

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Family and Domestic Violence
Leave

17 May 2019

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GROUP

4 YEARLY REVIEW OF MODERN AWARDS

AM2015/15 – FAMILY AND DOMESTIC VIOLENCE LEAVE

1. INTRODUCTION

1. This submission relates to the statement issued by the Full Bench on 10 May 2019¹ (**the May Statement**) and the earlier statement issued by the Full Bench on 11 February² (**the February Statement**). It primarily responds to the ACTU submission calling for the retention of the ‘leave to deal with family violence model term’ that is included in all modern awards (**the Current Model Term**).
2. Ai Group supports the Full Bench’s provisional view that the Current Model Term should be replaced with an award provision referencing the entitlement under the NES, as proposed in paragraph 2 of the May Statement. The commencement of the legislative entitlement subsequent to the implementation of the current award provisions is a significant development that warrants making such a change.
3. Ai Group’s overarching contention is that retention of the relevant award provisions is not *necessary*, in the sense contemplated by s.138, given the new legislative entitlement. Moreover, as a matter of merit, awards should not continue to provide for a regulatory regime pertaining to family and domestic violence leave that is subtly different in either form or substance from that now prescribed by the NES.
4. The maintenance of different provisions dealing with family and domestic violence leave is not consistent with the need to ensure a simple and easy to understand modern award system³ and has the potential to cause confusion.

¹ [2019] FWCFB 767

² [2018] FWCFB 3936

³ As contemplated by s.134(1)(g)

5. The proposed variation is also consistent with the Commission’s repeatedly adopted approach within the 4 Yearly Review of avoiding the replication of NES provisions within awards, as referred to in the February Statement.⁴

2. RESPONSE TO THE ACTU SUBMISSIONS

6. As previously identified by the Full Bench, the new legislative entitlement is substantially the same as that provided for under the current award clauses.⁵ Although, as already observed in the February Statement, there are differences in the respective provisions. These are, to a large extent, matters of form rather than substance. In this regard we note that while the ACTU has identified some differences between the respective provision, these are relatively minor, and it is not clear that they give rise to a substantively different entitlement.

7. The May statement succinctly summarises the ACTU’s objections in the following manner:

- The NES entitlement has no equivalent to the Note under cl X.7 which deals with confidentiality;
- The NES entitlement has no equivalent to the Note under cl X.6 which deals with evidence;
- The coverage of de facto partners is narrower in the NES entitlement than the model term. The NES entitlement excludes non-resident, current de facto partners, while the model term does not;
- The model term has no equivalent of s.106E of the Act. 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.’ 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.

8. We here deal with each of these objections.

⁴ [2018] FWCFB 3936

⁵ February Statement

The Deletion of the Note in clause X.6 and Clause 7

9. This variance between the approach in the awards and NES in this regard does not give rise to a substantive difference in the entitlements provided by the respective element of the safety net.
10. Although we accept that the notes contained in the awards may provide guidance to employees and employers, the imperative for such assistances is undoubtedly reduced given that similar guidance is now provided in the explanatory memorandum accompanying the *Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018*.⁶
11. Further, the elevation of the entitlement to an element of the NES, as well as the expansion of the application of the entitlement, will likely raise public awareness of the entitlements. In this regard we observe that the Fair Work Ombudsman has also produced guidance material on its website relating to the new legislative entitlement and that it effectively replicates the content of the notes.⁷
12. Ultimately, while we do not contend that the notes included in the Current Model Term are entirely without merit, they are not of sufficient utility so as to warrant retaining a different family and domestic violence leave provision in the award system to that which operates under the statute.

Issues associated with definition of “de facto partner”

13. The ACTU also contends that the coverage of de facto partners is narrower under the NES than the provisions contained within the awards. In this regard they assert that the NES “...excludes non-resident, current de facto partners, while the NES does not.”⁸

⁶ At 44

⁷ <https://www.fairwork.gov.au/leave/family-and-domestic-violence-leave/notice-and-evidence-for-family-and-domestic-violence-leave>

⁸ ACTU submission at paragraph

14. It is not apparent that the coverage of the legislative provision is narrower than that provided under awards. There is no apparent intent for the Current Model Clause to adopt a different definition for the term “de facto partner” than that contained in the legislation.
15. Before addressing the ACTU submissions in detail, it is useful to consider the relevant provisions of the awards and the Act. Both the Current Model Term and the legislation extend the entitlement in circumstances where an employee is experiencing violence from a person who is a de facto partner or former de facto partner.
16. The Current Model Term does not provide a comprehensive definition of the term “de facto partner”, although, the provision does expressly provide that a reference to a de factor partner includes a former de facto partner.⁹
17. In contrast, the legislation does define the term “de factor partner”:

de facto partner of a national system employee:

- (a) means 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. We understand the ACTU to be concerned that the Current Model Term covers the following circumstance but that the NES allegedly does not:
 - persons who are in a de facto relationship but who have previously lived together, but no longer do so; and
 - persons who have never lived together but who are ‘de facto partners’

⁹ See for example Cl. 45.2(b) of the *Manufacturing and Associated Industries and Occupations Award 2010*

19. Contrary to the ACTU's contentions, it is not apparent that the legislative scheme narrows the coverage of the entitlement in the manner identified. Instead, it is arguable that the term "de facto partner" has a consistent meaning under both schemes.
20. It is significant that the words "de facto partner" is a defined term under the legislation. It is arguable that a person who has at any point met the specific requirement in subclause (a) of the definition cited above, would subsequently be covered by subclause (b) in circumstances where they have ceased living with their current or former partner. Accordingly, the legislation addresses any concern that a person might fall out of coverage of the new entitlement in circumstances where they have been a de facto partner but ceased living with their partner.
21. In relation to the concern that the NES may not apply in the context of persons who may be in a de facto relationship but have never lived together, we raise a concern as to whether such persons could in fact be "de facto partners" for the purposes of either the Award or the NES.
22. Contrary to the ACTU's contention that it unlikely that the legislative provision was intended to exclude such persons from the definition of de facto partners, this appears to be the clear effect of the provision. Moreover, this is not an inherently controversial outcome.
23. At the heart of commonly adopted notions of de facto partnerships is typically the existence of a relationship involving persons living together. Although not determinative of the current controversy, we observe that s.2(f) of the *Acts Interpretation Act 1901* provides a definition of when a person is in a de facto relationship (for specific purposes) which includes the following elements:¹⁰

¹⁰ We acknowledge that there are other elements to this definition, including provisions dealing with circumstances where employees are not living together because of temporary absences, illness or infirmity (see ss.2(f)(4)).

- (1) For the purposes of paragraph 2D(b), a person is in a **de facto relationship** with another person if the persons:
 - (a) are not legally married to each other; and
 - (b) are not related by family (see subsection (6)); and
 - (c) have a relationship as a couple living together on a genuine domestic basis.
24. Regardless of any argument about what the proper or intended interpretation of the Current Model Term's reference to "de facto partner" is, there should be no difference in the family and domestic violence leave entitlements of an employee based on whether they are award covered or award free, No legitimate justification for divergent approaches has been established.
25. The ACTU submission also highlights the prospect that, in the absence of any award derived definition of "de facto partner", it may be far from clear to a reader what relationships constitute de facto relationships. It is accordingly preferable that this matter is wholly regulated by the NES and that the awards merely refer parties to these provisions.

The absence of an equivalent provision to s.106E

26. At paragraph 21 of their submissions, the ACTU asserts that it is not possible to assess with any certainty the impact of s.106E, which provides that what constitutes a day of leave for the purposes of the new entitlement is taken to be the same as what constitutes a day of leave for the purposes of section 85 and Subdivisions B and C. A comparable provision to this is not contained within the Current Model Term.
27. In support of their position the ACTU identifies that, to its knowledge, no court or tribunal has considered the meaning of "day" for the purposes of s.85 and Subdivision B and C. It also points to the Federal Court proceedings in *Mondelez Australia Pty Ltd v AMWU and Ors VID731/2018*, which are dealing with the meaning of a "day" in the context of paid personal/carers leave in s.96(1) of the Act.

28. It is not clear what relevance the abovementioned proceedings have to the issue currently before the Full Bench.
29. The meaning of a “day” for the purposes of the Current Model Term is consistent with the meaning contemplated by s.106E.
30. If the meaning of “day “adopted within the relevant award provisions differs from that contained within the legislation, this would be a further reason for varying the award as proposed by the Full Bench to ensure consistency of entitlements.

3. ADDITIONAL CONSIDERATIONS

31. A difference between the Current Model Term and the Act which had not been identified by the ACTU arises from s.106A(3), which operates in conjunction with s.106A(2), and deals with the determination of when the leave becomes available in the circumstances of an employee engaged as a casual employee or employed for a specific period of time, for a specific task or for the duration of a specified season. This difference was identified in the February Statement. The sections relevantly provide:

- (2) Unpaid family and domestic violence leave:
 - (a) is available in full at the start of each 12 month period of the employee's employment; and
 - (b) does not accumulate from year to year; and
 - (c) is available in full to part-time and casual employees.
- (3) For the purposes of subsection (2), if an employee is employed by a particular employer:
 - (a) as a casual employee; or
 - (b) for a specified period of time, for a specified task or for the duration of a specified season;

the start of the employee's employment is taken to be the start of the employee's first employment with that employer.

32. Although we do not contend that this provision is fundamentally inconsistent or incompatible with the Current Model Term, the award provisions do not provide clarification in relation to this issue. As such, it would be better for employers and employees to refer to the NES than to only read the Current Model Term. Should they merely read the Current Model Term they may not become aware of the requirements of s.106A(3).

4. CONCLUSION

33. The ACTU submission does not establish a compelling justification for the Commission refraining from implementing its provisional view.

34. Maintaining separate and subtly different provisions dealing with essentially the same subject matter within the awards system and NES is not desirable or warranted and is certainly not *necessary*.¹¹

¹¹ As contemplated by s.138