



STATEMENT

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

Family and Domestic Violence Leave Clause

(AM2015/1)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT GOOLEY
COMMISSIONER SPENCER

SYDNEY 19 OCTOBER 2017

4 yearly review of modern awards – family and domestic violence leave clause – status of the proceedings.

[1] This Statement seeks to put the current proceedings into context.

[2] On 3 July 2017 Deputy President Gooley and Commissioner Spencer handed down their Decision in relation to the ACTU’s claim. Taken together with the Decision of former Vice President Watson, the unanimous decision of the Full Bench was to reject the ACTU’s claim. However, Deputy President Gooley and Commissioner Spencer expressed a 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.’

[3] As Deputy President Gooley and Commissioner Spencer observe, at [120] of their decision, interested parties had not yet been given an opportunity to make submissions or call evidence in respect of their preliminary views and further proceedings will be necessary to provide that opportunity. Consequently, directions were issued in respect of the further proceedings in this matter.

[4] In a [Statement](#) issued on 24 July 2017¹ it was made clear that in determining the remaining issues the Full Bench would have regard to all of the submissions and evidence in the proceedings to date. A list of that material is set out at Attachment A to the 24 July Statement. An opportunity was provided for interested parties to suggest any amendments of additions to that list.

¹ [2017] FWCFB 3865

[5] At a mention held on Friday 21 July there was general agreement with the proposition that it would be of assistance to the parties and the Commission if some guidance was provided about the issues to be addressed in the submissions in respect of the majority's preliminary view.

[6] A further [Statement](#) was issued on 3 August 2017², dealing with:

(i) the list of materials set out at Attachment A to the 24 July Statement;

(ii) the inclusion of the Australian Government Industry Award 2016 in this matter and the review of modern enterprise awards;

(iii) a list of issues to be addressed in relation to the preliminary views;

(iv) the implementation of any outcome of the Family and Domestic Violence Leave matter in particular modern awards.

[7] In summary, the 3 August 2017 Statement:

- Attached a revised list of submissions and evidence (at Attachment A to the Statement);
- Confirmed that the *Australian Government Industry Award 2016* will be considered as part of the ACTU application and that any outcome in this matter may apply to that award;
- Finalised the list of issues to be addressed in these proceedings (at Attachment B to the Statement); and
- Made some observations regarding the implementation of any outcome from these proceedings.

[8] In relation to the last mentioned point we said:

'[17] In the event that the Full Bench confirms the preliminary views in respect of unpaid leave and access to personal/carer's leave for the purpose of taking family and domestic violence leave, the likely outcome will be a model term.

[18] If any party wishes to contend that such a model term should *not* be inserted into a particular award or that a tailored industry specific approach should be adopted, then they should set out their position in accordance with the Directions set out at Attachment C to this Statement. At this stage such a position need only be identified in summary terms, by reference to particular modern awards. Any awards so identified will be the subject of further proceedings after the resolution of a model term.

[19] To be clear, if a model term(s) is determined as part of these proceedings and we are satisfied that such a term is necessary to achieve the modern award objective then it will be inserted into each modern award except those modern awards which a party has indicated a preference for a different approach, in accordance with the process set out at paragraph [18] above.³

² [2017] FWCFB 4047

³ Ibid

[9] In a [Statement](#) issued on 15 September 2017⁴ we noted that 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](#).⁵

[10] A [summary of these submissions](#) was published on 15 September 2017.

[11] A [Research reference list](#) was also published in conjunction with the 15 September 2017 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. It was made clear that if any interested party wished to comment on any of the publications mentioned in the Research Reference List they should do so in their submissions in reply.

[12] In order to assist parties in the preparation of their submissions in reply, staff of the Commission also prepared a [Background Paper](#) exploring a number of issues relating to the form and content of a model term giving effect to the preliminary views set out in the decision of Deputy President Gooley and Commissioner Spencer. The Background Paper identified five key elements requiring consideration in the drafting of a model term:

- (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.

[13] The Background Paper examined each of these elements and provided 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.

[14] We note that the unanimous position of the parties appears to be 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.

[15] A [Statement](#) issued on 6 October 2017⁶ noted that submission in rely had been received from the following parties:

- (i) [Australian Chamber of Commerce and Industry](#)

⁴ [2017] FWCFB 4729

⁵ Ibid at [2]

⁶ [2017] FWC 5192

- (ii) [Australian Meat Industry Council](#)
- (iii) [Australian Industry Group](#)
- (iv) [Transport Workers' Union of Australia](#)
- (v) [Australian Council of Trade Unions](#)
- (vi) [Master Electricians Australia](#)

[16] The Statement also noted that a conference would be held on 13 October 2017 before the President and identified the issues for discussion at the conference.

[17] On 19 October 2017 a [Statement](#)⁷ was issued setting out the outcome of conferences of interested parties on 13 and 18 October 2017.

PRESIDENT

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⁷ [2017] FWC 5417