

Family and Domestic Violence Leave Model Award Term

Fair Work Commission

Matter No: AM2015/1

Submissions – Family and Domestic Violence Leave Model Award Term

Master Electricians Australia (MEA) is a modern trade association representing electrical contractors. A driving force in the electrical industry and a major factor in the continued success and security of electrical contractors, MEA is recognised by industry, government and the community as the electrical industry's leading business partner, knowledge source and advocate.

MEA currently has a membership base of approximately 3000 electrical contractors Australia-wide, the vast majority of which are small businesses with fewer than 20 employees.

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

MEA submits that the elements set out are the key issues that ought to be considered first for the preparation of a model term.

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

MEA submits that a detailed definition should be inserted into the award. Those utilising the award will need guidance on what is within the meaning of family and domestic violence without having to refer to other material.

Accordingly, MEA prefers the Family Violence – A National Legal Response definition as it provides a reasonably clear and relevantly broad scope of circumstances to ensure that the intended coverage is captured.

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

MEA submits that a list of situations is appropriate for those utilising the award practically speaking will need guidance on the occasions and will not have the benefit of the knowledge of the lengthy and complicated arguments before the Commission regarding the intended scope. Rather, they will rely on the wording in the award itself.

As such, MEA prefers the award list such that they encompass situations limited to; *where they have a court appointment, need to meet their lawyer, need to make alternative housing arrangements or need to make alternative care arrangements for a dependant.*

Additional situations listed in the background paper include occasions in which an employee is able to access other forms of leave; such as injury or an unexpected emergency for personal leave.

The evidentiary requirements should be complimentary to substantiate that the leave is taken for reasons that it aligns with the relevant listed situations.

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

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

MEA foresees difficulties for employees and employers in the practical application of this term. Particularly, where an employer is in a position of considering if an employee is a victim, witness or alleged perpetrator and therefore, under an exclusive term, may not be eligible to the leave as a result of their status.

The employer should not be placed in a situation where they are required by circumstance to make a judgement of innocence or guilt of the employee making application for leave. Australian law is founded on concepts of natural justice and innocence until proven guilty.

While unpalatable if the employee is later found guilty it is not the place of an employer to play judge, jury and executioner on matters outside of the employment relationship. Alternatively, if an employer was to refuse an application on the basis that the employee was an alleged perpetrator, and later found innocent, would the employer have to adjust leave balances on the basis that they were entitled to the leave.

Further, as soon as this term is inserted into the award it will create a workplace right. Given the broad nature of general protections claims; and reverse onus of proof an aggrieved employee could make application against their employer for 'harming' their employment as a result of not approving applications on the presumption of guilt. There is no cap to these claims, as is commonly identified, and there is prospect that employees could be paid for hurt and humiliation for the leave not being approved. While perhaps not the intended use of the general protections provisions the Commission needs to be mindful of creating further scope for unique or vexatious claims.

Accordingly, MEA submits that the terminology "exposed to family or domestic violence" is suitable for this purpose.

Further, while MEA does not support perpetrators of family violence being entitled to access the benefits of leave entitlements it does not envisage a viable or practical alternative other than by covering all parties. MEA has tried for over 2 years to engage with Union representatives on this specific issue. Union officials are either unwilling or reluctant to engage in meaningful discussion to address the topic which limits perpetrators and does not disadvantage victims but which supports the legal human right of innocent until proven guilty.

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

MEA submits that casual employees who are engaged on a regular and systematic basis should be able to access unpaid family violence leave. This approach is consistent with casual entitlement to other forms of leave, such as compassionate leave or unpaid carer's leave.

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

MEA submits that the 'permissible occasions' as is the case for compassionate would be appropriate; with a maximum of two days per occasion. This would be consistent with compassionate leave and reasonable given the term is attempting to address circumstances affecting an employee which are subject to variable factors.

MEA submits that 'permissible occasions' would negate the need to consider accruals and any requirement for the entitlement to accrue from year to year.

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

MEA submits that the evidence requirements of the leave ought to be correspondingly narrow as they relate to the list of circumstances. Further, the evidentiary requirements ought to be sufficiently clear about the nature of the leave being claimed and the length of time off.

Employers are already sufficiently frustrated with a lack of information regarding medical leave information provided by the employees. Accordingly, MEA submits that the evidence terms included in the award should be comprehensive enough so as to provide the employer with clear information that the leave is being sought due to family and domestic violence and that they are/were required to attend to a matter arising. Further, the length of time required to attend to the matter, for example, the duration of a meeting with a lawyer should be a requirement of the evidence.

MEA does not support that an employee ought to be able to provide written advice or a statutory declaration. The entitlement is intended to support those employees who are seeking time off in order to respond to, make arrangements to prevent or prosecute situations of domestic and family violence. This action is not typically taken in isolation and accordingly it is not unreasonable for the claim to be corroborated by some other party.

MEA submits the corroborating evidence could include a statutory declaration from another third-party organisation who is involved the process of housing or assisting person's experiencing domestic and family violence such as a shelter.

Evidentiary requirements must adequately substantiate the claim so the employer can be satisfied that the leave is being claimed appropriately and not being misused.

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

MEA submits that any information revealed to the employer in relation to the leave would be subject to the requirements of the Fair Work Act with respect to the disclosure of employee records only to those parties provided by the legislation.

The current provisions have not been identified as inadequate when dealing with other employee personal information such as medical information or financial information to third parties. Permission is sought by the employer before revealing this information.

MEA submits that the Federal Government should support employers and employees through an education campaign regarding these new provisions and their practical application.