Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Family and Domestic Violence Clause (AM2015/1)

19 September 2016

Note: The statement of Mr M Potter was withdrawn on 17 November 2016, see Transcript, PN [1717]. The statement has been deleted from this document.

Ai GROUP

4 YEARLY REVIEW OF MODERN AWARDS

AM2015/1 FAMILY AND DOMESTIC VIOLENCE CLAUSE

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1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) makes this reply submission pursuant to the Amended Directions of the Fair Work Commission (**Commission**) issued on 20 May 2016 and a subsequent extension of time granted to Ai Group on 15 September 2016.

2. Ai Group's submission is in response to an Australian Council of Trade Unions (**ACTU**) claim for a family and domestic violence leave clause to be introduced into all 122 modern awards. The clause would provide the following key entitlements:

   - 10 days per year of paid family and domestic violence leave for full-time, part-time and casual employees;
   - Upon exhaustion of the above entitlement, up to 2 days' unpaid family and domestic violence leave on each occasion; and
   - An obligation on the employer to take all reasonable measures to ensure that any personal information provided by the employee to the employer concerning an employee's experience of family and domestic violence is kept confidential.

3. The ACTU's claim forms part of the Commission's 4 yearly review of modern awards (**Review**) under s.156 of the *Fair Work Act 2009* (**FW Act** or **Act**).

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.

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 (**EAP**). 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

3.1 Sections 134 and 138 of the Act

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 FW 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.

3.2 Sections 136, 139 and 142 of the Act

11. Section 136(1) of the Act deals with what a modern award can include. Relevantly, s.136(1) enables awards to contain matters permitted or required by Subdivision B or Division 3 of Part 2-3. Subdivision B includes s.139, and s.139(1) provides a list of matters about which a modern award can include terms.

12. Section 139(1) reflects s.576J of the *Workplace Relations Act 1996*[1] (**WR Act**), which established the matters about which a modern award was permitted to include terms when the awards were made pursuant to the Part

[1] See the Explanatory Memorandum to the *Fair Work Bill 2008* at paragraph 529

10A Award Modernisation Process. Section 576J was inserted by the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*. The Explanatory Memorandum to the Bill[2] identified the list of matters in the former s.576J as "allowable modern award matters". The Explanatory Memorandum also said that each allowable award matter would have its ordinary workplace relations meaning. The phrase "allowable award matter" and the principle that each allowable matter would have its ordinary workplace relations meaning derives from s.89A of the WR Act.

13. A Full Bench of the Australian Industrial Relations Commission (**AIRC**) in the *Award Simplification Decision*[3] considered s.89A. The Full Bench referred to a decision made by another Full Bench regarding the *Commonwealth Bank of Australia Officers Award.*[4] The Full Bench in that earlier case held that (emphasis added):

> The list of allowable award matters is comprised of concepts of particular kinds of award benefits and conditions of employment. <u>The construction of Section 89A(2) demands that each concept be given a meaning consistent with the use of the concepts in industrial relations practice in Australia. In its context, section 89A is not a provision for which there is a need for either a restrictive or a generous construction. The terms in it are to be given their ordinary meaning in regard to industrial relations usage.</u> Most of the allowable award matters listed are industrial concepts formulated around entitlements and conditions of employment ubiquitously the subject of award provisions in State and Federal industrial jurisdictions. Even within the standard award concepts, the formulation of an award provision covering employment entitlements and conditions has long allowed room for craft and drafting skills. Conceivably, some conditions of employment could be formulated in sufficiently various ways to bring the conditions within one, another, or more than one of the allowable award matters. The categories of allowable award matters are not mutually exclusive. <u>However it is generally the case that established award provisions are of a sufficiently standard content and form to be identifiable as coming within one or occasionally, more of the allowable award categories, or as not coming within the category at all.</u>

14. The Full Bench in the *Award Simplification Decision* made the following additional points (emphasis added):

> … <u>In the first place, s.89A(2) does not contain a grant of power at all, but a limitation on power. Secondly, even if the principle applied, it cannot be used to broaden the</u>

[2] See paragraph 42.

[3] Print P7500.

[4] (1997) 74 IR 446.

scope of the power itself, but only to provide the means to carry it into effect. Each head of power in s.51 of the Constitution describes a category of laws which are within the competence of the Commonwealth Parliament to enact. By contrast, s.89A specifies particular subjects for award regulation. An example illustrates the distinction. The decision in Burton v. Honan [cited above] was concerned with the scope of the power to make laws with respect to trade and commerce with other countries contained in s.51(i) of the Constitution. Specifically, the Court had to consider whether a provision for forfeiture and seizure of goods was a law with respect to trade and commerce. An inquiry of this kind is not analogous to an inquiry as to the breadth of a specified subject (such as annual leave) for the purpose of the exercise of the Commission's arbitral power. Thirdly, the WR Act itself, in s.89A(6), establishes the limits of the category. That subsection makes it clear that the matters specified in s.89A(2) are not to be expanded, but that an award provision which is incidental to one of the matters is permitted, provided it is also necessary for the effective operation of the award. The State of New South Wales, supported by the LTU and the ACTU, submitted that the implied incidental power is not restricted to that which is "necessary or essential" for the effective operation of the express power. It cited authorities (to which we have already referred) concerning the construction of various grants of power in s.51 of the Constitution in support of that proposition. It went on to submit that, even if s.89A(6) is more restrictive than the implied incidental power, the implied incidental power is still available. We do not accept these submissions. We have already pointed out the difference in character between a constitutional grant of power and the specification of allowable award matters. In addition, it is impossible to construe s.89A(6) by resort to an implied power which is inconsistent with the clear words of that subsection. In enacting s.89A(6), the legislature has given direct guidance on the extent to which the Commission may make provisions extending beyond the subject matters specified in s.89A(2). We see no reason to depart from the language of the statute, as explained in the CBAOA Case [cited above], and limited by s.89A(6). [5]

15. These decisions are of relevance to the construction of s.139(1) as the list of allowable award matters at s.89A was in similar terms to that now found in the Act.

16. Consideration was given to the interpretation of s.139(1) during the two year review of modern awards by a Full Bench that was dealing with numerous claims regarding apprenticeship and traineeship provisions. The decisions above were cited by that Full Bench, after which it stated that the terms of s.139(1) should be given their ordinary meaning.[6] Ai Group concurs with this view.

[5] Print P7500.

[6] *Modern Awards Review 2012 – Apprentices, Trainees and Juniors* [2013] FWCFB 5411 at [95].

17. Section 142 also provides a basis upon which a modern award term may be included in a modern award. Specifically, s.142(1) provides for the inclusion of incidental terms:

142 Incidental and machinery terms

Incidental terms

(1) A modern award may include terms that are:

(a) incidental to a term that is permitted or required to be in the modern award; and

(b) essential for the purpose of making a particular term operate in a practical way.

18. This provision was also considered by a Full Bench during the review of apprenticeship and traineeship provisions in 2012, in which it observed the narrow basis upon which it allows for the inclusion of an award term (emphasis added):

[101] We should, however, say something about s.142(1), which allows terms to be included in an award that are incidental to a term that is permitted or required to be in an award and which is essential to make the particular term operate in a practical way. The terms of this section are to be contrasted with s.89A(6) of the WR Act. That section provided that the AIRC "may include in an award provisions that are incidental to the matters in subsection (2) and necessary for the effective operation of the award". We agree with the submission of the employers that s.142(1) provides only a relatively narrow basis for the inclusion of award terms. It is not in itself an additional power for the inclusion of any terms that cannot be appropriately linked back to a term that is permitted by s.139(1). The use of the word "essential" suggests that the term needs to be "absolutely indispensable or necessary" for the permitted term to operate in a practical way. The wording of the section suggests that it provides a more limited power to include terms than that of its earlier counterpart in s.89A(6).[7]

19. In *4 Yearly Review of Modern Awards - Pastoral Award 2010* a Full Bench made the following comments about s.136, 139 and 142 (emphasis added):

[40] The AWU submits that the proposed 'one in four' term can be included in the Pastoral Award 2010 because it is a term 'about':

- career structures (s.139(1)(a)(i));
- a type of employment (s.139(1)(b)); and/or
- piece rates (s.139(1)(a)(ii)).

[7] Ibid at [101]

[41] The AWU contends that ss.139 and 142 are beneficial or remedial provisions and should be construed accordingly. It also submits that s.15AA of the Acts Interpretation Act 1901 supports the construction for which it contends.

[42] The argument advanced in support of these contentions is set out at paragraphs 46-71 of the AWU's written submissions of 5 February 2016. In the alternative, the AWU submits that the proposed 'one in four' term is 'incidental' to a permitted matter and 'essential' for the purpose of making a particular term operate in a practical way. On this basis the AWU submits that the proposed 'one in four' term can be included in the Pastoral Award 2010, pursuant to s.142.

[43] Australian Business Industrial and the NSW Business Chamber Ltd (ABI) submits that the 'one in four stands' aspect of the AWU's proposed variation is not permitted by s.139 or s.142. ABI does not contest the proposition that ss.139 and 142 are to be characterised as beneficial provisions, but do submit that:

> 'The requirement to interpret a provision consistently with a beneficial intent does not mean that an interpretation which is not borne out by the ordinary meaning of the words can be preferred, merely because of the beneficial effect it may have for those who are affect by its operation.'

…

[50] As we have mentioned, the jurisdictional issue turns on the meaning of the word 'about' in s.139(1).

[51] Ascertaining the legal meaning of a statutory provision necessarily begins with the ordinary grammatical meaning of the words used, having regard to their context and legislative purpose. Context includes the language of the Act as a whole, the existing state of the law, the mischief the provision was intended to remedy and any relevant legislative history.

[52] Section 15AA of the *Acts Interpretation Act 1901* requires that a construction that would promote the purpose or object of the Act is to be preferred to one that would not promote that purpose or object (noting that s.40A of the Act provides that the Acts Interpretation Act 1901, as in force at 25 June 2009, applies to the Act). The purpose or object of the Act is to be taken into account even if the meaning of a provision is clear. When the purpose or object is brought into account an alternative interpretation may become apparent. If one interpretation does not promote the object or purpose of the Act, and another does, the latter interpretation is to be preferred. Of course, s.15AA requires us to construe the Act, not to rewrite it, in the light of its purpose.

[53] The literal meaning (or the ordinary grammatical meaning) of the words of a statutory provision may be displaced by the context and legislative purpose. As the majority observed in *Project Blue Sky*:

> '..the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.'

[54] Sections 139 and 142 are in Chapter 2 of Part 2-3 of the Act. The purpose of Chapter 2 is to prescribe minimum terms and conditions of employment for national system employees. <u>We accept that it is appropriate to characterise ss.139 and 142 as remedial or beneficial provisions. They are intended to benefit national system employees</u>.

[55] The proper approach to the construction of remedial or beneficial provisions was considered by the Full Bench in *Bowker and others v DP World Melbourne Limited T/A DP World; Maritime Union of Australia and others ('Bowker').* In *Bowker* the Full Bench said:

> 'The characterisation of these provisions as remedial or beneficial has implications for the approach to be taken to their interpretation. As the majority (per Gibbs CJ, Mason, Wilson and Dawson JJ) observed in *Waugh v Kippen*:
>
> > "...the court must proceed with its primary task of extracting the intention of the legislature from the fair meaning of words by which it has expressed that intention, remembering that it is a remedial measure passed for the protection of the worker. It should not be construed so strictly as to deprive the worker of the protection which Parliament intended he should have."
>
> Any ambiguity is to be construed beneficially to give the fullest relief that a fair meaning of its language will allow, provided that the interpretation adopted is 'restrained within the confines of the actual language employed that is fairly open on the words used.' As their Honours Brennan CJ and McHugh J put it in *IW v City of Perth*:
>
> > "...beneficial and remedial legislation, like the [Equal Opportunity] Act, is to be given a liberal construction. It is to be given 'a fair, large and liberal' interpretation rather than one which is 'literal or technical'. Nevertheless, the task remains one of statutory construction. Although a provision of the Act must be given a liberal and beneficial construction, a court or tribunal is not at liberty to give it a construction that is unreasonable or unnatural."
>
> If the words to be construed admit only one outcome then that is the meaning to be attributed to the words. However if more than one interpretation is available or there is uncertainty as to the meaning of the words, such that the construction of the legislation presents a choice, then a beneficial interpretation may be adopted.'

[56] <u>We adopt the above remarks and propose to apply them to matter before us</u>.

[57] <u>As to the meaning of the word 'about' in s.139(1), we accept the proposition advanced by ABI that having regard to the legislative context (and particularly s.142), the word 'about' requires more than an 'incidental' connection between the proposed award term and one of the subject matters listed in s.139(1)</u>.

[58] <u>We also accept that it is appropriate to adopt a liberal construction of the word 'about' in s.139(1), to the extent permitted by the context. The particular subject matters set out in s.139(1) are to be given their ordinary meaning and there is no warrant for a restrictive construction to be placed on any of them</u>. We note that such

an approach is consistent with that adopted by the Full Bench in the *Modern Awards Review 2012 – Apprentices, Trainees and Juniors Decision (the 'Apprentices decision')*.

[59] As to the proper construction of s.142 of the Act, we agree with the following observation from the Apprentices decision:

> 'We agree with the submission of the employers that s.142(1) provides only a relatively narrow basis for the inclusion of award terms. It is not in itself an additional power for the inclusion of any terms that cannot be appropriately linked back to a term that is permitted by s.139(1). The use of the word 'essential' suggests that the term needs to be 'absolutely indispensable or necessary' for the permitted term to operate in a practical way.'

[60] As we have mentioned, the AWU submits, in the alternative, that the 'one in four' term is 'incidental' to the 'piece rates' terms in the *Pastoral Award 2010* and 'essential' for the purpose of making those terms operate in a practical way. On that basis the AWU submits that the prosed term can be included in the *Pastoral Award 2010*, pursuant to s.142(1).

[61] Applying the above observations from the Apprentices decision to the present context we are not satisfied that the proposed 'one in four' term is 'essential', within the meaning of s.142(1)(b), for the purpose of making a particular term operate in a practical way. The piecework terms in the current award are clear in meaning and effect. We agree with the NFF's submission that the award terms can operate effectively without inclusion of the proposed 'one in four' term.

[62] For reasons which will become apparent, we have not found it necessary to conclusively determine the question of whether the proposed 'one in four' provision is a term 'about' one or more of the permitted matters in s.139(1). [8]

20. If Ai Group had been involved in the above proceedings, we would not have simply accepted the proposition referred to in paragraphs [41], [43] and [54] above, that ss.139 and 142 are entitled to a beneficial or remedial construction. At the very least we would have sought to make detailed arguments about the approach that Courts have taken to interpreting beneficial provisions in legislation (like the FW Act) which strikes a balance between competing interests.

21. The notion that ss.139 and 142 are remedial or beneficial provisions because *"(t)hey are intended to benefit national system employees"*, (see paragraph [54] in the above decision) appears the extend the concept of beneficial or remedial construction principles beyond any previous decisions of the Commission, including arguably the decision of the Full Bench in *Bowker and*

[8] [2016] FWCFB 4393.

others v DP World Melbourne Limited T/A DP World; Maritime Union of Australia and others ('Bowker')[9] as referred to in paragraphs [55] and [56] of the above decision). WHS provisions have been commonly regarded as beneficial or remedial provisions, and therefore it was perhaps not surprising that the Full Bench in *Bowker* regarded the bullying provisions in a similar light given that bullying is a topic also covered by WHS laws. The Full Bench accepted the submissions of the AWU (unchallenged by ABI – see paragraph [43] above) that ss.139 and 142 are appropriately characterised as beneficial or remedial.

22. Despite accepting the submissions that ss.139 and 142 are beneficial provisions, the Full Bench did not go on to address what the effect of a beneficial construction would be in the specific context of ss.139 and 142. It is this issue that we now address.

23. As stated in Pearce and Geddes' *Statutory Interpretation in Australia, Seventh Edition* (at p.292):

> A provision which on its face may appear to have a beneficial purpose may need to be limited in its operation because it in fact represents a compromise between competing interests: *Kennedy v Australian Fisheries Management Authority* (2009) 182 FCR 411 at 426-9.

24. This issue was recently the subject of detailed consideration by the Court of Appeal of the Supreme Court of Victoria in *Baytech Trades Pty Ltd v Coinvest Pty Ltd.*[10] The case concerned the interpretation of the *"Electrical Trades Work"* definition in the coverage Rules of the *Construction Industry Long Service Leave Act 1997* (Vic) which imported by reference certain terms of the *Electrical Contracting Industry Award 1992*. CoINVEST, the administrator of the portable long service leave scheme, argued that the provisions of the Act should be interpreted beneficially. On behalf of Ai Group member Baytech Trades, Mr Stuart Wood QC, briefed by Ai Group Workplace Lawyers, opposed CoINVEST's interpretation of the relevant provisions.

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[9] [2014] FWCFB 9227.

[10] [2015] VSCA 342.

25. In a unanimous judgment, Maxwell P, Tate JA and Dixon AJA of the Court of Appeal decided that because the relevant beneficial provisions in the *Construction Industry Long Service Leave Act 1997* (Vic) represent a compromise of purposes between the interests of employees and employers, their interpretation must be constrained. The following extract from the judgment is relevant (emphasis added):

General principles: approach to interpretation

55 As already noted, the trial judge identified the purpose of the Act as being to provide portable long service leave benefits to workers in the 'construction industry' who would otherwise be unable to qualify by reason of the itinerant nature of their employment. In her Honour's view, given that this purpose was beneficial for a category of the workforce, the scheme was generally entitled to a beneficial construction.

56 With respect, her Honour's conclusion about the beneficial purpose of the legislation was undoubtedly correct. But the Act also made clear that the beneficial purpose was to be achieved by imposing burdens on employers. The purpose of the very detailed provisions in the Rules was to define, with some provision, the circumstances in which benefits were to be conferred and corresponding burdens imposed. It is by giving primacy to the text that the interpreting court fulfils its task of discerning how far the legislature deciding to go in effectuation of its purpose

57. We draw attention here to the caution expressed by Gleeson CJ in *Carr*:[11]

> That general rule of interpretation [that a construction that would promote the purpose of the Act is to be preferred to a construction that would not promote the purpose] may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is an uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.".

58. In *Victims Compensation Fund v Brown,*[12] Spigelman CJ observed that it was not appropriate to apply the principle of liberal construction to a clause clearly intended to be one of limitation. His Honour said:[13]

> In a passage that has been frequently cited with approval, the Supreme Court of the United States said in *Rodriguez v United States,* at 525-526:

[11] (2007) 232 CLR 138 at 143.

[12] (2002) NSWLR 668.

[13] Ibid 671-2 [9]-[12].

> … No legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be law.

> In the present proceedings, the Respondent submitted that the purpose was to compensate victims. Even if we were to accept a legislative purpose stated at that level of generality, that would entail that any ambiguity must be construed in such a way as to maximise compensation (cf *Favelle Mort Ltd v Murray*). In any event, the very specificity of the provisions of the legislation indicate that the legislative purpose is to provide compensation in accordance with the and not otherwise.

> The issue before the Court is the determination of the circumstances in which compensation is payable. The Court is not required to give the most expansive possible interpretation of such circumstances.

> Specifically, the Court is not required to give words a meaning other than their primary meaning, unless the context indicates that that should be done.[14]

59. In appeal to the High Court, Heydon J (with McHugh ACJ, Gummow, Kirby, and Hayne JJ agreeing) agreed with the approach adopted by Spigelman CJ:[15]

> The question is a narrow one and it is possible to answer it briefly. It could be answered very briefly, merely by stating that the answer propounded by Spigelman CJ was correct for the reasons he advanced. In deference to the extremely careful judgments of the majority in the Court of Appeal, however, a longer answer is called for.

60. In *MyEnvironment v VicForests,* [16] where one of the purposes of the relevant legislation was to protect the habitat of the Leadbeater's Possum, the Court of Appeal was invited to construe the relevant provisions expansively with a view to furthering this legislative purpose. Warren CJ said that, while there was no doubt that the authorities endorsed a purposive approach to statutory construction, the authorities also showed that caution was required before interpreting a particular provision expansively because of an underlying purpose of the legislation. The Chief Justice observed:[17]

> In my view, the authorities can be seen as supporting two related propositions. First, that it is rarely, if ever, the case that legislation pursues a single purpose to the fullest extent possible. Rather legislation is typically the result of a carefully considered attempt at balancing multiple and sometimes competing objectives. To assume that the apparently confined words of a provision must be given an expansive operation on the basis of what is perceived to be the legislation's primary purpose may frustrate

[14] Citations omitted.

[15] *Victims Compensation Fund Corporation v Brown* (2003) 201 ALR 260, 263 [12] (citations omitted).

[16] (2015) 42 VR 456.

[17] Ibid 462 [14].

rather than effectuate legislative intent.

61. Tate JA said:[18]

When construing legislation that has a multiplicity of purposes, or seeks to strike a balance between competing interests, it is necessary to keep in mind the observation of Gleeson CJ in *Carr v Western Australia* that the purposive rule of statutory interpretation, embodied in Victoria in s 35(a) of the *Interpretation of Legislation Act 1984,* is of limited assistance in construing legislation, or regulatory instruments, that embrace numerous potentially conflicting objectives in relation to which the court has to determine from the language used where the intended balance lies. In that context, he expressly eschewed the adoption of a construction that furthered the pursuit of one of the competing objectives to the greatest extent possible while leaving the other objectives unfulfilled.

62. Drawing on the passage from the judgment of Gleeson CJ in *Carr* set out above, Tate JA concluded that the complexity of the statutory scheme and the competing aims apparent in the regulatory context showed that there had been 'a compromise'. In the legislative scheme before the court, the 'purpose or object' identified did not compel any particular construction, nor was it possible to 'identify a single purpose or objective. The fact that the legislative scheme was directed at the fulfilment of multiple purposes meant that the 'correct construction...must depend on the words used', within the relevant context.[19]

63. Applying these principles, we would uphold Baytech's submission that the Rules provide, in precise detail, for the scope of their application and that some aspects of the Rules limit, rather than expand, the cover provided by the legislative scheme. The Act confers a benefit on some employees but a financial burden on some employers, and reflects a compromise of purposes. In ways relevant to the question at trial, the scope of the legislative scheme is constrained.

26. In the light of the above authorities, we submit that even though the Full Bench in *4 Yearly Review of Modern Awards - Pastoral Award 2010*[20] decided that ss.139 and 142 are beneficial provisions, the interpretation of such provisions must be constrained because:

1. It is not appropriate to apply the principle of liberal construction to ss.139 or 142;

2. Sections 139 and 142 reflect a compromise of purposes;

3. Sections 139 and 142 strike a balance between competing interests;

[18] Ibid 497-8 [148].

[19] Ibid 500 [155].

[20] [2016] FWCFB 4393.

4. The fact that the FW Act, including Part 2-3, is directed at the fulfilment of multiple purposes means that the correct construction must depend on the words used within the relevant context.

27. As referred to earlier, the Full Bench in *Modern Awards Review 2012 – Apprentices, Trainees and Juniors* considered the interpretation of s.139(1). The Commission Full Bench cited the AIRC *Award Simplification Decision*[21] and the AIRC decision in the *Commonwealth Bank of Australia Officers Award*[22] and concluded that the terms of s.139(1) should be given their ordinary meaning.[23] These two AIRC decisions are authority for the following propositions:

- " … s. 89A is not a provision for which there is a need for either a restrictive or a generous construction. The terms in it are to be given their ordinary meaning." – AIRC Full Bench decision in Commonwealth Bank of Australia Officers Award;[24]

- " … s.89A(2) does not contain a grant of power at all, but a limitation on power.." – AIRC Full Bench *Award Simplification Decision*.[25]

28. The objects in ss.3 and 134 of the FW Act clearly highlight the compromise of purposes and the balance between competing interests which is sought to be achieved in the objects of the Act. Issues of prime concern to employees and employers are expressly addressed in ss.3 and 134.

29. The overarching objective of s.3 is "to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians". There is nothing in this objective which gives the slightest indication that the interests of employees are to be elevated ahead of the interests of employers. Instead the objective emphasises a balanced approach.

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[21] Print P7500.

[22] (1997) 74 IR 446.

[23] *Modern Awards Review 2012 – Apprentices, Trainees and Juniors* [2013] FWCFB 5411 at [95].

[24] (1997) 74 IR 446.

[25] Print P7500.

30. Similarly, the overarching objective in s.134 is the achievement of a "fair and relevant minimum safety net"*.* Again there is nothing in this objective which gives any indication that the interests of employees are to be elevated ahead of the interests of employers. The objective emphasis fairness to employees and employers.

31. The notion of 'fairness' in s.134(1) is to be assessed from the perspective of employers and employees. 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.[26]

32. 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.…[27]

33. In conclusion:

- For the above reasons, the weight of authority is that the terms in ss.139(1) and 142 should be given their ordinary meaning, without a restrictive or generous construction; and

- As held by the Full Bench in *Modern Awards Review 2012 – Apprentices, Trainees and Juniors* and as cited by the Full Bench in *4 Yearly Review of Modern Awards - Pastoral Award 2010* (at paragraph [59]), s.142(1): "…provides only a relatively narrow basis for the inclusion of award terms. It is not in itself an additional power for the

[26] *4 yearly review of modern awards* [2015] FWCFB 3177 at [109].

[27] *Re Shop, Distributive and Allied Employees' Association* (2003) 135 IR 1 at [11].

inclusion of any terms that cannot be appropriately linked back to a term that is permitted by s.139(1). The use of the word 'essential' suggests that the term needs to be 'absolutely indispensable or necessary' for the permitted term to operate in a practical way.'"[28]

[28] [2016] FWCFB 4393.

4. THE COMMISSION'S GENERAL APPROACH TO THE REVIEW

34. At the commencement of the Review, a Full Bench dealt with various preliminary issues. The Commission's *Preliminary Jurisdictional Issues Decision*[29] provides the framework within which the Review is to proceed.

35. 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, <u>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.</u>[30]

36. 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. <u>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.</u>[31]

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[29] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

[30] Ibid at [23].

[31] Ibid at [24].

37. 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.[32]

38. 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":

> [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 particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h),

[32] Ibid at [24] – [27].

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.[33]

39. 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."

40. 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.

[33] Ibid at [36].

41. 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.[34]

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

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

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

43. 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).

44. 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?

45. 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.

46. 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.

47. 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 …
>
> **Consideration**
>
> [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 …
>
> …
>
> [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 …
>
> …
>
> [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).[35]

48. It can be seen from the above extract that Ai Group's argument that the confidentiality provision (clause X.3.3) in the ACTU's proposed family and domestic violence clause is not allowable under ss.139 and 142, has not yet been determined. The Full Bench simply decided that it would be premature to determine this issue until the evidence had been heard.

49. Also, as is evident from the transcript of the hearing on 13 August 2015, both Ai Group[36] and ACCI[37] 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.

50. In the current proceedings, Ai Group continues to contend that:

   a. Clause X.3.3 is not allowable under s.139 of the FW Act;

   b. Clause X.3.3 is not allowable under s.142 of the Act;

   c. The ACTU's proposed family and domestic violence clause is inconsistent with ss.134 of the FW Act;

   d. 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.

51. We later address each of these propositions.

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

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

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

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

52. Although family and domestic violence is an important community problem that is currently receiving considerable attention by Governments, police force, 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.

53. 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.

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

55. 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)).

56. 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.

57. 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

58. 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.

59. 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.

60. The latest ABS publication on Crime Victimisation in Australia[38] 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.[39]

61. 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;[40]
- Of the 549,500 persons who experienced at least one threatened assault, 343,400 (approximately 62%) were employed;[41]
- Of the 58,600 persons who experienced at least one sexual assault,

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

[39] Ibid. Table 1.

[40] 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).

[41] Ibid. Table 12.

28,400 (approximately 48%) were employed.[42]

62. 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.

63. 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.

64. 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%).[43] 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.[44]

65. 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.[45] 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.

[42] Ibid. Table 19.

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

[44] Ibid.

[45] Ibid. Table 4.

66. 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).[46]

- 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).[47]

[46] Ibid. Table 4.

[47] 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.

67. 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).[48]

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

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

members (29,800) and professional relationships e.g. client/patient (24,200).[49]

68. 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

69. 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.

70. 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.

71. In a paper released by the Australian Institute of Criminology (**AIC**) in 2015[50] 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*."[51] This is despite the fact that physical assault has had the highest rate of victimisation of any of the four major types of violent crime (homicide, physical assault, sexual assault and robbery).[52]

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[49] Ibid. Table 15.

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

[51] Ibid p.2.

[52] Ibid p.1.

72. 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.[53]

73. 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

74. 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

75. With ABS statistics estimating that 1 in 3 marriages (33%) end in divorce,[54] 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.[55] This equates to 2.0 divorces per 1,000 residents in the population.[56] Of these divorces, 47% involved children.[57]

76. 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

[53] Ibid p.6.

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

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

[56] Ibid.

[57] Ibid.

financial implications for separating and divorcing couples.[58] 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.[59] For children's matters, this can be even more drawn out because of the need to attend compulsory family dispute resolution first.[60] 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.[61] This accounts for 91% of all applications filed with the court in 2014-2015.[62] 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.[63]

77. 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.[64] 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,[65] undoubtedly a large proportion of Australians affected by separation and divorce each year are employed.

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

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

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

[60] 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

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

[62] Ibid p.51.

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

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

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

Drug and alcohol addiction

79. 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.[66] 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.[67] 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.[68]

80. 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.[69] 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.[70]

81. 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.[71] It has also been found that persons in paid employment generally use illicit drugs more frequently than those not in paid employment[72] and that amphetamine use in particular is almost twice as common among those in the paid workforce as those not in

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

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

[68] Ibid pp.49-50.

[69] 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.

[70] 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.

[71] Ibid p.14.

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

paid work.[73] 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.[74] 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.

82. 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.[75]

83. 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

84. 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[76] 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 people in 2013 to 12 suicides per 100,000 people in 2014.[77] The data showed that there were 2,864 deaths from intentional self-harm in 2014, resulting in a

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[73] 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.*

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

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

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

[77] 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

ranking as the 13th leading cause of all deaths.[78] Of these deaths, about three-quarters (75.4%) were men, making intentional self-harm the 10th leading cause of death for males.[79] Rates have been particularly stark in men aged 40-44 years, with 18.3% of male deaths in this age group attributable to suicide. [80]

85. 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.[81]

86. 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.[82] 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 relationships with partners, family and friends and the contemplation of suicide themselves.[83]

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[78] 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

[79] Ibid

[80] 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

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

[82] Ibid p.9.

[83] Ibid p.8.

Death and bereavement

87. 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,[84] 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.[85]

88. 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*."[86] 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).[87] 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.[88]

89. 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

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

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

[86] 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/

[87] Ibid.

[88] Ibid.

(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

90. 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.

91. 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.

92. 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.

93. 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 INCIDENCE OF FAMILY AND DOMESTIC VIOLENCE

94. The matter here before the Commission will require the Full Bench to consider data that goes to the incidence 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). 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:

> For the purposes of this clause, family and domestic violence is defined as any violent, threatening or other abusive behaviour by a person against a member of the person's family or household (current or former).

95. As mentioned in the previous section of this submission, the ACTU's presentation of statistical information relies primarily on the PSS[89] conducted in 2012; the results of which were published in late 2013[90]. It is important to appreciate, however, that there are various limitations to this source of data, some of which are outlined in the report prepared by Dr Michael Flood for the purposes of these proceedings. Importantly, Dr Flood explains that the PSS focuses on "violent acts" and gives only limited information about the character of violence in relationships and families:[91] (emphasis added)

> These figures from the PSS do indicate what proportions of males and females experienced at least one incident of physical or sexual assault or threat by a current or former partner. But <u>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 as accompanied by (other) strategies of power and control, or whether it involved fear and injury and other forms of harm.</u>[92]

96. 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

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

[90] Witness statement of Dr Peta Cox dated 26 May 2016 at Annexure PC-3, paragraph 3.7.

[91] ACTU Outline of Submissions dated 1 June 2016 at paragraph 3.13.

[92] Ibid at paragraph 3.14.

not have been living with”[93] 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 (that is, it includes cohabitating partners, ‘boyfriends, girlfriends and dates’[94]). The term ‘violence’ incudes physical violence, physical assaults, physical threats, sexual violence, sexual assaults, sexual threats; each as defined in Dr Cox’s report at pages 6 – 7.

97. The figures also appear to capture any incident of violence that has occurred at *any* point in time. 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.

98. 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.[95]

99. 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.

100. The sample of the PSS consists of 17,050 individuals; 13,307 women and just 3,743 men.[96] Therefore, only 22% of the sample is made up of male respondents.

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

[94] Ibid, paragraph 7.1.

[95] Ibid, paragraph 7.4.

[96] Ibid, paragraph 2.9.

101. 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.[97]

102. 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 domestic violence; a matter acknowledged only in passing by the ACTU.[98] 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.

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

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

103. 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.[99]

104. 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.[100]

105. 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 to 9.925 male victims. This equates to a rate per 100,000 population of 594 for females and 277 for males.[101]

106. Recognition that domestic violence is committed against both men and women, and a consideration of the extent to which men are so impacted is relevant to the potential impact of the ACTU's claim.

107. What is perhaps more controversial is whether, and if so the extent to which the incidence of family and domestic violence (however described) in Australia is increasing.

108. The ACTU first acknowledges that "there is no detailed data source that provides insight into how, or if, rates of domestic violence are changing over time".[102] It also accepts that some data suggests that domestic violence homicides have in fact *declined*.[103] However it then goes on to cite data from

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

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

[101] Ibid at page 40.

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

[103] Ibid at paragraph 5.64.

police reports which, in its submission indicate an increase in the number of ‘domestic violence incidents’.[104]

109. 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.[105] 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.[106]

110. 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 Victorian Royal Commission into Family Violence (**VRC**), greater recognition of domestic violence may have encouraged additional reporting.[107] 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.[108]

111. 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.[109] We also note that the manner in which ‘family violence incidents’

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[104] Ibid at paragraph 5.64.

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

[106] Crime Statistics Agency, Victoria.

[107] 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.

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

[109] Ibid.

in the above definition is currently applied, or has previously been applied, is not known.

112. There appears to be little if any support for the proposition that the incidence of family and domestic violence, as defined by the ACTU, is increasing in Australia. Indeed the ACTU do not appear to seriously contend that this is the case. 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.[110]

[110] 4906.0 *Personal Safety, Australia*, 2012, Table 21.

8. THE RESPONSES OF GOVERNMENTS TO FAMILY AND DOMESTIC VIOLENCE

113. 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.

8.1 Government responses and public inquiries – recent developments

114. 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.

115. 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.

116. 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."[111] 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

117. 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*."[112]

118. 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.[113]

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[111] Victorian Royal Commission into Family Violence, Summary and Recommendations, March 2016, Vol. VI, p.1.

[112] National Plan to Reduce Violence against Women and their Children, including the first three year Action Plan, p.10.

[113] 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.[114]

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.[115]

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.[116]

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.[117]

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.[118]

119. 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 focused on improving law enforcement and the responses of the justice system).

[114] Ibid pp. 18-19
[115] Ibid p.20
[116] Ibid pp. 23-25
[117] Ibid pp.26-28
[118] Ibid p.29

120. 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.[119] 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

121. 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.

122. 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 to change;
- Aboriginal and Torres Strait Islander communities require trauma-informed

[119] Ibid p.14. See also *Second Action Plan (2013-2016) – Moving Ahead*, p.18.

responses to violence; and

- Integrated responses are needed to keep women and their children safe.[120]

123. 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*."[121]

124. 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.[122] 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
> - eliminate violence-supportive attitudes and respond to men who perpetrate violence
> - safeguard their products and services from being used to facilitate violence

[120] COAG Advisory Panel on Reducing Violence against Women and their Children, Final Report, April 2016, Executive Summary p.vi-vii.

[121] Ibid p. 30

[122] Ibid pp. 30-31

- consider the feasibility of co-investment to support the work of the alliance.[123]

125. 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.[124]

126. 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

127. The Australian Law Reform Commission Report titled *Family Violence and Commonwealth Laws – Improving Legal Frameworks* (**ALRC Report**)[125] 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.

128. 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.

[123] Ibid p.31

[124] Ibid

[125] The ALRC, *Final Report, Family Violence and Commonwealth Laws – Improving Legal Frameworks* (ALRC Report 117), February 2012.

- *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.[126]

129. 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.

130. 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 necessarily be the product of agreement "*in light of the specific circumstances of the workplace*."[127]

131. 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*."[128] With regard to

[126] Ibid, p.37 and Chapters 15-18.

[127] Ibid, p.397

[128] Ibid

family violence leave, the ALRC noted that "*not all employers are in a position to be able to provide such leave*".[129] Ai Group contends that these same arguments apply in relation to the inclusion of paid domestic and family violence leave in modern awards.

132. 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*."[130]

133. In relation to the NES, the ALRC made two recommendations.

134. 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.

135. 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 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*."[131] 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*

[129] Ibid p.400

[130] Ibid p.406

[131] Ibid p.415

the recommended review of the NES and determination of any quantum of leave."[132] 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

136. In August 2015, the Senate Finance and Public Administration References Committee released its report on *Domestic Violence in Australia* after an inquiry (**Senate Inquiry**).

137. 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.

138. 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. [133] However, they did not make any recommendations as to how this should be implemented, or what the leave should be, instead finding that "*the Commonwealth Government should investigate ways to implement this across the private and public sector*."[134]

139. 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:

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[132] Ibid p.421

[133] The Senate Finance and Public Administration References Committee, *Domestic Violence in Australia*, report, August 2015, p.15.

[134] Ibid

> 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.[135]

140. 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;
- 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.[136]

141. 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

[135] Ibid, Government Senators' Additional Comments paragraph 1.4

[136] Ibid, Executive Summary pp. xiv-xv

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

142. 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.

143. 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 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.[137]

144. 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

[137] Productivity Commission Inquiry Report, *Workplace Relations Framework*, No.76, 30 November 2015, Volume 1, p.550.

internal policies about supporting staff experiencing family or domestic violence.[138]

145. 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.[139] 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

146. 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.

147. 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 of this leave should be or how it should be applied.[140] It also did not recommend that modern awards be varied to provide a paid family and domestic violence leave entitlement.

148. 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*

[138] Ibid pp.550-551

[139] Ibid p.549

[140] Victorian Royal Commission into Family Violence, Report and Recommendations, March 2016, Volume VI, p.93.

in violence prevention by encouraging attitudinal and behavioural change in their workplaces."[141]

Queensland Government Taskforce into Family and Domestic Violence, and the Review of the Industrial Relations Framework in Queensland

149. 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.

150. 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.[142] It also recommended that up to 10 days of paid leave per year be granted to Queensland public sector workers.

151. 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.*[143] 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

[141] Ibid p.75

[142] Queensland Government Taskforce into Family and Domestic Violence, 'Not Now, Not Ever' Report, February 2015, p.187.

[143] Industrial Relations Legislative Reform Reference Group, *A Review of the Industrial Relations Framework in Queensland* (December 2015).

majority of Queensland employees.

The relevance of the abovementioned public inquiries and Government taskforces to the ACTU's claim

152. 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).

153. 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 inquiries, many of which recognise the need to consider the impact that any such entitlement would have on businesses, especially small enterprises.

8.2 Recent developments to improve police and Court responses to family and domestic violence

154. 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.

155. 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.[144]

156. Since then, substantial progress has been made on developing a National Domestic Violence Order Scheme.

157. 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.

158. 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.[145]

159. 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.

160. 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

[144] COAG Communiqué 17 April 2015, p.1. Available at: http://www.coag.gov.au/node/522

[145] COAG Communiqué 11 December 2015, p.3.

being developed pursuant to recommendations of the Senate Inquiry.[146] 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.[147] 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.[148]

[146] See the Senate Finance and Public Administration References Committee, *Domestic Violence in Australia*, report, August 2015, p.129.

[147] Attorney-General for Australia, Media Release, 18 August 2016.

[148] Ibid.

9. EXISTING STATUTORY EMPLOYMENT PROTECTIONS AND ENTITLEMENTS

161. 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.

162. 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.

163. 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.

164. 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.

9.1 The right to request flexible work arrangements

165. 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)).

166. 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)).

167. 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.

168. 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.

169. In practice, many workers request, and are granted, flexible work arrangements without using the right to request provisions. For example, the FWC *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."*[149] The FWC 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.[150]

170. The FWC 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.

[149] 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.

[150] 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*.

171. 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.

172. 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.

173. 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.

174. 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.

9.2 Leave entitlements in the NES

175. 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*[151] 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).

[151] 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, <u>the nature of the emergency and that such emergency resulted in the person concerned requiring care by the employee</u>.

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).**

9.3 Continuity of service

176. 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)).

177. 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)).

9.4 Protection against unfair dismissal

178. Subject to relevant limited exemptions, employees are protected from unfair dismissal under Part 3-2 of the FW Act.

179. 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.

180. 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.

181. 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.

182. In *Ms Leyla Moghimi v Eliana Construction and Developing Group Pty Ltd*,[152] 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.

183. 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.[153]

184. The employer then applied to the Federal Court for judicial review of the FWC Full Bench's decision. Justices North, Katzmann and Bromberg dismissed the

[152] [2015] FWC 4864

[153] [2015] FWCFB 7476.

application and ordered the employer to pay costs of $30,000 on the basis that the application was initiated without reasonable cause.[154]

185. In *Alexis King v D.C Lee & L.J Lyons,*[155] 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.

186. 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.

9.5 General protections

187. 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.

188. 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).

189. 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.

[154] *Eliana Construction and Developing Group Pty Ltd v Moghimi* [2016] FCAFC 113.

[155] [2016] FWC 1664.

9.6 Work health and safety legislation

190. Under WHS laws employers must, as far as reasonably practicable, ensure the health and safety of workers and other people in workplaces.

191. 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.

192. 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.

193. 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.

10. EXISTING AWARD ENTITLEMENTS

194. In addition to the statutory entitlements referred to in section 9 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.

195. 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**).

196. The *Australian Workplace Relations Study, First Findings Report* shows at Figure 4.4 the widespread availability of flexible work practices to employees.[156] The following extract is relevant:

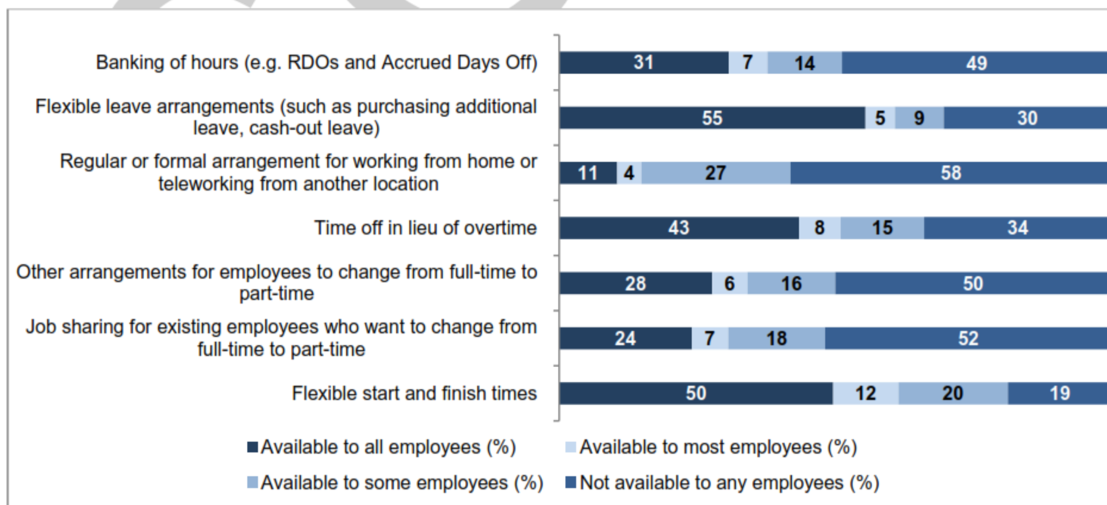
[156] Australian Workplace Relations Study, *First Findings report, 29 January 2015, Figure 4.4, p.30.*

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.

197. 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.

198. The FWC *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.[157] 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.[158] However, just over 30 per cent of employees reported having an informal

[157] 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.

[158] Ibid, p.viii.

flexible working arrangement with their employer that was undocumented.[159] 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.[160]

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[159] Ibid, p.viii.

[160] Ibid, pp.36-37.

11. DEVELOPMENTS IN EMPLOYER RESPONSES TO FAMILY AND DOMESTIC VIOLENCE

199. 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.

200. 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[161] (**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.[162] 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*."[163]

201. 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 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

[161] 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.

[162] Ibid p.12.

[163] Ibid pp.10-11.

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.

202. 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.[164] This represented an increase from 32.2% of employers in 2013-2014.[165]

203. 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.[166] 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 grief to health and well-being, gambling, mental health, drug/alcohol problems, domestic violence and debt management.[167]

[164] '*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.

[165] Ibid.

[166] Ibid.

[167] See: https://www.drakeworkwise.com.au/employee-services/employee-assistance-program.aspx

204. 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,[168] 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.

205. 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.[169] 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.[170]

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[168] For more information about the CEO Challenge see: http://ceochallengeaustralia.org/about-us/

[169] 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

[170] Ibid

206. 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.[171] 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.[172] 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.[173] 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.

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[171] For more information about White Ribbon see: http://www.whiteribbon.org.au/about

[172] For more information about Our Watch see: http://www.ourwatch.org.au/Who-We-Are

[173] 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.[174] 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.

207. 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*,"[175] 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.

208. 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*."[176] This is likely to be even more so now, given that since 2016 the WGEA Employer of Choice citation requires employer

[174] For more information about the Male Champions of Change see: http://malechampionsofchange.com/about-us/

[175] ACTU Outline of Submissions dated 1 June 2016 at paragraph 4.80

[176] 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.[177]

209. 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.[178]

210. 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.*"[179] 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*.".[180] 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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[177] *WGEA Employer of Choice for Gender Equality Criteria and Guide to Citation 2016*, version 3.0, published on 30 June 2016, criteria 48.

[178] 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.

[179] 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

[180] Ibid at p.20

211. 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

212. 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.[181] 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*."[182]

213. 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

214. 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.[183] Accordingly, imposing paid family and domestic violence leave on employers, rather than seeking to encourage their participation and assistance in

[181] Ibid p. 21-22. Also see the *Victorian Royal Commission into Family Violence, Report and Recommendations*, March 2016, Volume VI, p.80.

[182] 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.

[183] Ibid at p.24. See also the *Victorian Royal Commission into Family Violence, Report and Recommendations*, March 2016, Volume VI, p.81.

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

215. 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.[184] 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

216. 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

217. 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.

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[184] Victorian Royal Commission into Family Violence, Report and Recommendations, March 2016, Volume VI, pp.79-80.

12. LEAVE SHOULD BE DEALT WITH IN LEGISLATION, NOT AWARDS

218. 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. 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.

219. 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.

220. 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*).

221. This is the first occasion since the major changes in March 2006 which implemented a national workplace relations system founded on the 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.

222. 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.

223. As explained in Section 9 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)).

224. 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.

225. 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.

226. 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.

227. 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: …

228. 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. <u>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</u>.
>
> *New section 576J - Matters that may be dealt with by modern awards*
>
> 42. <u>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</u>.

…

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.

229. 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.

230. 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.

231. In its *Decision re making of priority modern awards*,[185] 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.

232. Clearly, family and domestic violence leave is not a prevailing industry standard in any award.

[185] [2008] AIRCFB 1000.

233. In its *Decision re making of priority modern awards*,[186] 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.

234. In its *Decision re making of priority modern awards*,[187] 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 rationale for the inclusion of

[186] Ibid.

[187] Ibid.

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.

235. 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.

236. 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*:

237. **Pressing Domestic Leave**

238. 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.

239. 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;

240. Only the current P& E Award contains a provision for such leave;

241. 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;

242. 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.

243. 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);

244. 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.

245. 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

246. 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.

247. 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.

248. 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"*.[188]

249. No doubt circumstances surrounding domestic violence would fall within the concept of "pressing domestic leave" and, accordingly, the AIRC's decision has direct relevance for the current proceedings.

250. 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*[189] (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.

251. 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 extract from the AIRC's Statement[190] 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

[188] *Decision re making of priority modern awards*, [2008] AIRCFB 1000 at [165].

[189] [2009] AIRC 345.

[190] *Statement re Stage 4 of the award modernisation process* [2009] AIRCFB 641.

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.

252. 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 in any other case where in the opinion of the employer special circumstances exist.

(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.

253. 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.[191]

254. After considering these submissions, in its *Decision re making of Stage 4 modern awards*[192] 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.

255. No doubt circumstances surrounding domestic violence would fall within the concept of "pressing necessity leave" and, accordingly, the AIRC's decision has direct relevance for the current proceedings.

[191] UFU submission, para [62].

[192] [2009] AIRCFB 945.

256. As set out in section 4 of this submission, in the Commission's *Preliminary Jurisdictional Issues Decision*[193] 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. <u>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.</u>[194]

257. 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

[193] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

[194] Ibid at [24].

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.[195]

258. 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 *Preliminary Jurisdictional Issues Decision*, these earlier Full Bench decision should not be departed from. Accordingly, the ACTU's claim should be rejected.

[195] Ibid at [24] – [27].

13. THE INCIDENCE OF PAID FAMILY AND DOMESTIC VIOLENCE LEAVE INTERNATIONALLY

259. 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.

260. 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.[196] 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 leave existed.[197] 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.[198]

261. 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.[199] In Puerto Rico, employees who are victims of domestic violence or whose family

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[196] *Republic Act No.9262* also known as the *Anti-Violence Against Women and their Children Act of 2004* section 43.

[197] '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/

[198] Ibid.

[199] *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

members are victims of domestic violence are entitled to paid leave for up to 5 working days.[200]

262. 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).[201] Further, in many instances, the granting of unpaid leave at all, and/or the amount of unpaid leave to be 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.

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[200] 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.

[201] Legal Momentum, *State Law Guide – Employment Rights for Victims of Domestic or Sexual Assault*, Updated September 2015, pp.1-11.

- 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.[202]

263. 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.[203] 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.[204]

264. 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

[202] Ibid pp.1-11

[203] *Family and Medical Leave Act of 1993*, 29 U.S,C. §§ 2601-2653.

[204] Ibid. 29 U.S,C. §§ 2612(a)(1).

extended up to a maximum of 18 months with a court order.[205]

265. 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.[206] None of these countries have paid family or domestic violence leave as an employee entitlement.

266. 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 recent scheme launched by Women's Aid in England to help people identify victims of domestic violence and reach out to them.[207]

267. 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

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[205] 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

[206] Glassdoor Economic Research and Llewllyn Consulting, '*Which Countries in Europe Offer the Fairest Paid Leave and Unemployment Benefits?*' Research Report, February 2016.

[207] 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

action.[208]

268. 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.[209]

269. 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.[210] Similar protections are already provided for in Australia under the unfair dismissal and general protections laws.

270. 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.[211]

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[208] For more information see: http://thecorporatealliance.co.uk/about/

[209] 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.

[210] 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.

[211] *ETUC* 8th March Survey (2014) p.3.

271. 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).[212] 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.[213] However, outside of this, there is little available information on the prevalence of such clauses in agreements negotiated in the private sector.

272. 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 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*."[214] It went on to state

[212] 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

[213] *ETUC* 8th March Survey (2014) p.37.

[214] ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A) (2003), p.463

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*."[215]

- 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*."[216]

- 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.

273. 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.

274. 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.

275. Moreover, the relevant legislative provisions do not require any consideration of the need to introduce a new entitlement that "is likely to be regarded

[215] Ibid

[216] ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A) (2009), p.32.

internationally as an advance worth emulating"[217]. 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.

[217] ACTU Outline of Submissions dated 1 June 2016 at paragraph 9.39.

14. THE CLAUSE PROPOSED BY THE ACTU

276. 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.

277. The proposed provision 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 defined as any violent, threatening or other abusive behaviour by a person against a member of the person's family or household (current or former).

X.2 Family and Domestic Violence Leave

X.2.1 An employee, including a casual employee, experiencing family and domestic violence is entitled to 10 days per year of paid family and domestic violence leave for the purposes of:

(a) attending legal proceedings, counselling, appointments with a medical or legal practitioner;

(b) relocation or making other safety arrangements; or

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

X.2.2 Upon exhaustion of the leave entitlements in clauses X.2.1, employees will be entitled to up to 2 days unpaid family and domestic violence leave on each occasion.

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 clause X.2.1. 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 The employer must take all reasonable measures to ensure that any personal information provided by the employee to the employer concerning an employee's experience of family and domestic violence is kept confidential.

278. In the submissions that follow, we deal with issues that arise from specific elements of the above clause, in the order in which they arise. In so doing, we have had regard to pages 8 – 12 of the ACTU's submission, which purport to explain the manner in which the proposed clause is intended to operate.

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

279. 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 member of the person's family or household (current or former).

280. 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.[218]

281. 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.

282. Nonetheless, having regard to the plain and ordinary meaning of these words, as well as the context of the ACTU claim, 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;

[218] ACTU Outline of Submissions dated 1 June 2016 at paragraph 2.12.

- 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.

283. The ACTU submits that the definition proposed is "a simplified version derived from s.4AB of the *Family Law Act 1975* (Cth)".[219] "Family violence" is there defined as: (emphasis added)

> … 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.

284. 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.

285. That is, the behaviour must have a bearing or effect on the "victim" that meets the above description.

[219] Ibid at paragraph 2.12.

286. 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".[220] 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
- discriminates between the employee and other employees of the employer.

287. 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. For reasons that will later become apparent, the identification of the purposes for which the leave can be accessed at clause X.2.1 does not alter the proposition we have here set out.

288. 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: (emphasis added)

> Thus, intimate partner violence or domestic violence (between adults) can best be understood as involving <u>a systematic pattern of power and control exerted by one</u>

[220] Section 789FD(1)(b).

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.[221]

289. 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.

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

290. The second element of the definition is also notably broad. It refers to "a member of the person's family or household (current or former)" (emphasis added).

291. A member of the person's "family" would appear to include any individual whom the person is related to by blood,[222] whether living together or otherwise, as well as adopted children and step-children.[223] This includes parents, grandparents, children, siblings, uncles, aunts, cousins and so on.

292. The definition also refers to a member of the person's "household". We interpret this to mean all individuals who live (or have lived) in the same house or apartment as the person. This is sufficiently broad to include a carer who resides (or resided) with the person.[224] 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 flatmates 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 would include a very wide range of persons, e.g. other residents in a boarding house.

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

[222] Macquarie Dictionary, fifth edition.

[223] See s.17 – Meaning of *child* of a person, of the FW Act.

[224] ACTU Outline of Submissions dated 1 June 2016 at paragraph 5.13(c).

293. Also, we proceed on the basis that the violence does not capture intimate partners who are not members of an employee's household. That is, the proposed definition of "family and domestic violence" does not include non-cohabiting partners.

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

294. The application of the clause sought is contingent upon the employee experiencing family and domestic violence. That is, an entitlement to leave arises only if the employee is experiencing any violent, threatening or other abusive behaviour by a member of the person's family or household (current or former).

295. The proposed provision places employers in an impossible position. Should any question arise as to the eligibility of an employee to the leave entitlement under the proposed provision, it may be necessary to consider whether that employee is in fact experiencing family and domestic violence. This requires an assessment by the employer as to whether an employee's circumstances satisfy clause X.1.

296. 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.

297. The difficulties associated with the potential need to make this assessment is compounded by the fact that the provision itself does not require an employee to provide any evidence of the fact that they are experiencing family and domestic violence. Indeed the entitlement to leave is available to any employee who simply alleges that he or she has been subjected to any violent, threatening or other abusive behaviour by a member of their family or

household. That is to say, any employee who claims to be a ‘victim’ of family and domestic violence would be subject to the proposed clause.

298. The provision does not require an assessment as to whether an employee is in fact a ‘victim’ of domestic violence, nor does it exclude those who engage in the behaviour specified at clause X.1. All that is required is that an employee who claims to be ‘experiencing’ family and domestic violence must satisfy the notice and evidentiary requirements at clause X.3. That is, the relevant employee need only provide evidence that satisfies the reasonable person that the leave requested is for one of the *purposes* specified at clause X.2.1. The evidentiary requirements do *not* go to whether the behaviour described at clause X.1 has in fact been experienced.

299. 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. 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.

14.4 The definition of ‘family and domestic violence’ – the dispute settlement procedure

300. 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.

301. 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.

302. 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’.

303. 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. 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.

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

304. The entitlement to family and domestic violence leave is expressed as arising in respect of any employee 'experiencing' family and domestic violence. Read with the definition proposed at clause X.1, an employee experiencing any violent, threatening or other abusive behaviour by a person against a member of that person's family or household (current or former) is entitled to leave.

305. The ACTU submits that its clause is not intended to entitle perpetrators of family violence with access to 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. [225]

306. We agree that the provision of additional paid leave to perpetrators is not appropriate.

307. Confusingly, the ACTU submits that the definition of 'family and domestic violence' that it has proposed 'refers to a *victim* of family violence'[226] (their emphasis). As is evident from the proposed provision replicated above, this is clearly not the case.

308. We are concerned that the clause as presently drafted could be interpreted as entitling perpetrators of domestic violence to a period of leave. That is, we

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[225] ACTU Outline of Submissions dated 1 June 2016 at paragraph 2.13.

[226] Ibid at paragraph 2.12.

consider it arguable that a person who commits ‘any violent, threatening or other abusive behaviour’ is also ‘experiencing’ such behaviour and therefore, satisfies the criteria set out in clause X.2.1.

309. Moreover, the difficulty with the very concept underpinning the ACTU’s proposal is that it presupposes that there is a clear demarcation between victims of domestic violence and perpetrators of it. However, even if the proposed provision were amended to expressly apply only to “victims” of domestic violence, the eligibility of the entitlement remains unclear, open to disputation and may nonetheless provide an entitlement to those who engage in behaviour that is violent, threatening or abusive against a member of their family or household.

310. 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.[227]

311. 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.

312. 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

[227] Statement of Dr Michael Flood at Annexure MF-3, paragraph 3.33. See also paragraph 3.35.

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"[228], 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.

313. In this regard, 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 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.

14.6 The provision of the entitlement to other individuals

314. The drafting of clause X.2.1 would appear to apply to individuals other than those towards whom the violent, threatening or abusive behaviour has been directed, but are nonetheless "experiencing" it.

315. The third edition of the Macquarie Dictionary defines "experience" as follows: (emphasis added)

> 1. a particular instance of personally encountering or undergoing something …
>
> 2. <u>the process or fact of personally observing</u>, 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 …

[228] Family Court of Australia, *Family Violence Best Practice Principles* (December 2015).

316. If, for instance, an employee has witnessed or observed ‘any violent, threatening or other abusive behaviour by a person against a member of the person’s family or household’, the proposed clause would entitle them to leave.

14.7 The provision of the entitlement to casual employees

317. 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.

318. Consider a casual employee who “experiences” 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.

319. 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.

320. 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.

14.8 The entitlement to paid leave – ‘10 days’

321. 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,[229] 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.

322. Also, unlike the NES annual leave and personal/carer’s leave provisions which specify that leave accrues progressively on the basis of ordinary hours,[230] 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.

323. 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
- 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.

[229] Sections 90, 99, 106, 111 and 116 of the FW Act.

[230] See ss.87(2) and 96(2).

324. 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).

325. 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	Minimum hourly rate
	(based on 38-hour week)	
	$	$
Level 1		
Year 1	698.40	18.38
Year 2	733.00	19.29
Year 3	756.00	19.89

…

326. 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).

327. 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.

328. 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.

14.9 The entitlement to paid leave – part-days

329. The ACTU's submissions state that the paid and unpaid leave afforded under the proposed provision can be taken:

- as a continuous period;
- on a single period of one day; or
- any separate periods of less than one day to which the employer and employee agree.[231]

330. The terms of the provision proposed by the ACTU does not expressly contemplate that leave may be taken for periods of less than one day if agreed. At clause X.2.1, it expresses the entitlement to the leave by reference to "10 days" but does not subsequently deal with the manner in which the

[231] ACTU Outline of Submissions dated 1 June 2016 at paragraph 2.23.

leave may be taken. To this extent, the ACTU's intention is not borne out in the drafting of the clause.

14.10 The entitlement to paid leave – the rate of pay

331. Clause X.2.1 states that the employee will be entitled to *paid* leave in the circumstances prescribed. The provision, however, is silent as to the *rate* at which an employee is to be paid for such leave.

332. The ACTU's submissions briefly deal with this element of its proposal at paragraph 2.21: (emphasis added)

> Employees would be entitled to be paid at <u>the employee's ordinary rate of pay</u>, that is, <u>the rate of pay they would have received had they worked the period</u>.

333. It is trite to observe that the clause proposed by the ACTU does not reflect its intention. It does not deal in any way with the rate at which an employee would be paid.

334. 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 specific proposal that an employee be paid at their "ordinary rate of pay'.

335. Firstly, it would appear that the ACTU intends that the proposed clause provide employees with the benefit of over-award payments during a period of family and domestic violence leave. This is inconsistent with recent Full Bench decisions of the Commission.

336. Modern awards, together with the NES, provide a minimum safety net of terms and conditions. It is not the role of the awards system to require the payment or maintenance of over-award amounts. The AIRC, during the Part 10A Award Modernisation Process expressed this view when considering whether a model 'absorption' provision should be included in all awards:

> [19] We deal first with the issue of absorption. … Modern awards are concerned with minimum wages and conditions and not with overaward payments. It would not be

appropriate, even on a transitional basis, to require an employer to maintain overaward payments. We have decided to provide for absorption. …[232]

337. A Full Bench of the Commission has made similar observations during this Review:

> [96] Modern awards provide a safety net of minimum entitlements. The modern award prescribes the minimum rate an employer must pay an employee in given circumstances. Overaward payments, while permissible, are not mandatory. …[233]

338. It is neither "necessary" (in the sense contemplated by s.138 of the Act) nor appropriate to introduce an award derived obligation to maintain over-award payments during a period of leave prescribed by the award. It is not the role of the safety net to mandate the payment of such amounts. A Full Bench of the Commission reached a similar conclusion in respect of the unions' claims to introduce accident pay provisions in numerous awards in the context of this Review:

> [214] In relation to the form of the accident pay provision to be inserted into the relevant awards, the ACTU in response to a request from the Full Bench provided a proposed simplified accident pay clause. … In this regard it was said that the reference in the draft clause to "appropriate rate of pay" to be used for the purpose of calculating the accident pay entitlement was intended to reflect the way in which the rate of pay is described in a particular award. … <u>We do not consider that it is appropriate or necessary in order to achieve the modern awards objective that accident pay entitlements to be included as part of the minimum safety net in the awards should include over award payments</u>, shift allowances or overtime.[234]

339. We also note that the ACTU has not provided any justification for the inclusion of over-award payments.

340. Secondly, 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.

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[232] *Award Modernisation* [2009] AIRCFB 800 at [19].

[233] *4 yearly review of modern awards* [2015] FWCFB 4658 at [96].

[234] *4 yearly review of modern awards – transitional provisions* [2015] FWCFB 3523 at [214].

341. 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.

342. 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.

343. 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.

344. 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.

345. 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.

346. 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.

347. 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".[235] In our view, an agreement that the employee will work three days a week, of which one

[235] Clause 12.3.

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.[236] 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.[237]

348. 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.

349. Notably, the ACTU has not so much as attempted to grapple with issues such as the above that would arise from its proposal.

350. 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 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

[236] Clause 28.2(g)(i).

[237] Clause 11.3(a).

employee covered by the Manufacturing Award accessing personal/carer's leave would have no equivalent entitlement to receive such amounts.

14.11 The entitlement to leave on an annual basis

351. The entitlement to family and domestic violence leave is expressed in clause X.2.1 as 10 days "per year". This is explained at paragraph 2.20 of the ACTU's submissions in the following terms: (emphasis added)

> Family violence leave <u>would not be an accruable leave entitlement</u> and would operate such that on <u>each respective anniversary date</u> when the employee commenced with the employer, the employee would have a bank of 10 days paid leave available throughout the year.

352. The provision proposed does not in fact make clear that the entitlement would not accumulate, nor does it state that the entitlement arises by reference to the employee's period of service (as opposed to calendar years).

353. In addition, 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. In certain instances, such as the employment of casual employees, this could result in circumstances where an employee has access to paid leave, even though they have not yet performed any work for the employer.

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

354. We here consider the purposes for which family and domestic violence leave could be taken. Clause X.2.1 would permit an employee experiencing family and domestic violence to take leave for the purposes of:

- attending legal proceedings, counselling, appointments with a medical or legal practitioner;
- relocation or making other safety arrangements; or

- other activities associated with the experience of family and domestic violence leave.

355. The proposed clause does not require the existence of a causal connection between the experience of family and domestic violence leave and the specified purpose. That is, the clause does not require that the relevant legal proceedings must be in relation to the family and domestic violence experienced.

356. The provision would appear to grant an entitlement to leave to attend any legal proceedings (whether associated with the family and domestic violence experienced or otherwise) to an employee experiencing family and domestic violence. This could result in an outcome whereby an employee experiencing family and domestic violence is entitled to leave under the proposed clause to attend court proceedings for a traffic infringement, which is in no way connected with the "violent, threatening or other abusive behaviour" experienced by the employee. Similarly, the provision would provide an entitlement to leave in circumstances where an employee experiencing family and domestic violence decides to relocate, even if that decision is not due to their experience of family and domestic violence.

357. The entitlement sought by the ACTU is cast in terms so broad that it would provide a benefit to employees experiencing family and domestic violence in circumstances where the purpose for that leave is not caused, connected or even associated with that family and domestic violence.

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

358. The proposed clause X.2.1(c) is effectively a "catch all" provision. It would enable an employee to access family and domestic violence leave for the purposes of any "other activities associated with the experience of family and domestic violence". It follows provisions that allow the taking of leave for the purposes of:

- attending legal proceedings, counselling, appointments with a medical or legal practitioner; and
- relocation or making other safety arrangements.

359. The ACTU provides the following examples of circumstances in which an employee might seek to access the entitlement pursuant to the aforementioned subclause:

> … 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. …[238]

360. Clause X.2.1(c) would allow an employee to access leave for any purpose that the employee claims is associated with 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.

361. We have earlier submitted that the provision would appear to apply to those who "experience" domestic violence by way of having witnessed it. We consider that clause X.2.1(c) 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(c) is of potentially broad import.

[238] ACTU Outline of Submissions dated 1 June 2016 at paragraph 2.16.

362. The relevant provision must be seen in the context of the proposal more generally, which does not permit any employer discretion as to whether the leave is granted or when the leave is to be taken. An employee is simply required to provide evidence that would satisfy a reasonable person that the leave is for the purposes of an activity other than those identified at clauses X.2.1(a) and (b), which is in some way associated with the experience of family and domestic violence. Contrary to the ACTU's submission, an assessment as to whether the activity is "sufficiently connected" to their experience of the violence would not arise.[239]

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

363. 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.

364. 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 is met, the legislation does not grant an employer the discretion to refuse access to the leave entitlement. Compassionate leave operates similarly.[240]

365. 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

[239] Ibid at paragraph 2.16.

[240] Sections 104 and 105 of the FW Act.

necessary. That is s.97 allows an employee to take personal/carer's leave if it is taken:

- because the employee is <u>not fit for work</u>; or
- to <u>provide care or support</u> to a member of the employee's immediate family or household.

366. 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.

367. 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 can be taken. So long as the employee is "experiencing" family and domestic violence and the employee is absent from work for any one of the purposes identified at clause X.2.1 (noting the potential breadth of clause X.2.1(c)), 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.

368. As a consequence, family and domestic violence leave can be taken by an employee experiencing 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. In addition, the provision does not require that the leave is

necessary *due to* the employee's experience of family and domestic violence. Indeed as we have earlier identified, the provision does not require any connection between the employee's experience of family and domestic violence and the purpose for which the leave is sought.

369. For instance, an employee may need to attend a financial institution. The need to do so may be premised on the fact that they are "experiencing" 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.

370. 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.

371. 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.

372. 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 (including one within the very broad parameters of X.2.1(c)), and if the

employee provides evidence that would satisfy a reasonable person that the leave was for that purpose, the leave can be taken. Nothing more is required.

14.15 Unpaid leave – 'each occasion'

373. The proposed provision, at clause X.2.2 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'.

374. 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.[241]
- in the case of compassionate leave: a member of the employee's immediate family or household contracts or develops a personal 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.[242]

375. 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.

376. 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

[241] Section 102 of the FW Act.

[242] Section 104 of the FW Act.

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".

377. Clause X.2.2 of the ACTU's proposal, by contrast, does not specify the circumstances by reference to which the entitlement to unpaid leave arises. It simply states, somewhat ambiguously, that employees will be entitled to unpaid leave "on each occasion".

378. 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.

379. Clause X.2.2 could also be interpreted as entitling an employee to unpaid leave "on each occasion" that such leave is sought by the employee for one of the purposes listed at clause X.2.1. 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 potential reasons for leave that have been identified in clause X.2. Such leave could be taken at any time, noting that the clause does not allow for any employer discretion as to whether such leave will be granted and if so, when it can be taken.

14.16 The confidentiality obligation – jurisdiction

380. We have earlier referred to the Commission's decision regarding the jurisdictional objections raised by Ai Group and other employer organisations regarding clause X.3.3 of the ACTU's proposal. In summary, the employer interests there argued that it is beyond jurisdiction, in the sense that it is not a term that can be included in a modern award pursuant to s.134(1) or s.142(1).

381. The Full Bench concluded that a determination of the employer parties' jurisdictional objections at that stage "would be premature"[243] and accordingly, deferred the making of a ruling on the issue until the matter proceeded to a final hearing.[244] It also made the following additional observations:

> [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*".[245]

382. It is however important to note that the Commission made clear that it had not "formed any final view about the employer parties' jurisdictional objections"[246] and therefore, its decision should not be regarded as having determined the matter. Rather, Ai Group's contention that clause X.3.3 is not a term that can be included in a modern award falls for determination by the Full Bench as presently constituted.

[243] *Family and domestic violence leave clause; Family friendly work arrangements clause* [2015] FWCFB 5585 at [20].

[244] Ibid at [26].

[245] Ibid at [21].

[246] Ibid at [26].

383. The ACTU submits that clause X.3.3 may be included in a modern award because:

- It is a term that is about leave and the arrangements for taking leave and therefore is permitted by s.139(1)(h).[247]

- It is a term that is incidental to the leave entitlement at clause X.2 and essential for the purposes of making the leave entitlement operate in a practical way.[248] Accordingly, it can be included in an award pursuant to s.142(1).

384. We first deal with the proposition that the clause is one that is "about" leave or arrangements for taking leave.

385. Clause X.3.3 is in the following terms: (emphasis added)

> The employer must take all reasonable measures to ensure that <u>any personal information provided by the employee</u> to the employer <u>concerning an employee's experience of family and domestic violence</u> is kept confidential.

386. The provision sought relates to *any* personal information provided by the employee to the employer concerning their 'experience of family and domestic violence'. It is not confined to information that is provided by the employee to their employer for the purposes of accessing leave under the proposed clause. That is, the confidentiality obligation is not limited to information provided by an employee pursuant to clauses X.3.1 and X.3.2. Instead, it creates a separate and distinct obligation in respect of *any* personal information provided by the employee concerning the employee's experience of family and domestic violence generally. The provision is not one that is "about" leave or arrangements for taking leave; the subject matter of the provision cannot be described as such. It is about the manner in which personal information provided by an employee concerning their experience of domestic violence is to be treated. We cannot identify any provision of s.139(1) that might permit the inclusion of such a term.

[247] ACTU Outline of Submissions dated 1 June 2016 at paragraph 2.37.

[248] Ibid at paragraph 2.38.

387. The ACTU also relies on s.142 of the Act. We refer the Commission to chapter 3 of our submissions in this regard and reiterate the high hurdle that must be overcome in order for the Commission to be satisfied that a term is incidental and essential for the purposes of making a particular term operate in a practical way.

388. Consistent with the submissions we have here made, we also submit that the proposed term is not *incidental* to clause X.2. Clause X.3.3 could operate in circumstances that are not limited to an employee seeking to access leave under the proposed clause.

389. Even if the ACTU's proposed term were an incidental one, the evidence before the Commission does not establish that it is "absolutely indispensable or necessary for the permitted term to operate in a practical way".[249] This requires a factual finding to be made by the Commission which, in our view, is not open to it on the material before it. Accordingly, the Commission cannot be satisfied that the clause meets the requirements of s.142(1)(b).

390. Neither s.139(1) nor s.142(1) provide a basis upon which the proposed clause X.3.3 can be included in a modern award.

14.17 The confidentiality obligation – practical problems

391. In addition, multiple ambiguities and practical difficulties arise from the provision proposed by the ACTU.

392. Firstly, the provision requires an employer to take "all reasonable measures" to ensure that the relevant information is kept confidential. This involves a subjective consideration of those measures that are reasonable as compared to those that are unreasonable. However, the basis upon which that assessment is to be made is ambiguous and, we consider, may give rise to disagreements.

393. Furthermore, the clause refers to "*all* reasonable measures". The effect is to mandate that an employer must take every possible reasonable measure to

[249] [2013] FWCFB 5411 at [101].

maintain confidentiality, and the failure to take any one such step would result in a breach of the award. Self-evidently, the obligation imposed by the clause is a very onerous one.

394. Secondly, the meaning of "personal information" is unclear. If any information provided by an employee to their employer regarding their "experience" of domestic violence is considered "personal" in nature, then the obligation presumably applies to all information provided by an employee to their employer concerning family and domestic violence. However, the inclusion of the term "personal" suggests that some distinction is to be drawn between different categories of information. The basis upon which that distinction is to be made is not clear.

395. For instance, if an employee, via an online portal, applies for family and domestic violence leave, absent any further detail, is that leave application considered personal information? If an employee provides a medical certificate that states that the employee was absent from work because he or she was attending a medical appointment (without identifying the reasons for that appointment) and the certificate is provided to an employer for the purposes of satisfying the evidentiary requirements in the proposed clause, is it considered *"personal information … concerning an employee's experience of family and domestic violence"* given that the medical appointment was in fact concerning that violence?

396. Moreover, as we have previously stated, the clause is not confined to information provided for the purposes of accessing leave. It refers to *any* personal information. As a consequence, while the proposed clause X.3 otherwise deals only with the leave entitlement, does clause X.3.3 extend to circumstances in which an employee provides "personal information" about their experience of family and domestic violence that is provided in the context of queries regarding access to an employee assistance program or flexible working arrangements under s.65(1) of the FW Act?

397. Thirdly, 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.

398. 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?

399. 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?

400. Also, are the leave records of employees who have accessed family and domestic violence leave (i.e. the records which state how many days of leave have been taken) considered "personal" and required to be kept confidential?

If so, what level of confidentiality would be required? Typically, HR staff and managerial staff would have access to leave records.

401. Self-evidently, the confidentiality obligation sought is ambiguous and as a result, would give various difficulties associated with an employer's endeavours to comply with it.

15. THE EXPERT WITNESS EVIDENCE RELIED UPON BY THE ACTU

402. We here consider the evidence of those witnesses that have been advanced by the ACTU as "experts".[250]

15.1 Dr Peta Cox

403. Dr Peta Cox has been a Senior Research Officer for the Australian National Research Organisation for Women's Safety (**ANROWS**) for two years.[251] She is also a member of the Survey Advisory Group for the PSS.[252] 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".[253]

404. The statistics cited by Dr Cox are based entirely on the PSS and her analysis of the relevant data. As we have previously stated, the survey was completed by a total of 17,500 individuals; 13,307 women and 3,473 men.[254]

405. 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.[255]

406. 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.

[250] At the time of filing this submission, it remains the case that the reports referred to by Dr Natasha Cortis are under embargo. Accordingly, we have not here dealt with her evidence.

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

[252] Ibid at paragraph 4.

[253] Ibid at paragraph 12

[254] Ibid at annexure PC-3, paragraph 2.9.

[255] Ibid at annexure PC-3, paragraph 2.4.

407. 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 confined or limited to the experience of "family and domestic violence" as defined by the ACTU's proposed clause. 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.

408. Earlier in this submission, we have considered the statistic 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.[256] As we there explained, this captures any experience of violence by an intimate partner since the age of 15. That is, if a woman experienced one isolated incident of violence (as defined) some 20 years ago, she would form part of the 2,194,200 women included in this statistic.

409. Relevantly, 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. 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.

410. Violence is defined broadly and includes each of the following:

- 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;

[256] Ibid at annexure PC-3, paragraph 7.2.

- 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.[257]

411. An "intimate partner" includes a person that the respondent may or may not be living with. It incorporates cohabiting partners (a person who the respondent is living with or has lived with, in a marriage or de facto relationship) and boyfriends, girlfriends and dates.[258] Accordingly, it would appear to us that this category of "perpetrators" is broader in scope than those encapsulated by the ACTU's proposed definition, which refers to "a member of the person's family or household (current or former)". For instance, we do not consider that the violence, abusive or threatening behaviour by "boyfriends, girlfriends and dates" is necessarily caught by the ACTU's claim.

412. Dr Cox also refers to statistics regarding the incidence of violence (which again includes each of the above categories) by an "intimate partner" in the 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.

[257] Ibid at annexure PC-3, paragraph 4.3.

[258] Ibid at annexure PC-3, paragraph 7.1.

413. 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;[259]

- the proportion of employed women and the proportion of unemployed women (including women not in the workforce) who experienced intimate partner violence;[260]

- the proportion of employed women, the proportion of unemployed women, and the proportion of all women nationally who experienced cohabiting partner violence;[261] and

- the proportion of employed women, the proportion of unemployed women, and the proportion of all women nationally who experienced intimate partner violence.[262]

414. This suggests that neither any correlation nor causal relationship is established by the PSS between the employment status of a woman and the incidence of male cohabiting partner violence or intimate partner violence.

415. 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.[263] Dr Cox asserts that this data is "of particular relevance"[264] to the Commission, however she does not provide any basis for this submission. At its highest, the figures might suggest some correlation between the level of

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[259] Ibid at annexure PC-3, paragraph 7.8.
[260] Ibid at annexure PC-3, paragraph 7.9.
[261] Ibid at annexure PC-3, paragraph 7.10.
[262] Ibid at annexure PC-3, paragraph 7.10.
[263] Ibid at annexure PC-3, paragraph 8.2.
[264] Ibid at annexure PC-3, paragraph 8.2.

contact with police and a woman's employment status, however neither the statistics nor Dr Cox's analysis establishes a causal relationship.

416. 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.[265] Regardless, the data reveals that the majority of women, whether employed or unemployed, sought advice or support in the relevant circumstances.

417. 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. 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;[266]

- of those women who were employed at the relevant time and had experienced sexual assault by a male cohabiting partner as their most recent incident, one in five took time off work in the 12 months after the incident.[267]

418. 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. 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;

[265] Ibid at annexure PC-3, paragraph 8.8.

[266] Ibid at annexure PC-3, paragraph 8.14.

[267] Ibid at annexure PC-3, paragraph 8.15.

- 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;

- If they accessed paid leave, the specific form of leave;

- 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;

- Whether the purpose for the leave was communicated to the employer; and

- Their type of employment (i.e. full-time, part-time or casual).

419. 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.[268] For this reason, 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 in the last 12 months, irrespective of whether it was the most recent incident of violence experienced, the proportion of women who accessed leave may vary.

420. 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

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

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 incidence 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 incidence of violence against women by intimate cohabiting partners in the 12 months preceding the 2012 PSS produces a figure of far smaller quantum.

421. 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.

15.2 Dr Michael Flood

422. Dr Michael Flood is an Associate Professor in Sociology and an Australian Research Council Future Fellow at the University of Wollongong.[269] The report attached to his statement, consistent with his previous publications, examines "intimate partner violence" by reference to gender.

423. The term "partner" includes spouses, de facto partners and non-cohabiting sexual partners such as boyfriends and girlfriends.[270] It does not include other forms of intra-familial violence.[271] We also note that "intimate partners" may include those that would not be captured by the definition of "family and domestic violence" sought by the ACTU. Accordingly, Dr Flood's report is different in scope to those employees that would be captured by the provision sought.

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

[270] Ibid at annexure MF-3, paragraph 2.1.

[271] Ibid at annexure MF-3, paragraph 2.2.

424. 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.[272]

425. Dr Flood later 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: (emphasis added)

> 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.[273]

426. The witness' assessment of the PSS suggests that its results do not reflect intimate partner violence or domestic violence as Dr Flood defines it in the paragraph cited above. His report also considers other shortcomings of the PSS which we have set out earlier in this submission and need not repeat.[274] 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.

427. The remainder of Dr Flood's report contains an analysis of the different experiences, forms of violence, motivating factors, levels of reporting and the impact that intimate partner violence has on women as compared to men. 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. Little attention is given to male victims of intimate partner violence or partner violence in which both

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[272] Ibid at annexure MF-3, paragraph 2.6.

[273] Ibid at annexure MF-3, paragraph 3.14.

[274] Ibid at annexure MF-3, paragraph 3.13 – 3.18.

the male and female in a heterosexual relationship are violent towards one another. Dr Flood's report does not purport to connect intimate partner violence with the workplace, participation in the workforce or access to paid leave.

15.3 Professor Cathy Humphreys

428. Professor Cathy Humphreys is a Professor of Social Work at the University of Melbourne[275] and has undertaken research in the area of violence against women and their children.[276] 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.

429. Professor Humphreys report in part deals with the role of employment and financial security in assisting women leave violent relationships.

430. 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".[277] However she cites a recent study "of a hospital workforce" which purportedly revealed that employees who had experienced domestic violence and/or sexual violence:

> .. reported specific effects of DFV on their work which included taking time off work, being tired, distracted or unwell, depression and/or anxiety, and a small group of women attended work to avoid violence at home.[278]

431. Whilst this evidence might be relied upon to establish the potential impact of family and domestic violence on an unidentified group of employees, it goes no further. That is, the evidence does not establish why they did or did not take time off work, the amount of time taken from work, the form of leave taken and so on.

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[275] Statement of Professor Cathy Humphreys dated 27 May 2016 at paragraph 1.

[276] Ibid at paragraph 8.

[277] Ibid at annexure CH-3, paragraph 3.6.

[278] Ibid at annexure CH-3, paragraph 3.6.

432. 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;[279] or

- That women experiencing family and domestic violence are not able to maintain financial security.[280]

433. 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.

434. Professor Humphreys cites VRC as urging "recognition of the workplace as part of the solution''.[281] Importantly, however, she also highlights that the VRC leaves some room for doubt as to the precise role to be undertaken by workplaces in this context:

> 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 developed which can play an important role in helping women explore their choices and develop safety plans.[282]

[279] Ibid at annexure CH-3, paragraph 3.7 and 3.12.

[280] Ibid at annexure CH-3, paragraph 3.7.

[281] Ibid at annexure CH-3, paragraph 5.7.

[282] Ibid at annexure CH-3, paragraph 5.8.

15.4 Ludo McFerran

435. Ludo McFerran is a “Domestic Violence at Work” research affiliate with the “Women and Work Research Group” at the Business School of the University of Sydney.

436. Ms McFerran has undertaken an analysis of enterprise agreements based on the Department of Employment’s Workplace Agreement Database. Without accepting the accuracy of the data relied upon or the analysis conducted, we make the following observations about her evidence.

437. Ms McFerran’s evidence establishes that a small proportion of the enterprise agreements examined contain an entitlement to paid family and domestic leave. The evidence does not, however, consider the detail of these provisions or the manner in which they in fact operate.

438. For instance, the *Belmont 16Ft Sailing Club Employees Enterprise Agreement 2014* [283] is one of the agreements identified in the analysis attached to Ms McFerran’s statement. It provides for up to three days of paid leave per year to an employee “experiencing family or domestic violence” to manage “such issues”. Relevantly, however, that entitlement is not extended to casual employees. Permanent employees must have completed a minimum 12 months’ continuous service with the employer to be entitled to the leave. Further, loadings or penalties are not payable during the period of leave. Similar limitations can be found in the *Revesby Workers' Enterprise Agreement 2014.*[284] United Voice is covered by both agreements. Each is underpinned by the *Registered and Licensed Clubs Award 2010*.

439. Some enterprise agreement terms do not give rise to an entitlement to family and domestic violence leave unless other leave entitlements that form part of the safety net have been exhausted. For example, the *Max Solutions Health Enterprise Agreement 2014,*[285] which covers the ASU. By virtue of clause

[283] AE410640.

[284] AE407360.

[285] AE411372.

8.3.1, an employee is entitled to up to 5 days of leave per calendar year where the employee is unfit for work due to domestic violence and the employee "does not have any Personal/Carer's Leave". The *Max Solutions Employment and Training Enterprise Agreement 2014* contains a similar clause.

440. Multiple enterprise agreements do not give rise to an entitlement to paid family and domestic violence leave for casual employees.[286] Some operate at the employer's discretion; that is, the entitlement to the leave is subject to approval by the employer.[287] Others provide for the progressive accrual of the leave.[288]

441. Many prescribe a more limited set of circumstances for which the leave may be taken as compared to those proposed by the ACTU. For example, the *Rooty Hill RSL Club Enterprise Agreement 2014*[289] allows employees to access up to three days of paid leave each year to:

- seek legal advice or counselling services in relation to the domestic violence and/or to prevent or prohibit domestic violence they are or have recently been involving;

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[286] For example the *Belmont 16Ft Sailing Club Employees Enterprise Agreement 2014* (AE410640), the *Revesby Workers' Enterprise Agreement 2014* (AE407360), the *East Coast Pipeline Pty Ltd Enterprise Agreement 2015-2017* (AE415317), the *Walker & Frazer Industrial (Qld) Pty Ltd & CEPU Electrical Division Queensland Enterprise Agreement 2015* (AE413081), the *Tasracing Pty Ltd Racecourse Enterprise Agreement 2014* (AE411801), the *Bethany Enterprise Agreement 2014* (AE412005), the *YSAS Enterprise Agreement 2014* (AE409193), the *Berry Street Victoria 2014 - 2017 Agreement* (AE410373), *the Vodafone CoVered 2.0* (AE415137), the *Australian Jewish News Journalists Enterprise Agreement 2014* (AE409404), the *Community Accommodation and Respite Agency Inc Employees Enterprise Agreement 2014* (AE409317) and the *Young Women's Christian Association of Adelaide Inc Employees Enterprise Agreement 2014* (AE415622).

[287] For example, the *Rooty Hill RSL Club Enterprise Agreement 2014* (AE407526), the *Australian Catholic University Staff Enterprise Agreement 2013 – 2017* (AE407248), the *Swinburne University of Technology, Academic & General Staff Enterprise Agreement 2014* (AE411742), the *EnergyAustralia Retail Call Centre Agreement 2013* (AE405985), the *Wannon Water Enterprise Agreement 2013* (AE408352), the *Western Water Enterprise Agreement 2014* (AE415331), the *Southern Cross Credit Union Limited Enterprise Agreement 2014-2017* (AE410110), the *Vodafone CoVered 2.0* (AE415137) and the *Community Accommodation and Respite Agency Inc Employees Enterprise Agreement 2014* (AE409317).

[288] For example the *Corumbene Nursing Home for the Aged Inc. Non-Nursing Agreement 2014* (AE412223).

[289] AE407526.

- assist the relevant authorities with their investigations in relation to domestic violence they are or have recently been involved in; and
- Attend court hearings or proceedings in relation to domestic violence they are or have recently been involved in.

442. A further example can be found in *ahm Enterprise Agreement 2015*[290] which provides for up to five days paid leave per year to victims of domestic violence who "need time off work for medical and legal assistance, court appearances, counselling, relocation or to make other safety arrangements". Agreement terms that similarly provide for an entitlement in circumstances of narrower compass can also be found in other agreements.[291]

443. A careful consideration of the specific terms of the relevant enterprise agreements reveals that in many instances, the entitlement is less beneficial in various ways than that sought by the ACTU.

444. At paragraph 5.3 of her first report, Ms McFerran provides an example of a "typical clause providing for paid dedicated domestic/family violence leave". The basis for this assessment is unclear. Based on our review of the enterprise agreements considered by Ms McFerran, we do not accept that the provision there extracted is reflective of a clause that is commonplace.

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[290] AE413673.

[291] For example the *Flinders Adelaide Container Terminal Stevedoring Enterprise Agreement 2014-2017* (AE409868), the *Healthscope - Victoria - Health Professionals - Enterprise Agreement 2015-2019* (AE415773), the *Australian Catholic University Staff Enterprise Agreement 2013 – 2017* (AE407248), the *Bankstown Sports Club Employees Enterprise Agreement* (AE409412) and the *Blacktown Workers Club Managers Enterprise Agreement 2014* (AE410616).

445. The overwhelming majority of enterprise agreements identified by Ms McFerran as containing a paid leave entitlement cover one or more unions. In fact only nine of the 168 did not cover any union.

Union	Number
NULL	9
ASU	76
CPSU	10
HSU	10
NTEU	10
IEUA	8
FSU	7
United Voice	7
CEPU	6
MEAA	4
RTBU	4
ANMF	3
TWU	3
AEU	2
AMWU	2
AWU	2
TCFUA	2
CFMEU	1
MUA	1
NUW	1
SDA	1
UFUA	1

446. The incidence of enterprise agreements containing paid family and domestic violence leave clauses in certain industries is far greater as compared to others. As can be seen from the table below, the largest portion of such agreements reviewed by Ms McFerran operate in public administration. In the very vast majority of industries identified, the number enterprise agreements with paid leave entitlements is less than 20.

Industry	Number of Agreements
Public Administration	46
Education	28
Health Care	19
Other Services	18
Financial	11
Electricity	8
Accommodation	6
Administrative	6
Manufacturing	6
Arts	5
Construction	5
Transport	4
Info Media	4
Professional	2

447. As can be seen from the table below, a significant majority of the enterprise agreements reviewed by Ms McFerran containing a paid family and domestic violence leave provision apply to 100 or more employees and, accordingly, apply to larger businesses.

Employee number	Number of Agreements
Up to 15 employees	12
16-49 employees	28
50-99 employees	21
100-500 employees	60
501 or more employees	47

16. THE LAY WITNESS EVIDENCE RELIED UPON BY THE ACTU

448. The ACTU has called 15 lay witnesses[292] in support of its claim. We do not here propose to deal with their evidence comprehensively. Rather, we simply note that the evidence can be relied upon for the purposes of establishing only the following factual propositions:

- that some employees are victims of family and domestic violence;
- that the impacts of family and domestic violence can vary for different employees;
- that most (but not all) employees who are victims of family and domestic violence are women;
- 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;
- that there are various programs that have 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;

[292] Given the nature of the evidence given by the three individual employees called by the ACTU and the issue of a confidentiality order in respect of their evidence, we have not here dealt with their statements.

- that where those unions have been successful, the terms of the provisions included vary;

- 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.

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

17. A MATTER FOR ENTERPRISE BARGAINING?

450. It is not contentious that enterprise bargaining has resulted in a number of enterprise agreements including provisions dealing with matters associated with domestic violence. This is demonstrated by the statements of both Ludo McFerran and Jenni Mandel.

451. The content of enterprise agreement provisions dealing with family and domestic violence matters varies significantly. The divergent approaches adopted can be seen in our earlier summary of Ms McFerran's evidence. 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.

452. 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;
- 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.

453. A "one size fits all approach" to dealing with such matters is neither a necessary or desirable outcome.

454. The central basis for the ACTU 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.

455. 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. 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.[293]

456. The ACTU's submissions question the adequacy of enterprise bargaining as a mechanism for delivering appropriate regulation of family and domestic violence leave.[294] The 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.

457. 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;

[293] Section 3(f) of the FW Act.

[294] paragraphs 4.48 to 4.76

- 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).

458. The Full Bench should not accept that these broad assertions are properly established by the evidentiary case advanced.

459. The ACTU proposes to lead evidence from just five union officials relating to their experiences of collective bargaining. The experience of such a small number of officials can hardly be viewed as representative of the bargaining experiences of employees in Australia generally. The weight that can be attributed to such evidence is further undermined by the relatively narrow experience of the relevant officials. For example:

- Mick Dolman's evidence is largely limited to a consideration of the "strongly male dominated maritime sector". He provides hearsay evidence suggesting that that there is no "push back" from male members when speaking about a family and domestic violence leave clauses. He indicates that the National Council of the MUA does not ratify agreements that do not have a family and domestic violence leave clause but does not confirm precisely how successful or unsuccessful the union is in obtaining such clauses in enterprise agreements.
- Brad Gandy works for the WA branch of the AWU. He gives evidence of his experience bargaining with Spotless in relation to an agreement covering certain employees performing work at Alcoa sites. Mr Gandy

indicates, in effect, that he unsuccessfully pursued a family and domestic violence leave clause in such negotiations and that it was the first time he have ever pursued such a clause. He intends to pursue the same or similar clauses in future agreements but notes that his role as an organiser is being phased out.

- Michelle 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. 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.

- Sunil Kemppi, a Senior Industrial Officer at the CPSU, provides a statement almost exclusively addressing bargaining over family and domestic violence provisions in the context of the Australian Public Service.

- Michelle 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.

460. The evidence advanced by the ACTU falls well short of establishing that there has been any broad or long term campaign advanced by unions generally 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.

461. Regardless of the 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. The evidence suggests that this is a matter that is capable of being dealt with at the enterprise level.

462. Moreover, the absence of family and domestic violence leave provisions within enterprise agreements should not viewed as demonstrating employer unwillingness to support employees experiencing 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.

463. 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".*

464. In this respect the union wrongly assumes that a valid objective for the Full Bench in the context of these proceedings is improving capacity for employees to secure family and domestic violence through enterprise bargaining. 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.

465. The ACTU also points to the variability in agreement provisions dealing with family and domestic violence as a justification for addressing family and domestic violence 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."* 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 award system is capable of delivering such an outcome. The Commission should not accept either proposition.

466. 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.

467. In response to ACTU concern that enterprise bargaining will not deliver "*uniform enforceable benefits*" and that "*family violence leave should be an entitlement for all Australian worker*", we make the obvious observation that the award 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.

468. 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.

18. THE COST OF FAMILY AND DOMESTIC VIOLENCE

469. The ACTU deals with the cost of family and domestic violence at chapter 7 of its submissions. It relies on three reports prepared by Pricewaterhouse Coopers (**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.

470. We here seek to address each of these propositions.

18.1 The economic cost of family and domestic violence

471. 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.

472. 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.

473. 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".[295] 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.

474. 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.[296] 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.[297]

475. Relevantly, one of the cost categories is "production related", which is described as follows:

> 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. … [298]

476. 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;

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[295] ACTU Outline of Submissions dated 1 June 2016 at paragraph 7.8.

[296] Witness Statement of Debra Eckersley dated 20 June 2016 at Annexure B, p. 11.

[297] Ibid, p.11.

[298] Ibid, 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.[299]

477. 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.

478. 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 (including "perpetrators" for reasons we have earlier articulated) in the various circumstances described, thus increasing employers' total leave liability.

479. Further, the evidence does not establish that the opportunity cost to victims will necessarily be reduced by a 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.

[299] Ibid,p.47.

18.2 The cost of the ACTU's claim for employers

480. 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"*;[300]

- 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;[301] and

- Not all employees who experience family and domestic violence will seek to access this entitlement, even where it is available.[302]

481. We deal with each of these propositions in turn.

482. 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"[303]. Indeed the material does not establish that there will be *any* offset.

483. 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.

[300] ACTU Outline of Submissions dated 1 June 2016 at paragraph 722.

[301] Ibid at paragraph 7.28.

[302] Ibid at paragraph 7.23.

[303] Ibid at paragraph 7.27.

484. 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".[304] 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.

485. 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.

486. 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".[305] 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".[306] It subsequently published a report titled '*Implementation of Domestic Violence Clauses – An Employer's Perspective*' in November 2015.

487. The report is based on an online survey.[307] 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 underpinning the findings reported by the authors are also not available.

[304] Ibid at paragraph 7.25.

[305] Ibid at paragraph 7.28.

[306] Ibid at paragraph 7.29.

[307] UNSW and ACTU (November 2015) *Implementation of Domestic Violence Clauses – An Employer's Perspective* at page 4.

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.

488. We note that 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.

489. 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.

490. 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.

491. 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.

492. The average period of paid leave was 43 hours[308] 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.

493. The average period of unpaid leave taken was 19 hours.[309] 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.

494. 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 the introduction of leave entitlements for certain employers. The report is not, of course, representative of award-covered employers generally and its

[308] UNSW and ACTU (November 2015) *Implementation of Domestic Violence Clauses – An Employer's Perspective* at page 7.

[309] Ibid.

results cannot be extrapolated for the purposes of reliably assessing whether the potential cost for employers if the ACTU's claim were granted.

495. Thirdly, the ACTU contends that "not all employees who experience family violence will seek to access this entitlement, even where it is available".[310] This submission is of little comfort or implication. It does not assist the Commission in assessing the potential impact of the claim.

496. 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 chapter 16 of this submission where we have addressed the relevant part of 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.

[310] ACTU Outline of Submissions dated 1 June 2016 at paragraph 7.33.

19. SECTION 138 AND THE MODERN AWARDS OBJECTIVE

The legislative requirement

497. 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).

498. 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.

499. 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.

500. 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.

501. 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.[311]

502. 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."

503. 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.

504. 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.

[311] *4 yearly review of modern awards: Preliminary jurisdictional issues* [2014] FWCFB 1788 at [33] – [34].

505. 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.[312]

506. 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.

507. 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.

508. 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.

[312] Ibid at [60].

The ACTU's claim

509. 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.

510. The ACTU's proposal defines 'family and domestic violence' in 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.

511. 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.

512. 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".* [313] 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

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

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.

513. 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.

514. 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.

515. 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 is "experiencing" family and domestic violence (either by virtue of having engaged in the relevant behaviour himself or due to 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.

516. 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.

517. 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.

518. 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.2.2 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.

519. The provision is designed to operate wholly at the employee's discretion. It effectively provides certain employees with an absolute right to take leave. Leave can be accessed by an employee should he or she consider that they are experiencing family and domestic violence as defined, without the need to establish that this is in fact the case. 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 has in fact faced some implication by result of their experience of family and domestic violence. The provision does not require that the experience of family and domestic violence and the purpose for which the leave is taken are connected. 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.

520. As can be seen, the provision sought would entitle a casual employee engaged for one day of work to 10 days of paid leave where that employee alleged that he/she received an abusive text message. The employee could be absent from work in order to attend medical appointments associated with a sporting injury that is in no way related to the alleged family and domestic violence and/or legal appointments associated with the conveyance of recently purchased real estate. All that is required is that the employee must establish that the leave taken was for the purpose of attending a medical practitioner and legal practitioner. That leave can be taken at any time, at the employee's will.

521. To provide another example, 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.

522. 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.

523. 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

524. 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.

525. 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.[314]

526. 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 …[315]

[314] *4 yearly review of modern awards* [2015] FWCFB 3177 at [109].

[315] *Re Shop, Distributive and Allied Employees' Association* (2003) 135 IR 1 at [11].

527. 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.

528. At the very heart of the ACTU's claim is the proposition that the burden carried by employees who suffer from family and domestic violence should be shared by and/or shifted to employers.

529. Of course, employees should not suffer family and domestic violence. There is nothing *fair* about family and domestic violence. Nor is there anything *fair* about a victim of domestic violence suffering the various negative consequences that flow from this problem.

530. 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 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.

531. 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.

532. Regardless, the reference to consideration of 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.[316] 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."* [317]

533. 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.

534. The ACTU acknowledges that the cost of family and domestic violence is shared by Governments, the community and employers. Undoubtedly employers already shoulder part of the cost of family and domestic violence. A question that must be considered by the Full Bench in the context of these proceeding is whether it is *fair* for awards to directly impose additional costs of family and domestic violence upon the employer of a victim of domestic violence.

535. The ACTU believe that victims shoulder too much of the burden and cost of family and domestic violence.[318] 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.

536. A fundamental difficulty with this proposition is that it simply assumes that 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

[316] Section 138.

[317] Paragraph 1.5.

[318] Paragraph 1.5.

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.

537. 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.

538. 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.

539. Later in this 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.

540. 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.

541. 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 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.

542. 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.

543. 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 stringently regulated than under previous regimes.

544. 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 very 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.

545. 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 enjoy 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.

546. 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

547. 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.[319]

548. We also 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.

19.3 A minimum safety net

549. 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.

550. 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 pre-existing entitlements in the absence of there being any clear justification for such an expansion.

551. 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

[319] ACTU Outline of Submissions dated 1 June 2016 at paragraph 2.13.

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.

552. 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.

553. 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 for purposes that may or may not in fact be associated with their experience of family and domestic violence and 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.

554. 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. So much is also evident from Ms Mandell's analysis and Ms McFerran's analysis of enterprise agreement terms.

555. 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.

556. 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".[320] 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.

557. 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 accreditation program that Mr Doleman speaks of [321] constitute forms of "primary prevention" and, to the extent that businesses have the capacity to adopt them, this should be encouraged within the community.

558. 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

[320] Witness Statement of Marilyn Beaumont at paragraph 31.

[321] Witness Statement of Mick Doleman dated 27 May 2016 at paragraph 8.

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 NES

559. 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.

560. The NES represents 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.

561. Earlier in this submission, we have identified the various NES entitlements that, in different ways, allow employees experiencing family and domestic 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.

562. There is some evidence (primarily anecdotal in nature) that might suggest that in certain limited circumstances, the leave accruals of 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.[322]

563. 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 unreasonable been refused, contrary to s.65(5).

564. 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.

19.5 Relative living standards and needs of the low paid (s.134(1)(a))

565. The *Annual Wage Review 2014 – 2015* decision dealt with the interpretation of s.134(1)(a) (emphasis added):

> [310] The assessment of <u>relative living standards</u> 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 <u>needs of the low paid</u> 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.[323]

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[322] *4 yearly review of modern awards – Annual leave* [2016] FWCFB 3177 at [299] – [300].

[323] [2015] FWCFB 3500 at [310] – [311].

566. 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.[324]

567. 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 might subsequently seek 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.

19.6 The need to encourage collective bargaining (s.134(1)(b))

568. 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.

569. 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.

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[324] *Annual Wage Review 2012 – 2013* [2013] FWCFB 4000. See also *Annual Wage Review 2013 - 2014* [2014] FWCFB 3500 at [310].

570. 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.

571. 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.

572. 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.

573. 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.

574. 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.

575. 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.

576. 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))

577. 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.[325]

578. Accordingly, s.134(1)(c) requires the Commission to have regard to the need to improve overall labour force participation rates.

579. The ACTU submits that this consideration is "at the heart of the ACTU's application".[326] It argues that "women who have experienced domestic violence are associated with a more disrupted work history, casual and unstable employment"[327] and that "workplace support logically leads to greater retention of women in employment"[328].

580. 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.

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[325] *4 yearly review of modern awards – Common issue – Award Flexibility* [2015] FWCFB 4466 at [166].

[326] ACTU Outline of Submissions dated 1 June 2016 at paragraph 5.70.

[327] ACTU Outline of Submissions dated 1 June 2016 at paragraph 10.27.

[328] ACTU Outline of Submissions dated 1 June 2016 at paragraph 10.28.

581. In any event, the ACTU acknowledges that there is no established causal link between the experience of family and domestic violence and casual employment.[329] 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.

582. The ACTU's contentions regarding the employment status of women experiencing family and domestic violence are directly contradicted by the 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;[330]

- the proportion of employed women and the proportion of unemployed women (including women not in the workforce) who experienced intimate partner violence;[331]

- the proportion of employed women, the proportion of unemployed women, and the proportion of all women nationally who experienced cohabiting partner violence;[332] and

- the proportion of employed women, the proportion of unemployed women, and the proportion of all women nationally who experienced intimate partner violence.[333]

[329] ACTU Outline of Submissions dated 1 June 2016 at paragraph 4.3.

[330] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraph 7.8.

[331] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraph 7.9.

[332] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraph 7.10.

583. This analysis suggests that neither any correlation nor causal relationship is established by the PSS between the employment status of a woman and the incidence of male cohabiting partner violence or intimate partner violence.

584. 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”.[334] 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 employed.[335] 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.

585. 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.

586. 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.

587. 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.

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[333] Statement of Dr Peta Cox dated 26 May 2016 at annexure PC-3, paragraph 7.10.

[334] ACTU Outline of Submissions dated 1 June 2016 at paragraph 4.2.

[335] ABS 6202.0 – Labour Force, Australia, August 2016.

588. 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))

589. 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 impact not only on employment costs incurred by an employer, but can also cause disruption to an employer's operations. We refer to the witness statement of Mr Matthew Potter of Spotless in this regard.

590. 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).

591. 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.

592. 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))

593. 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))

594. This is a neutral consideration in this matter.

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))

595. 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. We refer to the previous section of our submission in this regard.

596. 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, 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.

597. 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. 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.

598. Further, 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?

599. 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.

600. 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, particularly in light of the inherently unclear confidentiality obligation there contained, is self-evident. We have earlier addressed the impact that the claim would have on productivity, with reference to s.134(1)(d).

601. 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

602. 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.

603. Subsection 3(g) of the Act requires that the special circumstances of small and medium businesses be acknowledged, and of course taken into account.

604. 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.

605. 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).

606. A much higher proportion of the employees of small businesses are award-reliant than the employees of larger businesses.

607. 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**

608. 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**

609. 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.

610. 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

611. 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.

612. 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

613. The need to maintain a stable and sustainable modern awards system tells strongly against the grant of the ACTU's claim.

614. 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.

615. 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.

616. 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.

617. 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).

618. 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.

619. 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))

620. 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.

20. CONCLUSION

621. For the reasons set out in this submission, The ACTU has failed to establish that its claim:

- Is consistent with the modern awards objective in s.134 of the FW Act; and

- Is “necessary” in order for the modern awards objective to be achieved (s.138).

622. Accordingly, the claim should be dismissed by the Commission.

IN THE FAIR WORK COMMISSION
AT MELBOURNE

AM2015/1

4 YEARLY REVIEW OF MODERN AWARDS – FAMILY AND DOMESTIC VIOLENCE CLAUSE

WITNESS STATEMENT OF JENNI MANDEL

I, Jenni Mandel, of 51 Walker Street, North Sydney, 2060 in the State of New South Wales, solemnly and sincerely declare and state as follows:

Background

1. I am employed by the Australian Industry Group (**Ai Group**) as a Workplace Relations Policy Adviser. I have been employed by Ai Group in this role for approximately 2 months. Prior to this role I was a Workplace Advisor with the Ai Group Workplace Advice Line for approximately 1 year.

2. Prior to my employment with Ai Group I worked at Isakow Lawyers as a Lawyer for approximately 1 year.

3. My qualifications are a Bachelor of Laws / Bachelor of Arts from Monash University. and a Graduate Diploma of Legal Practice from the College of Law. I was admitted to practice as a solicitor in May 2014.

Workplace Agreement Database data

4. In September 2016, I was asked by Stephen Smith, Head of National Workplace Relations Policy at Ai Group, to analyse and summarise information provided by the Department of Employment from the Workplace Agreement Database (**WAD**) on enterprise agreements containing domestic violence provisions (**WAD data**).

5. A copy of Stephen Smith's email to Philip Swinton at the Department of Employment requesting the WAD data, and a copy of Philip Swinton's email to Stephen Smith

containing the WAD data and information about the collection of the data are at **Attachment A** to this statement.

6. In particular, I was asked to analyse and summarise the following information from the WAD data:

- The proportion of the total number of enterprise agreements current as at 30 June 2016 that have domestic violence provisions;

- The proportion of the total number of employees covered by enterprise agreements current as at 30 June 2016 who are covered by enterprise agreements which have a domestic violence provision;

- The characteristics of enterprise agreements current as at 30 June 2016 which contain domestic violence provisions, including:

  i. The industry sectors where the agreements apply;
  ii. The proportion of agreements in the private and public sectors;
  iii. The state/territories where the agreements apply;
  iv. The proportion of agreements which cover the following categories of employees:
     - 1-15 employees;
     - 16-50 employees;
     - 51-100 employees;
     - 101-500 employees;
     - 501 or more employees.
  v. The proportion of agreements which have union coverage;
  vi. The unions covered by the agreements.

- The characteristics of enterprise agreements approved in 2016 (up to 30 June 2016) which contain domestic violence provisions, including:

  i. The proportion of agreements which contain paid domestic violence leave entitlements;
  ii. The proportion of agreements which contain unpaid domestic violence leave entitlements;

iii. The proportion of agreements which contain provisions allowing access to other forms of leave for domestic violence purposes;
iv. the industry sectors where the agreements apply;
v. the proportion of agreements in the private and public sectors;
vi. the states/territories where the agreements apply;
vii. The proportion of agreements which cover the following categories of employees:
    - 1-15 employees;
    - 16-50 employees;
    - 51-100 employees;
    - 101-500 employees;
    - 501 or more employees.
viii. The proportion of agreements which have union coverage;
ix. The unions covered by the agreements.

- The characteristics of enterprise agreements approved in 2016 (up to 30 June 2016) which have paid domestic violence leave provisions, including:

i. the industry sectors where the agreements apply;
ii. the proportion of agreements in the private and public sectors;
iii. the states/territories where the agreements apply;
iv. The proportion of agreements which cover the following categories of employees:
    - 1-15 employees;
    - 16-50 employees;
    - 51-100 employees;
    - 101-500 employees;
    - 501 or more employees.
v. The proportion of agreements which have union coverage;
vi. The unions covered by the agreements;
vii. The number of days of paid domestic violence leave as follows:
  - More than 10 days;
  - 10 days;
  - 5-9 days;
  - 1-4 days.

Analysis of the WAD data

7. I completed my analysis of the WAD data on 16 September 2016.

8. The full WAD data set which was analysed and summarised is contained in Tabs 1, 2 and 3 of the spreadsheet at **Attachment B** to this statement.

9. The results of my analysis of the WAD data are set out below.

The proportion of the total number of enterprise agreements current as at 30 June 2016 that have domestic violence provisions

10. According to the WAD data (from Tab 1 in the Department's spreadsheet, which is entitled *"Summary"*) there were 1,149 enterprise agreements current as at 30 June 2016 with some type of provision dealing with domestic violence, not necessarily leave provisions. This equates to 7.9% of all enterprise agreements current as at 30 June 2016.

The proportion of the total number of employees covered by enterprise agreements current as at 30 June 2016 who are covered by enterprise agreements which have a domestic violence provision

11. According to the WAD data (from Tab 1 in the Department's spreadsheet) a total of 819,805 employees were covered by enterprise agreements current as at 30 June 2016 with some type of provision dealing with domestic violence. This equates to 37.8% of all employees covered by enterprise agreements that were current as at 30 June 2016.

The characteristics of enterprise agreements current as at 30 June 2016 which contain domestic violence provisions

The industry sectors where the agreements apply

12. The WAD data (from Tab 1 in the Department's spreadsheet) shows the following data about the industry sectors (by ANZSIC industry classification) that comprise the 1,149 enterprise agreements current as at 30 June 2016 with some type of provision dealing with domestic violence:

ANZSIC Industry Classification	Number of agreements current as at 30 June 2016 with some type of DV provision	% of agreements current as at 30 June 2016 with some type of DV provision
Agriculture, Forestry and Fishing	8	0.7%
Mining	1	0.1%
Manufacturing	67	5.8%
Electricity, Gas, Water and Waste Services	31	2.7%
Construction	53	4.6%
Wholesale Trade	9	0.8%
Retail Trade	32	2.8%
Accommodation and Food Services	24	2.1%
Transport, Postal and Warehousing	71	6.2%
Information Media and Telecommunications	13	1.1%
Financial and Insurance Services	41	3.6%
Rental, Hiring and Real Estate Services	4	0.3%
Professional, Scientific and Technical Services	21	1.8%
Administrative and Support Services	26	2.3%
Public Administration and Safety	163	14.2%
Education and Training	102	8.9%
Health Care and Social Assistance	382	33.2%
Arts and Recreation Services	23	2.0%
Other services	78	6.8%

13. Based on the above, the industry sectors with the greatest proportion of enterprise agreements current as at 30 June 2016 with some type of provision dealing with domestic violence are:

- Health Care and Social Assistance (approx. 33.2% of all agreements current as at 30 June 2016 with some provision dealing with domestic violence are in this industry);
- Public Administration and Safety (approx. 14.2% of all agreements current as at 30 June 2016 with some provision dealing with domestic violence are in this industry); and
- Education and Training (approx. 8.9% of all agreements current as at 30 June 2016 with some provision dealing with domestic violence are in this industry).

14. The WAD data (from Tab 1 in the Department's spreadsheet) also shows the following data about the industry sectors of the 819,805 employees covered by enterprise agreements current as at 30 June 2016 with some type of provision dealing with domestic violence:

ANZSIC Industry Classification	Number of employees covered by agreements current as at 30 June 2016 with some type of DV provision	% of employees covered by agreements current as at 30 June 2016 with some type of DV provision
Agriculture, Forestry and Fishing	1,404	0.2%
Mining	93	0.01%
Manufacturing	9,365	1.1%
Electricity, Gas, Water and Waste Services	18,170	2.2%
Construction	4,901	0.6%
Wholesale Trade	425	0.1%
Retail Trade	33,977	4.1%
Accommodation and Food Services	103,068	12.6%

Transport, Postal and Warehousing	22,401	2.7%
Information Media and Telecommunications	34,376	4.2%
Financial and Insurance Services	75,697	9.2%
Rental, Hiring and Real Estate Services	295	0.04%
Professional, Scientific and Technical Services	6,884	0.8%
Administrative and Support Services	5,516	0.7%
Public Administration and Safety	144,167	17.6%
Education and Training	232,746	28.4%
Health Care and Social Assistance	110,202	13.4%
Arts and Recreation Services	4,636	0.6%
Other services	11,482	1.4%

15. Based on the above, the industry sectors with the greatest proportion of employees covered by enterprise agreements current as at 30 June 2016 with some type of provision dealing with domestic violence are:

- Education and Training (approx. 28.4% of all employees covered by enterprise agreements current as at 30 June 2016 with some provision dealing with domestic violence are in this industry);
- Public Administration and Safety (approx. 17.6% of all employees covered by enterprise agreements current as at 30 June 2016 with some provision dealing with domestic violence are in this industry); and
- Health Care and Social Assistance (approx. 13.4% of all employees covered by enterprise agreements current as at 30 June 2016 with some provision dealing with domestic violence are in this industry).

The proportion of agreements in the private and public sectors

16. According to the WAD data (from Tab 1 in the Department's spreadsheet), of the 1,149 enterprise agreements current as at 30 June 2016 with some type of provision dealing with domestic violence:

    - 912 of these (approx. 79.4%) are in the private sector; and
    - 237 of these (approx. 20.6%) are in the public sector.

17. The WAD data (from Tab 1 in the Department's spreadsheet) also shows that:

    - The 912 private sector agreements current as at 30 June 2016 with some type of provision dealing with domestic violence cover 480,941 employees. (This equates to approximately 58.7% of all employees covered by enterprise agreements; current as at 30 June 2016 with some provision dealing with domestic violence).
    - The 237 public sector agreements current as at 30 June 2016 with some type of provision dealing with domestic violence cover 338,864 employees. (This equates to approximately 41.3% of all employees covered by enterprise agreements current as at 30 June 2016 with some provision dealing with domestic violence).

The State/Territories where the agreements apply

18. The WAD data (from Tab 1 in the Department's spreadsheet) shows the following data about the States and Territories where the 1,149 enterprise agreements current as at 30 June 2016 with some type of provision dealing with domestic violence apply:

State/Territory	Number of agreements current as at 30 June 2016 with some type of DV provision	% of agreements current as at 30 June 2016 with some type of DV provision
ACT	28	2.4%
NSW	245	21.3%
NT	22	1.9%
QLD	114	9.9%
SA	73	6.4%

TAS	85	7.4%
VIC	359	31.2%
WA	70	6.1%
MULTI-STATE	153	13.3%

19. The WAD data (from Tab 1 in the Department's spreadsheet) also shows the following data about the proportion of employees in each State/Territory covered by enterprise agreements current as at 30 June 2016 with some type of provision dealing with domestic violence:

State/Territory	**Number of employees covered by agreements current as at 30 June 2016 with some type of DV provision**	**% of employees covered by agreements current as at 30 June 2016 with some type of DV provision**
ACT	33,718	4.1%
NSW	88,763	10.8%
NT	7,767	0.9%
QLD	57,924	7.1%
SA	21,189	2.6%
TAS	13,272	1.6%
VIC	205,504	25.1%
WA	21,475	2.6%
MULTI-STATE	370,193	45.2%

The proportion of enterprise agreements which cover between 1-15, 16-50, 51-100, 101-500 employees and more than 501 employees

20. According to the WAD data (from Tab 2 in the Department's spreadsheet), of the 1,149 enterprise agreements current as at 30 June 2016 with some type of provision dealing with domestic violence:

- 133 agreements (approx. 11.6%) cover between 1-15 employees;
- 240 agreements (approx. 20.9%) cover between 16-50 employees;
- 171 agreements (approx. 14.9%) cover between 51-100 employees;
- 385 agreements (approx. 33.5%) cover between 101-500 employees; and
- 220 agreements (approx. 19.1%) cover 501 or more employees.

21. The above data means that:

- 133 or 11.6% of enterprise agreements current as at 30 June 2016 with some type of provision dealing with domestic violence cover up to (and including) 15 employees.
- 1,016 or 88.4% of enterprise agreements current as at 30 June 2016 with some type of provision dealing with domestic violence cover more than 15 employees.
- 776 or 67.5% of enterprise agreements current as at 30 June 2016 with some type of provision dealing with domestic violence cover more than 50 employees.
- 605 or 52.7% of enterprise agreements current as at 30 June 2016 with some type of provision dealing with domestic violence cover more than 100 employees.
- 220 or 19.1% of enterprise agreements current as at 30 June 2016 with some type of provision dealing with domestic violence cover more than 500 employees.

The proportion of agreements which have union coverage

22. According to the WAD data (from Tab 1 in the Department's spreadsheet), of the 1,149 enterprise agreements current as at 30 June 2016 with some type of provision dealing with domestic violence:

- 162 of these (approx. 14.1%) do not cover unions; and
- 987 of these (approx. 85.9% cover unions).

23. The WAD data (from Tab 1 in the Department's spreadsheet) also shows that:

- The 162 non-union covered agreements current as at 30 June 2016 with some type of provision dealing with domestic violence cover 50,899 employees. (This equates to approximately 6.2% of all employees covered by enterprise agreements current as at 30 June 2016 with some provision dealing with domestic violence).
- The 987 union covered agreements current as at 30 June 2016 with some type of provision dealing with domestic violence cover 768,906 employees. (This equates to approximately 93.8% of all employees covered by enterprise agreements current as at 30 June 2016 with some provision dealing with domestic violence).

The unions covered by the agreements

24. The WAD data (from Tab 2 in the Department's spreadsheet) shows that of the 987 union-covered enterprise agreements current as at 30 June 2016 with some type of provision dealing with domestic violence the following unions are covered:

Union name	Number of agreements where union is the only union covered	Number of agreements where union is one of multiple unions covered	Total number of agreements union is covered by
AEU	5	7	12
AFAP	-	1	1
AIMPE	3	4	7
AMIEU	-	1	1
AMOU	3	5	8
AMWU	27	59	86
AWU	16	28	44
ANF	58	273	331
APESMA	2	83	85
ARTBIU	10	9	19
ASMOF	3	2	5
ASU	149	130	279
BHTEU	-	1	1
CEPU	23	42	65
CFMEU	8	23	31
CPSU	18	46	64

DWU	1	-	1
ETU	-	3	3
FAAA	-	1	1
FSU	20	2	22
HSUA	30	201	231
IEUA	40	9	49
LHMU	28	47	75
MEAA	9	9	18
MUA	11	5	16
NTEU	30	28	58
NUW	5	15	20
PFA	1	-	1
PSU	-	1	
SDAEA	27	11	38
TCFUA	4	1	5
TWU	7	17	24
WAMEU	-	4	4
UFUA	1	1	

25. Based on the above, the unions covered by the most enterprise agreements current as at 30 June 2016 with some type of provision dealing with domestic violence are:

- ANF – the ANF is covered by 331 of the 1,149 enterprise agreements (approx. 28.8%) current as at 30 June 2016 with some type of provision dealing with domestic violence;
- ASU – the ASU is covered by 279 of the 1,149 enterprise agreements (approx. 24.3%) current as at 30 June 2016 with some type of provision dealing with domestic violence; and
- HSUA – the HSUA is covered by 231 of the 1,149 enterprise agreements (approx. 20.1%) current as at 30 June 2016 with some type of provision dealing with domestic violence.

The characteristics of enterprise agreements approved in 2016 (up to 30 June 2016) which contain domestic violence provisions

The proportion of agreements which contain paid domestic violence leave entitlements

26. According to the WAD data (from Tab 1 in the Department's spreadsheet), 323 enterprise agreements approved in 2016 (up to 30 June 2016) contain some type of provision dealing with domestic violence. This equates to 15% of all enterprise agreements approved in 2016 (up to 30 June 2016).

27. Of these 323 agreements, the WAD data (from Tab 1 in the Department's spreadsheet) shows that 124 (approx. 38.4%) contain paid domestic violence leave entitlements.

The proportion of agreements which contain unpaid domestic violence leave entitlements

28. According to the WAD data (from Tab 1 in the Department's spreadsheet), of the 323 enterprise agreements approved in 2016 (up to 30 June 2016) that contain some type of provision dealing with domestic violence, 21 of these (approx. 6.5%) contain unpaid domestic violence leave entitlements.

The proportion of agreements which contain provisions allowing access to other forms of leave for domestic violence purposes

29. According to the WAD data (from Tab 1 in the Department's spreadsheet), of the 323 enterprise agreements approved in 2016 (up to 30 June 2016) that contain some type of provision dealing with domestic violence, 115 of these (approx. 35.6%) contain provisions allowing access to other forms of leave for domestic violence purposes.

The industry sectors where the agreements apply

30. The WAD data (from Tab 3 in the Department's spreadsheet which is entitled *"2016 DV Agreements"*) shows the following data about the industry sectors (by ANZSIC industry classification) that comprise the 323 enterprise agreements approved in 2016 (up to 30 June 2016) with some type of provision dealing with domestic violence:

ANZSIC Industry Classification	Number of agreements approved in 2016 (up to 30 June 2016) with some type of DV provision	% of agreements approved in 2016 (up to 30 June 2016) with some type of DV provision
Agriculture, Forestry and Fishing	1	0.3%
Manufacturing	32	9.9%
Electricity, Gas, Water and Waste Services	8	2.5%
Construction	27	8.4%
Wholesale Trade	3	0.9%
Retail Trade	8	2.5%
Accommodation and Food Services	6	1.9%
Transport, Postal and Warehousing	33	10.2%
Information Media and Telecommunications	2	0.6%
Financial and Insurance Services	7	2.2%
Rental, Hiring and Real Estate Services	3	0.9%
Professional, Scientific and Technical Services	6	1.9%
Administrative and Support Services	9	2.8%
Public Administration and Safety	37	11.5%
Education and Training	27	8.4%
Health Care and Social Assistance	90	27.9%
Arts and Recreation Services	5	1.5%
Other services	19	5.9%

31. Based on the above, the industry sectors with the greatest proportion of enterprise agreements approved in 2016 (up to 30 June 2016) with some type of provision dealing with domestic violence are:

- Health Care and Social Assistance (approx. 27.9% of all enterprise agreements approved in 2016 (up to 30 June 2016) with some provision dealing with domestic violence are in this industry);
- Public Administration and Safety (approx. 11.5% of all enterprise agreements approved in 2016 (up to 30 June 2016) which contain some provision dealing with domestic violence are in this industry); and
- Transport, Postal and Warehousing (approx. 10.2% of all agreements approved in 2016 (up to 30 June 2016) which contain some provision dealing with domestic violence are this industry).

The proportion of agreements in the private and public sectors

32. According to the WAD data (from Tab 3 in the Department's spreadsheet), of the 323 enterprise agreements approved in 2016 (up to 30 June 2016) with some type of provision dealing with domestic violence:

- 279 of these (approx. 86.4%) are in the private sector; and
- 44 of these (approx. 13.6%) are in the public sector.

The States/Territories where the agreements apply

33. The WAD data (from Tab 3 in the Department's spreadsheet) shows the following data about the States and Territories where the 323 enterprise agreements approved in 2016 (up to 30 June 2016) with some type of provision dealing with domestic violence apply:

State/Territory	Number of agreements approved in 2016 (up to 30 June 2016) with some type of DV provision	% of agreements approved in 2016 (up to 30 June 2016) with some type of DV provision
ACT	7	2.2%

NSW	55	17.0%
NT	1	0.3%
QLD	51	15.8%
SA	38	11.8%
TAS	20	6.2%
VIC	86	26.6%
WA	21	6.5%
MULTI-STATE	44	13.6%

The proportion of enterprise agreements which cover between 1-15, 16-50, 51-100, 101-500 employees and more than 501 employees

34. According to the WAD data (from Tab 3 in the Department's spreadsheet), of the 323 enterprise agreements approved in 2016 (up to 30 June 2016) with some type of provision dealing with domestic violence:

- 56 agreements (approx. 17.3%) cover between 1-15 employees;
- 79 agreements (approx. 24.5%) cover between 16-50 employees;
- 37 agreements (approx. 11.5%) cover between 51-100 employees;
- 115 agreements (approx. 35.6%) cover between 101-500 employees; and
- 36 agreements (approx. 11.1%) cover 501 or more employees.

35. The above data means that:

- 56 or 17.3% of enterprise agreements approved in 2016 (up to 30 June 2016) which contain some type of provision dealing with domestic violence cover up to (and including) 15 employees.
- 267 or 82.7% of enterprise agreements approved in 2016 (up to 30 June 2016) which contain some type of provision dealing with domestic violence cover more than 15 employees.

- 188 or 58.2% of enterprise agreements approved in 2016 (up to 30 June 2016) which contain some type of provision dealing with domestic violence cover more than 50 employees.
- 151 or 46.7% of enterprise agreements approved in 2016 (up to 30 June 2016) which contain some type of provision dealing with domestic violence cover more than 100 employees.
- 36 or 11.1% of enterprise agreements approved in 2016 (up to 30 June 2016) which contain some type of provision dealing with domestic violence cover more than 500 employees.

The proportion of agreements which have union coverage

36. According to the WAD data (from Tab 3 in the Department's spreadsheet), of the 323 enterprise agreements approved in 2016 (up to 30 June 2016) with some type of provision dealing with domestic violence:

- 70 of these (approx. 21.7%) do not cover unions; and
- 253 of these (approx. 78.3% cover unions.

The unions covered by the agreements

37. The WAD data (from Tab 3 in the Department's spreadsheet) shows that of the 253 union-covered enterprise agreements approved in 2016 (up to 30 June 2016) with some type of provision dealing with domestic violence the following unions are covered:

Union name	Number of agreements where union is the only union covered	Number of agreements where union is one of multiple unions covered	Total number of agreements union is covered by
AEU	-	2	2
AIMPE	1	1	2
AMOU	1	2	3

AMWU	8	26	34
AWU	4	7	11
ANF	26	31	57
APESMA	1	10	11
ARTBIU	3	7	10
ASMOF	1	-	1
ASU	17	29	46
BHTEU	-	1	1
CEPU	13	14	27
CFMEU	6	8	14
CPSU	6	4	10
DWU	1	-	1
ETU	-	3	3
FSU	8	-	8
HSUA	6	23	29
IEUA	19	5	24
LHMU	19	11	30
MEAA	4	-	4
MUA	3	2	5
NTEU	6	2	8
NUW	3	4	7
PFA	1	-	1

SDAEA	7	3	10
TCFUA	1	-	1
TWU	3	6	9
WAMEU	-	2	2
UFUA	-	1	1

38. Based on the above, the unions covered by the most enterprise agreements approved in 2016 (up to 30 June 2016) with some type of provision dealing with domestic violence are:

- ANF – the ANF is covered in 57 of the 253 enterprise agreements (approx. 22.5%) approved in 2016 (up to 30 June 2016) with some type of provision dealing with domestic violence;
- ASU – the ASU is covered in 46 of the 253 enterprise agreements (approx. 18.2%) approved in 2016 (up to 30 June 2016) which contain some type of provision dealing with domestic violence; and
- AMWU – the AMWU is covered in 34 of the 253 enterprise agreements (approx. 13.4%) approved in 2016 (up to 30 June 2016) which contain some type of provision dealing with domestic violence.

The characteristics of enterprise agreements approved in 2016 (up to 30 June 2016) which contain paid domestic violence leave provisions

The industry sectors where the agreements apply

39. The WAD data (from Tab 3 in the Department's spreadsheet) shows the following data about the industry sectors (by ANZSIC industry classification) that comprise the 124 enterprise agreements approved in 2016 (up to 30 June 2016) with paid domestic violence leave:

ANZSIC Industry Classification	Number of agreements approved in 2016 (up to 30 June 2016) with paid DV leave	% of agreements approved in 2016 (up to 30 June 2016) with paid DV leave
Manufacturing	3	2.4%
Electricity, Gas, Water and Waste Services	7	5.6%
Construction	1	0.8%
Accommodation and Food Services	1	0.8%
Transport, Postal and Warehousing	11	8.9%
Information Media and Telecommunications	2	1.6%
Financial and Insurance Services	5	4.0%
Rental, Hiring and Real Estate Services	1	0.8%
Professional, Scientific and Technical Services	3	2.4%
Administrative and Support Services	5	4.0%
Public Administration and Safety	17	13.7%
Education and Training	17	13.7%
Health Care and Social Assistance	40	32.3%
Arts and Recreation Services	4	3.2%
Other services	7	5.6%

40. Based on the above, the industry sectors with the greatest proportion of enterprise agreements approved in 2016 (up to 30 June 2016) with paid domestic violence leave are:

- Health Care and Social Assistance (approx. 32.3% of all agreements approved in 2016 (up to 30 June 2016) with paid domestic violence leave are this industry);
- Public Administration and Safety (approx. 13.7% of all agreements approved in 2016 (up to 30 June 2016) with paid domestic violence leave are in this industry); and
- Education and Training industry (approx. 13.7% of all agreements approved in 2016 (up to 30 June 2016) with paid domestic violence leave are in this industry).

The proportion of agreements in the private and public sectors

41. According to the WAD data (from Tab 3 in the Department's spreadsheet), of the 124 enterprise agreements approved in 2016 (up to 30 June 2016) with paid domestic violence leave:

- 99 of these (approx. 79.8%) are in the private sector; and
- 25 of these (approx. 20.2%) are in the public sector.

The States/Territories where the agreements apply

42. The WAD data (from Tab 3 in the Department's spreadsheet) shows the following data about the States and Territories where the 124 enterprise agreements approved in 2016 (up to 30 June 2016) with paid domestic violence leave apply:

State/Territory	Number of agreements approved in 2016 (up to 30 June 2016) with paid DV leave	% of agreements approved in 2016 (up to 30 June 2016) with paid DV leave
ACT	4	3.2%
NSW	9	7.3%
QLD	16	12.9%
SA	17	13.7%
TAS	11	8.9%

VIC	47	37.9%
WA	4	3.2%
MULTI-STATE	16	12.9%

The proportion of enterprise agreements which cover between 1-15, 16-50, 51-100, 101-500 employees and more than 501 employees

43. According to the WAD data (from Tab 3 in the Department's spreadsheet), of the 124 enterprise agreements approved in 2016 (up to 30 June 2016) with paid domestic violence leave:

- 14 agreements (approx. 11.3%) cover between 1-15 employees;
- 28 agreements (approx. 22.6%) cover between 16-50 employees;
- 11 agreements (approx. 8.9%) cover between 51-100 employees;
- 46 agreements (approx. 37.1%) cover between 101-500 employees; and
- 25 agreements (approx. 20.2%) cover 501 or more employees.

44. The above data means that:

- 14 or 11.3% of enterprise agreements approved in 2016 (up to 30 June 2016) which contain paid domestic violence leave cover up to (and including) 15 employees.
- 110 or 88.7% of enterprise agreements approved in 2016 (up to 30 June 2016) which contain paid domestic violence leave cover more than 15 employees.
- 82 or 66.1% of enterprise agreements approved in 2016 (up to 30 June 2016) which contain paid domestic violence leave cover more than 50 employees.
- 71 or 57.3% of enterprise agreements approved in 2016 (up to 30 June 2016) which contain paid domestic violence leave cover more than 100 employees.
- 25 or 20.2% of enterprise agreements approved in 2016 (up to 30 June 2016) which contain paid domestic violence leave cover more than 500 employees

The proportion of agreements which have union coverage

45. According to the WAD data (from Tab 3 in the Department's spreadsheet), of the 124 enterprise agreements approved in 2016 (up to 30 June 2016) with paid domestic violence leave:

- 6 of these (approx. 4.8%) do not cover unions; and
- 118 of these (approx. 95.2%) cover unions.

The unions covered by the agreements

46. The WAD data (from Tab 3 in the Department's spreadsheet) shows that of the 118 union-covered enterprise agreements approved in 2016 (up to 30 June 2016) with paid domestic violence leave, the following unions are covered:

Union name	Number of agreements where union is the only union covered	Number of agreements where union is one of multiple unions covered	Total number of agreements union is covered by
AEU	-	1	1
AMOU	-	1	1
AMWU	1	8	9
AWU	-	3	3
ANF	9	11	20
APESMA	-	6	6
ARTBIU	2	7	9
ASMOF	1	-	1
ASU	12	17	29
CEPU	5	5	10
CFMEU	3	3	6
CPSU	1	3	4
ETU	-	1	1
FSU	6	-	6
HSUA	4	7	11

IEUA	12	2	14
LHMU	15	5	20
MEAA	3	-	3
MUA	-	1	1
NTEU	5	2	7
NUW	1	-	1
PFA	1	-	1
SDAEA	2	-	2
TCFUA	1	-	1
TWU	1	2	3
UFUA	-	1	1

47. Based on the above, the unions covered by the most enterprise agreements approved in 2016 (up to 30 June 2016) with paid domestic violence leave are:

- ASU – the ASU is covered in 29 of the 118 enterprise agreements (approx. 24.6%) approved in 2016 (up to 30 June 2016) which contain paid domestic violence leave.
- ANF – the ANF is covered in 20 of the 118 enterprise agreements (approx. 16.9%) approved in 2016 (up to 30 June 2016) which contain paid domestic violence leave.
- LHMU – the LHMU is covered in 20 of the 118 enterprise agreements (approx. 16.9%) approved in 2016 (up to 30 June 2016) which contain paid domestic violence leave.

The number of days of paid domestic violence leave

48. According to the WAD data (from Tab 3 in the Department's spreadsheet), of the 124 enterprise agreements approved in 2016 (up to 30 June 2016) with paid domestic violence leave:

- 13 agreements (approx. 10.5%) provide for more than 10 days of paid leave;
- 23 agreements (approx. 18.5%) provide for 10 days of paid leave;
- 37 agreements (approx. 29.8%) provide for between 5-9 days of paid leave
- 25 agreements (approx. 20.2%) provide for between 1-4 days of paid leave

- 26 agreements (approx. 21.0%) provide for paid leave that varies (i.e. is discretionary)

Jenni Mandel

19 September 2016

Signed:

ATTACHMENT A

From: Stephen Smith
Sent: Tuesday, 6 September 2016 5:31 PM
To: 'SWINTON,Philip' <Philip.Swinton@employment.gov.au>
Subject: WAD Data Request

Dear Mr Swinton

A Workplace Agreement Database (WAD) Request Form is attached.

Thank-you for your assistance.

Yours sincerely

Stephen Smith
Head of National Workplace Relations Policy

51 Walker St, North Sydney 2060
T: 02 9466 5521
F: 02 9466 5599
M: 0418 461183
E: stephen.smith@aigroup.com.au
www.aigroup.com.au

Department of Employment – Workplace Agreement Database – Data Request

INSTRUCTIONS: PLEASE COMPLETE THE FORM, SIGN AND RETURN VIA FAX on (02) 6276 9940 or EMAIL TO EBTRENDS@EMPLOYMENT.GOV.AU. SHOULD YOU HAVE ANY PROBLEMS PLEASE CONTACT THE DIRECTOR OF THE WORKPLACE AGREEMENTS DATABASE AND ANALYSIS SECTION VIA THE DEPARTMENT OF EMPLOYMENT (THE DEPARTMENT) SWITCHBOARD ON 1300 488 064.

DETAILS OF REQUESTER

NAME:	Stephen Smith
ORGANISATION:	Australian Industry Group
POSITION/TITLE:	Head of National Workplace Relations Policy
WORK AREA IN ORGANISATION	National Workplace Relations Policy Department
MAILING ADDRESS:	51 Walker Street, North Sydney, NSW, 2060
EMAIL ADDRESS:	stephen_sydney03@yahoo.com.au
DAYTIME TELEPHONE:	02 9466 5521 or 0418 461183
DAYTIME FAX:	

DESCRIPTION OF THE DATA AND TIME PERIOD THAT YOU ARE INTERESTED IN:

Information of domestic violence provisions in all current enterprise agreements, as follows:

1. The following information on current enterprise agreements which have domestic violence provisions:

    a. The name of the agreement
    b. The FWC agreement number
    c. The industry sector
    d. Public sector or private sector
    e. States / Territories where agreement applies
    f. Number of employees covered by the agreement
    g. The unions/s covered by the agreement, if any
    h. Whether contains domestic violence leave
    i. Whether contains provision/s allowing other leave to be accessed for domestic violence purposes
    j. Whether contains non-leave domestic violence entitlements
    k. Whether contains provisions enabling employees to support victims of domestic violence (eg. carer's leave)

2. We understand that domestic violence leave entitlements have only been broken down into paid leave and unpaid leave for agreements approved since 1 January 2016. Therefore, we would appreciate a separate report being provided on agreements with domestic violence provisions approved since 1 January 2016 with the following information:

    a. The name of the agreement
    b. The FWC agreement number
    c. The industry sector
    d. Public sector or private sector
    e. States / Territories where agreement applies
    f. Number of employees covered by the agreement
    g. The unions/s covered by the agreement, if any
    h. Whether contains domestic violence leave
    i. **If contains DV leave, whether paid leave or unpaid leave**
    j. Whether contains provision/s allowing other leave to be accessed for domestic violence purposes
    k. Whether contains non-leave domestic violence entitlements
    l. Whether contains provisions enabling employees to support victims of domestic violence (eg. carer's leave)

3. The text of any of the above domestic violence provisions, if available.

WHEN REQUIRED (DATE)?

As soon as possible

SHORT DESCRIPTION OF THE INTENDED USE OF THE DATA*? For the purposes of submissions and evidence in the FWC's *Family and Domestic Violence Leave Case*.
WHAT (IF ANY) IS THE DISSEMINATION PLAN (IE PUBLIC REPORT/CONFERENCE PRESENTATION/ JOURNAL ARTICLE) AND WHEN? Submissions and evidence in the FWC's *Family and Domestic Violence Leave Case*.
HOW DID YOU HEAR OF THE DATABASE? Have known of the database since its inception many years ago.
 SIGNATURE: DATE:...6.../...9..../..2016.......

* Please ensure that the intended use of the data is correctly reflected. The Department will review every request it receives, and reserves its right to approve or decline data requests. Please note that for reference purposes, the data source is to be referred as "Department of Employment Workplace Agreement Database"

By signing this form you acknowledge that you are aware that giving false or misleading information is a serious offence under section 137.1 of the Schedule to the Criminal Code Act 1995.

Privacy Notice

The personal information collected from you on this form is protected by law, including the Privacy Act 1988 (Cth) (Privacy Act), and is collected by the Australian Government Department of Employment (the Department) for the purpose of making the requested data available to you. The consequence for not providing some or all of your personal information is that the Department may not be able to provide the requested data to you.

Your personal information will not be used for any other purpose or disclosed to any other person or organisation unless such a use or disclosure is permitted under the Privacy Act.

The Department's APP Privacy Policy contains more information about the way in which the Department will manage your personal information, including information about how you may access your personal information held by the Department and seek correction of such information. This APP Privacy Policy also contains information on how you can complain about a breach of the Australian Privacy Principles (APPs) and how the Department will deal with such a complaint. A copy of the Department's APP Privacy Policy can be found at employment.gov.au/privacy or by requesting a copy from the Department at privacy@employment.gov.au.

From: SWINTON,Philip [mailto:Philip.Swinton@employment.gov.au]
Sent: Wednesday, 7 September 2016 12:43 PM
To: Stephen Smith <Stephen.Smith@aigroup.com.au>
Subject: RE: WAD Data Request [SEC=UNCLASSIFIED]

Dear Mr Smith

Please find in the attachment a list of all agreements current as at 30 June 2016 (that is, not passed the expiry date) with some type of domestic violence (DV) provision. For each agreement we have added the Certification, Commencement and Expiry Dates as well as the information for each agreement that you requested.

The attachment also includes summary tables with a breakup of federal enterprise agreements current as at 30 June 2016 that contain some kind of DV provision by industry, State/Territory, union/non-union and sector.

Please note, an agreement is coded as having a DV provision if:

- "*the agreement provides a domestic violence clause, or deals in some other way with domestic violence. This might include – but is not limited to – additional entitlements for employees experiencing domestic violence, flexible working arrangements or access to leave; both paid and unpaid leave should be coded here*."

The attachment also includes a list of agreements approved in 2016, to 30 June of the year, with the additional DV data in our database. Please note that collection of this additional data only commenced in 2016 so we are not able to provide it for all agreements current as at 30 June 2016.

The definitions for the 2016 DV codes are as follows:

- Paid DV Leave if:
  - "*the agreement provides paid leave for victims of domestic violence. This should be coded regardless of whether the leave is automatically granted, or subject to manager discretion/approval. This code is only to be coded if the agreement contains an entitlement to a separate paid leave for domestic violence purposes. This should not be coded if the agreement grants employees the right to access other types of leave (like personal or compassionate leave).This can still be coded if the paid leave occurs after an employee exhausts other leave entitlements. This is a numeric field. The number of paid days leave per annum is to be recorded. Where the amount varies, or is unclear / unknown, or the leave is granted on a 'per occasion' basis, code '555'.*"
- Unpaid DV Leave if:

- “*the agreement specifically states that victims of domestic violence may use unpaid leave provisions for domestic violence reasons. This code should not be used for agreements which are silent on whether their unpaid leave provisions (if they exist in the agreement) can be used to cover domestic violence situations. This should be coded regardless of whether the leave is automatically granted, or subject to manager discretion/approval. This can still be coded if this unpaid leave occurs after other leave entitlements are exhausted*.”

- Access to other leave if:
  - “*the agreement allows victims of domestic violence to access other leave entitlements. This can include (but is not limited to): access to personal leave; compassionate leave; annual and long service leave; TOIL; and accrued flex-time. This could also include access to “pressing emergency leave” which has domestic violence as one of the grounds for eligibility. This should be coded regardless of whether the leave is automatically granted, or subject to manager discretion/approval. This can still be coded if this other leave occurs after an employee has exhausted dedicated domestic violence leave*.”
- Non-leave entitlements/support if:
  - “*if the agreement provides entitlements to employees that are not included in codes 93, 94, or 95 above. This could include safety precautions (changing location of work, phone numbers, etc.), counselling or access to an Employee Assistance Program (in which case, code 90 should also be coded), or any other related benefits*.”
- Right to request flexible working arrangements as per NES
  - “*the only mention of domestic violence in the agreement is to repeat or refer to the right to request flexible working arrangements (which contains a reference to domestic violence) in the NES*.” This code identifies agreements that specifically draw attention to the flexible working arrangements NES and that it applies to domestic violence matters.
- Provisions for carers/supporters of domestic violence victims if:
  - “*the agreement contains any domestic violence provisions (other than the right to request flexible working arrangements contained in the NES) that offer entitlements or support to employees who are carers or supporters of domestic violence victims. This is most likely going to be coded in the event of carer’s leave being available to these employees, but should also be coded if any other support is available to them*.”

In addition, the attachment contains text of the DV clauses in agreements approved from 1 January 2014 onwards. Text is missing for some agreements and this occurs where it cannot be read by the software we use for this purpose.

You should be aware of the following caveats relating to the attached data:

- The employees figure for each agreement the number of employees covered at the time the agreement is lodged with Fair Work Commission (FWC)
- The “paid DV leave” and “unpaid DV leave” codes are not mutually exclusive. Occasionally agreements offer an entitlement to both forms of leave.
- The data is based on agreements that specifically state that victims of domestic violence may access the entitlement. Thus agreements with domestic violence entitlements which are covered by informal arrangements or by company policy documents outside the agreement are not included in the data.

- "Unions covered" under Fair Work Act enterprise agreements are unions mentioned in the FWC approval decision as having written to the Commission seeking to be covered by the agreement.

Please don't hesitate to let me know if you have any questions about the data.

Yours sincerely

Philip Swinton
Assistant Director
Economic and Workplace Agreements Analysis Team
Department of Employment
(02) 61217787

From: Stephen Smith [mailto:Stephen.Smith@aigroup.com.au]
Sent: Tuesday, 6 September 2016 5:31 PM
To: SWINTON,Philip
Subject: WAD Data Request

Dear Mr Swinton

A Workplace Agreement Database (WAD) Request Form is attached.

Thank-you for your assistance.

Yours sincerely

Stephen Smith
Head of National Workplace Relations Policy

51 Walker St, North Sydney 2060
T: 02 9466 5521
F: 02 9466 5599
M: 0418 461183
E: stephen.smith@aigroup.com.au
www.aigroup.com.au

Attachment B: Workplace Agreement Database on enterprise agreements containing domestic violence provisions