

IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 – Four Yearly Review of Modern Awards

AM2015/1 Family and Domestic Violence Leave

SUBMISSIONS OF THE AUSTRALIAN COUNCIL OF TRADE UNIONS

DATE: 28 July 2017

D No.: 85/ 2017

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Introduction

1. These submissions are filed in response to the Statement of the Full Bench dated 24 July 2017 (**Statement**) regarding the preliminary views of the majority reasons in *4 Yearly Review of Modern Awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 (“the decision”).
2. The ACTU is pleased that the decision made findings on principle that are consistent with the case advanced in support of the claim. In particular, the decision embodies important conclusions that:
 - a) The existing entitlements in the *Fair Work Act* 2009 do not meet the needs of employees who experience family and domestic violence;
 - b) Family and domestic violence is a workplace issue which requires a workplace response;
 - c) Family and domestic violence is a significant problem with significant impacts on those who experience it and their families;
 - d) Family and domestic violence has significant economic impacts both for the individual and for the general community;
 - e) Family and domestic violence is a gendered phenomenon which disproportionately effects women;
 - f) The circumstances faced by employees who experience family and domestic violence require a special response; and
 - g) The provision of paid family and domestic violence leave would be a desirable outcome.
3. Ultimately the decision did not accede to the ACTU claim to vary awards, on the basis that it was not *necessary to meet the modern awards objective*, a criteria expressed in the *Fair Work Act* 2009. The disjuncture between the conclusions reached at (a)-(g) above and the ultimate result does much to highlight the concern expressed in other forums that the *Fair Work Act* 2009 is not fit for purpose. However, we do not delve into those issues here save to observe that the ultimate result in this case does not discourage the ACTU or its affiliates from continuing to pursue a paid leave entitlement outside of modern awards.
4. These submissions address the following matters:
 - (a) The list of submissions and evidence in the proceeding to date.
 - (b) Proposed draft directions in respect of the future conduct of the matter.
 - (c) The list of issues to be addressed by the parties and the Full Bench with respect to any award entitlement to family and domestic violence leave.

(d) Matters raised by the Community and Public Sector Union

Submissions and evidence

5. The ACTU has reviewed the list of evidence and submissions in the proceeding to date contained in Attachment A to the Statement.

Part 2, Category 2

Item 10 – ACTU Submission – Tender List – 28 November 2016

6. This list and the documents referred to in it was tendered by the ACTU on 1 December 2016 and marked as **Exhibit B-28**: see transcript 1 December 2016, PN2783. This Exhibit does not appear on the List of Exhibits at Item 15 (below).

Item 15 – List of Exhibits 14–18 November 2016

7. The majority of the evidence tendered by the ACTU is listed in this document.
8. The document behind the link **Exhibit B-2**: Supplementary Report of Dr Peta Cox is not Dr Cox’s supplementary report. The ANROWS report at that link is actually attachment PC-4 to exhibit B-1. A copy of the correct exhibit B-2 is attached.
9. A number of corrections were made to the report of Professor Cathy Humphreys, marked as **Exhibit B-6**. The corrected version does not appear to have been uploaded. The ACTU will provide the corrected version shortly.

Proposed directions

10. The ACTU does not oppose the proposed directions.
11. We have assumed that a consolidated list of issues will be produced by the Full Bench in the final directions foreshadowed on 1 August 2017 (per paragraph 13 of the Statement). The parties’ submissions will be directed (without limitation) to the consolidated list.

Proposed list of issues

12. The ACTU proposes the following list of issues.
13. The **threshold issue** is that identified by as Issue 1 in the Statement (at paragraph 10). This issue concerns whether award-covered employees should be entitled to unpaid family and domestic violence leave.
14. The ACTU’s position is that the answer to this question is yes.

15. Following the threshold issues, and assuming that award-covered employees should be entitled to unpaid family and domestic violence leave, the ACTU proposes the following issues concerning the implementation of the entitlement:
- 1 The number of days of leave per year.
 - 2 The circumstances in which leave is permitted, addressing:
 - a. the definition of ‘family and domestic violence’ for the purposes of the clause;
 - b. the circumstances in which leave may be accessed (eg, to attend court);
 - c. who may access the entitlement.
 - 3 Whether the leave entitlement is available in full at the start of the year or accrues.
 - 4 The availability of leave for part-time and casual employees.
 - 5 The ability to take leave as a continuous, single-day, or other period less than a day.
 - 6 Notice and evidentiary requirements.
 - 7 Confidentiality of information provided by employees concerning their experience of family and domestic violence.
 - 8 Whether taking unpaid family and domestic violence leave counts towards continuity of service.
 - 9 Whether employees should be able to access their personal/carer’s leave NES entitlements for the purpose of family and domestic violence leave, addressing:
 - a. the jurisdiction of the Commission to make such an award term;
 - b. the merits of any such term; and
 - c. the content of any such term, if different to the matters in (1) to (8) above.

Matters raised by the Community and Public Sector Union

16. The CPSU has raised, in correspondence dated 19 July and at the mention on 21 July, the intersection between the current proceedings and particular awards which it has an interest in. Those awards are the *Australian Government Industry Award 2016* and several modern *enterprise* awards identified in their correspondence.

17. From its inception, the ACTU claim has been framed as one made in respect of all modern awards¹, albeit anticipating some tailoring in respect of the *Firefighting Industry Award 2010*. The claim was listed by the Commission as “Common issue” in 2014², describing it as a one “variations to all awards in respect of the issue of family and domestic violence leave” and signalling its status as a proposal “for significant variation or change across the award system”³. These developments and all developments since have been published on the Commission’s website, and notified to all persons who have subscribed to the Commission’s relevant e-mail notification services. The conclusions reached in the decision, referred to at paragraphs 2 and 3 above, clearly reflect the broad basis upon which the claim was brought. There is no sound reason to exclude the *Australian Government Industry Award 2016* from the proceedings as currently constitute nor is there any basis upon which to require any party to mount a positive case for its inclusion.
18. The situation as pertains to the modern *enterprise* awards referred to in the CPSU’s correspondence bears some further consideration. Our initial view is that the deeming provision in Item 17(1) of Schedule 6 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* places modern enterprise awards in no different position to any other modern award for the purposes of the four yearly review of modern awards. However, we appreciate that this matter is one that may not have been fully considered previously during four yearly review proceedings. It need not be resolved at this juncture, if the process identified by the President during the mention⁴ is one which the CPSU and other parties interested in the modern enterprise awards identified by the CPSU are content to adopt.

AUSTRALIAN COUNCIL OF TRADE UNIONS

¹ See <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/sub2-actu-281014.pdf> at [2].

² [2014] FWCGB 8583

³ *Ibid.* at [3]

⁴ at [PN260]

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 their decision.

3. Please review Section 7 and 15.1 of the AIG submission and advise:
- If any part of the submissions expressed causes you to modify any part of the Cox Report;
 - 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, police 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: Parliamentary 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.

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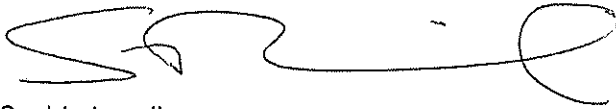
Timing and Communications

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,

A handwritten signature in black ink, appearing to read 'S. Ismail', with a long horizontal flourish extending to the right.

Sophie Ismail
Legal and Industrial Officer