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Four Yearly Review of Modern Awards: AM2015/1 Family & Domestic Violence Clause Common Issue Proceedings Submissions

16 September 2016



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1. ABOUT THE AUSTRALIAN CHAMBER

- 1.1 The Australian Chamber of Commerce and Industry speaks on behalf of Australian business at home and abroad.
- 1.2 Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses also get involved through our Business Leaders Council.
- 1.3 We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, making us Australia's most representative business organisation.
- 1.4 The Australian Chamber strives to make Australia a great place to do business in order to improve everyone's standard of living.
- 1.5 We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.
- 1.6 We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.
- 1.7 We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We also represent Australian business in international forums.
- 1.8 We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

2. INTRODUCTION

- 2.1 These submissions are made by the Australian Chamber of Commerce and Industry (the **Australian Chamber**) in response to the submissions of the Australian Council of Trade Unions (**ACTU**) dated 1 June 2016 (**ACTU Submissions**) in matter AM2015/1 of the 4 Yearly Review (**Proceedings**).
- 2.2 The background to the Proceedings is as follows.
- 2.3 On 28 October 2014, the ACTU set out an outline of the application seeking paid family and domestic violence leave in all 122 modern awards.
- 2.4 On 1 December 2014, Ross J determined that the ACTU Application would be dealt with as a common issue, and any preliminary or jurisdictional issues would be dealt with prior to the merits of the Application.
- 2.5 On 13 February 2015, in accordance with those directions, the ACTU filed a proposed draft clause entitled "*Support for employees experiencing family and domestic violence*".
- 2.6 On 15 June 2015, the ACTU narrowed the scope of the ACTU Application with the effect that it focussed solely on paid family violence leave (**ACTU Application**).
- 2.7 In substance, the ACTU Application seeks the inclusion of model clause (**ACTU Clause**) in all 122 modern awards which would entitle award-covered employees experiencing family and domestic violence to 10 additional days of paid leave per year. Upon exhaustion of the 10 days of paid leave, the ACTU Clause would also provide an entitlement to 2 days unpaid leave on each subsequent occasion of family and domestic violence.

3. POSITION IN SIMPLICITER

- 3.1 The modern awards under consideration meet the modern awards objective of the *Fair Work Act 2009 (Act)*.
- 3.2 The ACTU Claims are substantive and material.
- 3.3 A compelling case supported by probative evidence is required to be advanced by the ACTU.
- 3.4 In exercising any discretion, the Fair Work Commission (**Commission**) can only include in modern awards (relevantly for these proceedings) terms about matters in section 139 of the Act and section 142.
- 3.5 Each award must be considered in its own right against the modern awards objective.
- 3.6 To vary an award, a case satisfying the requirements of the Preliminary Issues Decision¹ must be made out for that award.
- 3.7 In exercising any discretion the Commission can only vary an award “to the extent necessary” to meet the modern awards objective². However compelling a case might be, if it passes this threshold, the Commission has acted outside of its jurisdiction.
- 3.8 At the heart of the modern awards objective is the setting of a fair and relevant minimum safety net.
- 3.9 The focus here is on minima rather than simply industrially desirable or meritorious terms.
- 3.10 The notions of fairness and relevance are not the exclusive domain of employees and are to be applied contextually to employers and employees and macro manifestations of them (the Australian economy etc.).
- 3.11 The Commission is required to have regard to the separate limbs of the modern awards objective.
- 3.12 No single limb holds any primacy over others.
- 3.13 Two general factors militate against the claim being granted:
 - (a) employers already provide and fund substantial forms of leave for employees; and
 - (b) employees can already access various forms of leave (paid and unpaid) as well as other statutory benefits to deal with the circumstances the claim goes to.
- 3.14 Unlawful violence is a social issue and it is proper that Governments respond to it through appropriate policy settings but the Commission needs to approach such an issue with caution.
- 3.15 It can be sympathetic to the social issue, as indeed it should be, without transposing the issue to be an employer responsibility in the workplace.
- 3.16 The Commonwealth was cognisant of domestic violence as a social issue when it enacted the Act and with it the National Employment Standards (**NES**) and did not include a form of domestic violence leave as part of the NES. This position has been retained under the NES despite later amendments to the Act and the NES which contemplate the effect of domestic violence in the workplace.³
- 3.17 The scheme of the Act and NES, the conceptual character of the claim and the clear lack of any pretence to advance this claim on an award by award basis militates against the Commission exercising its discretion to grant it.

¹ [2014] FWCFB 1788

² See s 138 of the *Fair Work Act 2009* (Cth)

³ See *Fair Work Amendment Bill 2013* and s 65(1A)(e) of the *Fair Work Act 2009* (Cth)

- 3.18 The ACTU evidentiary case at its highest is probative for a limited number of propositions which we would acknowledge in any event. These propositions are:
- (a) unlawful violence is an issue in our society;
 - (b) domestic violence is an issue in our society;
 - (c) it is proper that governments adopt appropriate policies in regard to all form of violence including domestic violence;
 - (d) there is a bias to females experiencing domestic violence over males;
 - (e) victims of domestic violence will experience a variety impacts to varying degrees;
 - (f) some of these impacts will be psychological, others will involve practical issues requiring time and focus;
 - (g) some of these impacts will be direct and others indirect and may or may not be related to children; and
 - (h) some employees will need to absent themselves from the workplace because of these impacts.
- 3.19 None of these propositions support:
- (a) the grant of leave itself as claimed;
 - (b) why the grant of leave as claimed is appropriate as part of the minimum safety net in any particular industry or occupation;
 - (c) that an employer should bear the cost and impact of the leave as claimed; or
 - (d) why an employer should bear the cost and impact in any particular industry or occupation.
- 3.20 On balance, the Commission should conclude that the claims do not meet the modern awards objective nor set a fair and relevant minimum safety net (with the NES).

4. THE STARTING POINT

- 4.1 The starting point for this matter is that each of the modern awards that are subject to the claim prima facie met the modern awards objective at the time they were made⁴.
- 4.2 Section 134(1) of the Act sets out the modern awards objective.
- 4.3 The objective requires that modern awards along with the National Employment Standards provide a “fair and relevant minimum safety net” of terms and conditions.
- 4.4 What is “fair and relevant” is a contextual consideration.
- 4.5 What is “fair and relevant” is conditioned by the requirement to take into account the matters set out in section 134(1)(a) to (h) of the Act.
- 4.6 What is being created is a “minimum safety net”.
- 4.7 The notion of a “safety⁵ net⁶” is effectively the creation of a floor ensuring employees are shielded from being exposed to hurt, injury or danger.
- 4.8 The addition of the term “minimum” reinforces the level that this floor is calibrated to - “...the least quantity or amount possible⁷...” (while still being fair and relevant).
- 4.9 Similar nomenclature appears in the minimum wages objective (section 284 of the Act).
- 4.10 This consideration illuminates what the phrase “only to the extent necessary” relates to in section 138.
- 4.11 That is, the Commission can only include terms in a modern award to the extent necessary to create a fair and relevant minimum floor.
- 4.12 Once this minimum floor is created section 138 restrains the Commission from going any further irrespective of what historically would be called the general industrial merits of the case.
- 4.13 In addition the Commission cannot vary a modern award if to do so would take the award below this floor.
- 4.14 This construction of section 138 (and related sections) is consistent with the Objects of the Act and also the overall scheme of the Act which sets a minimum safety net which is overlaid by a comprehensive enterprise bargaining regime.
- 4.15 In this context it is relevant for the Commission to consider two issues:
- (a) employers already provide and fund substantial amounts of paid and unpaid leave for employees; and
 - (b) employees who are subject to the claims can already access various forms of leave and other statutory benefits to deal with the circumstances the claims go to.

⁴ Preliminary Issues Decision [2014] FWCFB 1788 at [24]

⁵ Macquarie Concise Dictionary, 3rd edition, page 1025

⁶ Macquarie Concise Dictionary, 3rd edition, page p 769

⁷ Macquarie Concise Dictionary, 3rd edition, page p 727

4.16 Employers already provide the following leave benefits to employees:

Type of Leave	Relevant Legislation	Entitlement	Paid/Unpaid
Annual Leave	<i>Fair Work Act 2009</i>	20 days per year	Paid
Personal/Carer's Leave	<i>Fair Work Act 2009</i>	10 days per year	Paid
Compassionate Leave	<i>Fair Work Act 2009</i>	2 days per occasion	Permanent (Paid) Casual (Unpaid)
Long Service Leave	See Table F at Conclusion of Submissions		Paid
Unpaid Personal/Carer's Leave	<i>Fair Work Act 2009</i>	2 days per occasion	Unpaid
Community Service Leave	<i>Fair Work Act 2009</i>	Unlimited	Unpaid except for Jury duty
Public Holidays	<i>Fair Work Act 2009</i> , State related legislation and Modern Awards	8 under the <i>Fair Work Act 2009</i> with additional state-based public holidays	Paid

- 4.17 While casuals are not the beneficiary of certain forms of leave, they do of course receive a casual loading which in effect pays them in advance in lieu of the leave benefit.
- 4.18 Under Australian accounting standards some of these forms of paid leave are provisioned for by employers (annual leave, long service leave) and others are expensed upon them occurring (personal and carers leave, compassionate leave).
- 4.19 If we simply account for annual leave, long service leave (accrual), public holidays and personal leave, employers are providing employees approximately 17% of the working year off work with pay.
- 4.20 The claims represent a further 4.6% of the working year that is left having accounted for those leave periods referred to at 4.19 above (or 3.8% of the starting point of five days multiplied by 52 weeks).
- 4.21 Obviously the impost on employers is not only the funding of the leave but also the impact on the business from an employee being on leave.
- 4.22 We acknowledge that employers will try and encourage leave to be taken at times when labour is less required but it would be facile to say that leave will always be accessed in these circumstances. Having an employee on leave will create:
- (a) a reduction in work output; or
 - (b) the need to pay for additional labour (most likely overtime, a casual or labour hire employee to replace the person on leave).

- 4.23 As can be seen employers already provide and fund very substantial amounts of paid and unpaid leave to employees as part of the “fair and relevant minimum safety net”. This “starting point” is critical to the understanding of the ACTU Claim.
- 4.24 Requiring employers to do more is in our submission entirely unfair, irrespective of the reason why.
- 4.25 Relevantly many of these forms of leave could be accessed for persons who find themselves in the circumstances that the claims go to.
- 4.26 The notions set out in sections 97 and 102 (relating to paid and unpaid personal/carers leave) are broad in compass and can (and do) accommodate many circumstances that the claim goes to.
- 4.27 The basis for taking annual leave is similar especially given the language of section 88 of the Act and in particular section 88 (2).
- 4.28 As well as leave, employees in the circumstances the claims go to can also exercise their rights under section 65 to better deal with the circumstances.
- 4.29 Following the passage of the *Fair Work Amendment Act 2013* (Cth), such rights specifically includes a right to request flexible working arrangements⁸ when:
- (a) experiencing violence from a family member; or
 - (b) providing care or support to an immediate family member or a household member, who requires care or support because they are experiencing family violence.
- 4.30 In conclusion, we submit that the Commission must start an assessment of the ACTU Claims from the following position:
- (a) modern awards are taken to meet the modern awards objective at the time they were made;
 - (b) the fair and relevant safety net must be fair and relevant to employers as well as employees;
 - (c) employers already provide and fund substantial amount of paid and unpaid leave to employees;
 - (d) many of those forms of leave can be accessed to deal with the circumstances the claims go to; and
 - (e) an employee can also exercise their rights under section 65 to deal with the circumstances the claims go to.
- 4.31 These reasons militate against the Commission exercising its discretion to grant the claim.

⁸ Section 65(1A)(e) of the *Fair Work Act 2009* (Cth)

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5. SOCIAL ISSUE

- 5.1 Notwithstanding the statistical difficulties that arise in circumstances where there is no single nationally or internationally agreed definition as to what constitutes 'Family Violence', "Domestic Violence" or any similar term⁹, we acknowledge that domestic violence is a social issue in that it influences a considerable number of individuals within Australian society.
- 5.2 The materials filed by the ACTU seek to demonstrate to varying degrees the extent of that domestic violence occurring in Australia.
- 5.3 Given its status as a social issue, it is unsurprising that domestic violence is being addressed within the context of public policy.
- 5.4 The Senate Finance and Public Administration Committee Report into Domestic Violence in Australia 2015¹⁰ outlines the public policy responsibility holders for domestic and family violence. A figure extracted from that Report is located at Table **A** at the conclusion of these submissions.
- 5.5 As is apparent from Table A, at the forefront of public policy in this area is the National Plan to Reduce Violence against Women and their Children 2010-2022 (**the National Plan**).
- 5.6 The National Plan sets out a framework for coordination of Commonwealth and state and territory responsibilities. Under the National Plan, all states and territories are responsible for developing their own strategies and jurisdiction-specific programs to tackle domestic and family violence. These strategies and jurisdiction-specific programs are also identified in the materials of the ACTU.
- 5.7 Without in anyway detracting from the impact such violence has on those involved, domestic violence is one form of violence in our society.
- 5.8 Violent crime in general terms is a social issue and like the domestic violence is involves a perpetrator and a victim.
- 5.9 The Australian Bureau of Statistics (**ABS**) and the Australian Institute of Criminology (**AIC**) report on levels of crime in Australia.
- 5.10 Generally crime statistics are reported in two distinct categories, violent crime and property crime.
- 5.11 Violent crime includes homicide, assault, sexual assault, robbery and kidnapping. Robbery is included as a violent crime, as the use or threat of violence is a more serious offence than the theft.¹¹
- 5.12 Table **B** at the conclusion of these submissions sets out data on recorded incidents of violent crime as published by the ABS for the period 2003 to 2013. It is based on police records of crimes from 1 January to 31 December each year. This table was produced by the AIC in the publication, Australian Crime: Facts & Figures 2014.¹²
- 5.13 The ABS publication no. 4510.0, *Recorded Crime- Victims Australia 2015*, presents national statistics relating to victims of crime for a range of offences that are **recorded by police**.
- 5.14 The number of victims for selected offences from 2010 to 2015 is set out at Table **C** at the conclusion of these submissions (note homicide is reported separately).
- 5.15 Table **D** at the conclusion of these submissions sets out data on recorded incidents of property crime as published by the ABS for the period 2003 to 2013. It is based on police records of property crime from 1

⁹ See ABS 4533.0 - Directory of Family and Domestic Violence Statistics, 2013

¹⁰ At p 21

¹¹ Australian Institute of Criminology, *Australian Crime: Facts & Figures 2014*, Canberra, 2016 at page 2

¹² Australian Institute of Criminology, *Australian Crime: Facts & Figures 2014*, Canberra, 2016 at page 3

January to 31 December each year. This table was produced by the AIC in the publication, *Australian Crime: Facts & Figures 2014*.¹⁴

- 5.16 Property crime comprises unlawful entry with intent (UEWI) (i.e. break and enter or burglary), motor vehicle theft (MVT) and 'other' theft, which includes offences such as pick-pocketing, bag snatching, shoplifting and bicycle theft.¹⁵
- 5.17 Given the above, it obviously goes without saying that crime at large is also a social issue.
- 5.18 While the crime of domestic violence is a social issue it is not in and of itself a workplace issue.
- 5.19 The Commission needs therefore to approach such an issue with caution. It can be sympathetic to the social issue, as indeed it should, be without transposing the issue to be an employer responsibility in the workplace.
- 5.20 Granting the claim for the leave as sought would constitute such a transposition.
- 5.21 In the context of a "fair and relevant minimum safety net" such a transposition is not warranted.
- 5.22 In fact, and again without detracting from the impact such violence has on those involved, the claim begs the question why the grant of leave is limited to those suffering from domestic violence. Why not all victims of violence?
- 5.23 Obviously this question is posed rhetorically.

¹⁴ Australian Institute of Criminology, *Australian Crime: Facts & Figures 2014*, Canberra, 2016 at page 5

¹⁵ Australian Institute of Criminology, *Australian Crime: Facts & Figures 2014*, Canberra, 2016 at page 5

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6. NES

- 6.1 As stated earlier the fair and relevant minimum safety net is made up of modern awards and the National Employment Standards.
- 6.2 The National Employment Standards are in effect the bed rock for this minimum safety net in that they are inviolate (section 55).
- 6.3 Relevantly they apply to all national system employers and employees irrespective of the industry or occupation they work in and irrespective of whether they are covered by a modern award or an enterprise agreement.
- 6.4 Domestic violence is not a new issue, and statistical research and analysis of the topic is not a new phenomenon.
- 6.5 As Dr Peta Cox points out the Personal Safety Survey was undertaken in 2005 and 2012¹⁶.
- 6.6 As such the Commission is entitled to conclude that the Commonwealth was cognisant that domestic violence was a social issue when it framed the National Employment Standards.
- 6.7 Had the Commonwealth believed it was warranted they would have included domestic violence in the NES or at least within the scope of personal/carers leave.
- 6.8 The Parliament also saw fit to extend the NES in 2013 to include a right to request flexible working arrangements¹⁷ when:
- (a) experiencing violence from a family member;
 - (b) providing care or support to an immediate family member or a household member, who requires care or support because they are experiencing family violence.
- 6.9 As noted in the Explanatory Memorandum to the *Fair Work (Amendment) Bill 2013*:
- Part 3 of Schedule 1 to the Bill extends the right to request a change in working arrangements to a broader category of persons, including to employees with caring responsibilities, parents with children that are school age or younger, employees with a disability, those who are mature age, as well as to employees who are experiencing violence from a family member or are providing care and support to a member of their immediate family or a member of their household as a result of family violence.*
- In some circumstances it is legitimate to take measures that assist or recognise the interests of particular groups in the community who may be disadvantaged. The UN Committee on the Elimination of All Forms of Discrimination against Women, for example, has stated that gender-based violence, including domestic violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.*
- Extending the right to request a change in working conditions to this additional range of employees recognises the interests of these particular groups and further enhances the assistance provided to them.*
- 6.10 Despite clear cognisance of the social issue of domestic violence, no attempt has been made to provide an entitlement of the kind sought by the ACTU within the NES.
- 6.11 If the Commonwealth saw fit not to make this inclusion then little would have changed to move the Commission to include as a uniform entitlement now.

¹⁶ Statement of Dr Peta Cox 2.1

¹⁷ Section 65(1A)(e) of the *Fair Work Act 2009* (Cth)

- 6.12 This raises the conceptual character of the claim.
- 6.13 The claim is unique in that it seeks to introduce an entirely new grant of leave across all modern awards with a 'one size fits all' clause.
- 6.14 These features make the claim unique since modern awards were created.
- 6.15 As such, the claim appears in its conceptual form to be a *de facto* addition to the NES.
- 6.16 Such a claim sits very uncomfortably with the scheme of the Act in particular the role of modern awards.
- 6.17 Section 132 guides the Commission:
- “Modern awards may set minimum terms and conditions for national system employees in particular industries and occupations.”*
- 6.18 It should be uncontroversial therefore that the Commission should have regard to the circumstances in the particular industry or occupation covered by a modern award and not adopt a 'one size fits all' approach.
- 6.19 Section 156 outlines the following obligations of the Commission in the context of the Four Yearly Review:
- What has to be done in a 4 yearly review*
- (2) *In a 4 yearly review of modern awards, the FWC:*
- (a) *must review all modern awards; and*
- (b) *may make:*
- (i) *one or more determinations varying modern awards; and*
- (ii) *one or more modern awards; and*
- (iii) *one or more determinations revoking modern awards;*
-
- (5) *A 4 yearly review of modern awards must be such that each modern award is reviewed in its own right. However, this does not prevent the FWC from reviewing 2 or more modern awards at the same time.*
- 6.20 The ACTU Claims in these proceedings are described as a 'common claim'. This designation is an administrative mechanism developed in the Four Yearly Review to describe Review matters in which 'common issues' across a number of awards are heard concurrently by the same Full Bench.
- 6.21 While the hearing of common issues is clearly allowable under s 156(5) of the Act, such section requires the Commission to review "each modern award... in its own right."
- 6.22 The scope of s 156(5) of the Act was discussed in the Full Bench's Statement [2014] FWC 8583 at [18]:
- Subsection 156(5) of the FW Act provides that in a Review each modern award must be 'reviewed in its own right', however, this does not prevent the Commission reviewing two or more modern awards at the same time. In National Retail Association v Fair Work Commission the Full Court of the Federal Court considered the meaning of the expression '[t]he review must be such that each modern award is reviewed in its own right', in Item 6 (2A) of Schedule 5 of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth) . The Full Court held that the review of a particular modern award may be conducted through a number of different hearings in which different aspects of the award are determined. The Full Court rejected the proposition that Item 6 (2A) required that the review of each modern award is to be confined to a single holistic assessment of all of its terms and said:*

“... The purpose of the requirement to review a modern award “in its own right” is to ensure that the review is conducted by reference to the particular terms and the particular operation of each particular award rather than by a global assessment based upon generally applicable considerations.”

- 6.23 This issue is amplified in this case given the gender bias for experiencing domestic violence in female dominated industries such as *Social, Community Home Care and Disability Services Award 2010* (78.3% female) and *Children’s Services Award 2010* (70.9% female) which have large female workforces.¹⁸
- 6.24 The scheme of the Act and NES, the conceptual character of the claim and the clear lack of any pretence to advance this claim on an award by award basis militates against the Commission exercising its discretion to grant it.

¹⁸ Australian Government, Workplace Gender Equality Agency, Factsheet, Gender composition of the workforce: by industry (April 2016)

7. PRELIMINARY ISSUES DECISION

- 7.1 The legislative framework applicable to the 4 Yearly Review and these Proceedings has been considered in detail in the Preliminary Issues Decision.¹⁹
- 7.2 We draw particular attention to three specific principles determined in the Preliminary Issues Decision.
- 7.3 The Preliminary Issues Decision confirms (at [23]) that the Commission remains at all times obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.
- 7.4 This means that, when considering any variation, the Commission should be focused upon ensuring that any new version of the minimum safety net is consistent with the modern awards objective.
- 7.5 The discretion conferred on the Commission to make determinations varying modern awards is expressed in general terms. However, the need for a 'stable' modern award system suggests that parties seeking to vary a modern award must advance a merit argument in support of the proposed variation.²⁰
- 7.6 When considering the merit basis to make variations, the Preliminary Issues Decision held that:
- (a) there may be cases where the need for an award variation is self-evident. In such circumstances, proposed variations can be determined with little formality;²¹ and
 - (b) where significant award changes are proposed, they must be supported by submissions which address the legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.²²
- 7.7 The evidence advanced by the ACTU in this case is sizable in form.
- 7.8 In summary it is probative for a limited number of propositions which we would acknowledge in any event:
- (a) unlawful violence is an issue in our society;
 - (b) domestic violence is an issue in our society;
 - (c) it is proper that governments adopt appropriate policies in regard to all form of violence including domestic violence;
 - (d) there is a bias to females experiencing domestic violence over males;
 - (e) victims of domestic violence will experience a variety impacts to varying degrees;
 - (f) some of these impacts will be psychological and others will involve practical issues requiring time and focus;
 - (g) some of these impacts will be direct and others indirect and may or may not be related to children; and
 - (h) some employees will need to absent themselves from the workplace because of these impacts.
- 7.9 None of these propositions support:
- (a) the grant of leave itself as claimed, particularly in respect of the payment of such leave;
 - (b) why the grant of leave as claimed is appropriate as part of the minimum safety net in any particular industry or occupation;

¹⁹ [2014] FWCFB 1788

²⁰ Preliminary Issues Decision at [60]

²¹ Preliminary Issues Decision at [23] and [60]

²² Ibid

- (c) that an employer should bear the cost and impact of the leave as claimed; or
 - (d) why an employer should bear the cost and impact in any particular industry or occupation.
- 7.10 In our submission the character of the claim and how it is prosecuted should lead the Commission irresistibly to the conclusion that it should fail.

8. MODERN AWARDS OBJECTIVE

- 8.1 In arriving at this fair and relevant minimum safety net, the Commission is to “take into account” those matters set out in section 134(1)(a)-(h) inclusive.
- 8.2 This said the ultimate outcome is the creation of a “fair and relevant minimum safety net” having taken into account and weighed up the matters set out in section 134 (1) (a)-(h).
- 8.3 The phrase “take into account” has a relationship with similar phrases such as “consider” and “have regard to”. Such expressions are frequently used in legislation that vests a discretion in a decision making body to condition the scope of the discretion otherwise vested in the decision-maker.
- 8.4 Relevantly section 134 is not the section in the Act that vests the discretion but rather a section that conditions the exercise of ‘modern award powers’ which include for instance the discretion vested by section 139.
- 8.5 Such phrases have been consistently interpreted to mean that the decision-maker must take into account the matter to which regard is to be had and give weight to it as an element in making the decision.
- 8.6 However, the significance of the stated matters will depend upon their context.²³ The weight to be given the matter is for the decision-maker to determine, provided that the consideration of the matter is genuine.
- 8.7 The fact that a decision-maker is directed to have regard to certain matters that are specified does not preclude consideration of other factors thought to be relevant.²⁴
- 8.8 A deeper examination of the various limbs of section 134(1) illuminates a set of quite different requirements.
- 8.9 Some of the limbs are written in terms of the ‘need’ to do something, others not. The degree to which the Commission is moved in relation to these ‘needs’ is qualified using different phrases:
- (a) “encourage”;
 - (b) “promote”;
 - (c) “provide”; and
 - (d) “ensure”.
- 8.10 In addition, some of the provisions are focused on the impact of a possible exercise of power.

134(1)(a) - RELATIVE LIVING STANDARDS AND THE NEEDS OF THE LOW PAID

- 8.11 Section 134(1)(a) is written differently from other limbs (except perhaps 134(1)(e)). It requires consideration of ‘relative living standards’ and the ‘needs of the low paid’ generally.
- 8.12 ‘Relative living standards’ and the ‘needs of the low paid’ are related but not identical considerations.
- 8.13 Neither phrase is defined in the Act but they are relevant to the modern awards objective (s 134(1)), the low paid bargaining regime (s241) and the minimum wages objective (s 284).
- 8.14 These phrases have been given closest consideration in minimum wage reviews and have been considered in:
- (a) Measuring the Needs of the Low Paid Report to the Minimum Wage Panel of 14 December 2011;²⁵

²³ Barwick CJ in *Rathborne v Abel* (1964) 38 ALJR 293 at 295

²⁴ Kitto J in *Rathborne v Abel* (1964) 38 ALJR 293 at 301, *R v Hunt*; *Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 286; 25 ALR 497 at 504; *R v Toohey*; *Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 333; 44 ALR 63 at 67; *Haplin v Lumley General Insurance Ltd* (2009) 261 ALR 741 at 748; *Minister for Immigration and Citizenship v Khadgi* [2010] FCAFC 145 at [57]-[67].

- (b) Research Report 2/2011 Relative Living Standards and Needs of Low Paid Employees Jocelyn Pech - Minimum Wages and Research Branch Fair Work Australia, January 2011;
 - (c) Annual Wage Review 2009-2010;²⁶ and
 - (d) Annual Wage Review 2013-2014.²⁷
- 8.15 The Commission has made a number of observations about the phrase 'relative living standards' including that central to the examination of relative living standards is the extent to which low paid workers are able to purchase the essentials for a decent standard of living and to engage in community life.²⁸
- 8.16 The Commission has focused on the comparison between award reliant employees and other employed employees, especially non managerial.
- 8.17 Employees' relative living standards are also affected by the level of wages an employee earns, hours they work, household circumstances and tax transfer payments.
- 8.18 When considering the needs of the low paid, the Commission has generally adopted the notion that low paid persons are those who are award reliant and receive a rate of pay that as an adult full time equivalent would place them below two thirds of the median adult ordinary time earnings.²⁹
- 8.19 Having said these things, it must be said that simply categorising a class of employees subject to a claim as low paid is entirely insufficient in itself to warrant the granting of the claim.
- 8.20 Except the proposition that persons from lower socio economic backgrounds are more susceptible to experiencing domestic violence the ACTU has advance no probative evidence of why the grant of leave as claimed goes to this limb of the modern awards objective.
- 8.21 It would be facile to imply say low paid persons would get more paid leave and therefore it goes to this limb.
- 134(1)(b) - THE NEED TO ENCOURAGE COLLECTIVE BARGAINING**
- 8.22 The phrase "encourage" means "...to inspire with courage, spirit or confidence; ...to stimulate by assistance, approval..."³⁰.
- 8.23 To encourage is on any proper reading a positive act. That is to say that the Commission does not simply need to find that a provision does not discourage enterprise bargaining.
- 8.24 It must also be understood that this limb is not a proxy for making it easy to achieve a bargaining claim.
- 8.25 It is relevant to note that without domestic violence leave being in modern awards unions have pursued and successfully obtained it through bargaining.
- 8.26 Obviously whether domestic violence leave is pursued by a union will depend on their approach to bargaining, their priorities and ideally what their members want.
- 8.27 It is difficult to determine exact number of enterprise agreements that include a reference to domestic violence leave.
- 8.28 There are 1222 enterprise agreements on the FWC website that return a 'hit' for the search term 'domestic violence'.

²⁵ PR517718

²⁶ 3 June [2010] FWAFB 4000

²⁷ 4 June [2014] FWCFB 3500

²⁸ Id at 302

²⁹ Id at 391

³⁰ Macquarie Concise Dictionary, 3rd edition, p365

- 8.29 However, this total figure may include superseded or expired agreements that are no longer in use but are still available to view on the website.
- 8.30 Clearly a very small percentage of enterprise agreements located on the FWC website contain a “domestic violence clause”.³¹
- 8.31 This said there is evidence that enterprise agreements contain such clauses:
- (a) McDonalds offers 2 days paid domestic violence leave per occasion³² and access to personal/carer’s leave.
 - (b) David Jones provides 3 business days to all employees to be used for whatever personal business they may need to attend to.³³
 - (c) Coles Liquor Group employees can apply for flexible working arrangements.³⁴
- 8.32 In preparing these submissions we have reviewed 800 of the 1222 enterprise agreements which contain the phrase “domestic violence”. This review indicates that Enterprise Agreements which directly seek to address this issue do so in a variety of ways. Our review indicates that, in addressing the circumstances to which the ACTU Claim relates, various Enterprise Agreements provide for:
- (a) access to Employee Assistance Programs;
 - (b) access to existing leave entitlements (e.g. annual and personal/carers leave);
 - (c) access to cashing out of annual leave;
 - (d) access to flexible work arrangements or individual flexibility arrangements;
 - (e) access to leave at the employer’s discretion;
 - (f) access to paid leave;
 - (g) access to repatriation leave;
 - (h) access to unpaid leave.
- 8.33 To the extent that the factual picture suggests anything it is that:
- (a) bargaining for these types of clauses is in its infancy.
 - (b) employees and businesses have bargained for variety of enterprise specific entitlements tailored to the specific environment of those enterprises.
- 8.34 Whether such a clause is relevant in collective bargaining for a specific enterprise should simply be left to that enterprise (for the employer and employees) to determine through bargaining.
- 8.35 Such an approach will allow an employer to consider the size of their enterprise, the profile of their workforce, whether they receive any countervailing benefit in return and any issues they have in terms of their broader approach to HR.
- 8.36 Placing a one size fits all clause in all modern awards simply changes the scheme of the BOOT against which enterprise bargaining occurs rather than promote collective bargaining itself.

³¹ There are 1222 enterprise agreements on the FWC website that return a hit for the search term ‘domestic violence’. This is out of what appears to be a total of 148,205 enterprise agreements on the site. However, this total figure may include superseded or expired agreements that are no longer in use but are still available to view on the website.

³² <http://www.sda.org.au/download/enterprise-agreements/MCDONALDS-AUSTRALIA-ENTERPRISE-AGREEMENT-2013.pdf>

³³ <http://www.sda.org.au/download/enterprise-agreements/DAVID-JONES-ENTERPRISE-AGREEMENT-2012.pdf>

³⁴ <http://www.sda.org.au/download/enterprise-agreements/COLES-LIQUOR-GROUP-RETAIL-AGREEMENT-2014.pdf>

8.37 Does a minimum safety net adopting a one size fits all approach as claimed “encourage enterprise bargaining”?

8.38 In our submission the obvious answer must be no.

134(1)(c) - THE NEED TO PROMOTE SOCIAL INCLUSION THROUGH INCREASED WORKFORCE PARTICIPATION

8.39 The word “promote”, like “encourage” involves a positive act. “Promote” has a stronger positive meaning than “encourage” and it is usually taken to mean ‘...to advance in rank, dignity, position etc to further the growth development progress of; to help to found, originate, organise or launch...’³⁵.

8.40 “Social inclusion” is a term that has been considered by the Commission previously and essentially goes to the diversity of demographic composition within the workforce and the broader issue of having employment and reasonably engaging in community life.

8.41 Clauses that ordinarily promote social inclusion through workforce participation are those that encourage the optimum level of participation irrespective of the employee’s circumstance; flexibility clauses, broad flexibility in the types of employment and their flexibility to meet different social circumstances etc are examples of provisions which promote social inclusion.

8.42 There is no evidence in this matter that a lack of paid domestic violence leave entitlements prevents participation in the workforce and results in a form of social exclusion.

8.43 The evidence simply supports a proposition that persons in the workforce may need to absent themselves from time to time from being at work because of the impact of domestic violence.

134(1)(d) - THE NEED TO PROMOTE FLEXIBLE MODERN WORK PRACTICES AND THE EFFICIENT AND PRODUCTIVE PERFORMANCE OF WORK

8.44 As with bargaining and social inclusion this limb is expressed as a “need” but is qualified by the word “promote”.

8.45 This limb of the modern awards objective is aimed squarely at promoting:

- (a) flexible modern work practices; and
- (b) the efficient and productive performance of work.

8.46 The language in this limb of section 134 is aimed at the nature of the work practices and then to the performance of work as regulated by the modern award to achieve a particular goal.

8.47 Elements of this would seem uncontroversial:

- (a) ensuring that there are no artificial barriers to the performance of work; and
- (b) ensuring appropriate fluidity of the use of labour without unnecessary or arbitrary restrictions.

8.48 In our submission the notion of the efficient and productive performance of work extends to the broader cost structures within which labour is engaged and this would include the extent of leave an employee can access. As we submitted above, an employer will either loose output through an absence or be required to fund a replacement (overtime, casual, labour hire).

134(1)(da) - THE NEED TO PROVIDE ADDITIONAL REMUNERATION

8.49 This limb appears to have no work to do in this case.

³⁵ Macquarie Concise Dictionary, 3rd edition, p923

134(1)(e) - THE PRINCIPLE OF EQUAL REMUNERATION FOR WORK OF EQUAL OR COMPARABLE VALUE

- 8.50 This limb requires the Commission to be minded of the equal remuneration principle which must be read to be the principle set out in Part 2-7; equal pay for men and women performing work of equal or comparable value.
- 8.51 This limb appears to have no work to do in this case.

134(1)(f) - THE LIKELY IMPACT ON EXERCISING MODERN AWARD POWERS ON BUSINESS INCLUDING ON PRODUCTIVITY, EMPLOYMENT COSTS AND THE REGULATORY BURDEN

- 8.52 This limb of section 134(1) requires the Commission to consider the likely impact of exercising its power on business.
- 8.53 This consideration should be contextual; in each industry or occupation the subject of a modern award not in aggregate.
- 8.54 This consideration in its simplest form is that employers will be required to carry the additional burden of providing employees an additional 10 days paid leave each year.
- 8.55 We acknowledge that it would be sterile to suggest that all employees in all industries would take their full entitlement each year but clearly some leave will be taken.
- 8.56 Importantly an employee may be presented with a choice of leave in a particular circumstance; personal/carers leave or domestic violence leave and as such the burden may well be that the employee may access domestic violence leave for what traditionally would be personal/carers leave.
- 8.57 As to productivity, employers will be presented with a clear and simple picture; introduce more paid unproductive time or replace the employee on leave at an additional cost; overtime, casual, labour hire etc.

134(1)(g) - THE NEED TO ENSURE A SIMPLE, EASY TO UNDERSTAND STABLE AND SUSTAINABLE MODERN AWARD SYSTEM FOR AUSTRALIA THAT AVOIDS UNNECESSARY OVERLAP OF MODERN AWARDS

- 8.58 Like many limbs of the modern awards objective, this limb is expressed in imperative terms as a need but it is also qualified with the word “ensure”.
- 8.59 This suggests that an object that must be achieved by modern awards is a simple, easy to understand stable and sustainable modern award system.
- 8.60 The word “simple” means “... easy to understand, deal with, use ... not elaborate or artificial ...”³⁶. The words “easy to understand” are expressly stated and there is clearly some overlap between the notion of “simple” and “easy to understand”.
- 8.61 The notions of “stable” and “sustainable” are more complex. These could be said to introduce notions going to the inter-relationship of modern awards and their relevance and therefore longevity.
- 8.62 There is a superficial attraction to say that a model clause promotes simplicity but this misses the point of this limb.
- 8.63 Introducing a new and complex benefit is the opposite of simplicity adding more to the safety net by implication increases the likelihood of instability and complexity.

³⁶ Macquarie Concise Dictionary, 3rd edition, p1081

134(1)(h) - THE LIKELY IMPACT OF EXERCISING MODERN AWARD POWERS ON EMPLOYMENT GROWTH, INFLATION AND THE SUSTAINABILITY PERFORMANCE AND COMPETITIVENESS OF THE NATIONAL ECONOMY

- 8.64 This limb of section 134 requires the Commission to consider the likely impact of exercising its power in the context of the broader economy.
- 8.65 Again such an impact could be positive or negative.
- 8.66 We have not sought to advance expert evidence in these proceedings on the aggregate economic impact of the claim.
- 8.67 Any such analysis would simply be too difficult to advance with any necessary certainty.
- 8.68 In simple terms depending on how you do the math, the claim seeks to introduce a new form of leave that increases the grant of paid leave to permanent employees in the range of 3% to 5% of working days per annum.
- 8.69 Set out in Table E is a model examining the potential direct cost of the claim.
- 8.70 The model has been calculated on a series of assumptions applied to data drawn from the ABS publication Employee earning, Benefits and Trade Union Membership 6310.0 4 June 2014. The assumptions do not represent a factual concession but rather a low base line that should be relatively uncontroversial.
- 8.71 The model is calculated on the following assumptions:
- (a) The minimum wage of \$17.70 an hour has been used.
 - (b) Employee number have been reduced by 17% to account for employees in the public sector.
 - (c) Only 25% of the female workforce population are assumed to access the leave.
 - (d) Only 10% of the male workforce population are assumed to access the leave.
- 8.72 The range of potential direct costs for the Australian workforce as a whole and for key sectors is on any basis material.
- 8.73 As is emphasised in the ACTU's case, it may well be the case that domestic violence per se has an aggregate economic impact on the society, as no doubt all crime does, but it would be superficial to suggest that granting additional paid leave would prevent domestic violence such as to change this.
- 8.74 Ultimately the character of the claim will have an aggregate impact on the economy of some magnitude.
- 8.75 It is superficial to say that acts of domestic violence have a material cost to the economy and that in some way that cost is mitigated by employers paying for a consequence of domestic violence.
- 8.76 Ultimately, domestic violence will only change with a change in societal attitudes towards violence and women supported by appropriate government policy support.
- 9. CONCLUSION**
- 9.1 In our respectful submission when weighed in the balance the Commission should conclude that the claims do not meet the modern awards objective nor set a fair and relevant minimum safety net (with the NES).

TABLE A

Figure 1: Responsibility for domestic and family violence policy in Australia

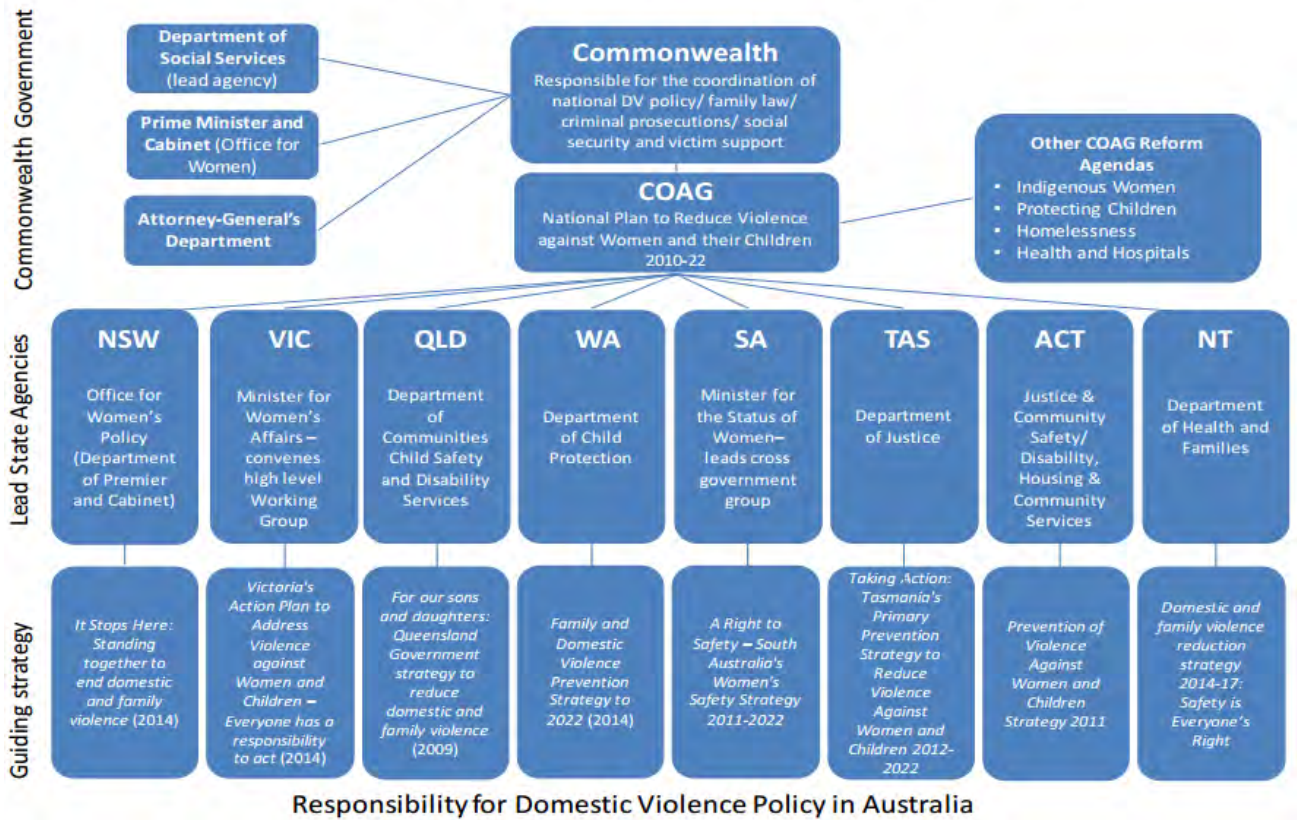


TABLE B

Table 1 Victims of selected violent crimes, 2003–13 (n)					
	Homicide ^a	Assault ^b	Sexual Assault	Robbery ^c	Kidnapping/abduction
2003	341	157,280	18,025	19,709	696
2004	302	156,849	19,171	16,513	768
2005	301	166,507	18,695	17,176	729
2006	321	172,441	19,555	17,375	726
2007	283	176,077	19,954	17,996	733
2008	293	170,720	19,992	16,513	788
2009	293	175,277	18,807	15,238	564
2010	261	171,083	18,027	14,631	608
2011	276	117,992	17,592	13,653	675
2012	296	116,160	18,494	13,163	638
2013	273	119,235	19,907	11,698	601

a: Comprises offences of murder and manslaughter

b: 2011, 2012 and 2013 figures do not include information from Victoria, Queensland and Tasmania. Therefore the assault figures cannot be compared with those prior to 2011

c: Comprises the offences of armed and unarmed robbery. Robbery is classified as a violent crime, as the use or threat of violence is more serious than a property offence

Note: Number of victims presented here represents revised estimates on numbers published in earlier editions of *Australian Crime: Facts & figures*

- Of the five categories of violent crime, three recorded a drop in the number of victims between 2012 and 2013. These were homicide, robbery and kidnapping.
- The number of victims of sexual assault increased between 2012 and 2013 by eight percent.
- The number of kidnappings/abductions in 2013 represents a 24 percent decrease since a peak in 2008, when 788 kidnappings/abductions were recorded.
- Overall, the number of victims of homicide has been in decline since 2003. In 2003, there were 341 victims of homicide in Australia compared with 273 in 2013. This is a decrease of 20 percent.
- The number of victims of robbery in 2013 is the lowest on record since 2003, with 11,698 victims.

TABLE C


		Australian Bureau of Statistics				
45100DO001_2015 Recorded Crime - Victims, Australia, 2015						
Released at 11.30am (Canberra time) Wed 13 Jul 2016						
Table 1 VICTIMS, Selected offences, 2010–2015						
	2010	2011	2012	2013	2014	2015
	NUMBER					
Sexual assault	18,862	18,616	19,448	20,025	20,739	21,380
Kidnapping/abduction	611	676	638	596	550	523
Robbery	14,634	13,650	13,161	11,711	9,893	8,966
<i>Armed robbery</i>	5,696	5,977	6,224	5,631	4,857	4,402
<i>Unarmed robbery</i>	8,937	7,673	6,939	6,076	5,035	4,563
Blackmail/extortion	479	424	445	509	531	528
Unlawful entry with intent	208,098	209,146	215,009	194,529	181,892	184,529
<i>Involving the taking of property</i>	144,193	144,598	147,216	132,138	122,954	123,530
<i>Other</i>	63,906	64,542	67,790	62,392	58,932	60,994
Motor vehicle theft	54,819	56,074	58,559	52,508	50,182	51,614
Other theft	477,265	501,295	512,352	493,540	485,374	508,738
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TABLE D

Table 2 Victims of property crime, 2003–13 (n)			
	UEWI	MVT	Other theft
2003	354,020	98,298	624,036
2004	308,675	87,939	548,778
2005	281,994	80,365	518,335
2006	262,005	75,377	518,734
2007	248,475	70,614	491,935
2008	241,760	68,265	497,053
2009	222,664	59,649	478,807
2010	217,030	54,821	465,547
2011	218,285	55,310	490,059
2012	214,241	58,556	500,892
2013	203,438	52,979	482,900

Note: Number of victims presented here represents revised estimates on numbers published in earlier editions of *Australian Crime: Facts & figures*

- Property crime victimisation continued to be reported at a higher volume than violent crime.
- There were 17,992 fewer victims of other theft in 2013 than were recorded in 2012; a four percent decrease.
- The number of victims of MVT has been declining since 2003, when there were 98,298 recorded victims compared with 52,979 in 2013. This is a total decrease of 46 percent.
- There was a 43 percent decrease in UEWI between 2003 and 2013, from 354,020 to 203,438 victims for this property crime type.

TABLE E

Employees	Workforce Female	Percentage of Workforce Female taking Leave	Workforce Male	Percentage of Workforce Male taking Leave	Adjusted Workforce Number taking leave	1 day per year	5 days per year	10 days per year
All Employees	4,843,400.00	25%	5,415,100.00	10%	1,524,553.20	\$205,082,896	\$1,025,414,482	\$2,050,828,965
Retail trade	647,900.00	25%	476,400.00	10%	182,365.05	\$24,531,747	\$122,658,733	\$245,317,465
Accommodation and Food Services	411,500.00	25%	305,200.00	10%	116,053.65	\$15,611,537	\$78,057,685	\$156,115,370
Health care and social services	1,035,500.00	25%	250,100.00	10%	246,979.95	\$33,223,743	\$166,118,714	\$332,237,429
Education and training	592,500.00	25%	244,600.00	10%	150,148.95	\$20,198,037	\$100,990,184	\$201,980,368
Transport, postal and warehousing	15,100.00	25%	395,800.00	10%	59,468.85	\$7,999,750	\$39,998,749	\$79,997,497
Manufacturing	223,300.00	25%	631,200.00	10%	103,482.15	\$13,920,419	\$69,602,094	\$139,204,188

Assumptions for purposes of model

All source data taken from ABS 6310.0 Employee Earning, Benefits and Trade Union Membership August 2013, table 14, pg 36 - 38)

Applied a blanket reduction to each workforce of 17% to allow for the % of employees in the public sector (ABS 6310.0 Employee Earning, Benefits and Trade Union Membership August 2013, table 13, pg 35)

Calculations based on the Minimum Wage of \$17.70 an hour

TABLE F

Long Service Leave Entitlement of Casuals (excluding Portable Schemes)

State or Territory	Name of Enactment	Amount of basic leave entitlement	Casual Entitlement	Comments
Northern Territory	<i>Long Service Leave Act</i>	On completion of 10 years continuous service with the employer the employee's entitlement is 1.3 weeks for each completed year of service	Definition of employee in s7(1) includes casual employees. But s12(1) requires continuous service which is likely to exclude some casuals.	S 6(2)(b) excludes a person who is entitled to long service leave under an award
Queensland	<i>Industrial Relations Act, 1999</i>	On completion of 10 years continuous service with the employer the employees entitlement is 8.6667 weeks per s43(2)(a)	The casual entitlement is in s47(1). The employment is continuous unless broken by a period of 3 months or more from the start of one employment contract to the next per s47(2).	See section 49 for the casual minimum amount using a formula Actual service/52x(13/15)x hourly rate
Tasmania	<i>Long Service Leave Act, 1976</i>	On completion of 10 years continuous service 8 2/3 weeks per s8(2)(a)(i)	The casual entitlement is in s5(3). Casual and part-time employees are considered to be continuously employed if they have been regularly working for 32 hours or more in each consecutive period of four works.	Mining employees entitlements differs

State or Territory	Name of Enactment	Amount of basic leave entitlement	Casual Entitlement	Comments
New South Wales	<i>Long Service Leave Act, 1955</i>	2 months leave for 10 years continuous service per s 4	Casuals mentioned in s4(11) but may be excluded if service is not “continuous”	S4(2)(a3) defines month to mean 4 and 1/3 rd weeks
ACT	<i>Long Service Leave Act 1976</i>	S3 and s4 provide 1.4 months leave for 7 years continuous service accrued at the rate of 1/5 th of a month’s leave for each year of service	S7(2) provides for the calculation of LSL payment for casual or part time employees as the ordinary number of hours worked in the 12 months prior to taking LSL multiplied by the ordinary remuneration of the employee on the day they qualified for LSL. Note that an employee is defined to include a casual employee. A casual employee is defined as engaged in regular and systematic employment with the employer in circumstances where employment of the same type would or might be offered but where the duration of employment is uncertain.	S7(3) contains a formula to calculate LSL where the employee converts from full time to part-time or casual
South Australia	<i>Long Service Leave Act, 1987</i>	13 weeks after 10 years continuous service per s5	S3(2)(b)(iii) contains an averaging provision where the employee was engaged on a casual or part time basis within three years of the date of entitlement to LSL.	Casuals must satisfy the continuous service criterion.

State or Territory	Name of Enactment	Amount of basic leave entitlement	Casual Entitlement	Comments
Victoria	<i>Long Service Leave Act 1992</i>	13 weeks after 15 years of continuous service per s 56	S59(b) includes a casual or seasonal employee in the definition of employee. S62A provides that casual and seasonal workers are entitled to LSL where their employment has not been broken for a period greater than 3 months.	S62a(1)(b) also permits the period of broken engagements to be greater than 3 months for casual and seasonal workers where the length of the absence is due to the terms of engagement of the employee by the employer.
Western Australia	<i>Long Service Leave Act 1958</i>	After 10 years continuous service 8 and 2/3 rd weeks per s8(2)(a)	Casual employees mentioned in s4(2)(c) re calculation of ordinary pay.	Employees, including casuals, entitled to their ordinary pay for a period of LSL. Casual or part time employees receive their ordinary rate of pay calculated on the average number of hours worked over their period of employment.

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