

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

**Submissions on the preliminary views
expressed by Deputy President
Gooley and Commissioner Spencer**

Family and Domestic
Violence Clause
(AM2015/1)

30 August 2017

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GROUP

4 YEARLY REVIEW OF MODERN AWARDS

AM2015/1 – FAMILY AND DOMESTIC VIOLENCE CLAUSE

SUBMISSIONS ON THE PRELIMINARY VIEWS EXPRESSED BY DEPUTY PRESIDENT GOOLEY AND COMMISSIONER SPENCER

1. INTRODUCTION

1. This submission is made by the Australian Industry Group (**Ai Group**) in response to the Statement and Directions ¹ issued by the Fair Work Commission (**Commission**) on 3 August 2017 in respect of the Family and Domestic Violence Leave Clause Case.
2. The Directions clarified that the further proceedings in the Case have the following scope:

Preamble

These directions concern the further proceedings in respect of the preliminary views expressed by the majority (Deputy President Gooley and Commissioner Spencer) ([2017] FWCFB 3494 at [6]) that:

- (i) All employees should have access to unpaid family and domestic violence leave.
 - (ii) Employees should be able to access their NES entitlement to personal/carer's leave for the purpose of taking family and domestic violence leave.
3. The following List of Issues was included as Attachment B to the Commission's Statement and Directions:

A. Unpaid Domestic Violence Leave

1. Should there be an entitlement to access unpaid domestic violence leave in Modern Awards?

¹ [2017] FWCFB 4047

2. If there is to be an entitlement to unpaid domestic violence leave in Modern Awards, then:
 - 2.1 What is the extent of the entitlement to unpaid domestic violence leave (i.e. quantum)?
 - 2.2 The circumstances in which the leave entitlement arises, including:
 - (a) the definition of 'family and domestic violence' for the purposes of the clause;
 - (b) the circumstances in which leave may be accessed (eg attending an appointment related to the violence); and
 - (c) who may access the entitlement
 - 2.3 Accrual issues, in particular whether the leave entitlement is available in full at the start of the year or accrues.
 - 2.4 How would an employee access the entitlement (notice and evidentiary requirements)?
 - 2.5 The availability of leave for part-time and casual employees.
 - 2.6 The confidentiality of information provided by employees concerning their experience of family and domestic violence.
 - 2.7 Whether taking unpaid family and domestic violence leave counts towards continuity of service.
 - 2.8 Relationship/interaction with other forms of leave.

B. *Extension of the NES entitlement to personal/carers leave to domestic violence leave*

1. Does the Full Bench have jurisdiction to extend the NES entitlement to personal/carers leave to incorporate domestic violence leave?
2. If so, should the NES entitlement to personal/carers leave be extended to incorporate domestic violence leave?
3. If the NES entitlement to personal/carers leave is to be extended to incorporate domestic violence leave, then:
 - 3.1 The circumstances in which the NES entitlement to personal/carers leave can be accessed for the purposes of domestic violence leave? This issue requires a consideration of definitional issues regarding domestic violence for the purposes of the clause, the purposes for which the leave could be accessed and who can access the entitlement.

3.2 Should there be a cap on the amount of personal/carer's leave that can be taken for family and domestic violence leave purposes?

3.3 The issues set out at 2.3 to 2.8 above.

4. The above issues are addressed in the sections which follow.
5. In making these submissions about the preliminary views expressed by Deputy President Gooley and Commissioner Spencer, Ai Group continues to rely upon the submissions and evidence that we have previously filed and presented in the proceedings.

2. UNPAID DOMESTIC VIOLENCE LEAVE

Issue A.1 – Should there be an entitlement to access unpaid domestic violence leave in Modern Awards?

6. In their decision, Gooley DP and Spencer C stated: (emphasis added)

[5] The task before the Full Bench is to determine if it is necessary for the purpose of ensuring that modern awards, together with the NES, provide a fair and relevant minimum safety net to include in all modern awards, an entitlement for employees to take family and domestic violence leave.

[6] We have formed the preliminary view that it is necessary to make provision for family and domestic violence leave but for reasons explained in this decision, have decided to dismiss the ACTU's application because we are not satisfied, at this time, that it is necessary to provide ten days paid family and domestic violence leave to all employees covered by modern awards. We have however, formed the preliminary view that all employees should have access to unpaid family and domestic violence leave and in addition we have formed the preliminary view that employees should be able to access personal/carer's leave for the purpose of taking family and domestic violence leave. We note that the parties have not had an opportunity to make submissions or call evidence on these matters and we intend to provide the parties with such an opportunity prior to finalising our decision.

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[45] While we accept that employees who experience family and domestic violence will have some protection from unfair dismissal, unlawful dismissal and adverse action we do not consider this to be sufficient. If employees have a right to family and domestic violence leave then that would be a workplace right. Employees would gain an additional protection against dismissal because an employee took family and domestic violence leave or proposed to take family and domestic violence leave would be prohibited under the Act. Currently unless the employee has such an entitlement under an enterprise agreement, the employee has no such right unless their circumstances fit the current protections. For example, there is no workplace

right to be absent from work to attend court proceedings or to find alternative accommodation.

[46] We are therefore, not satisfied that the existing entitlements meet the needs of employees who experience family and domestic violence.

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[115] We accept that these difficulties could be overcome by a narrower and more certain clause but given our conclusion about the provision of paid leave it is not necessary for us to include in this decision a re-drafted clause. However, given our preliminary view about the provision of unpaid leave we propose to provide the parties with a proposed clause for their consideration in the next stage of the review.

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[119] Based on the largely uncontested evidence before us we have formed the preliminary view that it is necessary to meet the modern award objectives for provisions to be inserted in modern awards which would allow for a period of unpaid family and domestic violence leave and which would allow employees who experience family and domestic violence access to personal/carer's leave for the purpose of taking family and domestic violence leave. As set out in [45], such unpaid leave serves to confirm the significance of family and domestic violence leave as a workplace right and provides an employment protection in circumstances where there is a need to access such leave.

[120] There has been no opportunity for interested parties to make submissions or call evidence if necessary in relation to our preliminary view and we intend to provide such an opportunity.

7. As Ai Group understands the above, Gooley DP and Spencer C have rejected the notion of a specific entitlement to paid domestic violence leave, but have formed the preliminary view that some amount of unpaid domestic violence leave and some access to personal/carer's leave for domestic violence purposes would be consistent with the modern awards objective and other requirements of the *Fair Work Act 2009 (FW Act)*.
8. Ai Group does not support the inclusion of domestic violence leave provisions in awards (i.e. paid or unpaid) for all of the reasons that we have argued in the proceedings. The provision of assistance to employees affected by domestic violence is a matter that is appropriately dealt with at the enterprise level, not in the award safety net.

9. If, despite Ai Group’s submissions and evidence, the Commission decides to adopt the preliminary view expressed by Gooley DP and Spencer C and include unpaid domestic violence leave provisions in awards, the entitlement needs to be carefully defined and limited.

Issue A.2.1 – If there is to be an entitlement to unpaid domestic violence leave, what quantum of leave is appropriate?

10. If, despite Ai Group’s submissions and evidence, the Commission decides to include unpaid domestic violence leave provisions in awards, Ai Group proposes an annual limit of two days of unpaid domestic violence leave per annum for full-time employees, with a pro rata entitlement for part-time employees. Of course, employees would be free to seek a longer period of unpaid leave from their employer, and employees who need to take a longer period of unpaid leave have various protections under FW Act (e.g. protection against unfair dismissal).
11. A two day leave entitlement applies to the following categories of leave under the FW Act:
-) The two day entitlement to unpaid carer’s leave under s.102 of the FW Act; and
 -) The two day entitlement to compassionate leave under s.104 of the FW Act.
12. In its Outline of Submissions of 1 June 2016, the ACTU summarised research they jointly funded with UNSW (*Implementation of Domestic Violence Clauses – an Employer’s Perspective*, Gendered Violence Research Network, University of NSW, Sydney, November 2016), in stating that “*where employers have implemented family violence entitlements, the number of employees who access the leave, and the number of days those employees request as leave, is low.*”²

² ACTU Outline of Submissions, 1 June 2016, para 7.31.

13. The ACTU state in their Outline of Submissions that of those organisations in the UNSW Study who had received leave requests from employees, the average time off for unpaid leave was 19 hours in the past 12 months.³
14. The UNSW Study largely surveyed employers in the industries of Public Administration and Safety (including Local and State Government) followed by Health and Social Assistance, being industry sectors with a disproportionately high participation of women compared to men. Overall, respondents reported that women made up about 60.6% of their workforces while men made up 39.7%.⁴
15. To the extent that the Commission decides to rely on the abovementioned research, the research does not support a finding that any unpaid leave entitlement should exceed two days per annum.
16. A leave entitlement of more than two days per annum cannot be seen as necessary to meet the modern awards objective, as required by s.138 of the FW Act.

Issue A.2.2 – If there is to be an entitlement to unpaid domestic violence leave, in what circumstances should the entitlement to leave arise?

17. If, despite Ai Group’s submissions and evidence, the Commission decides to include unpaid domestic violence leave provisions in awards, the entitlement needs to be carefully defined and limited.
18. In their decision Gooley DP and Spencer C stated: (emphasis added)

The scope of the clause

[109] The ACTU clause is directed at violence by a person against a current or former partner or member of the person’s family or household. Leave is available for the purpose of “*attending activities related to the experience of being subjected to family and domestic violence.*”

³ ACTU Outline of Submissions, 1 June 2016, para 7.30.

⁴ *Implementation of Domestic Violence Clauses – an Employer’s Perspective*, November 2016, p.5.

[110] The ACTU rejected the submission its definition is too broad and does not require the behaviour to have an impact or an effect on employees. It submitted that this is not relevant because the employer is not required to “*inquire into the circumstances of the violence the employee is being subjected, rather the purpose for which the leave is requested.*”⁵ It is submitted that all the employer is required to do is enquire of the purpose for which they need to be absent from work. The ACTU further rejected the submission that there was no requirement that the leave be necessary, i.e. an employee may be able to arrange the activities for a time he or she was not rostered to be at work. It submitted that there was nothing in its proposal that would prevent an employer negotiating with an employee about this.

[111] We accept the submission that the current clause is too broad and uncertain in its operation.

[112] For example, there is no requirement that the family member who is the perpetrator of the violence reside with the employee who is applying for the leave or that the employee is at risk of repeated violence. So for example, an employee who was assaulted by his or her brother would be entitled to family and domestic violence leave even if the future contact with the brother was unlikely. Further the definition would capture violence committed by a member of the person’s household towards her or him even if no relationship existed between the household member and the employee other than they shared a house. We accept the submission that this is too broad a scope.

[113] Further, we consider that the leave must be necessary to deal with the family and domestic violence. We accept the submission that the expression “attending activities related to the experience of being subjected to family and domestic violence” is too uncertain.

[114] Employees’ experiences of domestic violence can have long term effects both physically and psychologically. An employee whilst fit for work may need on-going counselling or a child may need on-going counselling. We accept the submission that while employers have a role in supporting employees who have experienced family and domestic violence, the provision of leave for family and domestic violence should be limited to dealing with the immediate impact of such violence such as finding alternative accommodation or attending urgent court hearings.

19. The following important principles flow from the above extract:
- a. The family member that is the perpetrator of the violence must reside with the employee who is applying for the leave.
 - b. The employee must be at risk of repeated violence.
 - c. The leave must be necessary to deal with the violence (e.g. the meeting or event to which the application for leave relates cannot occur outside of ordinary working hours).

- d. The leave must be for the purposes of dealing with the immediate impact of the violence.
20. Unpaid domestic violence leave should not be able to be accessed in circumstances where paid personal/carer's leave or unpaid carer's leave can be accessed. This is consistent with the approach in s.103(3) of the FW Act regarding access to unpaid carer's leave. Subsection 103(3) states:
- (3) An employee cannot take unpaid carer's leave during a particular period if the employee could instead take paid personal/carer's leave.
21. As stated by Gooley DP and Spencer C: (emphasis added)
- “[44] We also accept that employees, other than casual employees, who experience family and domestic violence, may be able to use personal/carer's leave, annual leave or long service leave to enable them to deal with the consequences of the violence. An employee who is unfit for work because of either a physical or psychological injury can take personal leave. However, an employee cannot take such leave to attend court or to find alternative accommodation...”

Issue A.2.3 – If there is to be an entitlement to unpaid domestic violence leave, should the leave entitlement be available in full at the start of each year, or accrue?

22. If, despite Ai Group's submissions and evidence, the Commission decides to include unpaid domestic violence leave provisions in awards, the unpaid leave entitlement should not accrue from year to year.
23. Also, the full annual entitlement should not apply for an employee with less than 12 months of service.

Issue A.2.4 – If there is to be an entitlement to unpaid domestic violence leave, what notice and evidentiary requirements should apply?

24. If, despite Ai Group's submissions and evidence, the Commission decides to include unpaid domestic violence leave provisions in awards, the appropriateness of the notice and evidence requirements in section 107 of the FW Act should be considered once the scope of the clause is determined.

Issue A.2.5 – If there is to be an entitlement to unpaid domestic violence leave, should leave be available to part-time and casual employees?

25. If, despite Ai Group’s submissions and evidence, the Commission decides to include unpaid domestic violence leave provisions in awards, it would be logical for part-time employees to be entitled to a pro rata amount of the leave to which full-time employees are entitled.
26. Casual employees should not be entitled to unpaid domestic violence leave. Such employees receive a casual loading to compensate for the fact that they are not entitled to most forms of leave that apply to full-time and part-time employees.

Issue A.2.6 – If there is to be an entitlement to unpaid domestic violence leave, what confidentiality provisions should apply?

27. There are substantial practical problems associated with confidentiality provisions pertaining to leave entitlements (see pages 208 and 209 of Ai Group’s Final Submission of 28 November 2016).
28. Confidentiality provisions are not necessary, as employers typically maintain appropriate levels of confidentiality with personal information relating to employees.

Issue A.2.7 – If there is to be an entitlement to unpaid domestic violence leave, should unpaid family and domestic violence leave count towards continuity of service?

29. This issue is adequately dealt with in section 22 of the FW Act.
30. Unpaid leave does not count as “service” (s.22(2)(b)(i)) but does not break an employee’s “continuous service” (s.22(3)).

Issue A.2.8 – If there is to be an entitlement to unpaid domestic violence leave, what is the relationship / interaction with other forms of leave?

31. If, despite Ai Group’s submissions and evidence, the Commission decides to include unpaid domestic violence leave provisions in awards, unpaid domestic violence leave should not be able to be accessed in circumstances where paid personal/carer’s leave can be accessed. This is consistent with the approach in s.103(3) of the FW Act regarding access to unpaid carer’s leave: Subsection 103(3) states:

- (3) An employee cannot take unpaid carer’s leave during a particular period if the employee could instead take paid personal/carer’s leave.

3. EXTENSION OF THE NES ENTITLEMENT TO PERSONAL/CARERS LEAVE TO DOMESTIC VIOLENCE LEAVE

Issue B.1 – Does the FWC have jurisdiction to extend the NES entitlement to personal/carers leave to incorporate domestic violence leave?

32. The answer to this question is No, for the reasons set out below.

33. Before setting out those reasons, the following background is noteworthy.

34. The ACTU’s claims in these proceedings originally included a claim for award terms providing access to NES paid personal/carer’s leave entitlements for domestic violence leave purposes.

35. Ai Group filed detailed submissions on 20 April 2015 identifying the reasons why the Commission does not have the jurisdiction to include such terms in an award.

36. Prior to the hearing of the jurisdictional issues by a Full Bench of the Commission on 13 August 2015, and after receiving Ai Group’s submissions on 20 April 2015, the ACTU withdrew its claim to extend the NES entitlement to personal/carer’s leave to incorporate domestic violence leave.

37. In correspondence to the Commission dated 15 June 2015, the ACTU gave the following reasons for withdrawing various claims in the proceedings, including its claim to extend the NES entitlement to personal/carer's leave to incorporate domestic violence leave: (emphasis added)

On 23 February 2015, the Fair Work Commission issued directions for interested parties to address the preliminary/jurisdictional issues. The ACTU has filed submissions on 15 June 2015 in response to those Directions.

In those submissions, the ACTU advised that it has revised its claims in these proceedings. In part, the ACTU has done so in response to the objections made by the employer parties, however we also consider that the revised claims will enable the Commission and interested parties to deal with the matter in a more expeditious and efficient manner.

Reason 1: Extending the NES entitlement to personal/carer's leave to include domestic violence leave would be inconsistent with the meaning of "personal/carer's leave" under the FW Act

38. The term "personal/carer's leave" is not defined in The Dictionary in s.12 of the FW Act.
39. In the Work Choices version of the *Workplace Relations Act 1996 (WR Act)*, which operated immediately before the FW Act came into operation, s.240 – Definitions, included the following definition of personal/carer's leave:

Personal/carer's leave has the meaning given by section 244.

40. Section 244 of the WR Act stated:

SECTION 244 – MEANING OF PERSONAL/CARER'S LEAVE

For the purposes of this Division, ***personal/carer's leave*** is:

- (a) paid leave (sick leave) taken by an employee because of a personal illness, or injury, of the employee: or
- (b) paid or unpaid leave (***carer's leave***) taken by an employee to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of:
 - (i) a personal illness, or injury, of the member; or
 - (ii) an unexpected emergency affecting the member.

41. Section 97 of the FW Act (Taking Paid Personal/Carer's Leave) is relatively similar to s.244 of the WR Act except that s.244 encompassed unpaid carer's leave as well as paid personal/carers' leave. Under the FW Act, unpaid carer's leave is dealt with separately in s.103. Even though s.97 of the FW Act is framed in terms of the circumstances when paid personal/carers' leave can be taken, in effect, the section sets out the meaning of paid personal/carers' leave in a similar manner to s.244 of the WR Act.
42. In Justice Jessup's judgment in *Anglican Care v NSW Nurses and Midwives' Association*,⁵ His Honour gave significant weight to the fact that there was no indication in the Explanatory Memorandum or other Parliamentary materials for the FW Act that there was any intention to change particular leave entitlements in the WR Act. Jessup J made the point that in such circumstances, the Court is "*justified in resolving any obscurity of meaning in favour of one which would not amount to a significant alteration in rights and obligations*" (emphasis added):

13 It was in this state of things that the WR Act was repealed and replaced by the FW Act. Section 130 undoubtedly dealt with the matter that had previously been the concern of s 237 of the WR Act, but it did so in different terms. Whereas s 237 had been based upon inconsistency with a law that would prevent or restrict the taking or accruing of leave, s 130(1) disentitled the relevant employee whenever he or she was absent from work on account of an illness or injury for which he or she was receiving compensation payments, and then subs (2) excepted from that disentitling rule any situation in which the taking or accruing of leave was permitted by the law in question. It is not apparent why the legislature made this change: the Explanatory Memorandum for the Bill which became the FW Act is not helpful in this regard. The change was, it seems, wholly responsible for the present litigation: the appellant accepts that, under s 237 of the WR Act, Ms Copas was entitled to accrue annual leave entitlements during the period when she was absent and in receipt of compensation payments under the WC Act.

14 It is tempting to suppose that the change from s 237 of the WR Act to s 130 of the FW Act was a change of a kind referred to in s 15AC of the *Acts Interpretation Act 1901* (Cth), but I cannot form the view the new wording was adopted "for the purpose of using a clearer style": regrettably, if anything, the contrary is the case.

15 Nonetheless, there is nothing to suggest that a change in substance was intended with the enactment of s 130 of the FW Act. That does not mean that we should construe this section as though it was in the same terms as s 237 of

⁵ [2015] FCAFC 81

the WR Act. It was and is in its own terms, and effect must be given to them as they stand in the statute. But it does mean that we are justified in resolving any obscurity of meaning in favour of one which would not amount to a significant alteration in rights and obligations arising under the section. On the case of the appellant, there was such an alteration, and it was, moreover, one which cut back the entitlements which employees previously had under the WR Act. I would not, however, impute to the legislature an intention to give effect to such an alteration, at least without some appropriate indication in the Explanatory Memorandum or other Parliamentary materials.”

43. Also, in *Re Canavan Building Pty Ltd*⁶, a Full Bench of the Commission considered the meaning of the term “paid annual leave” and decided that it was important to take the historical context into account:

[46] The historical context is of significant assistance in understanding the provisions of Division 6 of Part 2-2. (Footnote) The enactment by the legislature of a NES entitlement to paid annual leave in the Act did not occur in a vacuum, but rather against the lengthy historical background of the development and establishment of paid annual leave as a standard industrial entitlement through decisions and awards of industrial tribunals and earlier State and federal statutory provisions. We consider that we are entitled, under s.15AB(1)(a) of the *Acts Interpretation Act 1901* (Cth), to have regard to that historical context in order to confirm that the meaning of “paid annual leave” and s.90 “is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act”.

Footnote: See *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* [2013] HCA 36 at [45], [52]-[59] for an example of the way in which historical context may be used as an aid to statutory interpretation.

44. It cannot be legitimately concluded that the Legislature intended that the concept of “personal/carer’s leave” have a wider meaning than it had under the WR Act, given the historical context associated with personal/carer’s leave, and the absence of any such indication in the Explanatory Memorandum or other Parliamentary materials relating to *Fair Work Bill 2008*. The explanation about s.97 in the Explanatory Memorandum simply states:

Clause 97 – Taking paid personal/carer’s leave

392. An employee may take paid personal/carer’s leave:

- if the employee is not fit for work because of a personal illness, or personal injury; or
- to provide care or support to a member of the employee’s immediate family, or a member of the employee’s household, who requires care

⁶ [2014] FWCFCB 3202.

or support because of a personal illness or personal injury, or an unexpected emergency.

393. The legislative note that follows this clause is a reminder of the need to comply with the notice and evidence requirements set out in clause 107 to be entitled to take paid personal/carer's leave.

45. In effect, the meaning of the term "paid personal/carer's leave" is found in s.97 of the FW Act.
46. An award provision which purported to extend "paid personal/carer's leave" to include circumstances beyond those set out in s.97 (e.g. to include leave to attend a Court hearing or to arrange emergency accommodation) would be inconsistent with the meaning of the term "paid personal/carer's leave" in the Act.

Reason 2: Extending the NES entitlement to personal/carer's leave to include domestic violence leave would exclude provisions of the NES

47. Subsection 55(1) provides that a modern award must not exclude any provision of the NES.
48. There are exceptions to the rule in s.55(1) in subsections (2), (3), (4) and (5).
49. Subsections 55(2) and (3) provide that where the NES expressly permits an award to include a term, then such term does not exclude the NES.
50. Division 7 of Part 2-2 of the FW Act identifies certain terms about personal/carer's leave and compassionate leave that can be included in a modern award, and hence do not exclude the NES as a result of s.55(2) and (3), namely:
 - a. Terms relating to the cashing out of paid personal/carer's leave (s.101);
and
 - b. Terms relating to kind of evidence that an employee must provide in order to take paid personal/carer's leave, unpaid carer's leave or compassionate leave (s.107(5)).

51. It can be seen that an award term extending the NES entitlement to personal/carer's leave to include domestic violence leave, is not a term expressly permitted to be included in the NES and hence s.55(2) and (3) do not operate to prevent the term excluding the NES and breaching s.55(1).
52. It is obvious that a term extending the NES entitlement to personal/carer's leave to include domestic violence leave would represent a major change in the safety net and hence could not be legitimately considered:
 - a. an ancillary or incidental term, as permitted under s.55(4)(a); or
 - b. a term having the same or substantially the same effect as provisions of the NES, as permitted by s.55(5).
53. This only leaves s.55(4)(b) to be considered, i.e. terms that "supplement" the NES.
54. Award terms can only supplement the NES if *"the effect of those terms is not detrimental to an employee in any respect when compared to the National Employment Standards"*.
55. An award term that permitted paid personal/carer's leave to be used for a purpose other than those identified in s.97 of the FW Act would result in many employees who take the leave for domestic violence purposes, not having personal/carer's leave available when they ill or injured or need to provide care to a family or household member, who is ill, injured or experiencing an unexpected emergency. Accordingly, such a term would be detrimental to many employees in these important respects, and hence would breach s.55(1) by excluding the NES.
56. The term would also be of no effect due to s.56 of the Act.
57. The use of the phrase "in any respect" in s.55(4) of the FW Act suggests that a very broad assessment must be made of any detriment that may arise because of the operation of a term.

58. The meaning to be attributed to the term “exclude” in s.55(1) was considered by a Full Bench of the Commission in *Re Canavan Building Pty Ltd.*⁷ The Commission was there considering whether an enterprise agreement term excluded the entitlement to “paid annual leave” under s.87(1) and the requirement for payment in respect of annual leave in s.90(1) (emphasis added):

[36] Section 55(1) of the Act relevantly provides that an enterprise agreement “*must not exclude*” the NES or any provision thereof. It is not necessary that an exclusion for the purpose of s.55(1) must be constituted by a provision in the agreement ousting the operation of an NES provision in express terms. On the ordinary meaning of the language used in s.55(1), we consider that if the provisions of an agreement would in their operation result in an outcome whereby employees do not receive (in full or at all) a benefit provided for by the NES, that constitutes a prohibited exclusion of the NES. That was the approach taken by the Full Bench in *Hull-Moody*. The correctness of that approach is also confirmed by the Explanatory Memorandum for the *Fair Work Bill 2009* as follows:

"209. This prohibition extends both to statements that purport to exclude the operation of the NES or a part of it, and to provisions that purport to provide lesser entitlements than those provided by the NES. For example, a clause in an enterprise agreement that purported to provide three weeks' annual leave would be contrary to subclause 55(1). Such a clause would be inoperative (clause 56)."

59. The above decision makes it clear that an agreement term (and similarly an award term) cannot result in an outcome whereby an employee does not receive an NES entitlement *in full*. If an award term enables personal/carer's leave entitlements to be accessed for domestic violence purposes, whenever an employee takes personal/carer's leave for domestic violence purposes that extend beyond those in s.97 (e.g. attending a Court hearing or arranging emergency accommodation), the employee will no longer be entitled to the NES personal/carer's leave entitlement *in full*.
60. The effect of s.55(1) was also considered by a five Member Full Bench of the Commission in *4 yearly review of modern awards—Alleged NES Inconsistencies*.⁸ The following extract from the decision relates to various

⁷ [2014] FWCFB 3202.

⁸ [2015] FWCFB 3023

provisions in award dealing with transfer of employment and annual leave.

The Full Bench relevantly stated: (emphasis added)

[37] We consider that the modern award provisions in question generally are clearly inconsistent with s.91(1). Section 55(1) requires, relevantly, that a modern award “*not exclude the National Employment Standards or any provision of the National Employment Standards*”. Section 91(1) is a provision of the NES (being contained within Division 6, Annual Leave, of Part 2-2, The National Employment Standards), and the modern award provision excludes s.91(1) in the sense that in their operation they negate the effect of the subsection. A provision which operates to exclude the NES will not be an incidental, ancillary or supplementary provision authorised by s.55(4). Nor do we consider that the provisions in question are to be characterised as dealing with the taking of paid annual leave such as to be authorised by s.93(4); they are rather concerned with the quantum of the annual leave entitlement for which the second employer is liable.

61. An award term that enables personal/carer’s leave entitlements to be accessed for reasons beyond those in s.97 of the Act, would partially “negate the effect of” s.97 of the FW Act and therefore would operate to exclude the NES.
62. Also, an award term that enables personal/carer’s leave entitlements to be accessed for reasons beyond those in s.97 of the Act, would partially “negate the effect of” s.96(1) of the FW Act which states:

For each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer’s leave”
63. If paid personal/carer’s leave is able to be taken for reasons beyond those in s.97, the leave cannot be legitimately considered to be “paid personal/carer’s leave”, and the employee would no longer be entitled to take the full NES entitlement of 10 days per year of paid personal/carer’s leave. An award provision with this effect would exclude the NES and breach s.55(1).
64. For the above reasons, the Commission is not empowered to include a clause in an award that extends the NES entitlement to personal/carers leave to incorporate domestic violence leave.

Issue B.2 – If the FWC have jurisdiction to extend the NES entitlement to personal/carers leave to incorporate domestic violence leave, should the NES entitlement be extended?

65. Ai Group submits that the FWC does not have the jurisdiction to extend the NES entitlement to personal/carers leave to incorporate domestic violence leave.

Issue B.3.1 – If the NES entitlement to personal/carers leave is to be extended to incorporate domestic violence leave, then in what circumstances should the NES entitlement be able to be accessed?

66. Ai Group submits that the FWC does not have the jurisdiction to extend the NES entitlement to personal/carers leave to incorporate domestic violence leave.

Issue B.3.2 – If the NES entitlement to personal/carers leave is to be extended to incorporate domestic violence leave, should there be a cap on the amount of personal/carer’s leave that can be taken for family and domestic violence leave purposes?

67. Ai Group submits that the FWC does not have the jurisdiction to extend the NES entitlement to personal/carers leave to incorporate domestic violence leave.

Issue B.3.3(a) – If the NES entitlement to personal/carers leave is to be extended to incorporate domestic violence leave, should the leave entitlement be available in full at the start of each year, or accrue?

68. Ai Group submits that the FWC does not have the jurisdiction to extend the NES entitlement to personal/carers leave to incorporate domestic violence leave.

Issue B.3.3(b) – If the NES entitlement to personal/carers leave is to be extended to incorporate domestic violence leave, what notice and evidentiary requirements should apply?

69. Ai Group submits that the FWC does not have the jurisdiction to extend the NES entitlement to personal/carers leave to incorporate domestic violence leave.

Issue B.3.3(c) – If the NES entitlement to personal/carers leave is to be extended to incorporate domestic violence leave, should leave be available to part-time and casual employees?

70. Ai Group submits that the FWC does not have the jurisdiction to extend the NES entitlement to personal/carers leave to incorporate domestic violence leave.

Issue B.3.3(d) – If the NES entitlement to personal/carers leave is to be extended to incorporate domestic violence leave, what confidentiality provisions should apply?

71. Ai Group submits that the FWC does not have the jurisdiction to extend the NES entitlement to personal/carers leave to incorporate domestic violence leave.

Issue B.3.3(e) – If the NES entitlement to personal/carers leave is to be extended to incorporate domestic violence leave, should such leave count towards continuity of service?

72. Ai Group submits that the FWC does not have the jurisdiction to extend the NES entitlement to personal/carers leave to incorporate domestic violence leave.

Issue B.3.3(f) – If the NES entitlement to personal/carers leave is to be extended to incorporate domestic violence leave, what is the relationship / interaction with other forms of leave?

73. Ai Group submits that the FWC does not have the jurisdiction to extend the NES entitlement to personal/carers leave to incorporate domestic violence leave.