



# STATEMENT

*Fair Work Act 2009*

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

## **Family and Domestic Violence Leave Review**

(AM2021/55)

JUSTICE ROSS, PRESIDENT  
VICE PRESIDENT HATCHER  
COMMISSIONER SPENCER

MELBOURNE, 15 APRIL 2021

*Family and domestic violence leave term – review of unpaid leave term – paid family and domestic violence leave – correspondence from the ACTU.*

### **Background**

[1] During the 4 yearly review of modern awards (the Review), the Australian Council of Trade Unions (ACTU) made a claim for 10 days’ paid family and domestic violence leave to be included in all modern awards.

[2] The claim for paid family and domestic violence leave was rejected in 2017<sup>1</sup>, though the majority of the Full Bench expressed the preliminary view that all employees should have access to unpaid family and domestic violence leave and that employees should be able to access personal/carer’s leave for the purpose of taking family and domestic violence leave.<sup>2</sup>

[3] The Full Bench was then reconstituted after the retirement of 2 of its members<sup>3</sup> and the Full Bench as currently constituted issued a decision on 26 March 2018 confirming the preliminary view in respect of access to unpaid family and domestic violence leave.<sup>4</sup> A model term for unpaid leave to deal with family and domestic violence was finalised in a further decision published on 6 July 2018.<sup>5</sup>

[4] The model term provides an entitlement to 5 days’ unpaid leave for employees dealing with family and domestic violence. The Full Bench determined that the unpaid leave entitlement would:

- apply to *all* employees (including casuals)

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<sup>1</sup> [2017] FWCFB 3494 and [2017] FWCFB 1133

<sup>2</sup> [2017] FWCFB 3494 at [6]

<sup>3</sup> Vice President Watson and Deputy President Gooley

<sup>4</sup> [2018] FWCFB 1691

<sup>5</sup> [2018] FWCFB 3936

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

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

[6] Some 123 modern awards were subsequently varied to include the unpaid leave entitlement.<sup>6</sup>

[7] We concluded the March 2018 decision as follows:

[307] This decision takes a cautious regulatory response to this issue. We have decided to provide five days' unpaid leave to employees experiencing family and domestic violence, if the employee needs to do something to deal with the impact of that violence and it is impractical for them to do it outside their ordinary hours of work. We have decided to defer our consideration of whether employees should be able to access paid personal/carer's leave for the purpose of taking family and domestic violence leave.

[308] The extent to which the new entitlement to unpaid leave will be utilised is unknown, as is the impact of the new entitlement on business.

[309] We propose to revisit this issue in June 2021, after the model term has been in operation for three years. At that time we will consider whether any changes are needed to the unpaid leave model term, and whether to allow access to personal/carer's leave. At that time we will also revisit the question of whether provisions should be made for paid family and domestic violence leave.<sup>7</sup>

[8] The *Fair Work Amendment (Family and Domestic Violence Leave) Act 2018* (Cth) amended the *Fair Work Act 2009* (Cth) to include an entitlement to unpaid family and domestic violence leave as part of the National Employment Standards (NES). These amendments commenced from 13 December 2018. In a Statement issued on 3 February 2019, we expressed the view that the effect of the model term inserted into modern awards and the NES entitlement were substantially the same.<sup>8</sup>

[9] In a decision dated 25 July 2019 (the July 2019 decision), we decided to remove the model term from exposure drafts produced during the Review and to insert a note referring to

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<sup>6</sup> This number included the then 122 modern awards and the *Australian Government Industry Award 2016*. The 34 state reference public sector modern awards and enterprise modern awards were not included in the 4 yearly review matter. Following the amalgamation of the *Cement & Lime Award 2010* and the *Quarrying Award 2010*, there are now 121 modern awards.

<sup>7</sup> [2018] FWCFB 1691 at [307] to [309]

<sup>8</sup> [2019] FWCFB 767

the NES entitlement.<sup>9</sup> The technical and drafting issues in most modern awards has now been finalised and so the majority of modern awards<sup>10</sup> contain the following note:

## **27. Unpaid family and domestic violence leave**

Unpaid family and domestic violence leave is provided for in the NES.

NOTE 1: 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.

NOTE 2: Depending upon the circumstances, evidence that would satisfy a reasonable person of the employee's need to take family and domestic violence leave may include a document issued by the police service, a court or family violence support service, or a statutory declaration.

[10] In the July 2019 decision we also noted that:

[45] The Full Bench proposed to revisit the model term in June 2021 after it had been in operation for three years to consider the following issues:

- whether employees should be able to access paid personal/carer's leave for the purpose of taking family and domestic violence leave;
- whether any changes are needed to the unpaid leave model term;
- whether provisions should be made for paid family and domestic violence leave.

[46] Our decision to delete the model term and replace it with a reference to the NES as set out at [13] does not obviate the requirement for a review of the scope of the term and of the issues set out above. We intend to proceed with our consideration of the above issues and interested parties will be invited to participate in the review...

[11] On 12 April 2021, the [ACTU](#) wrote to the Commission requesting that the foreshadowed review of the adequacy of the unpaid family and domestic violence leave entitlement and a revisiting of the need for 10 days paid leave commence urgently.<sup>11</sup> The ACTU noted that 'the increased incidence of family and domestic violence during COVID-19 has clearly demonstrated that this remains a pressing problem confronting employees and employers and the wider community.'

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<sup>9</sup> [2019] FWCFB 5144

<sup>10</sup> The following awards still contain the full model term: *Aged Care Award 2010, Black Coal Mining Industry Award 2010, Children's Services Award 2010, Fast Food Industry Award 2010, Hair and Beauty Industry Award 2010, Nurses Award 2010, Social, Community, Home Care and Disability Services Industry Award 2010.*

<sup>11</sup> ACTU correspondence dated 12 April 2021

### Commencement of the 2021 review

[12] The 2021 review of family and domestic violence leave terms in modern awards (FDV Review) will commence with a conference at **1pm on Friday 30 April 2021**. Further details of the conference are set out in the ‘Next steps’ section below.

[13] As noted above, the following issues will be considered during the FDV Review:

1. whether employees should be able to access paid personal/carer’s leave for the purpose of taking family and domestic violence leave
2. the adequacy of the unpaid paid family and domestic violence leave entitlement, and
3. whether provisions should be made for paid family and domestic violence leave.

[14] We note that in the recently released report from the Inquiry into family, domestic and sexual violence<sup>12</sup>, the House Standing Committee on Social Policy and Legal Affairs (the Committee) considered the importance of leave for people experiencing family, domestic and sexual violence (FDSV) and concluded that:

8.218 As many services that support victim-survivors are only open or are primarily open during business hours, leave is an important tool to allow victim-survivors to access services. Without an ability to take leave, those experiencing FDSV may be faced with a choice between accessing services and maintaining employment.

8.219 The Committee believes that wherever possible victim-survivors should be supported to continue their employment if they wish.

8.220 The Committee recognises that many employers in both the public and private sector have voluntarily elected to provide paid family violence leave.

8.221 The Committee understands that there are concerns from the Australian business sector that mandating paid leave might result in negative outcomes for businesses. In this regard, while the Committee welcomed evidence from a few business representative groups, the Committee was disappointed that other major organisations were invited to provide the perspective of the business community to the Committee and declined or were unable to do so: the Business Council of Australia, the Australian Chamber of Commerce and Industry and the Australian Small Business and Family Enterprise Ombudsman.

8.222 The Committee believes that the upcoming Fair Work Commission review of family violence leave will provide a useful opportunity for evidence gathering and an evaluation of family violence leave.

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<sup>12</sup> Commonwealth of Australia, [Inquiry into family, domestic and sexual violence](#), March 2021

8.223 Given the scope of amendments to leave entitlements is a broad and complex issue that goes beyond the scope of this inquiry, the Committee defers to the pending Fair Work Commission review with regards to paid family violence leave.

[15] In order to assist in the FDV Review the Commission will conduct a research program which will include:

**1. Literature and data review**

A review of literature and data that examines the prevalence and impacts of family and domestic violence. This review may also consider state-based approaches to family and domestic violence leave.

**2. Analysis of the Workplace Agreements Database**

The analysis will update evidence filed by Ai Group in earlier proceedings and will analyse terms in enterprise agreements dealing with family and domestic violence.

**3. A qualitative assessment on the experience of family and domestic violence leave**

Qualitative research examining employee's experience of family and domestic violence by exploring their interaction with the various support services and systems.

**4. Survey analysis**

A survey of employers seeking information on the use and operation of the unpaid family and domestic violence leave entitlement. The survey will be designed by Commission staff and interested parties will have an opportunity to comment on a draft of the survey. A draft survey will also be published prior to the conference.

[16] The Commission will also update the [Research reference list](#) first published in September 2017.

**Next Steps**

[17] A conference will be listed at **1.00pm on Friday 30 April 2021**. The purpose of the conference is to discuss:

- the draft directions set out at [19] below; and
- any proposed additions to the research program.

[18] Any party who wishes to attend the conference should send an email to [Chambers.Ross.j@fwc.gov.au](mailto:Chambers.Ross.j@fwc.gov.au) specifying a name and contact telephone number by **4.00pm on Monday 26 April 2021**.

[19] Draft directions for the FDV Review are set out below:

1. Any party seeking to vary a modern award in relation to family and domestic violence leave is to file their proposed variation, evidence and written submissions in support by **4.00 pm on Friday 30 July 2021**.
2. Any party opposing proposed variations to modern awards is to file their evidence and written submissions by **4.00pm on Friday 1 October 2021**.
3. Submissions and evidence in reply is to be filed by **4.00pm on Friday 5 November 2021**.
4. The matter will be listed for Mention at **9.30am on Monday 15 November 2021**.
5. The matter will be listed for Hearing in the week commencing **29 November 2021**.
6. Liberty to apply.

PRESIDENT

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