IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 – Four Yearly Review of Modern Awards

AM2015/1

OUTLINE OF SUBMISSIONS IN REPLY
ON BEHALF OF
THE AUSTRALIAN COUNCIL OF TRADE UNIONS

DATE: 5 October 2015

D No.: DNo. 105/2016

Lodged by: ACTU

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Introduction

1. These submissions are filed in reply to the submissions of the employer parties filed between 16 and 19 September 2016, and are made further to submissions of the Australian Council of Trade Unions (**ACTU**) dated 1 June 2016.

2. Seven employer parties have filed submissions in response to the ACTU's application. The most substantive submissions have been filed by the Australian Industry Group (**AIG**), the only employer party to file any evidence. Submissions have also been filed by Aged Care Services Australia Group (**ACSAG**), the National Farmer's Federation (**NFF**), the Australian Chamber of Commerce and Industry (**ACCI**), the Australian Meat Industry Council (**AMIC**), the Australian Federation of Employers and Industries (**AFEI**), and the Pharmacy Guild of Australia (**PGA**) (together, **the employer parties**).

3. There is considerable overlap in the employer submissions. The AFEI is a member of ACCI and adopts the submissions of ACCI. The submissions of the PGA expressly adopt the submissions of ACCI. The submissions of ACCI, ACSAG, the NFF and the AMIC contain similar matters to those raised in the AIG submissions. For convenience, these submissions largely refer to the AIG submissions.

4. These submissions address the following matters raised by the employer parties:

   Part A – The relevant statutory framework.

   Part B – The significance of family and domestic violence (**FDV**).

   Part C – The necessity of the clause.

   Part D – The interaction between modern award entitlements and the National Employment Standards (**NES**).

   Part E –The operation of the ACTU's proposed clause, including the confidentiality clause and the remaining jurisdictional objections to that clause.

5. It has not been possible to address each and every matter raised in the employer parties' submissions in the time available for reply material. However, both the ACTU and the employer parties have previously filed comprehensive written submissions outlining their respective positions. In addition, the parties will file any agreed statement of facts by 31 October 2016, and the Full Bench will hear evidence between 14 November 2016 and 2 December 2016. Further, attached to these submissions at **Annexure A** is an amended proposed clause aimed at addressing several of the employer parties' concerns.

6. Taking into account these circumstances, the ACTU reserves its right to address the employer submissions in greater detail following the close of evidence and the clarification of the issues between the parties.

A THE STATUTORY FRAMEWORK

Relevant principles

7. There appears to be little dispute between the parties about the applicable principles relevant to the task of the Full Bench in conducting the four yearly review of modern awards. However, two matters require a response.

8. First, AIG correctly note that in the *Preliminary Jurisdictional Issues* decision, the Full Bench stated that in conducting the four yearly review, it was appropriate that the Commission take into account previous decisions relevant to any contested issue.[1] However, in this case, there is no previous decision to follow (or from which to depart).

9. Equally correctly, AIG note that the Full Bench stated in the *Preliminary Jurisdictional Issues* decision that in conducting the review, the Commission will proceed on the basis that the modern award being reviewed achieved the modern awards objective at the time that it was made.[2] It is not clear how this statement applies to the determination of a common issue. In statements regarding the hearing and determination of common issue claims, including this claim, Ross J held that "*the characterisation of a claim as a common issue… does not involve any assumption that, if granted, the variation would apply consistently across all or most modern awards*",[3] and that the result in a common issue claim "*may result in the Full Bench issuing determinations varying particular modern awards or issuing statements of principle that may be considered when reviewing individual modern awards*".[4] (This approach has been followed in the review of annual leave as a common issue in the four yearly review). Further, the assumption that the modern award under review achieved the modern awards objective at the time it was made does not preclude the introduction of new terms in a subsequent review. It cannot be the case that if a modern award made in 2010 contains no reference to a particular workplace entitlement (for example, to paid leave for persons affected by family and domestic violence), then it follows that the Commission considered and rejected that entitlement on the basis that the award met the modern awards objective without it. Such a construction would

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1 AIG submissions, [37], quoting *4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (***Preliminary Jurisdictional Issues* decision**), [27].

2 AIG submissions, [36], quoting *Preliminary Jurisdictional Issues* decision, [24].

3 *4 Yearly Review of Modern Awards – Common Issues – Statement* [2014] FWC 8583, [15].

4 *4 Yearly Review of Modern Awards – Common Issues – Statement and Directions* [2014] FWC 1790, [6].

militate against the introduction of any new award entitlement, and would undermine the function of the four yearly review and the modern awards objective.

B THE SIGNIFICANCE OF FAMILY AND DOMESTIC VIOLENCE

10. At Part 6 of their submissions, AIG raise two principal objections to the inclusion of paid FDV leave in modern awards. First, they argue that it is not the Commission's role to *"identify and prioritise specific social issues for the purposes of creating new minimum safety net standards*.[5] Second, AIG notes its concern that "*if the claim were successful, it may result in further calls from the union movement for additional forms of leave or otherwise … resulting in continual claims to expand the minimum safety net in a manner that would be contrary to the need to ensure a stable and sustainable modern award system"* per s. 134(1)(g) of the FW Act. Each objection is addressed below.

11. Firstly, it is inaccurate to state as the AIG submissions do, that the Commission has *identified* and *prioritised* family and domestic violence as a matter to be addressed by a modern award clause. The exercise of identification and prioritisation has been performed by the ACTU, as it has been performed by each party moving an amendment to a modern award or awards. The role of the Full Bench is to assess the merits of the application put before it, by reference to Divisions 2–4 of Part 2-3 of the FW Act. In performing this task, it is appropriate for the Commission to take into account the evidence before it, including evidence of the significance and prevalence of family and domestic violence across the Australian community.

12. Moreover, it is entirely consistent with the role and function of the Fair Work Commission and its predecessors to consider proposals for amendments to terms and conditions of employment that have broad application across awards, and decide those proposals on the basis of the evidence and within the statutory framework.

13. As observed by the Full Bench in a decision concerning annual leave:

" *…The Review is essentially a regulatory function and the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions. The role of modern awards and the nature of the Review are quite different from the arbitral functions performed by the Commission in the past. In the Review context, the Commission is not creating an arbitral award in settlement of an inter partes industrial dispute – it is reviewing a regulatory instrument"*[6] [emphasis added]

14. Many workplace entitlements dealing with various social issues and concerns now enshrined in legislation have their origin in decisions of the industrial umpire, including maternity leave,

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5 AIG submissions, [55].

6 [2015] FWCFB 3406 at [156]

paternity leave, and adoption leave;[7] the right of parents and carers to seek flexible working arrangements;[8] carer's leave;[9] reasonable working hours;[10] and redundancy benefits.[11]

15. Many applications before the Fair Work Commission as part of the four-yearly review of modern awards ask the Commission to prioritise and respond to current social issues and concerns. For example, AIG's application to vary penalty rates payable in modern awards is seeking the equalisation of penalty rates payable on weekends, which is partly justified by asking the Commission to determine that Sundays are no longer 'special' such as to warrant a higher penalty rates.[12]

16. AIG's submissions argue that family and domestic violence is just one of many forms of crime against the person, and one of numerous social and personal problems that can have a serious impact on the lives of employees.[13] AIG's submissions traverse statistics regarding personal crime, divorce and relationship breakdown, drug and alcohol addiction, suicide, and death and bereavement,[14] and argue that "*the Commission is being asked to determine…that a victim of family and domestic violence is more deserving of leave than a victim of a serious assault by a stranger*."[15]

17. AIG is of course correct to submit that there are a number of social and personal problems that can and do have a serious impact on the lives of employees – this is not controversial. The ACTU has elected to prioritise the issue of family and domestic violence in this Review because of the serious and pressing nature of the problem, its prevalence across the community, its impact on the working lives of those subjected to it, and the capacity of the workplace (in particular through the provision of paid leave) to play an effective role in supporting people to escape violence, therefore contributing to the prevention of family and domestic violence.

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7 Per *Federated Miscellaneous Workers Union of Australia v ACT Employers Federation* (*Maternity Leave Case)* (1979) 218 CAR 120; *Re Clothing and Allied Trades Union of Australia (Clothing Trades Adoption Leave)* (1985) 298 CAR 321; the *Parental Leave Case* (1990) 36 IR 1; and the *Parental Leave – Casual Employees – Test Case (Re Vehicle Industry – Repair, Services and Retail Award 1981)* (2001) 107 IR 71.

8 Per the *Family Leave Test Case (November 1994)* (1994) 57 IR 121; the *Personal/Carer's Leave Test Case – Stage 2 Decision – November 1995* (1995) 62 IR 48; and the *Parental Leave Test Case 2005* (2005) 143 IR 245.

9 Ibid.

10 *Re Working Hours Case July 2002* (2002) 114 IR 390.

11 Per the *Termination, Change and Redundancy Case*, Print F6230, 2 August 1984, (1984) 294 CAR 175; and the *Redundancy Case 2004*, PR032004, 26 March 2004 and PR062004, 8 June 2004.

12 See AIG final submissions in *4 Yearly Review of Modern Awards – Penalty Rates*, dated 5 February 2016 at [120], available at https://www.fwc.gov.au/sites/awardsmodernfouryr/AM2014305-finsub-AiG-080216.pdf.

13 AIG submissions, [52]–[54], [59].

14 At [58]–[89] of the AIG submissions.

15 AIG submissions, [57].

18. The second principal objection made by AIG is effectively a 'floodgates' argument. AIG propose, without evidence and without basis, that if the ACTU is successful in this application, then other applications may follow. The argument is trite. Any decision of the Fair Work Commission, whether in a modern award review or otherwise, may have an impact on how industrial parties choose to conduct future proceedings in the jurisdiction. However, there is no part of the statutory framework for four yearly reviews that allows the Full Bench to reject a proposed award amendment that is otherwise meritorious on the basis that it may lead the moving party to make further applications in the future. We do not understand AIG to be seriously contending that the need to maintain a stable and sustainable award system is incompatible with applications for variations to modern awards.[16]

19. Further, the ACTU rejects AIG's characterisation of the Commission's task. The statutory task of the Full Bench is to determine the ACTU's application for paid leave for persons subjected to family and domestic violence, by reference to the modern awards objective in s. 134(1) of the FW Act, and within the parameters of ss. 136–142 and 156 of the FW Act. The Commission is not required by the statutory framework to assess the 'fairness' or 'relevance' of a particular award provision by undertaking a comparative exercise between the actual proposal before it, and hypothetical applications that are not before the Commission.

The prevalence of family and domestic violence – evidence of Dr Peta Cox

20. The ACTU rely primarily on data collected by the Australian Bureau of Statistics in the Personal Safety Survey (**PSS**), and on the expert report of Dr Peta Cox which analyses relevant parts of that data, to demonstrate the prevalence of family and domestic violence.

21. AIG's submissions are critical of the PSS and suggest that the "*various limitations*" of the data render it "*unreliable for the purposes of assessing the extent to which the ACTU's proposed clause might be accessed and consequently the potential impact of the claim*".

22. These criticisms are misplaced for several reasons.

23. First, in several parts of its submissions, AIG erroneously describes the PSS as measuring *incidence* (i.e. the number of individual incidents of family and domestic violence).[17] Dr Cox has prepared a supplementary report (at **Annexure B**), which explains that the PSS in fact provides an estimate of *prevalence* (i.e. the number of people who have experienced family and domestic violence).

24. Second, AIG misunderstands the nature and purpose of the PSS. The PSS is a quantitative survey. It measures prevalence and incident characteristics for a range of violence types. The

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16 See, eg, AIG submissions, [613]–[619].

17 See paragraphs 112, 412, 414, 420 and 583 of the AIG submissions, and Reply Report of Dr Peta Cox dated 28 September 2016.

PSS is not designed to identify causal relationships and cannot be used to make claims about the relationships between variables, e.g. the employment status of a woman and her experience of family and domestic violence.[18]

25. Third, the PSS does not ask respondents if they are covered by modern awards. To the best of our knowledge, there is no data available that disaggregates employees' experiences of crime by employment arrangement.

Family and domestic violence is not a gender-neutral phenomenon

26. AIG submits that because the sample in the PSS consists of 22 per cent men and 78 per cent women, men are under-represented in the survey. No evidence is filed in support of this contention, and it does not appear to be contended that the PSS survey is unreliable or otherwise compromised for that reason.

27. AIG's refer in its submissions to a quote from Mr Paul Mischefski, Vice President of Men's Wellbeing Queensland, to the Senate Finance and Public Administration References Committee regarding the PSS. This quote is not relevant to this modern awards review. Mr Mischevski's submission to the Senate Inquiry is not evidence of the validity or credibility of the PSS, or of anything more than Mr Mischevski's opinion about various matters.

28. AIG's point in making these submissions is unclear, but the complaint appears to be that the ACTU has chosen to direct submissions to the fact that while both men and women can be subjected to family and domestic violence, the evidence shows that women are overwhelmingly more likely to be subject to violence from a male partner. AIG has not filed any evidence to suggest otherwise.

29. Paid family and domestic violence leave is a regulatory measure aimed at addressing a problem that, as a matter of fact, predominantly affects women.

30. The ACTU has previously acknowledged that men can be subjected to domestic violence and should be entitled to access leave under the proposed clause where eligible. The proposed award variation is gender neutral in application.

31. The purpose of AIG's submissions in regard to the 'gendered approach' taken by the ACTU are opaque.

[18] See Supplementary Report of Dr Cox.

C NECESSITY

The adequacy of existing workplace entitlements

32. The employer parties argue that paid FDV leave is not necessary, because the FW Act "*provides substantial protections and entitlements for victims of family and domestic violence*",[19] arguing that any assessment as to whether the ACTU's proposed term is necessary must consider whether the existing safety net provisions meet the need identified by the ACTU's proposed variation. The entitlements relied on by the employers are personal/carer's leave, annual leave, long service leave, the right to request flexible work arrangements, individual flexibility arrangements, enterprise agreement terms, and workplace policies.

33. The ACTU agree that in some circumstances, an employee could access existing workplace entitlements for the purposes of dealing with family and domestic violence matters, if eligible.[20] That is not the point.

34. The employers' objection misunderstands the nature of paid FDV leave. Paid leave for persons experiencing family and domestic violence is *not* sick leave, carer's leave, or annual leave. It is intended to allow employees to take an absence from work to attend to activities related to the experience of being subjected to family and domestic violence, without suffering financial disadvantage.

35. The ACTU has addressed the inadequacy of existing entitlements in the primary submissions dated 1 June 2016, and we refer to and repeat those matters here.[21] We also say something more about each of the existing workplace entitlements nominated by the employer parties below.

Personal/carer's leave

36. The NFF correctly describes the ACTU's position when it states that "*an employee who needs to attend court, seek specialist services, or relocate, may not be eligible for personal/carer's leave*".[22] This is the case. The NFF goes on to state that an employee who is unfit for work due to physical or mental illness or injury, or who needs time off to care for a member of their household or family affected by an unexpected emergency, will be eligible for personal leave. The ACTU agrees with this statement. However, personal leave does not answer the need for

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19 AIG submissions, [161]. See also NFF submissions, [65].

20 ACTU submissions, [4.36].

21 ACTU submissions, [4.34] – [4.52]

22 NFF submissions, [66].

leave to, for example, seek specialist services such as housing support services, or to attend court, or relocate in urgent circumstances.

Annual leave and long service leave

37. The purpose of annual leave is to provide employees with a period of rest and recreation.[23] Plainly, attending Court as the applicant in an intervention order, or seeking specialised housing support services to enable an urgent move from a violent household, to take two examples, are not activities related to rest or recreation.

38. Similarly, whereas the initial provision of long service leave was to enable civil servants to return home to Britain after extended service in the colonies, a century later long service leave has been recognised as an entitlement to a period of rest and an opportunity to refresh after an extended period of work. It is based on the notion that long service is of itself deserving of reward and recognition by way of additional leave entitlements, and that refreshment and renewal of workers through accessing a long service leave entitlement contributes to national productivity and social well-being.[24]

Discrimination

39. The NFF submits at [70]–[72] that employees subjected to family and domestic violence are able to, and should, access existing leave entitlements, regardless of the intended purposes of other forms of leave and regardless of any disadvantage that may be caused. The NFF submits further that the fact that such employees may be required (by the absence of a current award entitlement to paid leave) to exhaust other forms of leave is not unfair or unreasonable and does not amount to discrimination.

40. In response, the ACTU repeats and relies on its earlier submissions dated 1 June 2016, in particular paragraphs 4.39 and 4.40 and 9.1 – 9.16, and the submissions of the Australian Human Rights Commission, in particular paragraphs 63-67, which outlines how current leave entitlements may result in disadvantage to employees subjected to family and domestic violence.

Individual flexibility arrangements in the *Fair Work Act* and in modern awards

41. Section 65(1A)(e) of the FW Act grants an employee the right to request a change in working arrangement if that person is experiencing violence from a member of her or his family. The employer may refuse the request only on reasonable business grounds.

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23 *Re 4 Yearly Review of Modern Awards – Annual Leave* [2015] FWCFB 3406, [117].

24 ACTU Submission to Parliament of Victoria Economic, Education, Jobs and Skills Committee 'Inquiry into Portability of Long Service Leave Entitlements', 7 August 2015, at Page 6

42. The concept of a change in working arrangements, even temporarily, suggests some degree of predictability about the employee's situation that lends itself to a new schedule. The provisions of s. 65 support this contention. The request must be in writing, and must set out the details of the change sought and the reasons for the change: s. 65(3). The employer must give the employee a written request within 21 days, and if applicable, must include details of the reasons for refusal: ss. 65(4), (6). What constitutes 'reasonable business grounds' is not constrained, but may include difficulties in rearranging the work arrangements of other employees, or that the new arrangement would likely result in a significant loss in efficiency or productivity, per s. 65(5A).

43. None of these provisions suggest that the right to request flexible work arrangements could be engaged to ask for a day off to attend court, as suggested by AIG.[25] The proposal that s.65(1A)(e) could meet the need for paid leave is even less credible when assessed against the real possibility that an employee subjected to family and domestic violence may require leave on very short notice to attend to urgent matters. For example, if an employee requires leave from work in order to relocate on very short notice, they will not be assisted by the employer's right to consider the request and advise some three weeks later, as per s. 65(4) of the FW Act. By contrast, and by way of example, an employee who is regularly seeing a counsellor to assist with matters relating to family and domestic violence may request to work four instead of five days a week for a period of several months. Such a request is appropriately made under s. 65(1A)(e) of the FW Act. A day of leave is not a 'flexible working arrangement'. It is a one-off event.

44. For the same reasons, the availability of individual flexibility arrangements within modern awards are not appropriate for employees who need ad hoc leave that is responsive to a particular incident or situation.[26]

General protections and unfair dismissal laws

45. AIG contends that unfair dismissal laws provide "substantial protection" to employees who need to be absent from work as a result of family and domestic violence.[27] A similar argument is made with respect to the general protections in the FW Act.[28]

46. In fact, unfair dismissal laws are remedial provisions designed to compensate employees who have already been unfairly treated. It goes without saying that because general protections and

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25 AIG submissions, [167].

26 See AIG submissions, Part 10.

27 AIG submissions, [186].

28 AIG submissions, section 9.5, 79.

unfair dismissal laws operate ex-post, they do not assist workers who seek the support of their employers during times when they may be subject to family and domestic violence.

The role of enterprise agreements and workplace policies

47. It is central tenant of the employer parties' opposition to the ACTU's proposed clause that family and domestic violence leave is better addressed through enterprise bargaining or workplace-level policies and procedures.

48. Both the ACTU and AIG have filed evidence about the number of enterprise agreements that contain clauses addressing family and domestic violence, including the provision of paid leave.[29] The ACTU has also filed witness statements from five union organisers that speak of the difficulty in bargaining with employers on this issue.[30] AIG has filed a witness statement of Matthew Potter of the Spotless Group, who was not involved in bargaining, but who was involved in the introduction of a workplace policy addressing family and domestic violence experienced by Spotless employees.[31]

49. This evidence demonstrates that while some employers and employees are able to successfully negotiate workplace provisions addressing family and domestic violence matters, in the absence of employer support or interest the issue is unlikely to be addressed through bargaining. Further, there is a high degree of variability in bargaining outcomes. The same arguments apply to workplace policies directed to family and domestic violence matters.

50. The employer parties' argument that a 'one size fits all' approach is inappropriate could be said to apply to all minimum standards of employment. The argument fails to recognise that employees' rights should not be wholly dependent on the willingness or capacity of employers to bargain, or even to contemplate, every single issue that may be relevant to employees, particularly matters related to the safety and well-being of employees. Aside from the inherent unfairness of this proposition to employees, it is equally unfair and burdensome on employers to be expected to consider and negotiate each aspect of the employment relationship. Minimum standards and broadly applicable entitlements are efficient, and liberate employers and employees alike from the need to bargain over every aspect of workplace rights and responsibilities.

51. The ACTU submits that workplace policies and bargaining outcomes are relevant to the consideration of whether the proposed variation is necessary for the following reasons:

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29 See Ludo McFerran Report 1 (ACTU); statement of Jenni Mandel (AIG).

30 See statements of Michele O'Neil (TCFU), Mick Doleman (MIF), Brad Gandy (AWU), Michelle Jackson (ASU) and Sunil Kemppi (CPSU).

31 Statement of Matthew Potter, [12], [18]

(a) Employees covered by an enterprise agreement will not be covered by a modern award, per s. 57 of the FW Act. Accordingly, agreement-covered employees' access to entitlements does not obviate the need for a modern award term for award-dependent employees.

(b) Employees without union representation or working in small businesses may be reluctant to raise the issue directly with their employer, not out of any dysfunction in the employer-employee relationship, but because of the highly sensitive nature of the subject of family and domestic violence.

(c) Employees without union representation are far less likely to be covered by enterprise agreements containing paid family and domestic violence leave.[32]

(d) An award term is likely to produce greater efficiencies by providing a clear and consistent minimum standard as a benchmark for bargaining.

(e) There is no evidence that the inclusion of an award term would remove an incentive for bargaining.[33]

(f) There is no evidence that the inclusion of an award term would discourage employers from developing ways to support employees that are tailored to the needs of its business and workforce.[34] By contrast, the evidence of PWC in support of the ACTU's proposed clause suggests that award minima and workplace-specific policies can coexist.

(g) Workplace policies are *ad hoc*, may not be enforceable, and may lead to unequal protection of employees between employers.

(h) If there is no appetite to address family and domestic violence by employers, then the matter is unlikely to be addressed through bargaining or through the development of workplace policies.

(i) It is not fair or reasonable that some employees should have to wait for employers to become comfortable with the idea of providing workplace entitlements to paid family and domestic violence lave. There is no basis for an assertion that workplace entitlements are only meaningful if the employer is fully committed to the process and implementation of the entitlement. If this were the case, then it is apposite that some employers would *never* believe that they should provide workplace entitlements, and their employees would be left out in the cold permanently.

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32 Statement of Jenni Mandell, [22],[36], [45]

33 AIG submissions, [572]–[573].

34 AIG submissions, [555].

52. Finally, we note that the ACTU's application for an award variation is consistent with the proposal of the Australian Law Reform Commission in its 2012 report titled *Family Violence and Commonwealth Laws – Improving Legal Frameworks*.[35]

The utility of the proposed clause

53. It is difficult to reconcile the employer parties' argument with respect to the utility of the proposed variation. On one hand, the employers argue that the cost of the proposed variation will be high – up to $2 billion on ACCI's model. On the other hand, the employers argue that low rates of utilisation mean the clause is not necessary within the meaning of s. 138 of the FW Act.[36]

54. The concepts of 'utilisation' and 'necessity' are not synonymous. It is common for employees not to utilise the full extent of their workplace entitlements. By way of example, AIG and ACCI, among other employer parties, sought to insert a clause into 70 modern awards that would permit employers to direct an employee to take paid annual leave in circumstances where the employee had accrued an excessive amount of annual leave. In granting the application, the Full Bench (Ross J, Harrison SDP and Hampton C) found that "*the evidence clearly establish[ed] that most employees accrue a portion of their paid annual leave entitlement and that a significant proportion of employees have six or more of such accrued leave*."[37] The application in that case was expressly directed to the problem of entitlement under-utilisation. There was no suggestion that the under-utilisation of annual leave meant that annual leave was an unnecessary entitlement; in fact, the opposite proposition was established by the evidence called by the employer parties.[38]

The likely impact of paid family and domestic violence leave on productivity

55. The employer parties dispute the ACTU's contention that paid leave will have a positive impact on the productivity losses attributable to family and domestic violence.

56. The proposed clause is a form of tertiary prevention of family and domestic violence. Prevention strategies can be categorised as primary, secondary, and tertiary.[39] Primary prevention strategies aim to prevent violence before it occurs; secondary strategies involve early detection of risk or manifestation of the problem; and tertiary prevention strategies are designed to respond after violence has occurred. The purpose of tertiary prevention (known

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35 See ACTU submissions, [8.31].

36 See NFF submissions at [73]–[75].

37 *Re 4 Yearly Review of Modern Awards – Annual Leave* [2015] FWCFB 3406, [100].

38 Ibid, [117]–[138].

39 PWC, *A High Price to Pay: The Economic Case for Preventing Violence Against Women* (November 2015) (**PWC Report**), marked as Annexure B to the Witness Statement of Debra Maree Eckersley dated 20 June 2016 (**Eckersley Statement**), 19–20.

also as 'intervention') is not only to support persons subject to current family and domestic violence, but also enable safe escape from dangerous situations, thus reducing or eliminating the opportunity for further violence to occur in the future.[40] In this way, tertiary prevention strategies make an important contribution to the prevention of family and domestic violence.

57. Tertiary prevention strategies, such as paid family and domestic violence leave, form a crucial part of an effective whole of community response to family and domestic violence. The PWC Report estimates that if no further action is taken to prevent violence against women, the cost of such violence will accumulate to $323.4 billion over the thirty year period to 2045.[41] By implementing a tertiary prevention strategy in the form of paid leave for persons subjected to family and domestic violence, employers are contributing to the reduction of this cost.

Family and domestic violence and workplace participation

58. AIG claims that there is insufficient evidence to establish that the experience of family and domestic violence precludes employees from participating in the workforce, or that the introduction of paid leave will increase workforce participation.[42] This is not accurate.

59. First, AIG's submission misunderstands the implication of 'statistical significance' in this context. The evidence in Dr Cox's report as to the absence of a statistically significant variation between employed and unemployed women who experience family and domestic violence [43] does not mean that the finding itself is significant, or has any decision-making utility; rather, it means that it is highly probable that the statistic is reliable. Many women who are subject to family and domestic violence are also employed.

60. Second, the absence of a statistically significant finding with respect to the relationship between the employment status of a woman and her experience of male cohabitating partner violence or intimate partner violence does not reveal anything about the causal relationship between those factors. As set out above, the PSS is a quantitative survey and is not designed to identify causal relationships. The ACTU refers to and relies on the supplementary report of Dr Cox at **Annexure B**.

61. Finally, the ACTU repeats and relies on the material referred to in its primary submissions at paragraphs 4.2 to 4.25 regarding the impact that family and domestic violence has on employee participation rates.

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40 Noting that this preventative measure is not instantaneous, as persons subjected to domestic violence are most at risk of harm when leaving a violent relationship: see further, ACTU primary submissions, [628]

41 See PWC submissions, [14], and PWC Report, 4.

42 See AIG submissions, [585]–[586].

43 See AIG submissions, [582].

The cost of the policy to employers

62. ACCI has prepared a model examining what it claims are the potential direct costs of the ACTU's application.[44] The model at Table E estimates that the cost of 35 per cent of all employees (i.e. 25 per cent of all female employees and 10 per cent of all male employees) taking one day's paid leave per year, paid at the minimum wage, is $205,082,896 and taking ten days leave per year on the same basis would cost employers $2,050,828,965.

63. ACCI has not identified any data source, reasoning or basis for its assumptions that:

(a) The correct workforce to measure is the entire workforce less 17 per cent to account for the public sector;

(b) Of that workforce, 25 per cent of all women and 10 per cent of all men are subjected to family and domestic violence;

(c) Of the proportion of the workforce affected by family and domestic violence, one hundred per cent of them would take some amount of leave.

64. The ACTU has filed relevant evidence addressing prevalence and incidence of family and domestic violence, the proportion of women and men affected by family and domestic violence, and the utilisation rates of existing paid leave entitlements. ACCI's assumptions appear to bear no relation to this evidence, despite the fact that ACCI neither challenges the evidence nor suggests that any of the material filed by the ACTU and other parties is inaccurate insofar as it relates to the actual cost of family and domestic violence leave provided by employers. That evidence includes that:

(a) Telstra employs 33,000 employees across Australia, and introduced paid leave in November 2014. In the eight months to July 2015, 17 employees had used the leave entitlement (12 women and five men), taking a total of 45 days leave.[45]

(b) PWC employs 7,000 employees across Australia, and introduced paid leave in November 2015. PWC filed a witness statement of Debra Eckersley in this proceeding, dated 20 June 2016. Ms Eckersley's evidence was that two requests for leave had been received in the six or so months between November 2015 and June 2016.[46]

65. ACCI's costings model is contained within submissions and does not identify the author of the model, or the basis of the assumptions, meaning that the ACTU is unable to test the model through cross-examination. As a result, the ACTU intends to shortly file expert material directed to assessing the adequacy of ACCI's costings methodology.

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44 ACCI submissions, [8.69]–[8.71].

45 ACTU submissions, [7.32].

46 Eckersley Statement, [33].

Australia's international law obligations

66. The NFF at 46 – 51, and AIG at Part 13, make submissions about Australia's international obligations.

67. The NFF submits that there is no specific obligation under international law to provide universally accessible family and domestic violence leave. This misunderstands the nature of international law. International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights. Through ratification of international human rights treaties, Governments undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties. As submitted by the Australian Human Rights Commission, States have an obligation under general international law and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) to take all appropriate measures to eliminate discrimination against women and, in particular, to assist women to escape and avoid situations of family and domestic violence. The AHRC submissions outline the numerous other international bodies and forums which have prioritised the need for States to take urgent steps to eliminate violence against women.

68. The appropriateness of States' responses depends on all of the relevant circumstances, including the nature of the obligation, the practical demands and urgency of the situation, as well as the resources and capacity of the relevant State.

69. The evidence shows that unacceptably high levels of violence against women persist in Australia; a country with substantial resources and significant capacity to implement measures to address this crisis. It is clear that the provision of paid domestic violence leave for award-dependent employees is consistent with, and would assist Australia to comply with, its international obligations.

70. At Part 13, AIG claims that the ACTU's proposal "does not directly align with developments taking place within the ILO". This is not an accurate assessment. The proposed ILO standard on Gender Based Violence at Work is in the preliminary stages of discussion. While it is correct that the focus of the standard is violence occurring at work, measures aimed at the protection of workers affected by violence are clearly relevant to the standard and will continue to be discussed and debated by the parties as the standard develops.

71. The ACTU repeats and relies on its submissions dated 1 June 2016 at paragraphs 9.1 – 9.39.

D MODERN AWARDS AND THE NATIONAL EMPLOYMENT STANDARDS

72. The NES are not the sole or exclusive repository of minimum terms and conditions of employment. The words of s. 134(1) of the FW Act make it clear that it is the function of modern awards, *together with the NES,* to provide a fair and relevant minimum safety net of terms and conditions of employment.

73. The FW Act expressly contemplates that modern awards will contain terms about matters that are also addressed by the NES, and that modern awards may provide for entitlements beyond those in the NES.

74. Section 55(4) provides that a modern award can include terms that supplement the NES. Section 55(6) makes it clear that if a modern award includes a term that supplements the NES, then the NES entitlement operates as the minimum standard. Section 139(h) provides that modern awards can contain terms about leave. That is, the FW Act expressly contemplates that the NES and modern awards can include minimum standard terms.

75. The ACTU rejects the employer argument that the NES is the *sole* repository of minimum terms and conditions of employment. If that were the case, then the introductory words in s. 134(1) of the FW Act, that require the Commission to ensure that modern awards provide a fair and relevant minimum safety net terms and conditions, *together with the NES*, would have no work to do.

The role of government and of Parliament

76. Federal and state governments have played a significant role in developing, implementing, and designing policies and programs to address the prevalence and incidence of family and domestic violence. These matters are not disputed by the ACTU or by any of the employer parties. Nor is it disputed that, while there is no federal entitlement to family and domestic violence leave for public servants, four out of six states provide paid family and domestic violence leave to their employees, with Tasmania extending other forms of paid leave to those experiencing family and domestic violence.[47]

77. The NFF argues that "*things have not yet reached a point where there is broad community consensus for mandatory paid leave entitlements in all workplaces, large and small*".[48] This argument misses the point. First, it is arguable that the presence of paid FDV leave in the majority of state public sector enterprise agreements, as well as a third of major private sector employers, suggests that considerable community support for paid leave is emerging.

47 See NFF submissions, [40]–[41].

48 NFF submissions, [44].

Secondly, the notion that 'broad community consensus among all workplaces, large and small", is a necessary prerequisite for the introduction of a new award entitlement is misleading. 'Consensus' may never be achieved as it is reasonable to expect that some level of opposition to workplace entitlements may always be present. It is perhaps for that reason that 'consensus' is not any part of the modern awards objective.

78. The employer parties observe that this is the first occasion since *Work Choices* that the Commission has been asked to determine whether awards should contain a new type of leave applicable to all award-covered employees. The ACTU does not resile from that proposition; the application for variation has been made because the need exists for leave entitlements of this nature for award-covered employees.

79. The underlying rationale of the employers' submissions is that it is *preferable* that paid leave for persons affected by family and domestic violence be introduced for all employees by Parliament, rather than by the Fair Work Commission with respect to award-covered employees. This submission simply reflects the employer parties' preference and is not a matter of legal principle.

80. The decisions of the Australian Industrial Relations Commission made during award modernisation that are relied on by AIG do not assist the employer parties.[49]

81. In each of the award modernisation authorities, the AIRC considered whether particular award provisions that supplemented NES entitlements should be included in the relevant modern award. In each occasion cited by AIG, the proposed award entitlement considered by the AIRC was *already* the subject of an NES entitlement. Each of the examples cited by AIG – covering parental leave, jury service leave, pressing/domestic necessity leave (held by the AIRC to be akin to personal or carer's leave) – were expressly provided for in the NES, and it was for that reason that the AIRC determined that any inclusive award-based entitlement would undermine (by providing for greater entitlements) than the minimum standard set in the NES.[50] The same underlying principle applied in the *Decision Re Making of Stage 2 Modern Awards*, where the AIRC held that in making the award modernisation request and legislating the NES, Parliament cannot have intended that the Commission could make general provision for higher standards, i.e. higher than the standards set by the NES, as made clear by the inclusion of these words in the Stage 2 Decision:

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49 See AIG submissions, [230]–[255].

50 *Decision re Making of Priority Modern Awards* [2008] AIRCFB 1000, cited in AIG submissions, [233]–234], [238]–[239]; and *Decision re Making of Stage 4 Modern Awards* [2009] AIRCFB 945, cited in AIG submissions at [254].

> We think that we should give proper weight to the Parliament's decision to regulate minimum standards ***in relation to the matters covered by the NES***.[51]

82. By contrast, the ACTU's proposal for an award variation to provide for paid leave for persons affected by family and domestic violence is not the subject of any National Employment Standard. The ACTU does not seek to supplement an existing minimum standard established by the NES. The award modernisation decisions relied on by AIG are not inconsistent with the ACTU's application.

83. Further, the statement in the *Preliminary Jurisdictional Issues Decision* that the Commission will proceed on the basis that a modern award met the modern awards objective at the time it was made, has little work to do at this stage of the proceedings for the reasons already outlined above at paragraph 9. Even if the ACTU is wrong about this, the assumption that a modern award met the relevant test in 2010 does not preclude the introduction of a new entitlement. To suggest otherwise would be to stymie any application for variation or additional provisions in a modern award.

84. There is nothing in the FW Act to suggest that the Full Bench is prevented from including a new workplace entitlement in all modern awards because the issue has not been considered by Parliament for inclusion in the NES. The introduction of statutory entitlements by the Work Choices legislation through the Australian Fair Pay and Conditions Standards, and later in the form of the National Employment Standards contained in the Fair Work Act, did not operate to constrain or curtail the powers of the Fair Work Commission with respect to the subject-matter of award entitlements except where expressly stated to do so.

85. On the contrary, Parliament has clearly expressed its intention, through the Fair Work Act objectives, the Modern Award objectives and the existence of the four yearly review process, that the Fair Work Commission is authorised and required to make the variations necessary to ensure the maintenance of an award safety net which is fair as well as *relevant* to the needs and concerns of modern workplaces. The variation process provides a crucial mechanism by which to ensure that the modern award component of the safety net continues to respond to the real issues that employees and employers face in their workplaces as they evolve over time. The unacceptably high rate of family and domestic violence in Australia is exactly such an issue.

86. In *Hollis v Vabu (2001) 207 CLR 21*, the High Court observed that it was *"one thing to say"* that *"the common law should develop by analogy to enacted law"*, but it was *"another proposition that the common law should stand still because the legislature has not moved"*.[52]

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[51] *Decision re Making of Stage 2 Modern Awards* [2009] AIRCFB 345, [48] (Giudice J, Watson VP, Watson SDP, Harrison SDP, Acton SDP and Smith C).

87. Although the majority in Hollis was referring to the common law, the underlying principle is apposite.

E THE OPERATION OF THE PROPOSED CLAUSE

88. At Part 14 of its submissions, AIG sets out a series of concerns about the wording and practical operation of the ACTU's proposed clause.

89. The ACTU has considered the matters raised by AIG carefully and in response, proposes a number of amendments to the clause aimed at addressing the majority of the concerns raised.

90. Amended copies of the clause (both marked-up and clean) are attached at **Annexure A**.

91. Below, the ACTU addresses each issue, adopting the order and the headings used by AIG in its submissions.

The definition of 'family and domestic violence' – 'violent, threatening or other abusive behaviour'

92. AIG submits that the meaning of 'violent, threatening or other abusive behaviour' is unclear and potentially too broad to enable effective implementation of the entitlement and ensure that Modern Awards are simple and easy to understand as required by s.134(1)(g).

93. AIG submits further that the definition proposed by the ACTU does not require the behaviour to have an impact or effect on the employee, unlike the definition in the *Family Law Act 1974* which requires the behaviour to have the effect of causing 'coercion, control or fear' in the person experiencing the behaviour.

94. The ACTU submits in reply that the meaning of 'violent, threatening and other abusive behaviour' is evident, and that there is no need to include the effect of the behaviour for the purposes of the award clause. This is 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. (This point is addressed in more detail below). The ACTU's amended clause seeks to clarify the causal connection between the FDV and the purpose for which the leave is requested.

95. AIG also notes that the clause does not limit the entitlement to employees experiencing an ongoing pattern of family and domestic violence. This is correct and appropriate – an employee who experiences a single incident of family and domestic violence should be eligible to apply for paid leave in the same way as an employee experiencing repeated incidents.

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[52] *Hollis v Vabu* (2001) 207 CLR 21, [59].

The definition of 'family and domestic violence' – the person's family or household (current or former)

96. The ACTU agrees that the scope of this aspect of the definition is correctly outlined by AIG at this part of its submission.

97. The ACTU does not consider that the scope of this aspect of the definition is unclear, unreasonable or unworkable. On the contrary, it reflects a widely accepted, and clearly understandable, definition of family and domestic violence.

98. The ACTU accepts AIG's observation regarding non-cohabiting partners and has submitted an amendment to the clause to extend the leave entitlement to non-cohabiting partners.

99. The definition as previously drafted may have (without proper justification) excluded people experiencing violence from an intimate partner which impacts on their work, simply because the perpetrator has never cohabited with them. This exclusion may disproportionately impact on certain vulnerable groups. For example, young people are much more likely not to cohabit with their partners.

The definition of 'family and domestic violence' – the role of employers

100. The ACTU does not accept AIG's submission at [294] and [295] that the proposed clause charges the employer with responsibility for determining whether or not an employee is in fact being subjected to domestic violence. The employer is not asked to make this inquiry, in the same way that an employer is not asked to determine whether or not an employee is in fact suffering from a medical condition in order to determine eligibility for personal leave.

101. Rather, an employer must only be reasonably satisfied that the employee requires the leave to attend an activity related to the experience of being subjected to family and domestic violence. This is a different proposition.

102. It is the validity of the employee's request to be absent from work for a purpose related to the experience of being subjected to family and domestic violence which determines the employee's eligibility for leave, not the employee's experience of family and domestic violence per se.

103. For this reason, the proposed clause authorises the employer to ask for evidence - not of the employee's experience of family and domestic violence - but of the purpose for which they need to be absent from work. The ACTU's amended clause seeks to clarify the causal connection between the family and domestic violence and the purpose for which the leave is requested.

104. The proposed clause provides that if, upon request, an employee fails to satisfy an employer that the purpose for which they need to be absent relates to their experience of being subjected to family and domestic violence, then the employer is entitled to refuse the leave.

105. It is submitted that employers (including small employers with limited human resources capacity) will be able to determine without significant difficultly whether the purpose of the requested leave is sufficiently connected with the experience of being subjected to family and domestic violence.

The definition of 'family and domestic violence' – the dispute settlement procedure

106. As outlined above, any dispute about the application of the clause will be about whether or not the employee has demonstrated to the employer's reasonable satisfaction that their request to be absent from work was for a purpose related to the experience of being subjected to family and domestic violence; not whether or not the employee is in fact experiencing family and domestic violence. Such a dispute is within the competency of the Fair Work Commission.

The provision of the entitlement to perpetrators of family and domestic violence

107. The ACTU agrees that an employee should not be granted paid leave for any purpose associated with the experience of being a perpetrator (or being accused of being a perpetrator) of family and domestic violence.

108. The ACTU has proposed an amendment to clarify that it is only those employees who are *subjected to* family and domestic violence, not those perpetrating it, who are eligible to access leave.

The provision of the entitlement to other individuals

109. As outlined, eligibility centres on the purpose for which the leave is requested.

110. The ACTU accepts that the clause is most likely to be accessed by an employee for a purpose arising because they *themselves* have been subjected to family violence, but it is appropriate that there is some flexibility built into the clause due to the complexities associated with the experience of family and domestic violence. For example, it is foreseeable that an employee may require leave to make arrangements or attend appointments following a domestic homicide of a child or other family member. Such a purpose would meet the definition in the clause. The ACTU submits that this is appropriate as it directly addresses the type of harm and disadvantage the clause is intended to address.

The provision of the entitlement to casual employees

111. The ACTU submits that the entitlement to paid family and domestic violence leave should be extended to all employees, including casuals.

112. As previously submitted by the ACTU, the four yearly review process presents the Commission, for the first time, with a substantive opportunity to consider whether the regulation of casual employment in Australia is appropriate and satisfactory, having regard to the objectives of the FW Act and Modern Awards.[53]

113. Australia has experienced a significant increase in casual employment across almost all industries, and now has one of the highest rates of non-permanent employees in the OECD – double the OECD average of 12 per cent of employees on what the OECD terms 'temporary contracts'. Australia's casual employees also have lower protections than apply to temporary contract employees in Europe. Much of Europe restricts precarious employment to a designated start and end point with minimum weekly hours and leave and with other rights accrued on a pro rata basis. Australia is alone in the OECD in excluding non-permanent employees from leave rights.

114. Australia's regulatory environment (characterised by a lack of restrictions on casual employment and a lack of access to rights for casuals) has facilitated and encouraged the development of a large category of employees who lack both job security and entitlements. It is submitted that this long-term trend has seriously undermined the fairness and relevance of the safety net for a substantial number of employees.

115. In recognition of the inadequacy of current protections for casuals, rights to unfair dismissal protection, parental leave, long service leave and rights to request flexible working arrangements have been extended through regulation.

116. The defining features of casual employment centre on the informality, uncertainty and irregularity of hours worked and connection to the workplace. Lack of access to leave entitlements and the payment of a loading in lieu is also cited as a characteristic of casual employment. However, it is submitted that this is more a symptom of casual employment rather than an inherent defining feature. For example, in *Williams v MacMahon*[54] the Federal Court found that an employee was in fact permanent, even though he was labelled a casual, not paid entitlements and paid a loading in lieu, because of the continuous and regular nature of his connection to the workplace.

The Principle of Equal Remuneration for Work of Equal or Comparable Value

[53] ACTU Submissions 19 October 2015 - 4 Yearly Review of Modern Awards – Common Issues – Casual and Part-time employment - AM2014/196 and 197 including at [56], [57]
[54] [2010] FCA 1321

117. The ACTU does not agree with AIG that the s. 134(1)(e) *The Principle of Equal Remuneration for Work of Equal or Comparable Value* is a 'neutral consideration' in this matter. It has some work to do and should be given due weight. As submitted previously, the *Preliminary Jurisdictional Issues* decision explains how the modern awards objective is to be applied. The considerations outlined in s578 of the FW Act, including the objects of the Act are relevant.[55] Many of these overlap with the criteria in the modern awards objective. Section 578 requires that the FW Commission take into account "equity, good conscience and the merits of the matter"[56], and "the need to respect and value diversity of the work force by helping to prevent and eliminate discrimination on the basis of … sex … family or carer's responsibilities, [or] pregnancy."[57] The object of the FW Act includes "providing workplace relations laws that … take into account Australia's international labour obligations".[58]

118. The current failure to extend rights and protections to casuals disproportionately impacts on women. It limits their ability to participate equally in the workforce or earn as much as men.

119. This is because women are more likely to be casuals[59] and casuals earn less take home pay due to fluctuating hours, intermittency of work, lack of support for training, skill development and career progression and other barriers to workforce participation.[60]

120. Women are more likely to be casual employees (they are also more likely to be long-term casuals) because of their need for flexible working arrangements due to a disproportionately high responsibility for unpaid caring and family work.[61] Women still perform more than two thirds of domestic and caring work and are far more likely to take extended leave to care for dependants.[62] The lack of high-quality, secure flexible work options forces women to accept casual work and its adverse consequences, including lack of leave entitlements.[63] In this way, the increased casualisation of employment in Australia has undoubtedly contributed to the gender pay gap.

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[55] See Preliminary Jurisdictional Issues Decision at paragraphs [10]-[12].
[56] See s578(a) of the FW Act.
[57] Ibid s578(c).
[58] Ibid section 3(a).
[59] Modern awards covered approximately 1.86 million employees at May 2014. Of those, 533,400 were women employed casually, compared with 296,300 men employed casually.
[60] Glenda Strachan, 'Still Working for the Man? Women's Employment Experiences in Australia since 1950' Australian Journal of Social Issues, (2010) 45 (1) 124-125.
[61] Workplace Gender Equality Agency, *Parenting, Work and the Gender Pay Gap* (2013) 3.
[62] Australian Institute of Health and Welfare, *The Future Supply of Informal Care* 2003-2013, (2003).
[63] Australian Institute for Family Studies, Jennifer Baxter, *Australian mothers' participation in Employment* (September 2013) 3; Sarah Charlesworth, ' Women, work and Industrial Relations in Australia in 2013' *The Journal of Industrial Relations* (2014), 56 (3) 72.

121. Paid family and domestic violence leave is a regulatory measure aimed at addressing a problem which disproportionately affects women. The fact that family and domestic violence predominantly affects women is not seriously contested by AIG. The available evidence also suggests a link (although the exact nature of the link is not yet properly understood) between insecure and lower-paid forms of work and the experience of family and domestic violence.[64]

122. The primary purpose of the regulatory measure proposed by the ACTU in this application is to support those subjected to family violence to escape violent situations and retain financial stability and independence. The exclusion of casuals from the proposed clause will mean that the very group of employees who are likely to most need protection will not be entitled to access the benefit. As outlined, the exclusion of casuals from access to entitlements (paid leave in particular) disproportionately impacts on women because more casuals are women. This discriminatory effect will be compounded in the current circumstances because the entitlement in question (paid family and domestic violence leave) is aimed at addressing a problem which disproportionately affects women, many of whom are highly likely to be in casual forms of employment.

123. While there are some practical challenges involved, it is entirely possible to develop reasonable and workable averaging formulas for determining pro-rata accruals and rates of pay for casuals and part-time employees. For example, the Commission and employer and employee parties have previously considered and resolved arrangements for the calculation of Accident Make-up pay for casuals.[65] As noted by the NFF at [94], the Queensland Government entitlement to paid family and domestic violence leave is available to casual employees. In many other comparable countries around the world, including New Zealand, casual employees are entitled to pro-rata leave entitlements.

The entitlement to paid leave

124. The ACTU submits an amended clause at **Annexure A** clarifying that:

- An employee's paid yearly entitlement to family and domestic violence leave:

  a) becomes available in full, on and from the first day of each year of employment; and

  b) is payable at the ordinary hourly rate applicable to the classification of the employee under the award, including shift loadings and penalties but not including any over-award payments; and

  c) does not accrue from year to year; and

  d) is not payable on termination of employment.

[64] ACTU Submissions 1 June 2016, including at [4.17]

[65] *4 Yearly Review of Modern Awards—Transitional Provisions* [2015] FWCFB 3523

- Family and domestic violence leave may be taken as:

  a) a continuous period;

  b) a single period of one day;

  c) any separate period/s of less than one day which the employer and employee agree.

125. The ACTU submits that the leave should be counted as continuous service for all purposes.

126. The ACTU submits that family and domestic violence leave should be paid at the employee's ordinary award rate of pay. For the avoidance of doubt, this would not entitle an employee to over-award payments as suggested by AIG's submissions. Rather, it would entitle an employee to their ordinary award rate of pay, including penalties and bonuses ordinarily payable under the applicable modern award.

127. The ACTU recognises that other broadly comparable forms of leave, such as personal and carer's leave, are paid at an employee's base rate of pay. However, family and domestic violence leave is a different type of leave. It is aimed specifically at supporting vulnerable employees at times when retaining financial independence and job security are crucial factors for both escaping existing violence and avoiding future violence.

128. As outlined in preliminary submissions, the primary reason that the ACTU is seeking to make paid family and domestic violence leave available as a guaranteed award-based entitlement is to ensure that employees subjected to family and domestic violence are not further financially disadvantaged by the abuse.

129. As noted by the Victorian Royal Commission into Family and Domestic Violence[66], "*family violence has significant implications for a victim's economic security and independence. The abuse may be financial in nature, defined by law as economic abuse, or may be characterised by other forms of family violence that affect a victim's financial wellbeing and put them at financial risk*." The Commission cited research and submissions which show that "*victims of family violence are more likely than other women to experience financial difficulty and many women experience poverty as a result of family violence, regardless of their prior economic circumstances*." Significantly, the Commission also heard evidence that, "*financial security is a significant protective factor in victims gaining freedom from abusive partners*".

The purposes for the leave – a connection with family and domestic violence

130. The ACTU agrees that there must be a sufficient connection between the purpose of the leave and the experience of being subjected to family and domestic violence.

[66] *Victorian Royal Commission into Family Violence*, Volume IV, Chapter 21 'Financial Security', page 93

131. The amended clause contains the words 'related to' which require a clear causal link between the purpose of the leave and the experience of family and domestic violence.

The purposes for the leave – 'other activities associated with the experience of family and domestic violence'

132. The ACTU submits that because of the complexities associated with the experience of family and domestic violence, it is appropriate that the list of activities for which leave can be taken is inclusive, not exhaustive.

133. The redrafted clause omits the "catch-all" category and clarifies that eligibility for leave centres on the purpose for which the leave is requested.

134. If the activity is "related to the experience of being subjected to family and domestic violence" then the employee is eligible for leave, upon the provision of reasonable evidence if requested.

135. The clause has been amended to include appointments with "financial professionals" to reflect the prevalence and seriousness of financial abuse and its consequences.

The purposes for the leave – the necessity for taking the leave and the absence of employer discretion

136. On the occasion of each request for leave, the employer is entitled to request reasonable evidence of the purpose for which the leave is required. If not satisfied that the leave is related to the experience of being subjected to family and domestic violence, the employer is entitled to refuse the leave.

137. The ACTU submits that the notice and evidence requirements, along with the highly personal and sensitive nature of these matters, provide strong protection for employers against the misuse of the entitlement.

138. Evidence and research relied on by the ACTU suggests that employers already providing a paid leave entitlement do not experience significant challenges with the implementation of the clause.

Unpaid leave – 'each occasion'

139. The amended clause clarifies the need for "each occasion" of leave to be subject to the requirement that it is "for the purpose of attending to activities related to the experience of being subjected to family violence".

The obligation of confidentiality – jurisdiction

140. At Part 3 of its submissions, AIG devotes considerable attention to the construction of ss. 139 and 142 of the FW Act. The purpose of this discussion is directed to the inclusion of the confidentiality obligation in the proposed clause.[67]

141. The issue between the parties is whether the confidentiality obligation is "*about*" leave, or arrangements for taking leave, per s. 139(1)(h), and/or "*incidental to the operation of the proposed leave provision"*, per s. 142 of the FW Act.

142. These issues were subject to a hearing on preliminary and jurisdictional issues before a Full Bench on 13 August 2013. The confidentiality obligation that was the subject of that hearing read:

> **X.3.3** 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.

143. During the hearing of jurisdictional issues hearing, the employer parties objected to cl. X.3.3 in its then-form, stating that the "essential character" of the confidentiality clause was not about leave but was rather a separate obligation on an employer relating to confidentiality arising from the employee's experience.[68] It was expressly contemplated at the hearing that the clause could be re-drafted to address this concern.[69]

144. The ACTU has amended clause X.3.3., which now reads:

> **X.3.3** Sensitive personal information provided by the employee to the employer for the purposes of seeking leave under this clause will be kept confidential to the extent possible, except where disclosure is required by law or to prevent a serious threat to the life, health or safety of any individual.

145. 'Sensitive personal information' is defined in cl. X.1 as:

> **Sensitive personal information** means information provided by the employee to the employer for the purposes of seeking leave under this clause that identifies the employee and discloses their experience of family and domestic violence.

146. The re-draft of cl. X.3.3 makes it clear that it is information provided to the employer *for the purposes of taking leave* that is to be kept confidential, subject to the two exceptions which have been included in the proposed clause to take account of matters identified by the NFF.[70]

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67 See AIG submissions, [48]–[50].

68 See, eg, transcript of hearing before Hatcher VP, Acton SDP and Spencer C, 13 August 2013, Transcript PN 110–112 (N Ward, Hatcher VP); see also AIG submissions dated 19 September 2016, [386], [388].

69 Transcript of hearing before Hatcher VP, Acton SDP and Spencer C, 13 August 2013, Transcript PN 111 (Hatcher VP).

70 See NFF submissions, [113] – [119]

147. As for the confidentiality obligation *per se*, the Full Bench held that it would not be prepared to conclude that the confidentiality clause was beyond jurisdiction without hearing the evidence.[71] At paragraph 21 of the judgment, the Full Bench stated that:

> We consider that if there was evidence demonstrating the confidentiality requirement in clause X.3.3 was necessary in order for the proposed leave entitlement to operate effectively (for example because without confidentiality employees might not be prepared to disclose anything about domestic violence incidents and thus would not be able to access the entitlement), it would be reasonably arguable that clause X.3.3 was authorised by s. 139(1)(h) as a term which was about "*leave*" or "*arrangements for taking leave*" and/or by s. 142(1) as "*incidental to a term that is permitted… to be in a modern award*" and "*essential for the purpose of making a particular term operate in a practical way*".[72]

148. The position is clear. The only matter for determination by this Full Bench with respect to the confidentiality clause is whether there is sufficient evidence to satisfy the Commission that cl. X.3.3 is *about* leave or arrangements for taking leave, or *incidental to and necessary for* the practical operation of leave provision. The employer parties have not seriously challenged any of the evidence before the Full Bench as to the need for confidentiality. The most AIG are able to say about that evidence (without identifying it) is that it is not open to the Commission, in its view, to find that it is necessary for the permitted term to operate in a practical way.[73] This assertion does not undermine the available evidence in favour of confidentiality. For completeness, the following evidence supports the submission that confidentiality is necessary to enable the practical operation of the clause:

(a) The evidence of Fiona McCormack at paragraph 42 of her statement that "*it is critical that women feel safe to disclose family violence and that when they do, they know that their disclosure will be kept confidential*."

(b) The evidence of Marilyn Beaumont at paragraphs 51 to 56 of her statement, including that "*trust cannot be achieved unless the woman can be absolutely confident that her story will be kept confidential*".

(c) The evidence of ACTU Confidential Witness 3 at paragraphs 47–48.

(d) The evidence of Debra Eckersley of PWC is that without the knowledge that information about domestic violence would be kept confidential, employees "*would not ask for the assistance available under the Policy, making the Policy ineffective*".[74]

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71 *Family and Domestic Violence Clause; Family Friendly Work Arrangements Clause* [2015] FWCFB 5585, [21].

72 Ibid.

73 AIG submissions, [389].

74 Eckersley Statement, [17], and see [36] and [38].

(e) The inclusion of confidentiality obligations in the Victorian Government's model clause, now included at cl. 48.4(b) of the *Victorian Public Service Enterprise Agreement 2016*.[75]

(f) The research cited by the Australian Human Rights Commission that "*concerns about confidentiality appear to be key barriers in using family and domestic violence leave clauses*".[76]

149. Rather than directing attention to the evidence relied on by the ACTU to establish that the confidentiality clause is properly within the scope of ss. 139(1)(h) and/or 142 of the FW Act, AIG relies on an argument that was not made in the jurisdictional issues hearing about the proper construction of ss. 139 and 142 of the Act.

150. AIG contends that ss. 139 and 142 of the FW Act should be given their ordinary meaning and should not be construed beneficially. The purpose of this contention in the AIG submissions is unclear. The AIG submissions appear to be directed to a decision by the Full Bench in *4 Yearly Review of Modern Awards – Pastoral Award 2010* [2016] FWCFB 4393. In that decision, the Full Bench (Ross J, Kovacic DP and Saunders C) held that it was "*appropriate to characterise ss. 139 and 142 as remedial or beneficial provisions*" as they "*are intended to benefit national system employees*".[77]

151. AIG submits that had they been involved in the review of the *Pastoral Award*, they would have argued the case differently to Australian Business Industrial, the employer party in that hearing.[78] With respect, this is a highly unusual basis on which to attack the correctness or otherwise of a decision. The way in which AIG would have conducted a hearing to which it was not a party is irrelevant to an assessment of whether the Full Bench correctly decided the point.

152. AIG relies on the decision of the Court of Appeal of the Supreme Court of Victoria in *Baytech Trades Pty Ltd v Coinvest Pty Ltd* [2015] VSCA 342 (***Baytech Trades***), concerning the interpretation of part of the *Construction Industry Long Service Leave Act 1997* (Vic) (***CILSL Act***). The Court of Appeal found that the subject section of the CILSL Act should be given its ordinary meaning rather than construed beneficially, because that section represented a compromise of purposes.

153. Without saying anything about the correctness of the decision in *Baytech Trades* (noting that the ACTU, much like AIG in the *Pastoral Award* decision, was not a party to that

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75 See Victorian Government submission, Attachment 1, cl. 1.4(b).

76 See Australian Human Rights Commission submissions, [72].

77 Per Ross J, Kovacic DP and Saunders C, [54].

78 AIG submissions, [20].

proceeding), the holding in that case is limited to the relevant provisions of the CILSL Act. By contrast, the *Pastoral Award* decision, which was handed down six months after the Court of Appeal's decision in *Baytech Trades*, expressly considered the construction of ss. 139 and 142 of the FW Act. There is no reason to assume that the Full Bench in the *Pastoral Award* decision did not turn their minds to whether ss. 139 and 142 represented a compromise between the interests of employers and employees. Of the two decisions, the *Pastoral Award* decision is clearly directed to the relevant statutory provisions before this Commission. The decision in *Baytech* has nothing to say about the *Fair Work Act*, the Fair Work Commission, or the four yearly review of modern awards. It is not relevant to this proceeding.

154. Even if this Full Bench determines, in contrast to the *Pastoral Award* decision, that ss. 139(1) and 142 should be construed narrowly, the ACTU contend that the confidentiality clause is properly about a matter in s. 139(1)(h), and/or is incidental to and essential for the operation of the operation of the family and domestic violence leave clause, for the reasons set out in our submissions dated 1 June 2016 at paragraphs 2.35 to 2.39 and 4.84 to 4.98, and summarised in paragraph 148 above.

The obligation of confidentiality – practical objections

155. AIG raises a number of concerns about the practical operation of the confidentiality obligation in cl. X.3.3 of the proposed clause.

156. The ACTU submits that the majority of these concerns have been addressed by the amended confidentiality obligation, for the reasons set out above.

157. As to any remaining objections, we note that employers regularly collect, use, disclose and store employees' personal and health information for various purposes. In workplaces where the *Privacy Act 1988* (Cth) applies, employers must collect, use, disclose and store employees' personal or health information in accordance with the Australian Privacy Principles (**APPs**). The APPs apply to all private sector businesses with an annual turnover of more than $3 million, all private health service providers nationally, and a limited range of small businesses and all Australian government agencies.

158. While s. 7B(3) of the *Privacy Act* exempts private sector employers from complying with the APPs when handling current and past employee records for something directly related to the employment relationship, state and territory privacy laws may still apply to employee information held by private sector employers, notwithstanding the employee records exemption under the federal Act. For example, the *Health Records Act 2001* (Vic) applies to private sector organisations that collect, hold or use health information, per s. 11 of that Act.

159. These examples are provided to illustrate the point that maintaining confidence about employees' personal information is not a foreign concept to employers, and is capable of being addressed in a practical way.

CONCLUSION

160. The ACTU otherwise relies on its submissions dated 1 June 2016, and joins issue with the employer parties on the matters raised in their submissions, including the application of the modern awards objective to the proposed award variation.

5 October 2016

This submission was drafted by Kate Burke of counsel
and by the Australian Council of Trade Unions

Annexure A – Proposed Amended Clause

FAMILY AND DOMESTIC VIOLENCE LEAVE

X.1 Definition

For the purpose of this clause:~~,~~

F~~f~~amily and domestic violence is ~~defined as~~ any violent, threatening or other abusive behaviour by a person against a current or former partner or member of the person's family or household. ~~(current or former).~~

Employee includes part-time and casual employees.

Sensitive personal information means information that identifies the employee and discloses their experience of being subjected to family and domestic violence.

X.2 Family and Domestic Violence Leave

X.2.1 A~~A~~n 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 attending to activities related to the experience of being subjected to family and domestic violence. Such activities may include (but are not limited to)~~for the purpose of~~:

(a) attending legal proceedings, counselling, appointments with ~~a~~ medical, financial or legal professionals~~practitioner~~; and/or

(b) relocation or making other safety arrangements~~; or~~

~~(c) other activities associated with the experience of family and domestic violence.~~

X.2.2 An employee's paid yearly entitlement to family and domestic violence leave:

(a) becomes available in full, on and from the first day of each year of employment; and

(b) is payable at the ordinary hourly rate applicable to the classification of the employee under the award, including shift loadings and penalties but not including any over-award payments; and

(c) does not accrue from year to year; and

(d) is not payable on termination of employment.

X.2.3 Upon exhaustion of the leave entitlement~~s~~ in clause~~s~~ X.2.1, employees will be entitled to up to 2 days unpaid family and domestic violence leave on each occasion for the purpose of attending to activities related to the experience of being subjected to family and domestic violence.

X.2.4 Family and domestic violence leave may be taken as:

(a) a continuous period;

(b) a single period of one day;

(c) any separate period/s of less than one day which the employer and employee agree.

X.2.5 Family and domestic violence leave is in addition to other leave entitlements in modern awards and the National Employment Standards.

X.3 Notice and Evidentiary Requirements

X.3.1 The employee shall give his or her employer notice as soon as reasonably practicable of their request to take leave under this clause.

X.3.2 If required by the employer, the employee must provide evidence that would satisfy a reasonable person that the leave is for the purpose as set out in clauses X.2.1 and X.2.3. 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.

X.3.3 Sensitive personal information provided by the employee to the employer for the purposes of seeking leave under this clause will be kept confidential to the extent possible, except where disclosure is required by law or to prevent a serious threat to the life, health and safety of any individual. ~~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.~~

FAMILY AND DOMESTIC VIOLENCE LEAVE

X.1 Definition

For the purpose of this clause:

Family and domestic violence is any violent, threatening or other abusive behaviour by a person against a current or former partner or member of the person's family or household.

Employee includes part-time and casual employees.

Sensitive personal information means information that identifies the employee and discloses their experience of being subjected to family and domestic violence.

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(a) attending legal proceedings, counselling, appointments with medical, financial or legal professionals; and/or

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(b) is payable at the ordinary hourly rate applicable to the classification of the employee under the award, including shift loadings and penalties but not including any over-award payments; and

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(d) is not payable on termination of employment.

X.2.3 Upon exhaustion of the leave entitlement in clause X.2.1, employees will be entitled to up to 2 days unpaid family and domestic violence leave on each occasion for the purpose of attending to activities related to the experience of being subjected to family and domestic violence.

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X.3.3 Sensitive personal information provided by the employee to the employer for the purposes of seeking leave under this clause will be kept confidential to the extent possible, except where disclosure is required by law or to prevent a serious threat to the life, health and safety of any individual.

Annexure B – Dr Peta Cox – Supplementary Report

ANROWS

AUSTRALIA'S NATIONAL RESEARCH
ORGANISATION FOR WOMEN'S SAFETY
to Reduce Violence against Women & their Children

Sophie Ismail
Australian Council of Trade Unions (ACTU)
Level 4/365 Queen Street, Melbourne,
VICTORIA 3000

By email: sismail@actu.org.au

Re. Reply Report regarding Australian Industry Group (AIG) submissions on Expert Witness Report for the Four Yearly Review of Modern Awards – Family and domestic violence leave

Dear Sophie,

I refer you to your letter requesting additional input on my Expert Witness Report (Cox Report). Below I outline my response to each item, as enumerated in the ACTU letter dated 23 September 2016.

1. At paragraph 414 of the AIG submissions, the AIG state that data quoted in paragraph 413 "suggests that neither any correlation nor causal relationship is established by the PSS between the employment status of a woman and the incidence [sic] of male cohabitating [sic] partner violence or intimate partner violence". Do you agree with this statement? Please explain the basis for your answer.

Response: The AIG is discussing here my statistical significance testing of the difference in the prevalence of women experiencing male cohabiting partner violence with regards to the demographic feature of employment status. This type of testing is able to show if certain groups are more likely to experience violence. Significance testing demonstrates, with a 95% level of confidence, that the difference between results is "real" and not an aberration due to sampling method. It is useful for confirming the extent of a difference in estimates, however explanatory factors (e.g., such as causes) are unable to be determined using the information available in the PSS.

More generally, the PSS is a representative cross-sectional study that aims to provide national estimates of prevalence and incident characteristics for a wide range of violence types. The format of the survey is appropriate for the purpose of the instrument. However, it is not a survey designed for identifying causal relationships. In order for causal relationships to be established, we would require an experimental or longitudinal study design. As PSS uses neither of these methodologies, it cannot be used to make claims regarding causal relationships.

While there is a possibility of future research using logistic regression on elements of the survey in order to provide insight into predictive factors (which are different to causal factors), this is beyond the scope of the work underpinning the Cox Report. The data presented in the Cox Report is not this form of analysis, and thus does not, and cannot, demonstrate the existence (or not) of any type of relationship between variables.

Note that the survey provides data on prevalence (not incidence) of violence (see below).

[The characterisation of the PSS in the above paragraphs was discussed with ABS staff to ensure accuracy, however this report remains the opinion of the author].

2. At paragraph 415 of the AIG submissions, the AIG state that you have not provided a basis for your statement that data cited at paragraph 8.2 of your report "is of particular relevance to the Commission". Do you agree with this statement? Please explain the basis for your answer.

Response: I considered the data in paragraph 8.2 of my report to be of particular relevance to the Commission as it was disaggregated by employment status. Most of the data outlined in my report is for the general population and does not disaggregate in this manner. Given that the Commission is interested in provisions that will only affect people in employment, I assessed that the Commission was likely to have a particular interest in data more closely aligned to the population affected by the their decision.

3. Please review Section 7 and 15.1 of the AIG submission and advise:
    a. If any part of the submissions expressed causes you to modify any part of the Cox Report;
    b. Offer any comment you consider appropriate and within your expertise about those parts of the AIG submission that address the Cox Report.

Response 3a: No aspect of the AIG submissions require a modification of the Cox Report.

Response 3b: The AIG report (e.g., paragraphs 112, 412, 414, 420, 583) incorrectly describes the PSS as a measure of incidence. The PSS provides an estimate of prevalence (the number of people who have experienced a particular type of violence). The PSS does not provide an estimate of incidence (the number of incidents). To make this distinction clear, if a person had experienced 20 incidents of sexual assault, they would be counted once for a prevalence calculation (they were one person who has experienced sexual assault), and twenty times for an incidence calculation (they have experienced 20 incidents). In addition, within the PSS, data on the number of people who have experienced one or "more than one" incident of violence are collected using a prevalence count.

In paragraph 406, the AIG note that my report "involves some subjectivity and selection". The PSS is a long, detailed survey and it is not possible or appropriate for all data to be presented to the Commission. For instance, the PSS involves several separate modules, many of which cannot be compared directly due to potential double counting and other statistical errors. Care needs to be taken to represent the information accurately, and to ensure that it is clear to a reader unfamiliar with the survey design.

To give you a sense of the size of the data, the survey provides a separate module on the following:

- the participants' demographic characteristics (including those of their partner, if they have one);
- experiences of violence since the age of 15;
- detailed characteristics (such as injury, use of alcohol and other drugs, location of the incident, policy and court contact, advice and support, psychological impacts and time off work) of their most recent incident of eight different types of violence:
    - Sexual violence separated into sexual assault by a male, sexual threat by a male, sexual assault by a female and sexual threat by a female; and
    - Physical violence separate into physical assault by a male, physical threat by a male, physical assault by a female and physical threat by a female;
- the context and consequences of partner violence;
- emotional abuse by a partner;
- abuse before the age of 15;
- sexual harassment; and
- stalking.

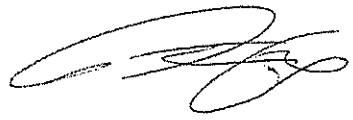
Further detail is available in the Horizons report from which most of the content of the Cox Report is taken. In addition, ANROWS has published the full set of data cubes that the Cox Report is based on – these can be accessed, along with the full Horizons report, at http://anrows.org.au/publications/horizons/pss.

In paragraph 420, the AIG claims that "the emphasis on 'lifetime experiences' as compared to the occurrence of family and domestic violence during recent times is unhelpful, as it has the effect of veering attention from data that is of greater relevance to these proceedings. Notably, the data that provides an insight into the incidence [sic – see above] of violence against women by intimate cohabiting partners in the 12 months preceding the 2012 PSS produces a figure of far smaller quantum". It is, of course, unsurprising that 12 month prevalence is far smaller than lifetime prevalence. There are a number of reasons for providing both 12 month and lifetime prevalence and incident characteristic data:

- In the context of the nature of the PSS data - Lifetime data (i.e., related to experiences of violence since the age of 15) is the most commonly collected data within the PSS, with many data items not collected for experiences of violence in the last 12 months. It should be noted that the use of lifetime data ensures a more reliable assessment of statistical significance of differences (e.g., between years or between men and women). In addition, lifetime data is the preferred source when providing statistics that come from multiple modules as it allows for greater coherence in the data presentation. Having said this, I acknowledge that 12 month data has particular salience to the Commission's work and thus 12 month data has been provided where this has been logical and possible, albeit in the context of the original work being done as part of a broader research project.
- In the context of the considerations of the Commission - Violence, and especially violence by an intimate partner, is known to have long term health (Lum On, Ayre, Webster, & Moon, 2016), financial (including employment) (Cortis & Bullen, 2015) and social impacts (Dunkley & Phillips, 2015) that are not limited to the 12 months after an incident. Limiting the time period considered by the Commission may restrict the utility of the provisions devised.

Should you require any further clarification, please do not hesitate to be in contact.

Yours sincerely



Dr Peta Cox
Senior Research Officer (Research Program) 28 September 2016

Cortis, N., & Bullen, J. (2015). *Building effective policies and services to promote economic security following domestic violence: State of knowledge paper (ANROWS Landscapes, 07/2015)*. Sydney: ANROWS.
Dunkley, A., & Phillips, J. (2015). *Domestic violence in Australia: A quick guide to the issues*. Canberra: Parliamentry Library.
Lum On, M., Ayre, J., Webster, K., & Moon, L. (2016). *Examination of health outcomes of intimate partner violence against women: State of knowledge paper (ANROWS Landscapes, 03/2016)*. Sydney: ANROWS.

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23 September 2016

Via e-mail: peta.cox@anrows.com.au

CONFIDENTIAL: SUBJECT TO LEGAL PROFESSIONAL PRIVILEGE

Dear Dr Cox,

FOUR YEARLY REVIEW OF MODERN AWARDS – FAMILY & DOMESTIC VIOLENCE LEAVE

I refer to the report you have prepared in this matter (**Cox Report**). This report was filed in the Fair Work Commission and made available to the employer parties on 1 June 2016.

The employer parties have filed and served their evidence and submissions in response to the ACTU's application. No employer party has filed any evidence in opposition or response to your report. However, parts of the submissions of the Australian Industry Group (AIG) dated 19 September 2016 address your expert report. We have provided you with the AIG submissions.

Reply Report

We request that you provide us with a report addressing the following matters arising from your review of the AIG submissions:

1. At paragraph 414 of the AIG submissions, the AIG state that data quoted in paragraph 413 "suggests that neither any correlation nor causal relationship is established by the PSS between the employment status of a woman and the incidence of male cohabitating partner violence or intimate partner violence".

   Do you agree with this statement? Please explain the basis for your answer.

2. At paragraph 415 of the AIG submissions, the AIG state that you have not provided a basis for your statement that data cited at paragraph 8.2 of your report "is of particular relevance to the Commission".

   Do you agree with this statement? Please explain the basis for your answer.

3. Please review Section 7 and Section 15.1 of the AIG submissions and advise:
   a. If any part of the submissions expressed causes you to modify any part of the Cox Report;
   b. Offer any comment you consider appropriate and within your expertise about those parts of the AIG submissions that address the Cox Report.

Timing and Communications

Your report is due to be filed in the Commission on 4 October 2016. We would be grateful for receipt of your report no later than 28 September 2016.

Please note that all communications between you, the ACTU and its legal representatives can, on request, be provided to the employer organisations and the Commission. This includes any draft of your report, including your working notes.

If you have any questions, or wish to discuss further, please do not hesitate to contact Sophie Ismail on (03) 9664 7218 or sismail@actu.org.au.

Yours faithfully,

Sophie Ismail
Legal and Industrial Officer