TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT WATSON
DEPUTY PRESIDENT GOOLEY
COMMISSIONER SPENCER

AM2015/1

s.156 - 4 yearly review of modern awards

Family and domestic violence leave clause

Melbourne

10.05 AM, FRIDAY, 2 DECEMBER 2016

Continued from 1/12/2016

PN2790

VICE PRESIDENT WATSON: Mr Ferguson.

PN2791

MR FERGUSON: Thank you, your Honour. Now as the Full Bench would be aware, AiGroup has filed two very detailed sets of submissions in the context of these proceedings. They carefully and comprehensively set out our position in relation to the claim. The first was dated 19 September 2016 and the second was dated 28 November 2016.

PN2792

Our second submissions wholly replaces the first submissions, save for where we've expressly referred to the first submission.

PN2793

VICE PRESIDENT WATSON: It looks that way.

PN2794

MR FERGUSON: Yes.

PN2795

DEPUTY PRESIDENT GOOLEY: It read that way.

PN2796

MR FERGUSON: What I was going to offer to do perhaps too late, from that comment, was to identify the chapters that had not changed, if there's any utility in that. They are chapters one - I apologise. I'll identify the chapters that have changed. They are one, three, five, seven, eight, nine, 10, 16, 17 and 19. The remaining chapters don't have any substantive variations.

PN2797

There are just a couple of corrections that I want to make to that submission before I start. Can I first take the Bench to paragraph 192. The second bullet point in the last sentence, the words 'does not' should be inserted between the word 'data' and 'deal'.

PN2798

Can I take the Bench to paragraph 620. The second bullet point - sorry, the first bullet point. If we can delete the word 'leave' at the end of the first sentence.

PN2799

DEPUTY PRESIDENT GOOLEY: What paragraph?

PN2800

MR FERGUSON: Sorry, paragraph 620, first bullet point, the word 'leave' at the end of the first sentence should be deleted.

PN2801

Can we just commence by explaining what I propose to do today. Mindful directions contemplated filing comprehensive written submissions. Given that context, I don't propose to traverse all of that detail, but what I intend to do is

make submissions by reference to the structure of the written submission and so doing, emphasise just some of the overarching deficiencies that we see in the proposal that's been advanced. In doing that, respond to the final submissions of the ACTU and of course, also address any questions that might come from the Bench as I go.

PN2802

In the course of that, I particular intend to focus on matters associated with why we say the existing regulatory regime and safety net affords appropriate protection for employees. On considerations related to the operation of the clause, such as in particular, the very problematic definition of family and domestic violence that's been adopted and we say is the unworkable mechanism for determining when an employee is entitled to the leave.

PN2803

Then I want to deal in a little more detail with considerations that should be given to enterprise bargaining, by this Commission in your deliberations. Of course in doing that, I do note that I don't intend to narrow any of the arguments that I've set out.

PN2804

To begin with, I just want to make some observations regarding the nature of the claim and these proceedings. The ACTU have proposed that 122 modern awards be amended to impose significant specific new obligations on employers in relation to paid and unpaid domestic violence leave. That's obligations to grant a period of leave and to provide an accompanying payment in compensation to persons who are or have experienced domestic violence and are taking leave for a particular purpose.

PN2805

The proceedings have been undertaken in the context of a specific claim that's been advanced by a single party. That's been amended during the course of the proceedings but the proceedings have, at all times, focussed on the proposed clause. Certainly, in advancing our case, we sought to direct our attention towards the specific claim that's been advanced. If memory serves correctly, counsel for the ACTU even sought to object to the line of cross-examination by myself on the basis that they perceived it wasn't relevant to the specific claim that was being advanced.

PN2806

I say this because the ACTU yesterday appeared to invite the Bench to make some sort of general finding as to the merits of domestic violence leave and then implement some other process for determining what the specific entitlement might look like. We say that that's not an invitation that this Full Bench should adopt, given the nature and way in which this proceeding has been undertaken.

PN2807

If the Full Bench forms the view that the case has not been made out for the claim advanced, then the proper course of action is to decline to grant the claim. We say that there are major deficiencies in the case that has been presented and

fundamental flaws in the proposed clause. They go to the definition, to the mechanism for determining when an employee is entitled.

PN2808

Even to issues such as what constitutes the actual quantum of leave that is to be provided and how you would calculate payment for that period of leave. We say they are fundamental elements of the case and if the case for the specific proposal advanced isn't made out, that would warrant rejecting the claim in its entirety.

PN2809

I think counsel yesterday made a suggestion that one course of action would be to have some source of conciliation undertaken after the proceedings in order to settle the content of the claim. There was a specific reference to the manner in which the annual leave common issues proceedings unfolded.

PN2810

I think firstly in response we'd say, we don't share their optimism about reaching agreement in relation to the content of claim. We've been down this road in the context of other common issues proceedings including in the annual leave case. What I would say for the Full Bench's attention in that respect is that wasn't a simple process of just undertaking some conciliation to settle the orders, if you will in relation to the finality of the terms of that annual leave case.

PN2811

There were in fact a series of hearings that were conducted in that context in order to afford parties fairness in the sense of giving them an opportunity to once again advance submissions and if they so chose, new evidence in relation to any new claim, or new proposal that was falling from the Bench. Now that's taken quite a long time and we say that's not a process that this Bench should lightly undertake.

PN2812

In essence, we're saying that the ACTU shouldn't be permitted to just put the onus back on the Full Bench to effectively make out a clause that would be workable in the absence - given their failure to do so.

PN2813

That then takes me to the body of the - - -

PN2814

DEPUTY PRESIDENT GOOLEY: But even in matters where one might go back to the more traditional matters which were inter parte matters, Full Benches have been known to propose solutions or outcomes which in fact neither of the parties asked for and apart from the issue of providing parties with an opportunity to comment or make submissions in relation to that proposal in terms of affording procedural fairness, that has always been available to the Commission, and particularly in these modern award matters, which are not inter parte matters, it would seem to me that that has been the approach of the Tribunal in relation to these maggers, if the Tribunal forms the view that - putting aside the questions of should it be dealt with by parliament, the NESSU, the consistency with Full Bench decisions, the modern award objectives - putting aside all of those.

PN2815

MR FERGUSON: Yes.

PN2816

DEPUTY PRESIDENT GOOLEY: The Full Bench could form a view that some form of domestic violence leave in some circumstances in fact, is necessary to meet the modern award objectives and surely the first step in that case would be either the Full Bench develops its own proposal and puts it out there for comment. Obviously the opportunity to respond or as was suggested, to see if the parties - give the parties an opportunity to see if they can reach an agreement on a proposed clause, giving guidance in the decision as to what the Full Bench is concerned about.

PN2817

MR FERGUSON: I accept that this Full Bench is bound to grant a remedy in the terms that has been sought and there is numerous authorities on that now. That doesn't necessarily mean that the Full Bench should likely go down the path of proposing its own clause just because it is open to it to potentially do it.

PN2818

Part of the issue here, is that there's been a specific claim advanced and we say that there are fundamental difficulties with the claim. They go to issues such as the definition. That has coloured the manner in which we have conducted our case; the evidence we have called and the submissions we have made. We say that on the material that's been advanced, the Full Bench shouldn't reach a conclusion that there's any inherent benefit in this sort of clause. On that basis you shouldn't elect to take first and second path.

PN2819

But in any event, in this case in particular, there's been numerous amendments made to the proposal advanced, and that flexibility has been afforded to the union. A line has to be drawn somewhere and it has to be drawn in the interests of fairness to all parties and the case can't just keep evolving to accommodate every objection or concern that's raised. All of that aside, there is a practical consideration that comes into this. This review has to end at some point.

PN2820

I understand the substantive merits that is an overarching consideration. But equally, we are late into that review and there will be another opportunity. Of course there will be an opportunity outside of this review for the union to advance a different case if it is unsuccessful in this basis. But we accept that you're not prohibited from granting a different remedy.

PN2821

In terms of substantive submissions, I don't need to say very much about the early chapters in our material. At chapter 2 we carefully set out the summary of AiGroup's position in relation to the community problem of domestic violence and then chapters 3 and 4, we addressed the relevant statutory framework and the Commission's general approach to the review.

PN2822

In chapter 5, we then address the Commission's previous decision regarding the jurisdictional issues associated with the ACTU's original claim. The short point in relation to that is simply that as a product of the ACTU having modified their initial claim, the only remaining concern of AiGroup in terms of the jurisdictional concern, if I can characterise it as that, is that the claim is not necessary, or the proposed terms are not necessary for inclusion in modern awards as contemplated by section 138 or the Act.

PN2823

That then takes me to chapter 6 of our submissions which is the first chapter I want to deal with in any detail. We then set up various statistics associated with the impact of a selection of social problems, personal problems and personal tragedies on employees and employers. That includes crime, violent crime in general, divorce, relationship breakdown, drug and alcohol addiction, suicide, death and bereavement more generally.

PN2824

Of course, that's not an exhaustive list of all of the issues that employees face. In providing this information, we're not seeking to marginalise the problem of domestic violence, but rather to put the ACTU's claim in its proper context. The central point is that family and domestic violence is simply one category of social problem that confronts Australian society and employees.

PN2825

In advancing the claim, the ACTU is asking the Commission to in effect, prioritise one problem or to elevate it in status above all of the other various issues that employees face. Of course we accept and acknowledge that the safety net needs to balance the needs and interests of both employees and employers.

PN2826

However, we say that in setting the legislative safety net of leave entitlements, only relatively recently, the legislature has already struck an appropriate balance and this proposition is reinforced by the fact that the legislative safety net has been amended only relatively recently to address the needs of employees facing domestic violence by affording them enhanced rights to request flexible working arrangements.

PN2827

We say that if the Commission were to insert an entire new category of leave into awards, this would amount to a quite radical and unjustified rebalancing of that relatively recently established safety net. If we were to do that, we would see no reason why other parties would not seek to move to grant similar entitlements for employees facing other significant social problems.

PN2828

The inevitable conclusion that flows from that is that there may be an ever increasing expansion or at least rebalancing of the safety net in response to such claims. We say that that is a course of action that the Full Bench should not take.

PN2829

We say specifically that granting the claim in this context would undermine that element of the modern award's objective that speaks to the necessity to maintain a stable and sustainable modern award system section 134(1)(g). In advancing that we don't say that the safety net can never be amended.

PN2830

However, as counsel for the ACTU submitted yesterday, there is nothing new about the problem of domestic violence. It's a long-standing and persistent problem. There has been no change in contemporary circumstances that warrants a change to the safety net. Now it may be that the issue of domestic violence has risen in prominence as a community issue and that's of course a positive development. But we do not accept that communities' expectations have shifted to the point that there's an expectation that all employers should provide compensation and leave to employees who experience domestic violence. We don't see anything in the evidence that establishes that proposition.

PN2831

If I move to chapter 7, which is page 35 in the material. We there set out in short form, the case mounted by the ACTU as we see it, and some of our key objections. I don't propose to take you through it, just to highlight that it provides quite a succinct assessment of many of the views that we later develop in the submissions.

PN2832

Chapters 8 and 9, commencing on page 40, chapter 8, we therefore summarise the nature - we there deal with all of the evidence that's been advanced. In particular in chapter 8 we deal with all of the expert witness evidence and identify the relevant conclusions that we say can be drawn from it.

PN2833

I just want to flag for the Bench paragraph 192 in particular. We there summarised the conclusions that we say are open to be drawn from the evidence. I won't read all of those to the Bench but I do want to just emphasise two points. One is that we say that there is no data before the Commission that identifies the prevalence of domestic violence as defined in the ACTU's proposed clause. We say that nothing goes to that level of detail.

PN2834

We say that the data advanced does not allow for the development of a model that can readily ascertain the potential costs of the claim. We say that's a major issue, because in balance - in considering the safety net, both the needs of the employees will need to be considered, but they'll need to be balanced against the costs that will be imposed upon employers. We say that the ACTU has simply not put this Full Bench in a position to undertake that assessment in a robust manner.

PN2835

In chapter 9 we deal with the lay witnesses; we do that at paragraphs 193 to 295. We commenced there by addressing the weight that should be afforded to the evidence in light of the various objections we raise to it. We do rely on that previous written submission where we identified the objections in that regard. But all I really want to do is highlight paragraph 295. Again, we set out a

summary of the conclusions that we say can be drawn from the lay witness evidence.

PN2836

In chapter 10, paragraphs 297 to 317, we deal with the evidence relating to the prevalence of domestic violence. We did that in the context of the ACTU's submission that in effect domestic violence is at a crisis point. The central proposition that we were advancing in that chapter is that the data before the Commission does not establish that there's been any recent increase in domestic violence in Australia and indeed, we put the proposition that arguably rates are decreasing.

PN2837

I must say that in a lot of the submissions from my learned friend yesterday, it appears that at least the first point is agreed, but there seems to be common ground that there is not necessarily any increasing level of domestic violence in Australia. The reason why we have highlighted this goes to the earlier proposition that there's no justification for rebalancing the safety net; that nothing has changed in contemporary circumstances to justify such a shift in regulation.

PN2838

Chapter 11, commencing at paragraph 318, we deal with various government responses or initiatives to family and domestic violence and we set out various enquiries and so forth that are undertaken. Suffice it to say, clearly the problem of domestic violence is attracting a high level of attention from governments; it is high on their agenda, so to speak. The point we make is that none of those enquiries have expressly recommended that modern awards should be varied to provide for paid domestic violence leave.

PN2839

The other point that I want to make is that the task before this Full Bench is very different to the task that is before any of those relevant enquiries and Commissions and so forth. Of course in this context, the Full Bench isn't charged with the responsibility for identifying the best way to tackle domestic violence. Such matters may not be an irrelevant consideration but cannot be the primary driver of the Full Bench's considerations.

PN2840

In exercising modern awards powers, we contend that the Full Bench is charged with ensuring that a fair and relevant minimum safety net is set through awards, having regard to the modern awards' objectives and the broader object of the Act. We say that a consideration of these matters means that a conclusion should be reached that there are limitations on the extent to which the workplace relations system should be seen as a vehicle for addressing broader social issues.

PN2841

If there are broader policy grounds for providing additional support to victims of domestic violence, then we say to a very large extent, this is a matter for the government, or for governments and it seems, given the submissions put on behalf of the Victorian government, that steps are at play already through the COAG

process to address these issues. But we don't see them as matters that necessarily necessitate a variation to modern awards.

PN2842

VICE PRESIDENT WATSON: Mr Ferguson, in that context, your submissions deal with - I think it's part 15 you say that leave should be dealt with by legislation not awards, your submissions deal with the overall economic position, Australia as a high wage economy.

PN2843

MR FERGUSON: Yes.

PN2844

VICE PRESIDENT WATSON: The nature of the safety net and potentially costly changes to that, especially in a transitioning economy.

PN2845

MR FERGUSON: yes.

PN2846

VICE PRESIDENT WATSON: Do your submissions deal with those matters?

PN2847

MR FERGUSON: They deal with it to a small degree at the end. They talk about the international perspective and I'm happy to go there now.

PN2848

VICE PRESIDENT WATSON: When it's convenient.

PN2849

MR FERGUSON: I'll come back to that.

PN2850

VICE PRESIDENT WATSON: Yes.

PN2851

MR FERGUSON: What I was going to deal with next was chapters 12 and 13. This raises matters that were more squarely dealt with by my learned friend yesterday. In those chapters we deal with or we identify relevant mechanism implemented under the Fair Work Act and awards that already assist employees that are victims of domestic violence.

PN2852

In relation to statutory protections, we point in particular to the right to request flexible family arrangements under section 65. We highlight here that the legislature has only very recently amended this element of the Act to reflect the needs of domestic violence, but we would also point to various types of leave, the protections for monthly dismissal, the protections against adverse action, the protection against unlawful termination.

PN2853

Undoubtedly there's a level of overlap between the leave that's available and the claim that's now advanced. Employees facing the difficulty of domestic violence will in certain circumstances be able to access certain types of leave that's available. They will at times be able to access personal carer's leave and they will at times be able to access annual leave. Now we don't accept that the evidence establishes that there's a significant proportion of employees that exhausts their personal carer's leave as a consequence of this but even if employees do, we don't see that this is a basis for simply granting additional entitlements. There are lots of reasons why people exhaust their personal carer's leave. And the legislature has seen fit to impose limits on how much of a burden an employer can be expected to carry in this regard. We don't see that it's appropriate to simply create a new category of leave from employees that may be sick or have carer's responsibilities as a consequence of particular reasons. And we say that undermines the determination that's already been made by the legislature in this regard.

PN2854

One of the key arguments for the union against the proposition that the existing leave arrangements are sufficient is that they don't cater in the union's submission for the reasons why victims need to take the leave. Now again we say that it's not going to be achievable in the context of a minimum safety net for every reason that an employee may seek or indeed, need to take leave to be accommodated. And in support of this proposition we draw parallels with parental leave. Now of course the birth of a child is going to require the absence of women from work for some period if she's regularly employed. However the safety net doesn't afford such leave to all employees. More, it certainly doesn't afford paid parental leave, regardless of what the often cited arguments in support of that might be. We say that the safety net can't and shouldn't impose an employer's responsibility for addressing every social issue or need of employees, but that a balance needs to be struck. And we say that's already been struck and shouldn't be disturbed.

PN2855

In terms of annual leave the ACTU asserts it's not appropriate that employees that are victims of domestic violence utilise their annual leave for reasons other than only, in effect, rest and relaxation. They say, in effect, it is not consistent with its proper purpose. Now in the context of the current Act we maintain that there's not the same emphasis on annual leave being solely for that purpose of rest and relaxation. Now we note that under the current legislation there's no requirement that employees even take their leave, as such, their annual leave each year, and there's the capacity for employees to cash out a proportion of it. Clearly there is a greater level of flexibility in relation to annual leave than there has existed at certain times in the past. And we don't see why cashing out a period of annual leave can be considered consistent with the justifications for annual leave – sorry, we don't see why cashing out of annual leave would be inconsistent with the proposition that annual leave should always be reserved for rest and relaxation but that employees shouldn't be able to access it for the purposes of dealing with domestic violence. It seems an odd proposition to us.

PN2856

Now the union also makes the point that casual employees don't receive paid leave entitlements and of course, that's true, however in reality that's - - -

PN2857

DEPUTY PRESIDENT GOOLEY: Well, apart from long service leave.

PN2858

MR FERGUSON: Apart from long service leave, that's right.

PN2859

DEPUTY PRESIDENT GOOLEY: They're (indistinct) to concept with the concept of casual employment but it shows the nature of what casual employment has become in our society.

PN2860

MR FERGUSON: There are certainly some long term casuals and – but the point I would make that at least in the context of the Federal safety net and in terms of - - -

PN2861

DEPUTY PRESIDENT GOOLEY: Well - - -

PN2862

MR FERGUSON: Well, I understand – yes.

PN2863

DEPUTY PRESIDENT GOOLEY: The Federal safety net provides that long service leave is a national employment standard.

PN2864

MR FERGUSON: No, no, I understand. But in the context of typical leave arrangements afforded under that safety net casual employees don't receive paid leave. But regardless, the problem is the ACTU's submissions don't really explain how this casual entitlement would be calculated. They provide no workable basis for determining it and we say there is in fact a raft of practical problems that will arise from their claim if it was extended to casual employees. I mean, one obvious difficulty is what applies in the context where a casual employee may work for a short period, a few days, and then still potentially be on the books but not necessarily with any intention to be recalled, and they come forward seeking leave. At what point do they get it and at what point do they not get it? And they would get the entire ten days, whatever a day is, but that's an issue we'll come back to, as well. Really there is no explanation in their material as to how this would work. And we say that's a reason why it should not be contemplated.

PN2865

But in any event, given we say, that really their submission is a complaint about the nature of casual employment in the Australian context, we point out to the Bench that there is another Full Bench in the context of this review that is considering issues around casual employment and specifically issues being ventilated by the ACTU around the need for a greater pathway out of casual employment into permanent employment. Now whatever happens in the context

of that Full Bench is, of course, going to have a bearing on the merits of the claim that's being advanced here. And we say that the appropriate course of action is for this Full Bench to not entertain extending the rights to casuals for all the reasons we've said, but also because of the fact that this issue is being looked at by another Full Bench and we say this Full Bench shouldn't deal with that matter given that context.

PN2866

Now the other point that we do develop in our submissions is that the unfair dismissal (indistinct) provides a meaning for protection for employees faced with domestic violence that impacts upon their performance at work or their attendance at work. The ACTU seeks to downplay the utility of the unfair dismissal regime in assisting employees experiencing domestic violence, given its nature is essentially remedial. We say that any submission to that effect fails to acknowledge the preventative role that that system also has and we say that it is, to a degree, naive. The reality is that the risk of an unfair dismissal claim does loom large in the minds of most employers in weighing decisions to terminate employees. We say that in the context of the fact that the existing unfair dismissal regime in Australia is long established and well known. And we say that it does have an deterrent effect.

PN2867

But what's also important to appreciate is that the unfair dismissal regime doesn't impose a one size fits all response to this issue on employers. It enables the Commission to look at all of the circumstances in a particular case and all of the circumstances of a particular employee and consider what reasonable accommodation the employer should potentially have had to make in lieu of terminating that individual. And in any event it does afford a meaningful protection for a significant proportion of employees who are terminated. If a termination is unfair in the relevant sense there will be a remedy. But putting that aside, there really isn't widespread evidence of any widespread problem of employees being terminated by their employer at their initiative as a consequence of their experience of domestic violence. We say that there is no reason to conclude on the evidence that employers generally don't accommodate the needs of employees to the extent that they reasonably can.

PN2868

Moving on then to section 65, we've made the point already that parliament has only relatively recently amended the right to request flexible arrangements for employees experiencing domestic violence. Now the union have indicated they sort of perceive some sort of limitations on the utility of that provision for employees. The obvious point though is that there is no evidence that we've identified in the proceedings to establish that a request for flexible arrangements are being unreasonably refused by employers. And we say the Commission should not accept that section 65 is not a useful mechanism for addressing the needs of victims of domestic violence.

PN2869

That then takes me to chapter 13 which commences at page 142. There we identify a range of flexible award provisions that can assist employees that need flexibility in their working arrangements due to reasons that might include being a

victim of domestic violence and the difficulties that are associated with that. We also cite the Australian Workplace Relations Study first findings report released in 2015 which demonstrates the widespread availability of a range of flexible work practices to employees. The ACTU has not made any attempt to identify why these particular mechanisms which may differ on an award by award basis aren't sufficient to cater to the needs of the many employees experiencing domestic violence.

PN2870

In chapter 14, commencing at page 145 we talk about various developments in employer responses to family and domestic violence and I won't take the Bench through all of that detail. The point that we derive from that is, in part, that clearly we don't need a variation to the modern award system in order to act as an impetus for employers to engage with this issue. It is happening to a degree. And quite appropriately, we say, room should be left for employers to identify the best way that they can identify or that they can assist employees based on their particular circumstances and their capacity to assist. And we say that is more appropriate than imposing a one size fits all approach, as the union has advocated for.

PN2871

Chapter 15 does deal with our proposition that leave should be dealt with in the legislation, not in awards. I wasn't going to add anything to the submissions that are there advanced but your Honour, I will come back to the issues associated with our position in the international context at the end. Now chapter 16 of our submissions deal with the operation of the clause. We've dealt there with a raft of what we say are very significant problems with the operation of the proposed clause and we do that in some detail. Counsel for the ACTU has made no real attempt to respond to a deal with all of the various problems that we've identified and we've endeavoured to go through it in a clause by clause basis and display just how unworkable this provision is.

PN2872

But nothing has been put in response and in that context I don't propose to take you through all of that detail. I just want to deal with two matters, the definition problem and the issue around the mechanism for eligibility, as I see it, unless there are any other questions about specific issues we've raised. If I could just take the Bench to the specific clause that's been proposed, now in clause 1, the "family & domestic violence" definition is set out. It is defined as "any violent, threatening or other abusive behaviour by a person against a current or former partner or member of the person's family of person's household". And obviously this claim is directed at helping victims of domestic violence as they are so defined in this clause. That's the case that we are answering and that's what we understand the ACTU intends.

PN2873

The difficulty with the clause is that the proposal is so broad – well, it's extremely broad and it's also extremely unclear as to exactly what conduct would be caught by this definition. We say that reasonable lines are going to differ often in terms of considering what particular behaviours might constitute domestic violence. There's a complete absence of clarity flowing from the provision. In general, this

clause – there may be an understanding in the community about what constitutes domestic violence. I think people may readily appreciate or identify serious physical violence, sexual assault and so forth, as domestic violence but the clause is not, as we read it, limited to that sort of violence. And there is evidence that suggests that certainly in the academic sphere and amongst some community service workers that the notion of what constitutes domestic violence is actually quite complex and quite broad in terms of the categories of behaviour that could be covered.

PN2874

We have set out in our submissions a list of the types of categories that could be caught. However the point is that the clause doesn't actually provide any indication. Now we have real doubts as to the extent to which an ordinary employer or employee is necessarily going to appreciate all of the conduct that might be caught, or the circumstances in which it would be caught. There is no rigour around the proposal. Now we also know that there's legislation that adopts modified definitions of domestic violence and in some cases puts limitations on circumstances where particular conduct that otherwise might be caught by this clause would fall within the ambit of that legislation. But none of that has been the subject of this case in the sense that it's suitability for use in the workplace relations system has not been examined or considered in any particular context and so we say that doesn't afford the Full Bench an answer in terms of remedying the difficulties in the ACTU's claim if they were so minded.

PN2875

Part of the difficulties is with the definition, there is no words of limitation at all around those behaviours. Take the word, "abuse", for example, "abuse". That could be read extremely broadly. There is no necessity that a person actually suffers some sort of harm, or be frightened or be coerced or anything like that, and what we see is that this potentially opens the door to a whole spectrum of behaviours being covered by the clause and could include things ranging from angry text messages right through to the worst offences, in terms of homicide and so forth. It is easy to think of a hundred scenarios of this. There was plenty of consideration in the evidence around things like divorce proceedings where heated words might be exchanged as is undoubtedly common in the context of any separations. Now all of that potentially falls under the scope of this clause. There is nothing to limit the inclusion of such provisions. There's no contemplation of the concepts of power and control, for example, that some of the academics contemplated. It's just not within the clause.

PN2876

Counsel yesterday was at pains to say that it all depends on context. I think there was an analogy to some sort of sporting event, and I think an indication if memory serves that it wouldn't capture ordinary arguments between couples. The difficulty is none of that context is clear from the clause and we don't know what the particular context is that we need to take into account. And we haven't known during the course of this case that it was so intended to be limited to that particular context.

PN2877

There are a number of implications that flow from the difficulties with the definition. The first one is obviously that it's not simple and easy to understand as contemplated in the context of modern award's objective. But the second one is that we're not going to be able to – it seems to me that it's going to be very difficult to identify when somebody is actually subject to this form of domestic – or to domestic violence as defined. If the answer is that you have to examine the context, the full context of the relationship and the person's circumstances and so forth, it strikes me as being incredibly difficult for any third party to verify that this has occurred or that it is occurring in some cases. And the evidence, of course, talked about some of the difficulties associated with financial abuse, for example. There was the evidence of Ms Kun, that talked about firstly the lack of understanding of financial abuse, or economic abuse amongst women in the community but also in amongst community service workers. And there was evidence about the need to take into consideration the full context, not that it seemed Ms Kun's organisation undertook that sort of assessment and I'm not saying that as a criticism to Ms Kun. Her organisation serves a different purpose. The point I'm making is, it's going to be very difficult to ascertain in a whole myriad of circumstances whether or not someone is properly the victim of domestic violence as however defined given the breadth of the concept.

PN2878

VICE PRESIDENT WATSON: It might be that an individual is both a perpetrator and a victim in a property dispute where there's economic claims against income and the major income earner regards themselves as subject to economic abuse by claims and the person making the claim regards themselves as being subject to economic abuse by not providing a greater share of income. So both of them might make claims to attend Family Court proceedings or the like. Now both allege that the other is a perpetrator and they both say that they're both victims, and they both might claim leave of 20 days a year under the Victorian system or whatever.

PN2879

MR FERGUSON: Yes.

PN2880

VICE PRESIDENT WATSON: They're the sort of issues that you say arise from this clause.

PN2881

MR FERGUSON: They are the sorts of issues. There are all sorts of complexities that flow from the evidence that it involves subjective considerations, including people's motivations and so forth. Undoubtedly, putting aside any argument about whether we should entrust employees or not, people may believe rightly or wrongly that they're subject to this abuse and they may both be a perpetrator and a victim. There was evidence from Professor Flood, if memory serves, that talked about the phenomenon of women engaging in retaliatory conduct and the complexities around that, that women may engage in self-defence or some other response to being subject to domestic violence, but that may be at some later point in time. Now of course, given the breadth of the way this works, if there was some sort of response and it may not be on par with what the male – in terms of conduct engaged in terms of violence, it could just be

verbal abuse or whatever – the reality is the perpetrator would also be entitled to leave under this clause. There are a whole raft of very complex situations. And I wasn't trying to be flippant when I cross-examined, I think it was Professor Kun, but I know we spoke on that around the difficulties flowing from examples like people incurring parking fines in someone else's name. Now undoubtedly that is a situation that does give rise to or can form financial abuse in some circumstances but I don't know how a third party such as an employer is necessarily going to be able to verify that it is abuse in every particular circumstance. And the entitlement that flows, admittedly you'd have to be undertaking an activity in some way related to that and the link can be very tenuous, but the entitlement that flows is very significant. It's ten days pay. Again, we don't know how that's defined but it is not a small issue. And that's why we say there does need to be rigour.

PN2882

DEPUTY PRESIDENT GOOLEY: I mean, apart from – you know, this clause obviously hasn't been put into the modern awards but there are family domestic violence leave clauses in numbers of collective agreements and there's no evidence before the Commission or, in fact, of employers having any policy, no evidence before the Commission in this matter that the kind of difficulties that you're talking about have actually arisen in practice.

PN2883

MR FERGUSON: I don't think there's much evidence at all about - - -

PN2884

DEPUTY PRESIDENT GOOLEY: But I mean, presumably if employees were having difficulty as you describe it, working out what the limits are, there would be evidence to put before this Commission of that difficulty.

PN2885

MR FERGUSON: I don't think that in the context of a review of this nature any inference can be drawn from a party's failure, a party who's not a moving party in terms of the claim, failure to come forward and give evidence about the sorts of difficulties. I don't think we can assume from the absence of evidence that it's all working swimmingly. In the context of this review the component of the claim carries the burden, if I can put it that way, for explaining the effect of the ward and, in effect, advancing evidence in support of all of the factual propositions upon which it relies. If the factual proposition is that it's all working well, we would have expected the union to advance a substantial body of evidence in support of that. That's not been advanced and I don't think it's open to the Commission to say that it is all working well. But in any event there is a difference between what is implemented under the safety net and will apply to everyone, and what employers choose to implement, and when I say "choose", I mean that in a very liberal sense because it may have been a product for bargaining, it may have been visited upon them but what they - - -

PN2886

DEPUTY PRESIDENT GOOLEY: It's all by agreement.

PN2887

MR FERGUSON: It's all done by agreement, and I say it in a broad way, but what they implement will presumably be – there will be some scope to accommodate and make sure that it reflects the circumstances and needs of that particular enterprise. Now we say that's appropriate. That's bargaining working. And that's why this is a matter that should be left to bargaining so that it can be tailored to the circumstances. Yes, we had the evidence of the PWC. Now commendable as an organisation, it doesn't seem that there's any problems there, but they are, and I think as they accepted, a high trust organisation. They don't necessarily, from what I could gather, require a particularly robust assessment of that, and I'm going on my recollection of the evidence.

PN2888

That doesn't mean that it's not difficult to identify. It doesn't mean that it's not abused, and I say that in the sense that people may mistakenly think that they're entitled to it or they may just honestly be seeking it, but the point is that that employer isn't necessarily going to choose to take that approach. When we're dealing with the safety net a different approach needs to be adopted. We say the safety net must operate in a robust manner and it must be open for, or it should be open in our view for an employer who is granted leave to an employee to know of the circumstances justifying that leave. We see nothing particularly inappropriate about that and we are live to the sensitivities around this issue and we don't suggest that employers will be insensitive to that. But it is significant and there is nothing inherently wrong with that proposition.

PN2889

Moving away from the definition because I think we've already articulated in our material the sorts of complexities about that, and before I do, we do advance the issue around – or the broader, more difficult issue around whether as a policy position an entitlement that could operate to grant leave to both victims and perpetrators is a desirable outcome, and I didn't intent to advance that further unless there are any questions. That then takes me to the actual mechanics of the clause. Now clause X.2.1 is the provision that deals with a person's eligibility to access paid domestic violence leave; clause X.2.3 is the provision that deals with someone's entitlement to access unpaid leave. They are the only provisions apart from the definitional provisions that define whether or not someone is entitled to this form of leave. And I'll come back to that. There is no connection as such to the employee having provided the relevant evidence and you don't get it under this clause if you have met the evidentiary requirements. Rather, you have to satisfy X.2.1 or X.2.3. If we look at X.2.1 the entitlement changed, admittedly at the last minute, but it became, an employee is entitled to ten days per year of paid family and domestic violence leave for the purpose of attending to activities related to the experience of being subjected to family and domestic violence. It then goes on to say what those activities may include but it's not limited to.

PN2890

We understand that an employee must have experienced domestic violence in order to have eligibility to this. And we set out in our submissions essentially the conditions precedent to be granted to receiving an entitlement under this clause, and we do that at paragraph 485. In essence, what we say is in order to have an entitlement under this clause an employee needs to have been subject to family

and domestic violence and there doesn't seem to be any temporal connection between the experience and the taking of the leave. As we read it you could have experienced it at any point in your life, and you need to be undertaking the activity related to the experience of being subject to such family and domestic violence, and you need to be taking the leave for the purpose for which - or the purpose for which the leave's taken must be to attend to the aforementioned activities.

PN2891

So we understand that as a matter of law, to have an entitlement under this proposal you would have to have experienced domestic violence and you would need to be undertaking activities related to that experience. We say that must be so. We can't all be just about the purpose for which you believe you're doing - performing the activity because this whole claim has been advanced on the basis that it's helping people who are victims of domestic violence, and there'd be no merit in it otherwise.

PN2892

The result that flows from that is clearly someone has to make an assessment about whether or not the employee has experienced it and then whether or not the activity that's being performed is related to that experience. It's very hard to see how you could make an assessment, for example, even if you assumed and took people on trust that they were experiencing it, how you could make assessment about the purpose for which the activity was being undertaken if you didn't have some character of the violence. So for example you'd need to know that the person was experiencing economic abuse if they were taking leave for the purpose of attending a counsellor and so forth.

PN2893

We say that there's no ability to side-step in this - under the context of this clause and the need to grapple with all of those complexities that flow from the definition of what is domestic violence. The first person that is going to have to do it or the person that needs to do it in practical terms is the employer. Because they will need to know whether or not the entitlement arises. Now the union I think say that it's not their intent that an employee if it goes down this course of inquiry, and I think counsel for the ACTU readily accepts and the transcript references in the submissions that that would be a high bar. But that is what this clause requires. There's analogy to sick leave to try and say well, it doesn't require that in the same way an employer doesn't have to work out whether an employee is sick. That's not right in our respectful submission.

PN2894

The way the sick leave provisions or the personal carers leave provision are dealt with, in our submissions, and the way they operate is that an employee must be not fit for work and the leave is taken for that purpose. Now there's mechanisms in that legislation that can require the provision of evidence and certainly a failure to provide that evidence would disentitle the person. But the inquiry doesn't stop just because the provision of the relevant evidence is complied with. If as a matter of fact the employee is not sick but they've gone and got a doctor's certificate which we submit occurs.

PN2895

DEPUTY PRESIDENT GOOLEY: Well as was discussed in the case of the Essendon football supporter, who had to go and see James Hird's last match in Perth.

PN2896

MR FERGUSON: That's right. That's right, and there's nothing novel about that proposition in this place.

PN2897

DEPUTY PRESIDENT GOOLEY: I think the Federal Magistrates Court or Circuit Court had to deal with looking behind the medical certificate that person had to support his absence from work.

PN2898

MR FERGUSON: Yes, that's the way it ultimately falls. It's not a case that if you give the evidence it all occurred, it's fine, you get the entitlement and it's not for other elements of the safety net. That's why we say what's being proposed is completely out of step with the safety net. We don't understand how it's going to operate. Now even if you took the union's view and you just relied on some other party to provide the indication, I don't know how you get past the evidence from their witnesses that there is a lack of understanding around certain elements of domestic violence within the community. It seems that it's going - and I'm talking about the evidence just for example of Professor Kun in relation to financial abuse.

PN2899

Now it seems that there can be no confidence in correspondence that may come from a service such as Ms Kun's verifying these issues, or from an organisation not like Ms Kun's where the persons are not armed with a proper understanding of these sorts of issues. These are just the kinds of complexities that we run into. Now I don't want to dwell on that for too long but the problem is it just really raises the issue of whether this is appropriate for the workplace relations system to be dealing with these kinds of issues of looking into the underlying reasons for why leave might be required, rather than simply accommodating it through the existing safety net. But in any event, we say that the clause proposed is deeply flawed for all of these sorts of problems. It's unworkable.

PN2900

Just in terms of - before I leave this - the contentions from the unions that there is no evidence that people lie about being victims of domestic violence and so forth. That may well be the case. The problem is what we are talking about now is the creation of a new entitlement in the context of the safety net at the very least, and as we've said in the context of other elements of the safety net, I don't think it's a novel or contentious proposition to put that people may not be completely honest about the need to take some leave.

PN2901

Now we do not suggest that all employers do not trust their employees; some may, some may not but there is a need for rigor in the safety net. While the unions criticise the absence of evidence being advanced, or at least point to it, we

also make the point that this shift in the clause so that it was about the purpose for which the leave was taken, rather than whether someone is experiencing the leave, only arose in the context of their final submissions. So that was well after the evidentiary material had been - should have been put on, and so the absence of material needs to be considered in that context as well.

PN2902

Look, the only other point I wanted to make around the mechanics of the clause is to identify an issue that I think my friend from ACCI made in their submissions about the fact that in effect there is no science behind the selection of 10 days and we endorse their submissions on that point. It just doesn't seem that there is any rigor in relation to how that's been picked. It is a nice round number, it is the same as personal carers leave, but we can't see why it is - it has been established that it is the quantum that is necessary for the purposes of the Act.

PN2903

That then takes me to Chapter 17 where we deal with the relevance of enterprise bargaining, commencing at page 210. This is one of the most strongly contested matters between the parties in these proceedings, and that is the role that bargaining should play in the deliberations of this Full Bench. I think yesterday counsel for the ACTU described it as something of a red herring. Now contrary to that position, we say that a consideration of the role of enterprise bargaining should be central to the Full Bench's considerations. We say that arises firstly because of the operation of section 134(1)(f) which mandates that you take into account the need to encourage enterprise bargaining when considering whether awards meet the modern award's objective. But secondly, the issue of bargaining arises for consideration under the object of the Act as set out in section 3.

PN2904

Now of course, and I don't think this is controversial, section 578 requires the Full Bench to take the object of the Act into account in the context of the current proceedings. I think that's a point that was recently confirmed in the Firefighting - or decision in the Firefighting Industry Award review that my friend took you to yesterday. I just want to take the Bench very briefly to section 3 of the Act.

PN2905

Now we say this arises because the object of the Act in section 3:

PN2906

is to provide a balanced framework for cooperative productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

PN2907

And we go to (f):

PN2908

Achieving productivity and fairness through an emphasis on enterprise-level collective bargaining by simple good faith bargaining obligations and clear rules governing industrial action.

PN2909

I won't read on. The clear intent of the Act is that there is an emphasis on enterprise-level bargaining. The need to promote bargaining and setting terms and conditions at the enterprise level is at the heart, we say, of the object of this Act. Now the ACTU will assert that domestic violence leave will promote productivity and is warranted on fairness grounds. Having regard to section 3, we say that it is appropriate that bargaining be used as the vehicle to achieve such outcomes.

PN2910

Now in our submission the evidence shows that enterprise bargaining is resulting in employees gaining entitlements, in relation to domestic violence and we rely on the evidence of Jenni Mandel in that regard, although the evidence of multiple union officials also confirms that outcome. Moreover, we contend that it appears to be happening at an increasing rate.

PN2911

Now there are variations to the outcomes that bargaining is delivering. We say there was nothing inappropriate about that. No doubt the parties are striking a deal that's workable and appropriate to the context of their particular circumstances, and we say that's the reason in part why this should be left to the bargaining sphere. On the evidence it's also clear that there's a growing, if only relatively recently acquired, desire amongst unions to secure domestic violence leave entitlements. That can in our submission be expected to result of course in increased efforts to bargain over such matters in the future.

PN2912

Logically we say if this Full Bench delivers that desired outcome to unions through the safety net, that must to some extent limit the extent to which the unions are encouraged to seek it through bargaining. In that way we say that is contrary to the element of the modern award objective that speaks to the need to encourage enterprise bargaining.

PN2913

Now the unions submissions do point to a number of barriers for bargaining. Our submissions have dealt with why we say they are over-stated. We also make the point that this Full Bench shouldn't overlook that there are other mechanisms within the Act that are specifically designed to facilitate bargaining. We of course point to the operation of majority support determinations, good faith bargaining obligations, the Commission's assistance in bargaining disputes and ultimately the right for employees to take protected action.

PN2914

It's not the case as I understand appears to being asserted that leaving it to bargaining is just leaving it to employee's good luck or the good will in some sense of their employer. There are mechanisms that are designed to assist parties to bargain for desired outcomes. Regardless, if the desired outcome is that there be a national standard for domestic violence or some level of consistency that applies across the board. The reality is the nature of the award system and the nature of the bargaining system is going to somewhat undermine the achievement of that through the variation to awards.

PN2915

Now of course awards only apply to a proportion of employees. More importantly for the purposes of this review, enterprise bargaining or the existence of enterprise agreements means that they won't have application to a large number of employees in a direct sense. Of course, the unions contentions are right that there are some employers and some workforces even that don't value or recognise domestic violence, then there's every possibility that the existence of the bargaining stream will continue to mean that this is not maintained - there is no national - there is no nationally consistent standard in relation to bargaining. It won't apply to some people because they're covered by agreements and it may be bargained away in essence.

PN2916

Now all that goes to why we say that the awards are not the appropriate vehicle for addressing the actual problem of domestic violence if that's what the underlying objective is in part. It's going to - the utility of using the award system is going to be limited by a number of measures. Of course that also goes to the extent or to undermining the extent to which some of the positive consequences of addressing domestic - or it undermines the extent to which some of the alleged positive consequences of addressing domestic violence might be actually realised. I'm not putting that well. Given the limitations on the award system, for the reason I've just said, it can't be assumed that the clause will have any of the positive effects in terms of increased productivity or reduced problems associated with retention, because it doesn't apply to everyone.

PN2917

The next chapter I want to deal with was Chapter 18 where we deal with the cost of family and domestic violence. Now largely we're content to rely on our material but I will make some comments about what we see to be the ACTU's mis-characterisation of certain elements of the PWC and KPMG reports. Now the ACTU do rely on reports from both organisations in relation to the costs associated with family and domestic violence to the economy. Now we say the ACTU's submissions misstate the cost of lost productivity estimated by those two reports, and I'll take the Bench to the ACTU's final submissions.

PN2918

At paragraph 68 of the submissions the ACTU states that both the PWC report and the KPMG report - 2016 report allocate the costs of family and domestic violence between the following seven cost categories. They set out a raft of categories. Category C or subparagraph (c) states that:

PN2919

The cost of lost productivity from paid and unpaid work is estimated to cost between 2.031 and 1.9 billion per year.

PN2920

If we go to the PWC report, and it's table 4 on page 11 of the PWC report that's attached to the statement of Debra Eckersley, we see that that's not accurate. In the PWC report that figure of 2.031 billion actually relates to all violence against women. It's not in relation to the cost of family and domestic violence. Now if we move across the table we can see the production related costs associated with

partner violence are in fact 926.1 million, so significantly lower. That's page 11 of the PWC report, table 4.

PN2921

Similarly, if we go to page 43 of the KPMG report, it states that:

PN2922

KPMG estimates that the impact of violence against women and their children on production and the business sector will cost the victim, community and Australian economy 1.9 billion this year.

PN2923

If we go to page 7 of that report we can see that the definition of what is violence against women and their children, and that includes acts of direct and indirect harm caused to women and their children but there is no limitations to the person who caused that harm. Whereas domestic and family violence is defined as a separate category on page 5. So again we can see that the costs are attributable actually to a broader cause than just that which is the subject of these proceedings.

PN2924

Now in any event we say that the PWC and KPMG reports do not provide liable cost estimates for the purpose of these proceedings. For instance, the estimates provided regarding production related costs in the PWC reports are based on methodology adopted in a 2004 report, prepared by Access Economics, which is not in evidence before this Commission. The respondent has accordingly been unable to test or explore these calculations. We say the KPMG estimates appear to be based on assumptions that it made in a 2009 report that it prepared, and those assumptions are set out on page 101 of the report. But the basis for those assumptions is not apparent from the document. It's not clear they appear to be based on any empirical evidence, study or data.

PN2925

As I said, we've dealt with the PWC report in Chapter 18. In summary, we say that even if the estimates provided were relied upon, the material before this Commission does not establish that the costs currently incurred would be reduced or offset. No serious - if the claim was granted. No serious attempts has been made the ACTU, including its expert witness Dr O'Brien, to analyse the manner or extent to which the introduction of a paid and unlimited unpaid, as we perceive it, entitlement in the modern award system would in fact reduce the economic costs associated with family and domestic violence.

PN2926

As I said, already the entitlements only going to imply to award company employees. There's been no evidence as to what proportion of family and domestic violence victims are in fact covered by that system. Indeed we say the granting of the claim may have the effect of increasing production costs associated with family and domestic violence leave, certainly in terms of the cost of paying the leave and so forth.

PN2927

The only other observation we make in terms of cost is it is vital that the micro economic costs be considered as well. It is one thing to look at how much this is going to affect the entire economy or the entire costs that employers are taken at the macro level but it is crucial for this Full Bench to bear in mind the circumstances of individual businesses, particularly small businesses that may have one, two employees. The granting of two weeks of paid leave is not an insignificant entitlement, especially not when it's accompanied by potentially additional leave entitlements.

PN2928

Now it may be that the arguments about the proportion of women that are likely to take it aren't looked at the macro level but that's no comfort, even if it were accepted that that would be a relatively small amount. That's no comfort to the individual business that is saddled with the burden of such a significant entitlement. Of course the object of the Act specifically speaks of the need to take into consideration the needs of such businesses.

PN2929

In Chapter 19 we deal with the modern awards objective, I won't go through any of that detail. Our final chapter then deals with international comparison which I think enliven some of the issues that your Honour was asking me about. We deal with that at Chapter 20. The conclusion we've reached there from our analysis is that very few countries have implemented any form of comparable paid leave entitlement.

PN2930

Now we do say that a relevant consideration for this Commission is that there are numerous sectors of the economy that will be subject to this claim and implementing a cost - a new and costly obligation on employers that appears to be completely out of step with what is in place internationally can only have negative effects on the competitive position of such sectors, and consequentially on the broader economy as a result.

PN2931

I think the textile clothing and footwear industry is a good example of this. I don't think there is any dispute that that sector has been in serious and sustained decline for some time. Ms O'Neill didn't seriously contest that point, putting aside the specifics of it and I doubt the ACTU will. The evidence from Ms O'Neill, the TCFUA is that one of the challenges facing that industry is competition from low wage countries, and I don't think that's a controversial proposition either.

PN2932

We say that implementing a new entitlement can only add to this problem. It can only have negative impacts on Australia's competitiveness, and of course section 134(1)(h) requires the Commission to take into account the competitiveness of the Australian economy, and we say that implementing this new entitlement can only be contrary to that consideration.

PN2933

The point we make though as well is that the ACTU have not made any real attempt to break down the capacity of individual industries to bear this additional

cost. We say it is incumbent upon them to have undertaken that sort of assessment. It's not something that can be just left to the next round of this case. It's a matter that should have been dealt with in these common issues proceedings. Those are the submissions I intended to make, unless there are any further questions.

PN2934

VICE PRESIDENT WATSON: Thank you, Mr Ferguson. Mr Ward.

PN2935

MR WARD: Thank you, your Honour. We filed what might reasonably be described as slightly more environmentally friendly written submissions on 16 September 2016 and 28 November 2016. We rely on those submissions. The Bench will be joyed to hear I don't intend to take them to them. What I do intend to do, however, is to make some general comments, then I want to focus on what I think is the gravamen of the case which is the question of leave and the grant of leave. I'm going to respond briefly to a small number of matters in the ACTU's reply submission, both its written submission and the oral submissions of yesterday, a brief submission on the Victorian government and then I might conclude at this stage by talking about COAG.

PN2936

This is a claim for 10 days' paid leave and for a certain quantity of unpaid leave in addition, and what has been strange to us about this case is that 98, 99 per cent of the case has actually been about domestic violence as a social issue and only a very modest part of the case has been about leave and the need for it. It seems to us that that's a very unusual way of advancing a case for such a substantial claim for paid leave.

PN2937

When you render the claim down to its constituent parts, you come up with these propositions. The ACTU would like three things for a very discreet group of employees. 1) they want to replace certain existing personal carers leave. 2) they appear also to want to top up existing personal carers leave, and thirdly they want to introduce leave for a new set of circumstances, which we'll come to, that is the visiting the lawyer, going to court, seeing the financial counsellor and the like. When you render their case down, it comes to those three propositions. I want to deal with those one by one.

PN2938

The use of personal carers leave in circumstances of domestic violence is, in our submission, an entirely proper use of that leave. If you meet the criteria that is set out in the statute for the taking of that leave, take it. It is an entirely arid line of reasoning to suggest that the legislature didn't actually intend victims of domestic violence to use that leave in those circumstances. If they meet the criteria in the Act you take the leave.

PN2939

The Act does not distinguish on the basis of cause. So be you a victim of domestic violence, be you terminally ill, be you looking after a terminally ill child, be you in an horrendous car accident that requires 12 months of

rehabilitation, the Act doesn't distinguish on the basis of the cause. We think that any line of argument that suggests that is, is unsound.

PN2940

The next question then is well is the 10 days' personal carers leave enough? Now the ACTU have said very, very boldly that it's very obviously not and I want to deal briefly with what material you actually have before you to make a conclusion on that. Now we dealt with this in our written submissions but my friend yesterday highlighted a couple of additional sources that they say you can rely on.

PN2941

There are in fact five potential sources of material before you that you can rely on for this proposition, and I want to deal with them. The first one is the statement of Sandra Dann. At paragraph 41 Ms Dann very boldly says this:

PN2942

Women who have been managing domestic violence and abuse for long periods of time, often have very little or no leave left that they can access.

PN2943

And it appears that the substantiation for that proposition appears in paragraph 42, which is one of her case studies, and these are anonymous case studies, and that is a case study of somebody ringing and talking about the plight of a friend. That, in our respectful submission, should be given very little weight. It certainly isn't probative of the proposition.

PN2944

The next material you could look at relates to the material of the confidential witnesses. The Bench will recall that confidential witness 3, this is a person who was systemically threatened with murder by a drunk partner over three and a half years, that that witness does tell us in direct evidence that they ran out of personal carers leave, but did not run out of other forms of paid leave. You are entitled to look at that.

PN2945

It's the evidence of one person and you are considering whether or not to vary 122 modern awards. But you can look at that and rely on it. Now, what weight you give it is a matter for the Commission in the context of the claim. The other confidential witnesses don't tell us whether or not they ran out of personal carer's leave in any way shape or form. They don't tell us whether or not they ran out of any other leave, but they do tell us that from time to time they did have to take sick leave. They did have to take annual leave and the like.

PN2946

The third source is the Victorian Royal Commission and the Victorian Royal Commission at page 81 make this observation, and I quote:

PN2947

The Commission heard that the victims often exhaust their leave entitlements when they must attend medical appointments and court appearances, organise accommodation and care for their family.

PN2948

We have no basis of understanding how they reach that conclusion. We don't know whether or not it was made on the basis of submissions. We don't know whether or not it was made on the basis of sworn evidence, tested evidence. It is at best evidence of an observation of the Royal Commission. It's not direct evidence before this Tribunal.

PN2949

The next source, and there was a fair amount of talk about this source yesterday, is the Australian Law Reform Commission Family Violence and Commonwealth Laws Improving Legal Frameworks Report. This is a clever piece of material to put before this Full Bench today and I will explain why. There were four references in that report to observations about exhausting entitlements.

PN2950

It is intriguing to read the report in more detail. The observation in paragraph 16.63 and 16.69 is clearly stated as being based on submissions. Well, who made the submissions? Surprisingly, the ACTU, the ASU and a number of other people. So the ACTU make a submission to the ALRC. It writes something in its report and now the ACTU bring it back and say that's probative evidence. Well, with respect, it needs to be treated as it is. It's not direct evidence. You can't say it proves the fact. It simply proves the fact that the ACTU made some submissions to them telling them that, which is what they have done here again.

PN2951

Now, lastly, and it doesn't embarrass me to say, a member of my client, the Australian Chamber, has written a letter to this Tribunal; that is, the National Retail Association, and that letter expresses the opinions, it appears, predominantly of Ms Lam(?)and the NRA. Well, that it is a letter. It is not evidence that's been tested. It's not sworn. One would give that the weight it should be given. It's a submission.

PN2952

Now, with respect, that is the totality of the evidence before this Tribunal which is very weak, upon which you are asked to conclude that the 10 days of personal carer's leave is insufficient and you should give some more. Again, in the context of trying to vary 122 modern awards, we say that is just unsatisfactory.

PN2953

The next part then of their case is that there is a need for a new form of leave. That is, you need leave to see a lawyer, to see a financial counsellor, to go to court et cetera. The first thing we want to say about that relates to part-time and casual employees. We would have thought that given that part-time and casual employees do not work 38 hours a week Monday to Friday on the whole - I concede some might, but on the whole they wouldn't - we would have thought that part-time and casuals would be in a reasonably good position to juggle those commitments with their work commitments. We acknowledge that that might be a little harder for full-time employees.

PN2954

With one exception which we will concede in a moment, doing those things however is commonplace. The Bench told me I could take it as a given that they are commonplace, because they are commonplace. Different people at different times in society need to do those things. There's no evidence to support the proposition that victims of domestic violence need to do this more and how much more than non-victims of domestic violence. You are not assisted by the applicant in relation to that proposition.

PN2955

It's not unreasonable to assume that people confronted by these issues, like all employees, will do their best to juggle, to see people in their lunch hour, to see people after hours and yes, as offensive as it is to the ACTU potentially possibly to take a day's annual leave if they need to.

PN2956

Now, I concede now that there is one area that probably is not commonplace. The notion that a person might need to seek emergency accommodation, particularly in the wee hours of the morning is not something that the average employee is ever going to have to confront. I think even if you are evicted as a tenant, you've probably got some level of notice and you can probably get your act together to some extent. So we must concede that that is one area that doesn't appear to be commonplace. But as Dr Cox gave in her evidence at paragraph 8.29 - it might be 8.28 as well - that's a very, very small percentage of persons. Very small indeed.

PN2957

So in our respectful submission, there is no strength in the evidentiary case as to why leave should be granted to a very discrete group of people for things that are for the most part commonplace to all employees.

PN2958

I come then to the fourth part, which seems to be another great fragility in the case. We've searched as best as we can and we can see no evidence to support the claim for 10 days. And no evidence to support the claim for the additional unpaid leave. The best that seems to be available to you is the indirect reference to Telstra and that Telstra's experience is 2.3 days a year. That seems to be the best that's available to you.

PN2959

Now, there's some problems with that straight away. We don't know how much of that 2.3 might otherwise have been taken up by personal carer's leave under the Act. So it might well be that some of that actually gets crossed off as personal carer's leave and it might even be less than 2.3 days. Price Waterhouse Coopers gave some evidence on this, which was reasonably ambivalent. The fact is that there seems to be no material before you that can support 10 days.

PN2960

Now, we say those submissions are compelling, because this is a case about leave, not domestic violence as a social problem. I want to just make a comment about section 156 as I move on and the Bench are not going to be surprised that we have reiterated that awards need to be reviewed in their own right. It's perhaps an inconvenient truth for the ACTU in this case. The fact that something is described

as a common claim is an entirely administrative term. It doesn't derogate from the statutory obligation that this Commission has.

PN2961

What's surprising about this case in comparison to all other common claims I must say I've been involved in, is there is not even a pretence of an award inquiry. There's not even a suggestion of it. They don't need even, it appears, to present any industry-based evidence, let alone award-based evidence relevant to the case.

PN2962

There is no examination of the amount of personal carer's leave taken in individual industries and whether or not one is more distinct from another. There's just no attempt to bring an award-based case. In our respectful submission, if it simply doesn't matter at all what award is being considered, it does squarely suggest that it might be more appropriate that this be a matter for consideration by the Parliament in the context of the National Employment Standards. But as we've said, nothing detracts from your obligation to review each award in its own right.

PN2963

I want to take issue with something the ACTU have said in their written submissions several times. The ACTU say squarely that domestic violence is a workplace issue. That is, with respect, an entirely misleading proposition. Entirely. Domestic violence is first and foremost a personal, private relationship issue. More often than not involving a victim and a perpetrator. More often than not, where the perpetrator has committed a criminal offence. That circumstance may or may not intersect with the workplace. It may or may not. But to boldly state that it is a workplace issue fundamentally mischaracterises what the nature of the issue is, and we take issue with that and we think its relevant to your consideration.

PN2964

There is, in the case against us, a kind of underlying theme that employers aren't doing enough, that in some way we need to step up to the plate to do our share. This again is a very inappropriate characterisation of the role of the employer. The employer, as the evidence in this case has proved - Dr Cox, Dr Cortis and Dr McFerran, which I will come to - the employer plays a pivotal part in dealing with domestic violence as a social issue. They do this by creating employment. It's the financial independence created by employment that appears to be at the heart of assisting people leave domestic violence situations and be more resilient to them. Dr Cox agreed with that, Dr Cortis agreed with that and Dr McFerran agreed with that when I cross-examined them.

PN2965

Employment costs impact decisions to employ. I think this Bench has well accepted that proposition and there is constant debate about the weight and strength of how much cost to how much employment, but as a general proposition in the annual wage reviews, that proposition has been accepted and it is magnified in our view in small business as well. But employers are doing their bit. It's the most important part. They are creating employment.

PN2966

Importantly as well, let's not forget that employers pay tax and it's the tax that actually supports the social programs. So we would ask this Bench to be very mindful that employers are already playing a pivotal part to the extent that it's relevant to a claim for leave in dealing with a social issue.

PN2967

I wanted to make some brief submissions on casuals. I had thought it was uncontroversial casuals get a loading in lieu of receiving personal carer's leave. They in effect get paid up front, a comment made to the Casual and Part-time Full Bench. Again, as I've said, assuming that the casual is not working 38 hours a week, Monday to Friday, one would have assumed that this class of person would have had increased opportunity to fit in the needs of seeing a lawyer, seeing a financial counsellor or whatever.

PN2968

It is also important to understand this, that there is an element of double dipping in the union's claim. If I am now going to pay the casual directly for a circumstance that otherwise would be characterised as falling under personal carer's leave, then I am paying them directly and paying them in their casual loading, and we think that's manifestly unfair.

PN2969

Intriguingly, the two people who came along to support the ACTU, PWC and the Victorian Labor government, and they came along to tell what their - and they used this word, both of them did - what their "best practice" approach was, not what the safety net approach should be, but their best practice approach. Neither of those persons extend the benefit to casual employees.

PN2970

Price Waterhouse Coopers told you they didn't and in the bundle of documents handed up yesterday by the Victorian Labor government, if you go to page 36, paragraph 4, 4.3, Eligibility, their policy says:

PN2971

Leave for family violence purposes is available to all employees with the exception of casual employees.

PN2972

So forget safety net. Even their best practice approach didn't include casuals.

PN2973

I must say we've got two other problems with casuals. It might be that we don't properly understand the claim and must concede that straight away. It seems to us that the claim might also provide for a casual to be paid domestic violence leave on a day they weren't otherwise rostered to work.

PN2974

I'm not entirely sure that that constitutes paid leave. It just seems to be paying casuals more money. We are also not sure how a casual takes unpaid leave.

PN2975

DEPUTY PRESIDENT GOOLEY: Well, they take unpaid compassionate leave.

PN2976

MR WARD: Yes. I am just struggling with the proposition of how they do that. I assume it just means they can roster off.

PN2977

DEPUTY PRESIDENT GOOLEY: Presumably it means they don't have to attend for work on the day they are rostered on.

PN2978

MR WARD: Yes. Exactly right. But it would appear though that on at least one reading of the union's claim, a casual could actually claim domestic violence leave with pay on days they are actually not rostered. There's a lot of good reasons therefore why casuals should not be included.

PN2979

I want to just briefly deal then with the question of costs. Both the cost economically and the cost of the claim. Mr Ferguson said a fair bit about this, but I will just deal with it reasonably in short order. I think KPMG at paragraph 74 of the ACTU's submissions say that the cost of the claim - the cost of domestic violence to employees is about a billion dollars a year. That's what they say.

PN2980

Now, whatever the number is, the ACTU claim isn't going to reduce that. All it's going to do is increase it. I really struggled with this notion of productivity. It's almost advanced by the ACTU that they are going to, in some way, help productivity and therefore we should support the claim. The first proposition is there is no doubt that employees who are distracted at work for whatever reason might be less productive than they normally could be. That's not something that's purely within the domain of victims of domestic violence. You could be distracted for many reasons.

PN2981

The idea though that we solve that by paying them to be away from work and being completely unproductive seems to me to be somewhat counter intuitive. Counterintuitive indeed. But the case before you doesn't solve the cost burden to the employer. As to the costs of the claim, well, any assessment is going to be largely speculative. After cross-examining Dr O'Brien, the ACTU have upped his estimate by three to four hundred per cent already. Give them a couple more weeks; they might add a bit more in as well.

PN2982

And I can only say it's in the nature of an entirely new entitlement that the Commission needs to move with great care in trying to be too precise about the cost. I can't be bullish and say it's X-million. I would feel that that is a very fragile way of putting it.

PN2983

What you can say though is this: it is evident that there is a direct cost and it's material. There is also some substitution cost in that some people, if the claim is granted, will move from claiming personal carer's leave to domestic violence but leave their personal carer's leave back there, so there is some substitution cost and putting aside the rather trite submission of my learned friend yesterday, there is clearly an administrative cost. And as Mr Ferguson so ably said at a micro level those matters are amplified, particularly the small employers, at a micro level.

PN2984

Now, that leads us on to what might be said to be a little bit of a misunderstanding between ourselves and the ACTU. We said on a number of occasions in our written submissions that we find it slightly curious how hard the ACTU have worked to downplay the cost. On the one hand, they tell us that there is a crisis of very substantial moment. Then on the other hand, they say it's okay, because there will be very low take-up of the leave and this very low cost. And without being facetious, we just find it difficult to reconciles those two propositions in the context of a claim of the magnitude and scope that's before the Bench.

PN2985

If it is so that the claim relates to a discrete group of the workforce and there is to be low take-up, it's very hard to see how that is relevant to the establishment of a safety net applying to all workers in all awards. It just doesn't sit well in our respectful submission.

PN2986

Let's deal with a theme that is in the submissions and I am not sure if it is a red herring, but it's a theme. There is a theme about securing and losing employment. We can't see how this theme relates to paid leave or unpaid leave. It might relate to many things, but it doesn't seem to relate to paid leave. There are some examples where people have lost their employment in circumstance of domestic violence. I think there is a reference to John C's decision.

PN2987

I am very pleased to say that the Fair Work Commission has done its job and fixed those matters up. It's good to see the system is working, but in our view, there is no evidence that shows that the claim is needed to maintain employment or, as the Victorian government put it yesterday, secure employment. There doesn't seem to be any evidence about that at all.

PN2988

We would ask the Bench to be cautious about placing too much weight on the ACTU's submissions about securing and maintaining employment in the context of the claim for paid leave.

PN2989

I'm just going to deal with a few matters and then I will finish. The ACTU in its written submissions have talked about the international obligations that the Australian Commonwealth have in relation to domestic violence. I am not sure that this appears to be a slightly desperate line of argument in our respectful submissions. It can't be said that the Fair Work Act doesn't give effect to our

current international obligations. We say it does. I'm sure the Commonwealth were very mindful of that when they made it.

PN2990

There is a long discussion in the ACTU's submissions of a potential ILO conference in 2018. Well, if our international obligations change in 2018 or 2019, that's a matter for the Commonwealth to address and I will address it at the time. But there's no force or weight in that line of argument to support the claims of leave.

PN2991

I want to make two comments about the ACTU's submissions associated with the modern award's objective. The rest we've dealt with sufficiently in our written submissions, but I just want to make two comments. One is about the needs of the lower paid and one is about bargaining and I'm going to try very desperately not to repeat what Mr Ferguson has said when we come to bargaining.

PN2992

I'd ask the Bench to be cautious about how it approaches its regard to 134(1)(a), the needs of the low paid. I simply say it for two reasons. One is it can't be axiomatic. It's simply increasing award benefits. It ticks that box. Otherwise the Bench would just be constantly increasing award benefits everywhere. There must be more to it than that. Perhaps more importantly, because the evidence of this case was that domestic violence isn't a socioeconomic issue, it's not something that's peculiar to working-class people and people on awards. Dr Cox's evidence says that and, in fact, Ms McFerran started to get into an argument with me to tell me that it was, I think, in effect a middle class problem, not a lower class problem and that's in her evidence. So just be cautious. This is not a socioeconomic issue and it cannot be said that simply giving more to workers axiomatically triggers that limb of the modern award's objective. We take a slightly - - -

PN2993

VICE PRESIDENT WATSON: Couldn't it be said that the impact of domestic violence on a low paid employee, if it involved a need to take leave and absences, and leave banks are exhausted, the nature of the employment is likely to - could well be threatened by taking additional excess leave and the impact on such people is much greater than other people and isn't that a relevant factor?

PN2994

MR WARD: Well, that's an extreme case, with respect. That's quite an extreme case. I am not sure if it would be a greater consequence, because the loss of employment of anybody will have an implication in the context of their personal socioeconomic circumstance. Now, it might well be, for instance, that somebody who is at the lower end of the socioeconomic chain is able to access government benefits very quickly.

PN2995

It might be that somebody who is r up the socioeconomic claim perhaps is carrying much more substantial debt and isn't able to access government safety nets might actually find themselves in a more precarious economic position than

somebody lower down. So I would be cautious saying that would be general proposition.

PN2996

I think it would be a matter of the actual socioeconomic circumstances of the individual and their ability to access the social services network balances against, in particular, the level of debt they are carrying at the time.

PN2997

In terms of bargaining, our take on that is just simply this: one of the things you are required to have regard to is whether or not granting the claim encourages bargaining. The evidence before you is, with respect, in our submission, to the contrary. He particularly focused on the evidence and the cross-examination of Mr Kemppi. It seems that his whole motivation for getting this in modern awards is to get it so he doesn't have to bargain for it, and that actually seems to be some of the motivation implicit in what the ASU's evidence was as well and others. So I'm not sure how granting the claim encourages bargaining in any sense of the word. There's no doubt that there is a healthy level of bargaining already for domestic violence leave in circumstances where modern awards don't have it. Now, you can form that conclusion based on the evidence that was brought by the ACTU.

PN2998

Now, yesterday some reliance was made on the firefighters case and I just want to make a couple of quick comments about that. How that case could to be said to be on all fours with what's in these proceedings is entirely beyond us. The Firefighting Industry Award was an examination of whether or not a prohibition on part-time employment should be removed, and the award originally said words to the following effect:

PN2999

An employer in the public sector may only employ a person in a classification in this award on a full-time basis.

PN3000

It actually prohibited part-time employment and the Bench formed the view there that it was prudent to remove the prohibition and they thought that that might in part be something that might encourage bargaining around those issues.

PN3001

We're not dealing with the removal of a prohibition here from modern awards. We're dealing here with an application for an entirely new benefit and it's difficult to see how that case is analogous to whether or not granting this claim will or will not encourage enterprise bargaining. We just struggle with how that has any application here today.

PN3002

I want to very carefully, unless Mr Arndt grabs my coat, respond to one, what appears to be, fairly desperate submission by the ACTU. It's at paragraph 250 of their written submission. They've effectively asserted to this Bench that if you don't grant their claim you're in breach of your obligations under the Act and you

will be acting in a way that breaches discrimination law. I don't need to deal with this in great detail other than to say this; any proper reading of section 153 would lead you to the conclusion that that's in error, and a more considered reading of section 153 might lead the ACTU to the conclusion that they've got a problem in advancing a claim that indirectly relates to gender than we have in trying to oppose it. But I don't think a lot of weight will be given to that submission but we just felt it couldn't go without some response.

PN3003

Can I just then deal with the Victorian Labour Government. We thought about whether or not we should object to them doing some of what they did yesterday. We didn't. It was a submission. It doesn't carry the weight of evidence. If they wanted to put evidence on they could have. I think what's really important about their - well, there's a couple of points. Obviously the Royal Commission made two recommendations to the Victorian Government. That's paragraph 191 and 190. Recommendation 191 and 190. Recommendation 191 can reasonably be described as the safety net recommendation. That is, go and talk to COAG about the national employment standards. It's notable that even the Royal Commission didn't recommend that that be a conversation that included casuals at large, only a very discrete form of casuals. But we see that very much as a safety net recommendation. An entirely sensible proposition, one we'll come to at the end. And recommendation 190 was no more than recommending how the Government should act as an employer in bargaining, that is, when you bargain we suggest you do this.

PN3004

Now, the Victorian Government is entitled to spend its tax payers' money as it sees fit. It's decided to do that. It's an employer, it's entitled to take whatever position in bargaining it wants, similar to PWC or anybody else. But we don't really see how that helps a claim for 10 days paid leave and additional unpaid leave. The Victorian Government also had a crack at saying it's all about, "securing and keeping employment". And again, as we've said already, there's no evidence before this Commission that a grant of 10 days paid leave has any role in securing and keeping employment sufficient to move this Commission.

PN3005

Can I just say this in closing, the question has been raised about COAG, and I shouldn't let it go without some observation. My client thinks that's a sensible idea and that if there is to be a conversation about domestic violence leave it would be highly desirable that it be done through the COAG process and with the discussion of the Commonwealth Government. I think the National Farmers' Federation have said something similar. We think that's an entirely sensible course of action. Now, that probably isn't enough to dissuade you from doing whatever you're going to do, but it would appear to us that that is, in the context of the National Employment Standards, a reasonably sensible approach and one advanced by the Royal Commission in Victoria and one that my client actually thinks is a sensible approach as well.

PN3006

In our respectful submission, the requirements of the Act in terms of section 156 and 134 should not move you in these proceedings to grant the claim. The

modern awards are taken to meet the modern awards objective without the benefit of domestic violence leave and if one applies the considerations in the preliminary issues decision while there has been a tidal wave of material about domestic violence as a social issue, there has been a vacuum of evidence to move you about 10 days' paid leave. In our respectful submissions, the claim should be declined.

PN3007

VICE PRESIDENT WATSON: Thank you, Mr Ward. Is it time for your cameo appearance, Mr Johnston?

PN3008

MR JOHNSTON: If the Commission pleases. I'll be very brief. We just wanted to make some observations in case at some point later on that it's said that AMIC didn't make any submissions concerning the Meat Award which is principally what we're interested in. Firstly our primary view is that the matter should be rejected. We made submissions in reply in September and/or that the matter should be left to Parliament or as my learned friend, Mr Ward, has said for COAG.

PN3009

I just want to refer to the Meat Industry Award because even though this is being dealt with as a common issue the Commission had to take regard of the 122 awards that are the subject of the application, and although the review can deal with one or more awards at the same time, primarily in an application like this, which is a common issue, the relevance of section 134 and 138 is paramount.

PN3010

This is not the first time during this four year review that the ACTU has embarked on, what can be described as, a general matter by way of application. They commenced the four year review by seeking to vary all the awards to remove the transitional provision, and that came before a Full Bench presided over by, as he was then, Bolton J, and the Full Bench rejected the application and then 100 awards fell off the loop and one was left with about 20 awards the subject of specific application.

PN3011

The second time the ACTU have done it is in relation to the casual conversion case where they've made a general application to vary the awards, made next to no reference to industry terms or industry employees or whatever, and then it was left to the employer bodies throughout the case, which has not been the subject of a decision yet, I understand that, to bring evidence as to specific matters in relation to the industry.

PN3012

Now, in relation to the application it seeks to vary the Meat Award for all employees. One may not be familiar completely, some Members of the Bench may be, completely familiar with the Meat Industry Award. It contains a number of categories, four of which are full time, part time, daily hire and casual. Daily hire is a peculiar beast merely exclusive to the meat industry. And in the casual conversion case in evidence that was filed on 25 February this year which was untested and uncontested, even with the ACTU counsel present, the evidence was

that nearly 50 per cent employees in the meat processing sector are daily hire around Australia. Clause 14, which covers daily hire under the award, says that they're employed by the day. The evidence in that case was that because of climatic conditions in December last year, January, February, March the daily hire were told they weren't wanted and at that point their employment ceased but their engagement continued. That's the effect of the provision of 14.5 of the Meat Industry Award. For that so-called standing down the daily hire people receive a 10 per cent loading.

PN3013

Then 11.4 of the award gives the right to the employer for a meat processing establishment to transfer people from full and part time to daily hire and part-time daily hire on the giving of seven days' notice. That provision has been in the meat award federal for a long time. In relation to casual employment the award says, in 15.4, that they're employed and paid as such but their employment ceases at the end of each day. Now, in the context of those two matters what the AMIC submissions that were drafted and filed by Andrew Herbert of counsel, who appeared for AMIC in the casual conversion case, was that in meat processing the daily hire is, in effect, the norm, and in relation to the meat industry in general that casual employment was the norm because, again it was uncontested evidence, that casuals can be employed by the hour for a day, for two days, for a week then not the next week, for a month, then not the next month, and how, in the context of the ACTU clause, this would operate for the meat industry we are a little confused. Now, I assume whatever the Bench does; if it doesn't reject the claim, that we'll be dealing with that later on, but it is just mind boggling how it would operate with these provisions in the Meat Industry Award that have been there for a long period of time.

PN3014

I'm not going to talk about the evidence. We'll leave that to ACCI and AiG and I'm not going to simply repeat the submissions they've put in writing and that they've made this morning. I just want to say a number of points, the first of which is this; there doesn't appear to be any limitation on the ACTU application. What I mean by that is if one goes to other leave provisions of the NES, be it the family friendly sections or personal leave or annual leave there are limitations. Those limitations could be excluding casuals; those limitations could be the employer has a right to oppose, but there's nothing here. There's nothing whatsoever. There's no right of the employer once a statutory declaration or other evidence is given; there's no right to ask whether the employee did the things that he wanted the leave for; there's no guarantee that the employee will do those things; nothing. It's just 10 days' paid leave with another two days' paid leave for every employee, casual or otherwise, from day 1 of employment.

PN3015

In our written submissions we attempted briefly to look at some of the provisions of the State Family and Domestic Violence legislation. I'm not going to take the Commission to it. It's there. Of course we know that the Federal Parliament doesn't have an absolute right in relation to family and domestic violence because it's not contained in the constitution. We know that the Family Law Act contains a provision concerning family and domestic violence but that's simply because it's

an incidental power, and it only relates to the jurisdiction that the Family Court has or those Courts that are exercising Family Law Act jurisdiction. And we put in our submission that in relation to the definition in 4AB I think it is that the Family Law Act that it primarily relates to a particular chapter of the Family Law Act which deals with the protection of children and the lining up of any inconsistency between any State, family and domestic violence orders.

PN3016

But there's no analysis, and this is the problem, of the State Family and Domestic Violence legislation. Now, I just give two examples; the ACTU application refers to household. Take Queensland for example, the Domestic and Family Violence legislation does not include household and they're excluded, so that particular aspect, if there are particular matters that an employee has to undertake, if this claim was granted, would be dealt with, one presumes, under the summary offences or whatever Act in Queensland that are in existence.

PN3017

The second point we make in relation to Queensland is that if a claim such as this covers emotional or psychological abuse, as an example, then in Queensland in a household if that sort of alleged abuse is occurring there may be nowhere to go in Queensland in any Court because one doubts, I haven't analysed it properly, but one doubts that the local Courts would have jurisdiction in relation to those matters in Queensland, in this particular example, so one would be left with a situation that if there's leave that has to be taken it would be under personal leave, because there's nothing in relation to family and domestic violence for any Court to do in Queensland so if you needed to go to doctors, if you needed to go to counselling that's what personal leave is there for.

PN3018

It's simply on this basis that we gave those two examples, that this is matter irrespective of the views that the Commission may come to, it is best left to Parliament to make a consistent approach around Australia in relation to family and domestic matters and/or COAG to deal with the matter. But, as I said, the main, or the primary reason we're on our feet here, was just talk about the meat industry and the peculiarities of it that the amended application of the ACTU would be very problematic in the industry. If the Commission pleases.

PN3019

VICE PRESIDENT WATSON: Thank you, Mr Johnston. Ms Burke, you have the benefit of the final say.

PN3020

MS BURKE: Thank you, Vice President. Might I seek the indulgence of an early lunch so I can take some instructions and endeavour to compress my reply submissions as much as possible?

PN3021

VICE PRESIDENT WATSON: When would you prefer to - - -

PN3022

MS BURKE: Just an hour.

PN3023

VICE PRESIDENT WATSON: An hour?

PN3024

MS BURKE: We could come back at half past one if that's convenient?

PN3025

MR WARD: Sorry, your Honour, I've done the unforgiveable and I've made an assumption we would probably finish by 1 o'clock today. Can I seek leave? I won't be in attendance when we return after lunch. Mr Arndt will be. I don't think we'll need to deal with anything else today, but I might be a little late after lunch, I apologise.

PN3026

VICE PRESIDENT WATSON: Very well. We'll adjourn until 1.30.

LUNCHEON ADJOURNMENT [12.20 PM]

RESUMED [1.36 PM]

PN3027

VICE PRESIDENT WATSON: Ms Burke.

PN3028

MS BURKE: Thank you. Thank you, members of the Full Bench. I have 14 points that I need to address in reply, but I'm hopeful to be able to do that in under 20 minutes. So having set myself that challenge, if I'm speaking too fast please let me know.

PN3029

The first point I want to respond to is one raised by my friend, Mr Ferguson, who stated that the ACTU is asking the Commission to essentially elevate one social problem over another. He also stated that if the Commission grants this application the concern of the Australian Industry Group is that it might encourage other unions to bring similar claims.

PN3030

I just want to point out that we've addressed both of those arguments at paragraphs 14 to 19 of our reply submissions. The short point is this, neither argument is properly a legal basis to refuse the variation.

PN3031

The second point is in relation to the concept of changed circumstances. The submission was put that the ACTU has shown no change in contemporary circumstances that warrants a change. I want to refer the Full Bench to the decision of a Full Bench of this Commission in *Restaurant and Catering Association of Victoria* [2015] FWCFB 1996. At paragraph 91 of that decision the Full Bench referred to the decision of, with respect, Gooley DP who determined that cogent reasons for an amendment to penalty rates in the Restaurant Award had not been established because the ground on which the

applicants had sought the variations did not identify significant change in circumstances.

PN3032

At paragraph 92 of the Restaurant's appeal decision the Full Bench found that although the Deputy President made some findings about these aspects of the applicant's case, her adoption of a significant change in circumstances, as the apparent criterion for variation, meant that the case had not been considered in accordance with the requirements of item 6 of schedule 5 of the Transitional Act, and therefore the exercise of discretion was artificially confined and miscarried.

PN3033

Item 6 of schedule 5 of the Transitional Act provides, at subparagraph (2), that, "In the review" - this is the transitional review of all modern awards:

PN3034

the Commission must consider whether the modern awards achieve the modern awards objective and are operating efficiently.

PN3035

Which is not material for the purposes of this point, which is that there is no requirement, on the ACTU, to demonstrate a change in circumstances in order to enliven the Commission's jurisdiction.

PN3036

The third point I want to address relates to the operational matters identified as problematic by both employer parties. I just want to point out that we have responded, in considerable detail, to operational concerns, at paragraph 88 to 139 of our reply submissions.

PN3037

There was some discussion about the difficulty in working out entitlements for casual employees, it is in our reply submissions, but I just really want to emphasise that this is not a new task that we are asking employers to do, because there are a number of examples where paid entitlements are available for casual employees, in particular long service leave and accident make up pay and paid no safe job leave and paid parental leave.

PN3038

The fourth point I want to address is this debate about the "broad definition of family and domestic violence in the clause." Much has been said about this and we agree that the clause is not just limited to dealing with the consequences from violence that you can see with your eyes, it also includes emotional, psychological and economic harm. Experiencing fear, experiencing threats and there are numerous, numerous examples in evidence, before this Commission, of employers who are working with very broad definitions and I am including Spotless, whose policy was put before the Commission, through the evidence of Mr Gandy.

PN3039

The Spotless domestic violence policy defines violence as, relevantly:

PN3040

A range of behaviours which may include physical, sexual, emotional or financial abuse, forced isolation, control, intimidation, threats or stalking.

PN3041

The PricewaterhouseCoopers policy defines family domestic violence as:

PN3042

Behaviour by your current and former intimate partner or a current and former relative towards you that is physically, sexually, emotionally, psychologically or economically abusive, threatening or coercive or in any other way controls or dominates you and causes you to fear for your safety or your wellbeing or that of another person.

PN3043

Now, Ms Eckersley was cross-examined for at least an hour and it was not put to her at all that that that definition was problematic and was causing problems. Of course, the other source of the evidence before the Commission on this point of the broad definitions are the number of enterprise agreements referred to by the union witnesses that do contain family domestic violence lead clauses, each of those, I've checked through all, have broad definitions of family and domestic violence and the Commission can take notice of the fact that where an employer and employee representatives bring an agreement to the Commission to be authorised, that it is the subject of agreement or is the product of agreement between the parties and you shouldn't assume that employers are asking the Commission to approve agreements that contain unworkable definitions of family and domestic violence.

PN3044

The fifth point I want to address was the submission that there's nothing in the ACTU's proposed clause to limit the scope of behaviour that could warrant the entitlement. It's a short point. Well, there is, there's the need to attend to particular activities that are identified in clause X.2.1. So we say that it does operate as a limit and that's entirely consistent with the vast majority of paid family and domestic violence leave clauses in enterprise agreements.

PN3045

The sixth point is described by my friend as the condition precedent to the enlivenment of the clause. It was said that somebody has to make an assessment, first, if family domestic leave is happening and, second, if the activity is related to that occurrence. So, yes, someone does have to make that assessment and that person is the employee, the person affected. And, if required by the employer, her doctor, her lawyer, a police officer, somebody who is in a position to make that assessment. This whole notion that there's no standard or objective measure of what is family and domestic violence, in my respectful submission, is a simpler way of dressing up the employer's subjective view as objectivity. It's not the case.

PN3046

VICE PRESIDENT WATSON: Can't an employee file or provide to the employer a statutory declaration?

PN3047

MS BURKE: Yes.

PN3048

VICE PRESIDENT WATSON: A statutory declaration could say, "I took leave on such and such a date as family and domestic violence leave. I notified the employer that I would be taking that leave on the morning of that date. I took that leave for the purposes of family and domestic violence. I don't want to provide further details of the matter to the employer." That would satisfy the - - -

PN3049

MS BURKE: Well, the statutory declaration would have to say, "I took that leave for the purposes of attending to a particular activity arising out of the family and domestic violence." You don't get the leave just for going through the experience, it has to be to attend to something that arises.

PN3050

VICE PRESIDENT WATSON: "Attend to an activity, but I don't want to go into the details of those matters."

PN3051

MS BURKE: In those circumstances if the employer has any basis for disbelieving or questioning the employee they can invoke the dispute clause, under the relevant award. So the remedy is there.

PN3052

DEPUTY PRESIDENT GOOLEY: Simply ask the employee, first of all, to provide some more evidence, they're prepared to provide that, prior to having to invoke a disputes procedure.

PN3053

MS BURKE: Certainly. I jumped to the worst case scenario, but there are a number of steps that could happen in between that outcome.

PN3054

DEPUTY PRESIDENT GOOLEY: The employer, of course, could simply not pay it.

PN3055

MS BURKE: Again, that would then entitle the employee or put the onus on the employee to either enter into those discussions with the employer or again, themselves, invoke the dispute clause. Then they would be required to demonstrate why they were entitled to be paid.

PN3056

We say, as I think was observed by Ms Richards yesterday, that these concerns about going behind the evidence provided by an employee, in that circumstance, in relation to personal leave, are not new issues that employees and employers deal with. There are different forms of personal injury and illness that, to quite my friend, reasonable minds can differ about, whether they properly mean somebody's not fit for work. In fact there's an entire jurisdiction that deals with

that. Employers and employees, their lawyers, sometimes in this Commission, deal with this all the time.

PN3057

The seventh point I want to respond to is in relation to bargaining. It was put to the Bench that bargaining should be central to the Bench's consideration of this. Certainly section 134(1)(b) requires the Commission to take into account the need to encourage collective bargaining. But there is a difference, in my submission, between the need to encourage collective bargaining and taking into account the number of employees who are covered by enterprise agreements, for the purposes of assessing whether a variation is necessary and meets the modern awards objective.

PN3058

I'll just illustrate my point this way, it wouldn't matter if 100 per cent of employees covered by collective agreements all had paid domestic violence leave, because it makes no difference to the award reliant employees. In my submission, it would be an error to find that the entitlement is not necessary for modern award covered employees because a completely separate pool of collective agreement covered employees have the entitlement or that they can and do bargain for it.

PN3059

Turning now to the submissions of Mr Ward, this is the eighth point, the eighth and ninth. There were criticisms made of the evidence relied on by the union to demonstrate the connection between employment disruption and the need for paid family and domestic violence leave. The evidence of Ms Dann was referred to and it was put that the entire basis of her opinion was a case study. In fact the case study was used as an example of her point, which is based on her experience, as the head of the Working Women's Centre in South Australia, and the body charged with implementing the - or one of the bodies charged with assisting workplaces to implement the South Australian government's paid family and domestic violence leave entitlement.

PN3060

In relation to the point made about the ALRC recommendation, certainly various unions, including the ACTU made a submission to the ALRC, so did ACCI, so did AIG, so did a number of bodies that have nothing to do with either unions or employers, and I'm talking about legal centres, health centres and the like. What we rely on is the recommendation of the ALRC, not a reference in their submissions to the submissions that they got. The recommendations are for paid family and domestic violence leave and we say that those recommendations made by the ALRC are made on the basis of considering all of the submissions and all of the material before it.

PN3061

The tenth point is one made by Mr Ward, that there's no evidence that family and domestic violence leave is needed to retain or maintain employment. I just want to say, in response to that, well, there is, because taking - the Commission can take notice of this, taking unauthorised leave is misconduct and it's grounds for dismissal. That's exactly what happened in the King case that I've referred to earlier. So we say that's a very clear illustration of that connection.

PN3062

The next point was one also made by Mr Ward, who said that it was misleading of the ACTU to say that family and domestic violence leave is a workplace issue because, in his words, family and domestic violence leave is a personal, private and domestic issue. In response to that, I want to say, very strongly, we reject to proposition that the ACTU has misled the Commission in any way about the importance or the inter-relationship of the workplace and employees affected by family and domestic violence and that we don't agree that it's a personal, private or domestic issue. In fact, Mr Ward, himself, has frequently described it as a social issue.

PN3063

The fact that there is an entitlement in the National Employment Standards to request flexible working arrangements for an employee who is subject to violence suggests, again, that it is proper to describe it as a workplace issue. Obviously there's disagreement between us about the extent to which the workplace and how it deals with it, but certainly, in my submission, it is the case that it's a workplace issue.

PN3064

The twelfth point relates to the Firefighters decision. It was said that that case cannot be on all fours with this case. Well, the principle that the ACTU is relying on in the Firefighters decision is the principle. That is, the decision there about the interaction between the modern awards, the four yearly review and enterprise bargaining and the use that the Commission can make of evidence of the contents of enterprise bargaining, as the basis for its decision about whether or not a variation should be made.

PN3065

Our final submissions to that point, which is from paragraph 239. We say that the absence of family and domestic violence leave absolutely does operate as a support for employers who refuse to bargain on this issue. The evidence or that, or what the Commission can take from that, is the evidence of Mr Kemppi about the Commonwealth government directive about bargaining for all 99 agencies in the Commonwealth public service.

PN3066

I want to deal very briefly with the submissions made by Mr Johnston, just two points. One relates to the workability, or otherwise, of the ACTU's proposed clause with the perhaps curious or at least unusual construction of the or the inclusion of the daily hire employee within the Meat Industry Award. From my very brief look at the Meat Industry Award, at clause 14, there is a provision that deals with how daily hire workers are entitled to and are paid their sick leave, their annual leave, et cetera, under the NES. So the employment is taken to continue, for the purposes of paying those entitlements. We suggest this is actually quite workable.

PN3067

Secondly, Mr Johnston said that there was nothing in the Queensland legislation that would allow family and domestic violence leave that deals with households or deals with emotional abuse, but there would be, I think the suggestion was, and I'll

be corrected if I'm wrong, there was some inconsistency with that. From my very brief read of the relevant legislation over lunch I can tell you that the Domestic and Family Violence Protection Act 2012, this is the Queensland Act, defines domestic violence at section 8. It includes emotional and psychological abuse. It includes economic abuse, it includes threatening behaviour. It includes any behaviour that causes a person to feel fear. So we say, in fact, that broad definition is available in Queensland and the persons to whom that definition applies are people who are in relevant relationship and affected by family and domestic violence. "Relevant relationship" includes all the people you think it would include, if they're married, they're a couple. It also includes someone who regards themselves as a relative, even if not related by blood.

PN3068

So we say the Queensland state definition is broad and it is that definition, in fact, that will be picked up by the Queensland government in the Industrial Relations Bill 2016 that will form the basis for the provision of the entitlement to Queensland public service employees.

PN3069

Finally, I just want to say something about the role of government. My friend Mr Ward said that in his opinion, or in the opinion, more properly, of the Australian Chamber, they think it's a sensible idea that this issue be dealt with by COAG and, presumably, by extension, in the National Employment Standards, if that's where it ends up, we welcome that. But what that must mean is that if you think it's suitable for the NES then you think it's suitable for a minimum safety net. Otherwise, I say there's real limitation on how the Commission can take this fact, that this is subject to debate within Commonwealth circles, how you can take that into account. It would be an error, in my submission, to refuse to grant the application on the basis that there's some prospect that paid family and domestic violence leave might end up in the NES. That point is also addressed, in detail, in all three sets of our written submissions.

PN3070

Those are the only points I wanted to raise in reply. I think I'm just come in under my estimate, unless there are any questions.

PN3071

VICE PRESIDENT WATSON: Thank you, Ms Burke. We thank the parties for their submissions in this matter, we'll reserve our decision. We'll now adjourn.

ADJOURNED INDEFINITELY [1.56 PM]