

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1988

s.113 application to vary

Australian Liquor, Hospitality and Miscellaneous Workers Union

Finance Sector Union of Australia

Shop, Distributive and Allied Employee Association

LAUNDRY INDUSTRY (VICTORIA) INTERIM AWARD 1993

(ODN C No. 21626 of 1992)

[Print K8194 [L0125]]

(C No. 20277 of 1994)

INSURANCE OFFICERS (CLERICAL INDOOR STAFFS)

CONSOLIDATED AWARD 1985

(ODN C No. 00571 of 1983)

[Print H4379 [I0002]]

(C No. 30482 of 1994)

**RETAIL AND WHOLESALE SHOP EMPLOYEES (AUSTRALIAN
CAPITAL TERRITORY) AWARD 1983**

(ODN C No. 03078 of 1982)

[Print J5408 [R0017]]

(C No. 30434 of 1994)

Various employees

Various industries

Leave - personal/carer's leave test case - various employees, various industries - parties achieved substantial agreement regarding the terms of the model draft clause - areas of disagreement determined - parties directed to submit orders within 14 days.

SENIOR DEPUTY PRESIDENT MARSH

SYDNEY, 26 MARCH 1996

DECISION

Substantial agreement has been reached between the parties over the terms of the model draft clause to implement the Personal/Carer's Leave Test Case - Stage 2 decision (Stage 2 decision) [Print M6700]. However, areas of disagreement exist which the parties have addressed by way of written submissions supplemented by oral submissions put at a hearing on 23 February 1996. A list of parties who presented written submissions is set out at

attachment A. The list of employer organisations which supported the Australian Chamber of Commerce and Industry (ACCI) submission is set out at attachment B. In the proceedings held on 23 February the ACCI and the Australian Council of Trade Unions (ACTU) tendered Joint Exhibit 1 which clearly sets out the respective union and employer positions. This exhibit is reproduced in full at attachment C.

During the proceedings on the settlement of the order the parties were directed to confer on adopting a 'plain English' draft order as tendered by the Australian Catholic Commission for Industrial Relations (ACCIR). Attachment D sets out the plain English draft orders received from the ACTU and ACCI numbered D(i) and D(ii) respectively. These drafts are relied upon throughout the decision where they differ from Joint Exhibit 1. I must express the Commission's concern that the author of the original 'plain English' draft, Mr Gair, was excluded from the discussions regarding his draft order.

This decision deals in a sequential way only with matters contested or upon which agreement has been reached but clarification sought. Agreed wording is adopted by the Commission and will form part of the model clause when issued. The order must be read in full to appreciate its full context.

The issues in dispute relate to:

1. The manner in which sick leave is accrued (clause 3.6)
2. Bereavement leave/compassionate leave - treatment of awards with per annum entitlement (clause 4.3)
3. Specific issues arising out of the carer's leave provision
 - (i) bereavement leave for deaths outside Australia (clause 2)
 - (ii) definition of de facto spouse (clause 2.2(i))
 - (iii) access to unpaid leave
 - (iv) access to carer's leave (clause 5.1)
 - (v) subclause 5.4 (ACTU 5.6)
 - (vi) definition of a 'day' where the award is on an hourly basis
 - (vii) order of clauses
4. Facilitative clauses

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5. Specific issues arising in relation to facilitative clauses
 - (i) requirement that majority vote is required at the time of instituting a system of individual use
 - (ii) requirement to notify all parties to an award of the intention to introduce a system
 - (iii) requirement to record the system introduced and requirement to record each individual use in the time and wages book
 - (iv) rostered days off
6. Scope of access for facilitative clauses
7. Departures from model clause

1. **Sick Leave Accrual**

The respective clauses on accrual of sick leave are as follows:

Clause 3.6 - Personal Sick Leave**ACTU**

3.6 Sick leave entitlements which are untaken at the completion of the year shall accumulate on the following scale:

3.6.1 The balance of personal/carer's leave provided that such remaining leave does not exceed the quantum of sick leave specified below less any personal sick leave taken by the employee during the year:

- . [existing sick leave] in the first year of service;
- . [existing sick leave] in the second year of service
- . [existing sick leave] in the third and subsequent year of service.

[Insert existing award provisions covering party days, notice, certification, existing caps on accumulation etc.], existing caps on accumulation etc.]

ACCI

3.6 The sick leave component of the aggregated personal/carer's leave entitlement may accumulate year to year to the extent that it is not used for personal/carer's leave, or bereavement leave. The bereavement leave component of the aggregated entitlement does not accumulate .

The essential difference between the parties is the order of accessing components within the pool and the corresponding impact this has on the accrual of sick leave. In the ACTU's view a situation may arise whereby if the bereavement leave portion of the pool is accessed for carer's leave first, an inequitable outcome would occur compared with the situation which existed prior to the pooling of the sick leave and bereavement leave. The inequity could arise if an employee, previously entitled to bereavement leave for bereavement purposes, was now faced with utilising sick leave from the pool instead of his/her non-accumulative bereavement leave.

The ACCI submitted that the approach the employers' contend for squarely reflects the decision of the Full Bench.

"The 8 days' sick leave component of the aggregated personal/carer's leave entitlement may accumulate year to year to the extent that it is not used for personal/carer's leave. Subject to the relevant award provision the bereavement leave component of the aggregated entitlement does not accumulate." (Clause 4, p.19)

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The ACCI further argued that the adoption of the ACTU's position would result in a substantial cost impact. On the other hand, the employers' proposal, if adopted, would minimise the cost impact because under its proposal the bereavement leave and carer's leave would be drawn more often from sick leave - hence less sick leave would accumulate than under the ACTU's proposal resulting in consequential lower costs.

The MTIA, as a primary submission, endorsed the ACCI position. As a less favourable alternative it suggested a formula whereby accrued sick leave did not exceed the sick leave component less any sick leave or carer's leave taken. The effect of this formula would be that when taking carer's leave from the pool bereavement leave would not be first deducted from the accumulated sick leave days. This facet distinguishes the MTIA's proposal from ACCI's proposal. As the MTIA written submission explained:

"The above model is not inconsistent with this aim. It still allows an employee to have access to the bereavement leave portion of the pool, in the event that their sick leave portion has been exhausted, but rather than accessing it first and accruing a greater portion of their sick leave, they access their sick leave portion first and the bereavement leave portion is there as an insurance policy in the event that sick leave is exhausted.

The other significant benefit of this model is that it is easy to understand and administer." (p.4)

The relative impact of the positions as contended for is explained by reference to examples contained in the MTIA's written submissions. (pp. 4-7)

Taking two examples, as relied upon by MTIA in its written submission, and assuming as follows:

- employee covered by Metal Industry Award 1984
- 2nd year of employment
- . sick leave entitlement is 8 days
- . bereavement leave entitlement is up to 2 days per occasion

THUS AN AGGREGATED 10 DAYS POOLED LEAVE IS AVAILABLE COMPRISING SICK LEAVE CAPPED AT 8 DAYS AND BEREAVEMENT LEAVE CAPPED AT 2 DAYS

Example 1

Employee takes - 3 days sick leave
2 days carer's leave

Under the ACTU draft order the employee would draw on 3 days sick leave for sick leave and 2 days carer's leave out of bereavement leave entitlement.

Hence out of the total of 8 days sick leave 5 days would accrue.

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Under the employers draft order the employee would draw on 3 days sick leave for sick leave and 2 days sick leave for carer's leave.

Hence out of a total of 8 days sick leave 3 days leave would accrue.

Under the MTIA alternative model the employee would draw on 3 days sick leave for sick leave and 2 days carer's leave out of sick leave. Hence 3 days sick leave would accrue because both carer's leave and sick leave are taken from the sick leave entitlement.

Example 2

Employee takes - 3 days bereavement leave
 1 day sick leave

Under the ACTU draft the employee would take 1 day sick leave out of sick leave, 2 days bereavement leave plus an extra day for bereavement leave out of sick leave, ie. 6 days sick leave would accrue.

Under the employers draft the employee would take 1 day sick leave out of sick leave entitlement and 3 days bereavement leave out of sick leave.

Hence out of a total of 8 days sick leave 4 days sick leave accrue.

Under the MTIA alternative model the employee would take 1 day sick leave out of sick leave, 2 days bereavement leave and 1 day sick leave for bereavement leave. Hence 6 days sick leave would accrue.

Conclusion

No firm conclusion can be drawn from the Full Bench decision on the particular detail now sought to be clarified on this issue. The "in principle" support given in the decision to the pooling of sick leave and bereavement leave did not address in detail the order of drawing upon the pooled leave. In endeavouring to balance the criteria of administrative ease and cost minimisation against the effect the new entitlement will have on employees in particular circumstances, the Commission is of the view that there is considerable merit in adopting the MTIA's secondary position. This proposal means that bereavement leave will not affect sick leave accruals, unless the annual or per occasion capped entitlement to bereavement leave is exhausted. In example 2 above, for instance, the ACTU's argument that an employee "has lost a quantum of [accrued] sick leave, but no benefit" (transcript p189), is overcome.

Hence sick leave accruals will be determined as follows:

- . sick leave is taken for sick leave up to the cap
- . carer's leave is deducted first from the sick leave portion of the pool
- . bereavement leave up to the cap for bereavement leave is not taken from sick leave accruals

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Clause 3.4 of the order will be worded as follows:

- 3.4 Sick leave entitlements which are untaken at the completion of the year shall accumulate on the following scale:*
- 3.4.1 The balance of personal/carer's leave provided that such remaining leave does not exceed the quantum of sick leave specified below less any personal sick leave or carer's leave taken by the employee during the year:*
- o [existing sick leave] in the first year of service;*
 - o [existing sick leave] in the second year of service;*
 - o [existing sick leave] in the third and subsequent year of service.*

2. Treatment of Awards with Per Annum Entitlement

Clause 4.1 Treatment of Awards which provide for annual bereavement leave.

ACTU

- 4.1 An employee is entitled to [award entitlement to bereavement leave/compassionate leave] days paid leave **on each occasion** if a member of the employee's immediate family or household in Australia [dies/is seriously ill].
- 4.2 Each day or part of a day used under subclause 4.1 is deducted from the amount of personal/carer's leave under subclause 2.
- 4.3 An employee is entitled to use accumulated sick leave as paid bereavement leave/compassionate leave up to [award entitlement to bereavement leave/compassionate leave] **on each occasion** when a member of the employee's immediate family or household in Australia [dies/is seriously ill] and the employee has already used the current year's personal/carer's leave entitlement under subclause 2.
- 4.4 An employee is entitled to use unpaid leave up to [award entitlement to bereavement/compassionate leave] **on each occasion** when a member of the employee's immediate family or household in Australia [dies/is seriously ill] if the employee has already used the current year's personal/carer's leave entitlement under subclause 2 and no accumulated **sick** leave is available.
- 4.5 An employee is entitled to leave in the following circumstances [insert existing award provisions providing for additional days for travel, overseas death and additional paid/unpaid leave etc.]
- 4.6 Proof of death must be provided to the satisfaction of the employer, if requested.
- 4.7 An employee is also entitled to leave in the following circumstances [insert existing award provisions providing extended circumstances of compassionate leave].

ACCI

- 4.1 An employee (fn. Who has an entitlement to bereavement leave as at * (insert dated of award variation)) is entitled to [award entitlement to bereavement leave/compassionate leave] days paid leave [in each year on each occasion] if a member of the employee's immediate family or household in Australia [dies/is seriously ill]. (fn. The intention is that the entitlement would reflect the existing situation. Awards which provide for bereavement/compassionate leave in situations where a family member is 'seriously ill' should continue to so provide, while the position would not be changed in awards which do not so provide.

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| <p>4.2 Each day or part of a day used under subclause 4.1 is deducted from the amount of personal/carer's leave under subclause 1.</p> <p>4.3 An employee is entitled to use accumulated sick leave as paid bereavement leave/compassionate leave up to [award entitlement to bereavement leave/compassionate leave] [in each year or on each occasion] when a member of the employee's immediate family or household in Australia [dies/is seriously ill] and the employee has already used the current year's personal/carer's leave entitlement under subclause 1.</p> <p>4.4 An employee is entitled to use unpaid leave up to [award entitlement to bereavement leave/compassionate leave] [in each year or on each occasion] when a member of the employee's immediate family or household in Australia [dies/is seriously ill] if the employee has already used the current year's personal/carer's leave entitlement under subclause 1 and no other accumulated paid leave (ie. sick leave or annual leave) is available. (Fn. Where no agreement can be reached between the employer and employee on the taking of annual leave, an entitlement to unpaid leave will arise).</p> <p>4.5 An employee is entitled to leave in the event of [insert existing award provisions for additional days for travel, overseas death and additional paid/unpaid leave etc.]</p> <p>4.6 Proof of death must be provided to the satisfaction of the employer, if requested.</p> <p>4.7 An employee is also entitled to leave in the following circumstances [insert existing award provisions providing extended circumstances of compassionate leave].</p> |
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As demonstrated in the above subclauses there is substantial agreement between the major parties in respect to clause 4. However, a difference relates to the treatment of clauses in awards which provide for a per annum entitlement.

A minority of awards of the Commission provide for bereavement leave on an annual rather than a per occasion basis. One such award is the Retail and Wholesale Industry Shop Employees (Australian Capital Territory) Award 1995 [R0017] which is one of the test case awards. Clause 3 - Bereavement Leave states:

“3. Bereavement Leave

- 3.1 An employee after one month's continuous employment with his/her present employer and on production of evidence satisfactory to his/her employer, must on the death of a near relative, be granted a maximum of three days' leave on full pay in any one year as bereavement leave.
- 3.2 For the purpose of this clause a near relative means the father, mother, husband or wife, or a brother, sister, son or daughter, mother-in-law, father-in-law of the employee.

- 3.3 Wife or husband does not include a wife or husband from whom the employee is separated but includes a person who lives with the employee as a de facto wife or husband as the case may be.”

The ACTU submitted that the changing base of bereavement leave justified awards providing an annual entitlement being treated similarly to the majority of awards which provide for a “per occasion” bereavement leave basis. The balanced approach taken by the Full Bench meant that unlimited, paid bereavement leave on a per occasion basis had been substituted for a regime providing for access to bereavement leave but via different avenues including pooled leave (up to award cap), accrued sick leave and unpaid leave. An inequity arose if awards providing access to an annual entitlement to bereavement leave were not varied to provide access on a similar footing.

ACCI argued that the different treatment provided for in their draft reflected current differences and noted the Full Bench had stated, that on the application before it:

“In our view this is not an appropriate case in which to consider the standardisation of bereavement leave in the manner proposed by the ACTU.”

...

“The purpose of aggregation is to provide greater access to existing paid leave entitlements for carer’s leave purposes. It is not intended to increase the amount of sick leave or bereavement leave currently provided in awards.”(p7 ACCI written submission)

ACCI argued that there was insufficient scope to permit the granting of the ACTU’s variation in the proceedings to settle the order.

Conclusion

It was not the intention of the Full Bench to standardise bereavement leave clauses as part of the application before it although it is acknowledged that inconsistent bereavement leave provisions exist across awards. As an interim position, pending any application to standardise clauses, the employers’ draft clause should be reworded to ensure that there is access for bereavement leave to be taken out of accrued sick leave or unpaid leave if the annual award based entitlement for bereavement leave has been utilised from the pooled entitlements. The amount of leave which can be accessed via sick leave or unpaid leave should be capped at the number of days provided for in the annual entitlement. To not provide for bereavement leave in this way would result in a widening, not narrowing of the current inconsistency between awards. Such an outcome would result in an employee being denied access to bereavement leave for bereavement leave purposes - thus producing a deterioration in the current award position. This was not an implicit or explicit intention of the Full Bench.

As indicated earlier this issue arises only in a minority of awards. Parties to the Retail and Wholesale Shop Employees (Australian Capital Territory) Award 1983 should provide a draft order.

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3. **Specific Issues Arising out of Carer's Leave Provision**

(i) Clause 2

Agreed

Immediate Family or Household

The entitlement to use bereavement leave/compassionate leave and carer's leave in accordance with this clause is subject to:

2.1 the person being either:

2.1(i) a member of the employee's immediate family; or

2.1(ii) a member of the employee's household.

The parties are in agreement with the wording of clause 2. However, a clarification was sought by the MTIA that the Commission's decision to provide access to bereavement leave to the same classes of employees covered by the definition of family, does not extend to clauses which provide for bereavement leave entitlements covering deaths which occur outside Australia.

Conclusion

The Commission has decided prima facie that existing clauses which provide an entitlement to leave which occurs outside Australia should not be varied at this stage but may be addressed in any application which seeks to standardise bereavement leave entitlements across awards.

(ii) Clause 2.2(i) - Definition of de facto spouse

Agreed

2.2(i) spouse (including a former spouse, a de facto spouse and a former de facto spouse) of the employee. A de facto spouse, in relation to a person, means a person of the opposite sex to the first mentioned person who lives with the first mentioned person as the husband or wife of that person on a bona fide domestic basis although not legally married to that person; and

Conclusion

The Commission accepts the agreement between the parties on this issue and the wording will be consistent with that contained in Joint Exhibit 1 as set out above.

(iii) Clause 4.4 - Access to unpaid leave "if paid leave is exhausted"

ACTU

4.4 An employee is entitled to use unpaid leave up to [award entitlement to bereavement/compassionate leave] **on each occasion** when a member of the employee's immediate family or household in Australia [dies/is seriously ill] if the employee has already used the current year's personal/carer's leave entitlement under subclause 2 and no accumulated **sick** leave is available

ACCI

4.4 An employee is entitled to use unpaid leave up to [award entitlement to bereavement leave/compassionate leave] [in each year or on each occasion] when a member of the employee's immediate family or household in Australia [dies/is seriously ill] if the employee has already used the current year's personal/carer's leave entitlement under subclause 1 and no other accumulated paid leave (ie. sick leave or annual leave) is available. (underlining added) (fn. Where no agreement can be reached between the employer and the employee on the taking of annual leave, an entitlement to unpaid leave will arise.)

The employers' contended that 'paid leave' in the context of the above provision, implicitly included other forms of paid leave including annual leave. This position was opposed by the ACTU which argued paid leave was more narrowly defined to include sick leave and bereavement leave.

Conclusion

The Commission states that it was not the intention of the Commission, in the context of providing an unpaid leave provision for bereavement purposes, that all forms of paid leave be accessed before triggering the facilitative provision for unpaid leave. The Commission expressly intended sick leave and bereavement leave to constitute "paid leave" in this context. However, access to annual leave for example, is not precluded as an option for employees. In this regard the parties are reminded that as a Stage 1 measure the Commission introduced the following facilitative provision:

"Annual leave: to allow an employer and an employee in an enterprise or part of an enterprise to agree to allow up to one week's annual leave to be taken in single days." (p.41 Family Leave Test Case Stage 1.)

(iv) Clause 5 - Carer's Leave

An issue has arisen between the parties, since hearing submissions on settling the order, over the clarification of clause 5.1 and the interpretation of subclause 5.4.

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Agreed

5.1 An employee with responsibilities in relation to either members of their immediate family or household who need their care and support is entitled to use up to 5 days per annum of their personal/carer's leave entitlement to provide care and support for such persons when they are ill. Leave may be taken for part of a single day.

The MTIA has noted that the ACCIR plain English draft order did not include the words "who need their care and support" in subclause 5.1.

Conclusion

These words will be included in subclause 5.1 of set out in the plain English draft order provided by the major parties.

(v) Subclause 5.4 (ACTU 5.6)

ACTU

5.6 In normal circumstances an employee must not take carer's leave under this clause where another person has taken leave to care for the same person.

ACCI

5.4 In normal circumstances an employee must not take carer's leave under this clause where another person has taken leave to care for the same person.

MTIA

5.4 In normal circumstances an employee shall not take carer's leave under this clause where another person has taken leave to care for the same person or where another person ordinarily provides care and support to that person.

The ACTU opposed the amendment sought by MTIA. It also raised the inappropriateness of the way the issue was addressed. The differing interpretations of this subclause arose between discussions of the parties. The MTIA wrote to the Commission and I subsequently wrote to all the parties inviting comment on the MTIA's views. The ACTU's response on the procedure was that this matter should be dealt with by way of application given the very late stage of proceedings and the manner in which the issue arose.

The Commission in the 2nd stage decision stated:

"In normal circumstances an employee shall not take carer's leave under this clause where another person has taken leave to care for the same person"

“What constitutes “normal circumstances” will be a matter to be determined having regard for the particular circumstances, reflecting the good sense of both the employer and employee to determine the needs of a particular case. Any disputed cases can be dealt with in accordance with the grievance procedure.” (pg. 16)

Commenting on this passage from the decision ACCI submitted:

“In other words, the words ‘and no other person is available to provide that care’ could be added to either paragraph 5.3 or 5.4. If those words are considered to be too broad a narrower reference consistent with the decision could be ‘and no other person is currently the primary care giver for that person’ could be added to clause 5.3, or the words ‘or where another person is currently acting as the primary care giver for that person’ added to clause 5.4.” (p.4 ACCI supplementary submission)

Conclusion

In all the circumstances, particularly having regard to the ACTU’s submission on the manner in which this issue arose, the Commission will not vary the order at this stage. However, if there are instances of ‘double counting’ it will be open to any party to seek to vary the award provision to overcome such unintended access to the provision. The wording of the order will be ACCI’s words without the additional words sought by MTIA, namely.

<p>5.4 <i>In normal circumstances an employee must not take carer’s leave under this clause where another person has taken leave to care for the same person.</i></p>

(vi) The definition of “day” where the award is expressed on an hourly basis.

The Commission accepts the agreement between the parties that the issue should be dealt with on an award by award basis where appropriate.

(vii) Order of clauses

The order of clauses was an issue between the parties, although it was acknowledged that this was not of major significance.

The Commission is of the view that the employers’ draft should be incorporated into awards seeking to reflect the model provision.

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4. **Facilitative Clauses**

Application of Test Case Principles

The major differences between the parties over facilitative clauses pertain to the protections or safeguards which should govern such provisions. These are specifically dealt with later in this decision. However, the general issue of the process of dealing with the insertion of clauses into awards, or in varying facilitative provisions already varied was raised by the parties.

To appreciate the differences a brief chronology of the Commission's decisions on facilitative provisions is instructive.

- In November 1994 the 1st Stage Family Leave decision provided for the introduction of facilitative clauses.

“We also intend to introduce additional facilitative provisions to provide greater flexibility with respect to the use of rostered days off and part-time work. The nature and extent of these provisions will be a matter for submissions to the August 1995 proceedings. In addition the parties will be able to raise the following matters for consideration by the Commission:

- further means whereby awards can be made more flexible in order to assist workers in reconciling their work and family responsibilities;
- whether the Commission should prescribe a general entitlement to unpaid family leave in addition to the aggregation of sick leave and compassionate/bereavement leave; and
- the scope for individual enterprise to seek an exemption from the measures we propose on the basis of an agreed package which has been developed to suit the needs of the enterprise and the relevant employees.” (P.42/3)

- In the October 1995 Third Safety Net decision the Full Bench determined a number of principles to govern the insertion of facilitative clauses. These were subsequently adopted by the Full Bench in the 2nd Stage Carer's Leave decision. Those guidelines are as follows:

- “1. At this stage the Commission intends to adopt an approach to the insertion of facilitative provisions into awards which reflects the fact that such clauses are self executing. Facilitative provisions need to be distinguished from other mechanisms which may be used to introduce flexibility at the enterprise. Enterprise flexibility clause agreements, certified agreement, enterprise flexibility agreements, consent awards or consent award variations all involve an assessment by the Commission of both the process leading to such agreements and their impact on the employees covered by them. By contrast the use of facilitative provisions at the enterprise level is not subject to Commission scrutiny.

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2. Facilitative provisions should continue to protect employees while allowing appropriate flexibility for individual enterprises in the way an award clause is implemented.
3. Facilitative provisions should not be a device to avoid award obligations because the Commission is obliged to ensure, among other things, that “employees are protected by awards that set fair and enforceable minimum wages and conditions of employment that are maintained at a relevant level [s.88A].” [August 1994 Review of Wage Fixing Principles decision [Print L4700, pp.33]

Neither should the adoption of a facilitative provision result in unfairness to the employees covered by the award. Given the lack of Commission scrutiny in relation to the operation of these clauses, a proposal that a facilitative provision should not operate to reduce ordinary time earnings is inadequate to ensure that in all cases unfairness to employees will not occur.

In order to provide the necessary protection and prevent unfairness the Commission will generally only insert facilitative provisions which require majority agreement at the enterprise level before they become operative. For example:

“The employer and the majority of employees at an enterprise may agree to establish a system whereby the employer and individual employees may agree to take an RDO at any time despite any award provisions to the contrary.”

In essence facilitative provisions should require a majority decision to introduce a particular form of flexibility which may then be utilised by agreement between the employer and individual employees.

Once a majority decision has been taken its terms should, in order to provide a record of them, be set out in the time and wages records kept in accordance with regulations 131A-131R of the Industrial Relations Regulations.

The Commission considers that these safeguards are appropriate given the self executing nature of facilitative provisions and the fact that facilitative provisions have a capacity to directly or indirectly affect all employees at an enterprise.

In circumstances where the Commission has decided that it is appropriate that a facilitative provision require the agreement of a majority of employees at an enterprise prior to the introduction of a particular type of flexibility, then the relevant provisions should also provide that:

- (a) unions which are both party to the relevant award and who have members employed at the particular enterprise must be informed of the intention to utilise the facilitative provision and be given a reasonable opportunity to participate in negotiations regarding its use;

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- (b) participation by a union in this process does not mean that the consent of the union is required prior to the introduction of the agreed flexibility arrangements at the enterprise. Unions will not have a right to veto the introduction of such arrangements;
- (c) union involvement and the requirement for majority consent are only required at the time a decision is made to introduce a particular form of flexibility at the enterprise. Thereafter the only requirement is agreement between the employer and an individual employee to access the agreed flexibility.

The Commission may also decide to establish a monitoring process under which a particular facilitative provision is, after a reasonable period, reviewed to consider its impact in practice.

Such a process can be used to ensure that the practical operation of a facilitative provisions is:

- not unreasonably impeding the introduction of greater flexibility at the enterprise level; or
- resulting in unfairness to employees.

If these objectives are not being met then the provision may be amended.

4. Award parties are not required to include facilitative provisions in award clauses. An award-by-award process is preferable as it allows the needs and circumstances of the enterprises and employees covered by the award to be properly taken into account in accordance with s.88A of the Act. However, all award parties must specifically address the use of facilitative provisions as a means of making their awards more relevant and better suited to the needs of individual enterprises. In this regard, award parties should consider giving priority to an examination of award provisions which affect the organisation of work or the efficiency of enterprises covered by the award.
5. Facilitative provisions should be used to promote the efficient organisation of work at the enterprise level and be designed to avoid the prescription of matters in unnecessary detail.” (2nd Stage decision [Print M6700] pp.23-5)

The Full Bench stated in relation to existing provisions:

“The safeguards we have provided in relation to facilitative provisions are intended to apply to applications to insert a facilitative provision into an award. They are not intended to automatically apply to existing facilitative provisions. A party wishing to vary an existing provision to incorporate any of the protections we have referred to will bear the onus of establishing that such a protection is necessary in all the circumstances.

For its part the Commission will promote the systematic examination by the award parties of the use of facilitative provisions as one means of making awards more relevant and better suited to the needs of individual enterprise and workplaces. The process of testing the relevant of the award at the enterprise level may assist the parties to identify appropriate clauses for such examination.” (p.30 Third Safety Net decision)

- The guidelines were subsequently summarised in the 2nd Stage Full Bench decision together with the following statement:

“We intend to apply these guidelines to the issues before us. As the October 1995 Review decision was handed down after the conclusion of the proceedings before us, we will provide the parties with an opportunity to make further submissions in relation to the application of these guidelines to the particular facilitative provisions dealt with in this decision. This can be done during the proceedings to settle the orders arising from this decision.” (p.25/6)

- The factual situation is that although a number of awards have been varied to include the facilitative clauses in the terms provided for in the 1st Stage Family Leave decision, many awards have not been varied. The ACTU now seeks an award by award revisiting of those awards which have been varied to reflect its view that “facilitative clauses should all be expressed in the same manner”.(transcript p.200)

It is the ACTU’s view that the Commission should determine its “preferred approach” (transcript p.199) and that any party seeking to depart from that position would bear an onus to justify that departure.

The ACCI seeks a “more flexible approach to these facilitative provisions which does build in the amount of discretion on an award by award basis which has been provided for by full bench decisions.” (transcript p.200) This view was supported by the MTIA. The ACCI sought a continuation of varying awards in accordance with the Stage 1 provisions with a discretion to argue departure on an award by award basis having regard to particular circumstances including the nature of the award and practice and custom within an industry or enterprise.

Conclusion

Turning to existing facilitative clauses, namely, annual leave, time off in lieu and make up time. As set out above many awards had been varied for the 1st Stage of family leave, prior to the Third Safety Net and Section 150A Review decision being handed down. Guidance as to whether or not these provisions should be disturbed in light of the latter decision is found in the Third Safety Net and Section 150A Review decision which states in relation to the guidelines as quoted above and repeated here:

PERSONAL CARERS LEAVE STAGE 2 - SETTLEMENT OF ORDERS19
DECISION

“The safeguards we have provided in relation to facilitative provisions are intended to apply to applications to insert a facilitative provision into an award. They are not intended to automatically apply to existing facilitative provisions. A party wishing to vary an existing provision to incorporate any of the protections we have referred to will bear the onus of establishing that such a protections is necessary in all the circumstances.”(p.30)

I consider that nothing has been put to justify a departure from this procedure to apply to any existing facilitative clause including those provided for in the 1st Stage family leave proceedings. It therefore forms part of this decision that the employers’ draft will apply to awards which have had facilitative clauses inserted as a result of the 1st Stage decision. At the time of hearing an application to vary the award for the 2nd Stage a party can seek to vary the existing provisions to incorporate any of the protections provided for in the Full Bench decision if such protections are not already provided. In doing so the party will bear an onus of establishing that such protection is necessary given the nature and circumstances of the matter.

Equally, a party seeking to vary an existing facilitative clause which already provides for the protections currently provided for in the Full Bench decision, will bear an onus in establishing that particular grounds warrant an individual member exercising his/her discretion in favour of granting the application.

In relation to awards which have not yet been varied to provide for facilitative clauses, the general position of the Commission as set out in the Full Bench decision and reproduced in this decision will apply. Any party seeking a departure from the test case provisions must bear the onus to justify that the departure is necessary in the circumstances of the matter.

Turning to particular issues raised in the proceedings arising out of the 2nd Stage decision in relation to facilitative provisions.

5. **Specific Issues Arising in Relation to Facilitative Clauses**

(i)

ACTU

1. Notwithstanding provisions elsewhere in the award, the employer and the majority of employees at an enterprise may agree to establish a system of make up time provided that:

(This provision is reproduced for annual leave, Time off in lieu, make up time and RDO's)

ACCI

1. Notwithstanding provisions elsewhere in the award, the employer and the majority of employees at an enterprise may agree to establish a system of RDO to provide that: (fn. The inclusion of this clause should be addressed on an award by award basis.)

(ACCI have placed this provision only under the heading of RDO's)

The ACTU seeks the above subclause to govern not only RDO's (an agreed position) but also annual leave, time off in lieu and make up time. The employers oppose the insertion of this subclause.

Conclusion

The Full Bench in the Third Safety Net Review decision stated:

“In order to provide the necessary protection and prevent unfairness the Commission will generally insert only facilitative provision which require majority agreement at the enterprise level before they become operative. For example:

“Despite any award provision to the contrary, the employer and the majority of employees at an enterprise may agree to establish a system under which the employer and individual employees agree to take an RDO at any time”

In essence facilitative provisions should require a majority decision to introduce a particular form of flexibility which may then be utilised by agreement between the employer and individual employees.” (p.28)

Consistent with that decision the safeguard will be included in the model draft clause as proposed by the ACTU.

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Where majority consent is provided for the provision should relate to the majority of employees in the enterprise who are actually affected by the proposed facilitative provision.

(ii)

ACTU

1.4 Paragraph 1 is subject to the employer providing written notice to each union party to the award of its intention to introduce an enterprise system of single day annual leave, and providing a reasonable opportunity for the union(s) to participate in negotiations.

(This provision is reproduced for annual leave, Time off in lieu, make up time and RDO's)

The ACTU draft order seeks the inclusion of a requirement in facilitative clauses that the employer provide written notice to each union party to the award of its intention to introduce the facilitative arrangement at the enterprise and to provide unions with the opportunity to participate in negotiations. The ACTU acknowledged that unions do not have the right to veto a decision.

The ACCI rejected the ACTU position and relied on the actual wording of the Third Safety Net Full Bench decision to be reflected in the order.

Conclusion

The Stage 2 decision provided that:

“In circumstances where the Commission has decided that it is appropriate that a facilitative provision require the agreement of a majority of employees at an enterprise prior to the introduction of a particular type of flexibility, then the relevant provisions should also provide that:

- (a) unions which are both party to the relevant award and who have members employed at the particular enterprise must be informed of the intention to utilise the facilitative provision and be given a reasonable opportunity to participate in negotiations regarding its use;
- (b) participation by a union in this process does not mean that the consent of the union is required prior to the introduction of the agreed flexibility arrangements at the enterprise. Unions will not have a right to veto the introduction of such arrangements;

- (c) union involvement and the requirement for majority consent are only required at the time a decision is made to introduce a particular form of flexibility at the enterprise. Thereafter the only requirement is agreement between the employer and an individual employee to access the agreed flexibility.” (p.24/5)

The terms of this decision should be reflected in an order providing for the introduction of facilitative clauses which require agreement by the majority of employees (or majority of employees in the enterprise who are actually affected by the proposed facilitative provision) at an enterprise.

(iii)

ACTU	
1.5	Once a decision has been taken to introduce an enterprise system of make up time, in accordance with this clause, its terms must be set out in the time and wages records kept pursuant to regulations 131A-131R of the Industrial Relations Regulations
1.6	An employer shall record make up time arrangements in the time and wages book, as prescribed in clause * of this Award at each time this provision is used

ACCI	
1.5	An employer shall record make time arrangements in the time and wages book, as prescribed in clause * of this Award at each time this provision is used. (fn The inclusion of this clause should be addressed on an award by award basis).

The contested issue between the parties is whether the recording of the system (cl. 1.5 of the ACTU draft) and the utilisation of the system (cl. 1.6 of the ACTU draft) should be provided for. The employers argued against any recording of the system and submitted that the recording of the utilisation of the system should be decided on an award by award basis.

Conclusion

The Third Safety Net Adjustment and Section 150A Review decision provided:

“In essence facilitative provisions should require a majority decision to introduce a particular form of flexibility which may then be utilised by agreement between the employer and individual employees.

Once a majority decision has been taken its terms should, in order to provide a record of them, be set out in the time and wages records kept in accordance with Industrial Relations Regulations 131A-131R.”(p.28)

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The decision also comments:

“The Commission may also decide to establish a monitoring process under which a particular facilitative provision is, after a reasonable period, reviewed to consider its impact in practice. Such a process can be used to ensure that the practical operation of a facilitative provision is:

- not unreasonably impeding the introduction of greater flexibility at the enterprise level; or
- resulting in unfairness to employees.

If these objectives are not being met, the provision may be amended.” (p. 29)

There are prudent reasons for recording facilitative provisions in the time and wages book.

This view is reflected in the 2nd Stage decision at page 24:

“Once a majority decision has been taken its terms should, in order to provide a record of them, be set out in the time and wages records kept in accordance with regulations 131A-131R of the Industrial Relations Regulations.

The Commission considers that these safeguards are appropriate given the self executing nature of facilitative provisions and the fact that facilitative provisions have a capacity to directly or indirectly affect all employees at an enterprise.”

The wording to be reflected in the order will be consistent with the wording of the 2nd Stage Full Bench decision:

Once a majority decision has been taken its terms should be set out in the time and wages record kept in accordance with Regulations 131A-131R of the Industrial Relations Regulations.

(iv) Rostered Days Off (RDO's)

ACTU

1.3 An employee may elect, with the consent of the employer, to accrue some or all rostered days off for the purpose of creating a bank to be drawn upon by the employee at times mutually agreed by the employer, or subject to reasonable notice by the employee.

ACCI

- 1.3 An employee may elect, with the consent of the employer, to accrue some or all rostered days off for the purpose of creating a bank to be drawn upon at times mutually agreed between the employer and employee, or subject to reasonable notice by the employee *or the employer*.

The ACTU opposed the insertion of the words “or the employer” arguing that giving a discretion to the employers to direct an employee to take an RDO would constitute an undue imposition on the employee. The employers argued that operational requirements could constitute sound reasons for the employer giving notice of taking RDO’s. The MTIA relied on s.88A(c) of the Act to underpin its view that the clause should operate in a way that suits the business needs of employers.

Conclusion

S.88A(c) of the Industrial Relations Act 1988 states:

“88A. The objects of this Part are to ensure that:

...

- (c) awards are suited to the efficient performance of work according to the needs of particular industries and enterprises, while employees’ interests are also properly taken into account; and”

The employee has the discretion, under the clause, to accrue RDO’s. Therefore abuse should not follow if the consent of the employer to the taking of the RDO’s is provided for, on the basis that reasonable notice is given. The employers’ draft will be incorporated into the order. The implementation of the monitoring procedures provided for in the order should provide adequate protection for documenting any examples of abuse, which in turn could form the basis of a further application to vary the provision. Such an approach would be consistent with the spirit and thrust of this decision.

6. **Scope of Access for Facilitative Clauses**

The MTIA asked the Commission to reaffirm the scope of access to facilitative clauses - specifically that the provisions, while not limited in their application to employees taking leave for care of family members, are “still limited to taking of leave for ‘family purposes’”. (p.13 MTIA)

Conclusion

The 2nd Stage decision stated:

“In the November 1994 decision we did not intend that the facilitative provisions determined would be restricted in the manner proposed by the ACTU. That decision states that the package of measures decided upon were intended to represent an appropriate balance between a number of objectives including:

“...introducing greater flexibility into the award system consistent with the Commission’s statutory obligation to ensure that ‘awards are suited to the efficient performance of work according to the needs of particular industries and enterprises, while employees’ interests are also properly taken into account’ [section 88A(c)].” [Print L6900, p.39]

The November 1994 decision also envisaged that the range of facilitative measures to be introduced would facilitate the introduction of greater flexibility at the workplace level. In particular the Commission stated:

“The approach we have adopted is consistent with the submissions of ACCI that the award system at present inhibits the capacity of employers and employees to reconcile work and family responsibilities. ACCI submitted that awards should be amended in a number of respects, including to provide for more flexibility in the use of annual leave entitlements, to amend award provisions which prevent employers allowing employees to make-up time at ordinary time rates at a time agreed between them, to remove restrictions on part-time work, provide adequate flexibility in rostered days off, and to introduce fully flexible working hours.

We also note that the measures to be introduced will facilitate the introduction of greater flexibility at the workplace level and a number of the studies we have referred to reported that employees saw additional flexibility as the primary means of reconciling work and family responsibilities.[Print L6900, pp.41-42]”

The limitation proposed by the ACTU would mean that employees would have no access to the facilitative provisions for reasons other than the illness of a member of the employee’s household or immediate family. If this limitation were adopted employees would not have access to the flexibilities provided in the package of measures we have determined for the purpose of attending, for example, school events and curriculum days. This would be contrary to existing practice. As noted in the November 1994 decision the most common method used by employees with depending children to

arrange time off to attend such events was flexible work arrangements. The evidence submitted in Stage 1 proceedings was that 2 out of 3 employees with dependent children arranged time off for these child related activities by using make-up time, flextime or rostered days off [Print L6900, pp.29-30].” (pp. 26/7)

The passage is reproduced in full given the MTIA’s submission made in relation to the example given in rejecting the ACTU’s submission that the facilitative clauses should only be available in the context of leave to care for family members. MTIA submitted that the example has generated a view that the intent of the Commission’s decision was to relate access to facilitative provisions to taking leave for “family purposes”.

The full context of the extract above makes it abundantly clear that no such limitation was intended.

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7. **Departures from Model Clause**

A number of submissions sought to argue departures from the packaged approach which forms the basis of the Full Bench decision. Some of those departures relate to matters of substance. For example, exclusion from RDO or make up time provisions (ACCIR). Others go to departures from processes determined as part of these proceedings or a safeguard governing the insertion or application of facilitative provisions (ACTU, ACCI, MTIA) as discussed above.

A number of general observations can be made.

- The Full Bench in reaching its decision has sought to balance a number of competing submissions. A departure from that package approach should not occur as a mere formality.

Regard must be had in dealing with any application to depart from the model clause to the safety net role that the award variation plays. As the Full Bench (2nd Stage) stated:

“The measures we have introduced also reflect the legislative intention that the award system needs to change in response to changed industrial needs. Such an approach is also consistent with the views expressed by the Commission in the September 1994 Safety Net Adjustment and Review decision [Print L5300, p.52]

In this regard we wish to emphasise the this test case decision will result in the variation of the safety net of minimum wages and conditions of employment. The award safety net is intended to underpin bargaining. As such, variations in the safety net should not, in our view, pre-empt the outcome of bargaining. Rather such award variations should follows outcomes in the bargaining process.

On this basis the measures we have decided to implement can be reviewed over time having regard to prevailing industrial, economic and social circumstances.”
(p.48)

In seeking an exemption from the package a distinction may be made out in particular cases between conditions which form part of the definition of a safety net, and processes governing the application of conditions which form part of the safety net.

In considering whether the application seeks to vary the safety net which would otherwise be provided for in the award. If an argument exists that this may occur, then the same requirements governing Principle 3.2 When an Award May be Varied or Another Award Made Without the Claim Being Regarded as Above or Below the Safety Net will need to be met, namely:

“3.1 Award Safety Net

The Commission will generally not arbitrate in favour of claims above or below the safety net of award wages and conditions, except in certain circumstances. This applies to those on paid rates as well as minimum rates awards.” (p.87)

“3.2.2 Test Case Standards

Test case standards established and/or revised by the Commission may be incorporated in an award. Where disagreement exists as to whether a claim involves a test case standard, those asserting that it does must make and justify an application pursuant to s.107. It will then be a matter for the President to decide whether the claim should be dealt with by a Full Bench.” (p.89)

- In dealing with an application to depart from the model clause, the particular circumstances of the award will be assessed against the requirements of the Act and the guidelines provided for in Full Bench decisions. In this regard the objects of Part VI s.88A are relevant including subclause (c):

“The object of this Part are to ensure that:

- (c) awards are suited to the efficient performance of work according to the needs of particular industries and enterprises, while employees’ interests are also properly taken into account; and”
- The parties are reminded that any agreement reached between the parties for a package of arrangements at an individual enterprise level which is tailored to the circumstances of that enterprise, may result in an exemption from the test case provisions. This outcome was envisaged in Full Bench decision in the Personal/Carer’s Leave Test Case. In that decision the Full Bench stated, there is “scope for individual enterprises to seek an exemption from the measures we propose on the basis of an agreed package which has been developed to suit the needs of the enterprise and the relevant employees.” (p.43)

Conclusion

The parties are directed to submit the orders arising out of this decision within 14 days. The areas covered by the agreement are complex in nature and the Commission has been assisted by the parties’ submissions. Further proceedings which may be required to address any unforeseen oversight or consequence flowing from this decision will, upon request, be treated as a matter of urgency by the Commission.

BY THE COMMISSION:

SENIOR DEPUTY PRESIDENT

PERSONAL CARERS LEAVE STAGE 2 - SETTLEMENT OF ORDERS29
DECISION

Date and place of hearing:

Melbourne.
1995
8 December.
1996.
23 February.

Appearances:

Ms E Rubin on behalf of the Australian Council of Trade Unions

Mr R Hamilton on behalf of the Australian Chamber of Commerce and Industry also appearing on behalf of the Retail Traders Association of NSW, the Confederation of ACT Industry, the Insurance Employers Industrial Association, the Australian Chamber of Manufactures, the Victorian Employers Chamber of Commerce and Industry and the Business Council of Australia.

Ms S Cullen on behalf of the Metal Trades Industry Association of Australia

Ms K Boland on behalf of the New South Wales Government

Ms K Knopp on behalf of the Association of Independant Schools in the ACT, Tasmania, Victoria, Western Australia and the South Australian Independant Schools Board.

Mr P Gair on behalf of Australian Catholic Commission for Industrial Relations

Parties who presented written submissions

Australian Chamber of Commerce and Industry
Australian Council of Trade Unions
Australian Catholic Commission for Industrial Relations
Metal Trades Industry Association of Australia
States of Victoria, Western Australia, South Australia and Tasmania
Association of Independent Schools of Victoria
State of New South Wales
Human Rights and Equal Opportunity Commission

ATTACHMENT B**Employers in support of ACCI's submissions**

Retail Traders Association of NSW

Confederation of ACT Industry

Insurance Employers Industrial Association

Australian Chamber of Manufactures

Victorian Employers Chamber of Commerce and Industry

Business Council of Australia

States of Victoria, Western Australia, South Australia and Tasmania

***Union Draft Order on
Personal/Carers Leave***

***Employer Draft Order on
Personal/Carers Leave***

1. Sick Leave, Carer's Leave, and Bereavement Leave

Each employee shall be entitled to the following quantum of leave¹ without loss of pay for personal/carers leave as provided in this clause:

- 1.1 [existing sick leave + bereavement leave *available per occasion or annually*] in the first year of service;
- 1.2 [existing sick leave + bereavement leave *available per occasion or annually*] in the second year of service;
- 1.3 [existing sick leave + bereavement leave *available per occasion or annually*] in the third and subsequent years of service.

2. Immediate Family or Household

The entitlement to use bereavement leave/compassionate leave and carer's leave in accordance with this subclause is subject to:

- 2.1 the person being either:
 - 2.1(i) a member of the employee's immediate family; or
 - 2.1(ii) a member of the employee's household.

1. Sick Leave, Carer's Leave, and Bereavement Leave

Each employee shall be entitled to the following quantum of leave² without loss of pay for personal/carers leave as provided in this clause:

- 1.1 [existing sick leave³ + bereavement leave *available per occasion or annually*] in the first year of service;
- 1.2 [existing sick leave + bereavement leave *available per occasion or annually*] in the second year of service;
- 1.3 [existing sick leave + bereavement leave *available per occasion or annually*] in the third and subsequent years of service.

2. Immediate Family or Household

The entitlement to use bereavement leave/compassionate leave⁴ and carer's leave in accordance with this clause is subject to:

- 2.1 the person being either:
 - 2.1(i) a member of the employee's immediate family; or
 - 2.1(ii) a member of the employee's household.

¹ Note: in awards which calculate the quantum on the basis of days, not hours, it will be necessary to convert the days to an hourly quantum. This should be done on an award by award basis.

² Note: in awards which calculate the quantum on the basis of days, not hours, it will be necessary to convert the days to an hourly quantum. This should be done on an award by award basis.

³ ie. the current year's entitlement

⁴ Existing award provisions restricting for example bereavement leave to deaths in Australia should be included.

2.2 the term **immediate family** includes:

- 2.2(i) spouse (including a former spouse, a de facto spouse and a former de facto spouse) of the employee. A de facto spouse, in relation to a person, means a person of the opposite sex to the first mentioned person who lives with the first mentioned person as the husband and wife of that person on a bona fide domestic basis although not legally married to that person; and
- 2.2(ii) child or an adult child (including an adopted child, a step child or an ex nuptial child), parent grandparent, grandchild, or sibling of the employee or spouse of the employee.

3. Personal Sick Leave

- 3.1 An employee shall be entitled to leave without loss of pay for absences due to their personal illness and/or injury as follows:
- 3.2 In the first year of employment to a maximum of * days [as per award] deducted from the quantum of personal carer's leave provided in subclause 1;
- 3.3 In the second year of employment to a maximum of * days [as per award] deducted from the quantum of personal carer's leave provided in subclause 1;

2.2 the term **immediate family** includes:

- 2.2(i) spouse (including a former spouse, a de facto spouse and a former de facto spouse) of the employee. A de facto spouse, in relation to a person, means a person of the opposite sex to the first mentioned person who lives with the first mentioned person as the husband and wife of that person on a bona fide domestic basis although not legally married to that person; and
- 2.2(ii) child or an adult child (including an adopted child, a step child or an ex nuptial child), parent grandparent, grandchild, or sibling of the employee or spouse of the employee.

3. Personal Sick Leave

- 3.1 An employee⁵ shall be entitled to leave without loss of pay for absences due to their personal illness and/or injury as follows:
- 3.2 In the first year of employment to a maximum of * days [as per award] [*The issue of what is a day may be argued on an award by award basis*]⁶ deducted from the quantum of personal carer's leave provided in subclause 1;
- 3.3 In the second year of employment to a maximum of * days [as per award] [*The issue of what is a day may be argued on an award by award basis*] deducted from the quantum of personal carer's leave provided in subclause 1;

⁵ Who has an entitlement to sick leave as at _____ (insert date of award variation).

⁶ Where the award currently provides a maximum number of hours of ordinary working time that maximum shall apply.

3.4 In the third year of employment to a maximum of * days [as per award] deducted from the quantum of personal carer's leave provided in subclause 1;

3.5 Where the sick leave component of the aggregated personal/carer's leave has been exhausted for personal sick leave, or the current year's aggregated personal carer's leave has been exhausted, the employee may access their accumulated sick leave entitlement for personal sickness.

3.6 Sick leave entitlements which are untaken at the completion of the year shall accumulate on the following scale:

3.6.1 The balance of personal/carer's leave provided that such remaining leave does not exceed the quantum of sick leave specified below less any personal sick leave taken by the employee during the year:

- [existing sick leave] in the first year of service;
- [existing sick leave] in the second year of service;
- [existing sick leave] in the third and subsequent year of service.

[Insert existing award provisions covering part days, notice, certification, existing caps on accumulation etc.]

3.4 In the third year of employment to a maximum of * days [as per award] [*The issue of what is a day may be argued on an award by award basis*] deducted from the quantum of personal carer's leave provided in subclause 1;

3.5 Where the sick leave component of the aggregated personal/carer's leave has been exhausted for personal sick leave, or the current year's aggregated personal carer's leave has been exhausted, the employee may access their accumulated sick leave entitlement for personal sickness.

3.6 Sick leave component of the aggregated personal/carer's leave entitlement may accumulate year to year to the extent that it is not used for personal/carer's leave, ie. is not used for personal sick leave, carer's leave, or bereavement leave. The bereavement leave component of the aggregated entitlement does not accumulate.

[Insert existing award provisions covering part days, notice, certification, existing caps on accumulation, *pro rata accruals* etc.]

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| <p>4. Bereavement/Compassionate Leave</p> <p>4.1 An employee shall be entitled to leave, without loss of pay, up to * days per occasion in the event of the death of an immediate family member or household member in Australia.</p> <p>4.2 Each day, or part thereof, taken in accordance with subclause 3.1 above shall be deducted from the quantum of personal/carer's leave provided in subclause 1 of this clause.</p> <p>4.3 Provided that where the current years personal/carer's leave entitlement in subclause 1 has been exhausted, an employee shall be entitled to use accumulated sick leave as paid bereavement leave up to * days per occasion in the event of the death of an immediate family member or household member in Australia.</p> <p>4.4 Provided that where no paid leave is available under subclause 1, and no accumulated sick leave is available, the employee shall be entitled to * days leave per occasion without pay in the event of the death of an immediate family member or household member in Australia.</p> | <p>4. Bereavement/Compassionate Leave</p> <p>4.1 An employee⁷ shall be entitled to leave, without loss of pay, up to * days per occasion [<i>or annually</i>, as per existing award provision] in the event of the death of an immediate family member or household member in Australia</p> <p>4.2 Each day, or part thereof, taken in accordance with subclause 3.1 above shall be deducted from the quantum of personal/carer's leave provided in subclause 1 of this clause.</p> <p>4.3 Provided that where the current years personal/carer's leave entitlement in subclause 1 has been exhausted, an employee shall be entitled to use accumulated sick leave as paid bereavement leave up to * days per occasion [<i>or annually, provided the annual entitlement for that year has not been exhausted, if an annual entitlement is provided in the award</i>] in the event of the death of an immediate family member or household member in Australia.</p> <p>4.4 Provided that where no paid leave is available under subclause 1, and no accumulated leave is available (<i>ie. sick leave or annual leave</i>⁸), the employee shall be entitled to * days leave per occasion [<i>or annually, provided the annual entitlement for that year has not been exhausted, if an annual entitlement is provided in the award</i>] without pay in the event of the death of an immediate family member or household member in Australia.</p> |
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⁷ Who has an entitlement to bereavement leave as at _____ (insert date of award variation).

⁸ Where no agreement can be reached between the employer and employee on the taking of annual leave, an entitlement to unpaid leave will arise.

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| <p>4.5 An employee shall be entitled to leave in the event of ... [insert existing award provisions for additional days for travel, overseas death and additional paid/unpaid leave etc.].</p> <p>4.6 Proof of death shall be provided to the satisfaction of the employer, if requested.</p> <p>4.7 An employee shall also be entitled to leave in the following circumstances [insert existing award provisions providing extended circumstances of compassionate leave].</p> <p>5. Carer's Leave¹⁰</p> <p>5.1 An employee with responsibilities in relation to either members of their immediate family as defined in subclause 2 or members of their household who need their care and support shall be entitled to use, in accordance with this subclause, up to 5 days per annum of their personal/carer's leave entitlement to provide care and support for such persons when they are ill. Provided that such leave may be taken for part of a single day.</p> | <p>4.5 An employee⁹ shall be entitled to leave in the event of ... [insert existing award provisions for additional days for travel, overseas death and additional paid/unpaid leave etc.].</p> <p>4.6 Proof of death shall be provided to the satisfaction of the employer, if requested.</p> <p>4.7 An employee shall also be entitled to leave in the following circumstances [insert existing award provisions providing extended circumstances of compassionate leave].</p> <p>5. Carer's Leave</p> <p>5.1 An employee with responsibilities in relation to either members of their immediate family as defined in subclause 2 or members of their household who need their care and support shall be entitled to use, in accordance with this subclause, up to 5 days [<i>The issue of what is a day may be argued on an award by award basis</i>] per annum of their personal/carer's leave entitlement to provide care and support for such persons when they are ill. Provided that such leave may be taken for part of a single day.</p> |
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⁹ Who has an entitlement to bereavement leave as at _____ (insert date of award variation).

¹⁰ The main area of difference is the order of clauses: union order setting out clauses outlining the entitlement clauses first, employer order setting out the tests to be satisfied for access to the entitlement first - see Attachment A for comparison of order.

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| <p>5.2 Each day, or part thereof, of carer's leave taken in accordance with subclause 5.1 above shall be deducted from the quantum of personal/carer's leave provided in subclause 1 of this clause up to a maximum of 5 days per annum.</p> | <p>5.2 The entitlement to use personal/carer's leave in accordance with this subclause is subject to the employee being responsible for the care of the person concerned.</p> |
| <p>5.3 Where the current years personal/carer's leave has been exhausted, an employee shall be entitled to use their accrued sick leave as paid carer's leave in accordance with subclause 4.1.</p> | <p>5.3 The employee shall, if required by the employer, establish by production of a medical certificate or statutory declaration, the illness of the person concerned and that the illness is such as to require care by another.</p> |
| <p>5.4 The entitlement to use personal/carer's leave in accordance with this subclause is subject to the employee being responsible for the care of the person concerned.</p> | <p>5.4 In normal circumstances an employee shall not take carer's leave under this clause where another person has taken leave to care for the same person.</p> |
| <p>5.5 The employee shall, if required by the employer, establish by production of a medical certificate or statutory declaration, the illness of the person concerned and that the illness is such as to require care by another.</p> | <p>5.5 The employee shall, where practicable, give the employer notice prior to the absence of the intention to take leave, the name of the person requiring care and their relationship to the employee, the reasons for taking such leave and the estimated length of absence. If it is not practicable for the employee to give prior notice of absence, the employee shall notify the employer by telephone of such absence at the first opportunity on the day of absence.</p> |
| <p>5.6 In normal circumstances an employee shall not take carer's leave under this clause where another person has taken leave to care for the same person.</p> | <p>5.6 Each day, or part thereof, of carer's leave taken in accordance with subclause 5.1 above shall be deducted from the quantum of personal/carer's leave provided in subclause 1 of this clause up to a maximum of 5 days [<i>the issue of what is a day may be argued award by award</i>] per annum.</p> |

5.7 The employee shall, where practicable, give the employer notice prior to the absence of the intention to take leave, the name of the person requiring care and their relationship to the employee (where applicable), the reasons for taking such leave and the estimated length of absence. If it is not practicable for the employee to give prior notice of absence, the employee shall notify the employer by telephone of such absence at the first opportunity on the day of absence.

6. Unpaid Carer's Leave

An employee may elect, with the consent of the employer, to take unpaid leave for the purpose of providing care to a family or household member who is ill.

7. Grievance Process

In the event of any dispute arising in connection with any part of this clause, such a dispute shall be processed in accordance with the disputes settling provisions of this Award [Note: Grievance process to be inserted where not already provided in an award.]

Facilitative Clauses - To Be Inserted in Relevant Primary Clause

Annual Leave

1. Notwithstanding provisions elsewhere in the award, the employer and the majority of employees at an enterprise may agree to establish a system of single day annual leave absences, provided that:

5.7 Where the current years personal/carer's leave has been exhausted, an employee shall be entitled to use their accrued sick leave as paid carer's leave in accordance with subclause 5.1, *provided the employee has not already accessed 5 days carer's leave in that year.*

6. Unpaid Carer's Leave

An employee may elect, with the consent of the employer, to take unpaid leave for the purpose of providing care to a family or household member who is ill.

7. Grievance Process

In the event of any dispute arising in connection with any part of this clause, such a dispute shall be processed in accordance with the disputes settling provisions of this Award [Note: Grievance process to be inserted where not already provided in an award.]

Facilitative Clauses - To Be Inserted in Relevant Primary Clause

Annual Leave

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| <p>1.1 An employee may elect, with the consent of the employer, to take annual leave in single day periods or part of a single day not exceeding a total of five days in any calendar year at a time or times agreed between them.</p> <p>1.2 Access to annual leave, as prescribed in subclause 1 above, shall be exclusive of any shutdown period provided for elsewhere under this award.</p> <p>1.3 An employee and employer may agree to defer payment of the annual leave loading in respect of single day absences, until at least 5 consecutive annual leave days are taken.</p> <p>1.4 Paragraph 1 is subject to the employer providing written notice to each union party to the award of its intention to introduce an enterprise system of single day annual leave, and providing a reasonable opportunity for the union(s) to participate in negotiations.</p> <p>1.5 Once a decision has been taken to introduce an enterprise system of single day annual leave, in accordance with this clause, its terms must be set out in the time and wages records kept pursuant to regulations 131A-131R of the Industrial Relations Regulations.</p> <p>1.6 An employer shall record these short term annual leave arrangements in the time and wages book, as prescribed in clause * of this Award.</p> | <p>1.1 An employee may elect, with the consent of the employer, to take annual leave in single day periods or part of a single day not exceeding a total of five days in any calendar year at a time or times agreed between them.</p> <p>1.2 Access to annual leave, as prescribed in subclause 1 above, shall be exclusive of any shutdown period provided for elsewhere under this award.</p> <p>1.3 An employee and employer may agree to defer payment of the annual leave loading in respect of single day absences, until at least 5 consecutive annual leave days are taken.</p> <p>1.6 An employer shall record these short term annual leave arrangements in the time and wages book, as prescribed in clause * of this Award¹¹.</p> |
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¹¹ The inclusion of this clause should be addressed on an award by award basis.

Time Off in Lieu of Payment of Overtime

1. Notwithstanding provisions elsewhere in the award, the employer and the majority of employees at an enterprise may agree to establish a system of time off in lieu of overtime provided that:
 - 1.1 An employee may elect, with the consent of the employer, to take time off in lieu of payment for overtime at a time or times agreed with the employer.
 - 1.2 Overtime taken as time off during ordinary *time* hours shall be taken at the ordinary time rate, that is an hour for each hour worked. [unless otherwise provided elsewhere in the award]
 - 1.3 An employer shall, if requested by an employee, provide payment at the rate provided for the payment of overtime as prescribed in clause * of this award, for any overtime worked under this subclause where such time has not been taken within four weeks of accrual.
 - 1.4 Paragraph 1 is subject to the employer providing written notice to each union party to the award of its intention to introduce an enterprise system of time off in lieu of overtime and providing a reasonable opportunity for the union(s) to participate in negotiations.
 - 1.5 Once a decision has been taken to introduce an enterprise system of time off in lieu, in accordance with this clause, its terms must be set out in the time and wages records kept pursuant to regulations 131A-131R of the Industrial Relations Regulations.

Time Off in Lieu of Payment of Overtime

- 1.1 An employee may elect, with the consent of the employer, to take time off in lieu of payment for overtime at a time or times agreed with the employer.
- 1.2 Overtime taken as time off during ordinary *time* hours shall be taken at the ordinary time rate, that is an hour for each hour worked. [unless otherwise provided elsewhere in the award]
- 1.3 An employer shall, if requested by an employee, provide payment at the rate provided for the payment of overtime as prescribed in clause * of this award, for *the* overtime worked under this subclause where such time has not been taken within four weeks of accrual.

1.6 An employer shall record time off in lieu arrangements in the time and wages book, as prescribed in clause * of this Award at each time this provision is used.

1.6¹² An employer shall record time off in lieu arrangements in the time and wages book, as prescribed in clause * of this Award at each time this provision is used.

Make Up Time

1. Notwithstanding provisions elsewhere in the award, the employer and the majority of employees at an enterprise may agree to establish a system of make up time provided that:

1.1 An employee may elect, with the consent of the employer, to work 'make up time' under which the employee takes time off during ordinary hours, and works those hours at a later time, during the spread of ordinary hours provided in the award.

1.2 An employee on shift work may elect, with the consent of their employer, to work 'make up time' under which the employee takes time off ordinary hours and works those hours at a later time, at the shift work rate which would have been applicable to the hours taken off.

1.4 Paragraph 1 is subject to the employer providing written notice to each union party to the award of its intention to introduce an enterprise system of make up time, and providing a reasonable opportunity for the union(s) to participate in negotiations.

Make Up Time

1. Notwithstanding provisions elsewhere in the award, the employer and the majority of employees at an enterprise may agree to establish a system of make up time provided that:

1.1 An employee may elect, with the consent of the employer, to work 'make up time' under which the employee takes time off during ordinary hours, and works those hours at a later time, during the spread of ordinary hours provided in the award.

1.2 An employee on shift work may elect, with the consent of their employer, to work 'make up time' under which the employee takes time off ordinary hours and works those hours at a later time, at the shift work rate which would have been applicable to the hours taken off.

¹² The inclusion of this clause should be addressed on an award by award basis.

1.5 Once a decision has been taken to introduce an enterprise system of make up time, in accordance with this clause, its terms must be set out in the time and wages records kept pursuant to regulations 131A-131R of the Industrial Relations Regulations.

1.6 An employer shall record make up time arrangements in the time and wages book, as prescribed in clause * of this Award at each time this provision is used.

1.6 An employer shall record make up time arrangements in the time and wages book, as prescribed in clause * of this Award at each time this provision is used¹³.

Rostered Days Off

1. Notwithstanding provisions elsewhere in the award, the employer and the majority of employees at an enterprise may agree to establish a system of RDO to provide that:

1.1 An employee may elect, with the consent of the employer, to take a rostered day off at any time.

1.2 An employee may elect, with the consent of the employer, to take rostered days off in part day amounts.

1.3 An employee may elect, with the consent of the employer, to accrue some or all rostered days off for the purpose of creating a bank to be drawn upon by the employee at times mutually agreed by the employer, or subject to the reasonable notice by the employee.

Rostered Days Off

1. Notwithstanding provisions elsewhere in the award, the employer and the majority of employees at an enterprise may agree to establish a system of RDO to provide that¹⁴:

1.1 An employee may elect, with the consent of the employer, to take a rostered day off at any time.

1.2 An employee may elect, with the consent of the employer, to take rostered days off in part day amounts.

1.3 An employee may elect, with the consent of the employer, to accrue some or all rostered days off for the purpose of creating a bank to be drawn upon by the employee at times mutually agreed by the employer, or subject to the reasonable notice by the employee *or the employer*.

¹³ The inclusion of this clause should be addressed on an award by award basis.

¹⁴ The inclusion of this clause should be addressed on an award by award basis.

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| <p>1.4 Paragraph 1 is subject to the employer providing written notice to each union party to the award of its intention to introduce an enterprise system of RDO flexibility, and providing a reasonable opportunity for the union(s) to participate in negotiations.</p> <p>1.5 Once a decision has been taken to introduce an enterprise system of RDO flexibility, in accordance with this clause, its terms must be set out in the time and wages records kept pursuant to regulations 131A-131R of the Industrial Relations Regulations.</p> <p>1.6 An employer shall record RDO arrangements in the time and wages book, as prescribed in clause * of this Award at each time this provision is used.</p> | <p>1.4 Paragraph 1 is subject to the employer <i>informing each union which is both party to the Award and which has members employed at the particular enterprise</i> of its intention to introduce an enterprise system of RDO flexibility, and providing a reasonable opportunity for the union(s) to participate in negotiations¹⁵.</p> <p>1.6 An employer shall record RDO arrangements in the time and wages book, as prescribed in clause * of this Award at each time this provision is used¹⁶.</p> |
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¹⁵ The inclusion of this clause should be addressed on an award by award basis.

¹⁶ The inclusion of this clause should be addressed on an award by award basis.

Comparison of Carer's Leave Order of Clauses**Union Order**

5.1 - 5 Days Entitlement

5.2 - Deduction from 5 Days

5.3 - Access to Accrued Leave

5.4 - Employee Responsible Care

5.5 - Medical Certification

5.6 - Only One Person Leave

5.7 - Prior Notice

Employer Order

5.1 - 5 Days Entitlement

5.2 - Employee Responsible Care

5.3 - Medical Certification

5.4 - Only One Person Leave

5.5 - Prior Notice

5.6 - Deduction from 5 Days

5.7 - Access to Accrued Leave

ATTACHMENT D(i)**Union Preferred Draft ‘Plain English’ Order on Personal/Carer’s Leave**

* * * * *

1 Amount of Paid Personal/Carer’s Leave

An employee is entitled to the following amount¹ of paid personal/carers’ leave:

- [*award entitlement to sick leave in the first year of service + award entitlement to bereavement leave/compassionate leave annual or each occasion*] in the first year of service;
- [*award entitlement to sick leave in the second year of service + award entitlement to bereavement leave/compassionate leave annual or each occasion*] in the second year of service; and
- [*award entitlement to sick leave in the third and following years of service + award entitlement to bereavement leave/compassionate leave annual or each occasion*] in the third and following years of service;

2 Immediate Family or Household

The entitlement to use bereavement leave/compassionate leave and carer’s leave in accordance with this clause is subject to:

2.1 the person being either:

- (i) a member of the employee’s immediate family; or
- (ii) a member of the employee’s household.

2.2 the term ‘immediate family’ includes:

- (i) spouse (including a former spouse, a de facto spouse and a former de facto spouse) of the employee. A de facto spouse, in relation to a person, means a person of the opposite sex to the first mentioned person who lives with the first mentioned person as the husband or wife of that person on a bona fide domestic basis although not legally married to that person; and
- (ii) child or an adult child (including an adopted child, a step child or an ex nuptial child), parent, grandparent, grandchild or sibling of the employee or spouse of the employee.

¹ Note: in awards which calculate the quantum on the basis of days, not hours, it will be necessary to convert the days to an hourly quantum. This should be done on an award by award basis.

3 Personal Sick Leave

- 3.1 An employee is entitled to the following amount of paid leave for absence due to personal illness or injury
- up to [*award entitlement to sick leave in the first year of service*] in the first year of service;
 - up to [*award entitlement to sick leave in the second year of service*] in the second year of service;
 - up to [*award entitlement to sick leave in the third and following years of service*] in the third and following years of service;
- 3.2 Leave taken by an employee under subclause 3.2 is deducted from the amount of personal/carer's leave under subclause 2.
- 3.3 An employee is entitled to use accumulated sick leave for personal sickness if the employee has already used:
- the current year's sick leave component of the personal/carer's leave entitlement as personal sick leave; or
 - the current year's aggregated personal/carer's leave entitlement.
- 3.4 Sick leave entitlements which are untaken at the completion of the year shall accumulate on the following scale:**
- 3.4.1 the balance of personal/carer's leave provided that such remaining leave does not exceed the quantum of sick leave specified below less any personal sick leave taken by the employee during the year:**
- [**existing sick leave**] in the first year of service;
 - [**existing sick leave**] in the second year of service;
 - [**existing sick leave**] in the third and following years of service.
- [NB: subclause 3.4 aligns with subclause 3.6 in the joint Exhibit. This subclause is not agreed and is for determination by the Commission]**
- 3.5 An employee is entitled to [*insert existing award provisions covering part days, notice, certification, existing caps on accumulation, pro rata accruals etc.*]
- ### 4 Bereavement/Compassionate Leave
- 4.1 An employee is entitled to [*award entitlement to bereavement leave/compassionate leave*] days paid leave on each occasion if a member of the employee's immediate family or household in Australia [*dies/is seriously ill*].

- 4.2 Each day or part of a day used under subclause 4.1 is deducted from the amount of personal/carer's leave under subclause 2.
- 4.3 An employee is entitled to use accumulated sick leave as paid bereavement leave/compassionate leave up to [*award entitlement to bereavement leave/compassionate leave*] **on each occasion** when a member of the employee's immediate family or household in Australia [*dies/is seriously ill*] and the employee has already used the current year's personal/carer's leave entitlement under subclause 2.
- 4.4 An employee is entitled to use unpaid leave up to [*award entitlement to bereavement leave/compassionate leave*] **on each occasion** when a member of the employee's immediate family or household in Australia [*dies/is seriously ill*] if the employee has already used the current year's personal/carer's leave entitlement under subclause 2 and no accumulated sick leave is available.
- 4.5 An employee is entitled to leave in the following circumstances [*insert existing award provisions providing for additional days for travel, overseas death and additional paid/unpaid leave etc.*].
- 4.6 Proof of death must be provided to the satisfaction of the employer, if requested.
- 4.7 An employee is also entitled to leave in the following circumstances [*insert existing award provisions providing extended circumstances of compassionate leave*].

5 Carer's Leave

- 5.1 An employee with responsibilities in relation to either members of their immediate family or household who need their care and support is entitled to use up to 5 days per annum of their personal/carer's leave entitlement to provide care and support for such persons when they are ill. Leave may be taken for part of a single day.
- 5.2 Each day or part of a day of carer's leave taken in accordance with subclause 5.1 is to be deducted from the quantum of personal/carer's leave provided in subclause 1 of this clause up to a maximum of 5 days per annum.
- 5.3 An employee is entitled to use accumulated sick leave as paid carer's leave if the employee has used the current year's personal/carer's leave entitlement. An exception to this is where an employee has already taken 5 days carer's leave in the current year.
- 5.4 The entitlement to use personal/carer's leave is subject to the employee being responsible for the care of the person concerned.
- 5.5 The employee must, if required by the employer, establish by production of a medical certificate or statutory declaration, the illness of the person concerned and that the illness is such as to require care by another.

- 5.6 In normal circumstances an employee must not take carer's leave under this clause where another person has taken leave to care for the same person.
- 5.7 The employee must, where practicable, give the employer notice prior to the absence of the intention to take leave, the name of the person requiring care and their relationship to the employee (where applicable), the reasons for taking such leave and the estimated length of absence. If it is not practicable for the employee to give prior notice of absence, the employee must notify the employer by telephone of such absence at the first opportunity on the day of absence.

[NB: the order of this subclause is not agreed and is for determination by the Commission]

6 Unpaid Carer's Leave

An employee may elect, with the consent of the employer, to take unpaid leave for the purpose of providing care to a family or household member who is ill.

7 Grievance Process

The dispute settlement clause of the award applies to a dispute about the effect or operation of this clause. *[Insert a dispute settlement clause if the award makes no general provision].*

Facilities Clauses

As in Joint Exhibit 1.

ATTACHMENT D(ii)***‘Plain English’ Order on Personal/Carer’s Leave*****1 Amount of Paid Personal/Carer’s Leave**

An employee is entitled to the following amount¹ of paid personal/carers’ leave:

- [*award entitlement to sick leave in the first year of service + award entitlement to bereavement leave/compassionate leave (annual or each occasion)*] in the first year of service;
- [*award entitlement to sick leave in the second year of service + award entitlement to bereavement leave/compassionate leave (annual or each occasion)*] in the second year of service; and
- [*award entitlement to sick leave in the third and following years of service + award entitlement to bereavement leave/compassionate leave (annual or each occasion)*] in the third and following years of service;

2 Immediate Family or Household

The entitlement to use bereavement leave/compassionate leave² and carer’s leave in accordance with this clause is subject to:

2.1 the person being either:

- 2.1(i) a member of the employee’s immediate family; or
- 2.1(ii) a member of the employee’s household.

2.2 the term ‘immediate family’ includes:

- 2.2(i) spouse (including a former spouse, a de facto spouse and a former de facto spouse) of the employee. A de facto spouse, in relation to a person, means a person of the opposite sex to the first mentioned person who lives with the first mentioned person as the husband or wife of that person on a bona fide domestic basis although not legally married to that person; and
- 2.2(ii) child or an adult child (including an adopted child, a step child or an ex nuptial child), parent, grandparent, grandchild or sibling of the employee or spouse of the employee.

¹ Note: in awards which calculate the quantum on the basis of days, not hours, it will be necessary to convert the days to an hourly quantum. This should be done on an award by award basis.

² Existing award provisions restricting for example bereavement leave to deaths in Australia should be included.

3 Personal Sick Leave

- 3.1 An employee³ is entitled to the following amount of paid leave for absence due to personal illness or injury
- up to [*award entitlement to sick leave in the first year of service*] in the first year of service;
 - up to [*award entitlement to sick leave in the second year of service*] in the second year of service;
 - up to [*award entitlement to sick leave in the third and following years of service*] in the third and following years of service;
- 3.2 Leave taken by an employee under subclause 3.1 is deducted from the amount of personal/carer's leave under subclause 1, provided it does not exceed the current year's sick leave component of the personal/carer's leave entitlement.
- 3.3 An employee is entitled to use accumulated sick leave for personal sickness if the employee has already used:
- the current year's sick leave component of the personal/carer's leave entitlement as personal sick leave; or
 - the current year's aggregated personal/carer's leave entitlement.
- 3.4 The sick leave component of the aggregated personal/carer's leave entitlement may accumulate year to year to the extent that it is not used for personal/carer's leave, ie. is not used for personal sick leave, carer's leave, or bereavement leave. The bereavement leave component of the aggregated entitlement does not accumulate.**

[NB: subclause 3.4 aligns with subclause 3.6 in the Joint Exhibit. This subclause is not agreed and is for determination by the Commission]

[Insert existing award provisions covering part days, notice, certification, existing caps on accumulation, pro rata accruals etc.]

4 Bereavement/Compassionate Leave

- 4.1 An employee⁴ is entitled to [*award entitlement to bereavement leave/compassionate leave*] days paid leave [*in each year or on each occasion*] if a member of the employee's immediate family or household in Australia [*dies/is seriously ill*⁵].

³ Who has an entitlement to sick leave as at _____ (insert date of award variation).

⁴ Who has an entitlement to bereavement leave as at _____ (insert date of award variation).

⁵ The intention is that the entitlement would reflect the existing situation. Awards which provide for bereavement/compassionate leave in situations where a family member is 'seriously ill' should continue to so provide, while the position would not be changed in awards which do not so provide.

- 4.2 Each day or part of a day used under subclause 4.1 is deducted from the amount of personal/carer's leave under subclause 1.
- 4.3 An employee is entitled to use accumulated sick leave as paid bereavement leave/compassionate leave up to [*award entitlement to bereavement leave/compassionate leave*] [*in each year or on each occasion*] when a member of the employee's immediate family or household in Australia [*dies/is seriously ill*] and the employee has already used the current year's personal/carer's leave entitlement under subclause 1.
- 4.4 An employee is entitled to use unpaid leave up to [*award entitlement to bereavement leave/compassionate leave*] [*in each year or on each occasion*] when a member of the employee's immediate family or household in Australia [*dies/is seriously ill*] if the employee has already used the current year's personal/carer's leave entitlement under subclause 1 and no other accumulated paid leave (*ie. sick leave or annual leave*⁶) is available.
- 4.5 An employee is entitled to leave in the event of [*insert existing award provisions providing for additional days for travel, overseas death and additional paid/unpaid leave etc.*].
- 4.6 Proof of death must be provided to the satisfaction of the employer, if requested.
- 4.7 An employee is also entitled to leave in the following circumstances [*insert existing award provisions providing extended circumstances of compassionate leave*].

5 Carer's Leave

- 5.1 An employee with responsibilities in relation to either members of their immediate family or household who need their care and support is entitled to use up to 5 days⁷ per annum of their personal/carer's leave entitlement to provide care and support for such persons when they are ill. Leave may be taken for part of a single day.
- 5.2 The entitlement to use personal/carer's leave is subject to the employee being responsible for the care of the person concerned.
- 5.3 The employee must, if required by the employer, establish by production of a medical certificate or statutory declaration, the illness of the person concerned and that the illness is such as to require care by another.
- 5.4 In normal circumstances an employee must not take carer's leave under this clause where another person has taken leave to care for the same person.

⁶ Where no agreement can be reached between the employer and employee on the taking of annual leave, an entitlement to unpaid leave will arise.

⁷ It is agreed that the issue of what is a day should be settled on an award by award basis.

- 5.5 The employee must, where practicable, give the employer notice prior to the absence of the intention to take leave, the name of the person requiring care and their relationship to the employee, the reasons for taking such leave and the estimated length of absence. If it is not practicable for the employee to give prior notice of absence, the employee must notify the employer by telephone of such absence at the first opportunity on the day of absence.
- 5.6 Each day or part of a day of carer's leave taken in accordance with subclause 5.1 is to be deducted from the amount of personal/carer's leave provided in subclause 1 of this clause up to a maximum of 5 days⁸ per annum.
- 5.7 An employee is entitled to use accumulated sick leave as paid carer's leave if the employee has used the current year's personal/carer's leave entitlement. An exception to this is where an employee has already taken 5 days carer's leave in the current year.

[EXPLANATORY NOTE: this means that an employee is not entitled to more than 5 days paid carer's leave in each year from current or accrued leave entitlements of any kind.]

6 Unpaid Carer's Leave

An employee may elect, with the consent of the employer, to take unpaid leave for the purpose of providing care to a family or household member who is ill.

7 Grievance Process

The dispute settlement clause of the award applies to a dispute about the effect or operation of this clause. [*Insert a dispute settlement clause if the award makes no general provision*].

Facilities Clauses

As in Joint Exhibit 1.

⁸ It is agreed that the issue of what is a day should be settled on an award by award basis.