

4 yearly review of modern awards

Family and domestic violence clause and Family friendly work arrangements

AM2015/1

**NATIONAL FARMERS' FEDERATION
SUBMISSION**

Date: 15 September 2016

1. The National Farmers' Federation (NFF) is the peak industry body representing Australian farmers and agribusiness across the supply chain, including all of Australia's major agricultural commodity groups.
2. This submission responds to the claim by the Australian Council of Trade Unions (ACTU) seeking the inclusion of a model clause dealing with family and domestic violence leave in all modern awards (**proposed clause**).

The statutory framework

3. Section 3 of the *Fair Work Act 2009* (**FW Act**) has as its object:

“...to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

 - (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
 - (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and ...
 - (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and ...
 - (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simply good faith bargaining obligations and clear rules governing industrial action; and
 - (g) acknowledging the special circumstances of small and medium-sized businesses.”
4. Section 5 deals with terms and conditions of employment in Chapter 2 of the FW Act:
 - a. Subsection 5(3) describes the National Employment Standards (**NES**) as:

“minimum terms and conditions that apply to all national system employees.”; and

- b. Subsection 5(4) describes the role of modern awards:

“...A modern award is made for a particular industry or occupation and provides additional minimum terms and conditions for those national system employees to whom it applies. A modern award can have terms that are ancillary or supplementary to the National Employment Standards.”
5. The NES is contained in Part 2-2 of the FW Act. Section 61 contains minimum standards applying to the employment of employees and dealing with the following matters:
 - a. maximum weekly hours (Division 3);
 - b. requests for flexible working arrangements (Division 4);
 - c. parental leave and related entitlements (Division 5);
 - d. annual leave (Division 6);
 - e. personal/carer’s leave and compassionate leave (Division 7);
 - f. community service leave (Division 8);
 - g. long service leave (Division 9);
 - h. public holidays (Division 10);
 - i. notice of termination and redundancy pay (Division 11);
 - j. Fair Work Information Statement (Division 12).
6. Part 2-3 of the FW Act deals with modern awards. The Commission must review each modern award in its own right every four years (section 156). The modern awards objective applies to the review.
7. Section 134 contains the modern awards objective. The Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account the following relevant criteria:
 - a. relative living standards and the needs of the low paid (subsection 134(1)(a));
 - b. the need to encourage collective bargaining (subsection 134(1)(b));
 - c. the need to promote social inclusion through increased workforce participation (subsection 134(1)(c));
 - d. the need to promote flexible modern work practices and the efficient and productive performance of work (subsection 134(1)(d));
 - e. the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (subsection 134(1)(f));
 - f. the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (subsection 134(1)(g)); and
 - g. the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (subsection 134(1)(h)).

8. Considerations of ‘fairness’ also include what is fair for employers who taken on the bulk of the responsibility for minimum safety net entitlements under the FW Act.
9. Under sections 136 and 138, a modern award must only include certain terms and only to the extent necessary to achieve the modern awards objective and the minimum wages objective. Terms that are permitted or required to be included in modern awards are those set out in:
 - h. Subdivision B of Part 2-3 (terms that may be included in modern awards)
 - i. Subdivision C of Part 2-3 (terms that must be included in modern awards)
 - j. Section 55 (interaction between the NES and modern awards or enterprise agreements); or
 - k. Part 2-2 (NES).
10. Part 2-3 of the FW Act contains the content rules for modern awards.
11. Modern awards may include terms about matters ranging from minimum wages and classifications to hours of work and penalty rates as well as leave, leave loadings and arrangements for taking leave.
12. Modern awards must include terms dealing with coverage, flexibility arrangements, dispute settlement, ordinary hours, applicable piecework rates, automatic variation of allowances and superannuation.
13. Modern awards must not include terms that are objectionable or discriminatory terms, or that deal with unreasonable deductions, right of entry, long service leave, certain superannuation matters and State-based differences.
14. Under section 55, modern awards can include:
 - (a) terms that the award is expressly permitted to include by a provision of Part 2-2 (which deals with the NES);
 - (b) terms that the award is expressly permitted to include by regulations made for the purposes of section 127; and
 - (c) terms that are ancillary or incidental to the operation of an entitlement of an employee under the NES, to the extent that their effect is not detrimental to an employee in any respect, when compared to the NES;
 - (d) terms that supplement the NES to the extent that their effect is not detrimental to an employee in any respect, when compared to the NES.
15. Modern award terms that contravene section 55 have no effect (sections 56 and 137 of the FW Act). This gives effect to the legislative intention that the NES sets “minimum standards that apply to the employment of employees which cannot be displaced” (subsection 61(1)).

Relevant case law – key principles

16. In *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues*¹ (**Preliminary Jurisdictional Issues decision**) the Commission confirmed that the four yearly review of modern awards would be conducted on the basis that *prima facie* modern awards achieved the modern awards objective at the time they were made.
17. The Commission also found that the modern awards objective applies to the modern award review, and the Commission may only include terms in an award to the extent necessary to achieve the modern awards objective (s.138)².
18. The Commission held that the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective³.
19. What is ‘necessary’ in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations⁴.
20. The Commission will have regard to the historical context applicable to each modern award, and will take into account previous decisions relevant to any contested issue⁵.
21. A party seeking a variation in the context of the 4 yearly review must advance merit arguments in support of the proposed variations. The extent of the merit argument required will depend on the circumstances⁶.
22. Where a significant change is proposed it must be supported by submissions addressing the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation⁷.
23. The more significant the change, the more detailed the case must be.⁸ This will usually require detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes.

¹ [2014] FWCFB 1788 (17 March 2014), paragraph 60.

² [2014] FWCFB 1788, paragraph 29.

³ [2014] FWCFB 1788, paragraph 36.

⁴ As above.

⁵ [2014] FWCFB 1788, paragraph 60.

⁶ As above.

⁷ As above.

⁸ *Re Security Services Industry Award 2010* [2015] FWCFB 620 (2 March 2015).

24. The characteristics and circumstances of the industries and parties covered by modern awards vary and the application of the modern awards objective may result in different outcomes between different awards.⁹

The ACTU Claim

25. The ACTU claim is for the inclusion of a family and domestic violence leave clause **(the proposed clause)** in all modern awards.
26. In support of the claim, the ACTU advance the following propositions:
- a. Family and domestic violence is a significant issue in Australia.
 - b. Australia has an international obligation to address violence against women.
 - c. There is a connection between family and domestic violence and the workplaces of victims of such violence.
 - d. The existence of this ‘connection’ means that employers should bear more of the cost burden of family and domestic violence.

Social policy responses to a complex social problem

27. The NFF accepts that family and domestic violence is a significant issue in Australia. As material filed in these proceedings makes clear, it is also a complex social policy issue, and an intensely personal one for those affected.
28. Australian governments have adopted a range of social policy responses to reduce the incidence of family and domestic violence.
29. This is because the types of assistance and support needed by persons affected by domestic violence depend greatly on the personal circumstances of the individual, including their health, social, financial, cultural and geographic backgrounds.
30. In addition, the economic costs of family and domestic violence to the economy, including from lost productivity, are significant. These costs can only be reduced through a net reduction in the incidence of family and domestic violence.
31. In 2011, the Council of Australian Governments (**COAG**) released a 12-year *National Plan to Reduce Violence against Women and their Children 2010-2022* (**the National Plan**). Under the National Plan, two separate “Action Plans” have been released; the *First Action Plan 2010-13* and the *Second Action Plan 2013 – 2016*, released in June 2014.
32. The Action Plans outline the range of COAG policies and measures to address family and domestic violence and encourage whole of community action. These include raising awareness through supporting communities and young people, improving

⁹ *4 yearly review of modern awards—transitional provisions* [2015] FWCFB 3523 (18 August 2015).

media engagement, promoting gender equality, a ‘respectful relationships program’ for incorporation into the national curriculum and enhanced online safety measures.

33. Specific initiatives introduced under the National Plan provide support services to those affected by family and domestic violence, including 1800RESPECT, a national telephone and online counselling service for victims and persons at risk. Other initiatives include Australia’s National Research Organisation for Women’s Safety, Our WATCH and The Line social marketing campaign.
34. In late 2015, the Australian Government announced 28 National Plan projects under the *Building Safe Communities for Women* program, covering crisis accommodation, education and prevention initiatives.
35. On 9 September 2016, the Australian Government announced additional grant funding of \$1.7 million for projects that help support women and children affected by violence and reduce the incidence of violence overall.
36. The White Ribbon Workplaces Program, also an element of the National Plan and funded by the Commonwealth Government, encourages employers to seek accreditation through awareness raising, early intervention and prevention programs specifically for workplace settings.
37. As these initiatives show, governments around Australia are working collaboratively on the issue of family and domestic violence, through increased funding for research, prevention and support measures, to reduce the incidence of family and domestic violence in society. In addition to responding to community concern, these measures assist in complying with Australia’s obligations under international law.
38. What is significant about all of these measures is that they are directed at the prevention and reduced incidence of family and domestic violence. Measures of success are found in regular surveys of community attitudes and experience of access to support services and justice agencies, as well as through education program evaluations. None of the measures contemplate the introduction of a minimum mandatory workplace leave entitlement for those experiencing family and domestic violence.
39. There is no national standard for family violence leave entitlements at the federal level, either for public servants or private sector employees.¹⁰
40. Some States have agreed to family violence leave for public servants:
 - a. In NSW, existing leave entitlements as well as 5 days “special leave” can be accessed by permanent employees for the purpose of responding to family violence;
 - b. In Queensland, all public servants can access up to 10 days paid leave under a State directive issued on 25 November 2015.¹¹

¹⁰ <http://www.canberratimes.com.au/national/public-service/malcolm-turnbulls-public-servants-lose-domestic-violence-leave-20160308-gndjcr.html>

- c. In South Australia, public servants employed on a permanent basis have an entitlement to 15 days paid leave under government policy announced on 25 November 2015.¹²
 - d. In Victoria, public servants have access to 20 days paid family violence leave under an enterprise agreement approved by the Commission in May 2016. Casual employees can access unpaid leave.
41. Tasmania has adopted workplace provisions for public servants, extending access to accrued personal leave and flexible working arrangements to those experiencing family and domestic violence.¹³
 42. In the private sector, a report from the Workplace Gender Equality Agency suggests that a third of major private sector employers have a family and domestic violence leave policy, including Telstra, KPMG, Woolworths, Qantas, NAB, Kmart and PwC.
 43. Evidence filed by the ACTU indicates that there are 168 current enterprise agreements that provide for family or domestic violence leave, ranging from 2 to 20 days.¹⁴ The most common amount of leave provided is 5 days leave.
 44. All of this suggests that in recent years, and particularly in the last twelve months, there has been growing support for measures to assist employees manage family and domestic violence leave. In terms of paid leave entitlements, the strongest support comes from organisations with substantial resources (that is, governments and large private sector employers). Things have not yet reached a point where there is broad community consensus for mandatory paid leave entitlements in all workplaces, large and small.
 45. As the ACTU submission makes clear, individuals experiencing family and domestic violence do not tend to have higher rates of absenteeism than their peers.¹⁵ This is in contrast to what are described as ‘lifetime victims’ – those who have experienced violence in the past, but have since left the abusive relationship – and who appear to have challenges around work attendance. These individuals are unlikely to benefit from the ACTU claim as they are no longer ‘experiencing’ family or domestic violence. This is in contrast to those who would be eligible for paid leave, but are unlikely to use it.

¹¹ Support for employees affected by domestic and family violence (Directive 04/15)
<https://www.qld.gov.au/gov/documents/directive/0415/support-employees-affected-domestic-and-family-violence>

¹² SA Department for Communities and Social Inclusion *Domestic Violence Workplace Policy Staff Guidelines*
https://officeforwomen.sa.gov.au/__data/assets/pdf_file/0019/16363/DCSI_DomesticViolenceWorkplacePolicy_Staff_Guidelines.pdf

¹³ Tasmanian Government *Employment Direction No. 28 Family Violence – Workplace arrangements and requirements* February 2013
http://www.dpac.tas.gov.au/__data/assets/pdf_file/0007/186055/ED28_FamilyViolence_WorkplaceArrangements_andRequirements.PDF

¹⁴ McFerran Expert Report 1, at 5.1-2.

¹⁵ ACTU submission, 1 June 2016, at paragraph 4.9

Relevant obligations under international law

46. Australia is a signatory to the Convention on Elimination of Discrimination Against Women (CEDAW).
47. Under Article 2(2) of the CEDAW, Australia has agreed to:
- “take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise”;
- and
- “provide assistance to those experiencing domestic violence, including by providing adequate opportunities for employment.”
48. There is no obligation under international law that signatories make provision for paid family and/or domestic violence leave. The obligation is to adopt measures that are appropriate in the context of the particular country.
49. As the ACTU concedes, there is also no global standard for paid leave for victims of family violence. Adopting a new uniform minimum standard for paid leave would be seen ‘internationally as an advance worth emulating’¹⁶ – in a country which already has some of the highest labour costs in the world.
50. In July 2010, the UN Committee on the Elimination of Discrimination Against Women issued its Concluding Remarks on Australia’s efforts to meet its international treaty obligations in relation to the protection of women and children:¹⁷

28. The Committee notes with concern the unacceptably high levels of violence against women that persist in Australia, with one in three Australian women experiencing physical violence in their lifetime and one in five experiencing sexual violence. It also notes the lack of federal legislation or minimum standards for protection of women against violence and domestic violence. The Committee welcomes the establishment in 2008 of a national council to advise on the development of an evidence-based national plan to reduce violence against women and their children and the Council’s report, “Time for Action”, presented in April 2009.

29. The Committee encourages the State party to continue its efforts to tackle the persistent problem of violence against women and urges the State party to adopt national legislation and adopt, implement and adequately fund as a matter of urgency the National Action Plan to Reduce Violence against Women and Their Children, including a mechanism for independent monitoring. The Committee further recommends that the State party develop strategies to prevent homelessness resulting from domestic violence and ensure that women who are victims of domestic and family violence and their children are provided with appropriate ongoing accommodation and integrated support. The Committee recommends that the State party take appropriate measures, including specific legislative measures criminalizing acts of domestic violence, prosecute acts of domestic violence and punish the perpetrators of such acts. The Committee requests the State party to include under the Committee’s follow-up procedure referred to in paragraph 50 of

¹⁶ ACTU submission, 1 June 2016, paragraph 9.39.

¹⁷ Committee on the Elimination of Discrimination Against Women Concluding Remarks 46th session July 2010 http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=3&DocTypeID=5

the present concluding observations available information on the number and nature of reported cases of domestic violence, on the conviction and the sanctions imposed on perpetrators, as well as any assistance and rehabilitation measures provided to victims of domestic violence.¹⁸

51. The Concluding Remarks are directed at the Australian Government and do not recommend minimum paid leave entitlements for persons experiencing family or domestic violence. Instead, they contemplate a range of measures to:
- a. adopt, implement and adequately fund the National Action Plan;
 - b. prevent homelessness;
 - c. provide ongoing accommodation and integrated support for victims;
 - d. criminalize acts of domestic violence;
 - e. prosecute acts of domestic violence; and
 - f. punish the perpetrators of such acts.

The connection between family and domestic violence and employment

52. The ACTU argue that family and domestic violence is linked to the workplace in two material respects:
- a. Family or domestic violence affects the work life of persons experiencing such violence, and also affects their employer(s); and
 - b. Work provides support and other benefits for those experiencing or recovering from family or domestic violence.
53. Seen through the prism of the employee, each of these propositions is hard to dispute. For the employer, however, the connection between family and domestic violence and the workplace is quite different.
- a. Except where the perpetrator is also an employee, the fact that the person experiencing violence happens to be an employee is often the only connection between family or domestic violence and the workplace. The employer has no capacity to prevent the situation from occurring, or to control it once it does, or even to monitor the situation by requiring access to relevant information.
 - b. The economic costs for employers can be significant. According to the ACTU submission, employees are likely to be distracted, less reliable and less productive. This can affect the productivity of other employees in a variety of ways, including where the person affected is managing others or where colleagues prioritise support for the individual over their ordinary work.

¹⁸ Committee on the Elimination of Discrimination Against Women Concluding Remarks 46th session July 2010 http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=3&DocTypeID=5

- c. Absenteeism means a doubling in wages where employees are replaced for the period of absence, and in circumstances where absences can involve multiple periods over many years.
 - d. The desire for confidentiality may mean that employers are not aware of the circumstances of the employee, and therefore in a difficult position in terms of managing the employment relationship fairly and effectively. This can create legal risks of its own where decisions are taken (for example, to initiate performance management) in the absence of information that may have encouraged the employer to adopt a different approach.
 - e. Significant work health and safety risks can arise, both for the person experiencing violence and for others in the workplace. This could include contact with the perpetrator as violent behaviour escalates, or less than desirable standards of performance due to distraction and other effects.
54. In other words, while a connection to work for individuals affected by family or domestic violence can benefit employees, there are relatively few benefits for employers arising from a connection between family and domestic violence and work.
55. This does not mean that employers are unlikely or even unwilling to support employees affected by family or domestic violence. A supportive environment will generally be preferred and can be provided without the need for formal paid leave entitlements.
56. As the ACTU submission suggests, most affected employees do not seek time off work in any event, including because they prefer privacy:¹⁹
- “Most people suffering from family and domestic violence will typically be reluctant to disclose their experience of family violence to employers or colleagues, even where they may desperately need flexibility to deal with family violence related matters such as attending court, or where their safety is at risk at home and/or in the workplace.”
57. This raises a question as to the utility of a statutory entitlement to family and domestic violence leave.
58. For employers, creating a supportive environment can assist in complying with work, health and safety laws. Avoiding this type of legal risk and seizing the opportunity to demonstrate corporate social responsibility through best practice policies and provisions may deliver some tangible benefits for employers.
59. However, such benefits are more likely to accrue to employers of significant size and capacity. It is those employers who have access to human resources and safety professionals, substantial market profiles, and greater capacity to absorb labour cost increases.

¹⁹ ACTU submission, 1 June 2016, at paragraph 4.9

60. For the many small and medium size businesses who operate on tight margins, minimal cashflow and limited capacity to find replacement workers on short notice, similar benefits are unlikely to accrue to any significant degree.
61. In the agriculture sector, persons experiencing family or domestic violence leave are more likely than not be employed on a small, family farm – 94 per cent of Australian farms have agricultural operations valued at less than \$1 million and 55 per cent of farms are valued at less than \$100,000.²⁰
62. The agriculture sector faces a number of unique challenges, including vulnerability to external events well beyond its control. Extreme weather events, a fluctuating dollar, declining margins, chronic labour shortages and a customer base dominated by only a few large retailers, are all forces outside the farmer's control.
63. Planning for production volumes depends on likely access to labour. Farmers are invariably on fixed price contracts, determined further up the supply chain with no capacity for effective negotiation. Any increased labour costs or commodity price reductions cannot be passed on and must instead be absorbed by the business.
64. The capacity for small farm businesses to absorb increased labour costs is limited. To the extent that they can, this has a flow on effect for the finances of all those involved in the family business.

Access to existing entitlements

65. Employees experiencing family or domestic violence have access to a range of entitlements under the legislative safety net, including in the NES and modern awards. Options include requests for flexible working arrangements, annual leave, personal/carer's leave, enterprise bargaining, individual flexibility arrangements and other forms of paid and unpaid leave. In some workplaces, enterprise agreements and policies and procedures also make provision for support in connection with family or domestic violence.²¹
66. Personal/carers leave can be used to accommodate many of the needs of an employee who is a victim of family and domestic violence. While the ACTU argue that an employee who needs to attend court, seek specialist services or relocate may not be eligible for personal/carer's leave, in many cases they will be eligible for leave (for example, where they are unfit for work because of a physical or mental illness or injury, or in the case of those who need time off to care or support for a member of their family or household affected by an unexpected emergency).
67. Similarly, requests for flexible work arrangements can now expressly accommodate the circumstances of employees experiencing family violence (subsection 65(1A)(e)).

²⁰ Australian Bureau of Statistics, *Australian farming and farmers* Cat. 4102.0 Australian Social Trends Dec 2012

²¹ See eg. *Domestic Violence and the Workplace* – Employee, Employer and Union Resources, https://www.csu.edu.au/_data/assets/pdf_file/0009/954540/policies_and_procedures.pdf.

Refusal of a request for such arrangements can only be made on reasonable business grounds.

68. It is notable that despite the ACTU contending that rights to request do not adequately address the needs of employees²², its claim to address this concern was withdrawn after the United Firefighters Union objected to the potential opportunities for part-time work for career firefighters it might create.²³
69. Concerns about leave being exhausted before employees have fully overcome their experience of family and domestic violence ignore both the reality that it can take years to do so and the need to strike a balance between supporting employees and reducing the regulatory burden on employers.

Is using leave for family violence purposes discrimination?

70. Annual leave was introduced to provide employees with a period of rest and recreation each year, but in a practical sense, not everyone takes a ‘holiday’ during their annual leave. Leave is used for many purposes that require absence from work for a period, including caring for children during school holidays, caring for parents, extending a period of parental leave, moving house, renovating, or volunteering.
71. Long service leave is the same. It is provided in recognition of years of loyal service, but how employees choose to use their leave is really a matter for them.
72. The fact that an employee takes accrued annual leave, personal/carers’ leave or long service leave to assist in managing circumstances arising from family or domestic violence does not mean there is discrimination. Discrimination requires different treatment of one person by another. Individual employees choose how they will use their accrued leave, and the same minimum entitlements apply to all comparable employees. A choice to use leave for a particular purpose does not involve any differential treatment by another.

Transferring the social cost of violence to employers

73. The ACTU assert that granting its claim will have a minimal cost impact on employers, because:
- a. not many employees will take up the option of family and domestic violence leave; and
 - b. the cost of administering family and domestic violence leave will be offset by increased productivity.
74. The first contention reinforces the utility question – why create a new leave provision that nobody will use?

²² ACTU submission, 1 June 2016, paragraph 4.44.

²³ ACTU submission, 1 June 2016, footnote 7.

75. As the ACTU assert, most affected employees do not seek time off work while experiencing family and domestic violence.²⁴ In the McFerran Expert Report 1, some more detail is provided:
- a. Among 102 employers with paid domestic violence leave provisions, the average amount of leave taken over a 12 month period was 43 hours, with a range from 8 hours to 202 hours.
 - b. At Telstra, 22 employees took family violence leave in a six month period and the average leave period was 2.3 days.²⁵
76. There is evidence to suggest that family and domestic violence has a productivity cost to the economy, but importantly, productivity gains can only be achieved by reducing the incidence of family and domestic violence in society. This explains why there is such a strong emphasis on measures to prevent and reduce the incidence of violence through the National Plan and other measures.
77. There is no evidence that productivity costs for employers can or will be offset through the introduction of substantial new paid and unpaid leave entitlements.
78. In our submission, the converse is true: a new leave entitlement will increase both wage and administration costs for employers. These costs will be proportionately higher for small and medium size businesses than for governments and large private sector employers.

The proposed family and domestic violence leave entitlement

79. The terms of the ACTU claim require some scrutiny, given the intended operation of the clause as set out in paragraphs 2.11 – 2.39 of the ACTU submission of 1 June 2016.

Definition

80. The proposed definition of ‘family and domestic violence’ (**the ACTU definition**) provides as follows:

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

81. According to the ACTU submission, this is a ‘simplified’ version of the definition of ‘family violence’ in the *Family Law Act 1975*. However, in our view, the two definitions vary in a number of significant respects.
82. Section 4AB of the *Family Law Act 1976* (**the Family Law Act definition**) provides as follows:

²⁴ ACTU submission, 1 June 2016, at paragraph 4.9

²⁵ McFerran Expert Report 1, paragraph 6.2.

“family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the *family member*), or causes the family member to be fearful.”

83. As is clear from the Family Law Act Definition, family violence only meets the statutory test if it has a particular effect on the person on whom it is inflicted. That is, the violence must “coerce” or “control” the person, or cause them “to be fearful.” Similar causative elements are found in State family law legislation, for example, in Victoria.
84. These elements limit the scope of the definition, and in doing so, target the proposed paid leave entitlement to the circumstances which the ACTU is seeking to address. Without these elements, the ACTU definition is far too broad.
85. On a literal reading, shouting at a family member would be covered by the ACTU definition, and being shouted at could create an entitlement to leave. This may seem to trivialise the position, but it is an open interpretation on a plain reading of the text.
86. If the Commission is minded to introduce a new legislative entitlement to paid family and domestic violence leave, in our submission the definition of ‘family and domestic violence’ should be narrowed to adopt elements similar to those found in the Family Law Act definition, so that there is a connection between the offending behaviour and its effect on another person (such as placing them at risk of, or in fear of, harm).

Amount of leave

87. The ACTU seeks the introduction of a significant new paid leave entitlement, in the following terms:
 - “An employee, including a casual employee, experiencing family and domestic violence is entitled to 10 days per year of paid family and domestic violence leave for the purpose of:
 - a) attending legal proceedings, counselling, appointments with a medical or legal practitioner;
 - b) relocation or making other safety arrangements; or
 - c) other activities associated with the experience of family and domestic violence.”
88. As discussed above, there is no current national entitlement to paid family and domestic violence leave in Australia. Four of the eight Australian public service jurisdictions provide for leave entitlements ranging from 5 to 20 days. In large private sector organisations, the entitlement ranges from 2 to 20 days, with the most common amount of leave being 5 days. The overwhelming majority of small and medium size businesses do not provide for paid family and domestic violence leave.
89. Modern awards are intended to operate as a “minimum safety net of terms and conditions”. Unlike public service wages and conditions, modern awards are not intended to set “best practice” standards for others to emulate. Once modern awards

are varied to include a new entitlement, the entitlement sets a floor below which no award-covered employee contract or enterprise agreement can go.

90. A new entitlement to 10 days paid family and domestic violence leave would be more than a minimum standard.
91. According to McFerran Expert Report 1, where family and domestic violence leave is granted, and taken, the average period of leave required ranges from 2.3 days to 43 hours.²⁶
92. A new statutory entitlement of 10 days paid leave, with unlimited unpaid leave of 2 days at a time, would be excessive. It would almost be a ‘world first’, doubling both the current NSW public service entitlement and the average enterprise agreement entitlement of this kind. It would be five times the leave entitlement found in some enterprise agreements.
93. While the ACTU suggests that the proposed leave entitlement would not accrue from year to year, there is no express statement to that effect in the proposed clause. To the extent that a claim for family and domestic violence leave is granted, this will need to be addressed to provide certainty and avoid disputes.

Paid leave for casuals

94. The claim for paid leave for casual employees is unusual. Even in jurisdictions where ‘best practice’ family violence leave entitlements for public servants have been introduced, casuals are excluded from access to paid leave (with the limited exception of Queensland).
95. Modern awards are intended to contain a “minimum safety net of terms and conditions”. Extending paid leave entitlements to casual employees would be inconsistent with the notion of a minimum safety net entitlement.
96. Casual employees are not entitled to any form of paid leave under the NES. This reflects the nature of their engagement, which is neither regular nor systematic. They are entitled to accept or refuse work, and perhaps with the exception of ‘long term casual employees’ as defined in the FW Act, they are not guaranteed any particular working hours, days or shifts.
97. From a practical perspective, creating a paid leave entitlement for casual employees would be very difficult to administer. Disputes would be likely to arise over which days were work days and which days were non-work days in a bid to determine whether a particular day or shift could be taken as leave instead.
98. In addition, faced with the alternative between simply refusing a shift or accepting a shift and simultaneously asking that it be taken as paid leave, and then having to give reasons and show evidence of the experience of family and domestic violence, many will choose the option of one less shift for privacy’s sake.

Payment for leave

²⁶ McFerran Report, paragraph 6.2.

99. The ACTU submission states that paid family or domestic leave should be paid at the “‘ordinary rate of pay’ – that is, at the rate of pay they would have received had they worked the period.”

100. However, the proposed clause does not deal with rates of pay. If the ACTU approach were to be adopted, payment at the rate it proposes would include penalties for certain work (for example, work on weekends or public holidays).

101. This is inconsistent with the approach taken by the NES in relation to other statutory minimum leave entitlements, which provide in each case that payment be made at “the base rate of pay for the ordinary hours of work in the period”.²⁷

Taking of leave

102. The ACTU argue that its proposal would operate “similar to that of compassionate leave”, so that leave could be taken as a continuous period, or on a single period of one day, or any separate periods of less than one day by agreement.

103. There is no provision to this effect in the ACTU’s proposed clause.

Purpose of leave

104. The ACTU claim (at subclause X.2.1) sets out what it says is a ‘non-exhaustive list’ of three categories of eligible activity for paid leave. While the three categories are each broad, the current form of words appears limited to activities that fall within one of those categories. To that extent, the list is ‘exhaustive’. If the intention is that additional activities also be eligible for leave, this should either be identified with precision by the ACTU or disregarded.

105. Two of the three categories are require further clarification:

- a. subclause X.2.1(b): ‘relocation’ is not limited to relocation only in response to the experience of family and domestic violence. ‘Other safety arrangements’ is also broad and is not limited, for example, to ‘arrangements to protect the person and/or a member of their family or household’.
- b. subclause X.2.1(c): the phrase ‘other activities associated with the experience of family and domestic violence’ is very broad. It could encompass a wide range of activities (for example, domestic activities) that are presumably outside the intended scope of the clause.

Unpaid Leave

106. The ACTU claim (at subclause X.2.2) would confer an additional, unlimited unpaid leave entitlement on employees:

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

107. The phrase ‘each occasion’ is not defined and would lead to disputes about which occasions give rise to an unpaid leave entitlement. While the ACTU

²⁷ Annual leave, s.90(1); Personal/carers’ leave, s.99; Compassionate leave, s.106; Community service leave, s.111; Public holidays, s.116.

submission suggests that this would be limited to ‘permissible’ occasions²⁸, it is not clear what those might be.

108. This is in contrast to the approach taken to unpaid carer’s leave in section 102 of the FW Act:

“An employee is entitled to 2 days of unpaid carer’s leave for each occasion (a permissible occasion) when a member of the employee’s immediate family or a member of the employee’s household, requires care or support because of;..”

Notice and Evidentiary Requirements

109. The ACTU claim (at subclause X.3) sets out proposed notice and evidentiary requirements:

- “.1 The employee shall give his or her employer notice as soon as *reasonably practicable* of their request to take leave under this clause.
- .2 If required by the employer, the employee must provide evidence that would satisfy a reasonable person that the leave is for the purposes set out in clause X.2.1. *Such evidence may include a document issued by the police service, a court, a doctor (including a medical certificate), district nurse, maternal and child health care nurse, a family violence support service, a lawyer or a statutory declaration.*

110. According to the ACTU, its clause is modelled on section 107 of the FW Act with “necessary modifications”. However, section 107 does not contain words equivalent to those in italics above.

111. Specifying the type of evidence that will satisfy a reasonable person is fraught with difficulty, because it limits the capacity to ‘go behind’ the document where there are concerns as to the source of the opinion, or the legitimacy of the claim. An email from a lawyer, or a letter from a nurse who may or may not have specialist medical training in relevant fields, may not meet the standard that would satisfy a reasonable person. However, because each of these would be a type of document prescribed in the modern award, reliance on such a document would be difficult to challenge.

112. Further, two of the elements of section 107 are notably absent from the proposed clause:

- a. the requirement to advise the employer of the period, or expected period, of the leave; and
- b. forfeiture of leave entitlement if notice and evidentiary requirements are not complied with.

Confidentiality Obligations

113. Under proposed clause X.3.3 of the ACTU claim:

²⁸ ACTU submission, 1 June 2016, paragraph 2.18.

“The employer must take all reasonable measures to ensure that any personal information provided by the employee to the employer concerning an employee’s experience of family and domestic violence is kept confidential.”

114. It goes without saying that, for the purpose of assessing a leave claim and administering a leave entitlement, a certain level of disclosure within the employer’s organisation will be necessary where family and domestic violence leave is claimed.
115. As currently drafted, the ACTU clause would prevent employers from disclosing a report of criminal activity to police or other authorities, potentially placing them in a position of unacceptable legal risk.
116. As the evidence suggests, perpetrators of family and domestic violence may target employees and others at work. It is easy to see how an employer may come into contact with the authorities where a threat of harm arises in the workplace. This may necessitate participation in interviews, and/or making of statements, about matters including information disclosed to the employer by the employee.
117. The current proposed clause would also prevent employers from relying on information they had received in connection with a claim for leave in subsequent legal proceedings (for example, an underpayment claim where the leave entitlement in question was under challenge).
118. It is common for confidentiality clauses to contain exceptions that allow necessary disclosures, for example, in accordance with law or for the purposes of certain proceedings.²⁹
119. The ACTU notes in its submission that the proposed confidentiality obligation does not extend beyond an obligation to keep confidential those documents that are provided to the employer to satisfy the notice and evidentiary requirements. However, there is no limitation of this kind in its proposed clause. To the extent that this is the ACTU intention, it should be clarified for the purposes of these proceedings.³⁰

The Modern Awards Objective

120. Varying all modern awards as proposed by the ACTU is not necessary to achieve the modern awards objective.
121. While ‘whole of community action’ is a progressive approach to a complex social problem, this does not warrant the compulsory transfer of significant social costs to the private sector, regardless of the circumstances of individual businesses or their capacity to pay.
122. As outlined above, an alternative approach has been adopted by all Australian governments in dealing with the issue through COAG and the National Plan. Under this approach, a range of measures are gradually being put in place to reduce the incidence of family and domestic violence in society over time.

²⁹ See, for example ACTU submission, 1 June 2016, paragraph 9.34.

³⁰ ACTU submission, 1 June 2016, paragraphs 2.28, 2.33.

123. Ultimately, modern awards establish a minimum safety net of terms and conditions. Where there are existing entitlements available for use in the relevant circumstances (and the ACTU concedes that such entitlements do currently exist), additional, supplementary entitlements are unlikely to fall within the description of a ‘minimum safety net’.

Relative living standards and the needs of the low paid (subsection 134(1)(a))

124. The experience of family and domestic violence is not confined to any particular demographic. Family and domestic violence is a social problem which affects individuals at all pay levels – including at the one end of the scale, those in lower paying jobs who have disrupted work histories, and at the other end of the scale, well paid, professionals who may or may not be covered by modern awards.

The need to encourage collective bargaining (subsection 134(1)(b))

125. Collective bargaining is an existing mechanism available, and currently used, by unions and employees both in Australia and overseas. It provides an avenue for employers and employees to reach agreement on entitlements that are most effective and appropriate for the individual workplace.
126. Evidence in the proceedings confirms that collective bargaining can successfully delivered paid family and domestic violence leave outcomes for employees.
- a. All Victorian public sector employees have achieved leave of this kind through collective bargaining;
 - b. Collective bargaining has been the mechanism through which to achieve family violence provisions in the UK, Canada and New Zealand as well as within the European Union and Spain;³¹
 - c. In Australia, 776 enterprise agreements covering over 650,000 employees had domestic violence related provisions as at September 2015.³²
127. While the ACTU argue that collective bargaining fails to provide ‘uniform, enforceable benefits’, this ignores the recent, but growing, momentum in Australia toward support for persons affected by family and domestic violence.
128. Imposing a new mandatory minimum standard in all modern awards will obviate the need for collective bargaining on the issue. In our view, this criteria tends against the imposition of a new universal minimum employment standard.

The need to promote social inclusion through increased workforce participation (subsection 134(1)(c))

³¹ ACTU submission, 1 June 2016, paragraphs 9.22-9.28.

³² McFerran Expert Report 2, paragraph 4.16.

129. There is no clear evidence that an entitlement to paid family and domestic violence leave will lead to increased workforce participation. Certainly, some of the witnesses in the proceedings believe that it will, but where there is available data on the issue, it tends to suggest limited take up of the entitlement among those experiencing family and domestic violence.

130. Some employees will choose to leave paid employment because of family and domestic violence, whether or not they have an entitlement to paid leave specifically for this purpose. Equally, the consequences of family and domestic violence on work performance may eventually lead to dismissal notwithstanding an entitlement to paid family and domestic violence leave. In each case, loss of financial security and poorer health outcomes may well result, but these are the consequences of the experience of violence itself. They are not the consequences of a lack of access to paid family and domestic violence leave.

131. In the absence of a clear link between paid leave and increased workforce participation, this criterion is neutral in relation to the ACTU claim.

The need to promote flexible modern work practices and the efficient and productive performance of work (subsection 134(1)(d))

132. Granting a new, non-discretionary form of paid leave will not promote the efficient and productive performance of work. For small and medium sized businesses, it will increase wage costs and necessitate replacement employees who may not be easy to find or to employ in a scenario where leave is taken on an ad hoc basis.

133. As discussed above, while family and domestic violence imposes productivity costs on the economy, it does not follow that a new paid leave entitlement will improve workplace productivity. The strong emphasis on measures to prevent and reduce the incidence of violence through the National Plan recognises this position.

134. In our view, there is no clear evidence of a link between paid family and domestic violence leave and the efficient and productive performance of work.

The need to provide additional remuneration for employees working overtime; unsocial, irregular or unpredictable hours; on weekends or public holidays; or shifts (subsection 134(1)(da))

135. This criteria is neutral in relation to the ACTU claim, which seeks payment for a period of leave as opposed to a period of work.

The principle of equal remuneration for work of equal or comparable value (subsection 134(1)(e))

136. This criteria is neutral in relation to the ACTU claim.

The likely impact of any exercise of modern award powers on business, including productivity, employment cost and the regulatory burden (subsection 134(1)(f))

137. As outlined in this submission, granting the ACTU claim would impose additional wage and administration costs on all award covered employers in Australia. It will not improve workplace productivity. These costs will be proportionately higher for small and medium size businesses than for governments and large private sector employers.

138. A new obligation to provide paid leave entitlements would increase the regulatory burden on employers in pursuit of a social policy outcome. There are a range of existing entitlements under the FW Act and work health and safety laws that are available to support victims of family and domestic violence. As the National Plan suggests, there are also many other more cost effective ways for employers to support employees affected by family and domestic violence in the workplace.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (subsection 134(1)(g))

139. A new leave entitlement will broaden the legislative safety net and increase the complexity of modern awards. To the extent that a new leave entitlement is introduced, this criteria will require careful consideration in the drafting of provisions.

140. At a broader level, the stability and sustainability of the modern award system is unlikely to be achieved until at least the conclusion of the four yearly modern award review.

The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (subsection 134(1)(h))

141. It is not clear that the introduction of a new family and domestic leave entitlement would have any impact on employment growth.

142. As outlined above, there is no global standard for paid leave for victims of family violence. Adopting a new uniform minimum standard for paid family and domestic violence leave in Australia would be seen ‘internationally as an advance worth emulating’³³ – by a country which already has some of the highest labour costs in the world.

Conclusion

143. On balance, the introduction of a new family and domestic violence leave entitlement is not necessary to achieve the modern awards objective.

144. What the ACTU is effectively seeking is the introduction of a new minimum employment standard.

145. In our submission, the statutory scheme is such that the place for new minimum employment standards is in the NES, alongside annual leave,

³³ ACTU submission, 1 June 2016, paragraph 9.39.

personal/carer's leave, community service leave and other nationally applicable standards.

146. If Victoria is proposing a new NES entitlement to deal with family and domestic violence leave through the COAG process, this process should be allowed to run its course.

147. In our respectful submission, the Commission should avoid an outcome that circumvents the COAG process, so as to ensure that all jurisdictions have the final say on what is ultimately a question of social policy and would amount to a significant transfers of social costs on to private sector employers, with no productivity offset.

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