

IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 – Four Yearly Review of Modern Awards

AM2015/1 - Family and Domestic Violence Leave

**SUBMISSIONS OF
THE AUSTRALIAN COUNCIL OF TRADE UNIONS**

DATE: 14 March 2019

D No: 13/2019

Lodged by: The Australian Council of Trade Unions

Address for service: Level 4, 365 Queen Street Melbourne VIC 3000

Tel: 03 9664 7333

Fax: 03 9600 0050

Email: sismail@actu.org.au

Introduction

1. On 26 March 2018, a Full Bench of the Fair Work Commission (**the Commission**) decided that it was ‘necessary’, within the meaning of s.138 of the *Fair Work Act 2009* (**FW Act**), to include five days unpaid family and domestic violence (**FDV**) leave in modern awards.¹ On 6 July 2018, the Full Bench issued a decision finalising the content of the FDV leave term (**the Model Term**).² On 30 July 2018, determinations varying 123 modern awards to include the Model Term were issued, with effect from the first pay period after 1 August 2018.³
2. Subsequently, the *Fair Work Amendment (Family and Domestic Violence Leave) Act 2018* (**the Amending Act**) amended the FW Act to include an entitlement to five days unpaid FDV leave in the National Employment Standards (**NES**), effective from 13 December 2018 (**the NES entitlement**). The Explanatory Memorandum to the Amending Act states that the NES entitlement is ‘consistent’ with the Model Term.⁴
3. On 11 February 2019, the Full Bench formed a preliminary view that the Model Term should be deleted from the exposure draft modern awards and replaced with a reference to the NES entitlement, on the grounds that the Model Term and the effect of the NES entitlement are ‘substantially the same’.⁵
4. The ACTU does not agree that the two clauses are substantially the same in effect and opposes the deletion of the Model Term from the exposure draft modern awards. The proposed deletion is not required by the FW Act and will be detrimental to employees.

Legal Framework

5. While the terms of the award modernisation process may have obliged the Commission to avoid repetition of the terms of the NES in modern awards, the provisions of the FW Act which set out the Commission’s powers and obligations in relation to the four yearly review do not. The Commission is permitted to make one or more determinations varying modern awards by s 156(2)(b)(i) of the FW Act. Subdivision A of Division 3 of Part 2-3 of the FW Act sets out the requirements regarding terms which must, may, or may not, be included in modern awards by the Commission.

¹ [2018] FWCFB 1691

² [2018] FWCFB 3936

³ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am20151-schedule-final-dets.pdf>

⁴ Explanatory Memorandum, *Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018*, iii

⁵ [2019] FWCFB 767, [6]

6. The Commission is not prevented from replicating the terms of the NES in modern awards; in fact this scenario is expressly contemplated by and provided for in the FW Act. Section 55 of the FW Act deals with the interaction between the NES and a modern award. Section 55(1) provides that a modern award must not exclude the NES or any provision of the NES. Section 55(7) provides that a term will not offend s 55(1) where it is permitted by s 55(4) of the Act. Section 55(4)(b) provides that a modern award may include terms that *supplement* the NES, to the extent that the effect of those terms is not detrimental to an employee when compared to the NES.
7. Relevantly, s 55(6) provides that, if a modern award includes a term permitted by s 55(4), then to the extent that the terms give an employee an entitlement that is the same as an NES entitlement, the terms operate ‘in parallel’ but not so as to give an employee a double benefit. Section 55(6) makes it clear an employee’s NES entitlement may derive from both the NES and a modern award, and can be enforced under either instrument.⁶ The provisions of the NES apply as a minimum standard to the award entitlement, but only to the extent that the award entitlement is the same as the NES entitlement.⁷
8. An analysis of the differences between the NES entitlement and the Model Term is set out below. It can be seen that in a number of aspects, the Model Term supplements the NES entitlement.

Note on Confidentiality

9. Both the Model Term and the NES entitlement require employers to ‘take steps to ensure information or evidence an employee has provided is treated confidentially, as far as it is reasonably practicable to do so’. However, the NES entitlement has no equivalent to the Note under Cl.X.7 of the Model Term, which states:

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

10. The confidentiality obligation in the Model Term was the subject of considerable evidence and argument during the proceedings before the Commission. The Commission was presented with a range of uncontested evidence showing that confidentiality is essential to the effective operation of an entitlement to FDV leave, not only to protect the privacy of employees and ensure that they feel confident to access leave when needed, but also to ensure their physical safety.⁸ It is not

⁶ Supplementary Explanatory Memorandum to the *Fair Work Bill 2008* at [25] and [26]

⁷ *Construction, Forestry, Mining and Energy Union v Glendell Mining Pty Ltd* [2017] FCAFC 35, [114]-[117]

⁸ ACTU Final Submissions at [191]

disputed that highly sensitive employee information may be collected and stored in connection with applications for FDV leave. Inappropriate handling of such information presents not only a risk of stress and reputational damage, but in some circumstances increased family and domestic violence. For example, evidence provided by an employee to an employer for the purposes of applying for leave could disclose the location of an emergency shelter or the time and location of a counselling appointment. The inappropriate handling of such information in a workplace where the perpetrator, or someone known to them, also works could result in a very real safety risk for the employee in question and/or their family members. Family businesses or regional workplaces, where workers and their families are more likely to have interconnected relationships, may confront this issue. Evidence submitted to the Royal Commission into Family Violence confirms that “*a failure to share information properly or to protect the security of information can actually increase the risk of family violence—for example, if information is inappropriately disclosed to a perpetrator or to someone who might tell the perpetrator.*”⁹

11. During proceedings, concerns were raised by employer representatives about the capacity of some employers, particularly those with limited resources, to understand and comply with the confidentiality obligation. The ACTU’s original claim sought a confidentiality obligation covering *all* information provided by an employee for the purposes of seeking FDV leave. The Model Term contains a narrower obligation, in that it applies only to information provided under the notice and evidence provisions of the Model Term. The Note was a compromise position included in the Model Term for the purpose of providing important and much needed guidance and clarity to employers on the reasons that confidentiality is important, and to offer practical advice on how to minimise the prospect of mishandling sensitive personal information.

Note on Evidence

12. Both the Model Term and the NES entitlement require an employee, if requested by their employer, to ‘provide evidence that would satisfy a reasonable person’ that the leave is taken for the purpose set out in the clause. However, the NES entitlement has no equivalent to the Note under Cl.X.6 of the Model Term, which reads:

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

13. The ACTU’s original claim included the above text in the body of the clause. As with the Note on Confidentiality, the Note on Evidence was included as a compromise position to provide

⁹ *Royal Commission into Family Violence: Report and Recommendations*, Volume 1, Chapter 7, 160.

guidance to employees and employers on an important aspect of the entitlement likely to generate queries.

14. The practical operation of a new entitlement to FDV leave, including confidentiality and notice and evidence requirements, was the subject of lengthy submissions and discussion during the hearing and subsequent conferences to determine the content of the Model Term. It was generally accepted by all parties that, in light of the novel nature of the entitlement, practical guidance on the operation and implementation of the entitlement is important. While it is correct that the text of these Notes is included in the Explanatory Memorandum, this does not address the ACTU's concerns. It would be extremely rare for an employer or an employee to consult an Explanatory Memorandum to obtain practical guidance on the implementation of a workplace entitlement. The omission of the two Notes from the NES entitlement means that the guidance is for all practical purposes not accessible to employers or employees, representing a detrimental difference in the effect of the two provisions.

Definition of 'de facto'

15. The coverage of de facto partners is narrower in the NES entitlement than the Model Term. The NES entitlement excludes **non-resident, current** de facto partners, while the Model Term does not.
16. The NES entitlement applies to employees experiencing violence from a 'close relative', which links to the following definition of 'immediate family' in s 12 of the FW Act:
 - a. *a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or*
 - b. *a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee.*
17. A 'de facto partner' is defined in s 12 as:
 - a. *a person who, although not legally married to the employee, lives with the employee in a relationship as a couple on a genuine domestic basis (whether the employee and the person are of the same sex or different sexes); and*
 - b. *includes a former de facto partner of the employee.*
18. By contrast, the Model Term defines 'family member' as follows:

- a. *a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or*
- b. *a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee; or*
- c. *a person related to the employee according to Aboriginal or Torres Strait Islander kinship rules.*
- d. *A reference to a spouse or de facto partner in the definition of family member in clause X.2(a) includes a former spouse or de facto partner.*

19. It can be seen that the definition of ‘de facto’ in the NES entitlement is expressly tied to the partner’s residence status (although the definition of ‘former de facto’ is not). By contrast, the definition of ‘de facto partner’ in the Model Term makes no reference to residence status. While it is correct (as the Explanatory Memorandum to the Amending Act notes) that ‘a former de facto partner of an employee, whether living in the same residence as the employee or not, is still covered by the definition of close relative’, a **current** de facto partner who no longer lives, or who has never lived, with the employee will not meet the definition of ‘close relative’ in the NES entitlement, because the definition of ‘de facto partner’ in s 12 expressly requires cohabitation.
20. Although it seems unlikely that this was the intended effect of the provision, on a plain reading of the text of the statute, this is the result. The ACTU argued that this matter should be addressed for the avoidance of doubt,¹⁰ but the Amending Act did not include such clarification. This means that if the Model Term is deleted, the ability of employees in this situation to access FDV leave will be uncertain.

Section 106E – the meaning of a ‘day’ of leave

21. The Model Term has no equivalent of s.106E of the FW Act. Section 106E provides that ‘what constitutes a day of leave for the purposes of this Subdivision is taken to be the same as what constitutes a day of leave for the purposes of section 85 and Subdivisions B and C.’ The Explanatory Memorandum simply repeats the terms of the clause and sheds no further light on the purpose or effect of this provision. Section 85 deals with Unpaid pre-adoption leave, Subdivision B deals with Carers’ leave and Subdivision C deals with Compassionate leave. To the ACTU’s knowledge, no court or tribunal has considered the meaning of a ‘day’ in the context of these provisions. The FW Act does not define what a ‘day’ of leave is for the purposes of the

¹⁰ ACTU Submission to the Senate Inquiry into the provisions of the Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018, 24 September 2018

NES. The ACTU submits that it is clear that the meaning of a ‘day’, for the purposes of both paid and unpaid leave in the NES, is the actual number of hours an employee works in a 24 hour period.¹¹ However, the meaning of a ‘day’ in the context of paid personal/carers leave in s 96(1) of the FW Act, including the effect (if any) of s 106E, remains the subject of ongoing Federal Court proceedings in *Mondelez Australia Pty Ltd v AMWU and Ors* VID731/2018. As such, it is not possible to assess with any certainty at this time the impact of s 106E on the NES entitlement compared with the Model Term. The proposed deletion of the Model Term should not proceed in these circumstances.

Conclusion

22. The content of the Model Term was the subject of lengthy discussion and negotiation at a conference of interested parties held before the Commission over four days in October 2017.¹² As noted by the Commission, the final text of the Model Term represented a ‘significant compromise’ on both sides.
23. In order to address the ACTU’s concerns about the differences in the entitlements, it would be open to the Commission to delete the aspects of the Model Term which replicate the NES entitlement, and retain the aspects that supplement the NES entitlement. While this may have the desired effect, it is submitted that this approach would result in significant confusion and would be entirely inconsistent with the need to ensure a simple, easy to understand modern award system as set out in s 134(g) of the FW Act.
24. In light of the fact that the NES entitlement is detrimental to employees when compared with the Model Term, it is not appropriate to delete the Model Term at this time. If at some point in the future the NES entitlement is amended to provide more beneficial entitlements than the Model Term, this option could be revisited.

14 March 2019

Australian Council of Trade Unions

¹¹ *RACV v ASU* [2015] FWCFB 2881

¹² <https://www.fwc.gov.au/documents/decisionssigned/html/2017fwc5417.htm>