



# STATEMENT

*Fair Work Act 2009*  
s.156 - 4 yearly review of modern awards

## **Family and Domestic Violence Leave Clause** (AM2015/1)

JUSTICE ROSS, PRESIDENT  
VICE PRESIDENT HATCHER  
COMMISSIONER SPENCER

SYDNEY, 3 MAY 2018

*4 yearly review of modern awards – family and domestic violence leave clause.*

[1] In 2017, a Full Bench rejected an ACTU claim for *paid* family and domestic violence leave.<sup>1</sup> The Majority Decision (Gooley DP and Spencer C) went on to express the following preliminary views:

‘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.’<sup>2</sup>

[2] In a decision issued on 26 March 2018 (the March 2018 Decision)<sup>3</sup> a Full Bench confirmed the preliminary view expressed in the Majority Decision, that all employees should have access to unpaid family and domestic violence leave.

[3] The content of an unpaid family and domestic violence leave model term was discussed at conferences of interested parties held on 13, 18, 19 and 20 October 2017. The parties reached agreement on most elements of a model term. The March 2018 Decision dealt with the remaining issues in dispute. The major issue in contention was the amount of the leave entitlement.

[4] The Full Bench decided to provide five days’ *unpaid* leave per annum to all employees (including casuals) experiencing family and domestic violence. Such leave will be available in the event that an employee needs to do something to deal with the impact of the family and

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<sup>1</sup> [\[2017\] FWCFB 3494](#).

<sup>2</sup> *Ibid* at [6].

<sup>3</sup> [\[2018\] FWCFB 1691](#).

domestic violence and it is impractical for them to do that thing outside their ordinary hours of work. The Full Bench decided to defer its consideration of whether employees should be able to access paid personal/carer's leave for the purpose of taking family and domestic violence leave.

[5] The Full Bench considered a number of matters relating to access to the entitlement to five days' unpaid leave, and decided that the unpaid leave entitlement:

- will apply to *all* employees (including casuals);
- will be available *in full* at the commencement of each 12 month period rather than accruing progressively during a year of service;
- will *not* accumulate from year to year; and
- will be available *in full* to part-time and casual employees (i.e. not pro-rated).

[6] The Full Bench also decided not to require employees to access any available paid leave entitlement before accessing unpaid family and domestic violence leave.

[7] After determining all of the contested issues, the Full Bench was satisfied that the model term was a 'permitted term' within the meaning of s.136(1)(a) of the *Fair Work Act 2009* (Cth) and concluded (at [303]) that the variation of modern awards to include the model term was necessary to ensure that such awards achieve the modern awards objective).

[8] The Full Bench exempted from this general finding the *Australian Government Industry Award 2016*, the *Road Transport and Distribution Award 2010* and the *Road Transport (Long Distance Operations) Award 2010*, which were to be the subject of separate consideration.

[9] As noted above, three modern awards are to be the subject of separate considerations. A mention to deal with the programming of the hearings in respect of these awards was held on 1 May 2018. At the mention, the Australian Public Service Commission and the National Road Transport Association confirmed they no longer pressed their objections to the inclusion of the model term.<sup>4</sup> Accordingly, the model term (once finalised) will be inserted into all modern awards.

[10] A model term has been drafted to give effect to the March 2018 Decision (see **Attachment A**). Interested parties are invited to comment on the draft model term. As noted in the March 2018 Decision, such comments are to be directed to whether the draft model term accurately reflects the outcome of the decision; it is not an opportunity to relitigate matters that have been determined.

[11] Comments are to be sent to [amod@fwc.gov.au](mailto:amod@fwc.gov.au) by no later than **4pm Friday 1 June 2018**. Any comments in reply are to be filed by **4pm Friday 15 June 2018**.

[12] Liberty to apply.

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<sup>4</sup> [Transcript – 1 May 2018](#) at PN69, PN83.

[13] A further mention/conference will be held on **Thursday 21 June** in **Sydney** at **9am**. Requests for video conference are to be directed to [chambers.ross.j@fwc.gov.au](mailto:chambers.ross.j@fwc.gov.au).

PRESIDENT

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## ATTACHMENT A

### Leave to deal with Family and Domestic Violence: Model Term

X.1 This clause applies to all full time, part-time and casual employees.

#### X.2 Definitions

(a) In this clause:

*family and domestic violence* means violent, threatening or other abusive behaviour by a family member of an employee that seeks to coerce or control the employee and that causes them harm or to be fearful.

*family member* means:

- (a) a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or
- (b) a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee; or
- (c) a person related to the employee according to Aboriginal or Torres Strait Islander kinship rules.

(b) A reference to a spouse or de facto partner in the definition of *family member* in clause X.2(a) includes a former spouse or de facto partner.

#### X.3 Entitlement to unpaid leave

(a) Each year, an employee is entitled to 5 days' unpaid leave to deal with family and domestic violence.

(b) The entitlement to 5 days' unpaid leave to deal with family and domestic violence:

- (i) is available in full at the start of each 12 month period of the employee's employment; and
- (ii) does not accumulate from year to year.

Note: 1. A period of leave to deal with family and domestic violence may be less than a day by agreement between the employee and the employer.

2. The employer and employee may agree that the employee may take more than 5 days' unpaid leave to deal with family and domestic violence.

#### X.4 Taking unpaid leave

An employee may take unpaid leave to deal with family and domestic violence if the employee:

- (a) is experiencing family and domestic violence; and
- (b) needs to do something to deal with the impact of the family and domestic violence and it is impractical for the employee to do that thing outside their ordinary hours of work.

Note: The reasons for which an employee may take leave include making arrangements for their safety or the safety of a family member (including relocation), attending urgent court hearings, or accessing police services.

### **X.5 Service and continuity**

The time an employee is on unpaid leave to deal with family and domestic violence does not count as service but does not break the employee's continuity of service.

### **X.6 Notice and evidence requirements**

#### **(a) Notice**

An employee must give their employer notice of the taking of leave by the employee under clause X.

#### **(b) The notice:**

- (i) must be given to the employer as soon as practicable (which may be a time after the leave has started); and
- (ii) must advise the employer of the period, or expected period, of the leave.

#### **(c) Evidence**

An employee who has given their employer notice of the taking of leave under clause X must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for the purpose specified in clause X.4.

Note: Depending on the circumstances such evidence may include a document issued by the police service, a court or a family violence support service, or a statutory declaration.

### **X.7 Confidentiality**

- (a) Employers must take steps to ensure information concerning any notice an employee has given, or evidence an employee has provided under clause X.6 is treated confidentially, as far as it is reasonably practicable to do so.
- (b) Nothing in clause X prevents an employer from disclosing information provided by an employee if the disclosure is required by an Australian law or

is necessary to protect the life, health or safety of the employee or another person.

Note: Information concerning an employee's experience of family and domestic violence is sensitive and if mishandled can have adverse consequences for the employee. Employers should consult with such employees regarding the handling of this information.

## **X.8 Compliance**

An employee is not entitled to take leave under clause X unless the employee complies with clause X.