. The Full Bench is required to review each modern award to determine if the awards and the NES provide a fair and relevant safety net of terms and conditions.

[119] Based on the largely uncontested evidence before us we have formed the preliminary view that it is necessary to meet the modern award objectives for provisions to be inserted in modern awards which would allow for a period of unpaid family and domestic violence leave and which would allow employees who experience family and domestic violence access to personal/carer's leave for the purpose of taking family and domestic violence leave. As set out in [45], such unpaid leave serves to confirm the significance of family and domestic violence leave as a workplace right and provides an employment protection in circumstances where there is a need to access such leave.

[120] There has been no opportunity for interested parties to make submissions or call evidence if necessary in relation to our preliminary view and we intend to provide such an opportunity.

[121] We propose to convene a mention to hear from interested parties about the future timetabling of this review.



DEPUTY PRESIDENT

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Annexure A

FAMILY AND DOMESTIC VIOLENCE LEAVE

X.1 Definition

For the purpose of this clause:

Family and domestic violence is any violent, threatening or other abusive behaviour by a person against a current or former partner or member of the person's family or household.

Employee includes part-time and casual employees.

Sensitive personal information means information that identifies the employee and discloses their experience of being subjected to family and domestic violence.

X.2 Family and Domestic Violence Leave

X.2.1 An employee is entitled to 10 days per year of paid family and domestic violence leave for the purpose of attending to activities related to the experience of being subjected to family and domestic violence.

Such activities may include (but are not limited to):

- (a) attending legal proceedings, counselling, appointments with medical, financial or legal professionals; and/or
- (b) relocation or making other safety arrangements.

X.2.2 An employee's paid yearly entitlement to family and domestic violence leave:

- (a) becomes available in full, on and from the first day of each year of employment; and
- (b) is payable at the ordinary hourly rate applicable to the classification of the employee under the award, including shift loadings and penalties but not including any over-award payments; and
- (c) does not accrue from year to year; and
- (d) is not payable on termination of employment.

X.2.3 Upon exhaustion of the leave entitlement in clause X.2.1, employees will be entitled to up to 2 days unpaid family and domestic violence leave on each occasion for the purpose of attending to activities related to the experience of being subjected to family and domestic violence.

X.2.4 Family and domestic violence leave may be taken as:

- (a) a continuous period;
- (b) a single period of one day;
- (c) any separate period/s of less than one day which the employer and employee agree.

X.2.5 Family and domestic violence leave is in addition to other leave entitlements in modern awards and the National Employment Standards.

X.3 Notice and Evidentiary Requirements

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.

- 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 X.2.1 and X.2.3. 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.
- 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.