

**DRAFT SUMMARY OF SUBMISSIONS**

This table is a summary of submissions received on or before 5:00pm on 7 September 2017

Party	Submission date	Summary of submission
<b>General Submissions / Additional Issues Raised</b>		
ACCI	<a href="#">1 September 2017</a>	<p>Propose the following model term:</p> <p><b>1.1 Entitlement</b>  An employee who experiences an act or acts of domestic violence committed by a member of the employee's immediate family and who is a member of the employee's household shall be entitled to take up to three days leave without pay in a calendar year to attend:</p> <ul style="list-style-type: none"> <li>(a) with police to report on an incident of domestic violence (including any required ongoing attendance with police);</li> <li>(b) court associated with the act or acts;</li> <li>(c) with a lawyer to seek advice or representation in relation to or arising from the act or acts;</li> <li>(e) a Government support service providing support to persons experiencing domestic violence; or</li> <li>(f) locate refuge or shelter or temporary accommodation in relation to or arising from the act or acts,</li> </ul> <p>provided it is impracticable to attend outside work time.</p> <p><b>1.2 Leave not to be taken if personal leave is available</b>  Despite anything else in this clause, an employee is not entitled to take leave under this clause if the employee was otherwise entitled to take personal/carer's leave.</p> <p><b>1.3 Notice</b></p> <ul style="list-style-type: none"> <li>(a) An employee must give their employer notice of the taking of leave under this clause by the employee.</li> <li>(b) The notice must: <ul style="list-style-type: none"> <li>(i) be given to the employer as soon as practicable (which may be a time after the leave has started); and</li> <li>(ii) advise the employer of the period, or expected period of the leave.</li> </ul> </li> </ul> <p><b>1.4 Evidence</b></p> <ul style="list-style-type: none"> <li>(a) An employee who has given their employer notice of the taking of leave under this clause</li> </ul>

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		<p>must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for a reason specified in this clause and it was impracticable to attend outside work time.</p> <p>(b) To avoid any doubt, a statutory declaration is sufficient for the purposes of clause 1.4(a).</p> <p><b>1.5 Additional Leave by agreement</b></p> <p>An employer and an employee may agree to allow the employee to take unpaid leave in addition to the leave set out in clause 1.1 above.</p>
Ai Group	<a href="#">30 August 2017</a>	<ul style="list-style-type: none"> <li>• Continue to rely upon the submissions and evidence previously filed and presented in the proceedings.</li> <li>• Do not support the inclusion of domestic violence leave provisions (paid or unpaid) in awards.</li> </ul>
AMIC	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>• Do not intend to file further evidence.</li> <li>• Submits that there are difficulties associated with the legislative framework of family and domestic violence relief, and lack of consistency amongst states and territories in definitions and coverage of family and/or domestic violence.</li> <li>• Submits that any coverage for unpaid leave, if granted, should be narrower than that contained in the state and territory legislation.</li> <li>• Identifies differences between ACTU's proposed definition and the wider matters covered by state and territory definitions. Submits that any unpaid leave needs to be clearly understood to satisfy the limbs of s.134 of FW Act.</li> </ul>
APSC	<a href="#">28 July 2017</a>	<ul style="list-style-type: none"> <li>• Raised additional issue of implications on the application of the Better Off Overall Test (BOOT) in future enterprise agreements should unpaid leave provisions be included in the Australian Government Industry Award.</li> <li>• Submits employees could be worse off if there is an expectation that accrued personal leave or a defined amount of unpaid leave should be used for these purposes.</li> <li>• Submits that current practice in providing miscellaneous and/or personal leave to employees experiencing family and domestic violence ought to satisfy any future BOOT assessment.</li> </ul>
APSC	<a href="#">31 August 2017</a>	Relies on the submissions filed on <a href="#">28/07/17</a> and have no further witness statements or documentary evidence to file at this time.

Party	Submission date	Summary of submission
Attachment B - List of issues to be addressed		
<b>A. Unpaid Domestic Violence Leave</b>		
1. Should there be an entitlement to access unpaid domestic violence leave in Modern Awards?		
ACCI	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>Acknowledge that the majority decision of the Full Bench expressed the preliminary view that the answer to this question is yes.</li> <li>Submit that the preliminary view does not accord with ACCI's position.</li> <li>Submit that it is not appropriate to undertake a rehearing of the matters that have already been heard.</li> </ul>
ACTU	<a href="#">1 September 2017</a>	Submit that it is both necessary within the meaning of s.138 of the FW Act, and appropriate to include an entitlement to unpaid leave in modern awards
Ai Group	<a href="#">30 August 2017</a>	<ul style="list-style-type: none"> <li>Do not support the inclusion of domestic violence leave provisions (paid or unpaid) in awards for all of the reasons that it has argued in the proceedings previously.</li> <li>Submits the provision of assistance to employees affected by domestic violence is a matter that is appropriately dealt with at the enterprise level, not in the award safety net.</li> <li>Submits if the Commission decides to adopt the preliminary view and include unpaid domestic violence leave provisions in awards, the entitlement needs to be carefully defined and limited.</li> </ul>
AMIC	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>Submits there should not be an entitlement to unpaid family and domestic violence leave.</li> <li>Submits the reasons provided in its submissions during the hearing of the matter for not granting paid leave are also relevant for not granting unpaid leave.</li> <li>Submits the matter is best left for consideration by Parliament.</li> <li>Submits that it does not agree with proposal by some other employer parties that assistance to employees affected by domestic violence is best dealt with at the enterprise level.</li> <li>Submits that state and territory legislation dealing with the processes for intervention with family and domestic violence issues adds weight to its submissions, in addition to other available NES entitlements and flexible working arrangement requests including s.65A of FW Act.</li> <li>Submits the issue has ramifications beyond modern award coverage.</li> </ul>
APSC	<a href="#">28 July 2017</a>	<ul style="list-style-type: none"> <li>Submits employees could be worse off if there is an expectation that accrued personal leave or a defined amount of unpaid leave should be used for family and domestic violence purposes.</li> <li>Submits that consideration should be given as to whether clauses providing for unpaid domestic violence leave, and the use of personal/carer's leave entitlements, are necessary in all awards.</li> </ul>
NatRoad	<a href="#">1 September 2017</a>	Does not support the introduction of unpaid family and domestic violence leave in the Road Transport Awards.

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<p>2. If there is to be an entitlement to unpaid domestic violence leave in Modern Awards, then: 2.1 What is the extent of the entitlement to unpaid domestic violence leave (i.e. quantum)?</p>		
ACCI	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>• Submit that basing entitlements on bargaining outcomes is unsound firstly because they occur in the context of a bargain for a particular enterprise and secondly because bargained outcomes and the fair and relevant minimum safety net serve two distinct and materially different roles.</li> <li>• Submit that the NES may provide guidance as it contains a number of provisions for unpaid leave. Specifically they refer to s.109 that provides unpaid carer's leave. They note that the leave has certain distinguishing features i.e.: <ul style="list-style-type: none"> <li>○ it is event driven;</li> <li>○ the scope of the events is contained;</li> <li>○ the leave is not available if paid personal leave is available;</li> <li>○ the leave does not accrue; and</li> <li>○ the employee must give notice of the leave including evidence "...that would satisfy a reasonable person..." that the leave is taken for the purposes of the section of the Act.</li> </ul> </li> <li>• Submit further that a number of other provisions in the NES provide unpaid leave including: community service leave; jury service; unpaid parental leave; unpaid special maternity leave, unpaid no safe job leave and pre-adoption leave. They note that the Full Bench should have regard to the following: <ul style="list-style-type: none"> <li>○ statutory unpaid leave is overwhelmingly limited in quantum;</li> <li>○ the purpose for taking the leave is clearly defined and is triggered by a specific event or cause;</li> <li>○ unpaid leave does not accumulate;</li> <li>○ well tested notification and evidence rules apply to the taking of unpaid leave;</li> <li>○ the NES contains explicit examples that unpaid leave should not be taken when a relevant form of paid leave is available.</li> </ul> </li> <li>• Submit that employees should not be able to access unpaid leave if paid leave is available for instance if an employee was entitled to paid personal/carer's leave then unpaid leave should not be available.</li> <li>• Submit that unpaid domestic violence is most akin to compassionate leave being occurrence based and not generally applicable. Based on this, and the Telstra experience up to <b>2-3 days</b> per annum would sit comfortably with the NES.</li> </ul>
ACTU	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>• The quantum should be whatever is required to meet the needs of a particular situation. The ACTU application sought the inclusion of 10 days of paid leave. Refers to the evidence of Debra Eckersley of PWC that 10 days was the industrial norm among many workplaces that have access to paid family and</li> </ul>

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		<p>domestic violence leave. Also refers to Ms Eckersley's evidence that PWC arrived at the quantum of 10 days based on the 'common standard' and advice of experts in the field.</p> <ul style="list-style-type: none"> <li>• Submit that unpaid leave is different as it does not accrue, is not paid out on termination and the only costs to employer are the costs of replacement staff members. ACTU recommend uncapped unpaid leave.</li> </ul>
Ai Group	<a href="#">30 August 2017</a>	<ul style="list-style-type: none"> <li>• Submits if the Commission decides to include unpaid domestic violence leave provisions in awards, there should be an annual limit of 2 days per annum for full-time employees, and pro-rata entitlement for part-time employees.</li> <li>• Submits employees would be free to seek a longer period of unpaid leave from their employer, and employees who need to take a longer period of unpaid leave have various protections under the FW Act (e.g. protection against unfair dismissal).</li> <li>• Refers to 2 day entitlement for unpaid carer's leave under s.102 of FW Act, and compassionate leave under s.104 of FW Act.</li> <li>• Refers to ACTU's <a href="#">Outline of Submissions of 01/06/16</a> and the results of the study indicating that the average time off for employees accessing unpaid family violence leave was 19 hours in the past 12 months. Submits the study surveyed employers with a disproportionately high participation of women. Submits that the research does not support a finding that any unpaid leave entitlement should exceed 2 days per annum.</li> <li>• Submits that a leave entitlement of more than 2 days per annum cannot be seen as necessary to meet the modern awards objective.</li> </ul>
AMIC	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>• Submits if the Commission introduces entitlement to access unpaid family and domestic violence leave, it should be limited to 1 day's unpaid leave.</li> <li>• Submits should the Commission decide to grant more than 1 day, the entitlement should be no more than 2 days' unpaid leave for each year of employment.</li> <li>• Submits the NES provides for unpaid leave in certain circumstances, such as unpaid carer's leave (s.102 FW Act) and unpaid compassionate leave (ss.104, 106 FW Act) which have a limit of 2 days per occasion.</li> <li>• Submits the unpaid leave should only be provided to attend to "immediate impact" matters, which narrows the quantum of leave required.</li> <li>• Submits attending appointments with lawyers or financial professionals are not matters that merit unpaid leave as these can occur outside rostered hours.</li> </ul>

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		<ul style="list-style-type: none"> <li>• Submits attending medical facilities or seeking professional counselling should not be considered for unpaid leave as they would in all probability come within personal/carer's leave and/or flexible work entitlements. May also access annual leave and long service leave.</li> <li>• Submits that any unpaid leave for family and domestic violence should be for a limited number of urgent purposes where personal/carer's leave may not be able to be accessed.</li> <li>• Submits that urgent interlocutory matters are unlikely to last a day in court, and alternative accommodation issues could be set in motion in less than a day. Submits that there are circumstances that may take longer, however modern award entitlements together with the NES are to provide a fair and relevant minimum safety net.</li> <li>• Submits that due to the limited urgent circumstances warranted for accessing unpaid leave, the quantum should not be for each occasion (i.e. should not be unpaid leave on an ongoing basis for each occasion).</li> <li>• Submits that if unpaid leave is granted, the options outlined in s.105(2) FW Act should be considered. If one day's unpaid leave is granted, the conditions need to be modified.</li> </ul>
NatRoad	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>• Submits if the Commission decides to include unpaid domestic violence leave provisions in the awards, it relies on its preliminary submissions of <a href="#">27 July 2017</a>.</li> </ul>
<p>2.2 The circumstances in which the leave entitlement arises, including:  (a) the definition of 'family and domestic violence' for the purposes of the clause;</p>		
ACCI	<a href="#">1 September 2017</a>	Definition is the most vexed issue and the definition posed by the ACTU appear to be as 'long as a piece of string' that could likely include heated divorces. Have not formed a definitive view but should a 'generic sociological' definition be adopted they submit that it would need to be qualified by the circumstances leave could be accessed.
ACTU	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>• Disagree with the suggestion from the Full Bench that the definition be limited to "employees experiencing repeated violence from a current intimate partner, or a family member who resides with them." Submits would exclude many employees with a legitimate need for time off work.</li> <li>• Submits that definition needs to describe both the type of conduct and the type of relationship which characterises a situation of family and domestic violence.</li> <li>• ACTU have looked at a number of definitions across criminal jurisdictions in Australia and existing enterprise agreements and submit that: <ul style="list-style-type: none"> <li>• they are generally consistent with the ACTU definition proposed;</li> <li>• cover a wide range of relationships including at least intimate partners (of any gender), as well as</li> </ul> </li> </ul>

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		<p>people usually regarded as relatives (including traditional Indigenous kinship relationships) whether or not they reside in the same household;</p> <ul style="list-style-type: none"> <li>• a broad range of conduct, including both physical and non-physical forms of abuse (such as economic and emotional abuse, as well as damage to property), coercion and threats to cause harm and damage; and</li> <li>• there is no requirement that violence be repeated or ongoing. Limiting access to the provision as proposed by the Full Bench is not consistent with widely-accepted definitions.</li> </ul>
AMIC	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>• Refers to ACTU’s proposed definition, and the definition contained in the Family Law Act.</li> <li>• Submits the amended claim clause is uncertain and open to ambiguous interpretation, and that it is unsatisfactory to use the words “member of the person’s family or household (current or former)”.</li> <li>• Submits the definition leaves the interpretation of “person’s family” unclear and there are no boundaries associated with “member’s household”.</li> <li>• Submits that any coverage extending to households must be severely limited and qualified.</li> <li>• Submits that any definition should cover: what (coverage); how (acts/circumstances); and who (the persons that may be affected). Submits the bullying definition in s.789FD of FW Act provides an example similar to what AMIC is suggesting in form and provides sufficient detail for employers and employees.</li> <li>• Proposes amending the Family Law Act definition as follows: <ul style="list-style-type: none"> <li>a) <i>‘Family and domestic violence’ means violent, threatening or other behaviour by a person that coerces or controls a member of the <u>person’s family</u> or <u>household</u> or causes that family member or member of the household to be fearful.</i></li> <li>b) <i>‘Person’s family’ in (a) means members of the person’s ‘immediate family’ as defined in s.12 of the Fair Work Act 2009.</i></li> <li>c) <i>Member of the household in (a) means a person who is residing in the household.</i></li> </ul> </li> <li>• Submits that any coverage for unpaid leave should be narrower than that contained in the state and territory legislation due to the majority of the Full Bench’s comments on the ACTU amended claim clause not requiring the family member who is the perpetrator to reside with the employee or that the employee is at risk of repeated violence, and also the majority of the Full Bench’s comments to take a cautious approach to the introduction of the leave.</li> <li>• Submits that the word “household” be limited. Submits “household” replace “member of the household” as it provides clarity for coverage for a person who “is residing in the household”.</li> </ul>

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		<ul style="list-style-type: none"> <li>Submits wording around “immediate family” and limiting “household” to a person “residing” is necessary for the purpose of imposing a time limit. Refers to example of South Australian legislation placing a three-year limit in definition of domestic partner.</li> </ul>
NatRoad	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>Submits if the Commission decides to include unpaid domestic violence leave provisions in the awards, ACTU’s proposed definition is not appropriate as there is no reference to the employed person who is presumably the target (or whose family or household member is the target) of the violent behaviour.</li> <li>Submits the definition is too broad and uncertain in its operation.</li> <li>Submits consideration should be given to changing the name of the leave to alleviate stigma associated with reporting this type of violence and accessing the leave. Suggests renaming to “violence leave” or “personal safety violence leave”.</li> <li>Submits the current definition is too narrow as it does not recognise other forms of abuse such as coercive control, psychological abuse, economic or financial abuse, or verbal abuse. However NatRoad does not suggest expanding the proposed definition to capture these other aspects.</li> </ul>
2.2 (b) the circumstances in which leave may be accessed (eg attending an appointment related to the violence)		
ACCI	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>Submit that the evidence of Dr Peta Cox provides meaningful guidance and suggest that the list of <u>urgent</u> circumstances include the following: <ul style="list-style-type: none"> <li>(a) attendance with police to report on an incident of domestic violence (including any required ongoing attendance with police);</li> <li>(b) attendance at Court;</li> <li>(c) attendance with a lawyer;</li> <li>(d) attendance with a Government service providing support to persons experiencing domestic violence; and</li> <li>(e) attendance to locate refuge or shelter or temporary accommodation.</li> </ul> </li> <li>Note that when employee can practically deal with these matters outside work time then leave should not be taken but where it is impracticable or necessary to use work time then the leave would be available.</li> </ul>
ACTU	<a href="#">1 September 2017</a>	<p>ACTU proposes:</p> <p>An employee experiencing family and domestic violence is entitled to leave without pay when required for the purposes of:</p>



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		<p>(a) Attending legal proceedings;            (b) Attending appointments with counsellors or medical, financial or legal professionals;            (c) Making relocation or other safety arrangements; or            (d) Any other activities related to the effects of family and domestic violence.</p> <ul style="list-style-type: none"> <li>• Definition was drafted in response to FB comments that ACTU wording should be narrowed to circumstances employee dealing with ‘immediate impact.’</li> <li>• Notes ACTU amended proposed clause to clarify need for causal connection between experience of domestic violence and the purpose for which leave is requested by requiring leave be ‘related to’ experience of domestic violence. States this terminology used in number of current enterprise agreements (Victorian Public Service Enterprise Agreement 2016) for accessing paid leave for activities “related to” family and domestic violence.</li> <li>• Also propose that the leave should include provision that leave can be taken in consecutive or single days or part of day.</li> </ul>
Ai Group	<a href="#">30 August 2017</a>	<ul style="list-style-type: none"> <li>• Refers to decision of Gooley DP and Spencer C at para [109]-[114] of <a href="#">[2017] FWCFB 3494</a>, and submits that the following important principles flow from the above extract:           <ol style="list-style-type: none"> <li>a. The family member that is the perpetrator of the violence must reside with the employee who is applying for the leave.</li> <li>b. The employee must be at risk of repeated violence.</li> <li>c. The leave must be necessary to deal with the violence (e.g. the meeting or event to which the application for leave relates cannot occur outside of ordinary working hours).</li> <li>d. The leave must be for the purposes of dealing with the immediate impact of the violence.</li> </ol> </li> <li>• Submits unpaid domestic violence leave should not be able to be accessed in circumstances where paid personal/carer’s leave or unpaid carer’s leave can be accessed. Submits this is consistent with approach in s.103(3) of FW Act regarding access to unpaid carer’s leave and is supported by para [44] of <a href="#">[2017] FWCFB 3494</a>.</li> </ul>
AMIC	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>• Submits if the Commission introduces entitlement to access unpaid family and domestic violence leave, it should only be for the matter listed in the majority decision (i.e. dealing with the immediate impact - finding alternative accommodation and attending urgent court hearings).</li> <li>• Submits attending appointments with medical practitioners and counsellors can come within ambit of personal/carer’s leave and should not be considered a circumstance in the granting of unpaid leave.</li> </ul>
NatRoad	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>• Submits that there must be a direct and immediate relationship between the violence and the purpose</li> </ul>

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		<p>of accessing the leave. For example if an employee needs to urgently move house, attend unscheduled court hearings or to have an emergency medical assessment.</p> <ul style="list-style-type: none"> <li>Submit further that where there is some capacity to use other forms of leave in such circumstances, consideration should be given to requiring that the other form of leave is used first.</li> </ul>
<b>2.2 (c) who may access the entitlement</b>		
ACCI	<a href="#">1 September 2017</a>	The general guidance from the FW Act is that all employees including casual employees are given access to statutory unpaid leave.
ACTU	<a href="#">1 September 2017</a>	Should be available to all employees who are affected by domestic violence (as defined) and for specified purposes. Should not be available to the perpetrator.
AMIC	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>Submit that for part-time employees, any entitlement should be pro-rata.</li> <li>See response to 2.5 in relation to coverage of casuals.</li> </ul>
<b>2.3 Accrual issues, in particular whether the leave entitlement is available in full at the start of the year or accrues.</b>		
ACCI	<a href="#">1 September 2017</a>	Submit that similar to other unpaid leave in the FW Act this leave would not accrue but would be circumstance based but would be capped per year.
ACTU	<a href="#">1 September 2017</a>	Submits that it is a needs based entitlement and should be treated similarly to unpaid carer's leave which does not depend on a minimum service period. No principled justification for limiting access to unpaid leave. Accrual not necessary.
Ai Group	<a href="#">30 August 2017</a>	<ul style="list-style-type: none"> <li>Submits if the Commission decides to include unpaid domestic violence leave provisions in awards, the unpaid leave entitlement should not accrue from year to year.</li> <li>Submits the full annual entitlement should not apply for an employee with less than 12 months of service.</li> </ul>
AMIC	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>Refers to accrual of personal/carer's leave (s.96 FW Act) and compassionate leave (s.104), and submits for consistency and fairness that any unpaid family and domestic violence leave should be available at the start of the employee's year.</li> <li>Submits that any unused unpaid leave for any year of employment would not accrue to subsequent years but would be available for each year of employment.</li> </ul>
<b>2.4 How would an employee access the entitlement (notice and evidentiary requirements)?</b>		
ACCI	<a href="#">1 September 2017</a>	Evidence required would be test consistent with FW Act "...that would satisfy a reasonable person..."
ACTU	<a href="#">1 September 2017</a>	<p>Proposes ACTU proposed model clause:</p> <p>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.</p>

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		<p>X.3.2 If required by the employer, the employee must provide evidence that would satisfy a reasonable person that the leave is for the purpose as set out in clauses [tbc] and [tbc]. 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.</p> <ul style="list-style-type: none"> <li>• Notes requirements likely to operate similarly to paid personal leave.</li> <li>• Notes employer is entitled to refuse statutory declaration outlining reasons for leave.</li> </ul>
Ai Group	<a href="#">30 August 2017</a>	<ul style="list-style-type: none"> <li>• Submits if the Commission decides to include unpaid domestic violence leave provisions in awards, the appropriateness of the notice and evidence requirements in s.107 FW Act should be considered once the scope of the clause is determined.</li> </ul>
AMIC	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>• Refers to submissions made by ACTU and employer parties during the hearing of the matter and submits the employer parties' submissions remain relevant.</li> <li>• Submits the words "may include" in the ACTU's amended claim clause in X3.2 relating to required evidence are too open-ended and raise uncertainty as to the type of evidence.</li> <li>• Submits reference to a statutory declaration should be clear by stating it is a document declared by the employee.</li> <li>• If the circumstances for unpaid leave are limited to those submitted by AMIC, the type of persons who may issue a document as proof of evidence is also limited.</li> <li>• Submits if leave is adopted, employees should be required to comply with notice and evidentiary requirements (refers to ss.107, 107(4) FW Act).</li> </ul>
2.5 The availability of leave for part-time and casual employees.		
ACCI	<a href="#">1 September 2017</a>	Again the guidance from the FW Act supports the view that casual and part time employees be entitled to access forms of unpaid leave.
ACTU	<a href="#">1 September 2017</a>	All employees should be able to access leave. Casual loading irrelevant because loading is intended to compensate for paid entitlements and long-term casuals are already able to access unpaid leave in certain circumstances (ie unpaid parental leave).
Ai Group	<a href="#">30 August 2017</a>	<ul style="list-style-type: none"> <li>• Submits if the Commission decides to include unpaid domestic violence leave in awards, part-time employees should be entitled to a pro-rata amount.</li> <li>• Submits casual employees should not be entitled to unpaid domestic violence leave. Submits the casual loading compensates for most other forms of leave that apply to full-time and part-time</li> </ul>

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		employees.
AMIC	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>Submits any unpaid leave entitlement would be on a pro-rata basis for part-time employees.</li> <li>Submits that a casual employee, as a regular and systematic employee, may be able to access unpaid leave should they be rostered to work.</li> </ul>
NatRoad	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>Submits if the Commission decides to include unpaid domestic violence leave provisions in the awards, it relies on its preliminary submissions of <a href="#">27 July 2017</a>.</li> <li>Further submits part-time employees should only be entitled to a pro-rata amount of leave.</li> <li>Further submits casual employees should not be entitled to unpaid leave as they generally have a right to refuse work (refers to <i>Reed v Blue Line Cruises Pty Ltd (1996) 73 IR 420</i> [at 425]) and casual loading provides compensation for lack of entitlement to most forms of leave that apply to full-time employees.</li> </ul>
2.6 The confidentiality of information provided by employees concerning their experience of family and domestic violence.		
ACCI	<a href="#">1 September 2017</a>	Does not believe that there should be additional privacy obligations to this leave and notes that the use of personal leave may be similarly sensitive. Note that in some jurisdictions there are mandatory reporting requirements around domestic violence that may make the question of confidentiality problematic.
ACTU	<a href="#">1 September 2017</a>	<p>Proposed clause:</p> <p>X.3.3 Sensitive personal information provided by the employee to the employer for the purposes of seeking leave under this clause will be kept confidential to the extent possible, except where disclosure is required by law or to prevent a serious threat to the life, health and safety of any individual.</p> <p>‘Sensitive personal information’ was defined in the proposed clause to mean:</p> <p>X.1 ... information provided by the employee to the employer for the purposes of seeking leave under this clause that identifies the employee and discloses their experience of family and domestic violence.</p> <ul style="list-style-type: none"> <li>Should objections to FWC’s jurisdiction concerning confidentiality be pressed by employers, the ACTU relies on its submissions 5 October 2016 at paragraphs 140–154, and its final submissions dated 28 November 2016 at paragraphs 188–192, and submissions to the Full Bench at paragraphs 148 and 155–159 of its reply submissions dated 5 October 2016, and paragraphs 190–192 of its final submissions dated 28 November 2016 regarding merits.</li> </ul>

Party	Submission date	Summary of submission
Ai Group	<a href="#">30 August 2017</a>	<ul style="list-style-type: none"> <li>Submits if the Commission decides to include unpaid domestic violence leave provisions in awards, there are substantial practical problems associated with confidentiality provisions pertaining to leave entitlements (refers to pages 208-209 of its <a href="#">Final Submission of 28/11/16</a>).</li> <li>Submits confidentiality provisions are not necessary as employers typically maintain appropriate levels of confidentiality with personal information relating to employees.</li> </ul>
AMIC	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>Refers to Ai Group's submissions of <a href="#">19 September 2016</a> which dealt with confidentiality matters. Despite these submissions being related to the ACTU amended claim clause, AMIC adopts and supports those submissions for the present stage of proceedings.</li> <li>Notes there is a simple reference at the end of s.107(5) of FW Act to the Privacy Act and the giving of personal information to the employer.</li> </ul>
APSC	<a href="#">28 July 2017</a>	<ul style="list-style-type: none"> <li>Submits the introduction of an identifiable leave type could put employee safety at risk.</li> <li>Submits establishing the leave could potentially identify affected individuals on human resources systems and create significant safety risks.</li> <li>Submits affected employees may prefer not to self-identify as victims of family and domestic violence or to have such an incident recorded in their employee records.</li> </ul>
NatRoad	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>Submits that confidentiality provisions are unnecessary as employers generally maintain appropriate levels of privacy and confidentiality, and legislation such as the <i>Privacy Act 1988</i> (Cth) contains appropriate provisions which capture many employers.</li> </ul>
2.7 Whether taking unpaid family and domestic violence leave counts towards continuity of service.		
ACCI	<a href="#">1 September 2017</a>	Refers to s.22 of the FW Act. Leave should not count as service but not break continuity.
ACTU	<a href="#">1 September 2017</a>	s.22 of the FW Act sets out continuity of service. Unpaid family and domestic violence leave would not count for service but not break continuity of service.
Ai Group	<a href="#">30 August 2017</a>	<ul style="list-style-type: none"> <li>Submits if the Commission decides to include unpaid domestic violence leave provisions in awards, this issue is adequately dealt with in s.22 of FW Act.</li> <li>Submits unpaid leave does not count as "service" (s.22(2)(b)(i)) but does not break an employee's "continuous service" (s.22(3)).</li> </ul>
AMIC	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>Submits s.22 of FW Act should be strictly followed. If unpaid leave is granted, there should be no break in the continuous service but the unpaid leave does not count towards the length of the employee's continuous service.</li> </ul>
2.8 Relationship/interaction with other forms of leave.		
ACCI	<a href="#">1 September 2017</a>	Should not take unpaid leave in cases where paid leave is available.

Party	Submission date	Summary of submission
ACTU	<a href="#">1 September 2017</a>	Unpaid family and domestic violence leave should operate in addition to other forms of paid leave.
Ai Group	<a href="#">30 August 2017</a>	<ul style="list-style-type: none"> <li>Submits if the Commission decides to include unpaid domestic violence leave provisions in awards, unpaid domestic violence leave should not be able to be accessed in circumstances where paid personal/carer's leave or unpaid carer's leave can be accessed. Submits this is consistent with approach in s.103(3) of FW Act regarding access to unpaid carer's leave.</li> </ul>
NatRoad	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>Submits that unpaid leave should not be accessed in circumstances where paid personal/carer's leave is available, which is consistent with approach in s.103(3) of FW Act.</li> </ul>
<b>B. Extension of the NES entitlement to personal/carer's leave to domestic violence leave</b>		
1. Does the Full Bench have jurisdiction to extend the NES entitlement to personal/carer's leave to incorporate domestic violence leave?		
ACCI	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>Refer to s.55 of the FW Act that provides that a modern award may contain terms that are ancillary or supplementary to the NES. Submit that the FW Act is clear that you cannot view the elements of the NES and offset an increased benefit in one area to outweigh a detriment in another.</li> <li>Submit that an employee who uses their paid personal leave in the circumstances not contemplated by the NES might be disadvantaged when they seek to use it in circumstances that are contemplated by the NES and find that they have less leave than is contemplated by the NES. ACCI submits that at this point the award has operated at a detriment to the employee with respect to the NES entitlement.</li> </ul>
ACTU	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>Submit that it is not open to extend NES entitlement to paid personal/carer's leave to incorporate domestic violence leave because: <ul style="list-style-type: none"> <li>expanding access to personal/carer's leave for other purposes potentially excludes access to minimum NES entitlement for use within the meaning of s.55(1);</li> <li>it is not ancillary, incidental or supplemental to the NES; and</li> <li>even if it was ancillary or supplemental to the NES it would reduce the amount of personal/carer's leave available to the employee as the minimum NES entitlement would be reduced.</li> </ul> </li> <li>Submit in applying <i>Canavan</i> employees who have accessed their paid personal leave in circumstances relating to domestic violence may exhaust their paid personal leave and will be unable to access it if they were later to fall sick or be required to care for a dependant. Notes relevant test whether minimum NES entitlement be reduced by the operation of the proposed term.</li> <li>In the alternative, ACTU submit that if the above is incorrect that terms expanding access to paid personal/carer's leave are not ancillary or incidental to the NES.</li> <li>Notes arguable that term expanding circumstances of accessing personal/carer's leave as supplementary to NES. Refers to the Full Bench in [2015] FWCFB 5771 as authority that a term</li> </ul>

Party	Submission date	Summary of submission
		<p>supplemented the NES because it ‘extended the circumstances’ when an employer must comply with an annual leave request. ACTU submits that supplementary terms must not be detrimental.</p> <ul style="list-style-type: none"> <li>• Proceeding on basis that proposed clause would allow access beyond employee’s unfitness for work due to a personal injury or illness. Argues that if proposed clause required an employee to utilise their personal or carer’s leave for non-illness purposes, then the proposed clause would almost certainly offend s 55(1), because the employee would not be able to avoid the requirement to deplete their personal leave balance, which would be inconsistent with the entitlement under the NES.</li> </ul>
Ai Group	<a href="#">30 August 2017</a>	<ul style="list-style-type: none"> <li>• Submits the Full Bench does not have jurisdiction to extend the NES entitlement.</li> <li>• Provides background on the ACTU withdrawing its original claim for award terms providing access to NES paid personal/carer’s leave entitlements for domestic violence leave purposes, and the Ai Group’s submissions of <a href="#">20/04/15</a>. Refers to reasons provided by ACTU on <a href="#">15/06/15</a> for withdrawing its original claim that it was in part in response to the objections made by the employer parties.</li> <li>• Submits that an award provision which purported to extend “paid personal/carer’s leave” to include circumstances beyond those set out in s.97 (e.g. to include leave to attend a court hearing or to arrange emergency accommodation) would be inconsistent with the meaning of the term “paid personal/carer’s leave” in FW Act.</li> <li>• Submits extending the NES entitlement would exclude provisions of the NES. <ul style="list-style-type: none"> <li>○ Refers to s.55 and Division 7 of Part 2-2 of FW Act. Submits that an award term extending the NES entitlement to personal/carer’s leave to include domestic violence leave is not a term expressly permitted to be included in the NES and hence s.55(2) and (3) do not operate to prevent the term excluding the NES and breaching s.55(1).</li> <li>○ Submits that a term extending the NES entitlement would represent a major change in the safety net and could not be considered an ancillary or incidental term under s.55(4)(a) or a term having the same or substantially the same effect as provisions of the NES under s.55(5).</li> <li>○ Which only leaves s.55(4)(b) to be considered, as a term that supplements the NES. However, submits such a term would be detrimental to many employees and would breach s.55(1) as they would take leave for domestic violence leave purposes and not have it available for when they are ill or injured or need to provide care to family or household member. Submits term would also be of no effect due to s.56 of FW Act, and s.55(4) requires a very broad assessment of any detriment that may arise because of the operation of a term.</li> <li>○ Refers to <i>Re Canavan Building Pty Ltd [2014] FWCFB 3202</i> and consideration of meaning attributed to the term “exclude” in s.55(1)(see [36]). The decision made it clear that an agreement term (and</li> </ul> </li> </ul>

Party	Submission date	Summary of submission
		<p>similarly an award term) cannot result in an outcome in which an employee does not receive an NES entitlement in full. If an award term enables personal/carer's leave entitlements to be accessed for domestic violence leave purposes, employees would not be entitled to the NES personal/carer's leave entitlement in full.</p> <ul style="list-style-type: none"> <li>○ Refers to s.55(1) being considered by a Full Bench in <i>4 yearly review of modern awards – Alleged NES Inconsistencies [2015] FWCFB 3023</i> (see [37]).</li> <li>○ Submits that an award term that enables personal/carer's leave entitlements to be accessed for reasons beyond those in s.97 of FW Act would partially “negate the effect of” s.97 of FW Act and s.96(1) and therefore would operate to exclude the NES</li> </ul>
AMIC	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>● Refers to s.97 and s.104 of FW Act relating to reasons for taking personal/carer's leave and compassionate leave, s.55 of FW Act, the Jurisdictional Issues decision <i>[2014] FWCFB 1799</i> (at [47]), the Explanatory Memorandum of the Fair Work Bill 2008.</li> <li>● Submits the Full Bench does not have the jurisdiction to extend the NES entitlement as family and domestic violence leave does not come within the s.97 criteria.</li> <li>● Submits the power given is to “supplement” rather than “extend”.</li> <li>● Submits the limits of the power to supplement in s.55(4) means the Full Bench does not have the jurisdiction to supplement the NES entitlement as family and domestic violence leave does not come within the s.97 criteria.</li> <li>● Submits the Commission has the power to supplement personal/carer's leave under NES but only for personal/carer's leave matters as defined in s.97 of FW Act.</li> <li>● Submits the Commission cannot add non-personal/carer's leave matters to personal/carer's leave entitlements under the NES.</li> <li>● Submits the Commission cannot dictate to an employee with ten (10) days' personal/carer's leave under the NES as this would be detrimental.</li> <li>● Submits the Commission is permitted to confirm that the domestic violence leave can be accessed under s.97 of FW Act as long as the leave is permitted under s.97.</li> <li>● Submits the Commission is permitted to create new forms of leave under modern awards under s.139 of FW Act</li> <li>● .</li> </ul>
NatRoad	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>● Submits the Full Bench does not have jurisdiction to extend the NES entitlement.</li> <li>● Submits extending the NES entitlement would be inconsistent with the meaning of and conditions</li> </ul>



Party	Submission date	Summary of submission
		<p>associated with taking personal/carer's leave under s.244 and s.97 of FW Act.</p> <ul style="list-style-type: none"> <li>Submits extending paid personal/carer's leave to include circumstances beyond s.97 of FW Act is inconsistent with the meaning of the term "paid personal/carer's leave" in FW Act.</li> <li>Submits extending paid personal/carer's leave beyond s.97 of FW Act cannot be considered to be "paid personal leave" and the employee would no longer be entitled to take the full NES entitlement of 10 days each year for which it was intended. Submits extension would breach s.55(1) of FW Act.</li> </ul>
2. If so, should the NES entitlement to personal/carer's leave be extended to incorporate domestic violence leave?		
ACCI	<a href="#">1 September 2017</a>	Refer to earlier response.
ACTU	<a href="#">1 September 2017</a>	Refer to above response.
Ai Group	<a href="#">30 August 2017</a>	Submits the Commission does not have jurisdiction to extend the NES entitlement to incorporate domestic violence leave.
AMIC	<a href="#">1 September 2017</a>	Submits the Full Bench does not have the power to incorporate or extend personal/carer's leave to cover domestic violence leave (at large).
NatRoad	<a href="#">1 September 2017</a>	Submits the Full Bench does not have jurisdiction to extend the NES entitlement, and therefore the NES entitlement should not be extended.
3. If the NES entitlement to personal/carer's leave is to be extended to incorporate domestic violence leave, then:		
3.1 The circumstances in which the NES entitlement to personal/carer's leave can be accessed for the purposes of domestic violence leave? This issue requires a consideration of definitional issues regarding domestic violence for the purposes of the clause, the purposes for which the leave could be accessed and who can access the entitlement.		
ACCI	<a href="#">1 September 2017</a>	Refer to earlier response.
ACTU	<a href="#">1 September 2017</a>	Refer to above response.
Ai Group	<a href="#">30 August 2017</a>	Submits the Commission does not have jurisdiction to extend the NES entitlement to incorporate domestic violence leave.
AMIC	<a href="#">1 September 2017</a>	Submits it is undesirable or unnecessary for the Full Bench to answer this issue. Submits the NES dictates the leave parameters.
NatRoad	<a href="#">1 September 2017</a>	Submits the Full Bench does not have jurisdiction to extend the NES entitlement, and there are no circumstances in which the NES entitlement should be able to be accessed for the purposes of family and domestic violence leave.
3.2 Should there be a cap on the amount of personal/carer's leave that can be taken for family and domestic violence leave purposes?		
ACCI	<a href="#">1 September 2017</a>	Refer to earlier response.
ACTU	<a href="#">1 September 2017</a>	Refer to above response.

Party	Submission date	Summary of submission
Ai Group	<a href="#">30 August 2017</a>	Submits the Commission does not have jurisdiction to extend the NES entitlement to incorporate domestic violence leave.
AMIC	<a href="#">1 September 2017</a>	For the reasons already provided, submits the Full Bench does not have the power to cap personal/carer's leave for domestic violence leave. And if it did, it would be beyond jurisdiction.
NatRoad	<a href="#">1 September 2017</a>	Submits the Full Bench does not have jurisdiction to extend the NES entitlement.
3.3 The issues set out at 2.3 to 2.8 above.		
ACCI	<a href="#">1 September 2017</a>	Refer to earlier response.
ACTU	<a href="#">1 September 2017</a>	Refer to above response.
Ai Group	<a href="#">30 August 2017</a>	Submits the Commission does not have jurisdiction to extend the NES entitlement to incorporate domestic violence leave.
AMIC	<a href="#">1 September 2017</a>	For the reasons already provided, submits these issues are not necessary to answer.
NatRoad	<a href="#">1 September 2017</a>	Submits the Full Bench does not have jurisdiction to extend the NES entitlement, and therefore the NES entitlement should not be extended.
Award implementation (implementation of any outcome of the Family and Domestic Violence Leave matter in particular modern awards)		
APSC	<a href="#">28 July 2017</a>	<ul style="list-style-type: none"> <li>Submits the inclusion of specific clauses for family and domestic violence leave are not necessary in the <i>Australian Government Industry Award</i>.</li> <li>Submits it has been working with Australian Government employers on this issue and recently circulated a family and domestic violence policy framework. Framework provides best practice advice to agencies about supporting employees experiencing family and domestic violence and a template policy to adapt as required.</li> <li>Provides examples of how Australian Government employers are providing support to employees, such as providing leave through miscellaneous leave clauses in enterprise agreements, implementing policies, providing access to counselling and support, providing assistance with personal safety, providing advance payments of salary or emergency financial assistance, providing access to suitable office facilities should employees need to attend work with children, loaning mobile phones, and relocating to alternative offices.</li> <li>Submits the introduction of the unpaid leave entitlement would generally not provide employees with a greater benefit than they currently receive.</li> <li>Concerned with implications on the application of the BOOT in future enterprise agreements should unpaid leave provisions be included in the Australian Government Industry Award.</li> <li>Submits that current practice in providing miscellaneous and/or personal leave to employees</li> </ul>

Party	Submission date	Summary of submission
		<p>experiencing family and domestic violence ought to satisfy any future BOOT assessment.</p> <ul style="list-style-type: none"> <li>• Notwithstanding this, APSC accepts that the Australian Government Industry Award should be included in these proceedings if the provisions are intended to apply to all industry awards.</li> </ul>
NatRoad	<a href="#">1 September 2017</a>	<ul style="list-style-type: none"> <li>• Does not support the inclusion of unpaid family and domestic violence leave in either the <i>Road Transport and Distribution Award 2010</i> or the <i>Road Transport (Long Distance Operations) Award 2010</i>.</li> <li>• Whilst it recognises that the ACTU claims are well-intentioned to use modern awards as a mechanism to combat the “social scourge” of family and domestic violence and “other (female) gender-based inequalities in the workplace”, submits there is no evidence to support the use of such provisions in respect of the road transport industry’s modern awards.</li> <li>• Submits the Australian road transport industry is male-dominated.</li> <li>• Submits there is no empirical evidence in respect of the prevalence of family and domestic violence in the road transport industry.</li> <li>• Submits due to absence of evidence, it would not be sensible to vary the road transport awards to combat a social problem of unknown quantum or relevance to this industry.</li> <li>• Refers to the 2012 Personal Safety Survey administered by the Australian Bureau of Statistics. Submits the quantum of those likely to be affected by IPV, and who are also road transport industry award-covered, is unlikely to be large.</li> <li>• Submits anecdotal reports from within industry raise concerns about the stigma and reluctance of male truck drivers in particular to report IPV to anyone at all, let alone employers.</li> <li>• Submits that applying an award-based right as a “band-aid to a social ill” that is not yet quantified in the road transport industry, and which is unlikely to be accessed, would not be helpful or justified at this time.</li> <li>• Submits that due to stigma attached, targets of IPV may be more open to accessing personal leave to address the issues arising from family and domestic violence, rather than using an award-based right named ‘family and domestic violence leave’.</li> <li>• Submits the issue of reduced income arising from unpaid family and domestic violence leave and/or family friendly working arrangements is also significant in respect of employee drivers, many of whom live from pay-to-pay. Submits this would also be an issue for small transport businesses who employ drivers. Submits that employee and community safety on the roads would be compromised by including provisions in awards which clearly contemplate a reduction in income to support unpaid leave in family and domestic violence situations.</li> </ul>

Party	Submission date	Summary of submission
		<ul style="list-style-type: none"> <li>Submits that, as recommended by the final report of the Australian Small Business and Family Ombudsman, consideration should be given to the potential impact on people's mental health when developing regulation that will have a significant impact on small businesses. Submits that there is no evidence that this has been done in this case despite the fact that the introduction of unpaid family and domestic violence leave would disproportionately impact those small businesses that make up 97.7% of transport and logistics businesses.</li> <li>Submits financial stress is often a precursor to and cause of IPV and any reduced income due to accessing unpaid leave or working fewer hours under family friendly working arrangements may exacerbate the very problem it is meant to relieve.</li> </ul>

**List of abbreviations (in alphabetical order)**

ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
Ai Group	Australian Industry Group
AMIC	Australian Meat Industry Council
APSC	Australian Public Service Commission
NatRoad	National Road Transport Association