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Education and Employment Legislation Committee – Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018

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Chamber of Commerce
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Introduction

1. On 13 September 2018 the Minister for Jobs, Industrial Relations and Women tabled the *Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018 (Bill)*. The Bill was referred to the Senate Education and Employment Legislation Committee (**Committee**) to inquire into its provisions.
2. The Bill is intended to amend the *Fair Work Act 2009 (FW Act)* to extend through the National Employment Standards (**NES**) the same entitlement to leave from work to deal with family and domestic violence as determined by a full bench of the Fair Work Commission (**Commission**) for employees who are covered by a modern award which applies to their employment. The Committee is to report on 24 August 2018.
3. The Australian Chamber of Commerce and Industry (**Australian Chamber**) thanks the Committee for the opportunity to comment. It supports passage of the Bill in its present form but asks the Committee to consider varying the Bill's commencement to avoid multiple start dates for the same entitlement (paras 29 – 31). The Australia Chamber supports consistency between the award provision which applies to about 2/3^{rds} of employees (disproportionately in small businesses) and the new NES entitlement proposed in the Bill.



Submissions

The Modern Award Clause

4. The Commission's determining decision was handed down on 26 March 2018 after lengthy proceedings. The Commission decided that the unpaid leave entitlement
 - a. will be available *in full* at the commencement of each 12 month period rather than accruing progressively during a year of service;
 - b. will *not* accumulate from year to year; and
 - c. will be available in full to part-time and casual employees (i.e. not pro-rated).¹
5. The Commission issued a draft model term on 3 May for comment and finalised the outstanding issues on 6 July. The clause was developed through a consultative process with, arbitrated matters aside, the broad agreement of the employers and unions party to the proceedings. The Commission was concerned to develop a model modern award term which was simple and easy to understand.
6. The Commission's modern award variations took effect from 1 August 2018. From the perspective of clarity and understanding it is important that the NES entitlement does not operate differently from the award provision.
7. Apart from the obvious costs to clarity and understanding differing obligations under a modern award from those under the NES brings other problems in respect of certainty and ease of understanding for employers and employees. These are not solved by choosing to observe the NES and ignore the award. A modern award can supplement an NES term and provide ancillary provisions but it cannot exclude a term of the NES. An award term which excludes a provision of the NES is of no effect, but only to the extent that it does so.
8. The law is not well developed to assist in identifying whether a term which potentially supplements the NES is in law exclusionary. For example, one question which arose during proceedings was whether NES personal/carer's leave could be used for purposes which fell outside its defined purpose. Most parties to the proceedings were of the view that deducting from an employee's personal/carer's leave balance leave taken for a purpose falling outside its definitional coverage was to exclude the entitlement. The Commission recognised this understanding but did not determine a view, noting that using personal/carer's leave in this way could also be seen to expand access to the entitlement. The question is before the Commission's foreshadowed June 2021 review for further consideration.
9. Most employees are covered by a modern award but not all of these employees have a modern award applying to their employment. The most usual reason for

¹ Para 253, *4 yearly review of modern awards – Family and Domestic Violence Leave Decision*, [2018] FWCFB 1691



this is that the employee is covered by an enterprise agreement in relation to his or her employment in place of the award. A small proportion of employees are award/agreement free. There are some employees who are covered by enterprise awards which apply to them.

10. The ABS' *Employee Earnings and Hours, Australia, May 2016*, issued 19 January 2017 reports 10,147,000 employees. 2,307,000 employees (23%) had their pay set by "award only" and 3,695,000 (37%) by "collective agreement". Those employees covered by "collective agreement" do not have the benefit of the new modern award domestic and family violence leave clause² but it would form part of the statutory matrix for the better off overall test for any replacement agreement or would apply if the agreement were terminated.
11. However, another 3,782,600 (37%) employees had their pay set by "individual arrangement". Most of these employees will have a modern award applying to them because the "award only" category does not include employees who are paid above the award rate, but who are otherwise subject to award conditions. Some of the 3,782,600 employees under "individual arrangement" will be award/agreement free, but most will not be, their terms and conditions will come from the award.
12. The remaining 361,900 (4%) employees were owner managers of an incorporated enterprise. Most of these employees would probably fall under the "individual arrangement" category if not separated out and most would probably be award-free.

Difference between the Modern Award Clause and the Proposed Entitlement in the Bill

13. The Bill does differ from the modern award clause in some respects. Some of these differences are necessary to give effect to the fundamental position that the proposed NES entitlement should not differ from the modern award provision which is already in operation applying to some millions of employees. Some differences arise from the context of legislation rather than award prescription and some appear to be based on the drafter's view about improved readability.

Items 1 – 4

14. These are consequential provisions.

Item 5 – The new Subdivision CA

15. The main amendments and the new entitlement to unpaid family and domestic violence leave are proposed to be inserted into the NES (existing Part 2-2 of the FW Act) and Subdivision CA of Division 7, Personal/Carer's leave.

² A small number of these employees may have an award applying to them because "collective agreement" also includes those working under an unregistered collective agreement.



16. Proposed s 106A provides the entitlement to unpaid family and domestic violence leave. Proposed s 106A(3) provides that an employee's engagement is the start of the employee's first employment with the employer. Although not included as a provision in the modern award clause it is consistent with the Commission's decision.
17. Proposed s 106A(4)(c) provides that an employee can access less than a day's leave by agreement with the employer and proposed s 106A(5) provides that an employer can agree to additional leave. These provisions are consistent with notes to the award clause.
18. Proposed s 106B provides for taking the leave if the employee is experiencing family and domestic violence and the leave is necessary to deal with it. Although restructured, proposed s 106B(1) corresponds to the award clause. Access to the leave is conditioned by two definitions. The first, "family and domestic violence", although again structured differently from the award replicates the award definition. Simply put, "family and domestic violence" is threatening behaviour by a close relative which seeks to control an employee and causes her or him to be fearful.
19. The second definition is "close relative" which is referred to in the definition of "family and domestic violence". A "close relative" is defined as someone who is a member of a person's "immediate family" (a term defined in s 12 of the FW Act) or is related to the employee according to Aboriginal or Torres Strait Islander kinship rules. This coverage is the same as provided in the award clause, however, under the award this composite range of family relationships is called "family members", not "close relatives".
20. Unlike the term "immediate family member", "family member" is not defined in the FW Act and to the best of the Australian Chamber's understanding the undefined term "family member" is not used in any provision of the FW Act. The Chamber appreciates that some readers may consider the term "family member" to be broader than what the award clause is intending to describe, that is, "immediate family member" and those related under Aboriginal or Torres Strait Islander kinship rules. The Australian Chamber "close relative" better captures this composite group of relationships for the reader.
21. Proposed s 106C replicates the award clause with the addition of a note about the possible operation of the *Privacy Act 1988*. This differs from the note in the award clause but the differences do not appear to be material.
22. Proposed s 106D provides for the operation of the NES entitlement in state and territory jurisdictions which have victims of crime legislation which provide access to leave and addresses national system employees and those who are national system employees because of state referral. Arising from the states' referrals this latter group of employees can only access the NES entitlement to the extent that the leave is not state victims of crime leave. Other national system employers can access either entitlement in full. Broadly speaking the net effect is the same for both groups. This has no counterpart in the award clause although the legal situation is the same.



23. Proposed s 106E which identifies what constitutes “a day of leave” has no counterpart in the award term. Under proposed s 106E “a day of leave” has the same meaning as it does for the related types of unpaid leave also provided for in Division 7 of Part 2-2, and the similar pre-adoption leave provided for prospective employee parents. The Australian Chamber accepts that there has been some confusion in respect of the use of the concept “day”. The clarified usage is not at odds with the meaning of the award clause.

Item 6 – Notice and evidence

24. Item 6 addresses the notice and evidence requirements by amending s 107, *Notice and evidence requirements*, of the FW Act. It is consistent with the “notice and evidence requirements” of the modern award term.

Item 7 – Commencement (CI 39)

25. The modern award term provides that the employee’s leave balance crystallises (is available in full) at the start of each 12 month period of her or his employment, but the modern award provision commences on the first pay period on or after 1 August 2018. Despite receiving their entitlement with the August commencement an existing employee’s “12 month period of employment” takes its date from her or his individual engagement. If any leave is accessed after 1 August it will be topped up, refreshed, to 5 days on the anniversary of the existing employee’s initial engagement.
26. Item 7 inserts a new Part 8 into Schedule 1, *Application, Saving and Transitional Provisions Relating to Amendments of This Act*, of the FW Act. Proposed s 39 deals with commencement of the Bill’s provisions.
27. Domestic and family violence leave “crystallises”, it does not accumulate, which makes it imperative that there are not different effective dates in the award and NES when an employee’s entitlement crystallises or refreshes. The date that an employee’s entitlement refreshes should be the anniversary of their initial engagement. Item 39 generally achieves this outcome. The period of time between the commencement of the family and domestic violence leave NES provision and the anniversary of the employee’s initial engagement is taken to be a 12 month period with the result that the employee’s employment anniversary triggers the entitlement to refresh.
28. Thus, at the anniversary of the employee’s engagement her or his leave balance refreshes to 5 days and it does so each subsequent anniversary. This is supported.
29. However, the proposed s 39 deals less well with the difference between the date of the NES provision and award term commencing. Under proposed s 106A (item 5) an employee receives an entitlement to 5 days’ leave on commencement of that clause. If an employee has accessed leave under the award after 1 August, the commencement of the NES provision crystallises the NES entitlement, which in turn triggers the obligation to refresh to leave balance in the employee’s record.



30. Small employers are more likely to employ under the award. There is therefore a reasonable likelihood of a record keeping breach arising from the employer's failure to understand the significance of the NES entitlement starting after the award entitlement.
31. This issue only affects the commencement year and only arises in circumstances where some leave has been accessed under the award by the time the NES entitlement commences. Instances would be less widespread should the legislation commence sooner rather than later. The Australian Chamber also accepts that in any given period of time most employees will not be accessing this leave. Nonetheless the Committee could give consideration aligning the initial entitlement to 5 days' leave to the start date of an existing entitlement which is the same, or substantially so.

Recommendation: That the Committee consider recommending that the commencement of the new NES entitlement (and the initial 5 day entitlement under the NES), coincide with the start date of an existing entitlement which is the same or substantially so, or commence on the first pay period to commence on or after 1 August 2018.

Item 7 – Amending agreements (CI 40)

32. The Bill's unpaid family and domestic violence leave provisions will apply from the enacted Bill's commencement to employees covered by an enterprise agreement which applies to them at that time. As with awards an enterprise agreement cannot exclude a term of the NES. The new NES provisions will apply on top of the agreement's terms except to the extent that they are of no effect because they would exclude a term of the NES. Apart from their impact on a bargained and agreed position, these conflicting inconsistencies are not always obvious. Inconsistencies sometimes arise in a particular fact situation, and, as submitted above (paras 7 – 8), the line between supplementation and exclusion is not obvious.
33. It is a significant step to impose new rules which may in some cases be contradictory onto an enterprise agreement which was properly negotiated between the parties and approved by the Commission consistently with the legislative requirements at the time. It is also not usual to impose new amendments on enterprise agreements in this way. It is usual and appropriate that new rules are imposed on future agreements and their negotiations – not on existing agreements.
34. Evidence before the Commission indicated that there were bargained provisions about family and domestic violence.

It is clear that some employers and employees have successfully negotiated provisions which seek to address family and domestic violence, and that there is significant variation in these provisions. They include provision for:

- *paid family and domestic violence leave;*



- *access to other leave entitlements (such as personal/carer's leave);*
- *unpaid leave;*
- *a right to request flexible working arrangements; and*
- *assistance for supporters and carers of people experiencing family and domestic violence.*

It is also clear from the Mandel Report that family and domestic violence provisions are found in agreements in most industries and involving employers of different sizes (particularly large employers).³

35. The Commission rightly concluded that domestic and family violence is a community problem requiring a community response.⁴ Neither the solution, nor the provision of assistance and support lies in the workplace. However it also concluded that

While we also accept that there are other matters which might impact on employees in a significant way we are satisfied that the evidence established that the circumstances faced by employees who experience family and domestic violence require a special response.⁵

36. Item 40 of the Bill provides the Commission with the power to make a determination to vary an existing enterprise agreement which is in operation at the time that the Bill's provisions commence to address a conflict between the agreement and the Bill's provisions. Under item 40 the Commission can give the determination retrospective effect.
37. The Australian Chamber's preferred position is that new NES entitlements should not impact existing agreements without transition but it accepts that the imposition of the new NES provisions on existing agreements supports the need for item 40 and that the capacity to give retrospective operation to a determination provides protection from unknowing breach. It is appropriate that applications for determinations are confined to persons covered by the enterprise agreement.

Conclusions

38. Noting its recommendation the Australian Chamber supports passage of the Bill in a form generally consistent with the award clause. Such consistency is reflected in the current drafting of the Bill.
39. Passing the Bill will deliver a consistent minimum family and domestic violence leave standard for all employees following on from the Commission's March 2018 decision and jointly worked up by the parties to provide employees covered by industrial awards with 5 days of unpaid family and domestic violence leave per

³ Paras 177 – 178, *4 yearly review of modern awards – Family and Domestic Violence Leave Decision*, [2018] FWCFB 1691

⁴ Paras 67 – 68, *4 yearly review of modern awards – Family and Domestic Violence Leave Decision*, [2018] FWCFB 1691

⁵ Para 182, *4 yearly review of modern awards – Family and Domestic Violence Leave Decision*, [2018] FWCFB 1691



- year. As well as submissions and witnesses the Commission drew on over 100 articles and reports referred to in submissions and over 40 additional sources searched by its internal research.⁶
40. In its preparation for the matter which came on in the Commission, the Australian Chamber became more aware of what individual employers were doing when they became aware of an employee who was in trouble. In small workplaces where relationships are much more informal and interpersonal it was clear that there were two strands of response, not always mutually exclusive, and that many employers tried to go the extra mile. Many employers didn't know what they should do or where to get advice about how to help the employee, and many employers wanted to help to resolve the problem – something which they did not have the training to do.
 41. Domestic violence is a serious community issue and victims must have access to support and services. When employees confront difficult personal circumstances or distress, employers show compassion and will work with them to understand what they can do to help. This might be access to time out of the workplace, flexible working arrangements, helping them to connect to support and services or providing a safe place away from the home – sometimes this safe place might be in the workplace itself. The first sign an employee is in trouble is not always the employee seeking time from work. In many cases the workplace was somewhere that the employee could make calls and undertake searches and somewhere that the employee could store documents and items.
 42. The Committee might wish to address the need for greater awareness about where to seek advice and where to suggest to people they might go.
 43. The Bill, if passed, will set a minimum employment standard, just like the minimum standard that applies to employees under awards. Just like the family and domestic violence leave provisions in awards, the proposed laws won't prevent businesses from providing more support where they are in a position to do so. Many large companies are already offering generous and diverse support mechanisms via company policies and formalised enterprise agreements. They do this voluntarily and this it to be applauded but the type of support a large and sophisticated corporation can offer will differ from the type of support a small or family centred business will be in a position to provide.

⁶ Research Reference List – Material to assist AM2015/1 – Family and domestic violence clause, Fair Work Commission, September 2017



About the Australian Chamber

The Australian Chamber of Commerce and Industry is the largest and most representative business advocacy network in Australia. We speak on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses are also able to be members of our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, employing over 4 million Australian workers.

The Australian Chamber strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.



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