

FAIR WORK COMMISSION

**4 YEARLY REVIEW OF MODERN AWARDS
(S.156 of the Fair Work Act 2009)**

**FAMILY & DOMESTIC VIOLENCE LEAVE
(AM2015/1)**

**SUMBISSIONS BY AUSTRALIAN MEAT INDUSTRY COUNCIL IN
RESPONSE TO SUMBISSIONS OF PARTIES FILED
1 SEPTEMBER 2017 AND BACKGROUND PAPER QUESTIONS**

29 September 2017

SUMMARY

- i) In this submission the Australian Meat Industry Council (AMIC) deals with the comments of the parties – primarily the ACTU – that filed 1 September as directed. The submission also attempts to answer the questions in the FWC Background Paper of 15 September last.

- ii) AMIC's views are as follows:
 - a) If unpaid leave for family/domestic violence is granted, leave should be a maximum of 2 days per year and leave should not accrue.
 - b) FWC cannot extend personal/carer's leave to incorporate family/domestic violence leave.
 - c) The circumstances where family/domestic violence leave is permitted should not duplicate the circumstances for personal/carers' leave.
 - d) The circumstances where unpaid family/domestic violence leave can be taken should be limited to the preliminary views of the majority decision or such similar circumstances: [2017] FWCFB 3494.
 - e) If any definition of 'family violence' is provided it should be simple and clearly understood without supplementing the definition with other definitions. It would be limited to 'family violence' and not 'domestic violence' at large as discussed in the majority decision.
 - f) Evidence and notice of leave conditions should be clear and strict with the rights of the employer acknowledged.
 - g) Confidentiality conditions would be limited and simple.

Introduction

1. AMIC provides this submission in reply pursuant to Statement and Directions of the Full Bench of 3 August 2017.
2. This AMIC reply is in two (2) parts as follows:
 - Part A (paragraphs [5] to [61]) is confined to comments on the submissions of the parties – primarily the ACTU - who filed on or about 1 September 2017, and
 - Part B (paragraphs [62] to [109]) represent AMIC's comments concerning the Questions raised in the Background Paper of FWC dated 15 September 2017.
3. Most of the submissions in Part A are relevant to our answers in Part B.
4. We note also that FWC produced a Draft Summary of the submissions of parties filed on or about 1 September.

Part A

5. We need to provide comments on the 1 September submissions.

The position of Employer parties

6. The views of the employer parties in the 1 September submissions appear generally consistent as follows:
 - i. No modern award leave, paid or unpaid, should be provided for family and domestic violence;
 - ii. If, to the contrary, leave is granted then the quantum should be severely limited and capped per year (the common figure is 2 days);
 - iii) Any definition of family and domestic violence is a complex matter and needs to be precisely defined;

- iv) The circumstances should be carefully and precisely defined/qualified effectively and confined to urgent matters (there is some debate about the extent of urgent circumstances);
- v) Any coverage should apply, at least, to full-time and part-time employees (there is some debate about length of service qualification and coverage for casuals);
- vi) Any leave granted should not accrue from year to year;
- vii) There should be strict evidentiary and notice provisions and the Act provides some guidance;
- viii) There be should be no confidentially provisions for reasons provided;
- ix) Any unpaid leave should not be counted as part of 'service' but the leave does not break 'continuous service';
- x) No jurisdiction exists to extend the NES personal/carer's leave to family and domestic violence leave.

7. AiG, ACCI and NatRoad submitted, in principle, that unpaid leave should not be accessed if a form of paid leave (i.e. personal/carer's leave) is available under NES. The provisions of the Fair Work Act 2009 (*the Act*) were mentioned for guidance. AMIC answered this issue indirectly (but in support) submitting that any granting of unpaid leave for family and domestic violence should not cover matters covered by personal/carer's leave.

The position of the ACTU (and employer positions)

8. Presently, it appears there is some agreement between the ACTU and the employer parties on a limited number of issues should the Full Bench grant unpaid leave for family and domestic violence:
- i) Lack of jurisdiction to extend personal/carer's leave to family and domestic violence leave;
 - ii) (Perhaps) period options;
 - iii) Unpaid leave not counting towards service;
 - iv) Coverage for full-time/part-time employees.
9. There is some considerable distance between the ACTU and the Employer parties on the remaining Issues.

The ACTU submissions on the Issues and AMIC comments

Quantum

10. The ACTU submitted there is no justification for capping the amount of unpaid leave available¹. It sought to justify this recent position for the following reasons:
- i. That paid leave is an entirely different entitlement to unpaid leave;
 - ii. That employers bear no liability if leave is not accessed;
 - iii. That the costs relate only to source replacement staff members;
 - iv. That it is more appropriate to focus on eligibility than number of days available;
 - v. That it is important there be sufficient flexibility to enable an employee to take time off as needed.

¹ See para. [9] to [13] of ACTU submissions of 1 September 2016

AMIC Comment

11. The ACTU's position has altered from 10 days paid leave during the hearing – for which it provided no satisfactory explanation – to uncapped, unpaid leave. It justifies this latest position on the matters listed in [10] above.
12. AMIC does not agree with uncapped, unpaid leave for family and domestic violence. AMIC continues to submit that a maximum of 2 days unpaid leave only is warranted should the Full Bench grant any unpaid leave. We submitted earlier that there is guidance in the Act for this position.
13. For the ACTU to submit that any quantum of leave granted should be uncapped, and hence no minimum, appears to be at odds with provisions of the Act. The ACTU does not, again, appear to provide a satisfactory explanation for their most recent position.
14. The ACTU submits one should be limiting talk about quantum by simply saying it is more appropriate to focus on circumstances. No doubt the circumstances for taking any unpaid family and domestic leave will bear some relation to quantum. However, the fundamental issue is a fair and relevant minimum safety net.
15. The ACTU states that unpaid leave is an entirely different entitlement to paid leave requiring different considerations relevant to any impact. This is only partly true because, if the leave was uncapped and the circumstances for taking unpaid leave include coverage of 'all other activities' associated with an incident as the ACTU suggests, it raises uncertainty as to the length of the permitted leave and therefore, the hidden costs for the employer. An employer needs to know with some certainty the length of the leave. Otherwise, simply, how can a business organise and plan? Especially a small business.
16. The ACTU states that employers bear no liability if unpaid leave is not sourced and the costs merely relate to replacement staff members. We do not understand the rationale of the argument and completely disagree. The focus must be on situations where unpaid leave is accessed. There may be no replacement

employees available. It may require another employee to perform extra tasks. There may have to be urgent training. There are countless examples that could be given. To suggest or imply there are really no cost factors is incorrect.

17. The ACTU states that sufficient flexibility for employees affected is important. It might be so however, we fail to see that is any more relevant than the impact on employers. As well, flexible working arrangements are provided in the Act for family and domestic violence incidents.
18. It appears to AMIC that the ACTU is ignoring key aspects of the Full Bench decisions:
 - i. The preliminary view of the majority was that that a cautious approach is needed to the introduction of family and domestic violence leave; that the claim was difficult to measure (the ACTU paid leave claim) in terms of costs; that any form of leave should be limited to immediate impact matters such as urgent court hearings or finding alternative accommodation ².
 - ii. The Vice President concluded that an occasional absence may not have a significant impact in a large business but unplanned absences could have greater impact in a small business; there may be particular problems in industries with a high incidence of casual employment; that the actual cost of the claim cannot be accurately assessed on the material before the Commission ³.
19. We outlined the Vice President's conclusions simply because they seem, implicitly at least, to appear consistent with the majority.
20. The majority decision stated a cautious approach was needed if any form of family and domestic leave was inserted into modern awards. AMIC previously submitted

² para(s) [95] to [98]. [99], [114] of majority decision

³ para(s) [129], [133] and [134] of minority decision

this was a new form of leave never before contemplated for federal awards⁴. The ACTU approach appears anything but cautious.

21. If members of the Full Bench hearing the 10 day paid leave claim considered that conclusions were extremely difficult concerning cost and related matters for paid family and domestic leave on the large amount of evidence led then, we submit, it would be nearly impossible for parties or the Full Bench to reach conclusions – on that evidence - for uncapped unpaid leave. Yet the Full Bench is being asked to undertake just that exercise by the ACTU in the latest submission.
22. ACCI in the 1 September submission referred to the paucity of evidence on this issue during the hearing⁵. FWC has emphasised during the 4 yearly award review that where significant award changes are sought a submission addressing the relevant legislative provisions plus probative evidence properly directed to facts in support is needed.⁶ This principle remains relevant for the present stage of the proceedings because no further evidence, we assume, is being led by any party.
23. If the Full Bench granted uncapped and unpaid leave for family and domestic violence it would sit uncomfortably alongside nearly all forms of paid or unpaid leave in the NES. If uncapped leave for family violence why not uncapped leave for all other social problems?

The circumstances

24. The ACTU proposes that '*an employee experiencing family and domestic violence is entitled to leave without pay*' for the following circumstances⁷:
 - attending legal proceedings;
 - attending appointments with counsellors or medical, financial or legal professionals;
 - making relocation or other safety arrangements;

⁴ AMIC 1 September 2016 submission at [21] and [22]

⁵ para(s) [9], [13] and [18] of ACCI 1 September submissions

⁶ [2014] FWCFB 1788 at [23]

⁷ 1 September 2017 submissions at [22]

- any other activities related to the effects of family and domestic violence.

25. The ACTU submits that the circumstances have been drafted having regard to the comments contained in the majority decision⁸.

AMIC comments

26. AMIC does not agree with [24] or [25] above. We do not agree having regard to the preliminary views of the majority and our understanding of the various court processes under state and territory legislation.

27. The words '*experiencing domestic violence*' appear open ended having regard to the proposed circumstances. It could mean, for example, the commencement of legal proceedings to the completion of legal proceedings and all appointments in between. The circumstances proposed by the ACTU cover '*any other activities*'.

Court hearings

28. The ACTU proposal means that uncapped unpaid leave is available for attending all legal proceedings – interim/interlocutory, mentions, directions, final hearings. All court appearances.

29. We are at a loss to understand how the wording of this circumstance proposed by the ACTU is confined to '*the immediate impact of such violence such as ... attending urgent court hearings*'.

30. There is little doubt that the legal procedure contained in state and territory legislation for family and domestic violence is somewhat complex. However, as the *Australian Law Reform Commission (ALRC)* obviously noted in the 2010 Family Violence Final Report:

⁸ 1 September 2017 submissions at [23]

‘Many family violence matters are likely to arise first in a local court of a state or territory, before a magistrate...’⁹.

31. AMIC pointed out during the hearing and in 1 September submissions that all state and territory legislation provide for the issuing of orders/notices by police or court officers on an interim basis. No doubt the aggrieved could also seek interim orders as the applicant. All these notices or orders may result in consent court orders at a later date or the orders may be contested at a later hearing date. The ALRC commented on these issues:

‘Police-issued protection orders

9.2 A person may be made subject to a protection order under family violence legislation in a number of ways: a victim might apply to a court directly for an order; a court may make an order on its own motion; police—and potentially directors of public prosecution (DPPs)—might apply to a court for an order; or police might issue an order themselves, without the approval of a judicial officer.’¹⁰

32. The majority’s preliminary view contemplated unpaid leave support for ‘attending urgent court hearings’. In situations where interim orders are made pending a final hearing we do not comprehend the ‘final hearing’ to be generally an urgent matter for which unpaid leave would be accessed. The final hearing date would be part of the normal court list.

Counsellors, medical and financial appointments

33. The ACTU proposal contemplates leave being available to attend appointments with counsellors or medical, financial professionals. AMIC does not agree. AMIC has already made comments concerning these matters as follows:
- i) AMIC is of the view that attendance with counsellors or medical professionals would, ordinarily, attract paid personal/carer’s leave. AMIC

⁹ Australian Law Reform Commission, Family Violence – A National Legal Response (ALRC114) Chapter 2 at [2.71]

¹⁰ Ibid, Chapter 2 at [9.2]

believes it is unnecessary to include these matters in any granting of unpaid leave for family and domestic violence leave as persona/carer's leave may be accessed for duplication reasons;

- ii) AMIC does not agree that meeting with financial professionals should be included in the category of 'urgent' or immediate impact' matters. We have before provided reasons in earlier submissions why it appears unnecessary to include this matter.

Legal appointments

- 34. The ACTU proposal contemplates leave being available to attend appointments with legal professionals. We do not necessarily agree with the width of the circumstance (as expressed). Our comments at [28] to [32] above are relevant.
- 35. We submit that attending appointments, as proposed by the ACTU, may or may not fit within the realm of 'attending urgent court hearings'. We point to our comments in [32]. Do 'urgent' circumstances denote all legal appointments.
- 36. We note that ACCI included in a list of circumstances attendance with a lawyer in the list of circumstances but only if it fits within 'urgent' circumstances¹¹.
- 37. What is proposed by the ACTU, we submit, somehow needs to be qualified to conform with the preliminary views of the majority.

Any other activities

- 38. Finally, there are the all-embracing words contained in the ACTU proposal of '*any other activities related to the effects of family and domestic violence*'.
- 39. AMIC does not agree. The words are uncertain, ambiguous, imprecise, unqualified and not capable of being clearly understood or comprehended. It could mean 'anything and everything'. This circumstance, as proposed by the ACTU, should not be accepted and especially considering the ACTU is seeking 'uncapped leave'.

¹¹ para [44] of 1 September submissions

The definition of family and domestic violence

40. The ACTU is standing firm on the definition proposed during the hearing¹². The definition reads:

‘...any violent, threatening or abusive behaviour by a person against a current or former partner or member of the person’s family or household’.

41. The ACTU persists with the non-resident aspects of any definition and also submits it is more appropriate to concentrate upon eligibility.¹³

AMIC comments

42. AMIC does not agree with the scope as proposed by the ACTU. The ACTU seems to have disregarded the comments of the majority as clearly expressed¹⁴. The majority did not agree with the ACTU definition.
43. ACCI agrees the definition issue is a vexed one and, if the Full Bench decided to grant unpaid leave and include a definition, it should definitely not be the one initially proposed by the ACTU¹⁵. AiG submits that any clause needs to be carefully defined and limited¹⁶. AMIC suggested (not proposed) that perhaps the Family Law Act definition (FL Act) could be a starting point for discussion.
44. All employer parties opposed to the ACTU definition proposed during the hearing. We assume that opposition remains.
45. ACCI suggests that perhaps the definition of domestic violence might be addressed through ‘circumstances’. Perhaps this is because, across jurisdictions, ‘family and

¹² para(s) [14] and [15] of 1 September submissions

¹³ para(s) 12 and 20 of 1 September submissions

¹⁴ para(s) [109] to [114] of majority decision

¹⁵ para [40] of ACCI 1 September submissions

¹⁶ para [9] of AiG submissions of 1 September

'domestic' are not interchangeable, some jurisdictions appear not to cover 'domestic' violence and some terms are defined differently.

Who may access any granted entitlement

46. The ACTU submits that all employees should have access to any unpaid leave and the entitlement should be available from the commencement of employment.

AMIC Comment

47. If unpaid leave was granted it would apply to full-time and part-time employees. As for casuals, AMIC submitted that perhaps certain leave provisions contained in the Act provide a guide.
48. The issue of including casuals is problematic. Both AiG and NatRoad state that casuals should be excluded.
49. AMIC notes that regular and systematic casuals have access to more entitlements under the Act than those that are not regular and systematic.

Accrual and qualification issues

50. The ACTU proposes that there be no qualification period for accessing unpaid leave.
51. Because the ACTU proposes uncapped and unpaid leave no accrual issues from year to year arise under the proposal. Also, because the ACTU proposes uncapped and unpaid leave it does not address the term 'for each occasion'.

AMIC comment

52. AMIC's preliminary view outlined in 1 September submissions was, that because of guidance from the Act, perhaps no qualification period should be imposed. We understand that AiG opposes the ACTU position and that a qualification period is

proposed. Should a qualification period be imposed it would not cause AMIC any concern.

53. AMIC does not agree that untaken unpaid leave (if a quantum is set) should accrue for already given reasons. In other words any unpaid leave entitlement that may be granted is limited to each year of employment. ACCI and AiG are of a similar view.

Notice and evidentiary requirements

54. The ACTU stands firm on the notice and evidentiary requirements proposed during the hearing.

AMIC comment

55. AMIC provided comments on these matters in the 1 September submissions as did ACCI and AiG. We think, in total, those submissions are consistent and should be followed.

Confidentiality matters

56. The ACTU stands firm on the confidentiality matters it sought during the hearing.

AMIC comment

57. AMIC also provided comments on this matter in the 1 September submissions.
There is no need to repeat our position and it is consistent with that of ACCI and AiG.

Relationship with other forms of leave

58. The ACTU submits that employees may be able to access paid leave entitlements in certain circumstances for family and domestic violence incidents. It submits that unpaid uncapped family and domestic leave, if granted, is simply an additional entitlement capable of being accessed.

AMIC comment

59. AMIC provided comments in the earlier submission. There will be circumstances where personal/carer's leave and other forms of leave will be available in relation to family and domestic violence incidents but only if the leave requirements are met. ACCI and AiG are of the view that paid leave should first be accessed and not unpaid leave. The Act provides some guide.
60. AMIC remains of the view that if unpaid leave is granted, it should be for a limited number of immediate impact matters where personal/carer's leave is not available.

Other matters

61. As noted earlier in [8] there appears to be agreement between parties on certain matters.

Part B

The Background Paper and Questions posed

Introduction

62. The Background Paper (Paper) poses nine (9) distinct questions for interested parties to consider. The Paper attaches three (3) Proposed Model Terms for consideration.
63. A number of general comments may be made concerning the Proposed Model Terms.
64. First, Proposed Model Terms provide that personal/carer's leave may be taken/extended for family violence. We do not agree, having regard to the provisions of the Act, that such a situation is possible. Any examples provided may or may not be covered by the circumstances in s.97 of the Act and even if they are covered the term is not necessary. The only circumstances where personal/carer's leave may be taken under the NES are contained in s.97. AMIC dealt with the issues in 1 September submissions¹⁷. All parties making submissions agree.
65. Proposed Model Term 3 (based upon a Queensland statute) must be seen in the proper context. This statute does not apply, overall, to employees covered by the (Federal) Act although it does have some very limited application to national system employees because no inconsistency issues arise¹⁸. The substantive provisions in the Queensland statute concerning domestic and family violence leave do not have regard to the majority decision and the preliminary views of the majority¹⁹. The legislature is not bound by the limitations in the Act concerning modern awards.
66. Second, the Proposed Model Term definitions of 'family violence' are sourced from specific legislative instruments (one Commonwealth, two state instruments). The

¹⁷ see para(s) [105] to [115]

¹⁸ see ss. 7, 8 and 52-54 of Industrial Relations Act 2016 (Qld)

¹⁹ para(s) [58], [69] and [114] of majority decision

power of the legislatures to so enact these instruments had no limitation equivalent to ss.134 or 138.

67. Third, the Proposed Model Terms appear not to reflect the preliminary views of the majority decision i.e. the immediate impact matters of an urgent nature. The various terms used, where an employee is entitled to take unpaid leave without limitation, are as follows:
- *'an employee, including a casual employee, who is experiencing family violence is entitled to 2 days paid leave for each occasion (**a permissible occasion**) when the employee needs to take leave as a result of the leave as a result of the family violence'* (from Proposed Model Term 1);
 - *'an employee, including a casual employee, who is a victim of family violence is entitled to 2 days of unpaid leave for each occasion (**a permissible occasion**) when the employee needs to take the leave as a result of the family violence* (from Proposed Model Term 2).
68. Employees needing to take leave may or may not do so for 'urgent' reasons. The terms appear not to be confined to the preliminary views of the majority decision.
69. In [65] we referred to the Queensland statute being used as a basis for Proposed Model Term 3. This Model allows employees, exposed to family violence, to access personal/carer's leave and provides for long and short-term casuals.

Question 1: Do the elements set out above cover the elements necessary for a model term to give effect to the preliminary views? Are there any additional elements that should be considered for inclusion in a model term?

Answer

70. The Paper sets out five (5) elements for consideration.
71. If unpaid leave were granted for family and domestic violence then the elements listed in paragraph [5] of the Paper would need to be considered.
72. Element (iv) in paragraph [5] of the Paper should perhaps be expressed as '*the notice and evidentiary requirements*'. We note that notice provisions are included in the Proposed Model Terms.
73. For completeness and clarity another element (dealt with in 1 September submissions of the parties) is '*the relationship with other forms of leave*'.

Question 2: Are there any other definitions of family and domestic violence that the Commission should consider?

Answer

74. Different definitions of family and domestic violence are provided in the Proposed Model Terms. We briefly made general comments in [64] to [69] above especially that any definition needs to have regard to the preliminary views in the majority decision at [112].
75. The ACTU, as applicant during the hearing, tried to convince the Full Bench to accept a definition. The ACTU failed to convince the Full Bench. The ACTU persists with that definition.
76. Any definition of family violence is a vexed question and (perhaps) one of the reasons why the majority decision suggested a 'cautious approach'. A cautious approach was suggested by ACCI, AiG and AMIC.

77. The Paper at [14] mentions that the Queensland statute uses some words within the definition of 'domestic violence' that are themselves defined. This observation need not be confined to the Queensland jurisdiction. Other state legislation takes the same course for family/domestic violence situations. Some jurisdictions have different meanings even for the same subject-matter. AMIC pointed this out in submissions during the hearing. Consider the following list of definitions under the umbrella of family/domestic violence extracted from some of the state legislation:

- relevant relationship;
- associated domestic violence;
- intimate personal relationship;
- spousal relationship;
- engagement relationship;
- couple relationship;
- family relationship and relative;
- informal care relationship;
- family member;
- domestic partner and relative;
- close personal relationships;
- intimate personal relationships;
- domestic relationship;
- family and domestic relationship;
- other personal relationship.

78. The Proposed Model Terms are based upon a Commonwealth Act and two (2) State Acts. The definition of family violence in the Commonwealth Act, as noted in the AMIC September 2016 submission is primarily concerned, in the body of the FL Act, with the protection of children in marriage or dissolution situations. The definition from the *Industrial Relations Act 2016* (Qld) that forms the basis of Proposed Model Term 3 is from an instrument that specifically excludes national system employees, except in very limited areas.

79. The Proposed Model Terms provide examples of family violence behaviour and hence, maybe, the root cause of the problem. Take the family violence legislation

of Western Australia and South Australia. Different terminology is contained in these acts compared to the examples contained in the Proposed Model Terms. They may be narrower or wider depending upon interpretation.

80. So if the Full Bench contemplated any of the Proposed Model Terms what if it is wider than coverage of (say) the WA and SA Acts? Where does the aggrieved go in terms of seeking court relief? Different considerations apply. One may ask does it matter? It does matter because one is considering circumstances and other issues.
81. The Paper could have picked Commonwealth and SA and WA legislation definitions. There is nothing inherently special about the Victorian and Queensland definitions? The NSW legislation provides no primary definition²⁰.
82. AMIC does not put forward other definitions. By not putting forward other definitions does not mean that AMIC supports the definitions (and other provisions) in the Model Terms in their current form.
83. AMIC certainly believes that extending any definition to former spouses, former partners, former relations, former family members etc. (all infinitum) creates similar problems envisaged by the majority at [112]. At least the definition in Proposed Model Term 1 appears to conform to this view.
84. Finally, we referred to some of the other 1 September submissions above at [42] to [45]. The ACTU submitted one should concentrate on eligibility issues but the proposal is without reference to matters of 'immediate impact' and has not remedied the defects noted by the majority. ACCI confines the situation to 'urgent matters in conformity with the preliminary views of majority decision.

²⁰ see Crimes [Domestic and Personal Violence] Act 2007 (NSW)

Question 3: Parties are asked to consider whether a list of situations in which an employee may access family violence should be included in a model term, and if so, which circumstances might be included in such a list?

Answer

85. The discussion in the Paper asks whether circumstances for any unpaid leave granted be included or not included and gives brief reasons. AMIC, for clarity purposes, believes they should and must be included in conformity with the preliminary view of the majority. S.97 contains circumstances for personal/carer's leave. The same principle should be adopted.
86. AMIC has made its position perfectly clear on the 'circumstances' for consideration. We did this in 16 September 2016 submissions and 1 September submissions. We reiterated our position in [26] to [39] above concerning the ACTU position and the circumstances that party has proposed.
87. Where personal/carer's leave can be accessed it should not be duplicated if unpaid family violence leave were granted i.e. medical practitioner/professional or counsellor.
88. We rely on the preliminary views of the majority where unpaid leave should be accessed namely, for circumstances '*dealing with the immediate impact of such violence such as finding alternative accommodation or attending urgent court hearings*'²¹.
89. We concede and realise there may be 'immediate impact' matters other than those referred to by the majority. The Full Bench, if it granted unpaid leave, may find favour with two (2) of the circumstances contained in ACCI's 1 September submission at (d) and (e) in paragraph [44].
90. If the Full Bench did consider these circumstances necessary the specifics proposed by ACCI for matters of 'urgency' would certainly be preferable to the

²¹ para [114] of majority decision.

ACTU proposal at para [22] of the 1 September submission where circumstances were not confined to 'immediate impact' matters'.

91. 'Urgency matters' related to attendance at court and attendance with a lawyer, need to be defined and referenced to 'immediate impact' situations.
92. AMIC is of the view that the purposes/situations listed in Proposed Model Term 1 (X.2) and Proposed Model Term 3 (X.2(d)) do not, in total, in any way resemble a compilation of matters concerned with 'immediate impact' noting that Proposed Model Term 2 contains no circumstances.

Question 4: Parties are asked to give consideration to the most appropriate terminology for inclusion in the model terms.

Answer

93. We make three (3) comments concerning the discussion in 3.2 of the Paper:
 - i) We are of the view that any unpaid leave granted should only apply to individuals to whom family violence is directed. For that reason we are of the view that the words 'exposed to domestic violence' should not be considered.
 - ii) We are of the view that the terminology should have regard to the preliminary views of the majority. We understand that s.65 of the Act uses the words '*because the member is experiencing violence from the member's family*'. We do not think those words are suitable. If a definition was to be included we suggest that the FL Act terminology is the starting point.
 - iii) We have made comments above concerning the Queensland legislation and terminology. We note that the Paper refers to the words 'has experienced domestic violence' from the Qld. Act and yet Proposed Model Term 3 uses the words 'is exposed to domestic violence'.

Question 5: The model terms have been drafted on the basis that the perpetrators of family violence would not be entitled to take family violence leave. Does any party take a different view?

Answer

94. AMIC makes no submission on this matter.

Question 6: If the entitlement under the NES to paid personal/carer's leave is extended to allow employees to use it if they are experiencing family violence, should casual employees also be able to access this entitlement? Should casual employees be able to access unpaid family violence leave?

Answer

95. The assumption in the first question posed is that FWC has the power to extend personal/carer's leave to allow employees to use this leave if they are experiencing family violence. We are of the view this is beyond power. One can't extend 'oranges' to fit into situations that are 'apples'. This appears to be what is contemplated in each of the Model Terms.

96. The Jurisdictional Issues decision referred to the interaction between the NES and modern awards²². S.55(4) of the Act, in our view, precludes FWC from extending in the circumstances contemplated. We have submitted previously on the issue.

97. If the views expressed in [95] and [96] are correct we are of the view the first question is answered in the negative given the way the question is formulated.

98. An alternative view is that one may find some comfort in the Fair Work Bill 2008/2009 Explanatory Memorandum(s) to argue differently to the view expressed in [97]. We rely upon the principle that if the words in the statute are not ambiguous there is no need to refer to other material²³.

²² [214] FWCFB 1788 at [47]

²³ See CFMEU V BHP Billiton Nickel West P/l [2017] FCA 991 at [42], [43]

99. Another alternative view is that FWC has wide powers concerning incorporating leave matters into modern awards because of s. 139 of the Act. This is true but that is not the specific question posed.
100. In answer to the second question it is noted that the majority reached a preliminary view that casuals should have access to unpaid leave in the circumstances that were posed in the decision. We expressed our views on the issue at [47] to [49] above and at [95] to [101] of the 1 September submissions. There is no need to repeat them.

Question 7: Should a term providing for employees to take unpaid family violence leave include a cap on the quantum of such leave? Should it accrue from year to year?

Answer

101. Concerning quantum, should any unpaid leave be granted, AMIC has submitted previously that the common figure of the employer parties is a maximum of two (2) days per year. Those submissions are at [11] to [23] above and at [47] of the 1 September submissions.
102. Concerning accrual AMIC is of the view that, if unpaid leave be granted, it should not accrue from year to year. We previously made submissions on this at [51] to [53] above.

Question 8: Are there any other types of evidence that the Commission should consider?

Answer

103. AMIC has previously made submissions on this subject in the hearing and 1 September submissions. There is no need to repeat the comments although AMIC believes notice of any unpaid leave, if granted, should be considered in tandem with the evidence issue.

104. We note the Paper at [43] refers to the Queensland statute and s.54(3). The Paper simply lists (a) to (e) from that section of the statute but does not produce the words that preceded (a) to (e) in the section. The words are important in the context of the section. For Convenience they are copied as follows:

1. *An employer may ask an employee to give the employer evidence that the employee has experienced domestic violence and needs to take leave as a result.*
2. *The employee must comply with the request.*
3. *Without limiting subsection (2), the employee may comply with the request by giving the employer—*

105. We agree, as the Paper noted, that the narrower the list of circumstances the narrower the evidence that may be required.

106. Proposed Model Terms 1 and 2 provide evidence/notice provisions. Taken as a whole they do not appear completely satisfactory in the view of AMIC.

Question 9: Parties are asked to consider whether the Commission can and should include in any model term dealing with family violence a requirement that an employer must keep information about their employee's experience of family violence confidential?

Answer

107. AMIC has answered this issue previously at [102] and [103] of the 1 September submissions. AMIC agrees with AiG and ACCI.

108. AMIC also notes that clauses of the Proposed Model Terms about confidentiality mention 'reasonable steps' of disclosure from the employer or 'must not disclose unless authorised by law'. This appears unsatisfactory. The employer has a duty of care and may have to disclose regardless of a law. The employee may be one half of the equation in the family violence incident. The incident may already be found on social media by the time the information reaches the employer. Depending on the size of the employer there may be any number of employees

privity to the information. All this imposes unreasonable regularity burdens on the employer.

109. Compliance or reference to privacy issues as noted in s. 107(5) of the Act is sufficient.

Australian Meat Industry Council

29 September 2017