Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Final Submission

Family and Domestic Violence Clause
(AM2015/1)

28 November 2016

4 YEARLY REVIEW OF MODERN AWARDS

AM2015/1 FAMILY AND DOMESTIC VIOLENCE CLAUSE

1. INTRODUCTION

1. The Australian Council of Trade Unions (**ACTU**) is seeking the insertion of a new family and domestic violence leave entitlement in each of the 122 modern awards. The grant of the claim would see the introduction of a clause throughout the modern awards system that provides for:

   - 10 days of paid family and domestic violence leave each year to full-time, part-time and casual employees; and
   - Upon exhaustion of the above entitlement, up to 2 days of unpaid leave on each occasion.

2. The ACTU's claim forms part of the Commission's 4 yearly review of modern awards (**Review**), which is being conducted pursuant to s.156 of the *Fair Work Act 2009* (**FW Act** or **Act**).

3. On 19 September 2016, the Australian Industry Group (**Ai Group**) filed a comprehensive submission in reply to the ACTU's claim. This further submission is filed in accordance with Vice President Watson's comments during proceedings before His Honour on 27 October 2016.[1]

4. Whilst Ai Group acknowledges that family and domestic violence is an important social issue, we oppose the grant of the ACTU's claim. It is our view that the introduction of the proposed paid leave entitlement to the modern awards system is not appropriate. Importantly, the Commission's power to allow the claim is confined by the operation of the relevant statutory provisions which we outline below. For present purposes, it is sufficient to note that the case mounted by the ACTU does not enable the Commission to conclude that the provision proposed is *necessary* in order to achieve the modern awards objective, as contemplated by s.138 of the Act.

[1] Transcript of proceedings on 27 October 2016 at PN81 – PN82.

2. Ai GROUP'S POSITION ON THE COMMUNITY PROBLEM OF FAMILY AND DOMESTIC VIOLENCE AND ON THE ACTU'S CLAIM

5. Ai Group's position on the community problem of family and domestic violence and on the ACTU's claim, can be summarised as follows:

   a. Family and domestic violence is a community problem. Federal and State governments, police forces, courts, community services organisations, health professionals, the legal profession, the media, employers, employees and many others in the community, all have roles to play in addressing the problem.

   b. The problem of family and domestic violence is currently receiving considerable attention by the Federal and State Governments.

   c. Ai Group supports the many programs and forms of assistance that have been implemented by governments, police forces, courts, community groups, and others to address the issue.

   d. Ai Group supports appropriate initiatives to educate employers about the issue of family and domestic violence and the role that employers can play in assisting employee victims, e.g. through company human resource policies and flexible work arrangements.

   e. The key to success with this important issue is to engage with employers in a positive way, rather than the unions seeking to impose a costly "one size fits all" paid leave entitlement upon employers. Employers have different capacities to provide support to employees experiencing family and domestic violence.

   f. Many large employers have relevant policies to assist employees who are victims of family and domestic violence, e.g. employee assistance programs (**EAPs**). Often these policies are broader than simply dealing with family and domestic violence; they provide assistance to employees faced with various hardships.

g. Smaller employers often do not have written policies but they typically adopt a reasonable and compassionate approach when their employees suffer genuine hardships.

h. Employers are required to deal with the impact that numerous social problems have on the lives of their employees, such as mental health issues, relationship breakdown, drug dependence, alcohol dependence, domestic violence and crime generally. Family and domestic violence is only one of many social problems that can have a serious impact on employees.

i. Work health and safety (**WHS**) legislation requires that employers provide safe workplaces and ensure the health and safety of workers.

j. The FW Act provides for various forms of paid and unpaid leave which employees experiencing family and domestic violence or other serious difficulties in their personal lives are able to access. In addition, the FW Act provides substantial protections for employees who need to be absent for such reasons, e.g. the general protections and unfair dismissal laws.

k. The National Employment Standards (**NES**) provide employees who are victims of family and domestic violence with the right to request flexible work arrangements.

l. These days the main leave entitlements are dealt with in the NES, not modern awards. Awards should not contain a major new category of leave entitlement. It is the role of the Commonwealth Parliament to determine the major categories of leave entitlements for employees and, to date, Parliament has not supported the creation of paid domestic violence leave entitlements.

m. If specific leave entitlements were included in awards for domestic violence, the unions could be expected to pursue specific leave entitlements for a myriad of other social problems such as mental health issues, relationship breakdown, drug dependence, alcohol

dependence and crime generally. All social problems interact with the workplace in one way or another.

n. Paid family and domestic violence leave exists in very few countries. Numerous countries with very generous employment entitlements do not have this leave entitlement.

o. Section 138 and the modern awards objective do not permit the Commission to grant the ACTU's claim.

3. THE STATUTORY FRAMEWORK

6. The ACTU's claim is being pursued in the context of the Review, which is being conducted by the Commission pursuant to s.156 of the Act.

7. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).

8. The modern awards objective is set out at s.134(1) of the Act. It requires the Commission to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at ss.134(1)(a) – (h).

9. The modern awards objective applies to any exercise of the Commission's powers under Part 2-3 of the Act, which includes s.156.

10. We later address each element of the modern awards objective with reference to the ACTU's claim for the purposes of establishing that, having regard to s.138 of the Act, the claim should not be granted.

4. THE COMMISSION'S GENERAL APPROACH TO THE REVIEW

11. At the commencement of the Review, a Full Bench dealt with various preliminary issues. The Commission's *Preliminary Jurisdictional Issues Decision*[2] provides the framework within which the Review is to proceed.

12. The Full Bench emphasised the need for a party to mount a merit based case in support of its claim, accompanied by probative evidence (emphasis added):

> [23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.[3]

13. The Commission indicated that the Review will proceed on the basis that the relevant modern award achieved the modern awards objective at the time that it was made (emphasis added):

> [24] In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.[4]

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[2] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

[3] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [23].

[4] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24].

14. The decision confirms that the Commission should generally follow previous Full Bench decisions that are relevant to a contested issue:

> [25] Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in Nguyen v Nguyen:
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> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq."
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> [26] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin):
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> > "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."
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> [27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.[5]

15. In addressing the modern awards objective, the Commission recognised that each of the matters identified at ss.134(1)(a) – (h) are to be treated "as a matter of significance" and that "no particular primacy is attached to any of the s.134 considerations". The Commission identified its task as needing to "balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net": (emphasis added)

> [36] … Relevantly, s.138 provides that such terms only be included in a modern award 'to the extent necessary to achieve the modern awards objective'. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms 'necessary to achieve the modern awards objective'. What is 'necessary' in a

[5] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24] – [27].

particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.[6]

16. The frequently cited passage from Justice Tracey's decision in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* was adopted by the Full Bench. It was thus accepted that:

"… a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action."

17. Accordingly, the *Preliminary Jurisdictional Issues Decision* establishes the following key threshold principles:

- A proposal to significantly vary a modern award must be accompanied by submissions addressing the relevant statutory requirements and probative evidence demonstrating any factual propositions advanced in support of the claim;
- The Commission will proceed on the basis that a modern award achieved the modern awards objective at the time that it was made;
- An award must only include terms to the extent necessary to achieve the modern awards objective. A variation sought must not be one that is merely desirable; and
- Each of the matters identified under s.134(1) are to be treated as a matter of significance and no particular primacy is attached to any of the considerations arising from it.

[6] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [36].

18. In a subsequent decision considering multiple claims made to vary the *Security Services Industry Award 2010*, the Commission made the following comments, which we respectfully commend to the Full Bench (emphasis added):

> [8] While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.[7]

19. The ACTU's claims conflict with the principles in the *Preliminary Jurisdictional Issues Decision* and accordingly the claims should be rejected.

[7] *Re Security Services Industry Award 2010* [2015] FWCFB 620 at [8].

5. THE COMMISSION'S JURISDICTIONAL DECISION REGARDING THE ACTU'S CLAIM

20. On 23 February 2015, President Ross issued directions to deal with four preliminary jurisdictional issues which Ai Group, ACCI and the ACTU had agreed would be determined before any directions were made in relation to the hearing of the merits of the ACTU's claims. The preliminary jurisdictional issues related to the ACTU's claims for a family and domestic violence clause (AM2015/1) and for claims that the ACTU entitled "family friendly work arrangements" (AM2015/2).

21. The agreed preliminary jurisdictional issues, as set out in the directions of President's Ross were:

    (i) Are any elements of the claims of the ACTU or individual unions inconsistent with Part 2-1 or Part-2-2 of the Fair Work Act 2009?

    (ii) Do any elements of the claims of the ACTU or individual unions require terms that are not permitted to be included in a modern award under Part 2-3 of the Fair Work Act 2009?

    (iii) Are any elements of the claims of the ACTU or individual unions inconsistent with Part 6-2 of the Fair Work Act 2009?

    (iv) Do any elements of the claims of the ACTU or individual unions purport to give the Commission powers which it does not have under the Fair Work Act 2009?

22. After Ai Group filed its submissions in the jurisdictional stage of the case on 20 April 2015 in accordance with the directions of President Ross, the ACTU withdrew a number of its claims in a submission filed on 15 June 2015.

23. Accordingly, on 11 August 2015, Ai Group filed a further submission which identified which arguments it continued to press in the light of the withdrawal of various ACTU claims. The submission (at paragraph 10) identified that Ai Group continues to advance the following arguments in respect of the ACTU's proposed family and domestic violence leave clause:

    a. The proposed clause is not 'necessary' to achieve the modern awards objective, as required by s.138. We acknowledged that what is "necessary" in a particular case is a value judgement based on an

assessment of the considerations listed in s.134(1), having regard to submissions and evidence directed to those matters).

b. Clause X.3.3 in the unions' proposed clause (which deals with confidentiality) is not *"about"* a matter listed in s.139(1) and therefore cannot be included in a modern award (s.136(1)(a)). To the extent that such a term is inserted, it would have no effect (s.137).

c. Clause X.3.3 is not an incidental or machinery term, as permitted by s.142 of the Act.

24. The preliminary jurisdictional issues were heard on 13 August 2015 by a Full Bench of the Commission. The Full Bench handed down its decision on the preliminary jurisdictional issues on 22 October 2015. In respect of the ACTU's claim for a family and domestic violence leave clause, the Full Bench relevantly stated (emphasis added):

> [15] In response to the ACTU's amended claim, the employer parties (primarily ACCI and Ai Group) made submissions which substantially overlapped and made a number of common points. In relation to the Family and Domestic Violence clause, it was submitted that clause X.3.3, which deals with confidentiality, is not "about" a matter in s.139(1) and is not an incidental or machinery term as permitted by s.142, and therefore cannot be included in a modern award …
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> **Consideration**
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> [17] There are circumstances where it may be convenient for a court or statutory tribunal to consider applications to strike out claims prior to the final hearing of the matter and before any evidence is received. However the power to do so will only be employed where it is clear that the claim is manifestly groundless and incapable of success …
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> …
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> [18] Where a claim is sought to be struck out on jurisdictional grounds, it must be demonstrated that the existence of jurisdiction to grant the claim is inarguable and that there is no order that could be made in favour of the applicant which would be within jurisdiction …
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> …
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> [19] As earlier stated, the employer parties do not contend that the whole of the amended ACTU claim should be struck out. Nor do they contend that there is no modern award provision which the Commission can make dealing with the subject matters of the ACTU claim, namely domestic violence leave, antenatal leave and a return to work from parental leave of part-time or reduced hours. Accordingly the

determination of the employer parties' jurisdictional objections to discrete aspects of the amended ACTU will not avoid the need to conduct a final hearing in respect of the ACTU claim. There is no suggestion here of the Commission proceeding to a hearing which it has no authority to conduct. The ACTU would not be prevented by any decision we might make at this juncture from further amending its claim to overcome any jurisdictional difficulties which might be identified by us in a preliminary decision. Nor would the Commission be prevented, after hearing the evidence and submissions at the final hearing of the matter, from granting modern award provisions different in form to those claimed by the ACTU if it is considered such provisions are consistent with the modern awards objective in s.134 of the FW Act and the Commission has the requisite power under the FW Act (subject, of course, to the parties being afforded procedural fairness). That is because the Commission, in the exercise of its modern award-making functions, is obliged to act within the scope of its statutory powers and to discharge its statutory obligations but is not confined by the terms of an application made by a particular party as if it were a pleading before a court.

[20] These matters by themselves indicate that the determination of the employer parties' jurisdictional objections at this preliminary stage would be premature. In addition however, we are not satisfied that the employer parties have discharged the "heavy burden" of demonstrating that even the discrete aspects of the amended ACTU claim which they have challenged are, in jurisdictional terms, without legal foundation.

[21] Without hearing the evidence, we would not be prepared to conclude that clause X.3.3 of the proposed Family and Domestic Violence Leave clause is beyond jurisdiction. It was accepted by the employer parties that the substantive provisions of the Family and Domestic Violence Leave clause, which would establish an entitlement to 10 days per year domestic and violence leave to be taken for specific identified purposes, were authorised by s.139(1)(h) as terms which could be included in a modern award because they were about "*leave*". We consider that if there was evidence demonstrating that 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 the modern award*" and "*essential for the purpose of making a particular term operate in a practical way*".

Conclusion

[26] Because we are not satisfied that the impugned aspects of the ACTU's amended claim lack an arguable legal foundation, we are not prepared at this stage of the proceedings and without having heard any evidence to strike out those parts of the ACTU's amended claim. The matter will proceed to a final hearing before a Full Bench of this Commission. We emphasise that in reaching this conclusion we have not formed any final view about the employer parties' jurisdictional objections. Nor of course is anything we have stated in the decision to be taken as indicating any view about the merits of the ACTU's amended claim - in particular whether it

would meet the modern awards objective in s.134(1).[8]

25. As is evident from the transcript of the hearing on 13 August 2015, both Ai Group[9] and ACCI[10] accepted that the argument about whether or not the ACTU's claims were necessary to achieve the modern awards objective in s.134 (and hence comply with s.138) were matters to be dealt with when the substantive case was heard, rather than as a preliminary jurisdictional issue, and were not dealt with at the hearing.

26. In the current proceedings, having regard to the amended claim filed by the ACTU on 5 October 2016, Ai Group continues to contend that:

- The ACTU's proposed family and domestic violence clause is inconsistent with s.134 of the Act;
- The ACTU's proposed clause is not necessary to achieve the modern awards objective and hence is not consistent with s.138 of the Act.

[8] *Family and domestic violence leave clause; Family friendly work arrangements clause* [2015] FWCFB 5585.

[9] Transcript of proceedings on 13 August 2016 at PN195.

[10] Transcript of proceedings on 13 August 2016 at PN180.

6. THE IMPACT OF SOCIAL PROBLEMS, PERSONAL PROBLEMS AND PERSONAL TRAGEDIES ON EMPLOYEES AND EMPLOYERS

27. Although family and domestic violence is an important community problem that is currently receiving considerable attention by Governments, police forces, courts and numerous other organisations, such violence is only one of the many social problems that can have a serious impact on the lives of employees. In addition, various personal problems and personal tragedies can have a serious impact.

28. Apart from family and domestic violence, crime in general, mental health issues, relationship breakdown, drug dependence, alcohol dependence, gambling addiction, death and bereavement, personal financial difficulties, housing affordability, homelessness, racism, traffic accidents and legal disputes are just some of the numerous social and personal issues that can have a major impact upon employees, and consequently may impact employers.

29. Indeed, many social problems can be said to interact with the workplace in one way or another.

30. The grant of the ACTU's claim would have the effect of creating a new entitlement for employees who face a particular type of social concern in the context of many other important and challenging issues that can also have a bearing on employee's personal and professional life. Our concern in this respect if twofold. Firstly, with respect, we do not consider that it is the Commission's role to identify and prioritise specific social issues for the purposes of creating new minimum safety net standards. Secondly, it is our concern that if the claim were successful, it may result in further calls from the union movement for additional forms of leave or otherwise in respect of various other prevailing social issues, 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 awards system (s.134(1)(g)).

31. It is not appropriate for the Commission, in considering what constitutes a 'fair and relevant minimum safety net', to prioritise particular social problems over others. The objective would not be furthered by treating those employees affected by particular social problems more generously than those affected by other social problems. The Legislature has already struck an appropriate balance in determining in what circumstances employees generally should be entitled to paid and unpaid leave. It has elected not to establish specific family and domestic leave entitlements. It has maintained this approach notwithstanding its evident understanding of the significance of the issue, as demonstrated by the amendment to s.65(1) of the FW Act to expressly deal with such subject matter. The Commission should not supplant the intent of the Legislature by developing a further general leave entitlement that would be applicable to all award covered employees.

32. Prioritising family and domestic violence within leave entitlements necessarily involves making a value judgment that the problem of family and domestic violence is more pressing and deserving than the myriad of other social problems in society. This is not the role of the Commission. The Commission is being asked to determine, for example, that a victim of family and domestic violence is more deserving of leave than a victim of a serious assault by a stranger.

6.1 The prevalence of crime

33. In their submission, the ACTU rely heavily on the Australian Bureau of Statistics (**ABS**) Personal Safety Survey (**PSS**) and an analysis of the PSS by Dr Peta Cox, to show the prevalence of family and domestic violence in Australian society and its connection to the workplace.

34. However, whilst it is evident that a significant number of women have experienced family and domestic violence, and that a significant proportion of these women are employed, there are a significant number of victims of crime, the majority of whom are also employed.

35. The latest ABS publication on Crime Victimisation in Australia[11] shows that, in the previous 12 month period:

a. Of the 18.7 million persons aged 15 years and over in Australia: 400,400 (2.1%) experienced at least one physical assault, 549,500 (2.9%) experienced at least one threatened assault (including face-to-face and non-face-to-face) and 55,900 (0.3%) experienced at least one robbery;

b. Of the 17.8 million persons aged 18 years and over in Australia: 58,600 (0.3%) experienced at least one sexual assault;

c. Of the 8.9 million households in Australia: 511,400 (5.7%) households experienced at least one incident of malicious property damage; 254,700 (2.9%) households experienced at least one theft from a motor vehicle; 261,400 (2.9%) households experienced at least one incident of other theft; 242,500 (2.7%) households experienced at least one break-in to their home, garage or shed; 180,600 (2.0%) households experienced at least one attempted break-in to their home, garage or shed; and 53,400 (0.6%) households had at least one motor vehicle stolen.[12]

36. Of those persons who experienced personal crime, the data further shows that:

- Of the 400,400 persons who experienced at least one physical assault, 245,700 persons (approximately 61%) were employed;[13]
- Of the 549,500 persons who experienced at least one threatened assault, 343,400 (approximately 62%) were employed;[14]
- Of the 58,600 persons who experienced at least one sexual assault,

[11] ABS 4530.0 – Crime Victimisation, Australia, 2014-2015.

[12] Ibid. Table 1.

[13] Ibid. Table 12 (the percentage of victims who were employed was worked out by dividing the total no. of victims employed by the total number of victims).

[14] Ibid. Table 12.

28,400 (approximately 48%) were employed.[15]

37. Clearly the prevalence of crime in the community, and the proportion of victims of crime who are employed, exceeds the incidence of family and domestic violence.

38. Indeed, the PSS provides data not only on family and domestic violence but on the prevalence of violence and the perpetrators of violence more generally.

39. Interestingly, the PSS shows that since the age of 15, more men (4.1 million or 49%) have experienced violence than women (3.6 million or 41%).[16] It also shows that in the 12 months prior to the survey, nearly three quarters of a million men aged 18 years and over (8.7% of men aged 18 years and over) compared to nearly half a million women aged 18 years and over (5.3% of women aged 18 years and over) had experienced at least one incident of violence.[17]

40. Looking at the PSS data on the perpetrators of violence, it is evident that men's and women's experiences of violence since the age of 15 have been perpetrated by both strangers and known persons in high proportions. In fact, men were not only more likely to experience violence than women, but more likely to experience violence by a stranger than by a known person.[18] Even where the perpetrators have been known to the victim (male or female), the PSS reveals that large numbers of these have not been partners (previous or current) or other family members but others such as friends, acquaintances, neighbours, co-workers and co-volunteers. These incidents of violence do not typically fall within the definition of family and domestic violence.

[15] Ibid. Table 19.

[16] ABS 4906.0 – Personal Safety, Australia, 2012.Table 1.

[17] Ibid.

[18] Ibid. Table 4.

41. In particular, the PSS data shows that (see **Table 6.1**):

- Since the age of 15, an estimated 3,018,700 men had experienced violence by a stranger (36% of all men) compared to 2,255,000 men who had experienced violence by a known person (27% of all men). Where the perpetrator was known, the most likely type of known perpetrator was an acquaintance or neighbour (873,600 or 10% of all men). Other large numbers of known perpetrators were friends (402,000 or 5% of all men), previous partners (336,300 or 4% of all men), boyfriends/girlfriends or dates (313,700 or 4% of all men), and co-workers/co-volunteers (319,200 or 4% of all men).[19]

- Since the age of 15, an estimated 3,106,500 women had experienced violence by a known person (36% of all women) compared to 1,068,200 women who had experienced violence by a stranger (12% of all women). The most likely type of known perpetrator was a previous partner (1,267,200 or 15% of all women). Other large numbers of known perpetrators were boyfriends/girlfriends or dates (990,700 or 11% of all women), fathers or mothers (306,100 or 4% of all women), friends (322,000 or 4% of all women) and acquaintances or neighbours (614,400 or 7% of all women).[20]

[19] Ibid. Table 4.

[20] Ibid.

Table 6.1: Experience of Violence Since the Age of 15 – Relationship to Perpetrator

	Males		Females		Persons	
	'000	%	'000	%	'000	%
Whether experienced violence since the age of 15						
Did not experience violence since the age of 15	4,318.2	51.0	5,174.8	59.2	9,493.0	55.2
Experienced violence since the age of 15 (a)	4,148.0	49.0	3,560.6	40.8	7,708.6	44.8
Relationship to perpetrator(b)						
Stranger	3,018.7	35.7	1,068.2	12.2	4,086.9	23.8
Known person	2,255.9	26.6	3,106.5	35.6	5,362.4	31.2
Partner	448.0	5.3	1,479.9	16.9	1,928.0	11.2
Current partner (c)	119.6	1.4	237.1	2.7	356.7	2.1
Previous partner (d)	336.3	4.0	1,267.2	14.5	1,603.4	9.3
Boyfriend/girlfriend or date (e)	313.7	3.7	990.7	11.3	1,304.4	7.6
Father or mother	178.3	2.1	306.1	3.5	484.4	2.8
Son or daughter	*16.7	*0.2	46.4	0.5	63.1	0.4
Brother or sister	75.6	0.9	162.6	1.9	238.3	1.4
Other relative or in-law	99.7	1.2	211.2	2.4	310.9	1.8
Teacher	*34.7	*0.4	*10.7	*0.1	45.4	0.3
Friend	402.0	4.7	322.0	3.7	724.0	4.2
Acquaintance or neighbour	873.6	10.3	614.4	7.0	1,488.1	8.7
Employer/boss/supervisor	62.3	0.7	74.5	0.9	136.8	0.8
Co-worker/co-volunteer	319.2	3.8	126.8	1.5	445.9	2.6
Other (f)	379.3	4.5	319.2	3.7	698.4	4.1
Total Persons	**8,466.2**	**100.0**	**8,735.4**	**100.0**	**17,201.7**	**100.0**

Source: ABS 4960.1 – Personal Safety, Australia 2012 (Table 4).

* estimate has a relative standard error of 25% to 50% and should be used with caution.

(a) Where a person has experienced violence (i.e. any incident of physical or sexual assault or threat) by more than one perpetrator, they are counted separately for each perpetrator type but are only counted once in the aggregated total.

(b) These estimates refer to all perpetrator types a person has ever experienced violence (i.e. any incident of physical or sexual assault or threat) by since the age of 15.

(c) The person the respondent currently lives with in a married or de facto relationship.

(d) A person the respondent lived with at some point in a married or de facto relationship from whom the respondent is now separated. This includes a partner the respondent was living with at the time of experiencing violence, or a partner the respondent was no longer living with at the time of experiencing violence.

(e) For the PSS, boyfriend/girlfriend or date refers to a person the respondent dated, or was intimately involved with but did not live with. This relationship may have different levels of commitment and involvement, e.g. one date only, regular dating with no sexual involvement or a serious sexual or emotional relationship.

(f) Includes counsellor/psychologist/psychiatrist, doctor, priest/minister/rabbi etc., prison officer, ex-boyfriend/ex-girlfriend and any other known persons.

42. The 2014-2015 ABS data on crime victimisation shows similar results. In relation to the most recent incident of persons aged 15 and over who experienced physical assault and face-to-face threatened assault in the 12 months prior to the survey, the results reveal the following:

Physical assault:

- Out of 400,400 persons who experienced physical assault, 210,900 victims were male and 189,300 victims were female;
- In relation to the male victims, 110,900 incidents were perpetrated by known persons and 99,700 were perpetrated by strangers. The most common known perpetrators were neighbours (18,700), persons only known by sight (16,700) and family members (15,200);
- In relation to the female victims, 140,100 incidents were perpetrated by known persons and 46,400 were perpetrated by strangers. The most common known perpetrators were intimate partners (58,300), family members (27,300) and professional relationships e.g. client/patient (15,300).[21]

Face-to-face threatened assault:

- Out of 491,900 persons who experienced face-to-face threatened assault, 267,400 victims were male and 224,500 victims were female;
- In relation to the male victims, 149,400 incidents were perpetrated by known persons and 118,600 were perpetrated by strangers. The most common known perpetrators were colleagues/fellow students (30,800), family members (22,500) and neighbours (20,900);
- In relation to the female victims, 154,500 incidents were perpetrated by known persons and 68,800 were perpetrated by strangers. The most common known perpetrators were intimate partners (including current and previous partners, boyfriends/girlfriends and dates) (49,800), family

[21] ABS 4530.0 – Crime Victimisation, Australia, 2014-2015.Table 13.

members (29,800) and professional relationships e.g. client/patient (24,200).[22]

43. The above is not intended to provide a complete overview of the incidence of crime in Australia. Rather it is intended to demonstrate the prevalence of other forms of crime in the community and the fact that family and domestic violence is not the only significant form of violence, or crime generally, that can impact on the lives of employees.

6.2 The Impact of Crime

44. Apart from pointing to the prevalence of family and domestic violence, the ACTU argues that the impact of such violence on victims, including the health impacts and the need to attend legal proceedings, gives rise to the need for victims to have access to paid family and domestic violence leave.

45. However, the impact of family and domestic violence on victims will in many respects be similar to that experienced by other victims of violent crime. In addition to having to attend court and liaise with police, victims of any violent crime potentially experience a range of health and other negative consequences that can impact on their work and require them to take time off.

46. In a paper released by the Australian Institute of Criminology (**AIC**) in 2015[23] looking at the impact of physical assault, it was noted that whilst the negative consequences of experiencing domestic violence or sexual assault have been extensively studied, "*victims of non-domestic, non-sexual physical assault have not received the same level of attention*."[24] This is despite the fact that physical assault has had the highest rate of victimisation of any of

[22] Ibid. Table 15.

[23] Fuller, G. 'The serious impact and consequences of physical assault,' *Trends & Issues in Crime and Criminal Justice*, No. 496 August 2015.

[24] Ibid p.2.

the four major types of violent crime (homicide, physical assault, sexual assault and robbery).[25]

47. The paper also found that "the impact of physical injuries was a particularly salient characteristic of the non-sexual, non-domestic assaults" with such victims often showing greater physical effects.[26]

48. The ACTU's claim, if successful, would mean that victims of physical or sexual assault perpetrated by a partner/family member would be entitled to an additional 10 days of leave to deal with the impacts of the crime, when victims of physical or sexual assault perpetrated by others, or indeed any other crime, would not. The claim cannot be seen as "fair" to employers or employees.

6.3 The prevalence and impact of other social problems, personal problems and personal tragedies

49. Apart from crime, there are a myriad of other prevailing social problems, personal problems and personal tragedies that can and do impact on employees in a significant way. Some common examples include the following:

Divorce and relationship break down

50. With ABS statistics estimating that 1 in 3 marriages (33%) end in divorce,[27] divorce and relationship break down is undeniably a pervasive feature of social life. The most recent ABS data shows that in 2014, there were 46,638 divorces granted.[28] This equates to 2.0 divorces per 1,000 residents in the population.[29] Of these divorces, 47% involved children.[30]

[25] Ibid p.1.

[26] Ibid p.6.

[27] ABS 4102.0 - Australian Social Trends, 2007.

[28] ABS 3310.0 - Marriages and Divorces, Australia, 2014.

[29] Ibid.

[30] Ibid.

51. It is widely accepted that separation and divorce rank among life's most traumatic experiences for adults and children. Apart from major changes in the conduct of family life, there can be significant social, emotional and financial implications for separating and divorcing couples.[31] In addition, there are the family law proceedings which can take 12 months or longer to complete with the current delays in the allocation of hearing dates.[32] For children's matters, this can be even more drawn out because of the need to attend compulsory family dispute resolution first.[33] In the Federal Circuit Court of Australia, which undertakes 87% of the family law workload (excluding Western Australia), 95,341 family law cases were litigated in 2014-2015 alone.[34] This accounts for 91% of all applications filed with the court in 2014-2015.[35] In the Family Court of Australia, which deals with the most complex and difficult family law cases, a total of 20,397 applications were filed in 2014-2015, including 2,936 final order applications.[36]

52. Of the divorces granted in 2014, the median ages at separation and divorce for men were 41.7 and 45.2 respectively, and the median ages for women at separation and divorce were 39.0 and 42.5 respectively.[37] Further, more than half (58.6%) of the females and close to half (49.1%) of the males granted a divorce in 2014 were under 45 years of age. Given this, and the fact that working-age Australians are generally considered to be persons aged between 25-64 years,[38] undoubtedly a large proportion of Australians affected by separation and divorce each year are employed.

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[31] Amato, P. (2000) 'The consequences of divorce for adults and children,' *Journal of Marriage and the Family*, vol. 62, pp. 1269-87.

[32] Federal Circuit Court of Australia, Annual Report 2014/2015, p.51

[33] See Family Court fact sheet on Compulsory Family Dispute Resolution: http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/getting-ready-for-court/compulsory-family-dispute-resolution-court-procedures-and-requirements

[34] Federal Circuit Court of Australia, Annual Report 2014/2015, p.46.

[35] Ibid p.51.

[36] Family Court of Australia Annual Report 2014-2015

[37] ABS 3310.0 - Marriages and Divorces, Australia, 2014

[38] http://www.aihw.gov.au/australias-welfare/2015/working-age/

53. There is no doubt that separation and divorce often have a major adverse impact upon employees and a consequent adverse impact upon employers.

Drug and alcohol addiction

54. The misuse of drugs and alcohol is widely recognised in Australia as a serious and complex problem, which contributes to thousands of deaths, serious illness, disease and injury, social and family disruption, workplace concerns, violence, crime and community safety issues.[39] The latest available National Drug Strategy Household Survey (**NDSHS**) found that in 2013, 3.5 million Australians were drinking at levels that placed them at life time risk of an alcohol-related disease or injury.[40] In relation to illicit drugs, the survey found that in the previous 12 months 15% of Australians had used an illicit drug and 8.3% of the population had been a victim of an illicit drug-related incident.[41]

55. The economic, health and social costs associated with these levels of drug and alcohol usage are known to be enormous. One study estimated that the economic costs associated with drug use in 2004-2005 amounted to $56.1 billion.[42] Further, the NDSHS notes that in 2010 it was estimated that 2.7% of the burden of disease in Australasia was attributable to alcohol use and 2.6% was attributable to the use of illicit drugs.[43]

56. Of persons with a drug or alcohol addiction, there are also strong links to the workplace. The NDSHS found that in 2013, 22.6% of lifetime risky drinkers and 16.8% of illicit drug users were employed.[44] It has also been found that persons in paid employment generally use illicit drugs more frequently than

[39] Ministerial Council on Drug Strategy (2011) The National Drug Strategy 2010-2015. Canberra: Commonwealth of Australia.

[40] Australian Institute of Health and Welfare, *National Drug Strategy Household Survey* detailed report 2013 p.35.

[41] Ibid pp.49-50.

[42] Collins, D. and Lapsley, H. (2008). *The costs of tobacco. Alcohol and illicit drug abuse to Australian society in 2004-2005*. National Drug Strategy Monograph Series no.66. Canberra: Australian Government Department of Health and Ageing.

[43] Australian Institute of Health and Welfare, National Drug Strategy Household Survey detailed report 2013 p.2, referring to data visualisationsfrom the Institute for Health Metrics and Evaluation 2014.

[44] Ibid p.14.

those not in paid employment[45] and that amphetamine use in particular is almost twice as common among those in the paid workforce as those not in paid work.[46] On an industry level, the National Centre for Education and Training on Addiction (NCETA) report that amphetamine usage by employees is higher than the total workforce average (4.0%) in the industries of hospitality, transport, construction, agriculture, retail and manufacturing.[47] This is more than double the rate of usage that was estimated by the Australian Institute of Health and Welfare (AIHW) for the entire population aged 14 years and over, at around 2% in 2010 and in 2013.

57. Given the impacts of alcohol and drug addiction to society, huge resources are devoted to the treatment of these kinds of addiction with treatment options including medication, withdrawal/detoxification, counselling, rehabilitation, programs devoted to peer, social and family support. The Australian Drug Information Network (**ADIN**), reveals that there are close to 500 help and support services to assist persons with the difficult process of dealing with a drug and alcohol addiction.[48]

58. There is no doubt that drug and alcohol addiction typically has a major adverse impact upon employees and a consequent adverse impact upon employers.

Suicide

59. Whilst reports show that suicide is one of the leading causes of deaths in Australia, there is an overall lack of public awareness about the impact of suicide on the community. The latest mortality data released by the ABS[49] shows that 2014 had the highest suicide rate in 13 years, with the overall suicide rate increasing significantly from 10.9 deaths by suicide per 100,100

[45] Bywood, P., Pidd, K., Roche, A. (2006) *Illicit Drugs in the Australian Workforce: Prevalence and Patterns of Use*, NCETA, Fact Sheet 5.

[46] Roche, A.M., Pidd, K., Bywood, P., & Freeman, T. (2008). Methamphetamine use among Australian workers and its implications for prevention*. Drug and Alcohol Review 27(3), 334-341*.

[47] Pidd, K., Shtangey, V., Roche, A., (2008) *Drug Use in the Australian Workforce: Prevalence, patterns & implications*, NCETA, Table 5.2.

[48] http://www.adin.com.au/help-support-services

[49] ABS 3303.0 – Causes of Death, Australia 2014.

people in 2013 to 12 suicides per 100,000 people in 2014.[50] The data showed that there were 2,864 deaths from intentional self-harm in 2014, resulting in a ranking as the 13th leading cause of all deaths.[51] Of these deaths, about three-quarters (75.4%) were men, making intentional self-harm the 10th leading cause of death for males.[52] Rates have been particularly stark in men aged 40-44 years, with 18.3% of male deaths in this age group attributable to suicide.[53]

60. The above statistics follow a 2010 senate inquiry, 'The Hidden Toll: Suicide in Australia,' which looked at the potential costs of suicide to individuals, families and communities. Reporting that at least six Australian lives are taken by suicide every day, and that over 60,000 people each year attempt to take their own lives, the inquiry found that the personal, social and economic impacts of suicide and attempted suicide on those affected are enormous.[54]

61. Apart from noting the difficulties faced by persons who had attempted suicide and the need to assist and support such persons, the inquiry found that each complete suicide has a ripple effect on the family and friends of the deceased as well as on work colleagues, neighbours, school mates and the rest of the community with an estimated six people said to be immediately affected by one completed suicide.[55] The impact of losing a loved one to suicide was also found to be significant, with consequences including losing their employment, needing to seek counselling, requiring medication such as antidepressants, becoming drug or alcohol dependent, the destruction or

[50] Ibid. See also: https://www.theguardian.com/society/2016/mar/09/highest-australian-suicide-rate-in-13-years-driven-by-men-aged-40-to-44

[51] ABS 3303.0 – Causes of Death, Australia 2014 http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/3303.0~2014~Main%20Features~Key%20Characteristics~10054

[52] Ibid

[53] ABS 3303.0 – Causes of Death, Australia 2014 http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/3303.0~2014~Main%20Features~Intentional%20self-harm%20by%20Age~10051

[54] The Senate, Community Affairs References Committee, 'The Hidden Toll: Suicide in Australia,' June 2010, p.3.

[55] Ibid p.9.

relationships with partners, family and friends and the contemplation of suicide themselves.[56]

Death and bereavement

62. Bereavement is well recognised to be one of the most psychologically and socially significant life events that most people ever experience. With ABS data estimating that there is one death every 3 minutes and 22 seconds in Australia,[57] many Australians experience the loss of a family member or loved one each year. In 2014 alone there were 153,580 recorded deaths in Australia, equating to a crude death rate of 6.5 per 1,000 persons in the population.[58]

63. Whilst there can be a range of responses to bereavement, death often causes significant distress to those closely connected to the deceased. In a research paper prepared for a cover feature on the psychology of grief and loss in the Australian Psychological Society bulletin 'InPsych,' it was noted that whilst most people typically regain their psychological equilibrium after some weeks or months of acute mourning, grief "*can be intense and chronic for many months or years*."[59] This is particularly the case for individuals bereaved as a result of deaths that are unexpected, violent or untimely (e.g. the death of a child).[60] Furthermore, whilst it has been shown that for most people grief intensity is fairly low after a period of about six months, it has been found bereavement is a severe stressor that can trigger the onset of both physical and mental disorders such as major depression, post-traumatic stress disorder, anxiety and sleep disorders.[61]

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[56] Ibid p.8.

[57] ABS population clock. See http://www.abs.gov.au/ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/1647509ef7e25faaca2568a900154b63?OpenDocument

[58] ABS 3302.0 - Deaths, Australia, 2014.

[59] Hall, C. 'Beyond Kübler-Ross: Recent developments in our understanding of grief and bereavement, *InPysch*, December 2011, Volume 33, Issue 6. See: https://www.psychology.org.au/publications/inpsych/2011/december/hall/

[60] Ibid.

[61] Ibid.

64. Parliament has determined that it is appropriate for permanent employees to have an entitlement to two days of paid compassionate leave if a member of the employee's immediate family or household dies, and for casual employees to have an entitlement to two days of unpaid compassionate leave (ss.104 and 106). The unions' claim for a 10 day paid leave entitlement for both permanent and casual employees who experience family and domestic violence contrasts starkly with the NES compassionate leave provisions.

Conclusion

65. The above examples are just some of the prevailing social problems in Australian society, aside from family and domestic violence, that can have negative consequences upon the lives of employees. The impact upon employees of divorce/relationship breakdown, drug or alcohol addiction, suicide of a loved one, the death of a family member, or indeed any other personal tragedy or trauma, can be very significant. However, employees dealing with these issues do not have access to an extra 10 days of paid leave under the safety net and no party is asserting that there should be a wholesale or radical reassessment of the minimum safety net in order to afford such entitlements. Accordingly, and without in any way refuting the serious and unacceptable impacts that family and domestic violence can have, it is difficult to accept that this particular social problem should be singled out in the context of the safety net above other similarly serious social problems and personal tragedies or traumas.

66. If specific leave entitlements were included in awards for family and domestic violence, the unions could be expected to pursue specific leave entitlements for a myriad of other social problems such as those referred to above.

67. Creating "a fair and relevant minimum safety net" is not about prioritising particular social problems ahead of others, nor does it necessitate the introduction of additional leave entitlements to the minimum safety net that are specifically designed to address all or any of these issues.

68. Many employers, particularly large ones, arrange for their employees to have access to an Employee Assistance Program where employees can talk confidentially to a counsellor about any social issues, personal problems or personal tragedies are impacting upon them. These arrangements are not part of the safety net, and it would be inappropriate for them to be made compulsory. Different employers have different capacities to provide this type of assistance.

7. THE CASE MOUNTED BY THE ACTU

69. In the matter here before the Commission, the ACTU is seeking the introduction of a new paid and unpaid leave entitlement in 122 modern awards, which would apply to full-time, part-time and casual employees. The proposed clause would provide for 10 days of paid leave at the commencement of each year and a further unlimited entitlement to two days of unpaid leave "on each occasion", absent any employer discretion as to whether the leave can be taken and if so, when it is taken.

70. The clause would provide an employee with an absolute right to take leave when the employee so seeks, provided that it is taken for the purpose of attending activities related to the experience of being subjected to family and domestic violence. That experience may have occurred the previous day, the previous week, six months prior or indeed some 20 years ago.

71. The nature of the experience may fall anywhere within a broad range of form, degree, consequence and impact. It may include grievous physical assault, accompanied by psychological and emotional trauma. It may also include an isolated incident of one partner shouting at another, which does not in fact result in any adverse or negative consequence for the recipient of that behaviour. It can include forms of abuse that are notoriously difficult to assess and identify, even for those who are trained and qualified to work in the family and domestic violence sector.

72. The behaviour may have been engaged in by a partner, former partner, mother, father, brother, sister, grandparent, cousin, uncle, aunt, son, daughter, step-parent, step-sibling, step-child, housemate or carer.

73. The leave can be taken for *any* purposes related to the experience of being subjected to family and domestic violence, irrespective of how tenuous the relationship with the experience itself might be. This could include visiting a bank, welfare agencies, a child's school, undertaking training, education and so on.

74. The taking of the leave need not be necessary. The taking of the leave at the elected time need not be necessary either. The employee carries no obligation to accommodate the operations of their employer's business or endeavour to attend to their personal circumstances outside of ordinary business hours, even where they work less than full-time hours.

75. The clause enables an employer to require evidence that the leave was taken for the purposes of attending the asserted activity, but does not appear to enable an employer to require evidence that the employee was in fact subjected to family and domestic violence, or that the activity was in fact related to the employee's experience of being subjected to family and domestic violence. In any event, the proposed clause does not preclude an employee from taking the leave should the evidentiary requirement not be met.

76. As is clear from this description, the entitlement sought by the ACTU is effectively limitless, exceptionally broad in scope, lacking in rigour and complex to interpret and apply. Indeed we cannot identify a comparable entitlement presently contained in the safety net.

77. The case mounted by the ACTU in these proceedings relates, in part, to the prevalence of family and domestic violence in the Australia. It describes the rates of such violence as having reached a "crisis point"[62], as a means of implying an increase in the prevalence and therefore there being a need to act urgently. If this characterisation were accepted, it would tend to suggest that there has been some change, some shift, in the relevant circumstances which should cause the Commission to now move to grant the ACTU's claim.

78. Our position in relation to family and domestic violence as an important social issue has previously been stated. We do not, however, accept that the issue should be addressed in the manner proposed by the ACTU. Nor do we accept that the evidence before the Commission will allow it to conclude that

[62] Transcript of proceedings on 14 November 2016 at PN23.

the prevalence of family and domestic violence is in fact experiencing an upward trend. The data rather suggests the contrary. To this extent, the Commission should not be misguided by the ACTU's choice of language.

79. The ACTU asserts that family and domestic violence is a workplace issue, because it is a complex problem, which requires a "whole of community" response. It appears to take the view that employers, in effect, bear a substantial obligation to support those who suffer from it, and to engage in the movement towards prevention of such violence.

80. As our consideration of the evidence will make clear, to the extent that employers are able, they typically provide their employees with a range of practical forms of support as and when the need arises. This includes training employees regarding gender-based violence, facilitating flexible working arrangements, providing referrals to various support services, making alterations to the workplace to ensure the safety of the employee, taking a compassionate approach to the granting of pre-existing leave entitlements and, in some circumstances, providing an entitlement to an additional form of leave.

81. The evidence before the Commission establishes that employers are generally empathetic, practical and pragmatic when faced with circumstances in which an employee is suffering from family and domestic violence. This can take many forms, and depends in part on the capacity and operations of the employer. All such actions form an effective part of the "whole of community" response to which the ACTU refers. As we later develop, the imposition of a costly one-size-fits-all leave liability is, in our view, very likely to have the effect of detracting from these successful, innovative, enterprise-specific measures implemented by employers. It must also be understood that, put simply, not all businesses have the financial capacity to provide their employees with an additional leave entitlement. This is particularly true of small businesses.

82. The ACTU submits that pre-existing entitlements under the NES do not adequately provide for the circumstances which its claim is directed towards.

Whilst we address this matter in greater detail in the submissions that follow, we note for present purposes that the evidence called does not establish that the NES is insufficient in providing paid leave and flexible working arrangements to employees who suffer from family and domestic violence. Notwithstanding some anecdotal, hearsay evidence relied upon by the ACTU, the material before the Commission falls well short of establishing that there is some systematic shortfall in the existing safety net such that those who suffer from family and domestic violence leave are frequently left without leave accruals that they could otherwise access for the purposes of attending to activities in relation to family and domestic violence.

83. One of the central tenets of the ACTU's case is the importance of financial stability and retaining employment, as this enables victims of family and domestic violence to escape from violent situations and relationships. Again, the ACTU's evidentiary case, which we soon turn to, does not establish that the current safety net does not provide victims with such certainty. There is no reliable evidence to ground the proposition that victims of family and domestic violence are subject to unfair dismissals or that they are left in perilous financial circumstances by virtue of there not being a dedicated leave entitlement which can be cured by the introduction of the ACTU's proposal. Indeed the data suggests that rates of employment and unemployment amongst women who have suffered from family and domestic violence as against those who have not reveals that there is no statically significant variation. That is to say, the data does not disclose increased rates of unemployment as a result of exposure to family and domestic violence.

84. The ACTU argues that the issue here before the Commission is not one that can appropriately be left to enterprise bargaining, by virtue of the fact that its affiliates have achieved varying outcomes during such negotiations and as such, this inconsistency is inadequate and undesirable. We need not detail our response to this argument here, as we have dealt with it comprehensively at chapter 17 of this submission. Suffice to say, in our view this is an issue that is best dealt with at the enterprise level. The negotiation

of collective agreements provides an important and suitable vehicle for developing a leave entitlement where this can be accommodated by the employer and is desired by its employees.

85. Crucially, the ACTU has not presented to the Commission any reliable cost model that might enable it to ascertain the microeconomic or macroeconomic costs associated with the grant of the claim. It is self-evident that the creation of a new leave entitlement introduces additional employment costs. However the precise extent of those costs and whether they will at all be offset is not established by the ACTU. Indeed it is the evidence of one of their expert witnesses that to do so requires the making of multiple assumptions, none of which are referable to any intelligent estimate. In simple terms, the claim cannot reliably be costed; thereby hampering the Commission's ability to take into account the likely impact on business, and weigh this consideration against those that, in the ACTU's submission, support the grant of its claim.

86. In the submissions that follow, we carefully consider and summarise the evidence called by the ACTU. We highlight that very few factual propositions in support of the claim are in fact established by it. Various elements of the evidentiary case do, however, show that the provision proposed is not necessary in order to ensure that each of the 122 modern awards is achieving the modern awards objective.

8. THE EXPERT EVIDENCE RELIED UPON BY THE ACTU

87. We here consider the evidence of those witnesses that have been advanced by the ACTU as "experts".

8.1 Dr Peta Cox

88. Dr Peta Cox has been a Senior Research Officer for the Australian National Research Organisation for Women's Safety (**ANROWS**) for two years.[63]

89. The report she has prepared for the purposes of these proceedings is based on the ANROWS publication titled "Violence against women in Australia: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012" (**ANROWS Report**).[64]

90. Despite our objections, the 143-page ANROWS Report was admitted into evidence during proceedings before the Full Bench on 14 November 2016. This was in circumstances where the ACTU failed to comply with the Commission's directions to file all documentary material upon which it seeks to rely in June 2016 and instead, did not provide a copy of the material or indicate its intention to tender it until 10 November 2016. As a result, respondent parties have been denied an opportunity to call any evidence in reply to it and, due to the truncated timeframes within which the matter has proceeded, as at the time of drafting this submission, we remain unable to consider and deal with the report. In such circumstances, it is our submission that the material contained in the ANROWS Report should be given little weight; it has not been the subject of cross-examination or any thorough investigation by respondent parties for the reasons we have here explained.

The PSS and Dr Cox's Analysis

91. The statistics cited by Dr Cox are based entirely on the PSS and her analysis of the relevant data. The survey was completed by a total of 17,500

[63] Statement of Dr Peta Cox dated 26 May 2016 at paragraph 1.

[64] Statement of Dr Peta Cox dated 26 May 2016 at paragraph 12

individuals; 13,307 women and 3,473 men.[65] The survey results derived from the interviews conducted with those 17,500 persons were extrapolated by the ABS in order to arrive at various statistics that are expressed as proportions of the Australian population at large.[66]

92. The distinction between the data published by the ABS and the ANROWS Report is explained by Dr Cox as follows:

> The ABS produces a statistical report for each time the survey is conducted. Each report is technical and precise with little background or contextualising information and no discussion of the implication of its findings. By using this tone, the ABS maintains a high level of objectivity in its reports. Organisations such as ANROWS and Our Watch aim to provide background information that may help to contextualise the reports.[67]

93. These remarks suggest that the interpretation and presentation of the PSS results by Dr Cox in the aforementioned ANROWS publication and her report before the Commission involves some subjectivity and selection.

Definitions and Terminology

94. The PSS defines different forms of violence in broad terms:

- physical violence: includes physical assault and physical threat;
- physical assault: the use of physical force with the intent to harm or frighten the person;
- physical threat: an attempt to inflict physical harm or a threat or suggestion of intent to inflict physical harm that was made face-to-face where the person believes it was able to and likely to be carried out;
- sexual violence: includes sexual assault and sexual threat;

[65] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraph 2.9.

[66] Transcript of proceedings on 14 November 2016 at PN205 – PN206.

[67] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraph 2.4.

- sexual assault: an act of a sexual nature carried out against a person's will through the use of physical force, intimidation or coercion, and includes any attempts to do this;

- sexual threat: the threat of acts of a sexual nature that were made face-to-face where the person believes it is able to and likely to be carried out.[68]

95. An important consideration that arose during the cross examination of Dr Cox is the apparent subjectivity involved in assessing whether a survey respondent had been subject to the above forms of violence. For instance, the PSS does not ascribe a definition to the notion of a respondent being 'frightened' (see definition of 'physical assault'). Rather, it is for a survey respondent to assess and identify whether they were 'frightened', absent any objective indicator or measure.[69] Similarly, an assessment as to whether a respondent was physically threatened is contingent upon the respondent's subjective opinion as to whether the threat was able and likely to be carried out.[70] By virtue of the fact that the PSS is a "victim survey", it does not attempt to derive its results against an objective standard. Rather, it seeks the views and opinions of self-identified victims of violence.

96. The PSS uses the following categories of 'partner':

- A current partner is defined as someone you live with in a marriage or de-facto relationship.[71]

- A previous partner is someone you have lived with in a marriage or de-facto relationship. The term indicates that the perpetrator was a previous partner at the time of the survey, and includes partners who were violent during the relationship.[72]

[68] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraph 4.3.

[69] Transcript of proceedings on 14 November 2016 at PN247 – PN248.

[70] Transcript of proceedings on 14 November 2016 at PN264 – PN265.

[71] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraph 4.4.1.

[72] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraph 4.4.2.

97. Dr Cox also refers to:

- Cohabiting partner: a person that the respondent is living with, or has lived with in a marriage or de facto relationship.

- Intimate partner: a broad definition that includes partners that a person may or may not be living with. This category includes cohabiting partners, as well as boyfriends, girlfriends and dates.[73]

98. Relevantly, the identification as to whether the alleged perpetrator was, for instance, a 'date' is undertaken by a survey respondent and, again, involves a degree of subjectivity.[74]

The Prevalence of All Forms of Violence

99. Section 6 of Dr Cox's report is titled "The different nature of violence experienced by men and women". The very vast majority of the data here contained relates to "violence" generally. It is not limited to the experience of "family and domestic violence" as defined by the ACTU's proposed clause.

100. For instance, the figures cited at paragraphs 6.1 – 6.4 relate to the prevalence of all violence, including that inflicted by a stranger. Similarly, the statistics set out at paragraphs 6.16 – 6.26 is generalised; it again includes data pertaining to incidents of violence committed by any person.

101. None of the data presented provides clear, reliable statistics that reveal the prevalence of "violent, threatening or other abusive behaviour by a person against a current or former partner or member of the person's family or household", such that the Commission could accurately assess the scope and potential cost of the ACTU's claim.

102. To the extent that the ACTU seeks to rely on this material, the submissions we make below regarding the interpretation of "lifetime experience" statistics

[73] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraph 7.1.

[74] Transcript of proceedings on 14 November 2016 at PN274.

must be borne in mind. As explained during cross examination: (emphasis added)

> Now, if I can stay with the example I've given you before, which was paragraph 6.1, which says, "Since the age of 15, 3.6 million women have experienced violence." Now, can I put this to you and see if you agree with me? I'm trying to understand that that means. Does that mean this, that a percentage of the 13,000- odd female respondents who were interviewed at some time in their lives between the age of 15 to whatever age they were when they did the interview, be it 20, 30, 40, 50, 60, 70, 80, that they experienced somewhere in their life at least once the categories of assault and threats that you set out in your statement?---Yes.[75]

The Prevalence of Partner Violence against Women

103. At paragraph 7.2 of her report, Dr Cox provides the statistic that is repeatedly cited in this case: that one in four women in Australia have experienced violence by an intimate partner they may or may not be living with.[76] It is important to appreciate, however, that this captures any experience of violence by an intimate partner (which includes partners that a person may or may not be, or have been, living with) since the age of 15. That is, if a woman experienced one isolated incident of violence some 20 years ago, she would form part of the 2,194,200 women included in this statistic.

104. Importantly, we note that at paragraph 7.23 of her report, Dr Cox states that of those women who had experienced male cohabiting partner violence:

- the majority (60%) said that the most recent incident of this form occurred ten or more years ago; and
- 16% said that their most recent incident of such violence occurred less than two years ago. Of those, less than 10% said that their most recent incident occurred in the 12 months prior to the survey.

105. Dr Cox also refers to statistics regarding the prevalence of violence (which again includes each of the above categories) by an “intimate partner” in the

[75] Transcript of proceedings on 14 November 2016 at PN213.

[76] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraph 7.2.

12 months prior to the PSS. The proportion of women so affected is significantly lower:

- 2.1% of women in Australia experienced at least one incident of violence by an intimate partner (cohabiting and non-cohabiting) in the 12 months prior to the PSS; and

- 1.5% of women in Australia experienced at least one incident of violence by an intimate cohabiting partner in the 12 months prior to the PSS.

Labour Force Participation of Women who Experienced Partner Violence

106. Dr Cox's evidence regarding labour force participation reveals that there is no statistically significant variation between:

- the proportion of employed women and the proportion of unemployed women (including women not in the workforce) who experienced male cohabiting partner violence;[77]

- the proportion of employed women and the proportion of unemployed women (including women not in the workforce) who experienced intimate partner violence;[78]

- the proportion of employed women, the proportion of unemployed women, and the proportion of all women nationally who experienced cohabiting partner violence;[79] and

- the proportion of employed women, the proportion of unemployed women, and the proportion of all women nationally who experienced intimate partner violence.[80]

[77] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraph 7.8.
[78] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraph 7.9.
[79] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraph 7.10.
[80] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraph 7.10.

107. This data is of obvious importance to these proceedings, as it confirms that the PSS does not establish any correlation or causal relationship between the employment status of a woman and the prevalence of male cohabiting partner violence or, more broadly, intimate partner violence.

108. Rather, the PSS suggests that:

- the experience of male cohabiting partner violence or intimate partner violence does not correlate with, contribute to or cause unemployment or lack of participation in the labour force; and
- unemployment or a lack of participation in the labour force does not correlate with, contribute to or cause a woman to be subjected to male cohabiting partner violence or intimate partner violence.

Socio-Economic Status and Household Weekly Income of Women who Experienced Partner Violence

109. Dr Cox's report establishes that the socio-economic status or characteristics of women do not affect the likelihood of being a victim of partner violence. This includes a consideration of household weekly income and a ranking for where the employee lives.[81]

Contact with Police by Women who Experienced Partner Violence

110. Data pertaining to the number of women who had experienced cohabiting male partner violence in the 12 months prior to the PSS and had contacted the police in this regard has been presented with reference to employment status.[82]

111. At its highest, the figures might suggest some correlation between the level of contact with police and a woman's employment status, however neither the statistics nor Dr Cox's analysis establishes a causal relationship.

[81] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraphs 7.13 – 7.17 and transcript of proceedings on 14 November 2016 at PN388 – PN390.

[82] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraph 8.2.

Advice and Support Sought by Women who Experienced Partner Violence

112. We make similar observations regarding the statistics that go to the proportion of women that sought advice or support about the violence perpetrated by their current partner.[83] The data does not reveal any potential contributing factors that may influence the extent to which unemployed or employed women require advice and support, are able to access advice and support and ultimately in fact do so.

113. Regardless, the data reveals that the majority of women, whether employed or unemployed, sought advice or support in the relevant circumstances. We note also that Dr O'Brien's evidence in relation to this data; that it does not assist the Commission in assessing the cost of the ACTU's claim, which we set out below.

Time Taken off Work by Women who Experienced Partner Violence

114. Participants of the PSS were asked if they took time off work in the 12 months after their most recent assault, where that most recent incident by a male was perpetrated by a cohabiting partner and the leave taken was as a result of the incident.

115. Dr Cox reports that:

- of those women who were employed at the relevant time and had experienced physical assault by a male cohabiting partner as their most recent incident, one in four took time off work in the 12 months after the incident;[84]

- of those women who were employed at the relevant time and had experienced sexual assault by a male cohabiting partner as their most

[83] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraph 8.8.

[84] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraph 8.14.

recent incident, one in five took time off work in the 12 months after the incident.[85]

116. The various limitations of this 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. This is consistent with Dr O'Brien's evidence, to which we later turn.

117. Importantly, the statistics do not reveal the following relevant information:

- Whether the relevant group of respondents were covered by modern awards;
- Whether a modern award applied to them and if so, which one;[86]
- Whether an enterprise agreement or policy applied to them, either of which entitled them to leave designed specifically for victims of family and domestic violence;
- Whether they accessed paid leave or were on an authorised unpaid absence;[87]
- If they accessed paid leave, the specific form of leave;[88]
- The precise purpose for which the leave was taken (that is, due to an injury, medical appointments, court proceedings etc);
- The period of the employee's absence;[89]
- Whether the purpose for the leave was communicated to the employer; and
- Their type of employment (i.e. full-time, part-time or casual).

[85] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraph 8.15.

[86] Transcript of proceedings on 14 November 2016 at PN517.

[87] Transcript of proceedings on 14 November 2016 at PN463.

[88] Transcript of proceedings on 14 November 2016 at PN464.

[89] Transcript of proceedings on 14 November 2016 at PN462.

118. Further, this element of the PSS relates only to those women whose most recent incident of violence was perpetrated by a male cohabiting partner. It does not include any women who, for instance, had previously experienced such violence but subsequently experienced another instance of violence that was perpetrated by a person other than a male cohabiting partner.[90]

119. Accordingly, the data was collected from a smaller subset of respondents. It is reasonable to infer that if the sample were expanded to include women who had experienced any instance of violence by a male cohabiting partner, irrespective of whether it was the most recent incident of violence experienced, the proportion of women who accessed leave may vary and potentially increase.

Conclusion

120. Dr Cox's report provides an overview of the PSS results of 2012 that must carefully be examined in order to ascertain the extent to which the data is in fact relevant to the proceedings before the Commission. Caution should be exercised in relying upon certain figures that, due to the way in which they have been derived, do not provide a proper measure of the prevalence of family and domestic violence as defined by the ACTU. Furthermore, the emphasis on 'lifetime experience' 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 prevalence of violence against women by intimate cohabiting partners in the 12 months preceding the 2012 PSS produces a figure of far smaller quantum.

121. We do not, of course, contend that, the issue of family and domestic violence is an unimportant one. Rather, we simply submit that the statistics presented should be considered carefully when determining the extent of family and domestic violence.

[90] ANROWS, *Violence against women in Australia: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012* (2015), page 97.

8.2 Dr Michael Flood

122. Dr Michael Flood is an Associate Professor in Sociology and an Australian Research Council Future Fellow at the University of Wollongong.[91] The report attached to his statement, consistent with his previous publications, examines "intimate partner violence" by reference to gender.

123. The term "partner" includes spouses, de facto partners and non-cohabiting sexual partners such as boyfriends and girlfriends.[92] It does not include other forms of intra-familial violence.[93] Accordingly, Dr Flood's report is narrower in scope than the provision sought by the ACTU.

124. Dr Flood's report does not purport to connect intimate partner violence with the workplace, participation in the workforce or access to paid leave.

The Nature of Intimate Partner Violence

125. Dr Flood makes the following remarks regarding the nature of intimate partner violence: (emphasis added)

> Thus, intimate partner violence or domestic violence (between adults) can best be understood as involving a systematic pattern of power and control exerted by one person against another involving a variety of physical and non-physical tactics of abuse and coercion, in the context of a current or former intimate relationship. While the presence of any aggressive behaviour between partners or former partners in a sense can be described as domestic violence, this pattern of power and control is domestic violence in the 'strong' or 'proper' sense.[94]

126. Under cross-examination, Dr Flood explained that in the above paragraph, he seeks to draw a distinction "between a definition of domestic violence that focuses on the presence of any physical aggression between intimate partners or ex-partners on the one hand, and a definition of domestic violence which focuses on … a systematic pattern of coercive and controlling

[91] Statement of Dr Michael Flood dated 26 May 2016 at paragraph 1.

[92] Statement of Dr Michael Flood dated 26 May 2016 at annexure MF-3, paragraph 2.1.

[93] Statement of Dr Michael Flood dated 26 May 2016 at annexure MF-3, paragraph 2.2.

[94] Statement of Dr Michael Flood dated 26 May 2016 at annexure MF-3, paragraph 2.6.

behaviour by one person against the other".[95] It is the latter which he considers domestic violence "in the 'strong' and 'proper' sense".

The PSS

127. In his report, Dr Flood notes that one of the limitations of the PSS is that it focuses on violent acts rather than revealing the extent of systematic patterns of abuse. Having cited statistics in relation to 'lifetime victimisation', Dr Flood states: (emphasis added)

> … These figures tell us about the numbers and proportions of men and women who have ever experienced any kind of violence – any physical or sexual aggression or the threat of these – by a partner or former partner. They do not, however, tell us about the severity, frequency, history, impact, or context of this violence. In other words, these figures by themselves do not allow a proper assessment of women's or men's experiences of intimate partner violence.
>
> …
>
> These figures from the PSS do indicate what proportion of males and females experienced at least one incident of physical or sexual assault or threat by a current of former partner. But they do not tell us whether this violence was part of a systematic pattern of physical abuse or an isolated incident, whether it was initiated or in self-defence, whether it was instrumental or reactive, whether it was accompanied by (other) strategies of power and control, or whether it involved fear and injury of harm.[96]

128. He has previously made similar comments regarding the PSS conducted in 2005 and confirmed that he is not aware of any changes having been made to the PSS that would render those observations irrelevant in the context of the 2012 PSS upon which the ACTU here seeks to rely: (emphasis added)

> The narrow assessment of violence used in the PSS has real implications, first, for the ways in which we discuss the extent and impact of 'domestic violence' or 'violence against women' in Australia. Violence prevention advocates typically use the term 'domestic violence' to refer to a systematic pattern of power and control exerted by one person (usually a man) against another (often a woman) involving a variety of physical and non-physical tactics of abuse and coercion, in the context of a current or former intimate relationship. It is simply not the case that every one of the 73, 800 women noted above is necessarily living with this. All experienced at least one violent act by a partner in the last year: for some this was part of a regular

[95] Transcript of proceedings on 14 November 2016 at PN713.

[96] Statement of Dr Michael Flood dated 26 May 2016 at annexure MF-3, paragraphs 3.11 and 3.14.

pattern of violent physical abuse, but for others it was a rare or even reciprocated event. …[97]

129. The witness' assessment of the PSS suggests that its results do not reflect intimate partner violence or domestic violence "in the 'strong' and 'proper' sense". His report also considers other shortcomings of the PSS which we later return to.[98] To the extent that Dr Flood cites PSS data, he primarily cites the ANROWS Report authored by Dr Cox to which we have earlier referred. That is, Dr Flood's report does not represent an independent analysis of that data.

Female Perpetration of Intimate Partner Violence

130. It is Dr Flood's thesis that domestic violence is overwhelmingly a crime committed by men against women and in this way, lends support to the gendered approach adopted by the ACTU in presenting its case. In his report, he gives little attention to male victims of intimate partner violence or partner violence in which both the male and female in a heterosexual relationship are violent towards one another.

131. Under cross-examination, however, Dr Flood confirmed that intimate partner violence is perpetrated by both men and women.[99] He explained that there are various underlying motivations that lead women to commit such acts, including self-defence which may occur during an incident of male perpetrated violence and, from a temporal perspective, on an entirely separate occasion.[100]

132. He also accepted that in certain circumstances, described as "situational couple violence", both partners use physical aggression however injuries are rare:[101] (emphasis added)

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[97] Flood, Michael (2006) Violence Against Women and Men in Australia: What the Personal Safety Survey Can and Can't Tell Us About Domestic Violence, *Domestic Violence and Incest Resource Centre Newsletter,* Summer: 8. (Exhibit F1)

[98] Statement of Dr Michael Flood dated 26 May 2016 at annexure MF-3, paragraph 3.13 – 3.18.

[99] Transcript of proceedings on 14 November 2016 at PN749.

[100] Transcript of proceedings on 14 November 2016 at PN749 – PN757.

[101] Transcript of proceedings on 14 November 2016 at PN759 – PN763.

> Some heterosexual relationships suffer from occasional outbursts of violence by either husbands or wives during conflicts, what Johnson (2000) calls 'situational couple violence'. Here, the violence is relatively minor, both partners practise it, it is expressive in meaning, it tends not to escalate over time, and injuries are rare.[102]

133. Dr Flood's evidence provides examples of circumstances in which both partners in a relationship may be subjected to intimate partner violence although in some cases, there will be minimal if any injury caused.

The Impact of Intimate Partner Violence

134. The remainder of Dr Flood's report contains an analysis of the different experiences, forms of violence and the impact that intimate partner violence has on women as compared to men.

135. Importantly, during the proceedings before the Full Bench, Dr Flood agreed with the following propositions in relation to the impact of intimate partner violence:

- There are various different consequences that might flow from intimate partner violence;[103]
- The impact of a similar form of intimate partner violence will manifest itself in different injuries or negative outcomes in the context of different individuals;[104]
- The impact of intimate partner violence is most pronounced where the victim is subject to violence in the 'strong' and 'proper' sense described by the witness above;[105]
- The impact of intimate partner violence will often be less pronounced where the victim is subject to such violence that appears "at the other

[102] Flood, Michael (2006) Violence Against Women and Men in Australia: What the Personal Safety Survey Can and Can't Tell Us About Domestic Violence, *Domestic Violence and Incest Resource Centre Newsletter,* Summer: 9. (Exhibit F1)

[103] Transcript of proceedings on 14 November 2016 at PN717.

[104] Transcript of proceedings on 14 November 2016 at PN721.

[105] Transcript of proceedings on 14 November 2016 at PN724.

end of the spectrum"; for instance, an isolated incident of violence;[106] and

- There may be circumstances in which a person is subjected to intimate partner violence but they do not suffer any injury or significant negative consequence.[107]

8.3 Professor Cathy Humphreys

136. Professor Cathy Humphreys is a Professor of Social Work at the University of Melbourne[108] and has undertaken research in the area of violence against women and their children.[109] Consistent with the other expert witnesses presented by the ACTU and the approach taken by it to this case, Professor Humphreys' report focuses on female victims of domestic violence.

The Definition of 'Family and Domestic Violence'

137. During the proceedings before the Full Bench, the Professor gave evidence regarding her understanding of the definition of "family and domestic violence" proposed by the ACTU. She testified that, in her opinion, the definition would include:

- any form of physical violence, irrespective of whether it causes injury or frightens the victim;[110]
- emotional abuse, however an understanding of the relevant context would be particularly important including an understanding of how the victim feels;[111]
- psychological abuse;[112]

[106] Transcript of proceedings on 14 November 2016 at PN725 – PN726.
[107] Transcript of proceedings on 14 November 2016 at PN727 – PN734.
[108] Statement of Professor Cathy Humphreys dated 27 May 2016 at paragraph 1.
[109] Statement of Professor Cathy Humphreys dated 27 May 2016 at paragraph 8.
[110] Transcript of proceedings on 15 November 2016 at PN1175 – PN1178.
[111] Transcript of proceedings on 15 November 2016 at PN1179 and PN1196 – PN1197.
[112] Transcript of proceedings on 15 November 2016 at PN1181.

- the threat of psychological abuse;[113]
- economic abuse;[114]
- the threat of economic abuse;[115]
- coercive behaviour;[116]
- stalking;[117]
- the threat of stalking;[118]
- face to face communication, as well that conducted by telephone, email, SMS or social media.[119]

138. She conceded, however an assessment as to whether a particular action or behaviour in fact satisfies the definition proposed may be unclear. For instance, in respect of the use of harsh words, the Professor said:

> It depends on the context. So that you can't just say that any harsh words equals domestic violence. There's a context in which there's a regime of control that's established, and harsh words by someone in an equal relationship where you're having a conflict is different from harsh words where it's a context in which there's been physical or sexual or emotional abuse.[120]

139. Similarly, if a person shouted at another, or engaged in name-calling, this would not always constitute family and domestic violence. A consideration of the context is again important.[121]

140. Critically, Professor Humphreys explained, in response to a question from Vice President Watson, that a determination as to whether specific

[113] Transcript of proceedings on 15 November 2016 at PN1183.
[114] Transcript of proceedings on 15 November 2016 at PN1182.
[115] Transcript of proceedings on 15 November 2016 at PN1184.
[116] Transcript of proceedings on 15 November 2016 at PN1185.
[117] Transcript of proceedings on 15 November 2016 at PN1186.
[118] Transcript of proceedings on 15 November 2016 at PN1187.
[119] Transcript of proceedings on 15 November 2016 at PN1198 – PN1200.
[120] Transcript of proceedings on 15 November 2016 at PN1188.
[121] Transcript of proceedings on 15 November 2016 at PN1192 – PN1193.

behaviour is abusive in nature is a subjective one that involves an understanding of the relevant context: (emphasis added)

> So do we look at what the dictionary says about what abuse is?---We could, yes. I mean, to a certain extent abuse, and what's experienced of abuse, has a subjective quality about it that can't be necessarily pinned down exactly. Context does count. People do shout at each other, call each other names, and it's not necessarily something that would necessarily fit immediately in to the context of domestic violence. Because I think that we don't want to become – you know, most couples when they separate there's a lot of strong words that happen, and it's not always domestic violence.[122]

141. Professor Humphreys' evidence in this regard goes to the inherent complexities associated with identifying the circumstances in which violent, threatening or abusive behaviour has in fact occurred; a matter to which we return later in this submission.

The Emotional and Mental Impact of Family and Domestic Violence

142. At section 2 of her report, Professor Humphreys gives evidence regarding the emotional and mental impact of family and domestic violence on women.[123] Her report does not appear to deal with the impacts of family and domestic violence on men.

143. It is important to note, however, that the consequences she there speaks of are not universal, in the sense that they are not experienced by all women who face such violence:

> … The emphasis on emotional and psychological problems can also overlook the extent of resilience and protective factors which may characterise women who live with or are separating from DFV. Not all women manifest with 'symptoms of abuse'. Women are choosing to separate earlier and the escalating rates of reporting DFV suggest that they may also be calling for formal help earlier (RC Report, chapter 20). …[124]

144. The evidence before the Commission does not reveal the extent to which the various mental and emotional consequences are in fact suffered by employed award covered employees who would be eligible for leave

[122] Transcript of proceedings on 15 November 2016 at PN1194.

[123] Statement of Professor Cathy Humphreys dated 27 May 2016 at annexure CH-3, paragraph 2.1.

[124] Statement of Professor Cathy Humphreys dated 27 May 2016 at annexure CH-3, paragraph 2.4.

pursuant to the ACTU's proposed clause. Nor does it provide any indication as to the extent to which such employees would require leave, if so the number of days of leave necessary and whether the employee could take paid personal/carer's leave for the relevant period.

145. The Professor's evidence does however suggest that there has in fact been an improvement in levels of reporting family and domestic violence, as well as greater numbers of women separating from violent partners at an earlier point in time than might previously have been the case.

146. We note that Professor Humphreys spoke of the possible long-term health impacts of what may be an isolated incident of violence. For instance, a victim of such violence may "break their back, or, you know, create a severe knee injury"[125]. We here highlight this evidence as it is relevant to our subsequent submissions regarding the potential scope and impact of the claim.

Services Needed for Recovery

147. Parts of Professor Humphreys' report reflect her personal views regarding the access that victims have to various services that provide support to women suffering from family and domestic violence, particularly at the time of and subsequent to separation.

148. It is trite to observe that any shortcomings in relation to the provision of or access to such services are matters that ought to be addressed through the appropriate channels in order to improve or reform them. They are not, as such, matters for the modern awards system; nor are they deficiencies for which individual employers ought to be saddled with an additional leave liability.

[125] Transcript of proceedings on 15 November 2016 at PN1222.

Domestic Violence and the Workplace

149. Consistent with the data produced by Dr Cox, the Professor confirms that women affected by domestic violence have similar work histories to "non-abused women".[126]

150. Professor Humphreys' evidence regarding the importance of retaining and gaining employment for the purposes of ensuring financial security can be relied upon only to that extent. Her evidence does not suggest that in the context of the current safety net:

- Women experiencing family and domestic violence are not able to retain or gain employment;[127] or
- That women experiencing family and domestic violence are not able to maintain financial security.[128]

151. That is to say, her evidence does not establish that the current safety net is failing to provide women experiencing family and domestic violence with the financial security that, in her view, is necessary to empower them.

152. Professor Humphreys cites the VRC as urging "recognition of the workplace as part of the solution''.[129] Importantly, however, she also highlights that the VRC leaves some doubt as to the precise role to be undertaken by workplaces in this context, whilst acknowledging that a range of valuable practices have already been developed and implemented in workplaces:

> However, the RC Report is not unequivocal in its recognition of the role of the workplace as a domain for DFV support. It strongly supports strengthening the development of 'whole of organisation' respectful relationships through training and staff development. Managers are not necessarily seen as a natural ally for survivors of DFV worried about their ability to manage the violence at home and the demands of the workplace. A range of good practice work place (sic) programs have been

[126] Statement of Professor Cathy Humphreys dated 27 May 2016 at annexure CH-3, paragraph 3.6.

[127] Statement of Professor Cathy Humphreys dated 27 May 2016 at annexure CH-3, paragraph 3.7 and 3.12.

[128] Statement of Professor Cathy Humphreys dated 27 May 2016 at annexure CH-3, paragraph 3.7.

[129] Statement of Professor Cathy Humphreys dated 27 May 2016 at annexure CH-3, paragraph 5.7.

developed which can play an important role in helping women explore their choices and develop safety plans.[130]

153. The first and only instance in which the Professor addresses the ACTU's claim is in the concluding paragraph of her report. She commences by stating that "women are most in danger of losing their employment when they are leaving a violent relationship".[131] The basis for this claim is unclear and does not appear to have been made out in her report.

154. She goes on to describe the proposed entitlement for leave as an "important and progressive step" which "can provide the catalyst for workplaces to play a stronger role in providing solutions to the scourge of this form of violence".[132] In her view, "the workplace is potentially an important arena in which to counter domestic and family violence"[133].

155. The Professor's evidence in relation to the provision of an additional leave entitlement and the role of the workplace is clearly tentative. She appears to hold the view that the introduction of a leave entitlement may assist women in accessing certain services and promote the role that workplaces play in combating family and domestic violence. However, importantly, her evidence does not establish, or purport to establish, that the provision proposed by the ACTU is a necessary part of the modern awards safety net.

8.4 Dr Natasha Cortis

156. Dr Natasha Cortis is a Research Fellow at the Social Policy Research Centre at the University of New South Wales.[134] Her evidence goes to the issues of economic abuse and what she deems the need for economic security.

[130] Statement of Professor Cathy Humphreys dated 27 May 2016 at annexure CH-3, paragraph 5.8.

[131] Statement of Professor Cathy Humphreys dated 27 May 2016 at paragraph 8.1.

[132] Statement of Professor Cathy Humphreys dated 27 May 2016 at paragraph 8.1.

[133] Statement of Professor Cathy Humphreys dated 27 May 2016 at paragraph 8.1.

[134] Statement of Dr Natasha Cortis dated 26 May 2016 at paragraph 1.

Women's Economic Security and Domestic Violence: The Role of Employment, Employment Support and Employment Protection

157. The aforementioned report (**First Report**), attached to Dr Cortis' statement, was prepared specifically for the purposes of these proceedings. It sets out the witness' opinion in relation to five discrete issues:[135]

i. "The economic dimensions of violence, including tactics and financial impact of domestic violence on women's economic security".

ii. "An estimate of the prevalence of such forms of economic abuse and the difficulties of estimating such figures".

iii. "Analysis of the economic impact of domestic violence on women on low incomes".

iv. "The relationship between violence and paid work, including the impact of violence on paid work".

v. "Strategies and ways to promote women's economic security during and following violence, with a focus on employment support services and industrial strategies".

158. We consider her evidence in relation to each of those matters in turn.

159. In relation to the first issue, at paragraph 6(a) of the First Report, Dr Cortis identifies a very broad range of behaviour that may constitute economic abuse. This includes (but is not limited to[136]):

- preventing access to joint assets;
- preventing or interfering with workforce participation or work attendance (e.g. forbidding employment, hiding keys or sabotaging childcare arrangements);

[135] Statement of Dr Natasha Cortis dated 26 May 2016 at annexure NC-3, First Report, page 3.

[136] Transcript of proceedings on 15 November 2016 at PN928.

- coercing or preventing someone from acquiring or relinquishing assets or obtaining credit; or

- withholding financial support.[137]

160. Dr Cortis agreed, under cross examination, that some of the behaviour identified above may also arise in contested divorce proceedings;[138] that is, they are not unique to circumstances in which family and domestic violence is present.

161. Secondly, Dr Cortis deals with the difficulties associating with estimating the prevalence of economic abuse. She states, at the very outset, that it is difficult to accurately estimate:

- the prevalence of economic abuse; and

- the broader economic costs of violence.

162. Dr Cortis warns that estimates of the prevalence of economic or financial abuse in Australia should be "interpreted with a degree of caution", and states:

> One likely reason is that the wide range of behaviours which may be involved makes the kind of abuse difficult to define and capture in surveys and administrative datasets. [139]

163. This evidence goes squarely to the cost of the claim; or rather, the inability of the Commission to ascertain the potential cost of the claim. Given the difficulties associated with estimating the prevalence of economic abuse, and noting that it can occur in isolation absent any other form of family and domestic violence, the Commission is unable to identify the extent to which the proposed leave entitlement would be accessed for purposes associated with economic abuse and as a result, cannot determine the potential cost of the claim.

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[137] Statement of Dr Natasha Cortis dated 26 May 2016 at annexure NC-3, First Report, page 5.

[138] Transcript of proceedings on 15 November 2016 at PN1074.

[139] Statement of Dr Natasha Cortis dated 26 May 2016 at annexure NC-3, First Report, page 7.

164. Dr Cortis testified that behaviours constituting financial abuse are poorly recognised "in the community and also in the service system and by the police".[140] She explained that to make an assessment as to whether specific behaviour constitutes economic abuse, one must have regard to the context, the underlying motivations of the alleged perpetrator and the subjective experience of how the victim felt.[141] For instance:

- Limiting a partner's access to funds or financial resources *may* be economic abuse "where it is in the context of exerting control and generating costs for women".[142]

- Contesting child support payments or a property settlement *may* be economic abuse. "For example deliberately prolonging the time taken for property settlement is a common form of economic abuse. … It depends on the motivations and the tactics and the faith, whether the party has entered into the proceedings in good faith".[143]

165. Ultimately, the witness states that she would "leave it to a domestic violence specialist to assess" whether, in specific circumstances, a person was subject to economic abuse and that she would expect such specialists "to take into account a whole range of circumstances and history in assessing that".[144]

166. To the extent that the report analyses the economic impact of domestic violence on women on low incomes[145], which is the third issue identified above, it relies on the Journeys Home survey, which we consider below.

167. Fourthly, the witness addresses the alleged relationship between violence and paid work. Importantly, Dr Cortis identifies that the proportion of women who experience partner violence that were in paid work is "fairly close to the

[140] Transcript of proceedings on 15 November 2016 at PN917.

[141] Transcript of proceedings on 15 November 2016 at PN936 – PN938.

[142] Transcript of proceedings on 15 November 2016 at PN930.

[143] Transcript of proceedings on 15 November 2016 at PN933 – PN935.

[144] Transcript of proceedings on 15 November 2016 at PN946 – PN951.

[145] Statement of Dr Natasha Cortis dated 26 May 2016 at annexure NC-3, First Report, page 11 – 22.

portion of all women who were working".[146] Prima facie, this suggests that the experience of family and domestic violence does *not* have an adverse impact on the employment status of women. Whilst Dr Cortis speculates in her report that family and domestic violence may have some bearing on a woman's employment, she does not provide any sound basis that might overcome the obvious statistical proposition outlined above.

168. Finally, Dr Cortis expresses her opinion as to appropriate strategies to promote women's economic security during and following violence. She states that this "may include leave entitlements" amongst various other proposals.[147] Dr Cortis' evidence is entirely speculative in nature. She has not established any proper basis for her opinions. Specifically, she does not appear to have undertaken any study or comparative analysis of employed women suffering from family and domestic violence who have access to a separate leave entitlement (for instance, by virtue of an enterprise agreement) as opposed to those that do not, in order to assess the precise impact that it has on the economic position of those women.

Horizons Research Report, October 2016: Domestic Violence and Women's Economic Security: Building Australia's Capacity for Prevention and Redress: Final Report

169. Dr Cortis is a co-author of the Horizons Research Report of October 2016, titled 'Domestic Violence and Women's Economic Security: Building Australia's Capacity for Prevention and Redress: Final Report' (**Horizons Report**). The report is based on two streams of research:

- The first is quantitative research "to assess women's economic outcomes following violence, using the Journeys Home longitudinal dataset".[148]

[146] Statement of Dr Natasha Cortis dated 26 May 2016 at annexure NC-3, First Report, page 9.

[147] Statement of Dr Natasha Cortis dated 26 May 2016 at annexure NC-3, First Report, page 23.

[148] Statement of Dr Natasha Cortis dated 26 May 2016 at annexure NC-3, Horizons Report, page 13.

- The second is qualitative research which involved interviews conducted with "key informants involved in developing and delivering systems of services and supports for women affected by violence".[149]

170. We deal with each in turn.

171. The quantitative research undertaken was derived in its entirety from Journeys Home, which is described in the Horizons Report in the following terms:

> As mentioned previously, Journeys Home was designed to focus on housing risks and was not specifically designed as a study of domestic violence. The sample of respondents was drawn from the Centrelink database in 2011, and includes men and women flagged by Centrelink staff as being homeless, and others identified as sharing similar characteristics with that population, who were at risk or vulnerable to homelessness.[150]

172. Quite clearly, the sample of respondents to the Journeys Home survey represents a particularly disadvantaged group of persons and, as the witness conceded during cross examination, does not reflect labour force participation of the Australian population generally.[151] This is demonstrated by the first research report published the Melbourne Institute of Applied Economic and Social Research regarding Wave 1 of the survey (**Journeys** Home Wave 1 Report):

Extract of Table 1: Demographic characteristics of JH sample, education and employment (%)[152]

Labour Force Status	Journeys Home Respondents	Australian Population
Employed	20.1	62.6
Unemployed	29.9	3.4
Not in labour force	50.1	34.0

[149] Statement of Dr Natasha Cortis dated 26 May 2016 at annexure NC-3, Horizons Report, page 13.

[150] Statement of Dr Natasha Cortis dated 26 May 2016 at annexure NC-3, Horizons Report, page 14.

[151] Transcript of proceedings on 15 November 2016 at PN1023 – PN1026.

[152] Scutella, Rosanna et al (July 2012), *Journeys Home Research Report No. 1: Wave 1 Findings,* Melbourne Institute of Applied Economic and Social Research at page 10.

173. As can be seen, 50% of the respondents were not participating in the labour force; that is, they were neither employed nor seeking employment. The experiences of such persons are not, in our view, relevant to these proceedings. A further 30% were unemployed, which represents a proportion almost ten times greater than the Australian population at large.

174. Accordingly, any observations or findings made by the authors of the Horizons report based on the Journeys Home survey cannot be interpreted or extrapolated to apply to all victims of family and domestic violence. It relates to far more confined group of persons.

175. In any event, we note that the report shows that there was no difference between the proportion of women in paid work, according to whether or not they were affected by violence in Wave 1, and there was no evidence of a bivariate association between exposure to violence in Wave 1 and paid work throughout the survey period.[153] Nor was domestic violence found to be associated with the level of weekly incomes.[154]

176. Whilst the use of "logistic regression models" was said to reveal that women who experienced violence in more than one wave were less likely to be employed in Wave 6,[155] it is not clear that this analysis controlled all other variables and as a result, it is open to the Commission to conclude that to the extent that domestic violence was a contributing factor, it was not the sole determinant.

177. The authors report that for those in paid work in Wave 6, "the majority (130) were employed in lower-skill, non-managerial or non-professional positions".[156] Importantly, the Horizons Report does not establish any causal relationship between the experience of family and domestic violence and the occupations in which those persons were engaged. It is also relevant to note

[153] Statement of Dr Natasha Cortis dated 26 May 2016 at annexure NC-3, Horizons Report, page 20.

[154] Statement of Dr Natasha Cortis dated 26 May 2016 at annexure NC-3, Horizons Report, page 34 and page 43.

[155] Statement of Dr Natasha Cortis dated 26 May 2016 at annexure NC-3, Horizons Report, page 44.

[156] Statement of Dr Natasha Cortis dated 26 May 2016 at annexure NC-3, Horizons Report, page 20.

that the Journeys Home Wave 1 Report indicates that 60% of respondents to the survey had completed, as their highest qualification, year 11 (or equivalent) or less.[157] In our view, this is an obvious factor that would contribute to the type of role in which such persons are employed.

178. Importantly, the report states that "there was no significant difference in how respondents were distributed across occupations or industries according to whether or not they experienced domestic violence in Wave 1, or at any point during the survey".[158]

179. We turn then to the qualitative research undertaken by the authors of the Horizons Report, which involved interviews with 32 unidentified "informants".[159] This included "one, maybe two" employer representatives, however the witness was unable to identify them.[160]

180. Importantly, the transcripts of the interviews are not publically available.[161] As a result, the report presented by the authors is somewhat opaque; that is, the conclusions reached in the report cannot properly be tested or verified. At its highest, the report constitutes generalised hearsay evidence from unidentified persons which should not be given any weight.

8.5 Ludo McFerran

181. Ludo McFerran is a Domestic Violence at Work Research Affiliate, Women and Work Research Group, Business School at the University of Sydney.[162]

182. We do not propose to deal with Ms McFerran's report comprehensively for the purposes of this submission. In our view, it can be given little weight. It is effectively an essay, which largely reflects her personal views.

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[157] Scutella, Rosanna et al (July 2012), *Journeys Home Research Report No. 1: Wave 1 Findings,* Melbourne Institute of Applied Economic and Social Research at page 10.

[158] Statement of Dr Natasha Cortis dated 26 May 2016 at annexure NC-3, Horizons Report, page 21.

[159] Statement of Dr Natasha Cortis dated 26 May 2016 at annexure NC-3, Horizons Report, page 47.

[160] Transcript of proceedings on 15 November 2016 at PN1039 – PN1040.

[161] Transcript of proceedings on 15 November 2016 at PN1038.

[162] Statement of Ludo McFerran dated 31 May 2016 at paragraph 1.

183. To the extent that Ms McFerran purports to give evidence regarding the cost of domestic violence to Australian businesses,[163] she refers primarily to a report by Pricewaterhouse Coopers (**PWC**) to which we give detailed consideration at chapter 18 of this submission. We there also deal with the 2015 UNSW survey to which Ms McFerran refers at paragraph 8.1 of her report,[164] in relation to the operation of domestic violence provisions in enterprise agreements.

184. Ms McFerran asserts that the introduction of a paid leave clause would "provide protection from adverse action and to some extent discrimination because the employee has or used the right".[165] It is important to appreciate that the introduction of the clause sought by the ACTU would not have the effect of introducing an additional basis upon which adverse action or discrimination is expressly prohibited by the Act, as appears to be suggested by Ms McFerran. Rather, by virtue of the current legislative provisions, an employee who exercises their workplace right by taking (or seeking to take) family and domestic violence leave pursuant to an award term must not be the subject of adverse action because they did so (or sought to do so). Of course that protection already exists for any employee that accesses any leave entitlement pursuant to the Act, an award or enterprise agreement, including in circumstances where the employee seeks to do so due to their exposure to family and domestic violence.

185. Ms McFerran highlights anecdotal evidence regarding small businesses that goes to the very core of one of Ai Group's contentions in these proceedings: "that small businesses can be both flexible and innovative when responding to domestic violence affecting staff and owners".[166] This is precisely why the imposition of a one-size-fits-all award term is inappropriate and undesirable.

[163] Statement of Ludo McFerran dated 31 May 2016 at Annexure LM-3, paragraphs 6.1 – 6.3.

[164] Statement of Ludo McFerran dated 31 May 2016 at Annexure LM-3, paragraph 8.1.

[165] Statement of Ludo McFerran dated 31 May 2016 at Annexure LM-3, paragraph 9.3.

[166] Statement of Ludo McFerran dated 31 May 2016 at Annexure LM-3, paragraph 10.1.

8.6 Dr Martin O'Brien

186. Dr Martin O'Brien is a Senior Lecturer in Economics at the University of Wollongong.[167]

187. Part of his report goes to submissions filed by ACCI in relation to the potential cost of the ACTU's claim. We do not here propose to deal with that aspect of his evidence. Rather, we consider the alternate modelling that he undertakes, as a result of which he comes to the conclusion that the ACTU's claim would cost "just under $3 million per annum for award covered employees, and just under $9 million for collective agreement employees"[168] if one day of paid leave[169] was taken by 50%[170] of the 3.15% of females and 1.26% of males estimated to have been subject to family and domestic violence.[171]

188. Dr O'Brien's analysis is based on a number of assumptions which are made, in large part, because the data necessary to more accurately ascertain the cost of the ACTU's claim is not available. For example:

- It is assumed that employees engaged on a part-time and casual basis are engaged to work 75% of full-time hours, however "no hard data is available on the average number of hours" worked by part-time or casual employees per day or shift.[172]

- It is assumed that the proportion of employees that may access family and domestic violence leave pursuant to the ACTU's clause will reflect the proportion of persons who experienced partner violence in the past 12 months, as reported by Dr Cox.[173]

[167] Statement of Dr Martin O'Brien dated 17 October 2016 at paragraph 1.

[168] Statement of Dr Martin O'Brien dated 17 October 2016 at Annexure MO-4, paragraph 5.6.

[169] Statement of Dr Martin O'Brien dated 17 October 2016 at Annexure MO-4, paragraph 3.20.

[170] Statement of Dr Martin O'Brien dated 17 October 2016 at Annexure MO-4, paragraph 3.19.

[171] Statement of Dr Martin O'Brien dated 17 October 2016 at Annexure MO-4, paragraph 3.6.

[172] Statement of Dr Martin O'Brien dated 17 October 2016 at Annexure MO-4, paragraph 3.4 and transcript of proceedings on 14 November 2016 at PN577 – PN578.

[173] Statement of Dr Martin O'Brien dated 17 October 2016 at Annexure MO-4, paragraph 3.5.

- Putting to one side the two limitations we identify below, in light of the ACTU's amended claim, this assumption is entirely inappropriate. The provision now proposed by the ACTU provides an entitlement to leave for purposes associated with any experience of family and domestic violence, absent the need for any temporal connection. That is, an employee who has experienced family and domestic violence 30 years ago and is now accessing the assistance of a counsellor in relation to that violence, would be entitled to the leave. As a result, reliance on data that relates only to those that experienced family and domestic violence in the 12 months preceding the 2012 PSS, in our view, has the effect of seriously underestimating the number of employees who may seek to access the leave.

- This includes physical and sexual violence, but does not include any other forms of abuse such as emotional abuse, economic abuse or psychological abuse. It was accepted by Dr O'Brien during the proceedings before the Full Bench that the estimated cost of the claim would increase if such forms of abuse were included.[174]

- It is also confined to violence committed by a cohabiting or non-cohabiting partner, and does not include violence committed by other members of a person's family or household.

- It is assumed that a further 50% of persons affected by partner violence per the PSS will be affected by family violence, however there is no available data that might provide a proper basis for this assumption.[175] It has been selected arbitrarily.

[174] Transcript of proceedings on 14 November 2016 at PN672 – PN673.

[175] Statement of Dr Martin O'Brien dated 17 October 2016 at Annexure MO-4, paragraph 3.6 and transcript of proceedings on 14 November 2016 at PN661.

- It is assumed that 50% of those employees affected by family and domestic violence (as calculating in accordance with the above assumptions) will access the proposed leave entitlement[176] however again, there is no basis for this. As Dr O'Brien explained: (emphasis added)

> My report goes through a list of sources to data or reports that make reference about people seeking advice, et cetera, but at the end of the day that data is not really that useful for trying to come up with a percentage of those that are experiencing violence that are likely to take leave. So in my report I list all of the relevant sources that I can see that make reference to something of relevance in that area, but at the end of the day I choose a 50 per cent simply because it's another assumption that's got such a high level of uncertainty. So I make reference to a number of things that come out of the Cox report and I don't actually use any of those figures when it comes down to the potential take-up rate of the leave, simply because it's so uncertain. …
>
> So your 50 per cent is - and I don't mean this pejoratively, but you just said you didn't rely on what Dr Cox said, so it's an arbitrary number which you've decided is appropriate?---I would certainly agree there's an arbitrary level to the figure that's chosen at the end, simply because it's another thing that there's simply no data available to give us a more reliable estimate to start off with, and that was similar to the family leave aspect as well. …[177]

189. Further, Dr O'Brien's analysis does not include any consideration of important factors which, in our view, would have an obvious bearing on the cost of the claim. For instance, Dr O'Brien's costings do not include:

- any costs associated with the taking of leave due to emotional abuse, which, as identified by Vice President Watson during the proceedings, ought to be considered in order to properly ascertain the cost of the claim.[178]

- any consideration of the costs associated with the relevant employees not accessing pre-existing personal/carer's leave and/or annual leave and instead, taking the new proposed form of paid leave.[179]

[176] Statement of Dr Martin O'Brien dated 17 October 2016 at Annexure MO-4, paragraph 3.11.

[177] Transcript of proceedings on 14 November 2016 at PN636 – PN637.

[178] Transcript of proceedings on 14 November 2016 at PN676.

[179] Transcript of proceedings on 14 November 2016 at PN622.

- any administrative costs associated with the proposed leave entitlement.[180]

- any costs associated with a loss of productivity arising as a consequence of staff absences. [181]

- any costs associated with the need to engaged relief staff.

- any costs associated with the cumulative effect of employees accessing more than one day of leave.

- any costs associated with the taking of unpaid leave "on each occasion".

190. As can be seen, Dr O'Brien's modelling is based on numerous assumptions that do not find any sound basis. Indeed in most cases, they are not so much as referrable to a reliable estimate. Rather, the assumptions made are entirely arbitrary. Furthermore, his costings omit important considerations, such as those we have identified above, which would likely have the effect of increasing the costs associated with the ACTU's proposed claim. For these reasons, the Commission should disregard Dr O'Brien's evidence; it cannot properly be relied upon in order to sensibly assess the potential cost of the ACTU's claim.

191. To the extent that the Commission nonetheless determines that some regard should be given to it, we note that $12 million for just one day of paid leave for award and enterprise-agreement covered employees is by no means an insignificant or inconsequential amount. Indeed it introduces a significant new leave liability to the overall wage bill. This must of course be considered in light of our submission that for the reasons here articulated, we consider that Dr O'Brien's analysis underestimates the cost of the claim. Accordingly, in our view, the cost of the entitlement would likely be higher than that which he has estimated.

[180] Transcript of proceedings on 14 November 2016 at PN639.

[181] Transcript of proceedings on 14 November 2016 at PN639.

8.7 Conclusions regarding the expert witness evidence

192. The evidence advanced by the ACTU as that of experts can effectively be summarised as follows:

- The manner in which the PSS is conducted, and by virtue of it being a 'victim survey', a certain degree of subjectivity is inherent in the data collected.

- The PSS provides data regarding the prevalence of partner violence. This includes physical and sexual violence, but does not include other forms of abuse such as psychological abuse, emotional abuse or economic abuse. The data deal with the prevalence of family and domestic violence committed by persons other than a partner or previous partner.

- As a result, there is no data before the Commission that identifies the prevalence of family and domestic violence as defined by the ACTU's proposed clause.

- The PSS cannot reveal the extent to which a victim of partner violence is in fact subject to such violence in the "'strong' and 'proper' sense". It is not the case that each woman subject to partner violence is subject to a system of power and control. The data captures any person who has faced any one incident of physical and/or sexual violence.

- Of the 2.2 million women who have experienced violence by an intimate partner since the age of 15, the majority said that the most recent incident of this form of violence occurred more than ten years ago. Of those, 16% (351,072) said that their most recent incident of such violence occurred less than two years ago.

- The PSS does not reveal any correlation between the employment status of a woman and the prevalence of male cohabiting partner violence or intimate partner violence.

- The impact of intimate partner violence is most pronounced where the victim is subject to violence in the "'strong' and 'proper' sense". The impact of intimate partner violence is less pronounced where the victim is subject to, for instance, an isolated incident of violence. There may be some circumstances in which a person subject to intimate partner violence does not suffer any injury or significant negative consequence.

- An assessment as to whether a particular instance of certain behaviour constitutes "abuse" requires a consideration of the context of the relationship and the feelings of the victim. It is an inherently subjective exercise, which can in some cases be very difficult to undertake. This is especially so in relation to emotional and economic abuse.

- The available data does not allow for the development of a model that can reliably ascertain the potential cost of the claim.

- Both men and women perpetrate intimate partner violence. In some cases, both persons in an intimate relationship can be subjected to such violence. That is, they are both the perpetrators and the victims of violence.

- By virtue of the gendered approach adopted by the ACTU to these proceedings, the evidence does not give any proper consideration to the prevalence of male victimisation or the impact that family and domestic violence has on men.

9. THE LAY WITNESS EVIDENCE RELIED UPON BY THE ACTU

193. The ACTU has called 18 lay witnesses in support of its claim. This includes evidence from 10 individuals who are associated with the provision of specialised support services that are available to victims of family and domestic violence. Five witnesses are union officials whose evidence relates to their respective unions' efforts to ensure the inclusion of family and domestic violence leave provisions in enterprise agreements by which they are covered. Three witness statements were filed from individual employees who have suffered from family and domestic violence.[182]

194. The ACTU also relies on the evidence of Deborah Eckersley, a witness called by PWC in support of the claim.

195. Before turning to deal with the evidence, we note that large swathes of the witness statements tendered should be attributed little if any weight. Various objections to those statements were raised by Ai Group in its submission dated 13 November 2016. The objections were raised on the following bases:

- That the evidence is hearsay; that is, it is evidence of a previous representation made by a person to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation;
- That the evidence is in the nature of an opinion that is expressed without there being a proper basis for that opinion;
- That the evidence is speculative in nature;
- That the evidence cannot be tested due to the anonymity of the persons referred to in the evidence and its admission is therefore inherently unfair; and

[182] Given the nature of the evidence provided by these employees and the issue of a confidentiality order, we do not here deal with their evidence.

- That the “evidence” is in fact a submission and does not communicate a matter of fact.

196. Whilst certain amendments were consequently made to the witness statements by the ACTU, the matter generally proceeded on the basis that submissions would be made at the appropriate time regarding the weight that should be attributed to that evidence. Accordingly, we continue to rely on the submission we have previously filed and submit that little (if any) weight should be attributed to the numerous parts of the ACTU’s evidentiary case that we there identified. In the submissions that follow, we develop our arguments regarding the weight that ought to be given to certain aspects of the evidence in greater detail.

197. We acknowledge of course that by virtue of s.591 of the Act, the Commission is not bound by the rules of evidence. Despite this, the Commission and its predecessors have noted that the rules of admissibility of evidence are relevant to proceedings before it.

198. In a passage often cited in subsequent decisions, a Full Bench (Ross VP, Duncan SDP and Bacon C) of the AIRC made the following comments: (emphasis added)

> [48] While the Commission is not bound by the rules of evidence that does not mean that those rules are irrelevant. As the then President of the Industrial Relations Commission of Western Australia said in respect of a similar provisions in the then *Industrial Relations Act 1979* (WA):
>
> > "However, this is not a licence to ignore the rules. The rules of evidence provide a method of enquiry formulated to elicit truth and to prevent error. They cannot be set aside in favour of a course of inquiry which necessarily advantages one party and necessarily disadvantages the opposing party (R. v War Pensions Entitlement Appeal Tribunal: ex parte Bott [1933] 50 CLR 228 Evatt J. at 256 (dissenting)). The common law requirement that the Commission must not in its reception of evidence deny natural justice to any of the parties acts as a powerful control over a tribunal which is not bound by the rules of evidence."
>
> [49] A similar observation was made by the Industrial Commission of New South Wales in *PDS Rural Products Ltd v Corthorn*:
>
> > "First, it is correct to say, as the commissioner did, that he was not bound to observe the rules of law governing the admissibility of evidence (s 83). It should be borne in mind that those rules are founded in experience, logic,

> and above all, common sense. Not to be bound by the rules of evidence does not mean that the acceptance of evidence is thereby unrestrained. What s 83 does do in appropriate cases is to relieve the Commission of the need to observe the technicalities of the law of evidence. Common sense, as well as the rules of evidence, dictates that only evidence relevant to an issue which requires determination in order to decide the case should be received. This means that issues must be correctly identified and defined. This did not happen in this case."
>
> [50] We agree with the above observations. In our view the rules of evidence provide general guidance as to the manner in which the Commission chooses to inform itself.[183]

199. This decision was adopted by a Full Bench of Fair Work Australia (as it then was) in the following terms: (emphasis added)

> [28] The tribunal is not bound by the rules of evidence and therefore has a discretion to admit as evidence material that would not be admissible under the rules of evidence. However, this does not mean that the rules of evidence are irrelevant to the exercise of that discretion in response to an objection to the reception of particular evidence. On the contrary, as was pointed out by the Full Bench in *Hail Creek Pty Ltd v Construction, Forestry, Mining and Energy Union* the rules of evidence "provide general guidance as to the manner in which the Commission chooses to inform itself". The rules of evidence are not arbitrary and were developed by reference to notions of what is fair and appropriate and, as such, they often provide a good starting point for a consideration of whether an objection to the reception of particular evidence by the tribunal should be upheld or rejected. [184]

200. More recently, Commissioner Wilson considered the proper approach to be taken in admitting evidence in the context of an application for an unfair dismissal remedy:

> [13] While the Fair Work Commission is not bound by the rules of evidence and procedure, that is not to say the Commission should not have regard to such rules in making its decisions, and for good reason. In this regard, Commissioner Thatcher observed the following;
>
> > Section 591 of the Act provides that FWA is not bound by the rules of evidence in relation to a matter before it. However that does not mean that the rules of evidence are irrelevant. In its decision in Re: Michael King the Full Bench agreed with the following observation of the Industrial Commission of New South Wales in Court Session in *PDS Rural Products Ltd v Corthorn*, which relevantly included:

[183] *Hail Creek Coal Pty Ltd v CFMEU* (PR948938).

[184] See for example *The AMIEU v Dardanup Butchering Company Pty Ltd* [2011] FWCFB 3847 at [28].

> "... it is correct to say, as the Commissioner did, that he was not bound to observe the rules of law governing the admissibility of evidence (s 83). It should be borne in mind that those rules are founded in experience, logic, and above all, common sense. Not to be bound by the rules of evidence does not mean that the acceptance of evidence is thereby unrestrained. What s 83 does do in appropriate cases is to relieve the Commission of the need to observe the technicalities of the law of evidence. ...." [185]

201. Section 590 grants the Commission power to inform itself "in such manner as it considers appropriate". This power is tempered by an obligation on the Commission to exercise its powers in a manner that is fair and just[186]. In performing its functions, the Commission must also take into account "equity, good conscience and the merits of the matter"[187].

202. These matters were deemed relevant by earlier authorities when considering s.110(2)(b) of the WR Act, which relieved the AIRC of the need to apply the rules of evidence. Despite this, the AIRC stated: (emphasis added)

> [27] But s.110(2)(a) does not mean that the rules of evidence are irrelevant. It is clear that members of the Commission are bound to act in a judicial manner and that the principles of natural justice are applicable to hearings before the Commission.
>
> [28] The term *natural justice* in the context of administrative decision making has essentially been equated to an obligation to act fairly. As Kitto J said in *Mobil Oil Australia Pty Ltd v FCT*:
>
> > "What the law requires in the discharge of a quasi-judicial function is judicial fairness. This is not a label for any fixed body of rules. What is fair in a given situation depends upon the circumstances."
>
> [29] In addition to the general obligation to act fairly there is also the statutory injunction in s.110(2)(c) that the Commission act according to *"equity, good conscience and the substantial merits of the case."* In view of these obligations it is appropriate, I think, to have regard to the rules of evidence as a guide to the exercise of the Commission's discretion to accept and exclude evidence."[188]

203. Ai Group submits that careful consideration should be given to the weight attributed to evidence that might otherwise be deemed inadmissible by a strict application of the rules of evidence. In a recent decision of the

[185] *Carol Haslam v Fazche Pty Ltd T/A Integrity New Homes* [2013] FWC 5593.

[186] See s.577(a).

[187] See s.578(b).

[188] Re *CFMEU* (PR941737). See also *King v Freshmore (Vic) Pty Ltd* (Print S4213) at [60] – [63].

Commission regarding the Review of the *Textile, Clothing, Footwear and Associated Industries Award 2010*, the Full Bench decided to admit evidence that was objected to by the employer interests, however it noted that:

> To the extent that the evidence involves matters which those opposing the variations did not have an opportunity to challenge, was hearsay evidence and reflects opinion without the identification of specific circumstances, probative value of the evidence is limited. Such evidence falls short in any case of establishing evidence of circumstances applying generally in the TCF industry.[189]

204. We respectfully commend the conclusion there reached to the Full Bench. The rules of fairness and natural justice dictate that evidence that is irrelevant, speculative, based purely on the opinion of a witness without there being a proper foundation for that opinion or where the evidence cannot properly be tested, it should be attributed little if any weight. It does not carry any probative value and therefore, is not "properly directed to demonstrating the facts supporting the proposed variation".[190]

9.1 Marilyn Beaumont

205. Marilyn Beaumont is the Chairperson of the Australian Women Health Networks National Board.[191]

206. Ms Beaumont's evidence goes, in part, to the various health impacts that can flow from family and domestic violence. Whilst we do not quibble with the proposition that in some instances, some of the consequences identified may be experienced by a victim of family and domestic violence (albeit to varying degrees), it is important to observe that the evidence by no means establishes that those consequences flow universally to the same extent to all persons who experience family and domestic violence. Indeed in our view, it is self-evident that this is not and cannot be the case.

207. Consistent with our submission, Ms Beaumont acknowledges in her statement that the health impact of family and domestic violence increases

[189] *4 yearly review of modern awards* [2015] FWCFB 2831 at [36].

[190] 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 at [23].

[191] Witness statement of Marilyn Beaumont at paragraph 1.

"the longer the violence goes on and the more severe it is"[192]. Similarly in relation to mental health concerns, Ms Beaumont states that such illnesses "become more manifest the longer the experience goes on".[193] It is also relevant to consider the witness' understanding of the context in which family and domestic violence occurs; that is, that it involves "a pattern of behaviour which takes place over time":

> My views reflect the significant research about the experience of family violence. The violence is a tool used by the perpetrator to gain control over their victim. The abuser's need to maintain control and dominance lies at the core of every abusive relationship. This is grounded in the false belief that the abuser is entitled to control the victim and to use violence to achieve this. My understanding of controlling or coercive behaviour is that it does not relate to a single incident, but is a purposeful pattern of behaviour which takes place over time in order for one individual to exert power, control or coercion over another.[194]

208. Regrettably, the evidence does not assist the Commission in making an assessment, with any degree of accuracy, as to the precise extent to which such consequences in fact flow, the number of victims that are affected by them, the number of such victims that are award covered employees, the extent to which a need to take leave arises from those consequences and whether that is presently accommodated within pre-existing leave entitlements to which an employee has access.

209. Ms Beaumont provides the first of many useful examples presented in the ACTU's evidentiary case regarding initiatives adopted by employers that are designed to provide support and assistance to employees suffering from family and domestic violence, which do not necessarily include the provision of a separate leave entitlement. Specifically, Ms Beaumont was involved in a project with Linfox, which she describes as follows:

> In the first year of the pilot titled *Harm in the Home*, we worked with a Linfox Victorian worksite to develop and test a process to strengthen organisational capacity of a male dominated workplace to promote gender equality and non-violent norms.
>
> …

[192] Witness statement of Marilyn Beaumont at paragraph 23.

[193] Witness statement of Marilyn Beaumont at paragraph 27.

[194] Witness statement of Marilyn Beaumont at paragraph 41.

> In 2008, Women's Health Victoria secured further funding from VicHealth to 'scale up' the project over three years, expanding the pilot to other Linfox worksites in Victoria. Phase II aimed to further embed in Linfox the prevention of violence against women through activities such as training, workplace policy and the dissemination of key prevention messages. It included the development and modelling of a workplace program that could be implemented in other activities.
>
> …
>
> … Evaluation demonstrated that training tools for workplace training helps both prevent violence before it occurs and to support staff who may be experiencing domestic violence. Employees are more likely to challenge violence supportive attitudes and behaviours after completing workplace training thus contributing to primary prevention of violence.[195]

210. The workplace program, now entitled 'Take a Stand against Domestic Violence: It's Everyone's Business' appears to now be widely available to employers.[196]

211. Ms Beaumont speculates as to the various positive implications that might flow from the introduction of an absolute right to take leave in the awards system, without providing any proper basis for her opinion in this regard. Specifically:

- She considers that such a clause "makes it more likely that organisations will build and develop broader workplace capacity, policies and procedures to support the implementation of domestic violence leave".[197] However, she makes this assertion without giving any specific examples of workplaces in which she has observed the introduction of a leave entitlement in fact having the described effect. The basis for her evidence is therefore unclear.

- She states that "the implementation of an entitlement to domestic violence leave would form part of human resource reporting and allow organisations to properly assess the cost of domestic violence to their business, whereas currently that information is unable to be

[195] Witness statement of Marilyn Beaumont at paragraphs 31 – 34.

[196] Witness statement of Marilyn Beaumont at paragraph 35.

[197] Witness statement of Marilyn Beaumont at paragraph 47.

captured". [198] She makes this assumption without any apparent understanding of the different internal reporting procedures and processes adopted by businesses and the extent to which they in fact exist in small businesses. Nor does she appear to consider whether this can be achieved given the proposed confidentiality obligations found in the ACTU's clause.

212. Whilst Ms Beaumont repeatedly speaks of the benefits of fostering a supportive workplace environment, it is clearly open for the Commission to conclude based on her evidence that this can, and is in fact being achieved by employers, where they have such capacity, by various means that are not limited to the provision of a leave entitlement.

9.2 Jocelyn Bignold

213. Ms Jocelyn Bignold is the Chief Executive Officer of McCauley Community Services for Women (**MCSW**).[199] MCSW provides accommodation, support and advocacy for women and their children who are homeless. [200] Accordingly, it is important to note that the observations Ms Bignold makes regarding the services it provides relate to a particularly disadvantaged group of persons in our society. The evidence cannot be read as having broader significance in relation to all or even most women who suffer from family and domestic violence.

214. In various instances [201], Ms Bignold gives evidence regarding certain unidentified persons. In each case, it appears that the circumstances described were either told to Ms Bignold by the unidentified person, or they were told to another person employed by MCSW who later conveyed them to Ms Bignold. Such evidence is clearly hearsay, and should be attributed little if any weight. This is particularly so as the nature of the evidence is such that it cannot properly be tested by respondent parties and in this way,

[198] Witness statement of Marilyn Beaumont at paragraph 48.

[199] Witness statement of Jocelyn Bignold at paragraph 1.

[200] Witness statement of Jocelyn Bignold at paragraph 8.

[201] Witness statement of Jocelyn Bignold at paragraphs 12, 21, 23.1, 23.3 and 61.

is highly prejudicial. In any event, the evidence cannot be relied upon to establish the truth of the prior representations made.

215. Large parts of Ms Bignold's statement resemble submissions that are directed towards establishing the importance of employment for women suffering from family and domestic violence. In so doing, however, she does not establish (or indeed purport to establish) that:

- all or most women suffering from family and domestic violence are unemployed by virtue of their exposure to such violence;
- all or most employed women suffering from family and domestic violence are unable to remain employed by virtue of their exposure to such violence;
- all or most unemployed women suffering from family and domestic violence are unable to obtain employment due to their exposure to such violence;
- all or most employed women suffering from family and domestic violence are unable to access pre-existing paid leave entitlements where necessary; or
- if the aforementioned difficulties are found to exist, that the provision of family and domestic violence leave in the manner proposed by the ACTU will address or alleviate such circumstances.

216. Indeed the success of the McAuley Works program in securing employment for the majority of women who had been referred to it suggests that many such women were able to obtain a job.[202]

217. At paragraph 20 of her statement, Ms Bignold states:

> Given the sort of work that we do at MCSW, it is clear that victims of family violence who are employees experience the impact of family violence in the workplace. Most of the women that we supported through our women's employment program were

[202] Witness statement of Jocelyn Bignold at paragraph 46.

long-term unemployed, meaning they had been unemployed for a period of 12 months or more. Some women had previous work experience.[203]

218. Ms Bignold purports to draw an inference, based on the work of MCSW, that victims of family violence who are employees, as a general proposition, experience the impact of that violence in the workplace. It must be noted of course that the women with whom MCSW interacts are those that are facing particularly acute disadvantages and are not representative of all or even most women who are victims of family violence. To this extent, Ms Bignold's evidence regarding the impact of family violence on the workplace, if accepted, must be so confined.

219. Furthermore, the observations Ms Bignold makes regarding the long-term unemployment of "most of the women that [MCSW] supported through [its] women's employment program" does not establish any causal relationship between their experience of family violence and their employment status. The evidence does not go to the matters that contribute to the unemployment of such women which, in our submission, may include any number of factors including caring responsibilities, levels of education and training or their health; which are not necessarily associated with the victim's experience of domestic violence.

220. At paragraphs 61 – 62, Ms Bignold expresses the view that paid domestic violence leave is "an important way for victims to maintain secure employment".[204] She goes on to state that paid leave "can assist women manage multiple financial impacts and help them to retain their jobs".[205] A proper basis for the opinion provided by Ms Bignold is not, however, made out on the face of her evidence. She does not state that she has had any experience working with employees that have access to, or employers that provide, a dedicated paid leave entitlement. Nor does she appear to have undertaken any analysis or study of the impact that such an entitlement has, or might have, on the employment prospects of a victim of domestic violence

[203] Witness statement of Jocelyn Bignold at paragraph 20.

[204] Witness statement of Jocelyn Bignold at paragraph 61.

[205] Witness statement of Jocelyn Bignold at paragraph 62. .

which cannot otherwise be achieved. The support she expresses for the ACTU's claim must also be seen in the context of her experience of working with a specific group of women (that is, those that are homeless) and their particular needs. Having regard to these matters, in our view, her opinion should be given little if any weight.

221. Ms Bignold also gives evidence regarding the 'Engage to Change' education program administered by McAuley works. It "aims to educate employers and staff about family violence, its impact on business and what can be done to support women experiencing violence".[206] Specifically, Ms Bignold states:

> The program covers how to recognise family violence, identify risks to staff, respond effectively and know where and how to refer women for help. The program includes face-to-face interactive training sessions tailored to the company's needs and a 20-minute e-learning package about the impacts of family violence on the workplace and what can be done to prevent it.
>
> Since the program commenced in its current form, we have delivered the program to 45 employers in industries including health, banking, superannuation, insurance, local government and retail.[207]

222. The evidence is demonstrative of the types of measures that can be (and are in fact being) implemented by employers to support victims of domestic violence, absent the introduction of an absolute right to take leave in the modern awards system, which are both educative and innovative by nature, and are designed to improve awareness as to the issue of family and domestic violence as well as how it may be addressed in the workplace.

9.3 Sandra Dann

223. Sandra Dann is the Director of the Working Women's Centre SA Inc.[208]

224. Ms Dann's evidence contains numerous 'case studies'. In each instance, the evidence is in the nature of hearsay. In some cases, it would appear to be second-hand or some more remote form of hearsay. Furthermore, the individual who is the subject of the case study and those persons or bodies

[206] Witness statement of Jocelyn Bignold at paragraph 47.

[207] Witness statement of Jocelyn Bignold at paragraphs 55 – 56.

[208] Witness statement of Sandra Dann at paragraph 1.

referred to in it (including the employer, where relevant) have not been identified, by virtue of which the admission of the evidence is particularly prejudicial to respondent parties. Accordingly, the evidence should not be given any weight.

225. Other aspects [209] of Ms Dann's statement suffer from the very same deficiencies identified above and for the reasons there articulated, they too should be disregarded.

226. At paragraph 35 of her statement, Ms Dann appears to express a view as to the matters that *should* be included in a "DV clause". We proceed on the basis that her evidence relates specifically to any provision pertaining to domestic violence that is to be included in the safety net by way of a modern award term. Quite clearly, a foundation for her opinion is not established in her evidence. For instance, the witness does not appear to have given proper consideration to other leave entitlements available to employees, the cost of such a clause to business and ultimately, whether such a provision can be included in an award pursuant to s.138 of the Act. Ms Dann's evidence amounts to little more than a submission whereby she advocates a particular position without regard for the relevant statutory criteria.

227. Ms Dann's statement nonetheless provides useful examples of initiatives taken by employers to provide support to their employees in the event that they are victims of domestic violence, and the specialised training and assistance available to such employers:

> On 16 October, 2014 the Premier of South Australia, Jay Weatherill, directed that all government departments and agencies undertake accreditation with the White Ribbon Workplace Accreditation program. … I am delivering this training, predominantly to Managers and White Ribbon Workplace Advocates, but in some instances to whole agencies. Some of this training is delivered along with specialist workers from DV services.
>
> In addition to this training, each WWC in South Australia, Queensland and the Northern Territory is delivering tailored awareness and training sessions on domestic and family violence and work to corporate, public sector and community based organisations. The Centres also provide specialised advice to organisations about the implementation of DV clauses in Enterprise Agreements, DV policies, DV

[209] Witness statement of Sandra Dann at paragraphs 33 – 34 and 37.

safety planning relevant to the workplace and information about appropriate referral services. WWC's also refer organisations and individuals to appropriate unions.[210]

9.4 Julie Kun

228. Julie Kun is the CEO the Women's Informational Referral Exchange.[211]

229. Ms Kun's evidence establishes that financial abuse can be very difficult to identify.[212] She states that "there is poor public awareness or understanding of the issues by professionals, services providers and legal or financial support services industries".[213] This includes financial counsellors, those engaged in the banking industry, social workers, youth workers, welfare workers, financial planners and the broader family violence and community services sector.[214] In effect, it is Ms Kun's evidence that the very personnel who might be responsible for providing an employee with 'evidence' pursuant to clause X.3.2 of the ACTU's proposal may not be able to accurately identify whether their client is in fact suffering from financial abuse. Indeed WIRE provides training for workers in the community sector,[215] which is designed, in part, to combat this lack of understanding; however such training is not mandatory.[216]

230. It would appear that some of the difficulties associated with identifying the existence of financial abuse arise from the complexities in defining it. Ms Kun testified that, for instance, limiting a partner's access to shared moneys is not always financial abuse. Rather, she describes financial abuse in the following terms:

> When power and control is involved as with all family violence. It's when it's not equal and not respectful.[217]

[210] Witness statement of Sandra Dann at paragraphs 14 – 15.

[211] Witness statement of Julie Kun at paragraph 1.

[212] Witness statement of Julie Kun at paragraph 21.

[213] Witness statement of Julie Kun at paragraph 34.

[214] Transcript of proceedings on 17 November 2016 at PN1976 – PN1982.

[215] Witness statement of Julie Kun at paragraph 40.

[216] Transcript of proceedings on 17 November 2016 at PN1983 – PN1985.

[217] Transcript of proceedings on 17 November 2016 at PN1992.

231. Whilst a range of behaviours may constitute financial abuse, such as limiting access to paid work, sabotaging employment opportunities, hiding keys, and restricting access to training or education,[218] ultimately it is necessary to understand how the victim feels[219] and the relevant context in order to ascertain whether they are subject to financial abuse:

> … At WIRE before we would make that determination about whether a person is experiencing about financial abuse, we would talk about the context of the relationship and have that conversation with the person.
>
> And then you just make that decision based on what the woman tells you or the person tells you?---We would base it upon our expertise and what the woman tells us.[220]

232. Ms Kun confirmed that in making the relevant assessment, WIRE does not speak with the alleged perpetrator[221] or conduct any 'investigations'.[222] Ms Kun and her colleagues at WIRE instead proceed on the basis that they "will believe a woman when she tells [them] of her experiences".[223]

233. Ms Kun also provided evidence regarding another service; the National Sexual Assault Domestic and Family Violence Counselling Service (1800RESPECT), which provides confidential online and telephone counselling information and referrals 24 hours a day, seven days a week. Such counselling is provided by professional counsellors.[224]

[218] Transcript of proceedings on 17 November 2016 at PN1996 – PN1999.
[219] Transcript of proceedings on 17 November 2016 at PN1995.
[220] Transcript of proceedings on 17 November 2016 at PN2002 – PN2003.
[221] Transcript of proceedings on 17 November 2016 at PN2004.
[222] Transcript of proceedings on 17 November 2016 at PN2007.
[223] Transcript of proceedings on 17 November 2016 at PN2008.
[224] Transcript of proceedings on 17 November 2016 at PN1968 – PN1972.

9.5 Fiona McCormack

234. Fiona McCormack is the Chief Executive Officer of Domestic Violence Victoria (**DV Vic**).[225]

235. Ms McCormack's evidence establishes that the Commonwealth and state governments have been "markedly more responsive in terms of family and domestic violence policy in recent times".[226] She highlights the complexities associated with the issue of family and domestic violence,[227] and confirms that DV Vic's advocacy is based on "best practice"[228]. It is also her evidence that the activities of organisations such as VicHealth has had the effect of increasing awareness about "the role of workplaces in responding to and preventing family violence including how they can support their workers through industrial instruments".[229] This has clearly occurred absent the existence of any modern award entitlement in relation to family and domestic violence as is here sought by the ACTU.

236. Ms McCormack's evidence regarding the role that workplaces should play in preventing family violence[230] is effectively a piece of advocacy that appears to be advanced on behalf of DV Vic, which as she earlier states, is based at least in part on that which it considers to be "best practice". It is trite to observe that the statute does not require or indeed permit the introduction of modern award terms on the basis that they reflect 'best practice'.

237. Paragraph 34 of Ms McCormack's statement states that family violence leave generally ensures that "women will be able to take time away from work to attend to all the issues that arise including legal matters, housing, their children's school and child care arrangements, medical appointments, counselling and so on".[231] In giving her evidence, including her opinion that

[225] Witness statement of Fiona McCormack at paragraph 1.
[226] Witness statement of Fiona McCormack at paragraph 13.
[227] Witness statement of Fiona McCormack at paragraph 16.
[228] Witness statement of Fiona McCormack at paragraph 15.
[229] Witness statement of Fiona McCormack at paragraph 18.
[230] Witness statement of Fiona McCormack at paragraphs 22 – 35.
[231] Witness statement of Fiona McCormack at paragraph 34.

domestic violence leave provisions should be introduced, the witness does not appear to have considered whether the aforementioned matters can be attended to by accessing current leave entitlements, flexible working arrangements or whether in fact any absence from work is necessitated where a woman works on a part-time or casual basis.

238. In her concluding paragraphs, Ms McCormack expresses support for three of the recommendations made by the Victorian Royal Commission into Family Violence (**VRC**). We note that none of those suggest the introduction of a modern award term as sought by the ACTU:

- Recommendation 190 relates to Victorian public sector enterprise agreements.
- Recommendation 191 relates to an amendment to the NES such that it provides "paid family violence leave for employees (other than casual employees) and an entitlement to unpaid family violence leave for casual employees".
- Recommendation 192 relates to the implantation of best-practice workplace programs and other measures by the Victorian Government.

9.6 Samantha Parker

239. Samantha Parker is a Generalist Advocacy Worker employed by the Western Sydney Women's Domestic Violence Court Advocacy Service (**Western Sydney DV Advocacy Service**).[232]

[232] Witness statement of Samantha Parker at paragraph 1.

240. At its highest, Ms Parker's evidence establishes that in the two NSW local courts identified in her statement [233], the process associated with an application for an apprehended violence order involves the following:

- The applicant will not always need to attend court when it is first set down for mention; for instance if the police make the application on her behalf.[234]

- The Western Sydney DV Advocacy Service provides women with assistance when the application is listed for mention including information regarding the services available to them, referrals for ongoing assistance and an explanation as to the court process and the terms of the order sought and/or granted. It appears that this service is provided at the Courts.[235]

- Where the application is not contested, the applicant will need to attend court on at least one day.[236] Her evidence also suggests that there may be some circumstances in which *only* one day of attendance is necessary.

- Where the application is contested, the applicant may need to attend court on at least four days.[237] The witness does not, however, provide any indication as to the incidence of such circumstances arising.

241. Ms Parker testifies that:

> Women in paid employment often express concern to me regarding taking leave from work to attend court, particularly if they are required to attend on more than one occasion. They may have already taken leave from their employment immediately after the initial domestic violence incident in order to seek safe alternative accommodation, medical assistance and/or appointments to access income support through Centrelink.[238]

[233] Witness statement of Samantha Parker at paragraph 7.

[234] Witness statement of Samantha Parker at paragraph 6.

[235] Witness statement of Samantha Parker at paragraph 9 - 10.

[236] Witness statement of Samantha Parker at paragraph 16.

[237] Witness statement of Samantha Parker at paragraph 16.

[238] Witness statement of Samantha Parker at paragraph 17.

242. Ms Parker's evidence does not reveal the identity of the persons who have "expressed concern" in this regard, the number of persons who have in fact expressed such a concern, the basis for the concern, whether they had access to a leave entitlement to attend court, if so whether it was paid or unpaid and if paid, the nature of the entitlement accessed. The absence of such detail renders the evidence of little probative value. The remaining evidence cited above is entirely speculative and accordingly, should be disregarded.

243. In her concluding paragraph, Ms Parker expresses her personal opinion as to the effect that paid employment might have on a victim suffering from domestic violence. She does so without having established that she in fact has the requisite experience or expertise to ground such an opinion and accordingly, it can be given little weight.

9.7 Bernadette Pasco

244. Bernadette Pasco is the Manager of Special Projects at the Financial and Consumer Rights Council (**FCRC**).[239]

245. Ms Pasco's evidence establishes that a number of financial counsellors practice in Victoria, offer their services free of charge to clients and are qualified, highly skilled "paralegal professionals": (emphasis added)

> Financial counsellors in Victoria are highly skilled paralegal professionals who provide assistance, advocacy, and information to those who are experiencing financial difficulty to enable clients to gain control of their financial situation. Financial counsellors offer their services free of charge to their clients and provide impartial advocacy.
>
> There are 200 financial counsellors in Victoria employed by 60 community/welfare not-for-profit agencies, …
>
> In order to become an accredited financial counsellor, individuals must complete a Diploma of Financial Counselling. They must also become a member of FCRC. In order to retain membership with FCRC, financial counsellors need to achieve ten professional development points and have a minimum of ten hours' professional supervision per annum.

[239] Witness statement of Bernadette Pasco at paragraph 1.

> Financial counsellors work with a vast array of consumer credit, bankruptcy, insurance and energy sectors.[240]

246. The evidence also goes to the additional resources that have recently been allocated to specifically assist victims of family and domestic violence: (emphasis added)

> FCRC has been successful in obtaining $1.8 million from the State Government budget for the next 12 months to build a specialist family violence response model, including specialist training for all financial counsellors to ensure that the needs of victims are met without increasing this risk. An integrated approach is vital for success of such a program.[241]

247. Ms Pasco characterises the work of financial counsellors in relation to clients experiencing family violence as "significantly more complex and time intensive than that required for the average financial counselling case".[242] She later clarified, however, that her evidence in this regard is based solely on what has been told to her by financial counsellors.[243] That is, the evidence is merely hearsay and cannot be relied upon to establish that such instances of counselling are in fact "more complex and time intensive".

248. At paragraph 44 of her statement, Ms Pasco identifies the forms of assistance that can be provided by a financial counsellor to a client experiencing family and domestic violence.[244] Under cross-examination, Ms Pasco confirmed that financial counsellors may also provide those services to clients who are not experiencing family and domestic violence.[245]

[240] Witness statement of Bernadette Pasco at paragraphs 14 - 17.

[241] Witness statement of Bernadette Pasco at paragraph 21.

[242] Witness statement of Bernadette Pasco at paragraph 29.

[243] Transcript of proceedings on 17 November 2016 at PN2058.

[244] Witness statement of Bernadette Pasco at paragraph 44.

[245] Transcript of proceedings on 17 November 2016 at PN2077.

9.8 Emma Smallwood

249. Emma Smallwood is a Family Violence Program Manager at Victoria Legal Aid.[246]

250. Ms Smallwood gives evidence regarding the services provided by Women's Legal Service Victoria, which includes free legal information, advice, referrals and representation.[247] Relevantly, it provides a duty lawyer at the Melbourne Magistrates Court in relation to family violence intervention orders[248] and it operates a "night telephone advice line" which provides legal advice outside of ordinary business hours[249].

251. Ms Smallwood's statement largely relies upon or draws from the 'Stepping Stones' report[250]. We consider that such evidence can be given little if any weight. The report is based on interviews conducted of a very small sample of respondents (30 women experiencing family violence).[251] The precise questions asked, the precise responses provided, the basis upon which the interviewees were selected, their demographic details, their employment status, their modern award coverage (if at all) and the basis upon which they were identified as suffering from 'family and domestic violence' is not revealed in Ms Smallwood's statement or the report. Further, the basis upon which the said "thematic analysis" and "coding"[252] was undertaken is also unclear.

252. In various parts of her statement, the witness retells incidents in relation to certain unidentified interview respondents.[253] Quite clearly, such evidence amounts to hearsay and, given the anonymity of the persons referred to, it is

[246] Witness statement of Emma Smallwood at paragraph 1.

[247] Witness statement of Emma Smallwood at paragraph 10.

[248] Witness statement of Emma Smallwood at paragraph 11.

[249] Witness statement of Emma Smallwood at paragraph 11

[250] Witness statement of Emma Smallwood at Annexure ES-A.

[251] Witness statement of Emma Smallwood at paragraph 15.

[252] Witness statement of Emma Smallwood at paragraph 16.

[253] Witness statement of Emma Smallwood at paragraphs 23, 24, 27, 29, 54, Annexure EM-1, Annexure EM-2 and Annexure EM-3.

virtually impossible for respondent parties to test. This evidence cannot properly be attributed any weight.

253. Ms Smallwood also relies on that part of the report that is based on a survey that was completed by 40 community sector workers.[254] It is trite to observe that the results of the survey (that is, the raw data constituting the survey results) are not in evidence. Therefore, the veracity of the reported results cannot be tested and accordingly, to the extent that Ms Smallwood purports to rely on that aspect of the report, it can be given little weight.

254. At paragraph 43 of her statement, Ms Smallwood asserts that "women most commonly have to do the legwork" associated with applications for family violence intervention orders themselves:

> … including making the application in-person at Court, in many cases prepare a statement of further and better particulars, seek advice from various sources and find a lawyer who will assist them to lodge a legal aid application and appear for them at the hearing.[255]

255. The witness here ignores the ability of police to make an application on behalf of a victim of family and domestic violence[256], and to represent her in court, thus obviating the need to seek independent legal representation and undertake the "legwork" described above.[257] Indeed according to the VRC, in 2013 – 2014, two-thirds of family violence intervention orders in Victoria were made by Victoria Police.[258]

256. To the extent that the witness proffers her opinion as to why the ACTU's claim ought to be granted[259], a proper basis has not been established in her evidence. Her statement does not reveal any experience of working with employees who have access to a paid leave entitlement (or those that don't) or any specific observations arising from it. Ms Smallwood is not an

[254] Witness statement of Emma Smallwood at paragraph 18.

[255] Witness statement of Emma Smallwood at paragraph 43.

[256] Transcript of proceedings on 16 November 2016 at PN1679.

[257] Transcript of proceedings on 16 November 2016 at PN1683.

[258] Victorian Royal Commission into Family Violence, Summary and Recommendations, March 2016, Vol. I, p.77.

[259] Witness statement of Emma Smallwood at paragraphs 57 – 58.

experienced specialist in this field, nor has she undertaken any rigorous, reliable research that can ground her speculative evidence as to the benefits that might flow from a separate paid leave entitlement.

9.9 Jessica Stott

257. Jessica Stott is employed as a Women's Support Worker at the Women's Information Referral Exchange.[260]

258. Ms Stott's statement consists, almost entirely, of examples of unidentified women who accessed the services of her employer and discussed their personal circumstances with the witness.[261] That is, the evidence is by its very nature, hearsay.

259. The evidence is such that it cannot reliably be tested by respondent parties. This because the identity of the individuals or their employers have not been identified. In our view, the attribution of any weight to such evidence is inherently prejudicial. Accordingly, Ms Stott's evidence should be disregarded in its entirety.

9.10 Karen Willis

260. Karen Willis is an Executive Officer of Rape and Domestic Violence Services Australia.[262]

261. Similar to the evidence provided by many other witnesses in these proceedings, Ms Willis tells of the positive steps that are being taken by employers to support victims of domestic violence, which includes the insertion of family and domestic violence leave provisions in their enterprise agreements and the implementation of workplace policies:

> For the past two years R&DVSA has been working with employers who want to include domestic violence leave provisions in their agreements with employees. … A number of workplaces to whom we had provided assistance when employees had experienced domestic violence approached us to assist with their policies. R&DVSA

[260] Witness statement of Jessica Stott at paragraph 1.

[261] Witness statement of Jessica Stott at paragraph 8.

[262] Witness statement of Karen Willis OAM at paragraph 1.

provides assistance with policy development and training for the first responders in the organisation. Some employers have also engaged in ethical leadership training to ensure their organisational culture is one which establishes an environment where violence against women is not tolerated and that those who may be experiencing such violence feel they will be supported in accessing the organisations policies.[263]

262. Additional examples of specific instances in which employers provided support to their employees can be found at paragraphs 16, 18 and 20 of her statement. The types of assistance provided included changes to bank account details, changes to the workplace to ensure the safety of the victim and her colleagues, personal assistance by the employer in order to enable the victim to relocate and flexible working arrangements. Ms Willis ultimately concludes:

> … In my experience, employers are increasingly supportive of their employees.
>
> …
>
> There are employers who help the person move, offer loans to be paid back 'when they get on their feet' and the finding of 'bits and pieces' they may need. The result is a safe women (sic) and an employee who is loyal to that organisation.[264]

263. Ms Willis identifies that a victim of domestic violence may suffer from increased illness or may, for other identified reasons, be absent from work including injury or the need to care for their child.[265] It is trite to observe that in such circumstances, a permanent employee can access paid personal/carer's leave and a casual employee may simply refuse to attend work.

264. Ms Willis testifies that where a victim of violence is employed "they have considerably more options".[266] Such evidence appears to proceed on the basis that victims of violence are often, if not predominantly, unemployed and that their unemployment is associated with their experience of domestic violence; both of which are asserted facts that are not in evidence.

[263] Witness statement of Karen Willis OAM at paragraph 1.

[264] Witness statement of Karen Willis OAM at paragraph 45 and 47.

[265] Witness statement of Karen Willis OAM at paragraphs 21 – 22.

[266] Witness statement of Karen Willis OAM at paragraph 24. .

265. The evidence provided by Ms Willis regarding the need to attend court effectively establishes that in some instances, an application for a protection order may be dealt with on a single day. Where the application is opposed, additional hearing days will be set down. [267] The number of days that may be necessary or the incidence of such applications being opposed is not apparent from the evidence.

266. Furthermore, Ms Willis' brief description of Family Court matters appears to relate to proceedings associated with the breakdown of a relationship, irrespective of whether either party engaged in violence.[268]

267. Finally, we make the following observations in relation to Ms Willis' opinion regarding the ACTU's claim. Her evidence does not establish that absent the leave provision sought, a person suffering from domestic violence is not able to "conserve [their] connection to the workplace"[269], have "an independent income" [270], have "the capacity to re-establish a life for them and their children"[271] or enjoy "a safe space to which they can go where there (sic) skills and capacities are appreciated" [272]. Indeed Ms Willis' evidence suggests the contrary; that increasingly employers have a greater understanding of the issue and will take various steps to provide support and ensure the safety of their employee. Her evidence certainly does not establish that employees requiring leave are not able to access time off work by virtue of existing entitlements or that their employment has been compromised due to their experience of family violence.

268. To the extent that she gives examples of unidentified employees and employers[273], this is quite clearly hearsay evidence that is inherently unfair and should not be attributed any weight.

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[267] Witness statement of Karen Willis OAM at paragraph 32.
[268] Witness statement of Karen Willis OAM at paragraph 29.
[269] Witness statement of Karen Willis OAM at paragraph 49.
[270] Witness statement of Karen Willis OAM at paragraph 49.
[271] Witness statement of Karen Willis OAM at paragraph 50.
[272] Witness statement of Karen Willis OAM at paragraph 50.
[273] Witness statement of Karen Willis OAM at paragraphs 12 and 21.

9.11 Mick Doleman

269. Mick Doleman is the Executive Officer of the Maritime International Federation.[274]

270. Mr Doleman's evidence is largely limited to a consideration of the "strongly male dominated" maritime sector.[275] He provides hearsay evidence suggesting that that there is no "pushback" from male members when speaking about a family and domestic violence leave clauses.[276] He indicates that the National Council of the MUA does not ratify agreements that do not have a family and domestic violence clause.[277]

271. Mr Doleman attests that the MUA has a draft model domestic violence leave clause.[278] During cross examination Mr Doleman confirmed that the MUA had approximately 17 enterprise agreement with this clause in it and that it will continue to pursue its inclusion in other enterprise agreements as they expire.[279] Mr Doleman also confirmed that 95% or more of MUA members are covered by enterprise agreements.[280]

272. Mr Doleman also gives evidence regarding the White Ribbon movement and, specifically, the accreditation process it has implemented for workplaces. He speaks of the success of the program, stating that "in some ways [it has been] too successful as the resources required to extend the program are in short supply".[281] We later provide additional information regarding this program.

[274] Witness statement of Mick Doleman at paragraph 2.
[275] Witness statement of Mick Doleman at paragraph 13.
[276] Witness statement of Mick Doleman at paragraph 12.
[277] Witness statement of Mick Doleman at paragraph 11.
[278] Witness statement of Mick Doleman at paragraph 11.
[279] Transcript of proceedings on 16 November 2016 at PN1475 – PN1480.
[280] Transcript of proceedings on 16 November 2016 PN1463.
[281] Witness statement of Mick Doleman at paragraph 8.

9.12 Brad Gandy

273. Brad Gandy is the Assistant Branch Secretary for the WA Branch of the AWU.[282]

274. Mr Gandy gives evidence of his experience bargaining with Spotless in relation to an agreement covering certain employees performing work at Alcoa sites.[283] Mr Gandy indicates, in effect, that he unsuccessfully pursued a family and domestic violence leave clause in such negotiations[284] and that it was the first time he has ever done so. He intends to pursue the same or similar clauses in future agreements but notes that his role as an organiser is being phased out.[285]

275. The union's pursuit of paid family and domestic violence leave clause was accompanied by a claim for what, on any reasonable assessment, would be a generous proposed entitlement to "personal business leave".[286] It is reasonable to suggest, given this context, that the company may have regarded the leave proposals as ambit.

276. The *Spotless (Alcoa Sites) Enterprise Agreement 2016* was ultimately approved by employees once certain concessions were made, and supported by the AWU[287] when an application for its approval was filed in the Commission. Such concessions did not include either of the proposed forms of leave. This included the employer dropping a claim for significant reductions in certain penalties payable to casual employees and movement on the parties' positions in relation to wage outcomes. The evidence does not provide any meaningful picture as to how vehemently the claim for domestic violence leave was pursued by the union. However, the ultimate outcome suggests that the proposed leave provisions were never 'big ticket' items.

[282] Statement of Brad Gandy at paragraph 1.

[283] Statement of Brad Gandy at paragraph 4.

[284] Statement of Brad Gandy at paragraph 9.

[285] Statement of Brad Gandy at paragraphs 16 – 17.

[286] Exhibit F3.

[287] Transcript of proceedings on 16 November 2016 at PN1562.

277. We note also that attached to Mr Gandy's statement is Spotless' Domestic Violence Leave Policy, which applies nationally to all its employees. Whilst the policy does not include a separate paid leave entitlement, it provides for the following:

- A victim of domestic violence may seek support from an EEO Contact Officer, who will advise the employee of avenues available to them under the policy.
- A victim of domestic violence should be offered confidential counselling services through the Spotless Employee Assistance Program.
- A victim of domestic violence should be provided information regarding government agencies and services that provide support to victims of domestic violence.
- A victim of domestic violence may be advised of legal protection available to them.
- A victim of domestic violence, or an employee who needs to provide care or support to a member of their immediate family or household because they are experiencing family violence, may request flexible working arrangements.
- If a request is made, managers must seriously consider what changes can be made in the workplace to support the victim. The request is to be considered in light of operational requirements and the safety of the victim.
- Discussion with the employee is required to ensure the proposition is fully understood and alternatives are exhausted if the original request cannot be accommodated.

9.13 Michelle Jackson

278. Michelle Jackson is a Branch Co-ordinator at the Victorian and Tasmanian Authorities and Services Branch of the ASU.[288]

279. Ms Jackson's statement discusses bargaining outcomes of relevance to the ASU. She gives examples of the diversity in agreement provisions dealing with family and domestic violence, [289] but accepts that inconsistent bargaining outcomes in relation to other entitlements is "quite common".[290] She also provides evidence of objections or concerns raised by just three named employers in relation to family and domestic violence leave clauses. These included concerns related to cost, employees claiming leave without a genuine need and a view that a one off 20 day entitlement should be sufficient.[291]

280. Ms Jackson evidence raises the difficulty her union has in negotiating enterprise agreements for the large number of employers that engage the union's members. This appears to relate to logistical and resource related challenges faced by the ASU. [292] Her evidence does not establish that the industries in which the ASU operates are inherently unsuited to enterprise bargaining**.**

281. Ms Jackson also gives evidence relating to bargaining for the *Hazelwood Power Enterprise Agreement 2015* (**Hazelwood Agreement**),[293] a matter we deal with in greater detail later in this submission.

282. To the extent that Ms Jackson purports to offer an opinion as the impact that family and domestic violence can have on an employee's performance at work,[294] she later clarified that this simply represents her personal opinion,

[288] Witness statement of Michelle Jackson at paragraph 1.

[289] Witness statement of Michelle Jackson at paragraph 6.

[290] Transcript of proceedings on 15 November 2016 at PN1387.

[291] Witness statement of Michelle Jackson at paragraph 16.

[292] Transcript of proceedings on 15 November 2016 at PN1355 – PN1358.

[293] Witness statement of Michelle Jackson at paragraph 15.

[294] Witness statement of Michelle Jackson at paragraph 13.

which is not based on any academic study.[295] Ms Jackson also informed the Commission that she has not assisted any ASU members with making a request under s.65 of the Act for flexible working arrangements, including pursuant to s.65(1A)(e), which relates specifically to an employee who is experiencing violence from a member of the employee's family.[296]

9.14 Sunil Kemppi

283. Sunil Kemppi is a Senior Industrial Officer at the CPSU-PSU Group.[297]

284. Mr Kemppi provides a statement almost exclusively addressing bargaining in the context of the Australian Public Service. His evidence addresses the lack of employer willingness to negotiate in relation to a family and domestic violence leave clause in the current round of enterprise bargaining. He also confirms that the majority of CPSU workers are covered by an enterprise agreement.[298]

285. Mr Kemppi's evidence includes the Australian Government Public Sector Workplace Bargaining Policy 2015.[299] He attests to the influence of that policy on bargaining outcomes. We cannot identify any element of that policy that suggests that there would be greater Government support for family and domestic violence leave if such an entitlement was included within relevant awards. His evidence establishes, at best, that he is hopeful that the development of an award standard relating to domestic violence leave may have an impact on bargaining outcomes.

[295] Transcript of proceedings on 15 November 2016 at PN1359 – PN1360.

[296] Transcript of proceedings on 15 November 2016 at PN1371.

[297] Witness statement of Sunil Kemppi at paragraph 1.

[298] Witness statement of Sunil Kemppi at paragraph 29.

[299] Witness statement of Sunil Kemppi at Attachment SK-2.

9.15 Michele O'Neil

286. Michele O'Neil is the National Secretary of the TCFUA.[300]

287. Ms O'Neil gives evidence about the TCFUA's attempts to bargain over family and domestic violence leave. Her evidence relates only to the textile, clothing and footwear industry. It appears that the union only decided to include family and domestic violence leave in its bargaining agenda in 2014.[301] Ms O'Neil's evidence establishes that the union intends to take steps to pursue claims for domestic violence leave going forward.[302]

288. Ms O'Neil's evidence identifies instances where the union has been unsuccessful in securing paid domestic violence leave entitlements during enterprise bargaining.[303] Although, Ms O'Neil conceded under cross examination that she was not present at the bargaining table for the negotiation of each of those agreements[304] and, consequently, the extent to which Ms O'Neil can provide probative evidence of the reasons for these failures is unclear.

289. Ms O'Neil also acknowledged during cross examination that some of the agreements contained additional leave entitlements to those afforded under the NES, such as blood donor leave, personal/carer's leave and unpaid leave which exceed those provided in the NES.[305]

9.16 Debra Eckersley

290. Debra Eckersley is the Managing Partner, Human Capital at PWC.[306]

291. Ms Eckersley gives evidence regarding the development and implementation of the PWC Family and Domestic Violence and Sexual Assault Support

[300] Witness statement of Michele O'Neil at paragraph 1.

[301] Witness statement of Michele O'Neil at paragraph 23.

[302] Transcript of proceedings on 17 November 2016 at PN2107 – PN2108.

[303] Witness statement of Michele O'Neil at paragraph 31.

[304] Transcript of proceedings on 17 November 2016 at PN2112.

[305] Transcript of proceedings on 17 November 2016 at PN2118 – PN2121.

[306] Statement of Debra Eckersley at paragraph 1.

Policy, which provides its employees with 10 days of paid leave, additional paid leave at the discretion of PWC and access to other entitlements and support.

292. The relevance of Ms Eckersley's statement, in which she asserts her support of the ACTU's claim and expresses her personal opinion as to the importance of introducing family and domestic violence leave into the minimum safety net, is significantly tempered when regard is had to the following factual propositions established during cross examination:

- PWC considers itself a "high trust" organisation.[307]
- An unidentified proportion of PWC's employees are award covered, primarily under the *Clerks – Private Sector Award 2010*.[308]
- As a general proposition, PWC's employees are paid above minimum standards.[309]
- PWC is a business of significant size and magnitude, employing 7,000 employees and 500 partners in Australia.[310] It is considered one of the "big four" professional services firms in Australia.[311]
- In the financial year ending in 2016, PWC in Australasia and Pacific Islands' total revenue was US$1.4 billion.[312]
- PWC strives to implement market-leading[313] employment conditions in order to attract and retain talented employees.[314] This includes 18 weeks paid parental leave,[315] flexible working arrangements,[316]

[307] Transcript of proceedings on 17 November 2016 at PN1904.
[308] Transcript of proceedings on 17 November 2016 at PN1778 – PN1782.
[309] Transcript of proceedings on 17 November 2016 at PN1791.
[310] Transcript of proceedings on 17 November 2016 at PN1793.
[311] Transcript of proceedings on 17 November 2016 at PN1799.
[312] Transcript of proceedings on 17 November 2016 at PN1797.
[313] Transcript of proceedings on 17 November 2016 at PN1817.
[314] Transcript of proceedings on 17 November 2016 at PN1805.
[315] Transcript of proceedings on 17 November 2016 at PN1807 – PN1808.

birthday leave,[317] personal/carer's leave entitlements that exceed the NES,[318] gym membership discounts, personal insurance services, as well as emergency and short notice care options for parents.[319]

- PWC considers its family and domestic violence leave policy to be "best practice" for its organisation.[320] Nonetheless, the provision of leave under the policy does not extend to casual employees.[321]

- In expressing the view that the ACTU's claim is "reasonable",[322] Ms Eckersley had regard to the entitlements provided by comparable businesses such as Telstra and National Australia Bank,[323] but did not give consideration to the "different circumstances of different businesses"[324].

293. Put simply, PWC and by extension, the evidence given by Ms Eckersley regarding its policy and practices, is by no means reflective of award covered businesses that would in fact be impacted by the ACTU's claim. PWC is a large corporate organisation that enjoys a profit margin of significant magnitude. We consider it reasonable to infer that only a relatively small proportion of its employees are in fact covered by an award and to the extent that they are, the evidence establishes that they enjoy pay and conditions that well exceed the award minima.

294. The ability of a business such as PWC to accommodate and finance an additional leave liability can by no means be extrapolated to establish or even suggest that award covered businesses, as a general proposition, can or should do the same. Rather, PWC is representative of a business with the

[316] Transcript of proceedings on 17 November 2016 at PN1811.
[317] Transcript of proceedings on 17 November 2016 at PN1813.
[318] Transcript of proceedings on 17 November 2016 at PN1900 – PN1903.
[319] Transcript of proceedings on 17 November 2016 at PN1815.
[320] Transcript of proceedings on 17 November 2016 at PN1826.
[321] Transcript of proceedings on 17 November 2016 at PN1880.
[322] Statement of Debra Eckersley at paragraph 39.
[323] Transcript of proceedings on 17 November 2016 at PN1893.
[324] Transcript of proceedings on 17 November 2016 at PN1896.

capacity and scope to introduce additional benefits for its employees and for reasons that include recruitment and retention of talented personnel, it has done so in relation to family and domestic violence as well as various other matters.

9.17 Conclusions regarding the lay witness evidence

295. Once careful consideration is given to the evidence of the ACTU's lay witnesses, and the appropriate weight that should be attributed to it, the evidence can be reduced to establishing only the following factual propositions:

- that some employees are victims of family and domestic violence;
- that most (but not all) employees who are victims of family and domestic violence are women;
- that different employees face different forms of family and domestic violence abuse;
- that economic and financial abuse are difficult to define and identify;
- that social workers and financial counsellors can find it difficult to identify the existence of economic and financial abuse;
- that an assessment as to whether economic and financial abuse exists is inherently subjective and involves a consideration of the context of the relevant person's relationship and the victims feelings;
- that the consequences of family and domestic violence vary for different employees;
- that the degree of impact as a result of those consequences vary for different employees;
- that some employees who are victims of family and domestic violence may seek leave from work;

- that the purposes for which such employees seek leave can vary;
- that the number of days of leave sought can vary;
- that numerous services have been established to provide various forms of assistance to victims of domestic violence, including gaining employment, free legal advice and counselling;
- that some of the purposes for which a victim of family and domestic violence may seek leave from work may also cause a person who is not so suffering to seek leave from work, for instance to attend court proceedings associated with a property settlement;
- that some victims of family and domestic violence may seek leave to attend court proceedings associated with intervention orders, however this may only be necessary for one day;
- that there are various programs that have successfully been implemented to educate employers regarding the prevalence and impact of family and domestic violence;
- that some unions pursue the inclusion of family and domestic violence leave provisions in some enterprise agreements in some industries;
- that those unions have had varying degrees of success;
- that where those unions have been successful, the terms of the provisions included vary;
- that the degree to which those unions have been successful is contingent upon various factors including whether it is endorsed by its members and the vigour with which it is pursued by the union;
- that where employers have opposed the inclusion of terms sought, this has been due to considerations associated with cost, operational requirements, existing leave entitlements, and potential abuse of the leave entitlement; and

- that some employers adopt a compassionate and supportive approach to assisting employees who identify that they are victims of family and domestic violence.

296. Importantly, the evidence does not allow the Commission to make the factual findings necessary to allow it to conclude that the provision proposed is necessary to ensure that the awards are achieving the modern awards objective.

10. THE PREVALENCE OF FAMILY AND DOMESTIC VIOLENCE

297. The matter here before the Commission calls upon the Commission to consider data that goes to the prevalence of and trends pertaining to family and domestic violence. It is important to note, however, that any such data must be read having regard to the manner in which it has been presented. Relevantly, attention should be given to the definition ascribed to 'family and domestic violence' (or any other such terminology that has been utilised).

298. Furthermore, in determining the relevance of such data, consideration must also be given to the definition of 'family and domestic violence' that has been adopted by the ACTU in its proposed 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.

Understanding the PSS

299. As mentioned earlier in this submission, the ACTU's presentation of statistical information relies primarily on the PSS[325] conducted in 2012; the results of which were published in late 2013[326]. It is important to appreciate, however, that there are various limitations to this source of data, as explained by Dr Flood.

300. The headline statistic that "one in four women in Australia have experienced at least one incident of violence by an intimate partner who they may or may not have been living with"[327] must be understood in this context. That is, it refers to the number of women who have experienced at least one incident of violence by a partner whom the person may or may not be living since the age of 15. As Dr Flood highlights, the statistic does *not* reveal the extent to which the violence committed was an isolated incident or whether it was part of an ongoing, systematic pattern of violence and abuse.

[325] ACTU Outline of Submissions dated 1 June 2016 at paragraph 5.35.

[326] Statement of Dr Peta Cox dated 26 May 2016 at Annexure PC-3, paragraph 3.7.

[327] Statement of Dr Peta Cox dated 26 May 2016 at Annexure PC-3, paragraph 7.2.

301. Dr Cox's report also reveals, however, that 1.5% of women experienced at least one incident of violence (including physical violence, physical assaults, physical threats, sexual violence, sexual assaults and sexual threats) by an intimate cohabitating partner in the 12 months prior to the 2012 PSS.[328]

302. The apparent contrast in these figures is illustrative of our contention that the manner in which the relevant data is construed and presented will have an important bearing upon their results. It is therefore important to adopt a careful and forensic approach to examining the various statistics put before the Commission in these proceedings.

Male Victims of Family and Domestic Violence

303. The sample of the PSS consists of 17,050 individuals; 13,307 women and just 3,743 men.[329] Therefore, only 22% of the sample is made up of male respondents.

304. The under-representation of men in this survey has previously been raised by stakeholders, as noted by the Senate Finance and Public Administration References Committee report of August 2015, titled 'Domestic Violence in Australia' (**Senate Inquiry**):

> … For example, Mr Paul Mischefski, Vice President of Men's Wellbeing Inc, Queensland, argued:
>
> Despite repeated calls for this highly-regarded and quoted survey to achieve gender parity and include an equal number of female and male respondents, the survey has consistently shown an immense bias towards a female survey sample.
>
> The 2005 survey included 11,800 females but only 4500 males. This heavy gender bias became even worse in the 2012 survey, where only 22% of respondents were male – less than one-quarter.[330]

305. Notwithstanding the gendered approach taken by the ACTU to the presentation of its case, it should be noted that men too can be the victims of

[328] Statement of Dr Peta Cox dated 26 May 2016 at Annexure PC-3, paragraph 7.4.

[329] Statement of Dr Peta Cox dated 26 May 2016 at Annexure PC-3, paragraph 2.9.

[330] The Senate Finance and Public Administration References Committee, *Domestic Violence in Australia* (August 2015) at page 36.

domestic violence; a matter acknowledged only in passing by the ACTU.[331] For example, the PSS found that:

- 33.3% of victims of "current partner violence" during the previous 12 months were male;
- 33.5% of victims of "current partner violence" since the age of 15 were male;
- 37.1% of victims of "emotional abuse" by a partner during the last 12 months were male; and
- 36.3% of victims of "emotional abuse" by a partner since the age of 15 were male.

306. Dr Flood's report states that:

- Since the age of 15, 694,100 men have experienced at least one incident of violence by a female intimate partner; and
- 30.2% of adults who have experienced violence by a cohabitating partner are men.[332]

307. The report resulting from the Senate Inquiry cites the following 2012 PSS data in this regard:

> In 2012, an estimated 17% of all women aged 18 years and over (1,479,900 women) and 5.3% of all men aged 18 years and over (448,000 men) had experienced violence by a partner since the age of 15.[333]

308. In a submission to the Senate Inquiry, the NSW Government stated:

> In the twelve months to March 2014, 69 per cent of victims of domestic violence-related assaults in NSW were women. There were 21,664 female victims compared

[331] ACTU Outline of Submissions dated 1 June 2016 at paragraph 5.71.

[332] Statement of Dr Michael Flood dated 26 May 2016 at Annexure MF-3 at paragraphs 3.17 – 3.13.

[333] The Senate Finance and Public Administration References Committee, *Domestic Violence in Australia* (August 2015) at page 35.

to 9.925 male victims. This equates to a rate per 100,000 population of 594 for females and 277 for males.[334]

309. Recognition that domestic violence is committed against both men and women, and a consideration of the extent to which men are so impacted is obviously relevant to the potential cost implications of the ACTU's claim. The Commission ought not to proceed that the proposed leave entitlement, if introduced, would be accessed only by female employees.

Trends in the Prevalence of Family and Domestic Violence

310. What is perhaps more controversial is whether, and if so the extent to which the prevalence of family and domestic violence (however described) in Australia is increasing. Whilst counsel for the ACTU described the rates of family and domestic violence in Australia has having reached "a crisis point"[335], the data in fact suggests that the prevalence of such violence is not increasing and in fact may be decreasing.

311. The ACTU acknowledges that "there is no detailed data source that provides insight into how, or if, rates of domestic violence are changing over time".[336] It also accepts that some data suggests that domestic violence homicides have in fact *declined*.[337] However it then goes on to cite data from police reports which, in its submission indicate an increase in the number of 'domestic violence incidents'.[338]

[334] The Senate Finance and Public Administration References Committee, *Domestic Violence in Australia* (August 2015) at page 40.

[335] Transcript of proceedings on 14 November 2016 at PN23.

[336] ACTU Outline of Submissions dated 1 June 2016 at paragraph 5.62

[337] ACTU Outline of Submissions dated 1 June 2016 at paragraph 5.64.

[338] ACTU Outline of Submissions dated 1 June 2016 at paragraph 5.64.

312. The source of the data cited regarding New South Wales has not been identified by the ACTU. Further, the statistics cited in respect of Victoria relate to the number of 'family incidents' recorded by Victorian Police during the relevant period.[339] A 'family incident' is defined as:

> An incident attended by Victoria Police where a Risk Assessment and Risk Management Report (also known as an L17 form) was completed. The report is completed when family violence incidents, interfamilial-related sexual offences, and child abuse are reported to police.[340]

313. In our submission, however, an increasing number of reports of family incidents made to police does not necessarily reflect an actual increase in the number of such incidents or of 'family and domestic violence' as defined by the ACTU's proposed clause. As is acknowledged by the VRC, greater recognition of domestic violence may have encouraged additional reporting.[341] Indeed it may be reflective of the effectiveness of the various efforts and recent campaigns that seek to raise awareness and encourage victims of domestic violence to contact authorities. As reported in an article recently published in *The Australian*, this opinion is shared by Mr Don Weatherburn, the Director of the NSW Bureau of Crime Statistics and Research.[342]

314. Moreover, the material presented by the ACTU does not appear to consider whether the definition of 'family incident' has remained consistent in its terms and application throughout the relevant period. An expansion of the definition would provide a ready explanation, at least in part, for the increased rates of reporting. [343] We also note that the manner in which 'family violence incidents' in the above definition is currently applied, or has previously been applied, is not known.

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[339] Royal Commission into Family Violence, Report (March 2016) at Volume VII, p.30.

[340] Crime Statistics Agency, Victoria.

[341] ACTU Outline of Submissions dated 1 June 2016 at paragraph 5.63 and Royal Commission into Family Violence, (March 2016) at Volume I, p.52.

[342] Arndt B, *Domestic violence: data shows women are not the only victims* published in *The Australian* (16 August 2016).

[343] Arndt B, *Domestic violence: data shows women are not the only victims* published in *The Australian* (16 August 2016).

315. There appears to be little if any support for the proposition that the prevalence of family and domestic violence, as defined by the ACTU, is increasing in Australia. Indeed none of the expert witnesses called contend that that is so. Rather, the PSS results of 2012 suggest that "there was no statistically significant change in the proportion of women and men who reported experiencing partner violence in the 12 months prior to the survey" between 2005 and 2012.[344]

316. We note that whilst Dr Cox prepared a 'reply report'[345] that dealt specifically with this assertion, which was also contained in Ai Group's reply submission of 19 September 2016, she did not contest the veracity of the proposition. She also accepts that the 2006 and 2012 PSS results are able to be compared, as they were largely in the same form and conducted in generally the same manner.[346]

317. Whilst we do not contend that family and domestic violence is an insignificant or unimportant issue, it is relevant in these proceedings to recognise that the data before the Commission lends support for the proposition that the prevalence of family and domestic violence in Australia is not increasing and may rather be decreasing. Any characterisation of the issue that suggests that it is escalating in terms of its prevalence would appear to be unsubstantiated by the evidentiary case here before the Full Bench.

[344] ABS Cat 4906.0 *Personal Safety, Australia*, 2012, Table 21.

[345] 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.

[346] Transcript of proceedings on 14 November 2016 at PN150 – PN152 and PN156 – PN157.

11. THE RESPONSES OF GOVERNMENTS TO FAMILY AND DOMESTIC VIOLENCE

318. The problem of family and domestic violence in the community has been receiving considerable attention by the Federal and State/Territory Governments in recent times. Apart from several public inquiries looking into the problem of family and domestic violence and ways to eradicate it, many initiatives have been developed and implemented to address the problem.

11.1 Government responses and public inquiries – recent developments

319. In their submission, the ACTU refer to a number of public inquiries and reports into family and domestic violence, noting in particular any recommendations made about the role of employers and workplaces in responding to the problem and dealing with the impacts on victims.

320. However, it is important to emphasise that all of the inquiries referred to by the ACTU were commissioned with the task of looking at the problem of family and domestic violence broadly and making recommendations on numerous ways that the problem could be addressed in the community. The workplace was just one of numerous areas considered, along with police forces, the justice system, educational institutions, community organisations, social service providers and others. In fact, in many of the inquiries, the role of the workplace in addressing family and domestic violence is only given relatively minor attention, with the majority of recommendations focusing on other areas such as law enforcement and the justice system.

321. The key focus of recent Government and public policy initiatives in response to family and domestic violence has been on primary prevention – that is, taking action to prevent the problem of violence before it occurs by changing the underlying causes of the problem – rather than responsive action which was the focus during much of the early 2000's. Indeed, the VRC noted "*while we have tended to focus on how best to respond to family violence once it occurs, prevention deserves an equal degree of attention*" because "*unless*

we address the problem of family violence as its source, and get better at preventing it from occurring in the first place, our communities and support systems will continue to be overwhelmed."[347] Paid family and domestic violence leave is not a preventative measure in tackling domestic violence.

National Plan to Reduce Violence against Women and their Children 2010-2022

322. The *National Plan to Reduce Violence against Women and their Children 2010-2022* (**National Plan**), which was released in February 2011 after extensive consultation with community stakeholders and endorsed by the Council of Australian Governments (**COAG**), is the first plan initiated by Australian Governments to coordinate action in response to family and domestic violence across jurisdictions. It is designed to provide a coordinated framework that improves the scope, focus and effectiveness of Governments' actions with the primary focus being to prevent violence by bringing about *"attitudinal and behavioural change at the cultural, institutional and individual levels*."[348]

323. The National Plan sets out a framework for reducing violence against women and children over a 12 year period, seeking the achievement of six national outcomes with four, three-year action plans. These national outcomes are:

    a. *Communities are safe and free from violence* – this focuses on strategies to promote community involvement, primary prevention and advancing gender equality recognising that positive and respectful community attitudes to women are critical to ensuring women and children are living free from violence. Strategies include the development of a national social marketing campaign aimed at changing community attitudes and behaviours and providing Local Community Action Grants to encourage primary prevention.[349]

[347] Victorian Royal Commission into Family Violence, Summary and Recommendations, March 2016, Vol. VI, p.1.

[348] National Plan to Reduce Violence against Women and their Children, including the first three year Action Plan, p.10.

[349] Ibid pp. 14-17

b. *Relationships are respectful* – this focuses on educating and encouraging young people to develop respectful relationships, supporting adults to model respectful relationships and promoting positive male attitudes and behaviours. Strategies include embedding evidence-based best practice respectful relationships education in schools, homes and communities.[350]

c. *Indigenous communities are strengthened* – this focuses on supporting Indigenous communities to develop local solutions to preventing violence including encouraging Indigenous women to have a stronger voice.[351]

d. *Services meet the needs for women and their children experiencing violence* – this focuses on improving access to and the responsiveness of specialist and mainstream services for victims including ensuring that services are flexible to meet the diverse needs of victims. Strategies include developing a national telephone and online counselling service for victims.[352]

e. *Justice responses are effective* – this focuses on ensuring increased access to the justice system and improved efficiencies in how the various systems/services work together. Strategies include improving information sharing, integrated case-management and developing a national scheme for domestic and family violence protection orders.[353]

f. *Perpetrators stop their violence and are held to account* – this focuses on ensuring stronger policing, consistent sentencing and serious consequences for perpetrators of violence.[354]

324. Notably, the focus of the national outcomes is aimed at the prevention or reduction of family and domestic violence (except for outcome four, which is focused on improving services, and outcomes five and six, which are

[350] Ibid pp. 18-19

[351] Ibid p.20

[352] Ibid pp. 23-25

[353] Ibid pp.26-28

[354] Ibid p.29

focused on improving law enforcement and the responses of the justice system).

325. Both the *First Action Plan 2010 – 2013* and the *Second Action Plan 2013 – 2016*, identify workplaces along with many other institutions such as local governments, community organisations, sporting clubs, schools and other key institutions as playing a role in supporting communities to prevent family and domestic violence by being able to promote equal and respectful relationships and to speak out against violence against women.[355] The action plans do not, however, require that this be achieved through the implementation of a paid leave entitlement.

The COAG Advisory Panel on Reducing Violence against Women and their Children Final Report 2016

326. In April 2016, a special advisory panel established by COAG released its final report on *Reducing Violence against Women and their Children* (**COAG Advisory Panel Report**). The COAG Advisory Panel Report provides advice on future directions for the National Plan and contains 28 recommendations for COAG's consideration.

327. Noting that a "*new mindset is needed*" to tackle domestic violence, the COAG Advisory Panel Report recommended six areas for action to keep women and their children safe:

- National leadership is needed to challenge gender inequality and transform community attitudes;
- Women who experience violence should be empowered to make informed choices;
- Children and young people should also be recognised as victims of violence against women;
- Perpetrators should be held to account for their actions and supported

[355] Ibid p.14. See also *Second Action Plan (2013-2016) – Moving Ahead*, p.18.

to change;

- Aboriginal and Torres Strait Islander communities require trauma-informed responses to violence; and

- Integrated responses are needed to keep women and their children safe.[356]

328. The COAG Advisory Panel Report then went on to make a number of recommendations for each of these areas. Considering the role of employers in addressing domestic violence, the report found that "*the corporate sector, comprising of business and industry, has a key role to play in addressing power imbalances and hidden gender bias, and in ensuring that men and women are seen as equal contributors to Australian society*."[357]

329. Looking at what an influential, coordinated and sustainable response by Australia's corporate sector could look like, the COAG Advisory Panel Report referred to corporate alliances overseas, such as the Corporate Alliance to End Partner Violence (United States) and the Corporate Alliance Against Domestic Violence (United Kingdom) which have been influential in enabling like-minded businesses to collaborate on projects and support culture change both within and beyond their organisations.[358] The Report recommended that all Australian Governments should support the corporate sector to establish a national corporate alliance. Recommendation 1.2 stated:

> All Commonwealth, state and territory governments should work with corporate Australia to establish a national corporate alliance to take collective action to address gender inequality and violence against women and their children. This alliance should support businesses of all sizes to:
>
> - promote culture change relating to gender equality and diversity awareness among staff, suppliers, customers and the community
>
> - identify and assist victims of violence

[356] COAG Advisory Panel on Reducing Violence against Women and their Children, Final Report, April 2016, Executive Summary p.vi-vii.

[357] Ibid p. 30

[358] Ibid pp. 30-31

- eliminate violence-supportive attitudes and respond to men who perpetrate violence
- safeguard their products and services from being used to facilitate violence
- consider the feasibility of co-investment to support the work of the alliance.[359]

330. Importantly, the COAG Advisory Panel Report's recommendation acknowledges that businesses exist in all sizes. The Report envisages that the purpose of any corporate alliance would be to promote cultural change and develop tools to support businesses of different types and sizes with identifying and assisting employees who experience violence and addressing the behaviour of employees who perpetrate it.[360]

331. There were no recommendations in the COAG Advisory Panel Report regarding the need for employers to provide paid family and domestic violence leave to employees.

Australian Law Reform Commission Report 2012

332. The Australian Law Reform Commission Report titled *Family Violence and Commonwealth Laws – Improving Legal Frameworks* (**ALRC Report**)[361] was released in February 2012 after the Australian Law Reform Commission (**ALRC**) was asked to look at the impact of Commonwealth laws on those experiencing family and domestic violence. The ALRC looked at the treatment of family and domestic violence in a number of areas of law including child support and family assistance law, immigration law, employment law, social security law, superannuation law and privacy provisions and made 102 recommendations for how all of these areas of law could be reformed to protect those experiencing family and domestic violence.

[359] Ibid p.31

[360] Ibid

[361] The ALRC, *Final Report, Family Violence and Commonwealth Laws – Improving Legal Frameworks* (ALRC Report 117), February 2012.

333. In relation to the workplace relations framework, the ALRC recommended several reforms should be implemented over five phases as follows:

- *Phase One* – a coordinated whole-of-government national education and awareness campaign; research and data collection; and implementation of government focused recommendations.
- *Phase Two* – continued negotiation of family violence clauses in enterprise agreements and development of associated guidance material.
- *Phase Three* – consideration of family violence in the course of modern award reviews.
- *Phase Four* – consideration of family violence in the course of the Post Implementation Review of the FW Act.
- *Phase Five* – review of the NES with a view to making family violence-related amendments to the right to request flexible working arrangements and the inclusion of an entitlement to additional paid family violence leave.[362]

334. The ALRC's first recommendation was for the government to initiate a coordinated and whole-of-government national education and awareness campaign about the impact of family violence in the employment context. As expressed above, Ai Group supports non-regulatory measures such as this.

335. The ALRC then went on to consider the role of enterprise bargaining. Importantly, in relation to enterprise agreements, the ALRC did not recommend that the FW Act be amended to mandate the inclusion of family violence clauses. The ALRC instead recommended that the Australian Government should support the inclusion of family violence clauses in enterprise agreements, noting that, as enterprise agreements are negotiated at an individual workplace level, the inclusion of a family violence clause will

[362] Ibid, p.37 and Chapters 15-18.

necessarily be the product of agreement "*in light of the specific circumstances of the workplace*."[363]

336. The ALRC also rejected calls for a "model" family violence clause in enterprise agreements. It decided that family violence clauses need to be "*sufficiently flexible to allow businesses to meet their particular needs*."[364] With regard to family violence leave, the ALRC noted that "*not all employers are in a position to be able to provide such leave*".[365] Ai Group contends that these same arguments apply in relation to the inclusion of paid domestic and family violence leave in modern awards.

337. In relation to the modern awards system, the ALRC recommended that the way in which family violence may be dealt with in modern awards should be considered as part of the award reviews in 2012 and 2014. However, it is important to note that the ALRC did not make any recommendations as to the form in which family violence-related terms should be incorporated into modern awards or recommend the inclusion of paid family and domestic violence leave within modern awards. Rather, the ALRC recommended that in the course of the modern awards reviews "*the ways in which family violence may be incorporated into modern awards should be considered*."[366]

338. In relation to the NES, the ALRC made two recommendations.

339. The first was that there should be a consideration of whether family violence should be included as a circumstance in which an employee should have a right to request flexible working arrangements. Parliament has since made this amendment to s.65 of the FW Act.

340. The second was whether additional paid family violence leave should be included as a minimum statutory entitlement under the NES. Whilst the ALRC was ultimately of the view that the NES should be amended to provide

[363] Ibid, p.397

[364] Ibid

[365] Ibid p.400

[366] Ibid p.406

for family violence leave, it recognised that this is the responsibility of the Commonwealth Parliament. The ALRC also noted that "*there is a need to build a foundation for any such changes, in order to balance the needs of employees with the economic and practical realities faced by businesses and employers*." [367] In particular, the ALRC refrained from making recommendations as to the period of any proposed leave, noting that "*research, data collection and economic modelling are important precursors to the recommended review of the NES and determination of any quantum of leave*."[368] The ALRC stressed that there would need to be an appropriate analysis of actual periods of leave taken and the projected costs to business before any amendment could be made. The ACTU has failed to carry out any such analysis in support of its proposed claims in the current proceedings.

The Senate Finance and Public Administration References Committee Inquiry into Domestic Violence in Australia 2015

341. In August 2015, the Senate Finance and Public Administration References Committee released its report on *Domestic Violence in Australia* after an inquiry (**Senate Inquiry**).

342. The majority of the Senate Committee's recommendations focused on primary prevention strategies, improved legal response/enforcement and better information sharing and coordination of services to assist victims.

343. One of the recommendations (Rec. 1) of the Opposition and Green Members of the Committee (but not of the Government Members) was that victims of domestic violence should have access to appropriate leave provisions which assist them to maintain employment and financial security whilst attending necessary appointments. [369] However, they did not make any recommendations as to how this should be implemented, or what the leave

[367] Ibid p.415

[368] Ibid p.421

[369] The Senate Finance and Public Administration References Committee, *Domestic Violence in Australia*, report, August 2015, p.15.

should be, instead finding that "*the Commonwealth Government should investigate ways to implement this across the private and public sector*."[370]

344. The Majority of members of the Senate Committee were ALP Opposition Members, including the Chair of the Committee. The final report notes additional comments made by the Government Members of the Committee who expressed opposition to Recommendation 1 and expressed the view that any additional entitlements in respect of family and domestic violence can be dealt with through enterprise bargaining:

> The Fair Work Act 2009 already provides for a right to request flexible working arrangements, including for employees experiencing or caring for someone experiencing domestic violence. If an employer wishes to provide additional entitlements, they can do so through enterprise bargaining. Government Senators believe that it is appropriate for employers and employees to consider specific leave provisions for domestic and family violence in that context.[371]

345. The Senate Inquiry regarded the following areas as key to making a difference to domestic violence:

- Understanding the causes and effects of domestic violence;
- The need for cultural change which involves prevention work to change attitudes and behaviours towards women;
- A national framework and ensuring ongoing engagement with stakeholders;
- Early intervention measures;
- Effective data collection to ensure programs and policies for women, their children and men are evidence-based;
- Coordination of services;
- More information sharing between stakeholders;

[370] Ibid

[371] Ibid, Government Senators' Additional Comments paragraph 1.4

- Better legal responses/enforcement to hold perpetrators to account;
- Sufficient and appropriate crisis services; and
- Providing long term support to victims of domestic and family violence.[372]

346. As can be seen, the Committee's recommendations did not include that the minimum safety net should be varied to stipulate a paid leave entitlement for employee's experiencing family and domestic violence. The comments of those Members of the Committee who also form part of the Government reflect its view that any additional entitlement can be dealt with by way of enterprise agreement; a proposition with which we agree.

Productivity Commission Inquiry into the Workplace Relations Framework 2015

347. The final report of the Productivity Commission Inquiry into the Workplace Relations Framework was released in November 2015 (**PC Report**). The report considered whether there was a need for employment protections for victims of family and domestic violence within its general assessment of the Fair Work legislation.

348. The Productivity Commission did not recommend any changes to legislation or awards to implement paid family and domestic violence leave. However, the PC Report did note several considerations that would need to be taken into account in any decisions about the scope of the workplace relations system to assist employees experiencing domestic violence. In particular, the PC Report noted:

> Requiring additional financial obligations on employers (for example, to provide paid domestic violence leave) would have cost impacts, especially for a smaller employer facing a claim for the maximum leave entitlements favoured by some participants. The information currently available does not provide a good indication of the likely magnitude of those costs and business risks, which would be relevant to the desirability and design of any legislated leave provision. As noted earlier, evidence on the actual use of leave provisions that are already included in some

[372] Ibid, Executive Summary pp. xiv-xv

enterprise agreements would be particularly useful in this regard as would evidence on the use of other types of leave for purposes related to domestic violence.[373]

349. The PC Report also noted that there may be alternative instruments to assist victims of domestic violence, such as Government-funded initiatives (including financial assistance). It went on to say:

> An important factor in determining the party that should primarily bear the costs of addressing family and domestic violence is their capacity to reduce the risks. Governments have a relatively strong capacity to reduce the risks because of the wide range of measures they can bring to bear (policing, information provisions, counselling, financial assistance, housing and other means). Nevertheless, businesses may also be able to reduce risks through the adoption of guidelines and internal policies about supporting staff experiencing family or domestic violence.[374]

350. Like the ALRC Report, the PC Report emphasised the need for a thorough analysis of the likely costs and business risks of any proposed changes to the workplace relations laws before any possible change could be considered. It noted that this should include an understanding of the extent to which people use domestic violence leave entitlements in enterprise agreements.[375] The ACTU has failed to carry out any such analysis in support of its proposed claims in the current proceedings.

Victorian Royal Commission into Family and Domestic Violence

351. The VRC handed down its final report in March 2016. The report contained over 200 recommendations for how the problem of family and domestic violence could be addressed, with the vast majority of these involving changes to law enforcement and Government services directed at preventing violence and supporting victims.

352. In respect of workplaces, the VRC recommended that the Victorian Government should encourage the Commonwealth to amend the NES to include paid domestic violence leave for permanent employees. Importantly, however, the VRC did not make any recommendations as to what the period

[373] Productivity Commission Inquiry Report, *Workplace Relations Framework*, No.76, 30 November 2015, Volume 1, p.550.

[374] Ibid pp.550-551

[375] Ibid p.549

of this leave should be or how it should be applied.[376] It also did not recommend that modern awards be varied to provide a paid family and domestic violence leave entitlement.

353. Like the COAG initiatives and the abovementioned national inquiries, the VRC placed a strong focus on the importance of primary prevention in tackling family and domestic violence, noting the role that employers as well as others in the community can play in this regard. The VRC Report states that workplaces are "*important settings for the prevention of family violence and violence-supporting attitudes*" and that employers can therefore "*be partners in violence prevention by encouraging attitudinal and behavioural change in their workplaces*."[377]

Queensland Government Taskforce into Family and Domestic Violence, and the Review of the Industrial Relations Framework in Queensland

354. The Queensland Government Taskforce into Family and Domestic Violence handed down its report titled *Not Now, Not Ever* in February 2015 (**QLD DV Taskforce Report**). The report made a large number of recommendations, with the vast majority involving changes to law enforcement and Government services in order to prevent family and domestic violence and to support victims.

355. The QLD DV Taskforce report recommended that the Queensland Government should encourage the Commonwealth to amend the NES to include paid domestic violence leave. The Taskforce did not made any recommendations as to what the period of this leave should be or how it should be applied.[378] It also recommended that up to 10 days of paid leave per year be granted to Queensland public sector workers.

[376] Victorian Royal Commission into Family Violence, Report and Recommendations, March 2016, Volume VI, p.93.

[377] Ibid p.75

[378] Queensland Government Taskforce into Family and Domestic Violence, 'Not Now, Not Ever' Report, February 2015, p.187.

356. In December 2015, the Industrial Relations Legislative Reform Reference Group presented its report to the Queensland Government on its *Review of the Industrial Relations Framework in Queensland*.[379] Amongst numerous recommendations, the Report included a recommendation that the Queensland Employment Standards be varied to provide up to 10 days of paid domestic violence leave to permanent employees. However, the report notes that the employer representatives on the Reference Group (i.e. the representatives from Ai Group, the Chamber of Commerce and Industry Queensland, and the Local Government Association of Queensland) do not support this recommendation. Also, the Queensland Employment Standards do not apply to constitutional corporations and hence do not apply to the vast majority of Queensland employees.

The relevance of the abovementioned public inquiries and Government taskforces to the ACTU's claim

357. The abovementioned public inquiries and Government taskforces were given the task of looking into a very wide range of issues. They were typically asked to consider the community problem of family and domestic violence from a very broad perspective and to make recommendations on a wide range of measures that could be taken to address the problem in the community. They were not constrained by any particular legislative framework. In contrast, the Commission's task in these proceedings is to ensure that the modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions in accordance with the requirements of s.134 of the FW Act, and to ensure that awards only contain terms that are "necessary" for awards to achieve the modern awards objective (s.138).

358. In any event, none of the inquiries and reports referred to recommend that the safety net be varied in the manner proposed by the ACTU. The reports referred to reflect the nuanced responses of the relevant governments and

[379] Industrial Relations Legislative Reform Reference Group, *A Review of the Industrial Relations Framework in Queensland* (December 2015).

inquiries, many of which recognise the need to consider the impact that any such entitlement would have on businesses, especially small enterprises.

11.2 Recent developments to improve police and Court responses to family and domestic violence

359. A number of initiatives aimed at improving police and Court responses to family and domestic violence have recently been implemented at a national level, in addition to large number of State and local initiatives. The aim of the national initiatives is to reduce the impact of family and domestic violence on victims as part of the broader national strategy to address family and domestic violence.

360. At the 17 April 2015 Meeting of COAG, the Commonwealth and State Governments agreed to take urgent collective action to address domestic violence as follows:

> By the end of 2015:
>
> - a national domestic violence order (DVO) scheme will be agreed, where DVOs will be automatically recognised and enforceable in any state or territory of Australia;
> - progress will be reported on a national information system that will enable courts and police in different states and territories to share information on active DVOs – New South Wales, Queensland and Tasmania will trial the system;
> - COAG will consider national standards to ensure perpetrators of violence against women are held to account at the same standard across Australia, for implementation in 2016; and
> - COAG will consider strategies to tackle the increased use of technology to facilitate abuse against women, and to ensure women have adequate legal protections against this form of abuse.[380]

361. Since then, substantial progress has been made on developing a National Domestic Violence Order Scheme.

362. In the last few months every State and Territory apart from Western Australia has introduced legislation to ensure that domestic violence orders issued in a particular jurisdiction can be enforced Australia-wide.

[380] COAG Communiqué 17 April 2015, p.1. Available at: http://www.coag.gov.au/node/522

363. COAG has also taken steps to establish an interim information sharing system that will provide police and Courts with information on all DVOs that have been issued, while a comprehensive national DVO information system (which will be able to be used for evidentiary purposes and to enforce orders) is being developed.[381]

364. In addition, COAG has agreed to a national summit on preventing violence against women and their children to profile best practice and review progress on COAG's priority actions. This summit will be held in Brisbane at the end of October 2016.

365. In relation to the justice system, the first stage of a Commonwealth funded *National Domestic and Family Violence Bench Book* (**Bench Book**) was released on 18 August 2016. The Bench Book is a new online resource for judicial officers dealing with domestic and family violence related cases that is being developed pursuant to recommendations of the Senate Inquiry.[382] When complete, it will provide comprehensive guidance for judicial officers in all jurisdictions on issues relating to family and domestic violence and will assist judicial officers with their decision-making in cases that involve some element of domestic and family violence.[383] It will also be able to be used by other service providers and legal professionals who are working with victims and perpetrators of family and domestic violence to promote best practice.[384]

[381] COAG Communiqué 11 December 2015, p.3.

[382] See the Senate Finance and Public Administration References Committee, *Domestic Violence in Australia*, report, August 2015, p.129.

[383] Attorney-General for Australia, Media Release, 18 August 2016.

[384] Ibid.

12. EXISTING STATUTORY EMPLOYMENT PROTECTIONS AND ENTITLEMENTS

366. The FW Act provides substantial protections and entitlements for victims of family and domestic violence. These include:

- The right to request flexible work arrangements;
- Various types of paid leave;
- Continuity of service where paid leave or unpaid leave is granted by the employer;
- Protection against unfair dismissal;
- Protection against adverse action;
- Protection against unlawful termination.

367. In addition, the WHS laws give employers a duty of care to ensure the safety of employees at work, including addressing the risks caused by violent members of an employee's family who may visit the workplace.

368. These existing protections and entitlements are of obvious relevance to these proceedings. In various different ways, they afford employees suffering from family and domestic violence with certain flexibilities, including addressing needs to be absent from work.

369. Importantly, many of these entitlements are contained in the NES. As the Commission is of course aware, s.134(1) states that modern awards, *together with the NES*, must provide a fair and relevant minimum safety net. Accordingly, any assessment as to whether the safety net is achieving the modern awards objective must necessarily include a consideration of the extent to which the NES provides relevant entitlements. The terms and conditions contained in modern awards are not to be viewed in a vacuum. The ACTU's case does not establish that, when considered in this way, the

safety net is deficient or that it warrants the insertion of the award terms it has proposed.

12.1 The right to request flexible work arrangements

370. NES in the FW Act provides employees who are victims of family violence with the right to request flexible work arrangements (s.65(1A)(e)). The NES also provides employees who provide care and support to a member of the employee's immediate family or household who are experiencing family violence, with the right to request flexible work arrangements (s.65(1A)(f)). Importantly, an employer can only refuse a request made pursuant to s.65(1) on reasonable business grounds (s.65(5)).

371. The right to request flexible working arrangements pursuant to s.65(1) is an important one. It allows an employee to seek a change in "working conditions". The note that follows s.65(1) provides the following examples of changes in working arrangements but is clearly not intended to be an exhaustive list: hours of work, changes in patterns of work and changes in location of work. Furthermore, the Act does not purport to limit the reasons or purposes for which an eligible employee can make a request. All that is required is that the relevant employee is experiencing violence from a member of their family or is providing care and support to a member of their family or household pursuant to s.65(1A)(f); and that the request made is in relation to those circumstances (s.65(1)).

372. Clearly, many of the circumstances which the ACTU argues require domestic violence leave entitlements, could instead be addressed by way of a flexible working arrangement that is put in place pursuant to s.65(1). For example, if an employee is required to attend legal proceedings on a particular day, the employee can make a request under s.65(1) of the Act to alter their working pattern such that they instead work on a different day or work different hours that week. Similarly, if an employee seeks to attend a counselling session and accordingly, needs to leave work earlier than their rostered finishing time, such a request can be made pursuant to this part of

the Act. As we have earlier identified, absent reasonable business grounds, an employer cannot refuse such a request.

373. Whilst the ACTU submits that "the right to request does not adequately address the needs of employees", it has not called any evidence that might establish any deficiency in the operation of these legislative provisions.

374. In practice, many workers request, and are granted, flexible work arrangements without using the right to request provisions. For example, the Commission's *General Manager's Report into the operation of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave 2012-2015* states that: *"many requests for flexible working arrangements or extensions of unpaid parental leave are dealt with informally, rather than following the processes set out in the Fair Work Act."*[385] The Commission's General Manager's report also identifies that a little over 40 per cent of employers received a request for a flexible working arrangement from an employee in the period from 1 July 2012 to July 2014; that in 90 per cent of cases the requests for flexible working arrangements were approved without change; and that on 9 per cent of occasions some elements of the requests were granted.[386]

375. The Commission's General Managers Report contains the following table (extracted from the *Australian Workplace Relations Survey*) relating to requests under s.65 of the FW Act. The table shows that the reason for 3.3 per cent of the requests was because the employee was experiencing family violence or was supporting a family member experiencing family violence.

[385] Fair Work Commission, *General Manager's Report into the operation of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave 2012-2015*, p.vii.

[386] Ibid, p.vii.

Table 5.4: Reason for employee request, per cent of employers who had received requests under s.65

	Weighted proportion (%)
To care for a child/children	73.0
To care for a family member (e.g., elderly parent)	28.4
Due to the employee being 55 years of age or older	23.3
The employee was experiencing family violence or was supporting a family member who was	3.3
Due to the employee's disability	np
Other	21.2[71]

Note: np = not published. Multiple responses were permitted and therefore proportions may not add up to 100. All data are weighted using the enterprise weight.

Source: Fair Work Commission, *Australian Workplace Relations Study 2014*.

376. The inclusion of s.65(1A)(e) and (f) in the FW Act occurred relatively recently (1 July 2013) through the *Fair Work Amendment Act 2013*. The amendments were supported in Parliament by the then Labor Government, the then Coalition Opposition, the Greens and independents.

377. At the same time as these amendments to the FW Act were made, Parliament expanded the following three leave entitlements in the NES:

- Unpaid special maternity leave;
- Concurrent unpaid parental leave; and
- Unpaid "no safe job" leave.

378. If Parliament had seen a need to create an additional specific category of leave to address family violence, it would have logically varied the NES to provide for this when the right to request provisions of the Act, and the abovementioned leave provisions, were amended.

379. To date, none of the political parties have introduced a Bill into Parliament to provide an entitlement to family and domestic violence leave. In the lead up to the last federal election, the Labor Party announced that, should it win Government, it would amend the NES to provide an entitlement to five days

of paid family and domestic violence leave for full-time employees and five days of unpaid leave for casuals. The Labor Party did not win Government.

12.2 Leave entitlements in the NES

380. The FW Act provides for various forms of leave which employees experiencing family and domestic violence are able to access. These entitlements include:

a. Paid personal/carer's leave for permanent employees where the employee is not fit for work because of a personal illness or injury (s.97(a)).

Where an employee is not fit for work because of a personal illness (physical or mental) or injury affecting the employee, the employee may take paid personal/carer's leave. Such leave is non-discretionary; if an employee satisfies the criteria set out in s.97(a) and the notice and evidentiary requirements at s.107, the Act does not grant an employer an ability to decline an employee access to the leave.

b. Paid personal/carer's leave for permanent employees where the employee provides care or support to a member of the employee's immediate family or household due to a personal illness or injury affecting the member (s.97(b)(i)).

Section 97(b)(i) allows an employee to take personal/carer's leave in circumstances where they are providing care or support to a member of the employee's family or household due to a personal illness (physical or mental) or injury affecting the member. We note that leave under s.97(b)(i) is also non-discretionary in the sense described above.

c. Paid personal/carer's leave for permanent employees where the employee provides care or support to a member of the employee's immediate family or household due to an unexpected emergency affecting the member. (s.97(b)(ii)).

"Unexpected emergency" is not defined in the FW Act, nor is it clarified in the Explanatory Memorandum for the *Fair Work Bill 2008*. A similar entitlement was introduced into Australian Fair Pay and Conditions Standard through the *Workplace Relations Amendment (Work Choices) Bill 2005*. The Explanatory Memorandum for that Bill states:

> 549. Carer's leave is paid or unpaid leave taken by an employee to provide care or support for a member of the employee's immediate family or household. Carer's leave is available where a member of the employee's immediate family or household is ill or injured, or there is an unexpected emergency affecting a family or household member. For example, an unexpected emergency could include the employee being asked to meet with a school teacher to discuss the employee's child's learning requirements or to take a household member to a medical practitioner.

The concept of personal/carer's leave being available for family emergencies, arose from the AIRC's *Family Provisions Case Decision*[387] of 8 August 2005. The provision was included in the package of award variations by consent between Ai Group, ACCI and the ACTU following an extensive conciliation process before Senior Deputy President Marsh, and jointly submitted to the Full Bench. The intentions of the parties can be seen from the following provisions of the *Agreement Arising from Conciliation* between Ai Group, ACCI and the ACTU which is included as Appendix 2 to the Full Bench decision (emphasis added):

> 1.4 The award provisions relating to carer's leave will be renamed "Personal leave to care for an immediate family or household member". This leave is for the purposes of caring for members of the employee's immediate family or household who are sick and require care and support or who require care due to an unexpected emergency. This entitlement is subject to the employee being responsible for the care and support of the person concerned and is subject to notice and evidentiary requirements. (See 1.7).

[387] PR082005, *Family Provisions Case Decision*, 8 August 2005, Giudice J, Ross VP, Cartwright SDP, Ives DP and Cribb C.

…

1.7.3 When taking leave to care for members of their immediate family or household who require care due to an unexpected emergency, the employee must, if required by the employer, establish by production of documentation acceptable to the employer or a statutory declaration, the nature of the emergency and that such emergency resulted in the person concerned requiring care by the employee.

It is evident from the wording in s.97(d)(ii), and from the background to the provision, that the entitlement is relatively broad and would be applicable in many circumstances where an employee provides care or support to a victim of family and domestic violence who is a member of the employee's immediate family or household.

d. Unpaid personal/carer's leave for permanent employees where the employee provides care or support to a member of the employee's immediate family or household due to a personal illness or injury affecting the member and the employee has exhausted his/her paid personal/carer's leave entitlement (s.103).

We make the same observations as have previously regarding s.97(b)(i).

e. Unpaid personal/carer's leave for permanent employees where the employee provides care or support to a member of the employee's immediate family or household due to an unexpected emergency affecting the member and the employee has exhausted his/her paid personal/carer's leave entitlement (s.103).

f. Unpaid personal/carer's leave for casual employees where the employee provides care or support to a member of the employee's immediate family or household due to a personal illness or injury affecting the member and the employee has exhausted his/her paid personal/carer's leave entitlement (s.103).

We make the same observations as have previously regarding s.97(b)(i).

g. Unpaid personal/carer's leave for casual employees where the employee provides care or support to a member of the employee's

immediate family or household due to an unexpected emergency affecting the member and the employee has exhausted his/her paid personal/carer's leave entitlement (s.103).

h. Paid annual leave for permanent employees (s.87).

An employer must not unreasonably refuse to agree to an employee's request to take paid annual leave (s.88(2)).

The ACTU submits that annual leave is "ordinarily taken for planned absences, where the employee has given the employer as much notice as is required or otherwise by agreement". Contrary to the ACTU's submissions, annual leave may be accessed by an employee in planned and "unplanned'" circumstances. The NES does not prescribe or require a minimum notice period prior to the taking of annual leave. We also observe that the ACTU has not established, in an evidentiary sense, that requests made to take annual leave for purposes pertaining to an employee's experience of family and domestic violence are, as a general proposition, unreasonably refused by employers.

i. Paid long service leave for permanent and some casual employees (Division 9 of the NES and State / Territory long service leave laws).

12.3 Continuity of service

381. Under the FW Act, where an employee is granted paid leave, the employee's continuous service is not broken and the period counts towards the length of the employee's continuous service (s.22(1), (2) and (3)).

382. Where an employee is on "unpaid leave" or an "unpaid authorised absence", the employee's continuous service is not broken but the period is not counted towards the length of the employee's continuous service (s.22(1), (2) and (3)).

12.4 Protection against unfair dismissal

383. Subject to relevant limited exemptions, employees are protected from unfair dismissal under Part 3-2 of the FW Act.

384. If an employee is dismissed as a result of a need to take leave or be absent from the workplace due to family or domestic violence, the employee is able to pursue an unfair dismissal claim on the basis that the dismissal was harsh, unjust or unreasonable. The determination of the claim will then be considered in the context of all of the relevant circumstances.

385. This protection is very relevant to the ACTU's arguments regarding the economic and financial security needs of family and domestic violence victims. Protection from dismissal is more important in this regard than paid leave entitlements.

386. There have been very few unfair dismissal cases relating to family and domestic violence and in each case the laws have been shown to provide substantial protection to the employees.

387. In *Ms Leyla Moghimi v Eliana Construction and Developing Group Pty Ltd*,[388] Commissioner Roe determined that Ms Moghimi had been unfairly dismissed. She was dismissed due to an absence from work, resulting from domestic violence. She did not seek reinstatement and the Commissioner awarded her compensation.

388. The employer appealed against the decision of Commissioner Roe. A Full Bench of the Commission (Vice President Watson, Deputy President Hamilton and Commissioner Johns) dismissed the appeal.[389]

389. The employer then applied to the Federal Court for judicial review of the Commission's Full Bench decision. Justices North, Katzmann and Bromberg

[388] *Ms Leyla Moghimi v Eliana Construction and Developing Group Pty Ltd* [2015] FWC 4864.

[389] [2015] FWCFB 7476.

dismissed the application and ordered the employer to pay costs of $30,000 on the basis that the application was initiated without reasonable cause.[390]

390. In *Alexis King v D.C Lee & L.J Lyons,*[391] Commissioner Johns determined that Ms King, a victim of domestic violence, had been unfairly dismissed. The dismissal followed an absence from work. Ms King did not seek reinstatement and was awarded compensation.

391. The above cases highlight that the unfair dismissal laws provide substantial protection to employees who need to be absent from work as a result of family and domestic violence.

12.5 General protections

392. The general protections in the FW Act provides comprehensive protections to employees, some of which are relevant to employees who experience family and domestic violence.

393. Adverse action must not be taken against an employee because the employee has a workplace right, has exercised a workplace right, or proposed to exercise a workplace right (s.340). A workplace right includes making a request for flexible work arrangements (s.341((2)(i)). Adverse action includes dismissal, injuring the employee in his or her employment, altering the position of the employee to the employee's prejudice, and discriminating against the employee (s.342).

394. An employer must not dismiss an employee because the employee is temporarily absent from work due to personal illness or injury for a period of 3 months or less (s.352 and Regulation 3.01). This entitlement can be accessed for physical and mental health reasons, and would be applicable to many circumstances where an employee is absent due to family and domestic violence.

[390] *Eliana Construction and Developing Group Pty Ltd v Moghimi* [2016] FCAFC 113.

[391] *Alexis King v D.C Lee & L.J Lyons* [2016] FWC 1664.

12.6 Work health and safety legislation

395. Under WHS laws employers must, as far as reasonably practicable, ensure the health and safety of workers and other people in workplaces.

396. This duty of care would extend to taking reasonable precautions to prevent harm to employees at work, including, for example, harm that may be inflicted by a violent family member who may visit an employee in a workplace. Many employers have implemented policies and procedures to protect employees who are domestic violence victims from physical harm or harassment at work.

397. Employers have a duty towards employees in all workplaces where they carry out work. Family and domestic violence raises significant WHS challenges for employers where employees carry out work at home. The ABS *Characteristics of Employment, Australia* (6333.0) report (as published on 31 August 2016) states that in August 2015, 3.5 million employed persons usually work from home in their main job, with 59% of these being employees.

398. WHS issues need to be dealt with under WHS legislation, regulations and codes, as well as through company policies, procedures and training. WHS is not specified in s.139 of the FW Act as a matter which awards are permitted to deal with.

13. EXISTING AWARD ENTITLEMENTS

399. In addition to the statutory entitlements referred to in section 12 above, modern awards contain various provisions which are of assistance to victims of domestic violence and employees who need to provide care and support to family members who are experiencing family violence. For the same reason that the entitlements in s.65(1A)(e) and (f) of the FW Act are of assistance to these employees, the flexible work arrangements which are available under awards are important.

400. The flexibilities within awards which are of assistance to employees experiencing family and domestic violence and those employees providing care and support to others, include:

- Flexible working hours arrangements;
- Time off instead of overtime;
- Make-up time;
- Facilitative provisions;
- The flexibility to convert to a different type of employment, e.g. part-time;
- Individual flexibility arrangements (**IFAs**).

401. The *Australian Workplace Relations Study, First Findings Report* shows at Figure 4.4 the widespread availability of flexible work practices to employees.[392] The following extract is relevant:

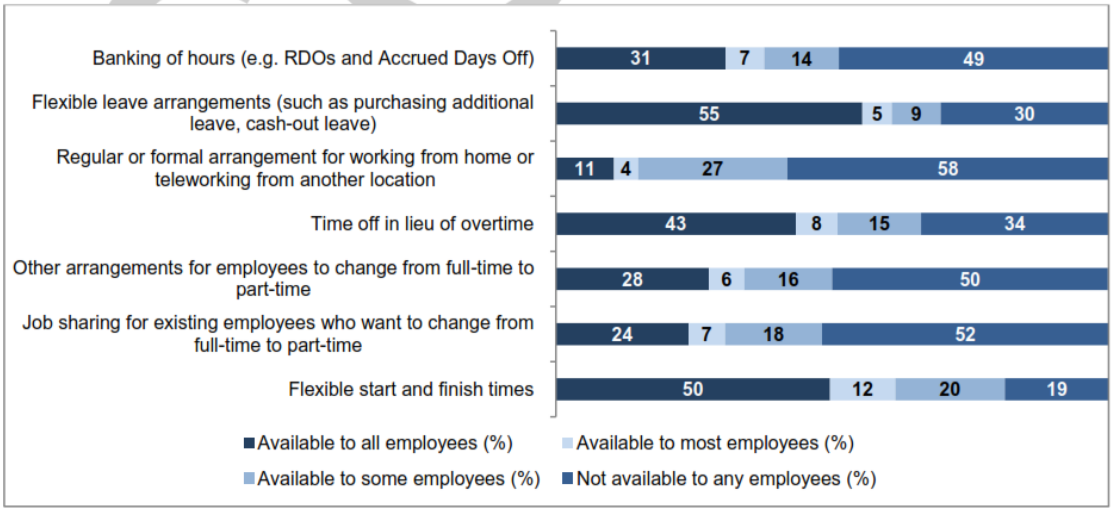
[392] Australian Workplace Relations Study, *First Findings report, 29 January 2015, Figure 4.4, p.30.*

4.3.5.1 Availability of flexible working arrangements

As presented in Figure 4.4, half of enterprises reported that flexible start and finish times were available to all of their employees. Flexible leave arrangements were also widely available to employees of enterprises, with over half (55%) of enterprises indicating that these arrangements were available to all employees.

Of note, these measures do not reflect the extent of flexible work practices *operating* at enterprises, but rather the availability to enact a flexible work practice if and when a need arose. The AWRS collected follow-up information about the extent of use of these types of practices across the employee workforce.

Figure 4.4: Availability of flexible work practices to employees of the enterprise, per cent of enterprises



Source: AWRS 2014, Employee Relations survey.

Base = 3057 enterprises.

402. IFAs entered into under the flexibility terms in awards and enterprise agreement are also very widely available given that every modern award and every enterprise agreement is required to contain such a term.

403. The Commission's *General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act 2009 (Cth) 2012–2015* states that overall, nearly 14 per cent of employers had made an IFA since 1 July 2012.[393] Data collected from employees on the creation of IFAs showed around 2 per cent of employees were considered to have made an IFA since 1 July 2012.[394] However, just over 30 per cent of employees reported having

[393] Fair Work Commission, *General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act 2009 (Cth) 2012–2015*, p.vi.

[394] Fair Work Commission, *General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act 2009 (Cth) 2012–2015*, p.viii.

an informal flexible working arrangement with their employer that was undocumented.[395] The most commonly reported outcome from the IFA for employees was the flexibility to better manage non-work related commitments, e.g. caring commitments. This outcome was reported by 42 per cent of employees overall and 61 per cent of employees with self-initiated IFAs.[396]

[395] Fair Work Commission, *General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act 2009 (Cth) 2012–2015*, p.viii.

[396] Fair Work Commission, *General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act 2009 (Cth) 2012–2015*, pp.36-37.

14. DEVELOPMENTS IN EMPLOYER RESPONSES TO FAMILY AND DOMESTIC VIOLENCE

404. In addition to existing statutory and award provisions offering protection to employees who are victims of family and domestic violence, there has been considerable development in recent years of workplace-based initiatives aimed at both preventing and responding to the problem. Whilst the history of program development in workplace approaches to preventing family and domestic violence goes back some 20 years, much of the development has occurred recently.

405. In 2015, RMIT University was commissioned by 'Our Watch' to review workplace and organisational programs and approaches for preventing violence against women. In its report [397] (**RMIT Report**) the RMIT researchers found that there was promising practice in workplace and organisational approaches to the prevention of violence against women. It noted that workplace initiatives can have three main targets of activity – responding to violence that is already occurring, preventing violence and promoting gender equality and respect – but that these activities often co-exist.[398] This was said to be important because "*policies and programs to respond to incidents of violence are less likely to be effective within an informal workplace culture that condones violence against women, sexist and/or discriminatory behaviour, or accepts gender inequality*."[399]

406. It is becoming increasingly common for employers to incorporate an awareness of family and domestic violence into existing human resources structures, such as those concerning occupational health and safety, anti-discrimination, bullying and harassment and Employee Assistance Programs

[397] Powell, A., Sandy, L. and Findling, J. (2015) *'Promising Practices in Workplace and Organisational Approaches for the Prevention of Violence Against Women,'* Report prepared for Our Watch, Melbourne: RMIT University.

[398] Powell, A., Sandy, L. and Findling, J. (2015) *'Promising Practices in Workplace and Organisational Approaches for the Prevention of Violence Against Women,'* Report prepared for Our Watch, Melbourne: RMIT University. p.12.

[399] Powell, A., Sandy, L. and Findling, J. (2015) *'Promising Practices in Workplace and Organisational Approaches for the Prevention of Violence Against Women,'* Report prepared for Our Watch, Melbourne: RMIT University. pp.10-11.

(**EAPs**). In particular, many employers (particularly large ones) now have relevant policies in place to assist employees who are victims of family and domestic violence. These policies may provide for benefits such as access to EAPs or counselling, flexible leave provisions, increased security measures, flexible working arrangements and referral information to local family services. It is also becoming more common for employers to train key personnel who are likely to come into contact with family and domestic violence issues (such as managers and human resources personnel) and to disseminate posters/information sheets that provide information about family and domestic violence and sources of assistance.

407. The Workplace Gender Equality Agency's 2014-2015 reporting data (**WGEA data)** showed that, in 2014-2015, 34.9% of major private sector employers had a specific policy or strategy in place to support employees experiencing domestic violence.[400] This represented an increase from 32.2% of employers in 2013-2014.[401]

408. Importantly, the WGEA data also showed that many more major employers, about three-quarters (or 76.1%), offered measures that are not specific to domestic violence but can be accessed by employees experiencing domestic violence, including EAPs and access to leave.[402] These broader policies and strategies are noteworthy because they provide assistance to employees facing various hardships, not just family and domestic violence. Many large employers in particular now provide employees with access to EAPs where they can obtain confidential advice from counsellors on a multitude of personal issues. The website for one EAP provider, for example, notes that counselling issues cover everything from relationships, stress, anger management, addictive behaviours, family/parenting issues, loss and

[400] '*Australia's gender equality scorecard – key findings from the Workplace Gender Equality Agency's 2014-2015 reporting data,'* Workplace Gender Equality Agency, November 2015, p.16.

[401] *Australia's gender equality scorecard – key findings from the Workplace Gender Equality Agency's 2014-2015 reporting data,'* Workplace Gender Equality Agency, November 2015, p.16.

[402] *Australia's gender equality scorecard – key findings from the Workplace Gender Equality Agency's 2014-2015 reporting data,'* Workplace Gender Equality Agency, November 2015, p.16.

grief to health and well-being, gambling, mental health, drug/alcohol problems, domestic violence and debt management.[403]

409. Other common employer-led initiatives include supporting family violence services through philanthropic activities and/or partnering with local family violence support services or health services. The CEO Challenge, which is an initiative of the Brisbane Lord Mayor's Women's Advisory Committee that was developed in 1999 in response to a gap in family violence awareness throughout the corporate sector,[404] is one example of an organisation working to broker partnerships between businesses and family violence service providers. The CEO Challenge encourages businesses to support family violence services and promote awareness of this issue in both their organisations and the wider community. Such partnerships are mutually beneficial in that businesses are able to support basic frontline services that face significant funding challenges whilst in return receiving awareness training, information on where to access help and support to develop workplace policies on family and domestic violence.

410. Some workplaces have also established relationships with local family violence support services whereby service workers visit the workplace offering information and referrals about family and domestic violence.[405] Child and Family Services Ballarat and Working Women's Health are two examples of organisations that offer industry visit programmes. Child and Family Services Ballarat, for example, operate a roving counselling service in a number of factories in Ballarat, Victoria. Such partnerships are well-suited to smaller and medium sized workplaces as they often do not have the resources to address the issue through existing structures and human resources programmes.[406]

[403] See: https://www.drakeworkwise.com.au/employee-services/employee-assistance-program.aspx

[404] For more information about the CEO Challenge see: http://ceochallengeaustralia.org/about-us/

[405] Murray, S. and Powell, A. (2007). 'Family Violence Prevention Using Workplaces as Sites of Intervention,' *Research and Practice in Human Resource Management*, 15(2), p.66.

[406] Murray, S. and Powell, A. (2007). 'Family Violence Prevention Using Workplaces as Sites of Intervention,' *Research and Practice in Human Resource Management*, 15(2), p.66.

411. In addition, there are a range of other organisations doing work to assist workplaces to prevent and respond to family and domestic violence. Some well-known examples include:

- *White Ribbon* – White Ribbon is the world's largest movement working to end men's violence against women.[407] In Australia, in addition to engaging in a range of activities such as an annual campaign, partnerships, social marketing and promotional activities, White Ribbon offers prevention programs in schools and workplaces. It also offers a workplace accreditation program that involves workplaces committing to implement policies, programs and training to prevent and respond to violence against women.

- *Our Watch* – Our Watch, which was established in July 2013 and was formerly the Foundation to Prevent Violence against Women and their Children, is national organisation established to advocate for and drive nation-wide change in the culture, behaviours and attitudes that lead to violence against women and children.[408] As part of its strategic plan to prevent violence, Our Watch has dedicated resources for workplaces. This includes the Victorian Workplace Equality and Respect project which is working to produce standards for key workplace actions to prevent violence against women.

- *Take A Stand Against Domestic Violence* (**Take A Stand**) – Take A Stand, which was initially developed by Women's Health Victoria, is a targeted workplace training program that aims to strengthen the capacity of male-dominated workplaces in promoting gender equality and non-violent norms.[409] The program provides tailored training to all staff in the workplace as well as dedicated training to managers and human resources personnel and a range of resources.

[407] For more information about White Ribbon see: http://www.whiteribbon.org.au/about

[408] For more information about Our Watch see: http://www.ourwatch.org.au/Who-We-Are

[409] For more information about Take a Stand see: http://whv.org.au/publications-resources/publications-resources-by-topic/post/take-a-stand-against-domestic-violence-it-s-everyone-s-business-brochure/

- *Male Champions of Change* – the Male Champions of Change initiative, which was founded by former Australian Sex Discrimination Commissioner Elizabeth Broderick, involves the CEOs of some of Australia's largest corporations forming a high profile coalition to improve gender equality in organisations and communities.[410] The group meets at least four times a year to discuss and share the role they are playing to prevent violence against women and the specific workplace strategies they have adopted.

412. The existence of the above initiatives is of course not dependent on whether or not some employees have an entitlement to separate paid family and domestic violence leave under modern awards. Whilst the ACTU contend that the provision of paid domestic violence leave will be "*the impetus for a more comprehensive breadth of initiatives that might also be employer-led*," [411] the above initiatives show that imposing mandatory leave entitlements on employers is not necessary to create workplaces that will invest in organisational support for employees experiencing family and domestic violence and/or more specific prevention strategies.

413. There are commercial incentives for employers to assist employees experiencing family and domestic violence. Indeed, the Productivity Commission Inquiry Report into the Workplace Relations Framework notes that "*there will likely be an increasing commercial advantage for employers to distinguish themselves from their competitors by the design of their family and domestic violence policy*."[412] This is likely to be even more so now, given that since 2016 the WGEA Employer of Choice citation requires employer

[410] For more information about the Male Champions of Change see: http://malechampionsofchange.com/about-us/

[411] ACTU Outline of Submissions dated 1 June 2016 at paragraph 4.80

[412] Productivity Commission Inquiry Report, *Workplace Relations Framework*, No.76, 30 November 2015, Volume 1, p.550, footnote 201 (referring to what the UNSW Gendered Violence Research Network has previously said).

applicants to demonstrate a policy or strategy supporting employees experiencing domestic violence.[413]

414. Most employers would likely be willing participants in workplace initiatives aimed at addressing family and domestic violence given increased awareness of the problem and the positive role employers can play in addressing it. However, compelling employers to provide paid family and domestic violence leave in the "one-size-fits-all" manner proposed by the ACTU is likely to hinder the development of more comprehensive and sustainable initiatives to tackle the problem. This is because leadership, local ownership and tailoring programs to the needs of the organisation have been found to be some of the most important preconditions for effective implementation of workplace-based initiatives to address family and domestic violence.[414]

415. In considering what is necessary for the successful implementation of workplace-based initiatives, the RMIT Report referred to above noted that "*at any given time organisations as a whole are likely to be at different levels of readiness and motivation for change*," and that this is important because "*organisations at different points in the stages of change are likely to benefit from different types of resources, support and interventions.*"[415] It further found that when considering the delivery of prevention programs in workplaces, "*assessing organisational capacity and readiness to change is a vital component of good practice*."."[416] Accordingly, it is clear that imposing a "one-size-fits-all" paid leave entitlement upon employers is not the best way to foster their support in addressing family and domestic violence.

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[413] *WGEA Employer of Choice for Gender Equality Criteria and Guide to Citation 2016*, version 3.0, published on 30 June 2016, criteria 48.

[414] Powell, A., Sandy, L. and Findling, J. (2015) *'Promising Practices in Workplace and Organisational Approaches for the Prevention of Violence Against Women,'* Report prepared for Our Watch, Melbourne: RMIT University, p.47. See also the Victorian Royal Commission into Family Violence, Report and Recommendations, March 2016, Volume VI, p.79.

[415] Powell, A., Sandy, L. and Findling, J. (2015) *'Promising Practices in Workplace and Organisational Approaches for the Prevention of Violence Against Women,'* Report prepared for Our Watch, Melbourne: RMIT University, p.18.

[416] Powell, A., Sandy, L. and Findling, J. (2015) *'Promising Practices in Workplace and Organisational Approaches for the Prevention of Violence Against Women,'* Report prepared for Our Watch, Melbourne: RMIT University, p.18.

416. Both the RMIT Report and the VRC considered a number of "key themes" that are essential for the long-term success of workplace initiatives to tackle family and domestic violence. Some of these themes were:

a) Tailoring the intervention to the needs of the organisation and its employees

417. Both reports found that approaches to encourage workplaces to become involved in family violence prevention and responses need to be tailored to meet the needs of an individual organisation.[417] Noting that workplaces are heterogeneous, the RMIT Report found that "*a one-size-fits-all approach is not suitable for the work, nor is it ideal*."[418]

418. Imposing paid family and domestic violence leave on all award-covered employers does not take into account these differences in workplaces and is therefore likely to hinder rather than assist in the development of more comprehensive strategies to tackle family and domestic violence. For example, an employer with a male-dominated workplace might decide that its resources are better devoted to education strategies designed to improve awareness of, and attitudes to, family and domestic violence rather than giving priority to new paid leave entitlements.

b) Encouraging local ownership

419. The RMIT Report and the VRC both noted the importance of encouraging local ownership of initiatives to address family and domestic violence. Apart from facilitating attitudinal and organisational change, ownership has been found to be essential in ensuring program stability and sustainability.[419]

[417] Powell, A., Sandy, L. and Findling, J. (2015) *'Promising Practices in Workplace and Organisational Approaches for the Prevention of Violence Against Women,'* Report prepared for Our Watch, Melbourne: RMIT University, p. 21-22. Also see the *Victorian Royal Commission into Family Violence, Report and Recommendations*, March 2016, Volume VI, p.80.

[418] Powell, A., Sandy, L. and Findling, J. (2015) '*Promising Practices in Workplace and Organisational Approaches for the Prevention of Violence Against Women,'* Report prepared for Our Watch, Melbourne: RMIT University, p.21.

[419] Powell, A., Sandy, L. and Findling, J. (2015) *'Promising Practices in Workplace and Organisational Approaches for the Prevention of Violence Against Women,'* Report prepared for Our Watch, Melbourne: RMIT University, p.24. See also the *Victorian Royal Commission into Family Violence, Report and Recommendations*, March 2016, Volume VI, p.81.

Accordingly, imposing paid family and domestic violence leave on employers, rather than seeking to encourage their participation and assistance in addressing the problem, is likely to detract from their willingness to do more. Employers may simply rely on the leave provisions as their way of addressing family and domestic violence rather than investing in more comprehensive strategies.

c) Fostering leadership

420. Similarly, it has been found that it is important to have internal workplace "champions" or "leaders" in leading organisational change and creating an environment that discourages family and domestic violence.[420] Imposing mandatory leave requirements on employers, as a result of union claims, may inhibit the necessary leadership to promote organisational change. This is because it risks the generation of negative views and resentment amongst employers instead of encouraging their active participation and leadership.

Responses of smaller employers

421. Smaller employers often do not have written family and domestic violence policies but they typically adopt a reasonable and compassionate approach when their employees suffer genuine hardships, including when they are victims of family and domestic violence.

Conclusion

422. For the above reasons, mandating paid family and domestic violence leave in modern awards is not necessary to provide the impetus for workplaces to do more to address family and domestic violence and may in fact hinder the establishment of more comprehensive strategies and policies. The key to success with addressing family and domestic violence in workplaces is to engage with employers in a meaningful and positive way, rather than seeking to impose heavy-handed "one-size-fits-all" measures upon them.

[420] Victorian Royal Commission into Family Violence, Report and Recommendations, March 2016, Volume VI, pp.79-80.

15. LEAVE SHOULD BE DEALT WITH IN LEGISLATION, NOT AWARDS

423. Prior to the implementation of the Australian Fair Pay and Conditions Standard (**AFPC Standard**) within the *Workplace Relations Act 1996* from 27 March 2006, leave entitlements for federal award covered workers were dealt with in awards, with the partial exception of long service leave.[421]

424. Since 27 March 2006, leave entitlements for employees have been primarily dealt with in legislated minimum standards. That is, within the AFPC Standard between 27 March 2006 and 31 December 2009, and in the NES from 1 January 2010.

425. Nowadays, awards often contain provisions which supplement a particular type of leave provided for in the legislated minimum standards, but awards do not provide for any distinct categories of leave which are universally available to all award-covered employees. For example:

- Awards commonly contain provisions requiring a higher rate of pay than the base rate to be paid during a period of annual leave, but the main annual leave entitlements are dealt with in the NES;

- A small number of awards contain unpaid ceremonial leave provisions, for Aboriginal and Torres Strait Islanders (e.g. the *Aboriginal and Community Controlled Health Services Award 2010*) but most awards do not; and

- Some awards contain dispute resolution procedure training leave, to enhance the operation of the dispute resolution procedure in the award (e.g. clause 11 of the *Manufacturing and Associated Industries and Occupations Award 2010*).

426. This is the first occasion since the major changes in March 2006 which implemented a national workplace relations system founded on the

[421] During this earlier period, if federal award long service leave provisions were not in place, the relevant State or Territory long service leave laws applied.

Corporations Power in the Constitution, that the Commission has been asked to determine whether awards should contain a completely new type of leave that would be universally available to all award-covered employees.

427. This is not a legitimate role for modern awards. These days it is the role of Parliament to determine what major categories of leave are appropriate for Australian workers.

428. As explained in Section 12 of this submission, the FW Act was amended relatively recently to give employees who are victims of family violence a right to request flexible work arrangements (s.65(1A)(e)), and to give employees who provide care and support to a member of the employee's immediate family or household who are experiencing family violence, with the right to request flexible work arrangements (s.65(1A)(f)). An employer can only refuse a request made pursuant to s.65(1) on reasonable business grounds (s.65(5)).

429. At the same time as these amendments to the FW Act were made, Parliament expanded the following three leave entitlements in the NES:

- Unpaid special maternity leave;
- Concurrent unpaid parental leave; and
- Unpaid "no safe job" leave.

430. If Parliament had seen a need to create an additional specific category of leave to address family violence, it would have logically varied the NES to provide for this when the right to request provisions of the Act, and the abovementioned leave provisions, were amended. To date, none of the political parties have introduced a Bill into Parliament to provide an entitlement to family and domestic violence leave.

431. We acknowledge that s.139 specifies that awards *may* include terms about "leave, leave loadings and arrangements for taking leave" (s.139(1)(h)) but this does not mean that it is appropriate for all awards to contain a new,

universal leave entitlement. Various other terms specified in clause 139(1) are not included in all awards, e.g. annualised wage arrangements, piece rates and bonuses.

432. The Explanatory Memorandum for the *Fair Work Bill 2008* states that:

> 529. Clause 139 sets out the kinds of terms that may be included in modern awards. These terms reflect those that the legislation instigating the award modernisation process permits modern awards to include (see section 576J of the WR Act. These terms are: …

433. Section 576J of the WR Act, was inserted in the Act as a result of the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008.* The provision is the same as s.139(1)(h) of the FW Act. The Explanatory Memorandum for the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008* stated (emphasis added):

> New Part 10A—Award modernisation
>
> 10. Proposed Part 10A would set out the Australian Industrial Relations Commission's award modernisation function and specify certain requirements for modern awards.
>
> …
>
> Subdivision A—Terms that may be included in modern awards
>
> 40. This Subdivision would establish what matters may be dealt with in awards. It would set out what matters are allowable modern award matters, and provide for an award modernisation request to specify other matters about which terms may be included in awards.
>
> 41. The Commission's power to include terms about particular matters in modern awards would be affected by new paragraph 576C(3)(d), which provides for an award modernisation request to give directions as to how, and whether, particular matters may be dealt with in modern awards.
>
> New section 576J - Matters that may be dealt with by modern awards
>
> 42. New subsection 576J(1) would set out the list of allowable modern award matters. Each of the allowable modern award matters would have its ordinary workplace relations meaning. The scope of the matters would be affected by any direction in an award modernisation request about how, or whether, a particular matter may be dealt with in a modern award.
>
> …
>
> Leave, leave loadings and arrangements for taking leave

57. New paragraph 576J(1)(h) would make leave, leave loadings and arrangements for taking leave allowable modern award matters.

434. There is nothing in the Award Modernisation Request which indicated an intention that a major new category of leave should be included in modern awards. Not surprisingly, the AIRC did not include any such new leave entitlements.

435. During the award modernisation process, the AIRC gave detailed consideration to the extent to which modern awards should contain leave provisions. This included considering:

- The circumstances in which it would be appropriate and inappropriate to include provisions in awards which supplement particular leave entitlements in the NES, and

- The circumstances in which it would be appropriate and inappropriate to include a particular type of leave in a modern award which was not included in the NES.

436. In its *Decision re making of priority modern awards*,[422] the AIRC Full Bench decided to maintain dispute resolution training leave in an award only if it was a prevailing industry standard in the industry covered by the award (emphasis added):

[46] The Minister and a number of parties made submissions concerning dispute resolution training leave. This type of leave was found to be incidental to an allowable award matter and necessary for its effective operation pursuant to s.89A of the WR Act, as it stood at that time, by a Full Bench of the Commission in 1998. Dispute resolution training leave, although quite common in pre-reform awards prior to the Work Choices amendments, has never been a test case provision. We have decided to maintain dispute resolution training leave where it is a prevailing industry standard.

437. Clearly, family and domestic violence leave is not a prevailing industry standard in any award.

[422] [2008] AIRCFB 1000.

438. In its *Decision re making of priority modern awards*,[423] the AIRC Full Bench rejected proposals to include parental leave and jury service entitlements in all awards because this would "be the creation of a new minimum standard" and would "tend to undermine" the NES (emphasis added):

> **Parental leave**
>
> **[94]** We received some submissions which urged us to supplement the entitlement to concurrent parental leave which is provided for in the NES. We have decided not to do so. This appears to be an area in which it would be necessary to supplement the NES in all awards and the result would therefore be the creation of a new minimum standard rather than mere supplementation.
>
> …
>
> **Community service leave**
>
> **[103]** We have given further consideration to whether modern awards should supplement the NES in relation to the amount of jury service leave to which an employee is entitled. The NES provides that jury service leave should be limited to 10 days. So far as we know jury service leave provisions in awards and NAPSAs are not subject to any cap at all. If we were to maintain an unlimited entitlement it would be necessary to supplement the NES in every modern award. Such a course would be inconsistent with the NES and tend to undermine it.

439. In its Decision re making of priority modern awards,[424] the AIRC Full Bench decided not to include "pressing domestic need leave" in the Black Coal Mining Industry Award 2010, on the basis that "such an entitlement is not appropriate in an award intended to provide a fair "minimum" safety net of enforceable terms and conditions of employment for employees" (emphasis added):

> Pressing domestic need leave
>
> **[165]** When the exposure draft was published we saw merit in the submissions of the CMIEG seeking the removal of pressing domestic need leave from the award but were inclined to think it better that the matter be addressed in a variation application after the modern award had commenced to operate. In light of the limitations in the Fair Work Bill on variation of modern awards we have revisited the issue. The entitlement to pressing domestic need leave was introduced into a federal award applying to production employees in New South Wales by the Coal Industry Tribunal in 1973 as part of a clause headed Compassionate Leave. This was at a time when carer's and compassionate leave were not a common feature of federal awards. With the widespread introduction of personal/carer's leave the

[423] Ibid.

[424] Ibid.

rationale for the inclusion of pressing domestic need leave is substantially removed. Nevertheless, the entitlement to pressing domestic need leave remains in the two key pre-reform awards applying to the vast majority of employees in the black coal mining industry. The clause providing for pressing domestic need leave puts no limit on the number of occasions in a year that an employee is entitled to pressing domestic need leave (with payment for the first day of each period of leave). In this respect the clause is most unusual. We accept the argument that such an entitlement is not appropriate in an award intended to provide a fair "minimum" safety net of enforceable terms and conditions of employment for employees.

440. The clause in the Coal Mining Industry (Production and Engineering Award 1997 stated:

32. PRESSING DOMESTIC LEAVE (PREVIOUSLY CLAUSE 18 (B))

Subject to the agreement of the employer, or in the event of dispute as determined by the Australian Industrial Relations Commission, an employee absent from work because of pressing domestic need will be entitled to leave of up to one day without loss of ordinary pay.

441. In an award modernisation submission of 1 August 2008, the Coal Mining Industry Employer Group argued that Pressing Domestic Leave entitlements should not be included in the *Black Coal Mining Industry Award 2010*:

Pressing Domestic Leave

This is a form of leave provided for in the current P&E award (Clause 32) but not in other coal mining industry awards. It was considered by Deputy President Duncan in a decision dated 5 October 1995 (print M5969) in the context of the then recent introduction of the test case standard concerning family leave, which is now embraced in personal/carers leave.

- The employer group submits that there should be no provision for "Pressing Domestic Leave" in a modern award for the coal mining industry for the following reasons;
- Only the current P& E Award contains a provision for such leave;
- Providing for a separate entitlement to Pressing Domestic Leave for employees not covered by the current P&E Award will increase costs to employees and is not otherwise justified;
- There is a significant overlap between the nature or purpose of Personal Carer's Leave and Compassionate Leave on the one hand Pressing Domestic Leave on the other.
- Personal/Carer's Leave in the draft award, reflecting the existing coal mining industry standard, is substantially more generous then in the NES (and the Commission's general safety net standards);

- The current provision for Pressing Domestic Leave in clause 32 of the P&E Award is vague and uncertain in ways that makes it inappropriate for inclusion in a modern award. In particular, it relies for its operation on an employer exercising a general discretion which is then challengeable in the Commission. Also, whilst it refers to entitlement to leave of up to 1 day without loss of ordinary pay, there is no apparent limit on the number of occasions on which such leave can be taken; and

- In all the circumstances it is reasonable and appropriate that the modern award not include a corresponding provision.

442. In an award modernisation submission of 1 August 2008, the CFMEU argued in support of the inclusion of Pressing Domestic Leave entitlements in the *Black Coal Mining Industry Award 2010*:

iii) Pressing Domestic Leave

48. The P & E award provides for pressing domestic leave in clause 32 as follows:

> Subject to the agreement of the employer, or in the event of dispute as determined by the Australian Industrial Relations Commission, an employee absent from work because of pressing domestic need will be entitled to leave of up to one day without loss of ordinary pay.

49. The provision provides one day in addition to the 10 days available for sick leave and special family leave for the purposes of addressing pressing domestic issues.

50. The employers' proposal removes the clause.

51. Industry employers tried unsuccessfully to have the provision removed from the award in 1995 when the Family Leave Test case provisions were inserted into the award. It was argued that the provisions overlapped. The Commission refused to remove the clause. The Commission usefully described the operation of the clause:

> Exhibit NSWMC6 was instructive. It was a collection of responses to a broad survey of the experience of many employers in the coal mining industry of New South Wales with pressing domestic need claims over, generally, a twelve month period. The results of the survey establish that a majority of the claims made could equally have been the subject of claims for special family need. However, not only were the minority for matters that could not be the subject of a claim under special family need the minority showed that the existing clause was not abused. Reasons which fell within the minority included fighting bushfires, `absconding' children, property damage, to add to the award provision for bereavement leave and deaths/funerals of persons not covered by the special family leave sought.
>
> An exhibit, Q6, was produced in Queensland from material garnered by a survey similar to that conducted in New South Wales. However, it simply noted what was the most common reason for pressing domestic need leave and that was domestic illness. The exhibit does show that leave for reasons other than that probably covered by a special family need provision is

> negligible. There were 13 respondents and they experienced 263 pressing domestic need claims. Of these, 232 were assigned to family leave situations.
>
> It is, therefore, appropriate to conclude that there will be an overlap but also that the pressing domestic need clause provides for other situations and the experience in both States is that those other situations are relatively few. On that basis I am satisfied that granting the application is warranted notwithstanding the overlap and in the belief that there is no ground to anticipate a broadening of claims. On that point I note that the very concept of the pressing domestic need clause is to cover the unusual situation and experience with it in the past, as demonstrated by the exhibits referred to, is warrant for expecting that it will not be abused in the future. It is, of course, for the employer in the first instance to control the use of the provision.

52. The union opposes the employers' proposal to remove the provision because:

> a) It would result in a reduction in entitlements of employees in the industry;
>
> b) It is provided for in the current award
>
> c) It has been in the award since 1990;
>
> d) It was not removed from the award during previous award reviews, including award simplification; and
>
> e) It is an industry practice

443. In a post-exposure draft submission of 10 October 2008, the Coal Mining Industry Employer Group continued to argue that Pressing Domestic Leave provisions should not be included in the modern award:

> **Clause 23 – Pressing Domestic Leave**
>
> 38. The employer group presses its submission for the exclusion of this provision for the following reasons:
>
> > (a) the provision is idiosyncratic. It is no longer necessary or justified. It entered the coal mining awards before the development of other types of award based leave such as paid and unpaid carer's leave. The reasons for taking pressing domestic leave are embraced by the various other types of leave. Pressing domestic leave, as such, now involves a doubling up inconsistent with the safety net nature of modern awards. This is unnecessarily burdensome for employers and provides an unnecessary windfall for employees;
> >
> > (b) the other types of leave provided for in the Coal Mining Industry Award are substantially more generous than similar entitlements provided for in the NES (and the Commission's general safety net standards). This adds emphasis to the point that to persevere with pressing domestic leave as a modern award condition dilutes the safety net nature of the award;

(c) only the P&E Award presently contains a provision for such leave. Providing for a separate entitlement to pressing domestic leave for employees presently not covered by the P&E, Staff or Mines Rescue Awards will increase costs to employers, contrary to the terms of the Request;

(d) employees are in a position to take such leave as they reasonably need under one of the other leave categories now available; so to remove this extra provision does not in a relevant way, given the safety net function of a modern award, disadvantage employees;

(e) the provision is vague and uncertain, in ways which make it inappropriate for inclusion in a modern award. It relies for its operation on an employer exercising a general discretion which may then be challenged in the Commission. Moreover, there is no apparent limit on the number of occasions on which such leave can be taken – once per year, once per week, etc.;

(f) the application of this clause in the P&E Award has been the source of disputation. This continues to be the case. Many disputes are resolved by employer acquiescence in potentially unsatisfactory situations where the practicability of disputing a claim is low. In addition, the parties have had to seek the assistance of the Commission on a number of occasions; and

(g) in all the circumstances it is reasonable and appropriate that the modern award not include this provision.

39. In the alternative, if the provision is to be retained in some form (notwithstanding the matters set out above), the modern award should state objective limitations and a cap on the entitlement available. For instance, it should state that no more than one day each year is available, and that pressing domestic leave is only available where an employee is unable to access one of the other types of award or NES leave provisions.

444. In a post-exposure draft submission of 10 October 2008, the CFMEU continued to argue in support of the inclusion of Pressing Domestic Leave provisions:

Pressing domestic leave

68. The Employer's pre-drafting submissions unsuccessfully sought the removal of this entitlement. The Union understands that they will press for this again in the exposure draft consultations. The Union relies upon its pre-drafting submissions and continues to oppose its deletion on the following bases:

- It would result in a reduction in entitlements of employees in the industry;
- It is provided for in the current award;
- It has been in the award since 1990;
- It was not removed from the award during previous award reviews, including award simplification; and

- It is an industry practice.

445. After considering these written submissions, and the oral submissions of the parties at the public consultations, the AIRC decided that the *"entitlement is not appropriate in an award intended to provide a fair "minimum" safety net of enforceable terms and conditions of employment for employees"*.[425]

446. No doubt circumstances surrounding domestic violence would fall within the concept of "pressing domestic leave", as considered by the Full Bench in the black coal mining industry award modernisation proceedings, and, accordingly, the AIRC's decision has direct relevance for the current proceedings.

447. During Stage 2 of the award modernisation process, the ACTU submitted that the AIRC had taken an overly restrictive view when determining what provisions should be included in modern awards concerning parental leave, community services leave and public holidays, but this argument was rejected by the Full Bench in its *Decision re making of Stage 2 modern awards*[426] (emphasis added):

> [48] Turning to another matter, the ACTU submitted that the Commission has so far taken a view of its power to supplement the terms of the NES which is too restrictive. It referred in particular to passages in the 19 December 2008 decision relating to concurrent parental leave, community service leave and public holidays. We adhere to those views. 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. It cannot have been Parliament's intention that the Commission could make general provision for higher standards. We accept, however, that there may be room for argument about what constitutes supplementation in a particular case.

448. During Stage 4 of the award modernisation process, the AIRC considered whether or not "pressing necessity leave" should be included in the *Fire Fighting Industry Award 2010* on the basis that the provisions seemed *"excessive or inappropriate as part of a minimum safety net*". The following

[425] *Decision re making of priority modern awards*, [2008] AIRCFB 1000 at [165].

[426] [2009] AIRC 345.

extract from the AIRC's Statement[427] accompanying the Stage 4 exposure drafts is relevant: (emphasis added):

> [71] One area requiring specific comment is the area of leave. We have excluded from the exposure draft a number of leave entitlements appearing in the Victorian Fire Award on the basis that they seem excessive or inappropriate as part of a minimum safety net. We will, of course, consider submissions in support of the partial or complete inclusion of those leave entitlements in the award that we finally make. In relation to pressing necessity leave, we note that we rejected a claim for the inclusion of this category of leave in the modern award for the black coal mining industry notwithstanding that it appeared in a pre-reform award applying generally in the industry and notwithstanding the consent of the industry parties to the maintenance of that form of leave.

449. The relevant provision in the Victorian Fire Award was (emphasis added):

> 42 - PRESSING NECESSITY LEAVE
>
> (a) Leave of absence of up to four shifts on full pay shall be granted to any employee on account of the serious illness of his or her spouse, child, father, mother, brother, sister or grandparent or his or her spouse's father, mother, brother, sister, grandparents or <u>in any other case where in the opinion of the employer special circumstances exist.</u>
>
> (b) Where in circumstances or in respect of a period not provided for in subclause (a) the employer is satisfied that on account of pressing necessity leave should be granted to an officer or employee the employer may grant such leave as the employer considers appropriate and on such terms and conditions as the employer sees fit.
>
> (c) The employer has the right to request that evidence be provided to support applications for leave in accordance with this clause.

450. In its post-exposure draft submission of 16 October 2009, the UFU expressed opposition to the omission of "domestic necessity leave" entitlements in the modern award.[428]

[427] *Statement re Stage 4 of the award modernisation process* [2009] AIRCFB 641.

[428] UFU submission, para [62].

451. After considering these submissions, in its *Decision re making of Stage 4 modern awards*[429] the Full Bench decided that "pressing necessity leave" is not *"appropriate for inclusion in a modern award that is intended to be a safety net"* (emphasis added):

> [54] In relation to personal/carer's leave and parental leave, consistent with our approach generally, we have decided not to supplement the National Employment Standards (NES). We are not persuaded that the pressing necessity leave, special leave and study leave provisions in the Victorian Firefighting Award are appropriate for inclusion in a modern award that is intended to be a safety net.

452. No doubt circumstances surrounding domestic violence would fall within the concept of "pressing necessity leave", as considered by the Full Bench in the fire fighting industry award modernisation proceedings, and, accordingly, the AIRC's decision has direct relevance for the current proceedings.

453. As set out in section 4 of this submission, in the Commission's *Preliminary Jurisdictional Issues Decision*[430] the Full Bench indicated that the 4 Yearly Review will proceed on the basis that the relevant modern award achieved the modern awards objective at the time that it was made (emphasis added):

> [24] In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.[431]

[429] [2009] AIRCFB 945.

[430] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

[431] Ibid at [24].

454. The decision confirms that the Commission should generally follow previous Full Bench decisions that are relevant to a contested issue:

> [25] Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in Nguyen v Nguyen:
>
> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq."
>
> [26] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin):
>
> > "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."
>
> [27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.[432]

455. The ACTU's claim is inconsistent with the Priority Stage, Stage 2 and Stage 4 Decisions of the Award Modernisation Full Bench. Consistent with the approach outlined by the Commission in the 4 Yearly Review *Preliminary Jurisdictional Issues Decision*, these earlier Full Bench decision should not be departed from. Accordingly, the ACTU's claim should be rejected.

[432] Ibid at [24] – [27].

16. THE CLAUSE PROPOSED BY THE ACTU

456. In addition to the various merit arguments that we raise in opposition to the ACTU's claim, the specific terms in which the proposed entitlement is cast gives rise to numerous concerns, many of which go to the potential impact of the claim; a matter that we deal with later in this submission.

457. The proposed provision now before the Commission represents the fourth iteration of the ACTU's claim. If the Full Bench forms the view that the proposed clause is, in a substantial way, unworkable or inherently problematic, the claim should be rejected in its entirety.

458. The draft clause is in the following terms:

> **X. FAMILY AND DOMESTIC VIOLENCE LEAVE**
>
> **X.1 Definition**
>
> For the purposes 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.
>
> **X.2 Family and Domestic Violence Leave**
>
> **X.2.1** An employee 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):
>
> **(a)** attending legal proceedings, counselling, appointments with medical, financial or legal professionals; and/or
>
> **(b)** relocation or making other safety arrangements.
>
> **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 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.

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 life, health and safety of any individual.

459. In the submissions that follow, we deal with issues that arise from specific elements of the above clause. In so doing, we have had regard to the ACTU's submissions which purport to explain the manner in which the proposed clause (and early iterations of it) are intended to operate. We note however that in various parts, the ACTU's submissions mischaracterise the effect of the clause proposed. That is, there is in many respects, a disconnect between the submissions relating the operation of the clause and the terms of the clause itself. This gives rise to a complete failure to explain

or demonstrate, in either a logical or evidentiary sense, the manner in which the provision will operate. As a result, the ACTU has not made out a case for the proposed variation.

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

460. Family and domestic violence is defined in the proposed clause as: (emphasis added)

> … any violent, threatening or other abusive behaviour by a person against a current of former partner or member of the person's family or household.

461. It is trite to observe that clause X.1 is drafted in very broad terms and, as submitted by the ACTU, is intended to be so interpreted.[433]

462. The provision itself does not stipulate the meaning to be ascribed to the terms 'violent', 'threatening' or 'abusive'. This, in and of itself, renders the provision inconsistent with s.134(1)(g), which refers to the need to ensure a simple and easy to understand modern awards system.

463. Whilst a review of the dictionary definition of the above terms may reveal their 'ordinary meaning', much of the evidence advanced in these proceedings suggests that the notion of what constitutes 'family and domestic violence' (however labelled) is potentially a far more complex concept than might be revealed through such an approach. Certainly, in the context of various academic literature referred to by the lay and expert witnesses there is scant reliance on dictionary definitions for terms such as 'violent', 'threatening' or 'abusive'. Many of the witnesses make reference to the notion that family and domestic violence occurs in the context of a relationship where power and control is also at play.[434] Similarly, it is clear that various legislative regimes adopt modified meanings of the concept of domestic violence.

[433] ACTU Outline of Submissions dated 1 June 2016 at paragraph 2.12.

[434] For example see Dr Flood's evidence: transcript of proceedings on 14 November 2016 at PN709 - PN715 and Professor Humphrey's evidence: transcript of proceedings on 15 November 2016 at PN188.

464. Having regard to the plain and ordinary meaning of these words, as well as the context of the ACTU claim (including the evidence that has been adduced), it would appear to us, that the proposed definition might encapsulate:

- any exertion of physical force, including acts of a sexual nature, whether causing injury or otherwise;
- any threat of physical force, including acts of a sexual nature;
- any emotional abuse;
- any threat of emotional abuse;
- any psychological abuse;
- any threat of psychological abuse;
- any economic abuse;
- any threat of economic abuse;
- any use of harsh or derogatory words, whether face-to-face or through some other medium;
- any coercive behaviour;
- any threat of coercive behaviour;
- stalking;
- any threat of stalking;
- any other form of ill treatment so perceived; and
- any threat of any other form of ill treatment.

465. The cross examination of Professor Humphreys broadly confirmed the potential for many of the abovementioned behaviours to fall within the ambit

of the definition of family and domestic violence proposed by the ACTU.[435] However, as we have summarised earlier in this submission, it also provided a succinct demonstration of the kinds of complexities that might arise in seeking to define family and domestic violence. Relevantly, the Professor was asked about whether certain specific behaviours would constitute family and domestic violence. The theme that emerges from her evidence in response is that it is in necessary to consider the context in which such behaviour occurs in order to determine whether it constitutes family and domestic violence. This includes the broader nature of the relationship between the parties and whether there is a regime of control at play:

> What about if someone uses harsh words against their partner?---It depends on the context. So that you can't just say that any harsh words equals domestic violence. There's a context in which there's a regime of control that's established, and harsh words by someone in an equal relationship where you're having a conflict is different from harsh words where it's a context in which there's been physical or sexual or emotional abuse.
>
> I'm just asking you about this definition and your understanding?---Mm.
>
> You say you'd need to understand the full context of the relationship, would you, in order to understand whether particular conduct is abuse?---I think you have to be careful about the expansion of abuse to harsh words. Lots of people use harsh words in relationships. It's not necessarily a definition by itself of domestic violence.
>
> Would shouting at someone be domestic violence?---Not always.
>
> Covered by that - sorry, would it be covered by that clause?—Not always. You know, it needs to be violent, threatening, or abusive behaviour by a person. So shouting can be a form of domestic violence, but the context is important. I don't think that - yes.
>
> VICE PRESIDENT WATSON: Calling names?---Well, it depends what sort of names. You know, swearing at a person in ways that are derogatory and humiliating, that sort of name calling can be experienced as extremely abusive. But not all name calling would necessarily constitute domestic violence.
>
> Where's your other abusive behaviour? So do we look at what the dictionary says about what abuse is?---We could, yes. I mean, to a certain extent abuse, and what's experienced of abuse, has a subjective quality about it that can't be necessarily pinned down exactly. Context does count. People do shout at each other, or call each other names, and it's not necessarily something that would necessarily fit immediately in to the context of domestic violence. Because I think that we don't want to become - you know, most couples when they separate there's a lot of strong words that happen, and it's not always domestic violence.

[435] Transcript of proceedings on 14 November 2016 at PN171 – PN1187.

> MR FERGUSON: Just, again, to clarify, I'm just asking for your view about what behaviours fall within that definition as contained in the document that you've been provided. Circumstances where one partner criticises the way in which another partner undertakes some sort of domestic chore. Could that be caught by this definition?---It could, but it's not always. Partners do criticise each other in the way in which they divide up their domestic duties. Women have a lot to say about men, and men have a lot to say about women in this area. I don't think that we necessarily call all of that domestic violence.
>
> In general terms, in order to determine whether it is behaviour that falls within this definition, do you need to understand how it makes the other partner feel?---We don't always have access to that.
>
> I agree, but do you need to understand that in order to - --?---It's helpful to understand it, but there's some circumstances in which it will be patently obvious and you don't need to have the subjective opinion of the other person.
>
> But there will be circumstances where you do?---Particularly when it comes to emotional abuse, I think you need to understand the context.[436]

466. The particular complexities and potential difficulties associated with determining or identifying the extent to which behaviour constitutes 'economic abuse' is revealed in the cross examination of Dr Cortis[437] and Ms Kun.[438] Indeed we suggest that the evidence of Ms Kun reveals the practical impossibility in some circumstances for an employer, or even a third party such as community service worker, to identify with certainty whether a person is subject to economic abuse.

467. Interestingly, the evidence of Ms Kun also establishes the lack of understanding of economic abuse amongst not only the women who experience it but also by the professions assisting women experiencing it.[439] This is said to include community sector professions (including social workers, youth workers and welfare workers) as well as providers of legal or financial services. Assuming the proposed definition of family and domestic violence incorporates 'economic abuse', this creates significant difficulties for a clause that operates on the assumption that such persons can provide evidence that a person is undertaking an activity associated with the experience of this form of abuse. Clearly, on the evidence, the Commission

[436] Transcript of proceedings on 15 November 2016 at PN1188 – PN1197.

[437] Transcript of proceedings on 15 November 2016 at PN907 – PN954.

[438] Transcript of proceedings on 17 November 2016 at PN1973 – PN2005.

[439] Transcript of proceedings on 17 November 2016 PN1972 – PN1987.

can have no confidence that the ACTU's proposed definition is a sufficiently understandable or workable basis for the clause.

468. The ACTU submits that the definition proposed is "a simplified version derived from s.4AB of the *Family Law Act 1975* (Cth)".[440] "Family violence" is there defined as:

> … violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the ***family member***), or causes the family member to be fearful.

469. As can be seen, the above definition is more rigorous than that proposed by the ACTU. It requires that the "violent, threatening or other behaviour":

- has the effect of coercing or controlling the family member; or
- causes the family member to be fearful.

470. That is, the behaviour must have a bearing or effect on the "victim" that meets the above description.

471. A similar approach can be found in provisions contained in the FW Act. For instance, the anti-bullying provisions in the Act require that, in addition to the alleged conduct of another worker, that behaviour "creates a risk to health and safety".[441] The circumstances in which a person is considered to have taken adverse action against another person under s.342(1) is also expressed by reference to the impact that that action has. For example, adverse action is taken by an employer against an employee if the employer:

- dismisses the employee;
- injures the employee in her or her employment;
- alters the position of the employee to the employee's prejudice; or

[440] Ibid at paragraph 2.12.

[441] Section 789FD(1)(b).

- discriminates between the employee and other employees of the employer.

472. By comparison, the definition contained at clause X.1 of the proposed clause, when read with clause X.2.1, only requires that an employee "experience" family and domestic violence as defined, irrespective of whether that behaviour has any impact or bearing on the employee. Accordingly, the definition allows for the proposed clause to apply to an employee who experiences the use of harsh words via a text message sent to their mobile phone, irrespective of whether that behaviour adversely affects the employee.

473. Several witnesses gave evidence accepting the variable impact that experience of family and domestic may have.[442] Indeed there was acceptance by some, in effect, that such experiences will not always manifest in any significant negative consequences, such as Dr Flood's evidence regarding 'situational couple violence' to which we have earlier referred. Such would appear to fall within the definition of "family and domestic violence" proposed by the ACTU, but we can see little justification for an award term that delivers paid and unpaid leave entitlements to individuals that experience it in the event that they do not in fact suffer any negative consequences as a result.

474. We also observe that the provision does not require the recurrence or a pattern of the alleged behaviour. The clause is not confined in its application to "domestic violence in the 'strong' or 'proper' sense", as described by Dr Flood:

> Thus, intimate partner violence or domestic violence (between adults) can best be understood as involving a systematic pattern of power and control exerted by one person against another, involving a variety of physical and non-physical tactics of abuse and coercion, in the context of a current or former intimate relationship. While the presence of any aggressive behaviour between partners or former partners in a

[442] See for example evidence of Dr Flood: transcript of proceedings on 14 November 2016 at PN719 - PN722.

sense can be described as domestic violence, this pattern of power and control is domestic violence in the 'strong' or 'proper' sense.[443]

475. This, too, is a matter that goes to the potential breadth of the provision. It potentially applies in the event of a single incident of family and domestic violence, as well as in instances of systematic violence or abuse.

16.2 The definition of 'family and domestic violence' – the person's family or household

476. The following element of the definition is also notably broad. It refers to a "member of the person's family or household" (emphasis added).

477. A member of the person's "family" would appear to include any individual whom the person is related to by blood,[444] whether living together or otherwise, as well as adopted children and step-children.[445] This includes parents, grandparents, children, siblings, uncles, aunts, cousins and so on. The definition is not limited to "immediate family", as referred to in the personal/carer's leave and compassionate leave provisions of the FW Act, and as defined in s.12 of the Act.

478. The definition also refers to a member of the person's "household". We interpret this to mean all individuals who live in the same house or apartment as the person. This is sufficiently broad to include a carer who resides with the person.[446] At first glance, the provision appears to have some similarity to the personal/carer's leave provisions which enable leave to be taken by an employee to provide care and support to a member of the employee's household. However, the personal/carer's leave provisions do not typically apply to flatmates because they are not typically responsible for the care of each other. The ACTU's clause does not require that the people in a household have any responsibility for providing care to each other, and

[443] Statement of Dr Michael Flood dated 26 May 2016 at annexure MF-3, paragraph 2.6.

[444] Macquarie Dictionary, fifth edition.

[445] See s.17 – Meaning of *child* of a person, of the FW Act.

[446] ACTU Outline of Submissions dated 1 June 2016 at paragraph 5.13(c).

would include a very wide range of persons, such as other residents in a boarding house.

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

479. The granting of 10 days paid leave represents a significant new entitlement. It is matter that has the potential to impose significant costs and disruption to employers. It is crucial that there is certainty over when an employee is eligible to receive such an entitlement.

480. Further and fundamentally, the Commission must be in a position to ascertain with certainty the circumstances in which an employee is able access the leave in order to assess the merits of the claim. This goes to issues such as the cost and broader impact of the claim.

481. Ai Group's submissions of 19 September 2016 identified the difficulty that an employer would face in seeking to ascertain whether, in some circumstances, an employee has been subject to domestic violence. Such difficulties are connected to matters including the unclear and excessively broad manner in which family and domestic violence is defined in the ACTU clause. The evidence advanced substantiates our concern. In response, the ACTU modified its claim and endeavoured to respond to such concerns in their written submissions of 5 October 2016.

482. The proposed clause X.2.1 gives rise to an employee's entitlement to paid leave (and, by virtue of clause X.2.3, to unpaid leave). The provision states:

> **X.2.1** An employee 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 leave. Such leave may include (but is not limited to):
>
> **(a)** attending legal proceedings, counselling, appointments with medical, financial or legal professionals; and/or
>
> **(b)** relocation or making other safety arrangements

483. This clause is the only element of the proposed provision that governs an employee's eligibility for paid leave.

484. Clause X.2.1 requires that the leave must be for the purpose of attending to certain activities. Relevantly, they must be activities related to the experience of being subjected to family and domestic violence. It appears implicit in the wording of the clause that the employee must also have been subjected to family and domestic violence, as defined in the clause.

485. Put another way, we contend that clause X.2.1 requires that three conditions precedent must be met for an entitlement to arise:

i. The employee has been subjected to family and domestic violence; and

ii. The employee must be undertaking an activity related to the experience of being subjected to such family and domestic violence; and

iii. The purpose for which the leave is taken must be to attend to the aforementioned activity.

486. The legal effect of the clause would be that an employee would only be entitled to paid leave if, as a matter of fact, the three conditions identified are met.

487. The ACTU now seeks to assert, in effect, that eligibility for paid family and domestic violence leave ought to be based on the purpose for which the leave is taken, rather than an employer being satisfied that the employee actually experienced family and domestic violence. The purpose for which the relevant leave may be taken is said to be for "undertaking an activity associated with the experience of being subjected to family and domestic violence." The ACTU's modified position and submissions are a blatant final attempt to paper over a fundamental flaw in the claim advanced. Even so, they fail to adequately address this issue, and do not accord with what would be the actual operation of the proposed clause.

488. We do not understand the modified clause to not require that the employee must in fact have experienced family and domestic violence. If that is not so,

this presents a fundamental flaw that would justify the rejection of the claim. The entire case mounted by the ACTU rests upon the assumption that the clause is intended to assist victims of family and domestic violence.

489. The ACTU now contends that it does not accept that the proposed clause charges the employer with responsibility for determining whether or not an employee is in fact being subjected to domestic violence. They observe that an 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/carer's leave.[447] Instead, the ACTU contends that an employer must only be reasonably satisfied that the employee requires the leave to attend to an activity related to the experience of being subjected to family and domestic violence. [448]

490. We accept that the clause does not expressly direct an employer to inquire into whether an employee has been subjected to domestic violence. However, in order to make an assessment as to whether the paid leave should be granted, an employer must determine whether each of the aforementioned conditions precedent have been met. This includes an assessment of whether the employee has been subject to family and domestic violence, which is a question of fact.

491. Even if the clause operated in the manner asserted by the ACTU, we contend that any assessment of whether an employee requires the leave to attend to an activity related to the experience of being subjected to family and domestic violence may necessitate a consideration of *whether* the employee has been subjected to family and domestic violence. It would plainly be ridiculous to simply expect that the safety net could operate on the basis that an employee assertion in this regard should simply be taken on trust. No other element of the safety net operates in this manner. It would be entirely unreasonable to expect an entitlement to paid family and domestic

[447] ACTU Outline of Submission in Reply dated 5 October 2016 at paragraph 100.

[448] ACTU Outline of Submission in Reply dated 5 October 2016 at paragraph 101.

leave to be linked purely to the narrower assessment referred to by the ACTU.

492. The ACTU's attempts to draw a distinction between the experience of family and domestic violence and an assessment of the purpose for which the leave is sought are overly artificial and ultimately unsustainable. In support of this approach it relies on a reading of the proposed clause that is simply not available to it.

493. The ACTU's analogy between the operation of the clause and personal/carer's leave does not assist it. Indeed it serves to prove the contrary and to highlight additional deficiencies in the clause. Section 97 of the Act provides an employee's entitlement to personal/carers leave:

> An employee may take paid personal/carer's leave if the leave is taken:
>
> (a) because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee; or …

494. If, as a matter of fact, an employee is fit for work, then an entitlement to personal/carer's leave does not arise. In order to receive an entitlement to such leave the requirement (or condition precedent) contained in s.97 must be met. That is, the leave must be taken "because the employee is not fit for work because of a personal illness, or personal injury affecting the employee." This is a discrete hurdle that must be met for an entitlement to crystallise. An employer is entitled to refuse to grant personal/carer's leave if the leave has not been taken for the purpose contemplated in s.97.

495. Section 107(3) sets out evidence requirements relating to the provision of entitlements including personal/carer's leave. It makes reference to the need for evidence that satisfies a reasonable person of the requirements of s.97 and has obviously guided the structure of the evidence requirements set out in the ACTU's claim. The receipt of such information will of course assist an employer to make an assessment of whether the requirements of s.97 are satisfied. However, it is not determinative of the matter.

496. Section 107(4) provides, in effect, that an employee is not entitled to take personal/carer's leave unless the requirements set out in s.107 have been complied with. Importantly, it does not provide that an employee is in all circumstances entitled to take personal/carer's leave if they comply with the requirements of s.107(3).

497. There is no equivalent provision to s.107(4) contained in the ACTU's proposed clause. This is a further deficiency in the claim. If an employee does not comply with the requirements of clause X.3 they may be in breach of the award, but there is nothing that will disentitle the employee to the leave provided by either clauses X.2.1 or X.2.3.

498. An employee is only entitled to personal/carer's leave if the requirements of both ss.97 and 107 are met. However, compliance with s.107 does not necessitate that the requirements of s.97 are met. The provision of evidence pursuant to s.107(3) simply arms an employer with a basis for making an assessment as to whether the requirements of s.97 have been met. There may be circumstances where an employer is provided with relevant evidence but, due to the existence of other factual considerations, the employer may be justified in not granting personal/carer's leave.

499. At paragraph 104 of its submissions in reply, the ACTU asserts that "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." There is a disconnect between this element of the ACTU submission and the clause proposed. The proposed clause does not reflect this submission. No element of the proposed clause renders the entitlement to either paid or unpaid leave dependent upon the provision of notice or evidence referred to in clauses X.3.1 or X.3.2. Similarly, no element of the proposed clause stipulates that an employee will have an entitlement to family and domestic violence leave if the notice and evidentiary requirements are met.

500. At best, the effect of the notice and evidentiary requirements are simply that the employer will have some advance warning of the leave and some basis for making a determination as to whether the legal obligation to provide the leave arises.

501. For the reasons we have set out above, the clause requires an employer (or ultimately a relevant Court or this Commission) to assess whether an employee has been subject to family and domestic violence for the purposes of ascertaining whether, at law, the clause provides an employee with an entitlement.

502. The proposed provision would place employers in an impossible position. The difficulties associated with identifying whether an employee has been subject to family and domestic violence were brought into sharp focus in the evidence of Dr Cortis, Professor Humphreys and Ms Kun. They were also acknowledged by counsel for the ACTU in the context of a series of questions put to Dr Cortis in this regard:

> … the ACTU's application doesn't require an employer to decide whether a person who seeks leave is being abused per se. We accept that that is a high burden.[449]

503. Businesses are not necessarily equipped with the personnel or the knowledge and experience necessary to make such an evaluation. In the absence of an understanding of the complexities associated with family and domestic violence (which cannot reasonably be expected or assumed), an employer is not in a position to undertake the fact-finding exercise necessary to ascertain whether in fact an employee is experiencing such violence. This difficulty is particularly pronounced for small businesses.

504. The difficulties associated with the potential need to make this assessment is compounded if the ACTU's interpretation of the proposed clause is accepted; that the provision itself does not require an employee to provide any evidence of the fact that they are experiencing family and domestic violence. That is to say, any employee who simply claims to be a 'victim' of

[449] Transcript of proceedings on 15 November 2016 at PN955.

family and domestic violence would be eligible to access leave under the proposed clause.

505. The issues we have here raised are intended to highlight the inherent complexities associated with the ACTU's claim and the difficulties that it poses for an employer of an employee who seeks to access the leave entitlement proposed. Such complexities arising from the ACTU's clause, whilst unacknowledged by it, leave employers in circumstances whereby they are unable to effectively monitor compliance with the provision.

506. We consider it likely that in practice, an employer would find themselves relying purely on an employee's assertion that they are experiencing family and domestic violence, without any real ability to verify this. This is a startlingly inappropriate basis for the operation of an element of the safety net.

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

507. The insertion of the proposed clause has implications for the scope of the dispute settlement procedure that is present in every award. It is triggered "in the event of a dispute about a matter under [the relevant] award". Where such a dispute arises, the dispute resolution clause states that:

- In the first instance, the parties must attempt to resolve the matter at the workplace by discussions between the employee or employees concerned and the relevant supervisor.
- If such discussions do not resolve the dispute, the parties will endeavour to resolve the dispute in a timely manner between the employee or employees concerned and more senior levels of management as appropriate.
- If the dispute cannot be resolved at the workplace and the above steps have been taken, a party to the dispute may refer it to the Commission.

The parties may agree on the process to be utilised by the Commission including mediation, conciliation and consent arbitration.

- Where the matter remains unresolved, the Commission may exercise any method of dispute resolution permitted by the Act that it considers appropriate to ensure the settlement of the dispute.

508. The dispute settlement procedure would apply to a dispute about a matter arising from the proposed clause. For instance, if an employer did not permit an employee to take family and domestic violence leave on the basis that it was not satisfied that the employee was in fact experiencing family and domestic violence, and a dispute arose in this regard, the dispute settlement procedure would apply.

509. The dispute settlement procedure grants power to the Commission to arbitrate a dispute arising pursuant to it if the parties consent. As a result, the insertion of the proposed clause could give rise to circumstances in which the Commission is required to determine whether, using the above example, an employee was experiencing family and domestic violence as defined. This involves a factual finding as to whether an employee is experiencing any 'violent, threatening or other abusive behaviour'.

510. It strikes us that the parties to such a dispute would be the employee seeking to access the leave and the employer. Whilst it would be open to the employee to lead evidence that goes to his or her personal experience, it is difficult to identify what sources (if any) of contradictory evidence might be available to the employer. Put simply, the alleged perpetrator of the violence would not be a party to the proceedings.

511. In such circumstances, leading evidence to counter the proposition that an employee is experiencing family and domestic violence would be a very difficult task for an employer. It would potentially involve seeking an order requiring the alleged perpetrator to attend the Commission to give evidence. Putting to one side the additional hurdles that this presents for an employer involved in such a dispute, it is reasonably foreseeable that this might also

have an adverse bearing on the relationship between the employee and the alleged perpetrator.

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

512. The ACTU accept that perpetrators of family violence should not receive family and domestic violence leave:

> Providing perpetrators with access to a workplace entitlement where that person may have engaged in criminal conduct would, in our submission, create unforeseeable complications for employees and employers alike, and is opposed more broadly on policy grounds by the ACTU.[450]

513. A similar position is maintained in the ACTU's reply submission:

> 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 subject to domestic violence, not those perpetrating it, who are eligible to domestic violence.[451]

514. Ai Group similarly views the provision of an award derived entitlement to additional paid and unpaid leave to perpetrators of family and domestic violence as inappropriate.

515. We nonetheless observe that the clause proposed by the ACTU does not include an exemption for employees who are perpetrators of family and domestic violence from the operation of the clause. Consequently, we contend that it will operate to provide an entitlement to some employees who engage in behaviour that is violent, threatening or abusive against a current or former partner or member of the person's family or household.

[450] ACTU Outline of Submissions dated 1 June 2016 at paragraph 2.13.

[451] ACTU Outline of Reply Submissions dated 5 October 2016 at paragraphs 107 – 108.

516. Dr Michael Flood, one of the expert witnesses called by the ACTU, gives evidence regarding the incidence of female perpetration of intimate partner violence and the intention or motivation underpinning such acts:

> There are contrasts in the intentions, motivations, and nature of men's and women's uses of intimate partner violence. In particular, women's perpetration of intimate partner violence is more likely than men's to be motivated by self-defence and to take place in the context of their partners' violence.[452]

517. Adopting momentarily the ACTU's gendered approach to this case, a male employee who has been violent towards his female partner, and whose female partner subsequently allegedly engages in violent or threatening behaviour towards him as an act of self-defence, would be entitled to leave under the ACTU's proposed clause. Alternatively, a male employee who is physically violent towards his female partner and subsequently receives text messages that are by their nature "abusive", would also be entitled to leave. It strikes us that this outcome is potentially at odds with the supposed intent underpinning the ACTU's claim.

518. The ACTU has elected to mount its case by reference to gender. It presents evidence that overwhelmingly deals with women's experience of family and domestic violence that is committed by male perpetrators. In passing, it also acknowledges that men might fall victim to acts of family and domestic violence by female perpetrators. There is virtually no recognition however of the incidence of violence between partners that is committed by both parties to the relationship. The existence of "situational couple violence"[453], as it is often called, has not been considered. There is of course also the occurrence of violence between other family members or members of a household that does not accord with the female victim/male perpetrator dichotomy presented by the ACTU.

519. The ACTU's case ignores one of the complexities associated with the incidence and nature of family and domestic violence and as a result, does not grapple with the potential application of the clause. Ultimately, the

[452] Statement of Dr Michael Flood at Annexure MF-3, paragraph 3.33. See also paragraph 3.35.

[453] Family Court of Australia, *Family Violence Best Practice Principles* (December 2015). See also transcript of proceedings on 14 November 2016 at PN759 – PN763.

question to be answered by the Commission is whether the insertion of a provision that potentially provides an employee with an entitlement to paid and unpaid leave where that employee has engaged in violent, threatening or abusive behaviour is necessary to ensure a *fair* and relevant minimum safety net. We return to this issue later in our submission.

16.6 The provision of the entitlement to other individuals

520. The previous iteration of clause X.2.1 appeared to apply to individuals other than those towards whom the violent, threatening or abusive behaviour has been directed, but have nonetheless "experienced" it.

521. The third edition of the Macquarie Dictionary defines "experience" as follows: (emphasis added)

> 1. a particular instance of personally encountering or undergoing something …
>
> 2. the process or fact of personally observing, encountering, or undergoing something …
>
> 3. the observing, encountering, or undergoing of things generally as they occur in the course of time …
>
> 4. knowledge observed, encountered, or undergone …
>
> 5. to have experience of; meet with; undergo; feel …

522. If, for instance, an employee has witnessed or observed 'any violent, threatening or other abusive behaviour by a person against a current of former partner or member of the person's family or household', the proposed clause would have entitled them to leave.

523. Clause X.2.1, as now drafted, would appear to us to no longer apply in such circumstances. This is because the entitlement arises where the employee has been "subjected to" family and domestic violence. Nonetheless, the ACTU's submission in reply state that it is appropriate that "some flexibility is built into the clause due to the complexities associated with the experience of family and domestic violence."[454] They then point to the several examples

[454] ACTU Outline of Submissions in Reply dated 5 October 2015 at paragraph 110.

of undertaking activities associated with a domestic homicide of a child or relative as being subject to the clause. It would appear, based on their submissions, that the ACTU holds the view that the revised provision continues to apply in the circumstances we have earlier described.

524. We are concerned that if its interpretation of the provision were accepted, the clause could extend the entitlements to an unjustifiably broad group of employees. This could include employees that are not themselves directly targeted by family and domestic violence. There has been no serious evidentiary case advanced in support of the proposition that all employees who 'observe' domestic violence should be entitled to ten days of paid leave and additional unpaid leave.

525. The homicide of any such individuals will always be a tragic and major event in a person's life, regardless of whether it is a product of this form or the actions of a person unrelated to the victim. Nonetheless, the clause is not limited to these kinds of events. The definition of family and domestic violence adopted by the ACTU's clause means that a very broad range of behaviours will be caught.

526. The Commission cannot be satisfied that a clause that entitles anyone who observes domestic violence to access paid and unpaid leave is necessary, in the manner contemplated by s.138. However, this appears to be the intent of the ACTU, provided the individual seeks to take the leave for a relevant purpose.

16.7 The provision of the entitlement to casual employees

527. The proposed provision purports to provide casual employees with an entitlement to paid leave. We cannot understand the manner in which such a provision is intended to operate in respect of employees engaged as such. Our concern is best illustrated by way of an example.

528. Consider a casual employee who is subjected to family and domestic violence and as a result, is required to attend court proceedings on a

particular day. Consistent with the very nature of casual employment, that employee cannot be compelled to work on that day. The employee is at liberty to refuse to so work and in this way, the need to seek leave does not arise.

529. Moreover, a casual employee is typically employed by the hour. The frequency and specific times at which the employee is required to work can vary markedly from week to week. Indeed there may well be periods during which a casual employee is not required to perform any work. Accordingly, if a casual employee is unable to attend work on a certain day (or days) due to family and domestic violence, it is not possible to identify whether it is in fact necessary for the employee to take leave and if so, the days or period of time for which such leave is required. This would also render it impossible to calculate the rate at which such a casual employee must be paid under the proposed clause; a matter which we address later.

530. In many cases, casual employees remain "on the books" of an employer even though the employer may not have had any work for the employee to perform for a period of time. The issue of whether or not a casual remains employed at a particular time can sometimes be contested. For example, there have been several cases concerning whether or not a casual has "been dismissed" for the purposes of the unfair dismissal laws.[455] Also, there have been various cases concerning the recognition of periods of service for casual employees and whether such service has been broken.[456]

531. Mechanically, it would appear to us that the provision cannot properly apply to casual employees. We note that the issue does not arise under the NES as it does not afford casual employees any paid leave entitlements.

[455] For example, Wilcox J decision in *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 6 IR 200, and the Full Court appeal against this decision. In his decision, Wilcox J held that: *"An employee is dismissed if the actions of the employer result directly or consequentially in termination of employment and the employee does not voluntarily leave the employment relationship".*

[456] *Shortland v The Smith's Snackfood Co Ltd,* [2010] FWAFB 5709.

16.8 The entitlement to paid leave – '10 days'

532. The proposed clause provides employees with an entitlement to "10 days" of paid leave. Unlike provisions in the NES regarding payment for certain leave entitlements,[457] the ACTU's clause does not refer to ordinary hours. For example, s.90(1) of the Act requires that an employee must be paid "for the employee's ordinary hours of work" in a period of paid annual leave. Rather, the ACTU's clause mandates payment for each "day" of leave. This necessarily gives rise to potentially complex issues pertaining to the meaning of a "day" and the amount that an employee is to be paid for a "day" of leave.

533. Unlike the NES annual leave and personal/carer's leave provisions which specify that leave accrues progressively on the basis of ordinary hours,[458] under the ACTU's clause an employee whose working hours are arranged on the basis of 12 hour days, would appear to be entitled to 10 x 12 hour days of family and domestic violence leave.

534. In addition, the absence of any connection between service undertaken by the employee and the accrual of the entitlement is unfair as there is no mechanism within the proposed clause that would limit or reduce the quantum of leave for employees who work less than full-time hours. For example:

- A part-time employee who works only one day per week would be entitled to the equivalent of 10 weeks' leave;
- A part-time employee who works two days per week would be entitled to the equivalent of 5 weeks' leave – more than their annual leave entitlement; and

[457] Sections 90, 99, 106, 111 and 116 of the FW Act.

[458] See ss.87(2) and 96(2).

- A casual who performs a very limited number of hours for an employer would be entitled to receive the same amount of leave as a full-time employee.

535. Typically, modern awards prescribe a weekly amount payable to employees covered by it who are engaged on a full-time basis. Awards also contain a mechanism for determining the hourly amount due to employees engaged on a part-time or casual basis. For example, clause 16 of the *Clerks – Private Sector Award 2010* sets out the minimum weekly wages payable for each classification under the award. Clause 11.7 states that a part-time employee must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed. Similarly, clause 12.2 states that a casual employee must be paid per hour at the rate of 1/38th of the weekly rate prescribed for the class of work performed (and an additional 25% casual loading).

536. It is relevant to note however that by virtue of the Commission's re-drafting process in this Review, virtually all modern awards will hereafter contain hourly rates of pay and that the entitlement to the minimum wages prescribed will, for all employees, be cast by reference to the number of ordinary hours worked. For instance, the *Exposure Draft – Clerks Private Sector Award 2010* at clause 10.1 states:

10.1 Adult employees

An employer must pay adult employees the following minimum wages for ordinary hours worked by the employee:

Classification	**Minimum weekly rate Full-time employees** (based on 38-hour week)	**Minimum hourly rate**
	$	$
Level 1		
Year 1	698.40	18.38
Year 2	733.00	19.29
Year 3	756.00	19.89

…

537. The concept of a “days’ pay” does not typically arise in the awards system; an employee is not entitled to a fixed amount for a “day” of work. Rather, the amount payable to an employee under an award is generally to be determined by reference to:

- the number of hours worked;
- an assessment as to whether those hours constitute ordinary hours or overtime; and
- a consideration of the precise start and finish times in order to ascertain whether any other penalties or loadings are due (such as weekend penalties, overtime rates or shift loadings).

538. An assessment as to the amount due to an employee for a particular day of work can accordingly vary. An obvious example arises from the possibility that an employee may be required to work overtime that is not rostered or pre-determined, either before/after the performance of ordinary or indeed an employee might be required to work a shift that is overtime in its entirety. Another example can be found in casual employees who are, of course, engaged by the hour or on an as needed basis.

539. For these reasons, and those articulated below regarding the relevant rate of pay to be applied, the notion of a “day” of paid leave is a misnomer.

16.9 The entitlement to paid leave – a temporal connection

540. The ACTU’s previously proposed clause provided that an employee “<u>experiencing</u> family and domestic violence is entitled to 10 days per year of paid family and domestic violence leave”.

541. The proposed clause has now been amended to provide:

> An employee is entitled to 10 days per year of paid family and domestic violence leave for the purpose of the attending to activities related to the experience of being subjected to family and domestic violence.

542. It appears that there is no longer any necessity for a temporal connection between the employee's experience of family and domestic violence and the individual's entitlement to the leave. That is, it appears that an employee who has at any time experienced family and domestic violence may access leave for purposes related to that experience.

543. The clause would enable an employee that experienced family and domestic violence several decades ago to obtain leave from their current employer. This may be so even if the individual was not employed by the employer at the time. This is a profound variation in the nature of the clause previously sought by the ACTU, given that the evidence suggests that some 2.2 million Australians have experienced at least one incident of violence by their intimate partner since the age of 15.[459]

544. This issue goes to the potential impact of the claim. It greatly expands the number of employees that may be eligible to the entitlement if granted. Given the statistic about persons' lifetime experiences of family and domestic violence, it simply cannot be assumed that the clause, if introduced, would be accessed by a small number of employees.

545. The absence of a temporal proximity between the incidence of the experience of the violence and the leave that is taken also undermines the workability of the clause. In cases involving a significant passage of time between the experience of the violence and the employee undertaking a related activity necessitating leave, it could foreseeably become increasingly difficult for an employer to be satisfied that the purpose was genuinely related to the experience of family and domestic violence.

546. An employee who experiences family and domestic violence may, in some instances, undertake a raft of activities related to that experience over a long period of time following the experience. This could include obvious activities such as ongoing counselling or medical treatment; as well as undertaking further education or training in order to overcome the adverse consequence

[459] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraph 7.2.

of economic abuse; or involvement in litigation associated with child support payment obligations or other legal proceedings associated with property settlement. It is not fair and reasonable to expect, as part of a fair and relevant *minimum* safety net, that an employer be required to continue to provide 10 days paid leave and additional unpaid leave to such an employee each year without any limitation.

16.10 The entitlement to paid leave – the rate of pay

547. There are a number of difficulties arising from the ACTU's claim relating to payment for the leave. In this section we make some general observations relating to such matters and then deal with the terms of the clause in detail.

General Observations

548. The difficulties we have identified in relation to the proposed treatment of the payment obligations under the ACTU's clause are not mere drafting issues that can be addressed in a settlement of orders process. The rate at which the proposed paid leave will be paid goes to the heart of the claim. It is matter related to the substantive merits of the proposed variation. As it stands, we do not know precisely what is sought. This, of course, adds to the difficulty of seeking to sensibly estimate the cost of the claim.

549. The ACTU has made no attempt to identify, on an award by award basis, the amounts would be included in the payment required by the clause. Consequently, the Full Bench is left in a position of simply having to speculate about such matters. For example, employees under the *Road Transport (Long Distance Operations) Award 2010* are typically paid on a cents per kilometre basis calculated by reference to distances travelled. This is underpinned by a minimum fortnightly rate of pay. There are no ordinary hourly rates applicable. The instrument does include certain rarely applied hourly driving rates and a method for calculating payment for undertaking loading and unloading work but, in both instances, these rates are calculated to include an industry allowance that compensates for a raft of disabilities that would not be applicable while an employee is on leave. The

classification that applies also depends on the type of vehicle that the employee is driving on any given engagement. It is entirely unclear how payment would be calculated under this award.

550. The ACTU has been afforded multiple opportunities to amend its claim. Nonetheless, the clause proposed, and the case advanced in support of it, is so seriously deficient that it warrants the Full Bench declining to grant the claim advanced.

Specific Elements of the Clause

551. Clause X.2.1 states that the employee will be entitled to *paid* leave in the circumstances prescribed. Clause X.2.2(b) provides that:

> An employee's paid yearly entitlement to family and domestic violence leave:
>
> …
>
> (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 …

552. Noting our opposition to the introduction of an entitlement to paid leave irrespective of the rate at which that payment is due, we make the following submissions regarding the above clause.

553. The proposed clause does not define what is meant by the "ordinary hourly rate applicable to the classification of the employee under the award". We also note that by including shift loadings and penalties, the clause appears to assume that the definition of "ordinary hourly rate" differs from the definition of that term adopted by the Commission in the exposure drafts that it has published during the course of the Review.

554. There is no definition of "penalties" provided in the clause. The Commission cannot know whether this term is intended to capture additional payments that may be applicable such as separate allowances or loadings that may apply for reasons such as an employee performing certain types of work, holding particular licences or qualifications or working in a particular industry.

555. There is also an absence of any link between the entitlement to take the leave and an employee's ordinary hours of work. We address this matter in greater detail elsewhere in this submission. However, one matter that arises from this issue is that it remains unclear as to whether the proposed leave is intended to include overtime payments, which may be caught by the reference to penalties. If such payments are intended to be captured by the clause, this would be a radical departure from all other forms of paid leave dealt with under the safety net.

556. The ACTU submits in its reply submission that the leave should be paid at the employee's ordinary award rate of pay.[460] Curiously, they assert that this would include penalties and bonuses ordinarily payable under the applicable modern award. It is not clear what "bonuses" the ACTU is intending to capture.

557. In its submissions the ACTU also contends (albeit by reference to the earlier iteration of its proposal) that employees would be entitled to be paid at the employee's ordinary rate of pay, that is, the rate of pay they would have received had they worked the period."[461]

558. Various difficulties can arise if it is necessary to ascertain "the rate [the employee] would have received had they worked the [relevant] period". Such a requirement would necessitate an assessment as to whether, during the period of leave, an employee would have performed work that attracts various allowances, loadings and penalties payable under the relevant award. It is our submission that in many circumstances, this will not be possible.

[460] ACTU Outline of Submissions in Reply dated 5 October 2016 at paragraph 126.

[461] ACTU Outline of Submissions dated 1 June 2016 at paragraph 2.21.

559. Take for instance the *Manufacturing and Associated Industries and Occupations Award 2010* (**Manufacturing Award**). Clause 32.2 requires the payment of various allowances including but not limited to:

- A “cold places” allowance where an employee works for more than one hour in places where the temperature is reduced by artificial means below 0 degrees Celsius.
- A “hot places” allowance where an employee works more than one hour in the shade in places where the temperature is raised by artificial means.
- A “wet places” allowance where an employee works in any place where their clothing or boots become saturated by water, oil or another substance.
- A “confined spaces” allowance where an employee works in a confined space.
- A “dirty work” allowance where an employee and their supervisor agree that work is of an unusually dirty or offensive nature.
- “Height money” for certain employees who work at a height of 25 metres or more directly above the nearest horizontal plane.

560. As can be seen from the above, an entitlement to these allowances arises only if specific work is performed by an employee. The ACTU’s proposed approach erroneously assumes that an employer can assess, in the abstract, whether an employee would have been required to perform such work; whether as a result, a particular allowance would have been payable and if so, the period of time (or more specifically, number of hours) over which that allowance would have been due.

561. Practically, this may not be possible. That is, an employer covered by the Manufacturing Award cannot necessarily determine the number of hours

during which a particular employee would have been required to perform "dirty work" had they worked during the relevant period.

562. Similarly, the ACTU's proposal appears to proceed on the basis that the precise number of hours that would have been worked by an employee and the times at which those hours would have been worked can be identified for the purposes of this clause.

563. For instance, under the *Clerks – Private Sector Award 2010*, an employee may be entitled to a shift allowance pursuant to clause 28.4(c) if the employee is employed as a shiftworker and is required to perform ordinary hours of work that meet any of the shiftwork definitions at clause 28.1. If an employee other than a shiftworker is required to work on a weekend, on a public holiday or overtime, they may be entitled to a penalty rate prescribed by clauses 27.1 or 27.2. In this respect the ACTU's proposed approach again incorrectly assumes that this is a matter that can be assessed in the abstract. For example, it would require an employer to determine the number of hours of overtime that an employee would have worked during the relevant period; a potentially impossible task in a workplace where employees are required to perform overtime on an irregular basis or in unforeseen circumstances.

564. In many circumstances, it will be a virtually impossible task to conclusively calculate the rate of pay that an employee would have received had they worked during the period of leave. In so submitting we note that many, if not most modern awards do not contain an obligation to roster its employees' hours of work. Put another way, few modern awards mandate that an employer prepare a roster of the hours to be worked by its employees.

565. Certain awards contain particularly flexible part-time provisions that do not require that an employee perform work at specified times. For example, the *Wine Industry Award 2010* requires only that at the time of engagement the employer and part-time employee agree "to a pattern of work".[462] In our view,

[462] Clause 12.3.

an agreement that the employee will work three days a week, of which one will occur on either a Saturday or Sunday, would satisfy this requirement. This would not, however, enable an employer to conclusively assess the amount that employee would have been paid during a period of family and domestic violence leave, as the penalty rate payable for a day worker for ordinary hours of work on a Saturday differs from that payable on a Sunday.[463] Some awards contain provisions pertaining to part-time work that are even less prescriptive, such as the *Professional Employees Award 2010*:

> An employee may be engaged for a specified number of ordinary hours each week being less than those hours prescribed in clause 18 – Ordinary hours of work and rostering.[464]

566. The issue we have identified is perhaps most acute in respect of casual employees who are engaged by the hour or on an as needed basis. There is often very little if any regularity or pattern to their hours of work. We cannot fathom how an employer can be required to perform the necessary calculations in respect of such employees.

567. In addition, the reference to a "yearly entitlement" in clause X.2.2 is unclear and is not addressed in the ACTU's submissions. Two obvious difficulties that flow from this element of the claim are:

- the possibility of the employee's classification varying during the course of the year; and
- the possibility that the rate applicable to the classification may change.

568. Notably, the ACTU has not so much as attempted to grapple with issues such as the above that would arise from its proposal.

569. A further difficulty with the approach to calculating payment envisaged by the ACTU is that it would require employers to pay employees amounts that are payable under awards if a particular disability is suffered even though, in the circumstance, the employee would be absent and not suffering the relevant

[463] Clause 28.2(g)(i).

[464] Clause 11.3(a).

disability. This would include various allowances (such as those specified in clause 32.2 of the Manufacturing Award), shift loading and penalties. No reasonable argument for employers being required to pay such amounts has been advanced and we contend that the obligation is inherently unjustifiable and unfair to employers. By way of example, there is no apparent justification for why an employee accessing the proposed form of leave should receive the "cold places" special rate referred to in clause 32.2 of the Manufacturing Award in circumstances where they are not performing such work. An employee covered by the Manufacturing Award accessing personal/carer's leave would have no equivalent entitlement to receive such amounts.

570. At paragraph 129 of submissions in reply, the ACTU acknowledges, in effect, that its proposal is out of step with the treatment of comparable forms of paid leave, such as personal/carer's leave. They justify this by reference to the aim of "supporting vulnerable employees at times when retaining financial independence and job security are critical for both escaping existing violence and avoiding future violence." However, the evidence does not establish the extent to which the receipt of shift loadings and penalties payable under awards will have a material bearing on such matters.

571. The ACTU also asserts that the reason for their claim is to ensure that employees subjected to family and domestic violence are not further financially disadvantaged by the abuse. Consequently, it appears that their proposed remedy seeks to shift the financial disadvantage flowing from an individual's non-attendance at work to the individual's employer.

572. In the context of a consideration of what constitutes a fair and relevant safety net of minimum terms and conditions, as contemplated by the modern awards objective, there is a need to balance the interests of both employers and employees. It cannot be fair to require an employer to not only provide leave to persons that experience family and domestic violence, but to also require the payment of compensation to such persons at an amount that includes a raft of payments that are ordinarily only applicable when certain

work is actually performed or certain disabilities associated with the performance of such work are actually suffered.

573. Family and domestic violence is a community wide problem that is experienced by many persons who are not employed. The financial challenges flowing from it are not only experienced by individuals that are employed. It is an area that the social security system, and Government more broadly, undoubtedly have a role to play. There are limits on the extent to which the workplace relations system, and employers' role within it, should be viewed as the vehicle for addressing such matters.

574. We do not accept that a case has been made out for any form of paid leave. In addition, the unions' proposed clause is very unbalanced in its treatment of the needs and interests of employers and employees.

16.11 The entitlement to leave on an annual basis

575. The entitlement to family and domestic violence leave is expressed in clause X.2.1 as 10 days "per year".

576. The proposed clause would immediately entitle an employee to 10 days of leave upon the commencement of their employment. The provision does not provide for the progressive accrual of the leave. The effect of the clause is to provide an employee with a significant entitlement at the very outset of their employment.

577. In certain instances the approach adopted could result in circumstances where an employee has access to paid leave, even though they have not yet performed any work for the employer. In the context of employees who will only be engaged for a short period (such as casual employees or employees engaged on a fixed term or specific task contract) it may mean that they access the paid leave but never actually perform any work for the employer. As discussed in section 16.7 above, in many cases, casual employees remain "on the books" of an employer even though the employer may not have had any work for the employee to perform for a period of time.

578. The unfairness that flows to an employer from the proposed approach is compounded by the fact that the employee need not have experienced the family and domestic violence while actually engaged by the employer.

579. This element of the proposed entitlement is out of step with comparable forms of leave provided by the safety net, such as personal/carer's leave, which provide for progressive accrual.

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

580. In our earlier submission of 19 September 2016, we expressed a concern that the previous iteration of the clause did not require a sufficient connection between the experience of family and domestic violence and the reason for which leave could be accessed.

581. The ACTU subsequently amended the claim so that the proposed entitlement now encompasses "activities related to the experience of being subjected to family and domestic violence."

582. The ACTU asserts that the words 'related to' require a clear causal link between the purpose of the leave and the experience of family and domestic violence.[465]

583. The words 'related to' do not require the clear causal link contemplated by the ACTU. The Macquarie Dictionary defines the word related as "1. associated; connected". This falls well short of necessitating causation as contemplated by the ACTU.

584. The proposed clause does require that the employee is actually taking the leave *due* to the experience of being subjected to the relevant violence. For example, an employee may move their domestic residence for reasons which include domestic violence. It may be uncontentious that, in some cases, activities associated with the relocation are captured by the clause. However, there may be a raft of activities that the individual undertakes in

[465] ACTU Outline of Submissions in Reply dated 5 October 2016 at paragraph 131.

the years that follow which are associated with such a relocation (such as future negotiation of rental arrangements) but have a far more tenuous connection to the experience of family and domestic violence. Nonetheless, all such activities could be construed as being undertaken for a purpose *related* to the experience of family and domestic violence and consequently captured by the clause.

16.13 The purposes for the leave – the potential breadth of activities

585. The proposed clause X.2.1 is effectively a "catch all" provision. It would enable an employee to access family and domestic violence leave for the purposes of any "activities related to the experience of being subject to family and domestic violence".

586. The ACTU provides the following examples of circumstances in which an employee might seek to access the entitlement pursuant to the aforementioned clause:

> … This could include attending appointments with children who have been affected by domestic violence, or attending a child's school or other sporting or extracurricular activities to notify those responsible for the child's care of relevant information. …[466]

587. In advancing their case the ACTU has not sought to identify all of the circumstances that justify an employee accessing the leave.

588. The clause would allow an employee to access leave for any purpose that is merely 'related' to their experience of family and domestic violence, even if the connection between their experience and the "activity" is tenuous. The proposed provision would potentially extend to circumstances such as attending financial institutions and visiting Centrelink or some other government agency.

589. We have earlier submitted that the provision would appear to apply to those who "experience" domestic violence by way of having witnessed it. We

[466] ACTU Outline of Submissions dated 1 June 2016 at paragraph 2.16.

consider that clause X.2.1 would enable such an employee to access leave under the proposed clause to not only seek assistance for themselves but also to accompany the victim or the perpetrator to, for example, medical or legal appointments or proceedings. Clearly, clause X.2.1 is of potentially broad import.

590. At paragraph 132 of its reply submissions, 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 exclusive". A difficulty with this approach is that, while it relieves the drafter of the difficult task of identifying the various relevant activities, it transfers the need to grapple with such complexities to the reader of the award. Such an approach is contrary to the need to ensure that awards are simple and easy to understand.

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

591. Importantly, an employee seeking to access the leave entitlement would not be required to establish that it is in fact necessary for the employee to be absent from work. The provision permits an employee to take the leave for any one of the purposes identified in the clause, without regard for whether the leave is warranted and if so, whether they require the leave at the time that they take it. In so submitting, we note that the provision does not contemplate any employer discretion as to whether the leave is taken and if so, when it is taken. The provision effectively provides an absolute right to take leave.

592. The concern we here raise is particularly pertinent given the ACTU's assertion that it is women who are primarily the victims of family and domestic violence. It is also widely accepted that women constitute the majority of the part-time and casual workforce in Australia,[467] and therefore typically work less than full-time hours. It is reasonable to infer that such

[467] ABS (2016), Labour Force, Australia, June 2016, cat. no. 6202.0.

employees may have greater capacity to accommodate or attend to certain personal circumstances without necessitating an absence from work.

593. Personal/carer's leave under the NES is also non-discretionary, in the sense that an employee who meets the circumstances described at s.97 and the notice and evidentiary requirements at s.107 may take personal/carer's leave. So long as the relevant statutory criteria are met, the legislation does not grant an employer the discretion to refuse access to the leave entitlement. Compassionate leave operates similarly.[468]

594. The distinction, however, between personal/carer's leave or compassionate leave, and the family and domestic violence leave entitlement proposed is that by virtue of the manner in which the Act casts the provisions associated with taking the leave, the ability to do so arises only in circumstances where it is necessary. That is s.97 allows an employee to take personal/carer's leave if it is taken:

- because the employee is not fit for work; or
- to provide care or support to a member of the employee's immediate family or household.

595. In describing the circumstances in which an employee can take personal/carer's leave by reference to specific situations that arise at a particular point in time and which, by their very nature, render absence from work necessary, the legislation effectively creates a limitation on the purposes for which the leave can be taken and *when* that leave is taken. Section 105 prescribes the circumstances in which compassionate leave may be taken in a similar vein.

596. By contrast, clause X.2.1 broadly describes the various purposes for which the leave may be taken. In so doing, it does not require (expressly or otherwise) that the employee's absence from work is necessary. There is a complete absence of any rigour as to the circumstances in which the leave

[468] Sections 104 and 105 of the FW Act.

can be taken. So long as the employee is accessing leave for the purpose of attending to activities related to the experience of being subjected to family and domestic violence, the leave can be taken. The leave can be accessed even if the relevant activity for which the leave was taken could have been completed outside of the employee's hours of work.

597. As a consequence, family and domestic violence leave can be taken by an employee who has experienced family and domestic violence as and when an employee so desires. The terms in which the entitlement is expressed do not, by their very nature, limit the entitlement to circumstances where it is necessary to do so. The provision does not require an employee to establish that the purpose for which they seek to take the leave necessitates their absence, nor does it grant an employer the discretion to make that assessment.

598. For instance, an employee may need to attend a financial institution. The need to do so may be premised on the fact that they have "experienced" certain abusive behaviour perpetrated by their partner and as a result, they seek to alter their financial arrangements because they intend to separate from their partner. It should not be assumed, however, that this is synonymous with a need to be absent from work. Notwithstanding, even in the absence of any urgency to make these arrangements or any reason why the employee cannot do so at a time that the employee is not required to attend work, the proposed clause would permit an employee to take leave and as a consequence, potentially impose additional costs and operational difficulties on an employer.

599. For example, a part-time employee who works three days per week, could choose to visit a financial institution or make non-urgent relocation arrangements on the three working days, rather than on the two non-working days. Also, an afternoon shift worker who usually works from 2pm to 10pm could choose to visit a bank at 4pm, rather than at Noon.

600. As can be seen from the above illustration, the provision proposed places the implications of an additional leave entitlement squarely upon an

employer, without any restriction upon the circumstances in which the leave can be taken by an employee. The provision does not give any consideration to the prospect of an employee taking steps to minimise the implications that such leave might have for their employer. For instance, it does not contemplate discussions between an employer and employee to consider the timing of the leave.

601. If an employee experiencing family and domestic violence decides to be absent for a specific purpose, if that purpose is one that is specified at clause X.2.1, nothing more is required.

16.15 Unpaid leave – 'each occasion'

602. The proposed provision, at clause X.2.3 provides for an entitlement to unpaid leave upon exhaustion of the paid leave entitlement stipulated at clause X.2.1. An employee is thereafter entitled to "up to 2 days unpaid family and domestic leave on each occasion for the purpose of attending to activities related to the experience of being subjected to family and domestic violence".

603. This element of the ACTU's proposal appears to be based on the entitlement under the NES to unpaid carer's leave and compassionate leave. In each instance, the relevant provisions state that an employee is entitled to two days of leave "on each occasion" when:

- in the case of unpaid carer's leave: a member of the employee's immediate family or household requires care or support because of a personal illness or injury, affecting the member; or an unexpected emergency affecting the member.[469]

- in the case of compassionate leave: a member of the employee's immediate family or household contracts or develops a personal

[469] Section 102 of the FW Act.

illness that poses a serious threat to his or her life; or sustains a personal injury that poses a serious threat to his or her life; or dies.[470]

604. As can be seen, the NES affords an entitlement to paid leave "on each occasion" that a certain set of personal circumstances arise that meet the descriptors contained in the statute. The entitlement to leave does *not* arise by reference to each occasion on which the employee seeks leave.

605. For instance, in the event of the death of a member of an employee's immediate family, the employee is entitled to two days of compassionate leave. That entitlement arises, in a temporal sense, when the family member dies. The NES does *not* entitle an employee to two days of leave each time an employee seeks to take such leave for purposes associated with the death. That is, a subsequent additional entitlement to two days of leave does not arise where an employee requires time away from work to, for example, attend a funeral or make arrangements in respect of their family member's personal affairs. Similarly, the entitlement to unpaid carer's leave arises "on each occasion" that a member of the employee's immediate family or household "requires care or support".

606. Clause X.2.3 of the ACTU's proposal, by contrast, does not specify the circumstances by reference to which the entitlement to unpaid leave arises. It states: (emphasis added)

> 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 <u>for the purpose of attending to activities related to the experience of being subject to family and domestic violence</u>.

607. A previous version of the ACTU's claim was worded as follows:

> Upon exhaustion of the leave entitlements in clause X.2.1. employees will be entitled to up to 2 days unpaid family and domestic violence leave on each occasion.

608. The ACTU contend that the clause now clarifies the need for "each occasion" of leave to be subject to the requirement that it is "for the purpose

[470] Section 104 of the FW Act.

of attending to activities related to the experience of being subjected to family violence."[471]

609. The words of limitation are an improvement; however the central deficiency in the clause remains. It is by no means clear what constitutes the "occasion" that gives rise to the entitlement.

610. On one view, the provision could be read to entitle an employee to unpaid leave "on each occasion" that he or she experiences family and domestic violence. However, the manner in which such a clause would apply in practice is unclear. The ACTU submits that the experience of family and domestic violence can be an ongoing or perpetual one. The identification of a specific "occasion" in such circumstances would appear to be impossible or, in the alternate, it could be argued that the employee is, at any point in time, entitled to unpaid leave. The potential uncertainty that might flow from such a provision should not be ignored.

611. It may be the ACTU's intention that clause X.2.3 be interpreted as entitling an employee to unpaid leave "on each occasion" that such leave is sought by the employee provided that it is "for a purpose related to the experience of being subjected to domestic violence." However, this would effectively entitle an employee to an unlimited amount of unpaid leave, so long as he or she can point to one of the purposes for the leave which has any connection to the experience of domestic violence.

612. If the clause is intended to entitle an employee to leave each time that it is requested for a purpose related to the employee having experienced family and domestic violence, it renders the proposed limitation of "up to 2 days unpaid family and domestic violence leave on each occasion" meaningless.

613. The difficulties we have earlier identified as arising from clause X.2.1 are also relevant to clause X.2.3. We need not repeat those concerns here.

[471] ACTU Outline of Reply Submission dated 5 October 2016 at paragraph 139.

16.16 The confidentiality obligation

614. The proposed clause X.3.3 requires an employer to keep sensitive personal information confidential "to the extent possible". This involves a subjective consideration, however the basis upon which that assessment is to be made is ambiguous and, we consider, may give rise to disagreement.

615. Further, the provision raises the question as to the precise nature of the obligation to keep the relevant information confidential. Critically, the clause does not identify the persons from whom the information is to be kept confidential.

616. The process for accessing leave will differ amongst businesses. In some instances, it may be a process that is entirely automated via an online system which involves only specific personnel that are engaged in the organisations' human resources department. Does clause X.3.3 require that the reason for an employee's absence when taking family and domestic violence leave must be kept confidential by the HR employee from the relevant employee's direct manager? Is that confidentiality obligation displaced if the HR department considers that the employee's direct manager should be informed of the employee's personal circumstances so that he or she might be provided with additional support? Is the confidentiality obligation displaced if the employee's direct manager raises a concern about the employee's performance in circumstances where the manager is not aware that the employee is experiencing family and domestic violence? If the ACTU's intention is that the confidentiality obligation is not subject to circumstances such as the above, is such an obligation in the best interests of the relevant employee and employer?

617. Equally, there may be circumstances in which an employee seeking to take leave under the proposed clause directly approaches their immediate supervisor to advise them of their experience of family and domestic violence. They may do so for the purposes of explaining their absence and to seek additional support or flexibility. In such circumstances, is the

supervisor under an obligation to keep the relevant information confidential from the payroll officer? Is the supervisor under an obligation to keep the relevant information confidential from the manager, who might benefit from understanding that the employee is experiencing challenging personal circumstances?

618. Self-evidently, the confidentiality obligation sought is ambiguous and as a result, would give rise to various difficulties associated with an employer's endeavours to comply with it.

17. A MATTER FOR ENTERPRISE BARGAINING?

The Evidence of Jenni Mandel

619. It is not contentious that enterprise bargaining has resulted in a number of enterprise agreements including provisions dealing with matters associated with family and domestic violence. Moreover, there appears to be an increasing prevalence of these provisions in agreements.

620. These propositions are supported by the evidence of Jenni Mandel, which is derived entirely from the Department of Employment's Workplace Agreement Database:

- 15% of all enterprise agreements approved in 2016 (up to 30 June 2016) contain a provision dealing with family and domestic violence leave.[472] These agreements cover 56.5% of all employees covered by the enterprise agreements approved in 2016 (up to 30 June 2016).[473]

- This is to be compared to 7.9% of all enterprise agreements current as at 30 June 2016 which contained a provision dealing with family and domestic violence.[474] These agreements cover 37.8% of all employees covered by the enterprise agreements current as at 30 June 2016.[475]

621. The evidence of Ms Mandel suggests that the inclusion of family and domestic provisions correlates with business size.

- 57.3% of all enterprise agreements approved in 2016 (up to 30 June 2016) that contain a paid domestic violence leave entitlement cover more than 100 employees.[476]

[472] Witness statement of Jenni Mandel at paragraph 26.
[473] Witness statement of Jenni Mandel at Attachment B.
[474] Witness statement of Jenni Mandel at paragraph 10.
[475] Witness statement of Jenni Mandel at paragraph 11.
[476] Witness statement of Jenni Mandel at paragraph 44.

- Only 11.3% enterprise agreements approved in 2016 (up to 30 June 2016) that contain a paid domestic violence leave entitlement 15 or less employees.[477]

622. This was also demonstrated by questions asked of Ms Mandel by His Honour, Vice President Watson:

> Well, let me give you a more graphic example. If you go down to accommodation and food services?---Yes.
>
> There was said to be 24 agreements and 103,000-odd employees covered by those agreements. That's said to represent 5.6 per cent of agreements in that sector, but it's said to represent 71 per cent of employees in that sector. That could only be the case if the particular agreements that have the clause apply to a large number of employees?---Yes, that would be right.[478]

623. The content of enterprise agreement provisions dealing with family and domestic violence matters varies significantly. The overarching observation that must be made is that many agreements deal with the challenges presented by family and domestic violence in a manner that is different to that now claimed by the ACTU. In many instances employers commit to doing more than the union seeks, in others less.

A Response to the ACTU's Case

624. It is appropriate that enterprise bargaining is used as a vehicle for regulating access to leave entitlements that exceed those currently provided for under the legislative safety net comprised by the NES. Enterprise bargaining enables the parties to tailor the provision of such entitlements to reflect the individual circumstances and needs of the enterprise. It also enables the parties to determine an approach that best reflects the capacity of the particular employer to assist its employees in ways which are of particular utility to the particular workforce. The impact of the claim on employers will vary based on matters including, but not limited to:

- The size of the employer;

[477] Witness statement of Jenni Mandel at paragraph 44.

[478] Transcript of proceedings on 18 November 2016 at PN2511 – PN2522.

- The nature of the employer's operations;
- The capacity of the employer to cover for employee absences;
- The financial resources of the employer; and
- The characteristics of the employer's workforce.

625. A "one size fits all approach" to dealing with such matters is neither a necessary nor desirable outcome.

626. The central basis for the ACTU's claim is a broad appeal to notions of fairness. They contend that the safety net is not fair absent an entitlement to family and domestic violence leave.

627. The assumption that awards must be the vehicle for regulating employer responses to family and domestic violence underestimates the positive role of enterprise bargaining as a mechanism for enhancing fairness in the workplace relations system. It also ignores the proposition that the utilisation of enterprise bargaining as the vehicle for such regulation is, itself, a desirable outcome.

628. In undertaking this Review, the Commission is required by s.578(a) to take into account the objects of the Act as articulated in s.3 and of that part of the Act that governs the performance of award reviews. The object of part 2-3 of chapter 2 of the Act is contained in s.134. [479]

629. Relevantly, the object of the Act is to provide a balanced framework for cooperative and productive workplace relations that promotes economic and prosperity and social inclusion for all Australians by, among other measures:

> (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.

630. A determination that enterprise bargaining is the appropriate mechanism for addressing the circumstances of employees that may want or require leave

[479] *4 yearly review of modern awards – Fire Fighting Industry Award 2010* [2016] FWCFB 8025 at [19].

additional to that afforded under the established safety net (such as employees who have experienced family and domestic violence) is consistent with both the above cited object of the Act and that element of the modern awards objective that speaks to the need to encourage enterprise bargaining (s.134(1)(b)).

631. The ACTU's submissions question the adequacy of enterprise bargaining as a mechanism for delivering appropriate regulation of family and domestic violence leave. Their position rests on a presumption that family and domestic violence leave is an entitlement that employees should receive as part of the minimum safety net; an assumption that Ai Group does not accept and which would necessitate a radical departure from the traditional approach to the regulation of leave in the Australian workplace relations system.

632. The ACTU appears to argue that the inadequacy of bargaining is, at least in part, a product of alleged barriers to collective bargaining delivering what they perceive to be appropriate outcomes in this regard. Such barriers are said, in effect, to be related to matters including that:

- The majority of employers do not agree with the inclusion of family and domestic violence leave within collective agreements;
- The inclusion of family and domestic violence leave within an agreement will not be achievable even where supported by the majority of employees;
- In male dominated industries it can be difficult to engage the workforce with the necessity for family and domestic violence leave;
- Different trade unions (and officials) may prioritise women's issues differently in the context of the bargaining agenda (noting that the ACTU implicitly perceives of family and domestic violence as a women's issue).

633. The Full Bench should not accept that the ACTU's broad assertions are properly established by the evidentiary case advanced.

634. The ACTU seeks to vary every modern award to include family and domestic violence leave. The evidence before the Full Bench does not establish that the various alleged barriers are relevant to the context of all 122 modern awards. There is no evidence of the context of bargaining that occurs in the majority of these awards or of the nature of either the specific industries or workforces they cover.

635. In some instances, the evidence that has been led by the ACTU suggests that there could be no real or arguable necessity to amend the relevant award to provide for family and domestic violence leave. We refer in particular to the evidence of Mr Doleman. It does not seem that there has been any real difficulty for the MUA in securing such entitlements for its members (95% or more of whom are covered by enterprise agreements). The necessity to amend the relevant awards is further undermined by the overwhelming prevalence of enterprise bargaining in sectors in which the MUA operates. It is, on the evidence, hard to imagine what tangible benefit the inclusion of family and domestic violence leave in awards would deliver employees in the maritime industry.

636. More generally, the evidence advanced by the ACTU falls well short of establishing that there has been any broad or long term campaign advanced by its affiliates in support of enterprise bargaining over family and domestic violence leave entitlements. No meaningful evidence of the experience of workforces that are not unionised has been advanced.

637. Regardless of union concerns over the barriers to bargaining over family and domestic violence related entitlements, the evidence suggests that the system is delivering some employees with additional entitlements in relation to family and domestic violence. It suggests that this is a matter that is capable of being dealt with at the enterprise level.

638. More broadly, the evidence demonstrates the utility of enterprise bargaining as a mechanism for delivering leave entitlements that are not provided for under either the NES or modern awards.

639. Relevantly, while Ms O'Neil's evidence identified a number enterprise agreements in which the union has purportedly been unsuccessful in securing paid family and domestic violence leave, under cross examination she confirmed that in some of those agreements did provide for leave entitlements such as blood donor leave and personal/carer's leave entitlements that exceed those provided in the NES. By way of example, Ms O'Neil identifies the *Australian Textile Mills Textiles Enterprise Agreement 2015*[480] as one of the agreements in which the union could not secure paid family and domestic violence leave. Nonetheless, that agreement provides the following additional leave entitlements beyond those delivered by the safety net:

- The provision of paid blood donor leave (clause 42);
- More beneficial entitlements to personal/carer's leave (clause 37.1);
- Additional public holiday entitlements (clause 39);
- Additional jury service leave entitlements (clause 38); and
- Up to 12 months "special leave without pay" for reasons which include, among others, extenuating personal circumstances or reasons of pressing domestic necessity which require the full-time presence of the employee (clause 41); presumably this would cover many circumstances associated with the experience of family and domestic violence.

640. To take another example, Ms Jackson's statement refers to the Hazelwood Agreement[481]. On even a cursory review of the agreement, it is evident that it provides for a raft of very generous entitlements that exceed those afforded

[480] AE413917.

[481] AE412897.

under the safety net. In relation to leave, the enterprise agreement provides entitlements associated with the following matters that exceed the safety net:

- An uncapped paid sick leave scheme (clause 21);
- Paid parental leave (clause 22);
- Benefits associated with performance of jury duty (clauses 24.5 – 24.9);
- Compassionate leave entitlements additional to those contained in the NES (clause 24.2);
- Paid and/or unpaid leave to cover attendance at court for certain purposes (clause 24.10 – 24.12);
- Attendance at WorkCover cases for certain purposes is regarded as being on duty (clause 24.13);
- Paid and/or unpaid leave to attend Defence Force Reserves training (clauses 24.14 – clauses 24.16);
- Paid emergency services leave (clauses 24.17 – 24.18);
- Paid education leave (clause 24.19);
- Union training leave (clauses 24.20 – 24.23); and
- Leave without pay (clauses 24.24 – 24.32).

641. The evidence of enterprise bargaining reflects what we anticipate will be an uncontentious proposition: that there are many different reasons for taking leave that employers already accommodate in their enterprise agreements. This is demonstrated by a review of the agreements referred to in the evidence of both Ms O'Neil and Ms Jackson.

642. We do not here wish to descend into a debate about the relative worthiness of such clauses compared to that of a family and domestic violence leave

clause. Suffice to say, that there are many reasons why an employee may need or wish to access leave from their employment. There may be many benefits that flow to the employee, the employer or even the broader community from employees being able to access leave, additional to that provided by the safety net, for various purposes. It is not appropriate to now elevate family and domestic violence leave above all such other forms of leave. It is both desirable and entirely consistent with the legislative scheme's emphasis on the role of enterprise bargaining for such matters to continue to be determined at the workplace level.

643. Further, it should not be assumed that unions and employees will not be able to achieve success in relation to family and domestic violence leave provisions in agreements.

644. Ms Jackson's statement refers to difficulties in obtaining the support of male dominated workforces for family and domestic violence leave clauses. There is scant additional evidence about this purported barrier to bargaining such matters. However, the weight that can be given to this evidence, or the degree to which it can be viewed as identifying a genuine barrier to the attaining of enterprise agreement provisions dealing with family and domestic violence leave is limited given:

- Ms Jackson conceded during cross examination that a proposal for paid domestic violence leave was never even put to employer in relation to the Hazelwood Agreement.[482] Had it been, the Company may well have acceded to it.

- Ms Jackson's evidence does not clarify the manner or extent to which the prospect of seeking such a clause was ventilated with the employees covered by that agreement.

[482] Transcript of proceedings on 16 November 2016 at PN1391.

- Ms Jackson did not personally participate in negotiations for the agreement[483]; and

- Ms Jackson fails to provide any other specific example as a basis for her opinion. It is accordingly almost impossible to test the veracity of her view.

645. Any contention that in male dominated industries it can be difficult to engage the workforce with the necessity for family and domestic violence leave is not consistent with the evidence advanced more broadly in the case. Relevantly, the evidence of Mr Doleman is that in the strongly male dominated maritime sector there is wide support for a family and domestic violence clause in enterprise agreements. In the context of bargaining he asserts that, "None of our officials have reported any pushback from male members when speaking about such clauses".[484] There is no reason to assume that the workforce in the maritime industry is an island of enlightenment that is not reflective of the views of the broader Australian workforce.

646. There is no evidence before the Commission that establishes any trend in the prevalence of family and domestic leave clauses based on the gender of workforce covered by such agreements. This analysis has not been undertaken by the ACTU. Accordingly, the Commission cannot be satisfied of the extent to which the fact that a workforce is either male or female dominated will have any bearing on bargaining outcomes relating to family and domestic violence related entitlements.

647. The Commission should be cautious about drawing any conclusion about the extent of any barriers or the extent to which developing an award clause would assist to overcome such barriers from the mere absence of family and domestic violence leave provisions in some enterprise agreements. An employer's views in relation to such matters should not be assessed in a vacuum. Many agreements already contain very generous over-award

[483] Transcript of proceedings on 16 November 2016 PN1392.

[484] Witness statement of Mick Doleman at paragraph 12.

entitlements. Of course, in such circumstances, employers may be reluctant to add additional costly entitlements. In the context of bargaining, it is often the cumulative total package of bargaining claims pursued by the relevant employees and unions that governs an employer's willingness to agree to any one particular claim.

648. Simplistic evidence from union officials suggesting, in effect, that they are faced with employer resistance to claims for family and domestic violence leave do not assist the Commission to properly understand employers' views in relation to such matters.

649. Further, there is no solid basis in the evidence to conclude that employers will be any more willing to include family and domestic violence leave in an agreement simply because it is incorporated in an underpinning award; unless they need to in order to enable it to pass the better off overall test.

650. Moreover, the absence of family and domestic violence leave provisions within enterprise agreements should not be viewed as demonstrating employer unwillingness to support employees experiencing family and domestic violence. The ACTU has advanced very little direct evidence of actual employer practices related to such matters. Their evidentiary case in this respect is largely confined to the experiences of three employees who suffered family and domestic violence. It cannot be assumed that employers only provide employees with terms and conditions through industrial instruments. Employers often provide more beneficial arrangements than applicable industrial instruments might require.

651. The ACTU contends that the development of an award entitlement will assist employees to secure family and domestic violence leave through bargaining as, "a modern award safety net will provide the framework and machinery for workers, whether represented by unions or not, a better opportunity to achieve family violence leave". In this respect the union wrongly assumes that a valid objective for the Full Bench in the context of these proceedings is improving the capacity of employees to secure family and domestic violence leave through enterprise bargaining.

652. Regardless, the evidence does not establish that there is widespread refusal to bargain over family and domestic violence leave because of the absence of such provisions in awards. Nor does it establish that employers will necessarily be more willing to reflect such provisions in agreements merely because of their presence in awards. It is trite to observe that one of the reasons that an employer may seek to bargain is to alter or even remove the application of award provisions to its enterprise.

653. The ACTU also points to the variability in agreement provisions dealing with family and domestic violence as a justification for addressing it within awards. They contend that "in the absence of a minimum safety net it is unlikely that any consistent and uniform entitlement to family violence leave will eventuate." The submission goes on to assert that "family violence leave should be an entitlement for all Australian workers and that this application is a first step in the right direction to achieving this objective."

654. Implicit in their submissions is the flawed assumption that a "one size fits all" approach to the complex challenge posed by family and domestic violence is inherently beneficial and that the awards system is capable of delivering such an outcome. The Commission should not accept either proposition.

655. The ACTU suggests that the claim will encourage greater efficiency in bargaining as parties will have a measurable minimum standard against which to assess proposals for the inclusion of family and domestic violence clauses in agreements. There is no reason to conclude that this claim can be substantiated on the evidence. It can be equally argued that such a standard is likely to complicate bargaining as employers that may be minded to deal with such matters in a substantively different manner than the award will be forced to assess how any departure from the standard award clause might be construed by the Commission in the context of the approval process.

656. The evidence establishes that several unions have developed template family and domestic violence leave clauses for enterprise agreements[485]

[485] See for example the evidence of Mr Doleman and Mr Grady.

There is no reason to conclude that the drafting of award clauses relating to such matters is particularly difficult or unachievable.

657. At paragraph 50 of its reply submission, the ACTU suggests that it is unfair and burdensome to expect employers to consider and negotiate every aspect of the employment relationship. In advocating for the granting of their claim they assert that minimum standards "liberate employers and employees alike from the need to bargain over every aspect of workplace rights and responsibilities".

658. There is no evidence to suggest that the absence of existing obligations to provide employees with paid and unpaid domestic violence leave is creating any particular burden for employers. Regardless, if accepted, the submission would lead to the proposition that every matter that arises in the context of the employment relationship should be regulated through the minimum standards. Taken to its logical conclusion, the ACTU submission would leave little or no role for enterprise bargaining. Indeed it appears to be an intent to "liberate" parties from the need to bargain; a proposition that squarely offends s.134(1)(b). The submission does not provide a sensible justification for the claim.

659. In response to the ACTU's concern that enterprise bargaining will not deliver *"uniform enforceable benefits"* and that "family violence leave should be an entitlement for all Australian workers", we make the obvious observation that the awards system does not apply to all Australian workers. Many employees are award free, and many award covered employees are subject to enterprise agreements and consequently the award has no direct application to them.

660. The dynamic between awards and enterprise agreements under the workplace relations system means that award derived entitlements are not sacrosanct or inalienable. They can be removed through bargaining. Accordingly, if employers are opposed to the proposed a new leave obligation, or a particular workforce does not value the entitlement, it is open to the parties to simply bargain them away. In such contexts the claim by the

ACTU will do little more than add to the leverage at the bargaining table in some circumstances. That is, it may raise the bar for the application of the "better off overall test" in relation to agreement approval.

661. This operation of the enterprise bargaining system represents a fundamental limitation of the utility of award derived entitlements as a means of meaningfully addressing the problem of domestic violence through an award clause. Any ACTU contention that award paid leave entitlements constitute a tertiary prevention strategy that would make a contribution to the prevention of family and domestic violence or the reduction of the cost of such violence is tempered by the limited application of awards and the existence of the bargaining system.

662. The inherent limitations within the award system call into question the utility of seeking to use it as a vehicle for the establishment of uniform enforceable benefits as advocated for by the ACTU. At best, the system will have piecemeal application.

663. The ACTU's reply submissions contend that there is no evidence that the inclusion of an award term would remove an incentive to bargain. This overlooks the evidence of numerous union officials attesting to either their personal or union's intent to pursue domestic violence leave clauses in the course of future enterprise agreement negotiations. Of course, logically, by delivering to unions or employees a desired outcome, it must to some extent remove an incentive to bargain.

664. The absence of family and domestic violence leave in non-union agreements may likely represent an absence of any widespread community expectation that employers should be required to be liable for such matters. The evidence suggests that, even amongst unions, the pursuit of family and domestic violence leave is a relatively new objective.

18. THE COST OF FAMILY AND DOMESTIC VIOLENCE

665. The ACTU deals with the cost of family and domestic violence at chapter 7 of its submissions. It relies on three reports, which were prepared by PWC, KPMG and Access Economics respectively. The gravamen of its submission is that:

- the economic cost of family and domestic violence is significant;
- that cost is borne by various stakeholders including employers and victims of domestic violence;
- the cost of implementing the leave entitlement sought by the ACTU will be minimal; and
- any such cost will be offset by productivity improvements.

666. We here seek to address each of these propositions.

18.1 The economic cost of family and domestic violence

667. A report prepared by PWC, titled "A High Price to Pay: The Economic Case for Preventing Violence against Women" (**PWC Report**) is relied upon by the ACTU and PWC in these proceedings.

668. We note at the outset that the report deals with all forms of violence against women; whether it is committed by a partner, family member or a person unknown to the victim. Accordingly, the various figures cited in the PWC Report should be treated with caution; many are not of direct relevance to the matter here before the Commission. Unless the report expressly states otherwise, it appears that the various findings relate to the cost of violence generally against women, and are not confined to "family and domestic violence" as it is to be understood in the context of these proceedings.

669. For instance, the ACTU cites page 12 of the report as stating that PWC "estimates the cost of lost productivity as a result of domestic violence as

$2.1 billion".[486] A review of the relevant section of the report itself, however, does not make clear that the estimated cost is in relation to family and domestic violence. Rather, it appears to be the estimated cost in respect of all violence against women.

670. The PWC Report has been repeatedly cited in the material before the Commission for the purposes of establishing that the annual cost to the Australian economy in 2014 – 2015 of physical violence, sexual violence or emotional abuse against women by a partner was $12.6 billion.[487] Whilst this is a higher quantum than that reported by KPMG in 2009, this is explained by PWC as follows:

> It is likely that the difference in costs between the studies are a result in changes to underlying prevalence data used in the analyses, in particular the definitions for emotional abuse and stalking used by the ABS and population growth. For the former, the most recent survey reports on emotional abuse perpetrated by current and previous partners whereas in the past it recorded only emotional abuse perpetrated by current partners. In addition, the recent survey includes a broader range of emotionally abusive behaviours and more detail about the experience which means that results in the most recent survey and past iterations are not strictly comparable.[488]

671. Relevantly, one of the cost categories is "production related", which is described as follows: (emphasis added)

> The cost of lost productivity refers to the opportunity cost to victims and perpetrators being unable to attend work due to death, illness or imprisonment. Employers themselves incur a cost in the form of leave and undertaking administration processes. It also values costs from loss of unpaid work which doesn't necessarily earn income but is still valuable to society. Examples of unpaid activities are child raising and domestic chores. … [489]

672. This cost component can be further disaggregated to include:

- The cost of victim absenteeism from paid work due to injury, emotional distress or attending court;
- The cost of victims late or leaving early from paid work;

[486] ACTU Outline of Submissions dated 1 June 2016 at paragraph 7.8.

[487] Witness Statement of Debra Eckersley dated 20 June 2016 at Annexure B, p. 11.

[488] Witness Statement of Debra Eckersley dated 20 June 2016 at Annexure B, p.11.

[489] Witness Statement of Debra Eckersley dated 20 June 2016 at Annexure B, p.12.

- The cost of perpetrators absent from work due to harassing victims;
- The cost of perpetrators absent due to legal and criminal justice processes;
- The cost of perpetrators absent due to attending family court;
- The cost of management time to process absentees;
- The cost of searching, hiring and retraining new employees; and
- The lost income of victims who should have survived.[490]

673. Self-evidently, the introduction of a paid leave entitlement to the safety net will increase 'production related' costs. This is because costs incurred by employers 'in the form of leave' and 'administration processes' will be inflated.

674. Each of the aforementioned costs might currently be dealt with by way of unpaid leave or access to paid leave entitlements that already form part of the safety net. However, the grant of the ACTU's claim would result in an additional form of paid leave that could be accessed by employees in the various circumstances described, thus increasing employers' total leave liability.

675. Further, the evidence does not establish that the opportunity cost to victims will necessarily be reduced by any measurable amount (if at all). Nor is there any evidence that might establish that costs associated with loss of unpaid work will fall. Accordingly, we contend that "production related" costs will be inflated if the ACTU claim is granted.

[490] Witness Statement of Debra Eckersley dated 20 June 2016 at Annexure B, p.47.

18.2 The cost of the ACTU's claim for employers

676. The ACTU submits that the cost of the claim for employers will be minimal on the following bases:

- The cost of administering family and domestic violence leave "will be offset by the productivity costs that employers already bear due to family violence";[491]
- The experience of employers who have already implemented family and domestic violence leave entitlements does not demonstrate that a significant number of employees will apply for this leave;[492] and
- Not all employees who experience family and domestic violence will seek to access this entitlement, even where it is available.[493]

677. We deal with each of these propositions in turn.

678. Firstly, there is neither any evidence nor compelling submissions put by the ACTU, PWC or any organisation supporting the claim that might establish that the increased costs that will be incurred by employers by virtue of the proposal will be "significantly offset by the benefits of providing paid family and domestic violence leave"[494]. Indeed the material does not establish that there will be *any* offset.

679. The nature of productivity or other specific benefits to business as a result of the introduction of family and domestic violence leave have not been identified by the ACTU. Nor has it undertaken any analysis that might provide some indication of the extent to which such benefits can be expected. The basis upon which it seeks to ground this element of its case is unclear.

[491] ACTU Outline of Submissions dated 1 June 2016 at paragraph 722.
[492] ACTU Outline of Submissions dated 1 June 2016 at paragraph 7.28.
[493] ACTU Outline of Submissions dated 1 June 2016 at paragraph 7.23.
[494] ACTU Outline of Submissions dated 1 June 2016 at paragraph 7.27.

680. The ACTU's evidentiary case does not establish that the introduction of an additional paid leave entitlement to the minimum safety net will necessarily address "lost hours of production caused by distraction, tardiness, days of leave lost and termination of employment".[495] That is to say, the material before the Commission does not allow it to find that the aforementioned factors will be remedied by the insertion of a term across the modern awards system that provides a specific leave entitlement for those experiencing family and domestic violence.

681. The submission by the ACTU presupposes that factors that presently cause an employer to incur productivity related costs are by virtue of or, at the very least, in some way associated with the absence of such an entitlement at present. However on the material before the Commission, we do not consider that such a conclusion is open to it.

682. Secondly, the ACTU relies upon "the experience of employers who have already implemented family violence leave entitlements" which, in its view "does not demonstrate that a significant number of employees will apply for this leave".[496] In so submitting, it seeks to rely almost entirely upon a jointly funded project by University of NSW and the ACTU which "investigated the implementation of 'Domestic Violence Clauses in select industrial agreements".[497] It subsequently published a report titled '*Implementation of Domestic Violence Clauses – An Employer's Perspective*' in November 2015.

683. The report is based on an online survey.[498] It is trite to observe that little is known about the conduct of that survey, including the basis upon which the sample was selected, the platform through which the survey was conducted, the manner in which the survey was set up and managed, all details pertaining to the composition of the sample and so on. The raw data

[495] Ibid at paragraph 7.25.

[496] Ibid at paragraph 7.28.

[497] Ibid at paragraph 7.29.

[498] UNSW and ACTU (November 2015) *Implementation of Domestic Violence Clauses – An Employer's Perspective* at page 4.

underpinning the findings reported by the authors are also not available. Accordingly, any apparent biases or other flaws in the conduct of the survey or its results cannot be identified. These factors necessarily go to the weight that can be attributed to the report.

684. We note that neither the specific terms of the "domestic/family violence leave clause" in operation, nor the context in which they arise (e.g. whether the clause is contained in an enterprise agreement or a policy) have been identified. For instance, the definition of family and domestic violence, however described, in the relevant clauses is not known and therefore, the potential breadth of the relevant provision is unclear. The number of days of leave afforded by the relevant clause is also not known. It can reasonably be inferred that this is a factor that would have some bearing on the survey's results as to the period of leave taken pursuant to the clause.

685. Similarly, the report does not reveal:

- whether the employers and their employees are award covered;
- whether the requests made for leave were from full-time, part-time or casual employees;
- of the organisations that received such requests, the industry in which they operate;
- the reason or purpose for which the requests for leave were made;
- whether other forms of leave were also accessed by the employees that sought family/domestic violence leave;
- the reasons for which the leave sought was granted;
- whether the grant of the leave had any impact on the employer's operations;
- the nature of any such impact; or

- any steps taken by the employer to address or alleviate those impacts.

686. The report states that respondents were asked about their *perceptions* of the amount of time off that was allocated to individuals that requested family/domestic violence leave. The report suggests that the responses provided are not reflective of a precise record made and retained by the relevant employers but rather, their observations as to the amount of time taken by employees.

687. We note that the report does not reveal the *number* of requests received by employers who identified that they had received at least one request. That is, an employer may have received requests for leave from multiple individual employees, or multiple requests from one employee over an extended period of time.

688. The average period of paid leave was 43 hours[499] which equates to 5.5 days that are 7.6 hours in length. It appears that this was the average period of paid leave taken by each individual employee that sought such leave (as opposed the average period of total leave granted by an employer to all employees who sought it). In our view, the average period of paid leave taken is not an insignificant cost or operational burden.

689. The average period of unpaid leave taken was 19 hours.[500] Whilst by its very nature, unpaid leave does not impose a direct additional cost upon employers, it nonetheless creates indirect costs that arise from relief staff and processes associated with the management of leave. As such the impact of unpaid leave upon employers should not be disregarded.

690. In our view the report demonstrates that for the employers sampled, the proportion of respondents who indicated that at least one request for leave was made in the preceding 12 months is not insignificant, nor is the period of leave taken. In our view the report is indicative of the potential implications of

[499] UNSW and ACTU (November 2015) *Implementation of Domestic Violence Clauses – An Employer's Perspective* at page 7.

[500] UNSW and ACTU (November 2015) *Implementation of Domestic Violence Clauses – An Employer's Perspective* at page 7.

the introduction of leave entitlements for certain employers. The report is not, of course, representative of award-covered employers generally and its results cannot be extrapolated for the purposes of reliably assessing whether the potential cost for employers if the ACTU's claim were granted.

691. Thirdly, the ACTU contends that "not all employees who experience family violence will seek to access this entitlement, even where it is available".[501] This submission is of little comfort or implication. It does not assist the Commission in assessing the potential impact of the claim.

692. To the extent that the ACTU seeks to rely on Dr Cox's evidence cited at paragraph 7.33 of its submissions, we refer to chapters 8 and 10 of this submission where we have addressed the relevant parts of Dr Cox's report and Dr O'Brien's attempted costings having regard to Dr Cox's report. As we there identified, there are various limitations of the data that 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.

[501] ACTU Outline of Submissions dated 1 June 2016 at paragraph 7.33.

19. SECTION 138 AND THE MODERN AWARDS OBJECTIVE

The legislative requirement

693. In exercising its modern award powers, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions taking into account each of the matters listed at ss.134(1)(a) – (h).

694. Additionally, the critical principle to flow from the operation of s.138 is that a modern award can *only* include such terms as are "necessary" to achieve the modern awards objective. The Commission's power to insert award terms is significantly limited in this way.

695. The requirement imposed by s.138 is an ongoing one. That is, at any time, an award must only include terms that are necessary in the relevant sense. It is not a legislative precondition that arises only at the time that a variation to an award is sought.

696. We also note that each award, considered in isolation, must satisfy s.138. The statute requires that the Commission ensure that each award includes terms only to the extent necessary to ensure the award, together with the NES, provides a fair and relevant minimum safety net. This necessarily requires an award-by-award analysis.

697. The need for this approach is supported by s.156(5), which requires that the Commission review each award in its own right. We again note the following observations made by the Commission in its *Preliminary Jurisdictional Issues Decision* (emphasis added):

> [33] There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. <u>The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.</u>
>
> [34] Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may

be *no one set* of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.[502]

698. Also, the frequently cited passage from Justice Tracey's decision in Shop, Distributive and Allied Employees Association v National Retail Association (No 2) was adopted by the Full Bench in its Preliminary Jurisdictional Issues Decision. It was thus accepted that:

> "… a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action."

699. The employer parties in these proceedings do not bear any onus to demonstrate that the claims will result in increased employment costs or undermine productivity in particular industries. No adverse inference can or should be drawn from the absence of evidence called by employer parties with respect to a particular award or from the absence of evidence that establishes that the claim will affect all or most employers in an industry.

700. The conduct of the Review differs from an inter-party dispute. Those responding to a claim do not bear an onus. Rather, it is for the proponent of a claim to establish that the variation proposed is "necessary" in order to ensure that an award is achieving the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions. In determining whether a proponent has in fact established as much, the Commission will have regard to material before it that addresses the various elements of the modern awards objective, including those that go to employment costs, the regulatory burden, flexible work practices and productivity. These considerations are both microeconomic and macroeconomic; they require evaluation with respect to the practices of individual businesses as well as industry at large.

[502] *4 yearly review of modern awards: Preliminary jurisdictional issues* [2014] FWCFB 1788 at [33] – [34].

701. As the Full Bench stated in the *Preliminary Jurisdictional Issues Decision* (emphasis added):

> … the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations.[503]

702. It is therefore for the proponent to overcome the legislative threshold established by ss.138 and 134(1), which includes a consideration of the impact upon individual businesses and industry at large.

703. It must also be understood that the ACTU has elected to develop its claim and run its case in the manner that is now presented before the Commission, knowing that the relevant statutory criteria must be satisfied in order for its claim to succeed. Whilst we acknowledge and understand that the nature of this Review is such that the Commission is not bound by the terms of the application made by a proponent, notions of fairness dictate that the Commission should not determine to vary the awards with an alternate clause absent respondent parties being granted an opportunity to consider the new proposal.

704. The case mounted by Ai Group and other interested parties that oppose the ACTU's claim is necessarily in response to the proposal put forward and the submissions and evidence that it has filed. Respondent parties do not bear an onus to pre-emptively challenge or address potential derivatives of the clause proposed by the ACTU or the Commission, whether they be more expansive or otherwise. Should any alternate or additional proposal subsequently be advanced by the ACTU or the Commission, it is our respectful submission that parties opposing the claim must be granted an opportunity to respond, including the filing of further submissions and any evidence.

[503] Ibid at [60].

The ACTU's claim

705. An evaluation as to whether the proposed provision is "necessary" in the relevant sense must be undertaken in light of the manner in which the clause will apply to employers and employees. The interaction between the various limbs of the clause, the effect of each individual element of the provision, and the cumulative effect of elements combined must be properly understood. Earlier in this submission, we have given careful consideration to each aspect of the ACTU's proposal and set out our understanding of its operation and the concerns that arise from it.

706. The ACTU's proposal defines 'family and domestic violence' in very broad terms. Whilst general discourse regarding family and domestic violence often focuses on serious instances of physical violence, sexual offences, stalking, intimidation and/or financial control, it is important to appreciate that the definition proposed by the ACTU is capable of encapsulating an expansive spectrum of behaviour, from the most serious criminal offences to behaviour that is of less severity and implication.

707. In making this submission, we do not of course suggest that any behaviour that is violent, threatening or abusive in nature should be condoned. However, we consider it uncontroversial that there are degrees of such behaviour. The question here before the Commission is whether it is necessary for the purposes of ensuring a fair and relevant minimum safety net to include the term sought by the ACTU in circumstances where it could apply to employees who experience behaviour at either end of the spectrum.

708. Further, the violent, threatening or abusive behaviour may have occurred at any time, including whilst the employee was a child. The provision is absent the requirement for any temporal connection between the violence and the taking of leave. 10 days of paid leave could be taken, year after year, in respect of an incidence of domestic violence that occurred in the distant past.

709. It is also relevant to note that the provision does not require any degree of repetition or pattern. It is not confined in its application to circumstances in which there is *"a systematic pattern of power and control"*, which is described by Dr Flood as *"domestic violence in the 'strong' or 'proper' sense".* [504] Any isolated incident is sufficient to trigger its application. Nor does the definition require that the alleged behaviour has any impact upon the employee. The effect of the definition sought, when considered with clause X.2.1, is to entitle an employee to paid leave where the employee is experiencing abusive behaviour in the form of, for instance, an abusive text message but the employee suffered no implication resulting from it. In this way, the provision is far reaching.

710. Despite the ACTU's recent amendments to its claim, there is then the potential application of the provision to those who engage in violent, threatening or abusive behaviour as described at clause X.1. That is, they are perpetrators of family and domestic violence as defined by the provision sought.

711. One of the difficulties to arise from the gendered approach adopted by the ACTU in mounting its claim is that it overlooks certain complexities associated with the incidence of family and domestic violence. The material before the Commission does not grapple with the prospect that an employee might be a "victim" of family and domestic violence as well as a "perpetrator". That is to say, whilst an employee may be subject to violent, threatening or abusive behaviour, the employee may also have engaged in the very same behaviour.

712. The purposes for which the leave can be taken are not confined to circumstances that arise from the employee's experience as a victim. Accordingly, a male perpetrator of family and domestic violence may need to attend court proceedings to defend an application for an apprehended domestic violence order and related criminal charges. If that employee alleges that he was also "subjected to" family and domestic violence (by

[504] Statement of Dr Michael Flood dated 26 May 2016 at annexure MF-3, paragraph 2.6.

virtue of alleged violent, threatening or abusive behaviour directed towards him by his female partner in response to his actions), he is entitled to paid leave to attend those legal proceedings.

713. Consequently, the Commission is here required to consider whether, having regard to the relevant statutory framework, it is *fair* to impose an additional leave liability and operational consequences upon employers so as to enable perpetrators of family and domestic violence to access paid and unpaid leave. When considered in this context, the ACTU's proposal is obviously out of step with community expectations.

714. As we have earlier set out, the provision applies with equal force to all full-time, part-time and casual employees. It does not make any distinction as to the amount of leave to which employees are entitled, resulting in a casual employee having access to 10 days of paid leave after performing just one, two hour shift. A part-time employee engaged to work two days a week is effectively entitled to the equivalent of five weeks of paid family and domestic violence leave upon engagement.

715. The potential imposition created by an unpaid leave entitlement should not be overlooked, particularly where it applies in the manner proposed by the ACTU. Once the paid leave entitlement has been exhausted, clause X.2.3 effectively provides an employee with an unlimited ongoing entitlement to unpaid leave. For the reasons we have earlier specified, the clause would appear to allow an employee to unilaterally take unpaid leave "on each occasion" that the employee determines that he or she seeks to be absent from work. This, coupled with the broad application of the clause and the absence of any rigour as to the circumstances in which the leave might be accessed is very problematic.

716. The provision is designed to operate wholly at the employee's discretion. It effectively provides certain employees with an absolute right to take leave. The leave can be taken at any time, for any period of time. The provision does not, either expressly or by its very terms, temper these aspects of the clause. The provision does not require that the employee's absence from

work is necessary. The provision does not require that any consideration be given to the operations of the business or the employer's needs when considering whether the leave is accessed and if so, the timing and duration of the leave. The provision does not enable an employer any discretion or ability to manage the absence (or absences) of an employee (or employees) pursuant to the proposed clause. The provision gives primacy to the employee's needs or desires without any regard for the employer's operations.

717. The provision sought would entitle a part-time employee to access paid leave for the purposes of attending a Centrelink office regarding issues associated with their experience of family and domestic violence. However the need to do so may not be time sensitive and it could be satisfied by the employee attending during a day upon which the employee is not required to work. Under the proposed provision, however, the employee's absence from work need not be necessary and the provision places no obligation (expressly or by its very operation) upon employees to take steps that would lessen the cost and disruption faced by their employer as a result of their absence. Neither, of course, does the employer have any discretion to deny access to the leave entitlement.

718. The broad application of the clause, the manner in which it would operate and the sheer extent of the entitlement afforded by it should not be understated and, notwithstanding the gravity of the context in which it arises, must be balanced against those considerations listed in s.134(1) of the Act that go to the impact on business, which we later address.

719. For the reasons that follow, the ACTU has failed to mount a case that establishes that the provision sought is necessary to ensure that each of the awards that are the subject of the claim before the Commission meets the modern awards objective.

19.1 A fair safety net

720. The notion of "fairness" as contained in s.134(1) of the FW Act suggests the need to finely balance competing interests and considerations in order to establish a safety net that is reasonable, just and equitable.

721. Consideration as to whether the safety net is "fair" is not limited to the rights and interests of employees. Rather, it must be also assessed from the perspective of employers. This was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues:

> [109] … It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide 'a *fair* and relevant minimum safety set of terms and conditions'. Fairness is to be assessed from the perspective of both employers and employees.[505]

722. A similar point was made by Justice Giudice in Shop, Distributive and Allied Employees' Association – Victorian Shops Interim (Roping-in No 1) Award 2003, in respect of the provision in the former Workplace Relations Act 1996 which required the AIRC to "ensure a safety net of fair minimum wages and conditions of employment …":

> In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups …[506]

723. The ACTU's claim appears to hinge primarily on broad ideals of fairness. The case mounted by it calls upon the Commission to determine whether the safety net, as it currently operates, provides a *fair* safety net to employees experiencing family and domestic violence and, proceeding on the basis that this is not so, it asks the Commission to find that it is necessary to include the provision it has proposed in all modern awards in order to achieve this.

724. A key element of the ACTU's broad appeal to notions of fairness is their implicit contention that the burden or cost of family and domestic violence

[505] *4 yearly review of modern awards* [2015] FWCFB 3177 at [109].

[506] *Re Shop, Distributive and Allied Employees' Association* (2003) 135 IR 1 at [11].

incurred by victims should be shared by employers. At paragraph 1.5 the ACTU contends:

> The modern award safety net has evolved on the basis of whether particular conditions of employment are a necessary or desirable minimum for workers and whether such conditions are achievable given the impact on employers and the economy generally. The ACTU believes that victims shoulder too great a proportion of the burden and cost of family violence, a cost that is shared by government, the community and employers. A minimum safety net of family and domestic violence leave is necessary to balance the share of the burden.

725. In response, it is firstly necessary to clarify that the modern award safety net has not "evolved" in the manner suggested. The ACTU appears to have completely forgotten the approach adopted under the Part 10A award modernisation process and instead seek to suggest that the modern award safety net was a product of a far more organic or piecemeal evolution.

726. Regardless, the reference to a "desirable" minimum for workers is entirely inappropriate in the current legislative framework. Awards may only contain terms that are *necessary* to achieve the modern awards objective.[507] Pursuant to s.134(1), certain matters must be taken into account in ensuring modern awards constitute a "fair and relevant minimum safety net". Suffice to say that this includes far more than an assessment of what is, *"…achievable given the impact on employers and the economy more generally."*[508]

727. Crucially, as already identified, the concept of fairness contemplated in the context of s.134(1) is to be considered from the perspective of both employers and employees. It may easily be accepted that it is not fair that employees suffer the various negative impacts that flow from family and domestic violence. This includes the cost of being unable to work. However, it does not follow that is fair to simplistically seek to shift an element of the burden or cost flowing from such unacceptable and in some instances criminal conduct to employers.

[507] Section 138.

[508] Paragraph 1.5.

728. The ACTU believes that victims shoulder too much of the burden and cost of family and domestic violence.[509] This is an understandable concern. However, it should not be accepted that it is fair to transfer such costs to employers in the manner proposed by the ACTU.

729. A fundamental difficulty with this proposition is that it simply assumes that it is appropriate that *employers* meet the cost of additional paid leave. This is inherently unfair given that family and domestic violence is a problem that is often, if not almost always, largely beyond an employer's direct control. It is not fair that an employer of an employee experiencing family and domestic violence incur further additional costs as a consequence of what is a broader societal problem.

730. Even if there are policy grounds for ensuring that persons who are the victims of family or domestic violence receive support in the form of paid leave, it does not follow that employers should provide such payment. Although the circumstances are of course very different, obvious conceptual parallels can be drawn between paid parental leave and paid family and domestic violence. In the context of parental leave it might be considered "unfair" that women suffer a loss of income as a consequence of the necessity of their absence from work accompanying the birth of a child. Nonetheless, the safety net does not provide that such leave must be paid for by the employer. However, the Commonwealth Government has implemented a system of publically funded paid parental leave. One of the key policy arguments which supported public funding of paid parental leave was to ensure that pregnant workers were not more costly for employers to hire and retain than other workers.

731. One of the primary arguments put by the ACTU is that it is *unfair* that employees experiencing family and domestic violence are compelled to access pre-existing leave entitlements such as annual leave, personal/carer's leave and long service leave.

[509] Paragraph 1.5.

732. Later in this section of our submission we deal with the nature of the minimum safety net. The leave entitlements found in the safety net have predominantly been developed by Parliament and are crafted in appropriately broad terms. For instance, personal/carer's leave can be taken if an employee is not fit for work because of any personal illness or injury affecting them. The Act does not confine the application of s.97(a) by reference to illness or injury that is caused in a specific way. That is, the Act does not regulate access to personal/carer's leave by limiting the circumstances in which the illness or injury was inflicted. As such it is sufficiently broad to cover some circumstances faced by victims of domestic violence.

733. Family and domestic violence is an issue that has prevailed in society since a time well before the commencement of the Fair Work regime. That the potential impact of family and domestic violence might include personal illness or injury that renders an employee unfit for work is not new. Despite this, when crafting the entitlement to personal/carer's leave in the NES and when determining the quantum of the leave that could be accessed, Parliament considered that the relevant provisions struck an appropriate balance.

734. The issue of fairness should also be considered in the context of other circumstances in which an employee may be required to access their personal/carer's leave to an extent that this ultimately results in the exhaustion of the entitlement. For instance, a terminal illness may result in an employee requiring more than 10 days of personal/carer's leave. Similarly, if an employee's child is seriously ill such that they require care and support, this too may necessitate 10 or more days of leave. The ACTU's claim appears to suggest that the unfairness facing an employee experiencing family and domestic violence is different in nature or perhaps more acute than for that of those in the above circumstances; a proposition that, in our view is not made out and should not be accepted.

735. Similar arguments are also made with reference to annual leave. The ACTU submits that accessing annual leave is inconsistent with its purpose, that being rest and recreation. The relevance of this observation is somewhat undermined by the changes in the regulation of leave generally since the early evolution of annual leave as an industrial standard.

736. Even accepting that historically the purpose underpinning the provision of annual leave entitlements was to ensure that employees were able to be absent from work for that purpose, the circumstances in which annual leave can or must be accessed are now considerably less stringent than under previous regimes.

737. The Act does not prescribe any limitations upon the circumstances in which annual leave can be taken. Nor does it impose any requirements to take annual leave within certain prescribed timeframes. Indeed it does not even mandate that leave must be taken. Rather, annual leave accumulates throughout the duration of an employee's service with the employer and is ultimately cashed out upon termination of employment if it remains untaken. In this Review, the vast majority of modern awards have been varied to allow the cashing out of annual leave during employment and the taking of leave in advance of its accrual.

738. Whilst the taking of annual leave for its originally intended purpose might previously have been deemed sacrosanct, the current legislation has improved an employee's ability to take or otherwise benefit from annual leave entitlements. The importance of retaining such leave for its arguably historically intended purpose is also somewhat modified by the introduction or enhancement of other specific leave entitlements such as personal/carer's leave and compassionate leave.

739. Considerations pertaining to the potential unfairness of the particular clause proposed and the manner in which the provision would operate must also be weighted by the Commission. The proposed clause does not balance the needs and interests of employees and employers. We make this submission particularly in light of the very broad application of the clause and the

problematic way in which it would operate. When consideration is given to the many circumstances in which the provision could be accessed, the absence of any obligation on an employee or discretion of an employer as to how or when the leave is accessed, it has the potential to operate in ways that are particularly unfair to employers. We have previously provided some examples that are illustrative of this possibility.

19.2 A relevant safety net

740. We do not consider that the proposed clause can form part of a relevant safety net, when nowadays, for valid reasons, the main types of leave are dealt with in legislation, not in awards. Under the current workplace relations system, it is the role of Parliament to determine whether a major new category of leave should be implemented.

741. Also, to the extent that the proposed clause provides for an entitlement to leave to perpetrators of family and domestic violence, we do not consider that it can form part of a relevant safety net. The provision of such an entitlement to an individual who has engaged in behaviour that is threatening, violent or abusive and potentially criminal in nature is inconsistent with community expectations and societal norms. Indeed, this is reflected in the policy position of the ACTU as set out in its submissions.[510]

19.3 A minimum safety net

742. The modern awards system, along with the NES, provides a *minimum* set of terms and conditions. That is, they represent the floor of entitlements that must be afforded to all employers and employees.

743. The very notion of a minimum safety net suggests that the relevant set of terms and conditions represent the very basic, essential rights and protections that must be afforded to all employees and employers. The concept of a minimum safety net does not contemplate the introduction of additional benefits that, as we demonstrate below, overlap considerably with

[510] ACTU Outline of Submissions dated 1 June 2016 at paragraph 2.13.

pre-existing entitlements in the absence of there being any clear justification for such an expansion.

744. It is not the role of the safety net or the Commission as the arbitrator of part of that safety net, to mandate terms and conditions that are designed to advance Australia's standing internationally, or to promote over-award outcomes. Rather, a minimum safety net must be such in its design that it can reasonably be applied to the full gamut of employees and businesses (by reference to size, industry, nature of operations, composition of workforce and so on) despite being uniform in its terms.

745. The restraint shown by the Legislature in providing for paid leave entitlements that are limited to situations in which an employee cannot attend work by virtue of certain specific personal circumstances, in addition to a single generalised entitlement to annual leave, is reflective of this. The absence of prescriptive obligations or restrictions as well as the ability to supplement or to some extent, deviate from them by way of modern award or enterprise agreement terms is also reflective of an implicit recognition of the role of the safety net. This has been furthered by the general absence of modern award terms that create new categories of leave.

746. In our view, the grant of the ACTU's claim would represent an unwarranted and inappropriate expansion of the minimum safety net. In effect, it would introduce a new category of leave that could be accessed by any award covered employee in a very broad range of circumstances that may be accommodated by way of pre-existing elements of the safety net. In addition, the ability of employers to comply with and accommodate various elements of the proposed clause, and the impact that it would have on their operations, would vary considerably. It cannot be assumed that the provision sought can be implemented by all award covered employers without significant additional costs and operational implications.

747. It is of course relevant to consider the potential implications that the ACTU's claim might have upon the initiatives taken by individual employers to address family and domestic violence as a broader social issue, some

examples of which we have highlighted earlier in this submission. Further, a range of benefits and entitlements are afforded by employers to victims of domestic violence leave, often in the form of enterprise agreement provisions or workplace policies.

748. We consider that the introduction of a significant new leave liability to the minimum safety net will likely discourage employers from developing specific and innovative ways in which it can support victims of family and domestic violence that are tailored to the needs of its business and its workforce. This is an undesirable outcome that should not be encouraged by the Commission.

749. By way of example, the evidence of Marilyn Beaumont, relied upon by the ACTU, goes to a training program implemented at Linfox, which employs a predominantly male workforce. The program was intended to "promote gender equality and non-violent norms".[511] The makeup of Linfox's workforce may have encouraged it to offer a training program of this nature to its employees. It can reasonably be expected, however, that if the safety net were amended to include the provision proposed by the ACTU, noting that it is potentially so broad that it may apply to employees who are perpetrators of violent or abusive behaviour, employers may be less inclined to expending resources that are directed towards formulating and executing enterprise specific initiatives that are potentially of greater relevance and value to its workforce.

750. The ACTU refers repeatedly in its submission to the need for a "whole of community" approach to tackling family and domestic violence. It would appear to us that allowing employers the scope and the resources to discover and adopt customised solutions to assisting victims of domestic violence as well as broader approaches that have the potential to gradually permeate community attitudes is consistent that the ACTU's calls. Indeed activities such as the aforementioned training program or the White Ribbon

[511] Witness Statement of Marilyn Beaumont at paragraph 31.

accreditation program that Mr Doleman speaks of[512] constitute forms of "primary prevention" and, to the extent that businesses have the capacity to adopt them, they are worthwhile initiatives.

751. The provision proposed by the ACTU is not appropriate for inclusion in a minimum safety net. Rather, for the various reasons we have earlier identified, the matter is one that should more appropriately be left to individual enterprises. The introduction of a "one size fits all" award term is likely to have an adverse effect on the progress that might otherwise be made through employers adopting creative and innovative ways to assist victims of domestic violence as well as to address the broader underpinning issues associated with the causes of family and domestic violence.

19.4 The National Employment Standards

752. An assessment as to whether a provision is necessary to achieve the modern awards objective necessarily requires that consideration be given to the NES. This is because s.134(1) requires the Commission to ensure that modern awards, *together with the NES*, provide a fair and relevant minimum safety net. For the purposes of s.138, the terms of an award are not to be considered in isolation from the FW Act.

753. The NES represent the minimum safety net that applies to all national system employees and employers, both award free and award covered. It is a set of terms and conditions that have been considered sufficient and appropriate by the Legislature. The relevant provisions of the Act are designed to balance the needs of the employees whilst affording employers the necessary rights and flexibilities. It represents a carefully balanced set of standards that have been crafted for the purposes of ensuring that employees are adequately protected, whilst bearing in mind the operational realities that face businesses.

754. Earlier in this submission, we have identified the various NES entitlements that, in different ways, allow employees experiencing family and domestic

[512] Witness Statement of Mick Doleman dated 27 May 2016 at paragraph 8.

violence the ability to access leave or other forms of flexibility. This includes annual leave, paid personal/carer's leave, unpaid carer's leave and the right to request flexible working arrangements.

755. There is some evidence (primarily anecdotal in nature) that might suggest that in certain limited circumstances, the leave accruals of some employees are exhausted by virtue of their experience of family and domestic violence. However, there is certainly no evidence that demonstrates that this is the case in all or even most situations. It is relevant to note that both annual leave and personal/carer's leave accumulate from year to year and so it can reasonably be inferred that some employees experiencing family and domestic violence may have access to more than the annual entitlement afforded by the statute. It is also relevant to note that virtually all modern awards now enable an employee to take annual leave in advance of its accrual, by agreement with their employer.[513]

756. There is limited if any evidence before the Commission that might suggest that many of the circumstances that would render an employee eligible to access family and domestic violence leave under the ACTU's proposed clause cannot effectively be managed by way of flexible working arrangements pursuant to s.65(1). There is certainly no evidence that where such requests have been made, they have unreasonably been refused, contrary to s.65(5).

757. It our contention that the aforementioned elements of the NES ensure that modern awards are achieving their legislated objective. The ACTU has not advanced material that seriously contradicts this proposition.

[513] *4 yearly review of modern awards – Annual leave* [2016] FWCFB 3177 at [299] – [300].

19.5 Relative living standards and needs of the low paid (s.134(1)(a))

758. The *Annual Wage Review 2014 – 2015* decision dealt with the interpretation of s.134(1)(a) (emphasis added):

> [310] The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant.
>
> [311] The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms.[514]

759. The term "low paid" has a particular meaning, as recognised by the Commission in its Annual Wage Review decisions:

> [362] There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach.[515]

760. The ACTU has not undertaken the analysis required by s.134(1)(a). Indeed it has not sought to address this element of s.134(1)(a) in any meaningful way. It would appear that the ACTU does not seek to rely on it and accordingly, we consider it sufficient to note for present purposes that the clause it has proposed would apply to all employees, regardless of whether they are "low paid". To the extent that the ACTU seeks to argue that all award-reliant employees are necessarily low paid, we draw attention to the aforementioned decisions which highlight that quite clearly, this is not the case.

[514] [2015] FWCFB 3500 at [310] – [311].

[515] *Annual Wage Review 2012 – 2013* [2013] FWCFB 4000. See also *Annual Wage Review 2013 - 2014* [2014] FWCFB 3500 at [310].

19.6 The need to encourage collective bargaining (s.134(1)(b))

761. The submissions and the evidence of the ACTU complain of difficulties faced by the union movement in achieving the inclusion of provisions in enterprise agreements that provide for leave entitlements of the nature here sought.

762. Any difficulty securing enterprise agreement provisions relating to a particular above award entitlements does not establish that such an entitlement is a necessary element of a fair and relevant minimum safety net as contemplated by s.134(1). It is not the role of modern awards to assist one party to obtain a better or particular outcome through enterprise bargaining. Indeed this is contrary to the very rationale for enterprise bargaining, which is instead premised on the desirability of setting terms and conditions at the enterprise level.

763. In considering whether family and domestic violence leave constitutes a *necessary* award term, the Full Bench must instead be primarily guided by the modern awards objective and relevantly, pursuant to s.134(1)(b), the need to encourage enterprise bargaining.

764. Section 134(1)(b) does not speak to the need to enhance the bargaining position of either party. Rather, it dictates that the Commission must have regard to the policy objective of promoting enterprise bargaining. Accordingly, the principal enterprise bargaining related consideration of relevance to whether the claim should be granted must be whether it will encourage parties to engage in enterprise bargaining.

765. The inclusion of a family and domestic violence leave provision in awards would remove an incentive for employees and unions to engage in enterprise bargaining by delivering, at least in part, an outcome that the ACTU material suggests is strongly desired by at least some unions and employees. Having regard to s.134(1)(b) this is a matter that must weigh against granting the claim.

766. The inclusion of a family and domestic violence leave clause in awards will be a factor that may, to some extent, discourage employers from engaging in enterprise bargaining by leaving less room to bargain over such matters and by raising the threshold for the application of the better off overall test.

767. We acknowledge the ACTU's observation that there are a range of "supportive elements" relating to domestic violence included in enterprise agreements and that they intend to "leave space" for these entitlements to be determined at the workplace level. However, if it is accepted that such matters are appropriately dealt with at the workplace level it is unclear why a different approach should be adopted in relation to leave. A "one size fits all" approach to this issue should be similarly avoided.

768. We also observe that there is a risk that if awards were to deal with family and domestic violence related matters, some employers may form the view that such treatment represents a fair and relevant standard and consequently cease to provide any additional or separate entitlements. That is, the award clause could come to represent a "ceiling" on employee entitlements.

769. The grant of the ACTU's claim is contrary to the need to encourage enterprise bargaining.

19.7 The need to promote social inclusion through increased workforce participation (s.134(1)(c))

770. In a recent decision of the Commission, a Full Bench explained the meaning of s.134(1)(c) of the FW Act in the following terms: (emphasis added)

> [166] … The social inclusion referred to in this context is employment. In other words, s.134(1)(c) requires the Commission to take into account the need to promote increased employment.[516]

771. Accordingly, s.134(1)(c) requires the Commission to have regard to the need to improve overall labour force participation rates.

[516] *4 yearly review of modern awards – Common issue – Award Flexibility* [2015] FWCFB 4466 at [166].

772. The ACTU submits that this consideration is "at the heart of the ACTU's application".[517] It argues that "women who have experienced domestic violence are associated with a more disrupted work history, casual and unstable employment"[518] and that "workplace support logically leads to greater retention of women in employment"[519].

773. We note at the outset that s.134(1)(c) does not contemplate that consideration be given to the basis upon which employees are engaged. The engagement of employees experiencing family and domestic violence on a casual basis rather than a permanent basis is not relevant to this statutory provision.

774. In any event, the ACTU acknowledges that there is no established causal link between the experience of family and domestic violence and casual employment.[520] In our view, to the extent that there is any correlation between the two, this can readily be explained by the fact that the ACTU's evidence establishes that a significant proportion of employee's experiencing family and domestic violence are women, and a significant proportion of employees engaged on a casual basis are also women; a contention with which we do not anticipate that the ACTU will quibble given its recent arguments to this effect as part of its campaign to introduce casual conversion provisions across the modern awards system. Furthermore, as was noted by Ms Bignold in relation to McAuley Works:

> Women presented with a variety of past experiences of employment and levels of education or qualifications. In our experience, quite a few women wanted to trial casual work to see how they would manage with the competing needs of children and ongoing health issues.[521]

775. The ACTU's contentions regarding the employment status of women experiencing family and domestic violence are directly contradicted by the

[517] ACTU Outline of Submissions dated 1 June 2016 at paragraph 5.70.

[518] ACTU Outline of Submissions dated 1 June 2016 at paragraph 10.27.

[519] ACTU Outline of Submissions dated 1 June 2016 at paragraph 10.28.

[520] ACTU Outline of Submissions dated 1 June 2016 at paragraph 4.3.

[521] Witness statement of Jocelyn Bignold at paragraph 41.

evidence of its own expert witness. As we have earlier identified Dr Cox's report reveals that there is no statistically significant variation between:

- the proportion of employed women and the proportion of unemployed women (including women not in the workforce) who experienced male cohabiting partner violence;[522]

- the proportion of employed women and the proportion of unemployed women (including women not in the workforce) who experienced intimate partner violence;[523]

- the proportion of employed women, the proportion of unemployed women, and the proportion of all women nationally who experienced cohabiting partner violence;[524] and

- the proportion of employed women, the proportion of unemployed women, and the proportion of all women nationally who experienced intimate partner violence.[525]

776. This analysis suggests that neither any correlation nor causal relationship is established by the PSS between the employment status of a woman and the prevalence of male cohabiting partner violence or intimate partner violence.

777. Furthermore, the ACTU relies on the PSS to assert that "around 62 per cent of women who experienced family and domestic violence in the last 12 months were in paid work".[526] That is, the majority of women who experienced family or domestic violence were employed. This statistic must be read in the context of data that reveals female participation in the workforce generally. The August 2016 Labour Force data released by the ABS reveals that 55.8% of all females aged 15 years and over are

[522] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraph 7.8.
[523] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraph 7.9.
[524] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraph 7.10.
[525] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraph 7.10.
[526] ACTU Outline of Submissions dated 1 June 2016 at paragraph 4.2.

employed.[527] Accordingly, the proportion of women experiencing family and domestic violence who are employed is greater than the proportion of all women who are employed. This data supports the proposition that there is no clear correlation between female workforce participation and the experience of family and domestic violence.

778. Apart from some anecdotal evidence, there is no material before the Commission that establishes that the experience of family and domestic violence precludes employees from participating in the workforce.

779. Nor is there a sufficient evidentiary basis for the proposition that the inclusion of the clause sought will *increase* workforce participation. Given that some employers presently afford their employees leave entitlements by way of enterprise agreements or otherwise, it would be open to the ACTU to call evidence that goes to the factors flowing from the operation of such an entitlement that assist employees experiencing family and domestic violence to gain and/or retain employment. It has not, however, done so.

780. To the extent that it is alleged that employees are unfairly dismissed or are the subject of adverse action, we refer to an earlier section of our submission in which we have dealt with the effectiveness of the relevant statutory provisions that afford such employees appropriate protections.

781. In our view, the case mounted by the ACTU does not establish that the provision sought will promote social inclusion through increased workforce participation.

19.8 The need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d))

782. Virtually any form of leave taken by employees can have an adverse impact upon the need to promote flexible modern work practices and the efficient and productive performance of work. This is because staff absences have an

[527] ABS 6202.0 – Labour Force, Australia, August 2016.

impact not only on employment costs incurred by an employer, but can also cause disruption to an employer's operations.

783. In some circumstances, it may not be possible for an employer to engage relief staff to cover the absent employee. To the extent that this adversely affects the efficiency with which the relevant work is performed in the employee's absence or the indeed whether the work can be performed at all, the creation of a new form of leave is inconsistent with s.134(1)(d).

784. However, an employer's access to relief staff is not necessarily the end of the matter. For instance, if the replacement employee does not possess the necessary skills, knowledge or experience to undertake the work ordinarily performed by the absent employee, this self-evidently will undermine the need to promote flexible modern work practices and the efficient and productive performance of work.

785. The difficulties arising from staff absences are particularly acute in the context of current proceedings given that the clause does not afford employers any discretion to manage the taking of the leave. Paid or unpaid leave could be taken by an employee with little or no notice, without any engagement between the employee and the employer as to how or when the leave might be accessed, having regard to the employee's personal circumstances, the purpose for which the leave is to be taken and the employer's operational requirements. We have previously distinguished the operation of the proposed clause to personal/carer's leave and compassionate leave, which are similarly non-discretionary. The justification that might there apply to the taking of those forms of leave do not necessarily arise in the context of these proceedings, given the very vast range of circumstances in which the leave might be accessed.

19.9 The Need to Provide Additional Remuneration for Employees Working in Various Circumstances (s.134(1)(da))

786. This is a neutral consideration in this matter.

19.10 The Principle of Equal Remuneration for Work of Equal or Comparable Value (s.134(1)(e))

787. The ACTU submits that s.134(1)(e) "has some work to do and should be given due weight".[528]

788. The notion of "equal remuneration for work of equal or comparable value" is defined by the Act. The phrase appears in s.12 of the Act (the dictionary), with a reference to s.302(2). Section 302 falls within Division 2 of Part 2-7 (Equal Remuneration) of the Act. Section 302(2) states:

> ***Equal remuneration for work of equal or comparable value*** means equal remuneration for men and women workers for work of equal or comparable value.

789. Consideration given to whether an award provides equal remuneration for work of equal or comparable value requires an assessment of whether men and women workers receive equal remuneration for work of equal or comparable value.

790. The ACTU has not undertaken the requisite analysis necessary to establish that s.134(1)(e) is of any relevance to these proceedings. That is, the ACTU has not established that certain female workers are not receiving equal remuneration for work of equal or comparable value performed by male workers. As the Commission is of course aware, the equal remuneration principle has been the subject of specific proceedings that were of significant size and magnitude, and involved large evidentiary cases. The application of the provision is inherently complex. It requires careful analysis and detailed consideration of the identified group of employees. Self-evidently, the ACTU has not done so for the purposes of these proceedings.

[528] ACTU Outline of Reply Submissions dated 5 October 2016 at paragraph 117.

19.11 The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f))

791. Perhaps one of the greatest difficulties to arise from the ACTU's case is that the material presented does not enable the Commission to properly assess the potential impact of the claim.

792. Fundamental to understanding the extent to which the proposed clause may be utilised, is identifying the proportion of employees who are experiencing family and domestic violence, as defined by the ACTU. This material is available, to some extent, in a piecemeal manner. That is to say, there is various data presented by the ACTU that goes to different forms of violent, threatening or abusive behaviour perpetrated by various persons that may satisfy the definition at clause X.1. However, consistent with Dr O'Brien's evidence, this information does not enable the Commission to determine the number of employees who might in fact be eligible to take leave pursuant to the proposed clause. Notably, there is no evidence in relation to the prevalence of certain forms of abuse, such as economic abuse, which is apparently notoriously difficult to identify.

793. Little is known about the extent to which those experiencing family and domestic violence may in fact seek to access the leave. We have earlier dealt with the ACTU's treatment of this issue and Dr O'Brien's costings. As we there set out, the material does not enable the Commission to make any clear or reliable assessment in this regard. This difficulty is compounded by the fact that the effect of introducing the entitlement across the modern awards system, on the extent to which employees seek to take such leave, is also not known. Nor can we identify the cost implications that will arise from such employees no longer accessing other forms of leave, such as annual leave or personal/carer's leave.

794. These difficulties are compounded by the gendered approach adopted by the ACTU in these proceedings. There is little probative evidence that goes to the prevalence of males being subjected to family and domestic violence

as defined, the precise consequences that can arise from that violence, the impact that is felt, the extent to which those impacts necessitate an absence from work, the purposes for which such leave is sought and so on.

795. The ACTU's evidentiary case does not reveal current practices adopted by employers in response to requests for leave from employees experiencing family and domestic violence. The evidentiary case does not, for instance, provide any indication of the purposes for which employees experiencing family and domestic violence access leave and the frequency with which they do so. That is to say, is leave primarily sought due to personal illness or injury resulting from family and domestic violence? If so, is personal/carer's leave being accessed? If so, what impact does this have on the employee's leave balance? To what extent does this result in employees leave balances in fact being exhausted? Are employees accessing annual leave in the alternate? If so, are requests for annual leave in such circumstances typically granted or declined? To what extent are annual leave balances in fact being depleted as a result (if at all)? To what extent can the needs of employees experiencing family and domestic violence be facilitated through flexible working arrangements? Are such arrangements sought? If so, are they effective? If they are being declined, on what basis?

796. The current practices of employers in dealing with employees experiencing family and domestic violence are of obvious relevance to these proceedings, as the manner in which such situations are presently accommodated by employers will have a bearing on the potential impact of the claim. Regrettably, the ACTU has not sought to call probative evidence that would assist the Commission in this regard.

797. That the introduction of a new leave entitlement will increase employment costs is a trite observation. Those employment costs arise in the form of payment made to the employee taking the leave as well as replacement employees and any other indirect costs that arise. Similarly, the increased regulatory burden that will flow from the proposed clause is self-evident. We

have earlier addressed the impact that the claim would have on productivity, with reference to s.134(1)(d).

798. Whilst the precise macroeconomic impact of the ACTU's claim is impossible to discern based on the material that it relies upon, it is clear that the microeconomic impact on businesses, including small businesses, would be significant. That every employer, or even the majority of employers, will not be met with a request to take family and domestic violence leave pursuant to the proposed clause is not a sufficient or appropriate answer. Section 134(1)(f) requires that consideration be given to the impact on individual businesses. In this context, it is important to note that for the reasons we have earlier explained, requests to access the leave from an employee (or employees), bearing in mind the broad application of the clause and the seemingly indefinite access to unpaid leave, could be profound.

The impact on small business

799. In performing its functions under Part 2-3 of the FW Act, in addition to the modern awards objective the Commission is required to take into account the object of the Act in s.3.

800. Subsection 3(g) of the Act requires that the special circumstances of small and medium businesses be acknowledged, and of course taken into account.

801. Small businesses are vital to the Australian economy. As such, the Commission needs to give specific consideration to the impacts of granting the ACTU's claims on such businesses.

802. The ABS *Australian Industry, 2014-15* (8155.0) report (published on 17 June 2016) shows that as at the end of June 2015, 4,761,000 people worked for businesses with less than 20 people (44.8% of workers).

803. A much higher proportion of the employees of small businesses are award-reliant than the employees of larger businesses.

804. Table 19.1 below is extracted from ABS Cat. No. 6306 – *Employee Earnings and Hours, Australia, May 2014*, released in late-January 2015. It shows that a much higher proportion of the employees of employers with under 20 employees are award reliant than the employees in each of the larger size categories.

Table 19.1: Employees reliant on award only, by employer size

Employer size	Number of employees
Under 20 employees	705,900
20 – 49 employees	366,600
50-99 employees	171,500
100-999 employees	353,500
1000 and over employees	263,300
Total	**1,860,700**

805. Table 19.2 below is also extracted from ABS Cat. No. 6306. It shows that of all the business size categories, the employees of businesses with less than 20 employees are least likely to be covered by a collective agreement.

Table 19.2: Employees covered by collective agreements, by employer size

Employer size	Number of employees
Under 20 employees	126,700
20 – 49 employees	203,800
50-99 employees	201,800
100-999 employees	1,289,000
1000 and over employees	2,248.80
Total	**4,070,100**

806. As a result of the high degree of award reliance and the low incidence of collective agreements, small businesses will be particularly hard hit by the unions' claim. Unlike many businesses with enterprise agreements, if awards

are varied in line with the ACTU's claim, small businesses will be impacted from the date of the award variations.

807. Leave and other employee absences are typically very difficult for small businesses to manage given that there are fewer remaining employees to cover for absent employees.

19.12 The Need to Ensure a Simple, Easy to Understand, Stable and Sustainable Modern Awards System for Australia that Avoids Unnecessary Overlap of Modern Awards (s.134(1)(g))

Simple and easy to understand

808. We refer to that section earlier in our submission where we have detailed various concerns that arise from the drafting of the provision sought. Whilst many of the matters are substantive in nature, others exhibit that the manner in which the provision has been drafted is by no means simple and easy to understand. Issues pertaining to the rate at which an employee is to be paid is one such example.

809. Accordingly, the provision proposed by the ACTU is inconsistent with the need to ensure a simple and easy to understand modern awards system.

Stable and sustainable system

810. The need to maintain a stable and sustainable modern awards system tells strongly against the grant of the ACTU's claim.

811. The insertion of the provision sought would result in a significant expansion of the safety net, as it would effectively introduce a new category of paid leave. For reasons we have earlier articulated, it cannot be assumed that the impact that this will have on business can necessarily be accommodated or absorbed.

812. Coupled with this is the likelihood that the creation of a new leave entitlement for employees experiencing family and domestic violence may result in calls for additional forms of leave or other benefits for those

employees who face different types of adversity. We acknowledge that if such a claim were advanced to vary the awards, it must necessarily satisfy the relevant statutory criteria in order to be effected. However, an acceptance that provision should be made for leave in circumstances of family and domestic violence may give rise to arguments that other challenging personal circumstances cannot readily be distinguished from it and therefore, specific provision should also be made for them in the safety net.

813. Put another way, we are concerned that if the ACTU's claim is granted, it may be seen as a precedent for similar claims that are subsequently made by the union movement. The ability of respondent parties and the Commission to set apart different social issues (having regard to their causes and implications), would, to some extent, by stymied.

814. A gradual expansion of the safety net would result in circumstances whereby an employee may have access to multiple forms of leave for a particular occasion at his or her discretion. In some cases, an employee may be able to select which form of leave is taken because the circumstance giving rise to their need for leave would in fact render them eligible to access multiple forms of leave (as is the case with the proposed family and domestic violence leave clause).

815. The cumulative effect of this growth of the safety net is not sustainable. It would continue to increase the cost and other implications faced by employers without regard for the extent to which this can in fact be borne by employers, including small businesses.

816. For these reasons, the ACTU's claim should be rejected.

19.13 The Likely Impact of any Exercise of Modern Award Powers on Employment Growth, Inflation and the Sustainability, Performance and Competitiveness of the National Economy (s.134(1)(h))

817. To the extent that the ACTU's claim is contrary to the considerations listed at ss.134(1)(b), 134(1)(d), 134(1)(f) and 134(1)(g), it may also undermine employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

19.14 Performance of the Commission's functions

818. In performing its functions, including its functions under s.156 of the Act, the Commission is required to take into account the objects of the Act and the objects under relevant parts of the Act, including the objects under Part 5-1 (see s.578).

819. Subsection 577(d) of the Act requires that the Commission perform its functions in a manner that promotes harmonious workplace relations. This object is consistent with the very longstanding role of the AIRC and its predecessors to prevent industrial disputes.

820. For the reasons set out in this submission, the unions' proposed family and domestic violence leave clause is extremely vague and uncertain, in terms of:

- The definition of family and domestic violence;
- The circumstances for which the leave could be taken;
- The proof that would be required to establish that the employee has been subjected to family and domestic violence;
- The proof that would be required to establish that the employee needs to take leave for a legitimate purpose;
- Whether perpetrators of violence can access leave;

- The extent of an employer's confidentiality obligation; and
- The rate of pay for the period of leave.

821. Given the uncertainties, the proposed clause would be a recipe for disharmony and disputation. Employers would not have the ability to effectively administer the entitlement. Also, the Commission would not have the means to effectively resolve disputes that arose about the entitlement.

822. Accordingly, to grant the claim would be inconsistent with the ss.577 and 578 of the Act.

20. THE INCIDENCE OF PAID FAMILY AND DOMESTIC VIOLENCE LEAVE INTERNATIONALLY

823. The relevant legislative provisions do not require any consideration of the need to introduce a new entitlement that "is likely to be regarded internationally as an advance worth emulating"[529]. Nor is it the role of the Commission to create award obligations that are intended to position Australia as the most generous provider of workplace protections for those experiencing family and domestic violence. Rather, it is the role of the Commission to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms of conditions. The relevant considerations listed at s.134(1) do not expressly contemplate international comparisons, but the importance of Australian businesses remaining internationally competitive is of obvious relevance to the need for the Commission to consider the likely impact of any exercise of modern award powers on business, the need to ensure a stable and sustainable modern awards system, and the need to consider the potential impact on the national economy.

824. Whilst the problem of family and domestic violence exists around the world, paid family and domestic violence leave as an employee entitlement is extremely uncommon internationally.

825. The only country that is known to have legislated paid domestic violence leave at a national level is the Philippines, where victims of domestic violence are entitled to up to 10 days of paid leave to attend to medical and legal concerns.[530] However, there is little evidence to suggest that this entitlement has been effective or even enforced. A national survey undertaken in 2015 on the impact of domestic violence on workers in the Philippines, found that only 39% of respondents were even aware that the

[529] ACTU Outline of Submissions dated 1 June 2016 at paragraph 9.39.

[530] *Republic Act No.9262* also known as the *Anti-Violence Against Women and their Children Act of 2004* section 43.

leave existed.[531] It also found that for one in four or 26% of the respondents, their employers do not act in a positive way when workers report their domestic violence experience.[532]

826. Manitoba in Canada (ranked 5th of 10 provinces in size) and the Caribbean Island of Puerto Rico (a territory of the United States) are the only other places that appear to have a legislated entitlement to paid domestic violence leave. In Manitoba, an employee who is a victim of domestic violence and has been employed by the same employer for at least 90 days is entitled to 5 days of paid leave, 5 unpaid days and a further 17-week unpaid period.[533] In Puerto Rico, employees who are victims of domestic violence or whose family members are victims of domestic violence are entitled to paid leave for up to 5 working days.[534]

827. In their submissions, the ACTU and the Australian Human Rights Commission (**AHRC**) both note that a number of states in the US have enacted laws granting victims of domestic violence time off from work. However, whilst several states in the US do grant domestic violence leave, none of these laws mandate that such leave is to be paid (the only exception to this is where employees are entitled to use existing sick leave entitlements to take time off to address the effects of domestic violence, for example in California, Massachusetts and Philadelphia).[535] Further, in many instances, the granting of unpaid leave at all, and/or the amount of unpaid leave to be

[531] 'High Incidence of Domestic Violence in PH Affects Work and Workers, Study Finds' Metrocebu News and Magazine, posted 24 September 2015. Available at: http://metrocebu.com.ph/2015/09/high-incidence-of-domestic-violence-in-ph-affects-work-and-workers-study-finds/

[532] 'High Incidence of Domestic Violence in PH Affects Work and Workers, Study Finds' Metrocebu News and Magazine, posted 24 September 2015. Available at: http://metrocebu.com.ph/2015/09/high-incidence-of-domestic-violence-in-ph-affects-work-and-workers-study-finds/.

[533] *The Employment Standards Code Amendment Act (Leave for Victims of Domestic Violence, Leave for Serious Injury or Illness and Extension of Compassionate Care Leave).* Available at: https://web2.gov.mb.ca/bills/40-5/b008e.php

[534] P.R. Stat. Ann. 21-223-4566 (a) (3). Referred to in Legal Momentum, *State Law Guide – Employment Rights for Victims of Domestic or Sexual Assault*, Updated September 2015, p.10.

[535] Legal Momentum, *State Law Guide – Employment Rights for Victims of Domestic or Sexual Assault*, Updated September 2015, pp.1-11.

provided, is limited by the size of the business to reflect the fact that not all businesses have the same capacity to assist. For example:

- In California, in addition to being able to use existing sick leave entitlements, victims of domestic violence are entitled to take unpaid leave of up to 12 weeks each year. However, this only applies to employers with 25 or more employees.

- In Colorado, victims of domestic violence are entitled to up to 3 days of unpaid domestic violence leave each year. However, this only applies to businesses that employ 50 or more employees and can only be used by employees that have been with the employer for at least 12 months and, unless waived by the employer, have exhausted all their other leave entitlements.

- In Florida, employees are entitled to up to 3 days of unpaid domestic violence leave each year but only if they work for employers with 50 or more employees.

- In Massachusetts, in addition to being able to use existing sick leave entitlements, employees are entitled to up to 15 days of unpaid domestic violence leave each year. However, this only applies to employers that employ 50 or more employees.

- In Hawaii, employees who are victims of domestic violence may take up to 30 days of unpaid leave per calendar year if the employer has 50 or more employees, but only up to 5 days for smaller employers.

- In Illinois, employees who are victims of domestic violence may take up to 12 weeks of unpaid leave each year if the employer has 50 or more employees and 8 weeks if the employer has between 15-49 employees but none if the employer has less than 15 employees.

- In Philadelphia, in addition to being able to use existing sick leave entitlements, employees who are victims of domestic violence are entitled to take up to 8 weeks of unpaid leave if the employer has 50 or

more employees, but only up to 4 weeks of unpaid leave if the employer has less than 50 employees.[536]

828. The federal *Family and Medical Leave Act 1993* may also permit victims of domestic violence in the US to take leave, but again this leave is unpaid.[537] Leave under this Act only applies to employers with 50 or more employees and can only be taken where the employee or their spouse, child or parent has a "*serious health condition*" so it is quite limited in scope.[538]

829. In Europe, Spain is the only apparent country with legislated domestic violence leave provisions. However, the Spanish laws do not mandate paid domestic leave. Rather, they entitle victims of domestic violence to take an unpaid leave of absence for an initial period of six months, which can be extended up to a maximum of 18 months with a court order.[539]

830. Importantly, numerous countries with very generous employment entitlements do not have paid family or domestic violence leave as an entitlement. A recent report by Glassdoor Economic Research on the workplace entitlements provided in the US and Europe, found that Denmark, France and Spain were the European countries that provided the most generous overall labour market social benefits.[540] None of these countries have paid family or domestic violence leave as an employee entitlement.

831. The focus of most countries in addressing the role employers can play in dealing with family and domestic violence has been on other, more flexible measures. In the UK, for example, there has been a large focus on educating the community about domestic violence and there have been a number of high-profile campaigns to encourage employers to recognise domestic violence as an issue that can affect employees. This includes a

[536] Ibid pp.1-11

[537] *Family and Medical Leave Act of 1993*, 29 U.S,C. §§ 2601-2653.

[538] Ibid. 29 U.S,C. §§ 2612(a)(1).

[539] Baker and McKenzie, *The Global Employer – Focus on Spain* (2015) p.17. Available at: http://www.bakermckenzie.com/-/media/files/insight/publications/2015/01/the-global-employer-focus-on-spain/files/read-publication/fileattachment/bk_employment_globalemployerspain_jan15.pdf

[540] Glassdoor Economic Research and Llewllyn Consulting, '*Which Countries in Europe Offer the Fairest Paid Leave and Unemployment Benefits?*' Research Report, February 2016.

recent scheme launched by Women's Aid in England to help people identify victims of domestic violence and reach out to them.[541]

832. The UK's Corporate Alliance Against Domestic Violence (**UK Alliance**), which was founded in 2005 and works on a business-to-business platform to advise companies in addressing and mitigating the risk domestic violence poses to their company and employees, has also been very successful in assisting businesses in the UK to deal with the problem of domestic violence. Following on from research which indicated that 87% of employers in the UK wanted to address domestic violence, the UK Alliance was established to educate and assist employers. It provides accredited training to employees where they can learn how to identify warning signs, know what best practice is and take action.[542]

833. In Canada, as the ACTU and AHRC submit, domestic violence protections for workers are provided primarily through Occupational Health and Safety Legislation, with most jurisdictions containing a general requirement for employers to take all reasonable precautions to protect employees. This requirement to provide a safe workplace for employees is largely the same in Australia, with the WHS laws of all states and territories containing such a clause.[543]

834. In the U.S, most law reform in relation to victims of domestic violence has focused on the protection of employees from dismissal or adverse action.[544] Similar protections are already provided for in Australia under the unfair dismissal and general protections laws.

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[541] Gayle, D. 'Women's Aid launches scheme to tackle hidden domestic abuse,' the Guardian, published on 16 June 2016. Available at: https://www.theguardian.com/society/2016/jun/15/womens-aid-launches-scheme-to-tackle-hidden-domestic-abuse

[542] For more information see: http://thecorporatealliance.co.uk/about/

[543] See *Occupational Health and Safety Act 2004* (Vic) s.21, *Work Health and Safety Act 2011* (NSW) s.19, *Work Health and Safety Act 2012* (SA) s.19, *Work Health and Safety Act 2011* (QLD) s.19, *Occupational Safety And Health Act 1984* (WA) s.19, *Work Health and Safety Act 2011* (ACT) s.19, *Work Health And Safety (National Uniform Legislation) Act* (NT) s.19, *Work Health And Safety Act 2012 (TAS)* s.19.

[544] Legal Momentum, *State Law Guide – Employment Rights for Victims of Domestic or Sexual Assault*, Updated September 2015, pp.1-11. States with such laws include California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Kansas, Massacusetts, New York City and New York State, North Carolina, Philadelphia and Rhode Island.

835. Internationally, entitlements to paid domestic violence leave can be found in agreements that have been negotiated with trade unions although the nature and amount of leave varies. However, even the inclusion of domestic violence leave clauses in agreements does not appear to be widespread overseas. For example, whilst trade unions in countries such as the UK, Canada and New Zealand have pursued such provisions through collective bargaining, the European Trade Union Confederation's 8th March Survey (2014) reported that out of 51 (of 85) national confederations from 31 (out of 36) European Countries surveyed, agreements on domestic violence were only concluded in Spain and the UK.[545]

836. Furthermore, outside of Australia, there is little evidence that agreements including domestic violence clauses have been particularly widespread in the countries that have them. In an article published in the New Zealand Herald in March 2016, the author mentions that only 7 government agencies have introduced such leave at present as well as the Warehouse Group (which employs 12,000 staff).[546] In the UK, the public sector union Unison reported in 2014 that domestic violence provisions had been signed in the national health sector, in higher education and in the civil service.[547] However, outside of this, there is little available information on the prevalence of such clauses in agreements negotiated in the private sector.

837. In addition to the above, it is important to note that the ACTU's claim does not directly align with developments taking place within the International Labour Organisation (**ILO**). In their submission the ACTU refer to discussions within the ILO about a possible new international labour standard on gender-based violence at work and contend that their application for paid leave would support this. However, it should be emphasised that recent discussions within the ILO about the issue of gender-based violence in the world of work, and the possible creation of an

[545] *ETUC* 8th March Survey (2014) p.3.

[546] Jones, N. "Calls for paid leave for domestic violence victims," NZ Herald, Published March 2016. Available at: http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11598860

[547] *ETUC* 8th March Survey (2014) p.37.

international standard, have primarily focused on the issue of gender-based violence taking place at work, particularly sexual harassment at work, rather than the impact of domestic violence on the working lives of employees, as follows:

- In 2003, the ILO Committee of Experts report on the Application of Conventions and Recommendation noted, in relation to the Discrimination (Employment and Occupation) Convention 1958 (No. 111), that "*sexual harassment undermines equality at work by calling into question integrity and dignity and the well-being of workers*" and "*damages an enterprise by weakening the bases upon which work relationships are built and impairing productivity*."[548] It went on to state that "*in view of the gravity and serious repercussions of this practice," governments should be urged "to take appropriate measures to prohibit sexual harassment in employment and occupation*."[549]

- In 2009, the ILO Committee of Experts again noted that an "*important implementation gap concerns sexual harassment*" and that effective measures, including collective bargaining, should be taken *"to prevent and prohibit both quid pro quo and hostile environment sexual harassment at work*."[550]

- In November 2015, at the 325th session of the ILO Governing Body, the ILO agreed to discuss the potential introduction of a new international labour standard on gender-based violence in the workplace. A standard-setting item on "*violence against women and men in the world of work*" has been placed on the agenda of the 107th Session of the ILO Conference (June 2018). This will be the first of a two-year process of agreeing to a possible new international standard to cover gender-based violence in the world of work.

[548] ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A) (2003), p.463

[549] Ibid

[550] ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A) (2009), p.32.

838. As can be seen, paid leave entitlements for employee's experiencing family and domestic violence are available in only a very small number of other countries; a matter that the ACTU appears to acknowledge. It cannot be argued that such entitlements are a common feature of workplace relations frameworks internationally.

839. Australia is a medium sized, very open economy. Australian businesses often struggle to compete with international firms that have much lower costs. Australia cannot afford to lead the world in terms of the generosity of its leave entitlements.

21. CONCLUSION

840. For the reasons set out in this submission, The ACTU has failed to establish that that the provision it has proposed is “necessary” in order to achieve the modern awards objective in any of the 122 modern awards.

841. Accordingly, the claim should be dismissed by the Commission.