



STATEMENT

Fair Work Act 2009

s.156–4 yearly review of modern awards

Family and Domestic Violence Leave Clause and Family Friendly Work Arrangements

(AM2015/1 & AM2015/2)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT GOOLEY
COMMISSIONER SPENCER

MELBOURNE, 15 SEPTEMBER 2017

4 yearly review of modern awards–family and domestic violence leave clause–model term–background paper–future conduct of the matter.

Introduction

[1] In their decision dated 3 July 2017, Deputy President Gooley and Commissioner Spencer expressed the *preliminary* view that:

‘...all employees should have access to unpaid family and domestic violence leave and...employees should be able to access personal/carer’s leave for the purpose of taking family and domestic violence leave.’¹

[2] A [Statement and Directions](#)² was published on 3 August 2017 attaching a list of issues relating to family and domestic violence leave and seeking submissions from interested parties by 1 September 2017 and submissions in reply by 29 September 2017. Submissions were received from the following parties:

- (i) [Australian Industry Group](#);
- (ii) [Australian Public Service Commission](#);
- (iii) [National Road Transport Association](#);
- (iv) [Australian Meat Industry Council](#);
- (v) [Australian Chamber of Commerce and Industry](#); and
- (vi) [Australian Council of Trade Unions](#).

[3] A summary of these submissions will be published on the Commission’s website in draft form concurrently with this Statement. Any corrections or comments should be sent to amod@fwc.gov.au by 4.00pm on 25 September 2017.

Research Reference List

[4] Staff of the Commission have prepared a [Research Reference List](#) which will also be published in conjunction with this Statement. The Research Reference List includes a non-exhaustive list of the research materials and data sources that parties have referred to in their submissions, together with further publications identified by staff of the Fair Work Commission. If any interested party wishes to comment on any of the publications mentioned in the Research Reference List they should do so in their submissions in reply.

[5] The purpose of the Research Reference List is to assist the parties and the Full Bench in the consideration of this matter.

Background paper

[6] In order to assist parties in the preparation of their submissions in reply, staff of the Commission have prepared a [Background Paper](#) exploring a number of issues relating to the form and content of a model term giving effect to the preliminary view set out at paragraph [1] above. The Background Paper identifies five key elements requiring consideration in the drafting of a model term, these are:

- (i) the definition of ‘family and domestic violence’ for the purposes of the clause;
- (ii) the purpose of the leave (i.e. in what circumstances an employee can access the leave and which employees may take the leave);
- (iii) unpaid leave;
- (v) the evidence requirements; and
- (vi) privacy considerations.

[7] The Background Paper examines each of these elements and provides various options as to how these elements might be combined in a model term. The Background Paper also poses a number of questions to the parties in relation to these issues.

[8] The Background Paper does not consider the jurisdictional issues raised in the list of issues attached to the Statement and Directions issued on 3 August 2017.³ We note that a number of parties have submitted that the Commission does *not* have jurisdiction to vary modern awards to enable employees to access personal/carer’s leave for the purpose of taking family and domestic violence leave. We have not formed a concluded view in respect of this issue and would only observe that in the event we ultimately decide that we lack jurisdiction to give effect to that aspect of the preliminary view set out at paragraph [1] above, the issues raised in the Background Paper may still inform the form and content of a model term providing for *unpaid* family and domestic violence leave.

[9] The Background Paper will be published on the Commission’s website in conjunction with this Statement. Interested parties should address the questions posed in the Background paper in their submissions in reply by 29 September 2017.

Family Friendly Work Arrangements

[10] On 6 September 2017, the ACTU sought leave to file the expert report of Dr James Stanford (the Stanford report). The correspondence from the ACTU to the Commission stated that Dr Stanford had been instructed on 1 May 2017, to consider the comments of the Full Bench in the *Parental Leave Test Case*⁴ in relation to ‘an absence of high quality evaluation data in relation to the business benefits associated with family friendly practices’. The ACTU sought leave to file the report of Dr Stanford on the basis that it is highly relevant to the matters to be determined by the Commission.

[11] On 7 September 2017, the Commission wrote to the employer parties seeking their views on the ACTU’s request to file the report.

[12] Directions were issued in this matter on 3 August 2017. The employer parties have until 6 October 2017 to file submissions and evidence in reply to the ACTU’s claim.

[13] On 8 September 2017, the Ai Group wrote to the Commission noting that there had not been sufficient time to evaluate the report but that a cursory review suggested that it covered material not otherwise dealt with in the evidentiary case mounted by the ACTU. Ai Group propose that if the Commission is minded to grant the ACTU’s request then Ai Group should be granted liberty to apply for an extension of time for filing material in reply.

[14] On 13 September 2017, ACCI wrote to the Commission noting, among other things, that if leave was given to file the Stanford report, ACCI sought liberty to apply for a short extension to the current timetable, but noted that the current listed hearing dates should be maintained.

[15] We have decided to grant the ACTU’s request and grant leave to file the Stanford report. We will also allow an additional period for interested parties to file submissions and evidence in response to the Stanford report. Amended directions are set out at Attachment A.

PRESIDENT

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¹ [\[2017\] FWCFB 3494](#) at [6]

² [\[2017\] FWCFB 4047](#)

³ [\[2017\] FWCFB 4047](#)

⁴ (2005) 143 IR 245 at [183]

Attachment A

AMENDED DIRECTIONS

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards –Family friendly work arrangements

(AM2015/2)

JUSTICE ROSS, PRESIDENT

DEPUTY PRESIDENT GOOLEY

COMMISSIONER SPENCER

MELBOURNE, 15 SEPTEMBER 2017

The directions issued on 22 December 2016 are vacated and the following directions are made:

- 1.** Any party opposing the ACTU's claim shall file comprehensive written submissions and any witness statements or documentary material on which the party seeks to rely by **4.00 pm on Friday 6 October 2017**.
- 2.** Any party wishing to file additional written submissions, witness statements or documentary material in response to the Stanford report shall do so by **4pm on Friday 20 October 2017**.
- 3.** The ACTU and any other interested party supporting the ACTU's claim shall file any reply evidence written submissions and evidence in reply by **4.00 pm on Friday 3 November 2017**.
- 4.** The matter will be listed for a directions hearing on **Wednesday 8 November 2017** for the purpose of scheduling the evidence. At that hearing, all parties intending to participate in the hearing must be in a position to inform the Commission of the witnesses required for cross-examination, and an estimate of the length of time required for cross-examination.
- 5.** The matter will be listed for hearing on **12-14 December 2017** and **18-22 December 2017**, inclusive.
- 6.** Liberty to apply.

PRESIDENT