

15 June 2015

Award Modernisation Team  
Fair Work Commission

Via email: [AMOD@fwc.gov.au](mailto:AMOD@fwc.gov.au)

Dear AMOD,

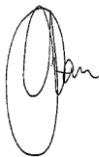
**RE: 2015/1 and 2015/2 – FAMILY AND DOMESTIC VIOLENCE AND FAMILY FRIENDLY WORK ARRANGEMENTS**

On 23 February 2015, the Fair Work Commission issued directions for interested parties to address the preliminary/jurisdictional issues. The ACTU has filed submissions on 15 June 2015 in response to those Directions.

In those submissions, the ACTU advised that it has revised its claims in these proceedings. In part, the ACTU has done so in response to the objections made by the employer parties, however we also consider that the revised claims will enable the Commission and interested parties to deal with the matter in a more expeditious and efficient manner. The revised Family and Domestic Violence Leave and Parental Leave clauses are attached as *Attachment 'A'* and *Attachment 'B'* respectively.

We also attach as *Attachment 'C'* a reference document which explains the changes that have been made; notably strikethrough text which shows the elements of the claim that are no longer pursued and notations that cross reference to the relevant revised clause numbers.

Yours faithfully,



**Gabrielle Starr**  
Legal and Industrial Officer

## **ATTACHMENT 'A' – ACTU REVISED FAMILY & DOMESTIC VIOLENCE LEAVE CLAUSE**

### **FAMILY AND DOMESTIC VIOLENCE LEAVE**

#### **X.1 Definition**

For the purpose of this clause, family and domestic violence is defined as any violent, threatening or other abusive behaviour by a person against a member of the person's family or household (current or former).

#### **X.2 Family and Domestic Violence Leave**

X.2.1 An employee, including a casual employee, experiencing family and domestic violence is entitled to 10 days per year of paid family and domestic violence leave for the purpose of:

- (a) attending legal proceedings, counselling, appointments with a medical or legal practitioner;
- (b) relocation or making other safety arrangements; or
- (c) other activities associated with the experience of family and domestic violence.

X.2.2 Upon exhaustion of the leave entitlements in clauses X.2.1, employees will be entitled to up to 2 days unpaid family and domestic violence leave on each occasion.

#### **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 clause X.2.1. 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 The employer must take all reasonable measures to ensure that any personal information provided by the employee to the employer concerning an employee's experience of family and domestic violence is kept confidential.

## **ATTACHMENT 'B' – ACTU REVISED PARENTAL LEAVE CLAUSE**

### **PARENTAL LEAVE**

#### **X.1 Return to work part-time or on reduced hours**

- X.1.1 Subject to this clause, on ending parental leave, an employee who is the primary carer of the child is entitled to return to:
- (a) the employee's pre-parental leave position on a part-time basis; or
  - (b) if the employee's pre-parental leave position is part-time, on reduced hours; or
  - (c) if the employee's pre-parental leave no longer exists – an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position on a part-time basis or on reduced hours.
- X.1.2 An employee who returns to work part-time or on reduced hours may continue to work part-time or on reduced hours for a period not exceeding two years from the date of birth or placement of the child (the nominated period).
- X.1.3 At the end of the nominated period the employee has the right to return to their pre-parental leave position, or at such other time before the end of the nominated period by agreement.

#### **X.2 Antenatal leave**

- X.2.1 An employee shall be entitled to 15.2 hours paid antenatal leave per year for the purpose of attending appointments associated with:
- (a) antenatal;
  - (b) fertility treatment;
  - (c) surrogacy;
  - (d) pre-adoption; or
  - (e) permanent care orders.
- X.2.2 The employee shall give his or her employer notice of the taking of the leave under this clause, and if required by the employer, evidence that would satisfy a reasonable person that the leave was for the reason as set out in X.2.1.
- X.2.3 For the purpose of clause X.2.1(a), an employee includes an employee who is the spouse or de facto partner.

## ATTACHMENT 'C' – ACTU REVISED CLAUSES REFERENCE DOCUMENT

### 1. SUPPORT FOR EMPLOYEES EXPERIENCING FAMILY AND DOMESTIC VIOLENCE

#### X.1 Definition

For the purpose of this clause, family and domestic violence is defined as any violent, threatening or other behaviour by a person that coerces or controls a member of the person's family or household or causes the family or household member to be fearful. It includes current or former partners in an intimate relationship, whenever and wherever the violence occurs. It may include physical, sexual, emotional, psychological or financial abuse.

*Revised clause X.1*

#### X.2 Confidentiality

The employer must take all reasonable measures to ensure personal information concerning an employee's experience of family and domestic violence is kept confidential.

*Revised clause X.3.3*

#### ~~X.3 Family and Domestic Violence Workplace Contacts and advice referral~~

~~X.3.1 The employer will appoint a family and domestic violence workplace contact person to provide a point of first contact for employees experiencing family and domestic violence. The name and contact details of the nominated contact person shall be disseminated to all employees.~~

~~X.3.2 The employer must ensure the contact person is trained in family and domestic violence issues and be able to provide employees with access to the relevant Employee Assistance Program and / or appropriate local specialist resources, support and referral services.~~

#### ~~X.4 Workplace Safety~~

~~— If it is determined that the disclosing employee, other employees or visitors of the employer may be at risk of physical harm, the employer must take reasonable measures to ensure their safety.~~

#### X.5 Leave

X.5.1 An employee experiencing family and domestic violence will have access to 10 days per year of paid family and domestic violence leave to attend legal proceedings, counselling, appointments with a medical or legal practitioner, relocation, the making of safety arrangements and other activities associated with the experience of family and domestic violence.

*Revised clause X.2*

X.5.2 Upon exhaustion of the leave entitlements in clauses X.5.1, employees shall be entitled to up to 2 days unpaid family and domestic violence leave on each occasion where paid leave would be available.

*Revised clause X.2.2*

~~X.5.3 If required, employees may take additional paid or unpaid family and domestic violence leave by agreement with the employer.~~

~~X.5.4 Family and domestic violence leave is in addition to any other existing leave entitlements, and may be taken as consecutive or single days or as a fraction of a day.~~

~~X.5.5 Nothing in this clause shall prohibit the employee from accessing other available forms of leave for the purposes of attending legal proceedings, counselling, appointments with a medical or legal practitioner, relocation, the making of safety arrangements and other activities associated with the experience of family and domestic violence.~~

X.5.6 The employee shall give his or her employer notice of the taking of the leave under this clause, and if required by the employer, evidence that would satisfy a reasonable person that the leave was for the purposes of attending medical appointments, legal proceedings, legal assistance, court appearances, counselling, relocation, the making of safety arrangements and other activities associated with the experience of family and domestic violence.

*Revised clause X.3.1*

X.5.7 Proof of family and domestic violence may be required and 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 or lawyer or a statutory declaration.

*Revised clause X.3.2*

~~X.5.8 An employee is entitled to use the NES entitlement to personal / carer's leave for the purpose of providing care or support to a person who is experiencing family and domestic violence, including but not limited to, accompanying them to legal proceedings, counselling, appointments with a medical or legal practitioner or to assist them with relocation, the making of safety arrangements, minding children and other activities associated with the experience of family and domestic violence.~~

## **X.6 Individual Support**

~~— [This clause supplements the entitlement to request flexible work arrangements pursuant to s.65 of the FWA.] In order to provide support to an employee experiencing family and domestic violence and to provide a safe work environment to all employees, the employer will approve any reasonable request from an employee experiencing family and domestic violence for:~~

~~(i) changes to their span of hours or pattern of hours and/or shift patterns;~~

~~(ii) job redesign or changes to duties;~~

~~(iii) changes to the location of work;~~

~~(iii) a change to their telephone number or email address to avoid harassing contact;~~

~~(iv) any other appropriate measure including those available under s.65 of the FWA.~~

## 2. RETURN TO WORK PART TIME FROM PARENTAL LEAVE

### X.1 Returning to work part time from parental leave

*Revised clause X.1 .1*

X.1.1 An employee who is returning to work after taking parental leave and who has responsibility for the care of a child is entitled, subject to this clause, to return to the position they held prior to taking parental leave:

- (a) part time; or
- (b) on reduced hours.

This is the employee's "Right to Return".

~~X.1.2 An employer must give effect to the employee's Right to Return, subject to the following:~~

- ~~(a) Where there are substantial countervailing business grounds or where the position no longer exists, the employer must offer to accommodate the employee's return to work on reduced hours in an equivalent position commensurate in status and pay to that of the employee's substantive position and for which the employee is qualified and capable of performing.~~
- ~~(b) The employer may decline to make an offer to accommodate the employee's return to work on reduced hours in an equivalent position under paragraph (a) above only on substantial countervailing business grounds.~~

~~X.1.3. The employee seeking to exercise the Right to Return shall provide written application to the employer no less than 28 days prior to the employee's due date of return to work from parental leave.~~

~~X.1.4 The employer must discuss the employee's application with the employee, and where they choose, their representative, within [14 days] of receiving the application.~~

~~X.1.5 The employer must take into account all relevant circumstances in considering the employee's application, including-~~

- ~~(a) the employee's circumstances; and~~
- ~~(b) the nature of the employee's role; and~~
- ~~(c) the nature of the arrangements required to accommodate the circumstances or responsibilities;~~
- ~~(d) the consequences for the employee of not making such accommodation; and~~
- ~~(e) alternative arrangements that might address the employee's circumstances.~~

~~X.1.6 A written agreement must be provided by the employer to the employee within 7 days which records an arrangement reached under this clause and which includes, at a minimum, the following matters:~~

- ~~(a) the location, hours, days and commencing and finishing times to be worked by the employee;~~
- ~~(b) the classification, job description and remuneration of the work to be performed;~~
- ~~(b) the period of changed work arrangements;~~
- ~~(c) that the terms of the agreement may be varied by written consent; and~~
- ~~(d) that all part time working arrangements are subject to the provisions of the Award.~~

~~X.1.7 Where the employee's application is refused or where the employer declines to make an offer in accordance with sub clause 1.2, the employer must provide its reasons (including evidence of its consideration of the alternative arrangements that might address the requirements of the employee) to the employee in writing within 7 days of discussing the employee's application under X.1.4.~~

## **X.2: Right to revert to position and / or work arrangements held prior to taking parental leave**

*Revised cl. X.1.2 and X.1.3*

- X.2.1 An employee who has changed their work arrangements in accordance with clause X.1, has the right to revert to the position and / or working arrangements they held prior to taking parental leave, up to 2 years from the date of birth or placement of the child.
- X.2.2 An employee who intends to revert to the position and / or working arrangements they held prior to taking parental leave upon the 2 year anniversary of the date of birth or placement of the child, shall provide no less than 28 days' notice to the employer of their intention. The employer must accommodate the employee's transition to the position and / or working arrangements they held prior to taking parental leave within 28 days of receiving the employee's notice.
- X.2.3 An employee may revert to the position and / or working arrangements they held prior to taking parental leave at any time before or after 2 years from the date of birth or placement of the child by agreement with the employer.

~~X.2.4 The terms of the agreement, or any variation to it, must be in writing and retained by the employer. A copy of the agreement and any variation to it shall be provided to the employee by the employer.~~

## **~~X.3: Safe work arrangements during pregnancy~~**

- ~~X.3.1 An employee who is pregnant may change their work arrangements (including hours, patterns, types and location of work) for the duration of their pregnancy to ensure their safety and that of their baby.~~
- ~~X.3.2 An employee who changes their work arrangements in accordance with this clause, is entitled to return to the position and/or work arrangements they held prior to changing their work conditions at any time by agreement with their employer.~~

**X.4: Paid leave for the purpose of attending appointments associated with pre-natal, pre-adoption or permanent care orders**

*Revised cl. X.2.1 and  
X.2.2*

X.4.1 An employee shall be entitled to 2 days paid leave for the purpose of attending appointments associated with pregnancy, adoption or permanent care orders. Any leave accessed under this clause will be deducted from the employee's entitlement based on the actual time taken to attend each appointment.

X.4.2 The employee shall give his or her employer notice of the taking of the leave under this clause, and if required by the employer, evidence that would satisfy a reasonable person that the leave was for the purposes of attending an appointment associated with pre-natal, pre-adoption or permanent care orders.

~~X.4.3 Once paid leave has been exhausted, an employee can access accrued personal leave for the purpose of attending appointments associated with pregnancy, adoption or permanent care orders.~~

~~X.4.4 An employee is entitled to use the NES entitlement to personal / carer's leave for the purpose of providing care or support or to accompany a person taking leave to attend an appointment associated with pre-natal, pre-adoption or permanent care orders.~~



THE FAIR WORK COMMISSION

Matter No: AM2015/1 and AM2015/2

**FOUR YEARLY REVIEW OF MODERN AWARDS – FAMILY AND DOMESTIC  
VIOLENCE CLAUSE AND FAMILY FRIENDLY WORK ARRANGEMENTS**

**REPLY SUBMISSIONS OF THE ACTU ON THE PRELIMINARY/  
JURISDICTIONAL ISSUES**

**Introduction**

1. These submissions of the ACTU address the preliminary/jurisdictional issues identified in the Commission's directions dated 23 February 2015, which are:
  - (a) Are any elements of the claims of the ACTU inconsistent with Part 2-1 or Part 2-2 of the *Fair Work Act 2009*?
  - (b) Do any elements of the claims of the ACTU require terms that are not permitted to be included in a modern award under Part 2-3 of the *Fair Work Act 2009*?
  - (c) Are any elements of the claims of the ACTU inconsistent with Part 6-2 of the *Fair Work Act 2009*?
  - (d) Do any elements of the claims of the ACTU purport to give the Commission powers which it does not have under the *Fair Work Act 2009*?
2. In response to the industry groups' submissions making objection to various parts of the ACTU's claims, while not conceding those jurisdictional objections, the ACTU has revised its claims as follows:
  - (a) a family and domestic violence leave clause at attachment A, which, in summary:

- (i) removes various parts of the claim objected to on jurisdictional grounds, in particular, those pertaining to a workplace contacts and advice referral<sup>1</sup> and those related to measures to ensure workplace safety;<sup>2</sup> and
    - (ii) clarifies that it provides a greater entitlement to the National Employment Standards (**NES**) entitlements but not a modified use of a NES entitlement, in particular, the ACTU no longer presses for the use of personal/carer's leave for reasons other than set out in the NES.<sup>3</sup>
  - (b) a parental leave clause at attachment B, which, in summary:
    - (i) removes various parts of the claim objected to on jurisdictional grounds, in particular, those pertaining to safe working arrangements;<sup>4</sup> and
    - (ii) clarifies that it provides a greater entitlement to the NES entitlements but not a modified use of a NES entitlement, in particular, the ACTU no longer presses for the use of personal/carer's leave for reasons other than set out in the NES.<sup>5</sup>
3. The key remaining jurisdictional issues in contention can be summarised as follows:
- (a) whether the family and domestic violence leave clause contains terms that are not permitted to be included in a modern award under Part 2-3 of the FW Act, in particular, the confidentiality obligations in X.3.3;
  - (b) whether the parental leave clause is inconsistent with Part 2-1 of the FW Act, in particular s.55.

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<sup>1</sup> See X.3 of previous clause.

<sup>2</sup> See X.4 of previous clause.

<sup>3</sup> See X.5.8 of previous clause.

<sup>4</sup> See X.3 of previous clause.

<sup>5</sup> See X.4.3 and X.4.4 of previous clauses.

**Are any elements of the claims of the ACTU inconsistent with Part 2-1 or Part 2-2 of the *Fair Work Act 2009*?**

Family and domestic violence clause

4. The revised family and domestic violence leave clause at attachment A is not inconsistent with Part 2-1, Division 3 of which sets out the interaction between modern awards and the NES in Part 2-2 of the FW Act.
5. Section 55(1) of Division 3 provides that a modern award must not exclude any provision of the NES. The NES provides for minimum employment standards applying to all national system employees: they are minimum standard protections for employees which cannot be displaced but can be added to under section 55.<sup>6</sup>
6. The revised clause does not provide for the use of personal/carer's leave for reasons other than set out in the NES and, therefore, cannot be said to exclude the NES or be detrimental in any respect when compared with the NES within the meaning of s.55(4) of the FW Act.<sup>7</sup>
7. Furthermore, the proposed clause does not exclude any provision of the NES, in particular:
  - (a) the proposed family and domestic violence leave X.2 provides for a greater form of leave to that found in the NES, for example, personal/carer's leave,<sup>8</sup> and it does not exclude the use of any other form of leave under the NES;
  - (b) employees can access any NES entitlements independently of the proposed family and domestic violence leave.
8. Section 55(4) of Division 3 provides that a modern award may include terms that are ancillary to and/or supplement the NES. The proposed family and domestic violence leave X.2 is ancillary to and/or supplements the NES, in particular:

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<sup>6</sup> See s.65 and s.55 of the FW Act.

<sup>7</sup> See ACCI-Jurisdictional Submissions – 20 April 2015 at paragraph 6.14 and AIG-Jurisdictional Submissions – 20 April 2015 at paragraphs 25-32.

<sup>8</sup> At s.96 of the FW Act.

- (a) the family and domestic violence leave provides for additional leave to related forms of leave under the NES, such as, the entitlement to personal/carer's leave;
- (b) existing leave entitlements under the NES are not interfered with or disturbed by the operation of the proposed family and domestic violence leave clause.

#### Family friendly work arrangements clause

9. The revised parental leave clause at attachment B is not inconsistent with Part 2-1, Division 3 of which sets out the interaction between modern awards and the NES in Part 2-2 of the FW Act.

#### *Return to work part-time or on reduced hours*

10. Section 55(1) of Division 3 provides that a modern award must not exclude any provision of the NES. The NES provides for minimum employment standards applying to all national system employees: they are minimum standard protections for employees which cannot be displaced but can be added to under section 55.<sup>9</sup>
11. The revised clause does not provide for the use of personal/carer's leave for reasons other than set out in the NES and, therefore, cannot be said to exclude the NES or be detrimental in any respect when compared with the NES within the meaning of s.55(4) of the FW Act.<sup>10</sup>
12. Furthermore, the proposed clause does not exclude any provision of the NES, in particular:
  - (a) the proposed return to work part-time or on reduced hours X.1 provides for a greater form of entitlement to those found in the NES, for example, the return to work to an employee's pre-parental leave position guarantee<sup>11</sup> and the right to request an extension of unpaid

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<sup>9</sup> See s.65 and s.55 of the FW Act.

<sup>10</sup> See ACCI-Jurisdictional Submissions – 20 April 2015 at paragraph 7.14 and AIG-Jurisdictional Submissions – 20 April 2015 at paragraphs 89-93.

<sup>11</sup> At s.84 of the FW Act.

parental leave for up to 12 months,<sup>12</sup> and it does not exclude the use of any entitlement under the NES;<sup>13</sup>

- (b) employees can access any NES entitlements independently of the proposed return to work part-time or on reduced hours entitlements;
- (c) it does not exclude s.65(1) because it does not exclude an employee from requesting flexible working arrangements;
- (d) the requests for flexible working arrangements s.65 still has “work to do” for reasons including:
  - (i) the circumstances of the employee to which s.65 applies extend beyond returning to work part-time or on reduced hours after parental leave, for example, the circumstances include whether the employee has a disability and whether the employee is 55 or older;
  - (ii) this provision applies to all national system employees and not just those covered by modern awards: the provision remains unaffected in its application to non-award national system employees;
  - (iii) the operation of s.65(5), regarding an employer’s refusal of a request, is not excluded as it remains in tact in respect of its application to requests by employees with the other relevant circumstances provided for under s.65(1A) and by non-award national system employees.<sup>14</sup>

13. Section 55(4) of Division 3 provides that a modern award may include terms that are ancillary to and/or supplement the NES. The proposed return to work

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<sup>12</sup> At s.76 of the FW Act.

<sup>13</sup> See *Maritime Union of Australia, The v FBIS International Protective Services (Aust) Pty Ltd* [2014] FWCFB 6737 at [18]-[33], which held that terms which provide supplementary benefits to an employee pursuant to s.55 do not exclude any other provision of the NES, in this case, redundancy entitlements in an enterprise agreement did not exclude the operation of s.120 of the FW Act whereby an employer can apply to reduce NES redundancy entitlements.

<sup>14</sup> See ACCI-Jurisdictional Submissions – 20 April 2015 at paragraph 7.14 and AIG-Jurisdictional Submissions – 20 April 2015 at paragraphs 78-84.

part-time or on reduced hours X.1 is ancillary to and/or supplements the NES, in particular:

- (a) the return to work part-time or on reduced hours entitlements builds upon while providing for additional entitlements, to related entitlements under the NES, in particular:
  - (i) the right to return to work to an employee's pre-parental leave position part-time or on reduced hours is an extension of the existing return to work guarantee in s.84 and is not a completely separate entitlement;<sup>15</sup>
  - (ii) the right to work part-time or on reduced hours for up to two years before returning to an employee's pre-parental leave position is an extension of the existing return to work guarantee in s.84 and the right to request an extension of unpaid parental leave for up to 12 months in s.76 and is not a completely separate entitlement.
- (b) existing entitlements under the NES are not interfered with or disturbed by the operation of the proposed return to work part-time or on reduced hours entitlements.

#### *Antenatal leave*

- 14. Section 55(1) of Division 3 provides that a modern award must not exclude any provision of the NES. The proposed clause does not exclude any provision of the NES, in particular:
  - (a) the proposed antenatal leave X.2 provides for a greater form of entitlement to those found in the NES, for example, personal/carer's leave or unpaid pre-adoption leave<sup>16</sup> and it does not exclude the use of any other form of entitlement under the NES;

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<sup>15</sup> See ACCI-Jurisdictional Submissions – 20 April 2015 at paragraph 7.9.

<sup>16</sup> At s.85 of the FW Act.

- (b) employees can access any NES entitlements independently of the proposed antenatal leave.
15. Section 55(4) of Division 3 provides that a modern award may include terms that are ancillary to and/or supplement the NES. The proposed antenatal leave X.2 is ancillary to and/or supplements the NES, in particular:
- (a) the antenatal leave provides for additional entitlements, to related entitlements under the NES, such as personal/carer's leave or unpaid pre-adoption leave;
  - (b) existing entitlements under the NES are not interfered with or disturbed by the operation of the antenatal leave entitlements.

**Do any elements of the claims of the ACTU require terms that are not permitted to be included in a modern award under Part 2-3 of the *Fair Work Act 2009*?**

Family and domestic violence leave clause

16. The proposed family and domestic violence leave clause is permitted according to the terms of s.136(1) of the FW Act by:
- (a) subsection 136(1)(a) Subdivision B (which deals with terms that may be included in modern awards); and/or
  - (b) subsection 136(1)(c) Section 55 (which deals with interaction between the NES and a modern award).
17. The proposed family and domestic violence leave clause is permitted because it may be included in the modern award pursuant to s.139(1)(h) of Subdivision B, as it is about leave and the arrangements for taking leave. The AIG submits that "family violence" is not a permitted matter under s.139, however, s.139(1)(h) is not restricted to particular types of leave.<sup>17</sup>

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<sup>17</sup> See AIG-Jurisdictional Submissions – 20 April 2015 at paragraph 43. That the family and domestic violence leave clause is properly grounded in s.139 is conceded in the ACCI-Jurisdictional Submissions – 20 April 2015 at paragraph 6.7.

18. The clause's definition at X.1 is a term that may be included in a modern award pursuant to s.142 of the FW Act,<sup>18</sup> in particular, it is:
- (a) incident to the leave entitlement at X.2; and
  - (b) essential for the purpose of the leave entitlement to operate in a practical way.
19. The clause's notice and evidentiary requirements at X.3 are terms that may be included in the modern award pursuant to s.142 of the FW Act in particular, they are:
- (a) incidental to the leave entitlement at X.2; and
  - (b) essential for the purpose of making the leave entitlement operate in a practical way, in particular:
    - (i) notice and evidentiary information in support is essential for the purpose of the domestic and violence leave clause operating in a practical way to substantiate leave taken in the case of family and domestic violence;<sup>19</sup>
    - (ii) X.3.3 regarding employers taking reasonable measures to ensure that personal information provided by the employee to the employer concerning the employee's experience of family and domestic violence is kept confidential, is essential given the nature of the leave for the purpose of providing employees experiencing family or domestic violence with the benefit of and ability to practically access such leave.

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<sup>18</sup> This is conceded in the ACCI-Jurisdictional Submissions – 20 April 2015 at paragraph 6.6.

<sup>19</sup> These notice and evidentiary requirements operate in the same manner as those regarding related NES entitlements.



20. The proposed family and domestic violence leave clause achieves the modern award's objective<sup>20</sup> within the meaning of s.138 and s.134 of the FW Act, in particular, because:
- (a) it provides a fair and relevant minimum safety net of leave entitlements;
  - (b) which entitlements take into account the need to promote social inclusion through increased workforce participation, within the meaning of s.134(1)(c) because providing leave arrangements for those experiencing family or domestic violence facilitates such employees maintaining their employment despite experiencing family and domestic violence.
21. The extent to which the proposed family and domestic violence leave clause achieves the modern award's objective is a matter for a merits hearing rather than a question of jurisdiction.
22. In the alternative, the proposed family and domestic violence leave clause is permitted pursuant to s.55(4) of the FW Act because it supplements the existing leave entitlements in the NES.

#### Family friendly work arrangements clause

23. The proposed parental leave clause is permitted according to the terms of s.136(1) of the FW Act by:
- (a) subsection 136(1)(a) Subdivision B (which deals with terms that may be included in modern awards); and/or
  - (b) subsection 136(1)(c) Section 55 (which deals with interaction between the NES and a modern award).
24. The proposed parental leave clause is permitted because it may be included in a modern award pursuant to s.139(1)(b) and (h) of Subdivision B, as it is about:

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<sup>20</sup> The modern award objective is very broadly expressed: see *SDAEA v National Retail Assoc (No 2)* (2012) 205 FCR 227 per Tracey J at [35].

- (a) the type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities; and
  - (b) leave and arrangements for taking leave.
- 25. The clause's antenatal leave notice and evidentiary requirements at X.2.2 are terms that may be included in the modern award pursuant to s.142 of the FW Act, in particular, they are:
  - (a) incidental to the leave entitlement at X.2.1; and
  - (b) essential for the purpose of making the leave entitlement operate in a practical way.
- 26. The proposed parental leave clause achieves the modern award's objective<sup>21</sup> within the meaning of s.138 and s.134 of the FW Act, in particular, because:
  - (a) it provides a fair and relevant minimum safety net of leave entitlements;
  - (b) which entitlements take into account the need to promote social inclusion through increased workforce participation, within the meaning of s.134(1)(c) because providing flexible working arrangements for employees with family responsibilities facilitates such employees maintaining their employment.
- 27. The extent to which the proposed parental leave clause achieves the modern award's objective is a matter for a merits hearing rather than a question of jurisdiction.
- 28. In the alternative, the proposed parental leave clause is permitted pursuant to s.55(4) of the FW Act because it supplements the existing entitlements in the NES.

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<sup>21</sup> The modern award objective is very broadly expressed: see *SDAEA v National Retail Assoc (No 2)* (2012) 205 FCR 227 per Tracey J at [35].

**Are any elements of the claims of the ACTU inconsistent with Part 6-2 of the *Fair Work Act 2009*?**

Family and domestic violence leave clause

29. Part 6-2 of the FW Act provides for the Fair Work Commission to deal with disputes, including those arising from the dispute procedure in modern awards pursuant to s.738 of the FW Act.
30. If the family and domestic violence leave clause were to become an award entitlement, any dispute settlement procedure would be a permitted term pursuant to s.139(1)(j) of the FW Act. In any event, the claim does not include a claim for a new dispute resolution procedure and the dispute resolution procedure would apply as for any other award entitlement.
31. Furthermore, pursuant to s.146 of the FW Act, a modern award must include a term that provides a procedure for settling disputes:
  - (a) about any matters arising under the award; and
  - (b) in relation to the NES.
32. The proposed family and domestic violence clause is not inconsistent with Part 6-2, because, if the clause were inserted into modern awards, the modern award must include a term that provided for a procedure for settling a dispute about it pursuant to s.146 of the FW Act.

Family friendly work arrangements clause

33. Part 6-2 of the FW Act provides for the Fair Work Commission to deal with disputes, including those arising from the dispute procedure in modern awards pursuant to s.738 of the FW Act.
34. If the parental leave clause were to become an award entitlement, any dispute settlement procedure would be a permitted term pursuant to s.139(1)(j) of the FW Act. In any event, the claim does not include a claim for a new dispute resolution procedure and the dispute resolution procedure would apply as for any other award entitlement.

35. Furthermore, pursuant to s.146 of the FW Act, a modern award must include a term that provides a procedure for settling disputes:
- (a) about any matters arising under the award; and
  - (b) in relation to the NES.
36. The parental leave clause is not inconsistent with Part 6-2, because, if the clause were inserted into modern awards:
- (a) the modern award must include a term that provided for a procedure for settling a dispute about it pursuant to s.146 of the FW Act; and
  - (b) any such dispute would not be a dispute about whether an employer had reasonable business grounds to refuse a request for flexible working arrangements pursuant to s.65(5) or a request to extend a period of unpaid parental leave pursuant to s.76(4) of the FW Act.<sup>22</sup>

**Do any elements of the claims of the ACTU purport to give the Commission powers which it does not have under the *Fair Work Act 2009*?**

Family and domestic violence clause

37. The ACTU's claim for the family and domestic violence leave clause does not purport to give the Commission powers which it does not have under the FW Act for the reasons set out above, in particular:
- (a) because modern awards may include terms:
    - (i) about matters including those about leave and arrangements for taking leave pursuant to s.139(1)(h); and/or
    - (ii) which supplement the NES pursuant to s.55(4) of the FW Act;
  - (b) the claim does not include a claim for a new dispute resolution procedure: the dispute resolution procedure would apply as for any other award entitlement pursuant to the Commission's existing powers.

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<sup>22</sup> In respect of which the Commission would not be permitted to settle a dispute pursuant to s.146. See AIG-Jurisdictional Submissions – 20 April 2015 at paragraphs 100-110 which rely on the FWC not having jurisdiction to settle disputes about such requests.

Family friendly work arrangements clause

38. The ACTU's claim for the parental leave clause does not purport to give the Commission powers which it does not have under the FW Act for the reasons set out above, in particular:

- (a) because modern awards may include terms:
  - (i) about matters including those about:
    - A. the type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities leave pursuant to s.139(1)(b); and/or
    - B. arrangements for taking leave pursuant to s.139(1)(h); and/or
  - (ii) which supplement the NES pursuant to s.55(4) of the FW Act.
- (b) the claim does not include a claim for a new dispute resolution procedure: the dispute resolution procedure would apply as for any other award entitlement pursuant to the Commission's existing powers.

Fiona Knowles

Counsel for the ACTU

15 June 2015

ACTU

D No. 54/2015

## **ATTACHMENT 'A' – ACTU REVISED FAMILY & DOMESTIC VIOLENCE LEAVE CLAUSE**

### **FAMILY AND DOMESTIC VIOLENCE LEAVE**

#### **X.1 Definition**

For the purpose of this clause, family and domestic violence is defined as any violent, threatening or other abusive behaviour by a person against a member of the person's family or household (current or former).

#### **X.2 Family and Domestic Violence Leave**

X.2.1 An employee, including a casual employee, experiencing family and domestic violence is entitled to 10 days per year of paid family and domestic violence leave for the purpose of:

- (a) attending legal proceedings, counselling, appointments with a medical or legal practitioner;
- (b) relocation or making other safety arrangements; or
- (c) other activities associated with the experience of family and domestic violence.

X.2.2 Upon exhaustion of the leave entitlements in clauses X.2.1, employees will be entitled to up to 2 days unpaid family and domestic violence leave on each occasion.

#### **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 clause X.2.1. 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 The employer must take all reasonable measures to ensure that any personal information provided by the employee to the employer concerning an employee's experience of family and domestic violence is kept confidential.

## ATTACHMENT 'B' – ACTU REVISED PARENTAL LEAVE CLAUSE

### PARENTAL LEAVE

#### X.1 Return to work part-time or on reduced hours

- X.1.1 Subject to this clause, on ending parental leave, an employee who is the primary carer of the child is entitled to return to:
- (a) the employee's pre-parental leave position on a part-time basis; or
  - (b) if the employee's pre-parental leave position is part-time, on reduced hours; or
  - (c) if the employee's pre-parental leave no longer exists – an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position on a part-time basis or on reduced hours.
- X.1.2 An employee who returns to work part-time or on reduced hours may continue to work part-time or on reduced hours for a period not exceeding two years from the date of birth or placement of the child (the nominated period).
- X.1.3 At the end of the nominated period the employee has the right to return to their pre-parental leave position, or at such other time before the end of the nominated period by agreement.

#### X.2 Antenatal leave

- X.2.1 An employee shall be entitled to 15.2 hours paid antenatal leave per year for the purpose of attending appointments associated with:
- (a) antenatal;
  - (b) fertility treatment;
  - (c) surrogacy;
  - (d) pre-adoption; or
  - (e) permanent care orders.
- X.2.2 The employee shall give his or her employer notice of the taking of the leave under this clause, and if required by the employer, evidence that would satisfy a reasonable person that the leave was for the reason as set out in X.2.1.
- X.2.3 For the purpose of clause X.2.1(a), an employee includes an employee who is the spouse or de facto partner.