

From: Sophie Ismail

Sent: Tuesday, 29 November 2016 11:08 AM

To: Chambers - Watson VP

Subject: RE: AM2015/1 - Family and domestic violence leave clause - Closing Submissions

Dear Associate,

We **attach** a slightly revised version of the ACTU's final submissions for filing and uploading. This version has two minor formatting changes:

1. An ACTU reference number;
2. A hyperlinked contents page for ease of reference.

The employer parties are copied.

Yours sincerely,

Sophie

Sophie Ismail

Legal and Industrial Officer

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IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 – Four Yearly Review of Modern Awards

AM2015/1

**OUTLINE OF FINAL SUBMISSIONS
ON BEHALF OF
THE AUSTRALIAN COUNCIL OF TRADE UNIONS**

DATE: 28 November 2016

D No: D No. 130/2016

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Introduction

1. The ACTU has brought this application for paid domestic violence leave as part of the four yearly review of modern awards conducted by the Fair Work Commission. The question for the Commission is whether paid family and domestic violence leave is necessary to meet the modern awards objective to provide a guaranteed fair and relevant minimum safety net of enforceable terms and conditions of employment.
2. It is the ACTU's case that paid family and domestic violence leave is a necessary part of the *safety net* of minimum terms and conditions, in the most literal sense of that term.
3. Family and domestic violence is a crime, and a pervasive social harm. Rates of family and domestic violence in Australia are at a crisis point. Family and domestic violence is the leading contributor to death, disability and ill-health among Australian women aged between 15 and 44. Unlike other forms of crime, family and domestic violence takes place in the home, frequently recurs, and takes multiple forms of abusive and criminal behaviour including physical and sexual assault and threat, emotional abuse, stalking, theft, and property damage.
4. The ACTU's application proceeds from the basic premise that family and domestic violence is a workplace issue in Australia.
5. It is a workplace issue in the way that many other events in employee's lives, including illness and parenthood, interact with and are accommodated by the workplace. It is a workplace issue because financial stability and therefore employment are crucial to enable persons affected by family and domestic violence to leave violent relationships, and to recover from violence. It is a workplace issue because workers' economic status shapes their capacity to escape violent relationships, and employment is central to economic power. It is a workplace issue because violence against women is estimated to cost the Australian economy \$22 billion per year, including \$1.3 billion in lost productivity, victim and perpetrator absenteeism, and the cost of replacing employees who have left the workforce, either through injury or death, due to family and domestic violence.
6. There are 1.86 million employees in Australia reliant on modern awards for their terms and conditions of employment. Only 55 per cent of those employees receive paid leave entitlements. For those employees who may be subjected to family and domestic violence, existing leave entitlements can be quickly consumed and are unfit for the purposes of attending court, urgently moving out of home, and seeking specialist support services. Moreover, over 45 per cent of award-reliant employees are employed on a casual basis,

including 51 per cent of all award-reliant women. Casual employees have no paid leave entitlements to rely on should they need to attend to activities arising out of being subject to violence or abuse from their partners or families. Casual employees, and permanent employees with depleted leave reserves face an unacceptable choice between their safety and their paycheque. This is not fair or relevant. Minimum standards are necessary to ensure that no employee is forced to make this choice.

7. Paid family and domestic violence leave will enable employees to escape violent relationships, attend court hearings, seek counselling and support to enable recovery, and care for children and family members affected by family and domestic violence, without the risk of jeopardising their employment. Paid family and domestic violence leave will enable employers to support their employees and maintain their connection to the workforce, reducing lost productivity and unauthorised absenteeism, and improving retention rates. Paid family and domestic violence leave is necessary to ensure that award-reliant employees are provided with minimum standards enabling employment stability and personal safety.

Matters addressed in these submissions

8. These submissions address the following matters:

Part A – The Legal Framework

Part B – The Evidence

- 1 *The nature and prevalence of family and domestic violence*
- 2 *The cost of family and domestic violence*
- 3 *The needs of persons affected by family and domestic violence*
- 4 *Family and domestic violence disproportionately affects women*
- 5 *Award-covered employees who are affected by family and domestic violence have no safety net*
- 6 *Employment is essential to recovery from family and domestic violence*
- 7 *The operation of family and domestic violence leave clauses*
- 8 *Family and domestic violence leave and employment costs*

Part C – Meeting the Statutory Tests

9. These submissions are further to the submissions of the ACTU filed and served on the following dates:
- (a) Submissions of the ACTU dated 1 June 2016 (**ACTU primary submissions**);
 - (b) Reply submissions of the ACTU dated 5 October 2016 (**ACTU reply submissions**);
 - (c) Supplementary submissions of the ACTU dated 17 October 2016 (**ACTU O’Brien submissions**).

A THE STATUTORY FRAMEWORK

Relevant principles

10. The applicable principles governing the task of the Fair Work Commission (**the Commission**) in conducting the four yearly review of modern awards are largely undisputed.¹ For convenience, we summarise the relevant principles below.
11. The requirement to conduct the four yearly review is contained in s. 156 of the *Fair Work Act 2009* (Cth) (**FW Act**). The four yearly review is essentially a regulatory function. The Commission is not creating an arbitral award in settlement of an *inter partes* industrial dispute,² and is not constrained by the terms of a particular application.³
12. In addition to s. 156, a range of other provisions in the Act are relevant to the review.⁴ Those provisions include the objects of the Act (s. 3), the modern awards objective (s. 134(1)), and those provisions providing for the performance of functions and exercise of powers by the Commission (ss. 577 and 578).
13. A term should be included in a modern award “*only to the extent necessary to achieve the modern awards objective*”.⁵ The determination of what is ‘necessary’ requires the Full Bench

¹ See ACTU primary submission, Part 3; AIG submissions dated 19 September 2016 (**AIG submissions**) at 10–27; ACTU reply submissions at Part A.

² *4 Yearly Review of Modern Awards – Annual Leave* [2015] FWCFB 3406 (**Annual Leave Decision**), [156] (Ross P, Harrison SDP, Hampton C).

³ *4 Yearly Review of Modern Awards – Fire Fighting Industry Award* [2016] FWCFB 8025 (**Fire Fighting Award Decision**), [21] (Ross P, O’Callaghan SDP, Wilson C).

⁴ *Re 4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (**Jurisdictional Issues Decision**), [10].

⁵ FW Act, s 138.

to form “*a value judgment*” based on the considerations delineated in s. 134(1) of the FW Act,⁶ and having regard to the evidence and submissions directed to those considerations.

14. The exercise of forming a value judgment about what modern award terms are ‘necessary’ does not take place in a vacuum. The general provisions relating to the Commission’s performance of its functions apply to the four yearly review. Section 578 requires the Commission to take into account the objects of the Act and of any part of the Act. It states:

578 In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), the FWC must take into account:

- (a) the objects of this Act, and any objects of the part of this Act; and
- (b) equity, good conscience and the merits of the matter; and
- (c) the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

15. The object of the FW Act is set out in s. 3, which provides:

3 The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

- (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
- (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
- (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and
- (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
- (e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and
- (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and
- (g) acknowledging the special circumstances of small and medium-sized businesses.

⁶ *Jurisdictional Issues Decision*, [36].

16. The object of the part of the Act relevant to the review of modern awards is set out in s. 134(1) of the Act, which provides:

- 134(1)** The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
- (a) relative living standards and the needs of the low paid; and
 - (b) the need to encourage collective bargaining; and
 - (c) the need to promote social inclusion through increased workforce participation; and
 - (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
 - (da) the need to provide additional remuneration for:
 - (i) employees working overtime; or
 - (ii) employees working unsocial, irregular or unpredictable hours; or
 - (iii) employees working on weekends or public holidays; or
 - (iv) employees working shifts; and
 - (e) the principle of equal remuneration for work of equal or comparable value; and
 - (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
 - (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; and
 - (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the *modern awards objective*.

17. The Commission’s power to order that all modern awards be varied so as to include a new paid leave entitlement is derived from s. 139(1)(h) of the Act, which provides that modern awards can contain terms about “*leave, leave loadings, and arrangements for taking leave*”.
18. The factors in the modern awards objective at ss. 134(1)(a) to (h) are “*broad considerations which the Commission must take into account in considering whether a modern award meets the objective set by s 134(1)*”.⁷
19. The modern awards objective is very broadly expressed, and the criteria “*do not set any standard against which a modern award could be evaluated*”. Many criteria are properly described as “*broad social objectives*.”⁸ No particular weight should be attached to any one

⁷ *National Retailers Association v Fair Work Commission* (2014) 225 FCR 154, [109] (Collier, Bromberg, Katzman JJ).

⁸ *Ibid.*

consideration over another; and not all of the matters identified in s. 134(1) will necessarily be relevant to a particular proposal to vary a modern award.⁹

20. To the extent there is any tension between some of the considerations in section 134(1), “*the Commission’s task is to balance the various considerations and ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.*”¹⁰ Further, while the Commission must take the s. 134 considerations into account, the relevant question is whether the modern award, together with the NES, provides a guaranteed *fair and relevant* minimum safety net of enforceable terms and conditions of employment.¹¹
21. ‘Fairness’ is to be assessed from the perspective of both employees and employers. In *4 Yearly Review of Modern Awards – Stevedoring Industry Award* [2015] FWCFB 1729, Watson VP observed that “*a fair and relevant minimum safety net is one that pays due regard to the requirements and disabilities of employees, and the costs of employers*”.¹²
22. In conducting the four yearly review, it is appropriate that the Commission take into account previous decisions relevant to any contested issue.¹³ There are no previous decisions to follow, or from which to depart, about family and domestic violence leave.

Relevance of contemporary and industrial standards

23. In *4 Yearly Review of Modern Awards – Fire Fighting Industry Award* [2016] FWCFB 8025, the Full Bench (Ross P, O’Callaghan SDP and Wilson C) stated that the word ‘relevant’ in s. 134(1) of the FW Act “*is intended to convey that a modern award should be suited to contemporary standards*”.¹⁴
24. This application by the ACTU builds on a considerable amount of work already undertaken by government and the private sector in recognition of the need for a workplace response to family and domestic violence, particularly in the form of paid leave. The application by the ACTU represents the evolution of paid leave for persons affected by family and domestic violence from what was undoubtedly a new concept in employment regulation to a community standard and an industrial norm. The history of the development of the entitlement of paid family and domestic violence leave is set out in detail in the ACTU

⁹ *Annual Leave Decision*, [19], [20].

¹⁰ *Annual Leave Decision*, [20].

¹¹ *Fire Fighting Award Decision*, [28].

¹² At [96].

¹³ AIG submissions, [37], quoting *Jurisdictional Issues Decision*), [27].

¹⁴ At [29].

primary submissions in Chapter 8, and in the McFerran Report. Some further detail is set out below.

25. In 2011, the Australian Law Reform Commission conducted a detailed review of Family Violence and Commonwealth Laws, and recommended that the Fair Work Commission, when conducting the four yearly review of modern awards, consider the inclusion of a model family violence term in modern awards.¹⁵
26. In 2015, the Commonwealth Government Senate Committee into Financial and Public Administration conducted a lengthy review into the prevalence and impact of family and domestic violence in Australia. The Committee's first Recommendation in its report is in support of paid family and domestic violence leave "*to assist victims of family and domestic violence to maintain employment and financial security while attending necessary appointments*" arising out of the experience of family and domestic violence.¹⁶
27. In March 2016, the Victorian Royal Commission into Family Violence handed down an extraordinarily comprehensive report evaluating and making recommendations about the strategies, frameworks, policies, programs, and services in four areas, including support for victims of family violence. The Royal Commission made several recommendations in support of the provision of paid family and domestic violence leave.¹⁷
28. Further, all state and territory public sector employees in Australia except Western Australia now have access to some form of paid family and domestic violence leave.¹⁸
29. The ACTU's application is consistent with the history of workplace entitlements that have their origin in decisions of the industrial umpire, including maternity leave, paternity leave, and adoption leave;¹⁹ the right of parents and carers to seek flexible working arrangements;²⁰ carer's leave;²¹ reasonable working hours;²² and redundancy benefits.²³

¹⁵ Australian Law Reform Commission, *Family Violence and Commonwealth Laws: Improving Legal Frameworks*, Recommendation 16-7 at 37, and see discussion from 402 (document 5 of the ACTU tender list).

¹⁶ Commonwealth of Australia, Finance and Public Administration References Committee, *Domestic Violence in Australia*, 15, and see Chapter 2 (document 4 of the ACTU tender list).

¹⁷ Victoria, *Royal Commission Report into Family Violence (RC Report)* (document 3 of the ACTU tender list), Recommendations 190 (Victorian government to include paid leave in enterprise agreements), 191 (Victorian government to lobby COAG for the inclusion of paid leave in the National Employment Standards). The RC Report also recommended that the Victorian government make a submission to the Full Bench in this Review: see Volume 6, 91.

¹⁸ See ACTU primary submissions, [8.62], and see letter to the Fair Work Commission from the Queensland Government dated 14 November 2016.

¹⁹ Per *Federated Miscellaneous Workers Union of Australia v ACT Employers Federation (Maternity Leave Case)* (1979) 218 CAR 120; *Re Clothing and Allied Trades Union of Australia (Clothing Trades*

B THE EVIDENCE

1 *The prevalence and nature of family and domestic violence*

30. The ACTU relies on the evidence of Dr Peta Cox, Senior Research Officer at Australia's National Research Organisation for Women's Safety (ANROWS).²⁴ Dr Cox has given evidence about findings from the Australian Bureau of Statistics' Personal Safety Survey (PSS).
31. The PSS is the most comprehensive quantitative study of interpersonal violence in Australia. It is a household study that collects data on how often violence occurs and how many people are affected by it.²⁵ It was conducted in 1996 (of women only), 2005, and 2012, and is currently being conducted for 2016. The PSS gathers information about the demographic details of survey participants, their experience of violence, and characteristics of eight particular types of violence.²⁶ The ABS produces data from the PSS but does not provide background information or commentary about the implications of the findings. It is the task of organisations such as ANROWS to read and contextualise this data.
32. Dr Cox is the author of an ANROWS 'Horizons' publication titled *Violence Against Women in Australia: Additional Analysis of the Australian Bureau of Statistics Personal Safety Survey 2012 (ANROWS PSS Report)*.²⁷ The ANROWS PSS Report is a peer-reviewed and ABS-checked research report that was published in October 2015.²⁸ The Cox Report draws from the findings in the ANROWS PSS Report.

Adoption Leave) (1985) 298 CAR 321; the *Parental Leave Case* (1990) 36 IR 1; and the *Parental Leave – Casual Employees – Test Case (Re Vehicle Industry – Repair, Services and Retail Award 1981)* (2001) 107 IR 71.

²⁰ Per the *Family Leave Test Case (November 1994)* (1994) 57 IR 121; the *Personal/Carer's Leave Test Case – Stage 2 Decision – November 1995* (1995) 62 IR 48; and the *Parental Leave Test Case 2005* (2005) 143 IR 245.

²¹ *Ibid.*

²² *Re Working Hours Case July 2002* (2002) 114 IR 390.

²³ Per the *Termination, Change and Redundancy Case*, Print F6230, 2 August 1984, (1984) 294 CAR 175; and the *Redundancy Case 2004*, PR032004, 26 March 2004 and PR062004, 8 June 2004.

²⁴ Statement of Dr Peta Cox dated 26 May 2016, tendered and marked as **Exhibit B1**, and statement of Dr Peta Cox dated 28 September 2016, tendered and marked as **Exhibit B2**. Dr Cox's report is attached to her statement and marked as Annexure PC-3 (**Cox Report**).

²⁵ Cox Report, [2.2].

²⁶ The eight types of violence are female and male victims of physical assault, physical threat, sexual assault, and sexual threat. See Cox Report, [2.12]–[2.16].

²⁷ Annexed to her witness statement and marked as PC-4.

²⁸ See further, Cox Report, [5.1].

Findings from the Personal Safety Survey

33. The primary findings from the Cox Report drawn from the PSS are set out below.

Prevalence

34. One in four women in Australia (2.194 million), and one in 12 men (694,100) have experienced violence by an intimate partner since the age of 15.²⁹
35. The majority of women who experienced violence by an intimate partner lived with their partner at the time violence occurred, and reported that the violence occurred more than once.³⁰ Over 22 per cent of those women reported that their children had seen or heard the violence, and over 18 per cent experienced violence during pregnancy.³¹

Employment status and time off work

36. In the twelve months prior to the 2012 PSS, one in 50 women,³² and less than one in 100 men,³³ experienced at least once incidence of violence by an intimate partner. The majority of those women (62 per cent) were employed. This is 2.3 per cent of all women employed in Australia.³⁴
37. Of those employed women who experienced violence in the twelve months prior to the PSS, 25 per cent took time off work following their most recent physical assault by a cohabitating partner, and 20 per cent took time off work following their most recent sexual assault by a cohabitating partner.³⁵

²⁹ Cox Report, [7.2] (women); ANROWS PSS Report, 30 (men), where the total population of women is 8.735 million and of men is 8.466 million (see Tables A1 and A2 of ABS data cubes at http://anrows.org.au/file/1339/download?token=g9_wNIHj).

'Intimate partner' means cohabitating and non-cohabitating partners. The 'intimate partner' category is an amalgam of the ABS categories of 'cohabitating partner' and 'boyfriend, girlfriend, date'. See Cox Report, [7.1].

³⁰ Cox Report, [7.2], [7.3]. Approximately 67 per cent of women (1.479 million) lived with their partner at the time of violence, and 42 per cent reported the violence occurred more than once (925,000).

³¹ Cox Report, [1.5].

³² Cox Report, [7.4], [7.8]–[7.10]. This is 186,900 women, or 2.1 per cent of the total adult female population of 8.735 million.

³³ Flood Report, [3.10]. This is 75,300 men, or 0.9 per cent of the total adult male population of 8.466 million.

³⁴ Cox Report, [7.9].

³⁵ Cox Report, [8.14]–[8.15]. This figure is limited to women who took time off work following their *most recent physical assault* by a *man*; ie, this does not describe women's responses to previous incidents of violence (which may or may not be more representative of the violence experienced overall); it does not include other manifestations of violence including physical or sexual threat, emotional abuse or financial abuse; and does not include assaults by a woman.

Support services

38. In the year prior to the 2012 PSS, between two and four out of 10 employed women who had experienced family and domestic violence contacted the police,³⁶ and between six and nine out of 10 employed women sought advice or support, including from a health professional, counsellor, or support worker.³⁷

Separation and finances

39. The PSS confirmed that separation from a violent partner is difficult and associated with an elevated risk of violence on separation, and with financial hardship following separation.³⁸
40. Over half of women who were currently in a violent relationship at the time of the survey (81,900) wished to leave but had not.³⁹ Of women who had left violent relationships, half had attempted to leave at least once before leaving finally.⁴⁰ When women did leave permanently, 24.4 per cent experienced increasing violence post-separation.⁴¹
41. Two out of three women who left violent partners moved away from their homes, and seven out of 10 women who left violent relationships report leaving behind property or assets.⁴²

The nature of family and domestic violence

42. Family and domestic violence can take many forms. The ACTU has set out, at paragraphs 5.15 to 5.33 of the ACTU primary submissions, the various forms of family and domestic violence that can be utilised by perpetrators against victims. At the core of all forms of family and domestic violence is the perpetrator's need to maintain control and dominance over the victim. The centrality of control to an understanding of family and domestic violence is reflected in statutory definitions of family and domestic violence in s. 4AB of the *Family Law Act 1975* and s. 5 of the *Family Violence Protection Act 2008* (Vic).
43. While recognising that control is central to an understanding of family and domestic violence, the definition of family and domestic violence in the ACTU proposed clause does not refer to control and dominance, for the simple reason that there is no requirement that an employer ascertain if family and domestic violence has occurred; the entitlement arises from the need

³⁶ Cox Report, [8.21].

³⁷ Cox Report, [8.8.1].

³⁸ Cox Report, [8.24]–[8.25], [8.27]–[8.30].

³⁹ Cox Report, [8.22].

⁴⁰ Cox Report, [8.24].

⁴¹ Cox Report, [8.27].

⁴² Cox Report, [8.28], [8.3].

for leave, not the experience of family and domestic violence per se, unlike the statutory definitions which are directed to specific legal remedies flowing from the experience of family and domestic violence.

44. Each of the numerous family and domestic violence workplace provisions in evidence before the Full Bench acknowledge the multiple and complex ways in which family and domestic violence can manifest, including provisions drafted by unions and referred to in the witness statements of Jackson, Doleman, Gandy, O’Neil and Kemppe,⁴³ and employers including PWC and Spotless. For example, the Spotless *Domestic Violence Policy* defines domestic violence as:

...any acts of violence which occur between people who have, or have had, an intimate relationship. The term domestic violence is used to cover a range of behaviours used to exert power and control over others which can cause the victims to live in fear. It may include physical, sexual, emotional or financial abuse, forced isolation, control, intimidation, threats or stalking.⁴⁴

45. The Spotless policy then provides a number of examples of acts which may be considered domestic violence, which include “*controlling or limiting a partners’ finances or how they spend their money*”, “*verbal abuse, including constant criticism, put-downs or insults*” and “*a single act of hitting, slapping, punching, pushing or shoving*”. ‘Family violence’ is defined as a broader term capturing the same behaviours as in domestic violence, but between family members. The Spotless policy applies to family and domestic violence.

46. The PWC policy defines family and domestic violence as:

...behaviour by your current or former intimate partner (of the same or opposite sex) or a current or 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 your safety or wellbeing or the safety or wellbeing of another person.⁴⁵

Forms of family and domestic violence other than physical and/or sexual assault

47. The course of cross-examination by the employer parties of certain of the ACTU’s witnesses suggested there was some doubt or confusion about the definition, prevalence and impact of

⁴³ See, eg, the 10 agreements at MJ-1 to the Statement of Michelle Jackson tendered and marked as **Exhibit B8 (Jackson Statement)**; the MUA model clause at MD-1 of the Statement of Mick Doleman tendered and marked as **Exhibit B9 (Doleman Statement)**; the AWU proposed family violence clause at Annexure 1 of the Statement of Brad Gandy, tendered and marked as **Exhibit B10 (Gandy Statement)**; the 4 agreements at MON-2 of the Statement of Michele O’Neil tendered and marked as **Exhibit B14 (O’Neil Statement)**; and the CPSU family violence model clause at SK-1 to the Statement of Sunil Kemppe tendered and marked as **Exhibit B15 (Kemppe Statement)**. Each of the relevant family and domestic violence clauses contains broad definitions of family and domestic violence.

⁴⁴ Attached as Annexure 5 to the Gandy Statement.

⁴⁵ Attached as Annexure A to the Statement of Debra Eckersley, tendered and marked as **Exhibit S1**.

forms of family and domestic violence which do not include *physical or sexual assault or the threat of physical or sexual assault* (or “violence” as defined by the PSS).⁴⁶

48. At paragraphs 7.24 to 7.26 of her expert report, Dr Cox explains that the PSS defines ‘emotional abuse’ as “*behaviours or actions that are aimed at preventing or controlling [a partner’s] behaviour with the intent to cause them emotional harm or fear*”. Emotional abuse includes, for example:

deliberate acts to stop or try to stop a partner from: contacting family or friends; using the telephone, internet or car; knowing about or having access to household money; working or earning money; or studying. Other examples (not exhaustive) include: constant put downs; destroying property; depriving them of medical or psychological care; threatening to harm to children pets or self (but does not include threats to harm the survey respondent – this would be sexual or physical threat).

49. Dr Cox gives evidence that one in 20 women in Australia had experienced emotional abuse by a former or current cohabiting partner in the 12 months prior to the survey (406,800, 4.7 per cent).
50. While available data from the PSS does not provide a 12 month aggregate of violence and/or emotional abuse, it is plausible to say that in total, no more than 6.8 per cent of women (2.1 per cent of women who have experienced violence in the preceding 12 months plus the 4.7 per cent of women who have experienced emotional abuse in the last 12 months) have experienced either violence or abuse by a partner in the last 12 months.
51. Given that many women experience both physical and/or sexual violence and emotional abuse,⁴⁷ it is likely that this figure is in fact an overestimation of the total number of woman impacted by emotional abuse and/or violence. It is noted that there are no data collected on emotional abuse by non-cohabiting partners.

Economic abuse

52. The definition of “emotional abuse” in the PSS includes economic or financial abuse.
53. Economic abuse as a form of family and domestic violence is widely recognised and is addressed in detailed analyses of the prevalence, incidence, cost, causes, and recommendations concerning family and domestic violence conducted by, for example the Victorian *Royal Commission into Family Violence (Royal Commission)*, KPMG, and the

⁴⁶ See, eg. Transcript, Tuesday 15 November 2016, PN 946, PN 952, PN 1001–03; Transcript, Thursday 17 November 2016, PN 1994.

⁴⁷ Cox Report, [7.18]: About half the women who reported having experienced violence by their current cohabiting partner also reported emotional abuse.

Australian Law Reform Commission.⁴⁸ Economic abuse is a significant form of family and domestic violence that involves interference with women’s acquisition of financial resources, and denying women financial autonomy.⁴⁹

54. Economic abuse can manifest in a number of different ways, but is characterised by controlling behaviour in relation to participation in employment, education, and financial decision-making and empowerment. In relation to employment, economic abuse can manifest as a perpetrator preventing workplace participation by, for example, forbidding employment, sabotaging transport (hiding keys, denying petrol money), and injuring women so they are unable to attend work.⁵⁰ Financial abuse is a subset of economic abuse dealing with controlling behaviour over finances (ie, debt, shared credit, and finances).⁵¹
55. The ACTU accepts that prevalence rates of economic abuse may be difficult to estimate accurately,⁵² but the lack of “*perfectly accurate estimates as to the prevalence or impact of economic abuse*” does not mean that this form of abuse does not occur. One Australian study estimated that between 80 and 90 per cent of women who sought support for family and domestic violence experienced financial abuse.⁵³
56. Economic abuse is recognised as a form of domestic and family violence across numerous legislative definitions, including Victoria,⁵⁴ South Australia,⁵⁵ Tasmania,⁵⁶ and the Northern Territory.⁵⁷ The *Family Violence Prevention Act 2008* (Vic) defines economic abuse as:

- 6 For the purposes of this Act, ***economic abuse*** is behaviour by a person (the ***first person***) that is coercive, deceptive or unreasonably controls another person (the ***second person***), without the second person's consent—
- (a) in a way that denies the second person the economic or financial autonomy the second person would have had but for that behaviour; or
 - (b) by withholding or threatening to withhold the financial support necessary for meeting the reasonable living expenses of the second person or the second person's child, if the second person is entirely or predominantly dependent on the first person for financial support to meet those living expenses.

⁴⁸ *Royal Commission into Family Violence Report*, Volume IV, Chapter 21- Financial Security; KMPG, *The Cost of Violence against Women and their Children in Australia*, May 2016; Australian Law Reform Commission, *Family Violence and Commonwealth Laws: Improving Legal Frameworks*, November 2011.

⁴⁹ Cortis Report, [6(a)]; Cortis *Landscapes* paper, 6.

⁵⁰ Cortis *Landscapes* paper, 6.

⁵¹ Cortis Report, [13].

⁵² Cortis Report, [14]–[20].

⁵³ Cortis *Horizons* paper, 11.

⁵⁴ *Family Violence Protection Act 2008* (Vic), s. 5(1)(a)(iii) and 6.

⁵⁵ *Intervention Orders (Prevention of Abuse) Act 2009* (SA), s. 8(5).

⁵⁶ *Family Violence Act 2004* (Tas), ss. 7, 8.

⁵⁷ *Domestic and Family Violence Act 2007* (NT), s. 8.

Examples—

- coercing a person to relinquish control over assets and income;
- removing or keeping a family member's property without permission, or threatening to do so;
- disposing of property owned by a person, or owned jointly with a person, against the person's wishes and without lawful excuse;
- without lawful excuse, preventing a person from having access to joint financial assets for the purposes of meeting normal household expenses;
- preventing a person from seeking or keeping employment;
- coercing a person to claim social security payments;
- coercing a person to sign a power of attorney that would enable the person's finances to be managed by another person;
- coercing a person to sign a contract for the purchase of goods or services;
- coercing a person to sign a contract for the provision of finance, a loan or credit;
- coercing a person to sign a contract of guarantee;
- coercing a person to sign any legal document for the establishment or operation of a business.

57. In addition to measuring the prevalence of emotional abuse (including financial abuse), the PSS asks questions about economic harm and family and domestic violence. Two out of three women who left violent partners moved away from their homes, and seven out of ten women who left violent relationships report leaving behind property or assets.⁵⁸
58. The PSS also asks questions about the emotional harm that may result from economic abuse, and in doing so, expressly excludes from the definition of emotional abuse in the situation where a person who has a substance abuse, gambling or compulsive shopping issue (etc), whose spouse restricted their access to money, the car, or the internet, unless the survey respondent perceived that these restrictions caused them emotional harm or fear.⁵⁹
59. Economic abuse is closely associated with economic harm, although the two are different. Economic abuse *causes* economic harm, but economic harm is a consequence of all forms of family and domestic violence, which may or may not include economic abuse. The economic consequences to individuals of family and domestic violence are discussed below from paragraph 76.

2 *The economic cost of family and domestic violence*

60. The ACTU relies on the report of Price Waterhouse Coopers published in November 2015 titled *A High Price to Pay: The Economic Case for Preventing Violence Against Women (PWC Report)*,⁶⁰ and on two reports of KPMG, the first published in 2009 and titled *The*

⁵⁸ Cox Report, [8.28], [8.3].

⁵⁹ See <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/0BB08821802D9340CA257CD60017992E?opendocument>, cited at footnote 3 of the Cox Report.

⁶⁰ Tendered as Attachment A to the Statement of Debra Eckersley dated 20 June 2016 (**Exhibit S1**).

Cost of Violence Against Women and their Children (KPMG 2009 Report),⁶¹ and the second published in 2016 and titled *The Cost of Violence Against Women and their Children in Australia (KPMG 2016 Report)*.⁶²

61. The three reports take a common approach to methodology and are interrelated. The 2009 KPMG Report was produced to assist the Commonwealth Government National Council to Reduce Violence Against Women and their Children. The PWC Report was published in response to a request from Our Watch and Vic Health, and compared its findings to those in the KPMG 2009 Report. The KPMG 2016 Report was produced at the request of the Commonwealth Government Department of Social Services for the purpose of updating the KPMG 2009 Report;⁶³ and uses the PWC Report as a comparator as well as the KPMG 2009 Report.⁶⁴
62. While there is considerable overlap between the findings reported in the PWC Report and the KPMG 2016 Report with regard to all violence against women, only the PWC Report differentiates between *all* violence against women and *partner* violence against women. Further, different data is available at the level of disaggregation, particularly with respect to the cost of family and domestic violence to employers. For that reason, the ACTU has referred primarily to the PWC Report. The KPMG 2016 Report is referred to identify consistent or inconsistent findings; or to supplement findings about matters that are not available in the PWC Report.
63. Published only six months apart, both the PWC Report and the KPMG 2016 Report constitute the most up-to-date evidence about the cost of family and domestic violence according to a range of measures including the national economy (which is relevant to s. 134(1)(h) of the FW Act), the impact on business including productivity and employment costs (which is relevant to s. 134(1)(f) of the FW Act), and the cost to employees affected by family and domestic violence (which is relevant to s. 134(1)(a) and the overarching provision in s. 134(1) of the FW Act).
64. Both the KPMG 2016 Report and the PWC Report use data from the 2012 PSS. As set out above at footnote no. 29, the ABS uses two relevant categories of relationship between perpetrator and victim when conducting the PSS: ‘cohabitating partner’, and ‘boyfriend,

⁶¹ ACTU Tender List document 1.

⁶² ACTU Tender List document 2.

⁶³ See KPMG 2016 Report, 20.

⁶⁴ All three reports also refer to and build on work done by Access Economics (Deloitte) in 2002. Due to the availability of up-to-date data, the ACTU has not sought to tender the Access Economics report, although reference is made to that material along with the KPMG 2009 Report and the PWC Report, in Chapter 7 of the ACTU primary submissions.

girlfriend, date'. The ANROWS PSS Report and Dr Cox's report filed in this proceeding combined those categories to create a category of 'intimate partner' that described violence inflicted by a person with whom the victim was in an intimate relationship, regardless of cohabitation status. By contrast, both the PWC Report and the KPMG 2016 Report rely solely on the ABS category of 'cohabitating partner' to assess the cost of family and domestic violence. Further, while the ANROWS PSS Report and Dr Cox's report provided data on the rates of violence against men, the PWC Report and KPMG 2016 Report only examine the rates of violence against women. Both the ANROWS PSS Report and the KPMG 2016 Report observe that the PSS lacks representative prevalence data for violence experienced by Aboriginal and Torres Strait Islander women, and women who may be pregnant, disabled, and/or homeless.⁶⁵ Finally, rates of family and domestic violence are highly likely to be underreported.⁶⁶

65. For these reasons, the figures in both reports are likely to be underestimates of the costs of family and domestic violence to the national economy and employers. KPMG has sought to alleviate some of the consequences of this underestimation by calculating likely prevalence rates of violence against those sub-groups identified above, which has added a total of \$4.1 billion to the annual national cost of family and domestic violence against women.⁶⁷
66. No employer party sought to challenge the contents of the PWC Report during the evidentiary hearing, and none of the submissions filed in opposition to the ACTU's application challenged the findings of the PWC Report or the KPMG 2009 Report, which were both extensively addressed in the ACTU primary submissions at Chapter 7.

The national economy

67. Violence against women costs the national economy \$21.7 billion each year.⁶⁸ When limited to violence against women inflicted by their partners, the cost to the national economy is \$12.6 billion.⁶⁹ These figures are taken from the PWC Report; the KPMG 2016 Report, published six months later, made the same finding with respect to the cost to the national economy of all violence against women.⁷⁰

⁶⁵ KPMG 2016 Report, 24; and see 14–16.

⁶⁶ See, eg, KPMG 2016 Report, 32; the RC Report at Vol. 1, Chapter 3 and Vol. VI, Chapter 39

⁶⁷ See KPMG 2016 Report, 13–14.

⁶⁸ PWC Report, 11 (Table 4).

⁶⁹ Ibid.

⁷⁰ See KPMG 2016 Report, 36 (Table 3.1). The KPMG 2016 Report refers to the total cost as 'approximately \$22 billion per annum', but the detailed breakdown at Table 3.1 shows the total cost to be \$2.722 billion.

68. Both the PWC Report and the KPMG 2016 Report allocate the costs of family and domestic violence between the following seven costs categories:
- (a) Pain, suffering, and premature mortality. This category carries the largest proportion of the total cost of violence against women, with both reports estimating this costs the Australian economy \$10.4 billion each year.⁷¹ This is 48 per cent of the total cost of violence against women;⁷²
 - (b) The cost of delivering health services to victims, estimated to cost between \$1.355 and \$1.4 billion per year;⁷³
 - (c) The cost of lost productivity from paid and unpaid work, estimated to cost between \$2.031 and \$1.9 billion per year;⁷⁴
 - (d) Consumption costs related to the loss of property and belongings, estimated to cost between \$4.31 and \$4.41 billion per year;⁷⁵
 - (e) Second generation costs incurred by children who experience violence, estimated at between \$300 and \$333 million per year;⁷⁶
 - (f) Administrative costs including of the criminal justice system, temporary accommodation, and funeral costs, estimated at approximately \$1.7 billion per annum;⁷⁷ and
 - (g) Transfer costs including lost income, lost taxes, and victim compensation, estimated to cost between \$1.515 and \$1.6 billion per year.⁷⁸
69. The PWC Report estimates that if no further action is taken to prevent violence against women, the costs to the national economy will accumulate to \$323.4 billion over a 30 year period to 2045.⁷⁹

⁷¹ PWC Report, 11 (Table 4); KPMG 2016 Report, 37.

⁷² PWC Report, 12 (Table 5).

⁷³ PWC Report, 11 (Table 4); KPMG 2016 Report, 41.

⁷⁴ PWC Report, 11 (Table 4); KPMG 2016 Report, 43.

⁷⁵ PWC Report, 11 (Table 4); KPMG 2016 Report, 44.

⁷⁶ PWC Report, 11 (Table 4); KPMG 2016 Report, 45.

⁷⁷ PWC Report, 11 (Table 4); KPMG 2016 Report, 48.

⁷⁸ PWC Report, 11 (Table 4); KPMG 2016 Report, 51.

⁷⁹ PWC Report, 4.

Employers

70. The cost of family and domestic violence is distributed across specific groups including, relevantly, victims, employers, and Commonwealth and State governments.
71. The cost of lost productivity (one of the seven cost categories listed at paragraph 68 above) captures the lost opportunity cost to victims and perpetrators of being unable to attend work due to death or illness (in the case of victims) or imprisonment (in the case of perpetrators); and the cost to employers of paying for leave (ie, leave already available under the NES or in awards and enterprise agreements), and undertaking administrative processes including the cost of searching, hiring and re-training employees to replace workers who have left employment due to family and domestic violence.⁸⁰
72. Production-related costs are the third largest category of loss, comprising 9 per cent of the total cost to the national economy, or 18 per cent if pain, suffering and premature mortality is removed from the analysis.⁸¹
73. While the PWC Report and the KPMG 2016 Report provide different levels of detail about the cost to employers, the similarity in the ‘headline cost’ of all violence against women as approximately \$22 billion per annum; the similarity in estimates of costs per category, and the concurrence of factors in the ‘lost productivity’ costs category suggests that the authors of the PWC Report would be likely to reach similar figures to the detailed estimates in the KPMG 2016 Report.
74. The KPMG 2016 Report suggests that:
- (a) Victim absenteeism from paid and unpaid work (including household tasks) costs \$860 million per year;⁸²
 - (b) Perpetrator absenteeism costs \$443 million per year;⁸³ and

⁸⁰ PWC Report, 12. ‘Production-related costs’ in the PWC Report also include the loss of unpaid work, which is of value to society; while significant, these costs are not directly related to employment and are not further discussed here.

⁸¹ PWC Report, 12 (Table 5). The KPMG 2016 Report does not provide a percentage-based hierarchy of the costs categories but, based on the dollar figures (set out in paragraph 68 above), production costs are the third-highest costs category after pain, suffering and premature mortality, and consumption costs. This is consistent with the findings in the PWC Report.

⁸² KPMG 2016 Report, 12, 43. Victim absenteeism from paid and unpaid work including household chores is included in the PWC Report analysis: see the detail under ‘Production costs’ in the table at Appendix B, 49–50.

⁸³ KPMG 2016 Report, 12, 43. See PWC Report, Appendix B, 49–50.

(c) Employers bear additional management costs including search, hiring, and training replacements, of \$96 million per year.⁸⁴

75. The PWC Report estimates that employers bear six per cent of the total cost of violence, which is the second-smallest cost burden of any stakeholder.⁸⁵ By contrast, victims “*bear the brunt of the cost of violence*”, measured at 31 per cent or \$6.7 billion of the total cost.⁸⁶ On this point, the KPMG 2016 Report and the PWC Report diverge, although not with respect to proportionality between costs borne by victims *cf.* employers. The KPMG 2016 Report allocates the cost burden between three categories: victims (52 per cent, or \$11.3 billion), State and Commonwealth governments (19 per cent), and others, including the community, employers, perpetrators, children of victims, and friends and family (29 per cent).⁸⁷ No further breakdown of the cost between the sub-groups in this third category is provided.

Employees and economic harm

76. The evidence demonstrates that employees affected by family and domestic violence suffer economic harm in two key ways: out of pocket costs, and employment disruption.

Lost income and actual expenditure

77. Employees who need to take time off work and have either no paid leave entitlements (like the 45 per cent of award-covered workers employed on a casual basis), or have exhausted their existing leave entitlements, will lose income that would have been earned had they been able to attend work.

78. Employees affected by family and domestic violence will incur out-of-pocket costs arising from, for example, lawyers’ and court fees, the cost of medical treatment, and relocation costs.

79. Finally, economic abuse as a manifestation of family and domestic violence can cause considerable economic harm to employees.

80. The evidence relied on by the ACTU provides several real-life illustrations of the economic impact of family and domestic violence: Confidential Witness 1 gave evidence of incurring

⁸⁴ KPMG 2016 Report, 12, 43. The PWC Report estimates of employer costs include search, hire, and training costs as well as the annual lost income of victims who should have survived: see Appendix B, 50.

⁸⁵ PWC Report, 13 (Figure 1).

⁸⁶ PWC Report, 13, and Figure 1.

⁸⁷ KPMG 2016 Report, 36.

legal costs of over \$6,000 to prepare for one court attendance.⁸⁸ Confidential Witness 3 gave evidence that over the period of an abusive relationship that continued for three years, she lost over \$90,000.⁸⁹ Neither of these witnesses was cross-examined.

81. Other evidence provides objective measures of economic harm occasioned by family and domestic violence.
82. Results from the PSS report that two out of three women who left violent partners moved away from their homes, and seven out of ten women who left violent relationships report leaving behind property or assets.⁹⁰
83. Cortis and Bullen observed that the loss of wealth that occurs when a woman flees her home in order to separate from a violent partner “*occurs in the context of limited access to adequate income support, and labour markets which are not necessarily responsive to the needs of women, especially sole parents*”.⁹¹
84. The PWC Report provides a detailed breakdown of the estimated costs that a woman experiencing physical/sexual violence and/or emotional abuse by a partner will incur in a year. The average cost is \$27,000 per woman; of that cost, production-related costs, which include lost income and productivity as a result of being late to or absent from work, is nearly \$2,000 per woman, and consumption costs arising from damage to property and assets is \$9,179.⁹² These estimates are annual. The lifetime costs of all violence for a 10-year cohort of victims is \$362 billion, of which \$90 billion are fiscal costs (ie, they are costs that do not include the cost of pain, suffering, and premature death).⁹³

Disrupted workplace participation

85. The second primary way in which family and domestic violence causes economic harm is by disrupting workforce participation.
86. ‘Disrupted workforce participation’ is used in distinction to ‘taking time off work’ as a result of family and domestic violence. The PSS found that one in four employed women took time off work following their most recent incident of physical assault by a cohabitating male, and

⁸⁸ Confidential Witness 1, tendered and marked as **Exhibit B23**, [23].

⁸⁹ Confidential Witness 1, tendered and marked as **Exhibit B24**, [10].

⁹⁰ Cox Report, [8.28], [8.3].

⁹¹ Cortis *Horizons* report, 11.

⁹² PWC Report, 14, Table 5; and 15.

⁹³ PWC Report, 16 (Table 6).

one in five took time off work following their most recent incident of sexual assault by a cohabitating male.⁹⁴

87. The ACTU repeats and relies on the material referred to in its primary submissions at paragraphs 4.2 to 4.25 regarding the impact that family and domestic violence has on participation rates. In summary, the ACTU relies on the following evidence in support of the proposition that family and domestic violence disrupts workforce participation:

- (a) A 2011 study conducted by McFerran which found that women who are experiencing or have experienced domestic violence have a more disrupted work history, are on lower personal incomes, have had to change jobs more frequently, and are more likely to be employed in part-time and casual jobs than women with no experience of violence;⁹⁵
- (b) Six studies referred to by Ludo McFerran in her report to the Commission that identified connections between workers' experiences of family and domestic violence and employment instability;⁹⁶
- (c) The evidence of Jocelyn Bignold, CEO of McAuley Community Services, of her experience working with employed women who experienced family violence. Ms Bignold's evidence was that in her experience, many women affected by family and domestic violence saw resignation as the only option available to them.⁹⁷ Ms Bignold was not cross-examined;
- (d) The evidence of Sandra Dann, director of the Working Women's Centre South Australia. In Ms Dann's experience, it has been difficult to find remedies for employment-related matters where a worker affected by family and domestic violence has been dismissed from employment or prevented from being offered employment.⁹⁸ Ms Dann provides numerous real-life examples to illustrate the pervasive way in

⁹⁴ Cox Report, [8.14]–[8.15].

⁹⁵ McFerran L (December 2011), *Safe at Home, Safe at Work? National Domestic Violence and the Workplace Survey*, Australian Domestic and Family Violence Clearinghouse and Centre for Gender Related Violence at UNSW, included in ACTU tender list at Document 9.

⁹⁶ Report of Ludo Catherine McFerran dated 31 May 2016 (**McFerran Report**) and attached to the Statement of Ludo Catherine McFerran tendered and marked as **Exhibit B16**. The studies by Crowne, Adams, Franzway, Reeves, McFerran (2011) and McFerran (2013) are discussed at [[5.1] to [5.8] of the McFerran Report.

⁹⁷ Statement of Jocelyn Bignold tendered and marked as **Exhibit B17 (Bignold Statement)**, [23.3].

⁹⁸ Statement of Sandra Dann tendered and marked as **Exhibit B18 (Dann Statement)**, [30].

which family and domestic violence can disrupt employment.⁹⁹ Ms Dann was not cross-examined;

- (e) The evidence of Julie Kun, CEO of the Women’s Information and Referral Exchange, that the ability to protect women affected by family and domestic violence from employment disruption can be very dependent on the attitude of the employer;¹⁰⁰
- (f) The evidence of Julie Kun that women who have fled to refuges to escape a violent relationship are often prevented from working due to the security rules around refuge accommodation; many refuges do not allow women to come and go, because to do otherwise would enable a violent partner to identify the location of the refuge, putting the woman and others at risk;¹⁰¹ and
- (g) The evidence of Dr Natasha Cortis as set out below.

Findings on economic harm and employment disruption in the Cortis Report

- 88. In her report for the Commission, Dr Cortis drew on statistical analysis conducted with Dr Jane Bullen of a study that examined how domestic violence is associated with financial hardship among a group of highly disadvantaged low-income women, called *Journeys Home: Longitudinal Study of Factors Affecting Housing Stability (Journey’s Home)*. The sample of 1,682 participants was drawn from the Centrelink database. Participants were interviewed over six ‘waves’, or every six months, between 2012 and 2014, about matters designed to allow the researchers to track indicators of economic wellbeing.
- 89. Although not intended as a study of domestic violence, *Journeys Home* revealed a correlation between domestic violence and economic hardship. Of the 765 women who participated in the study, 18.2 per cent were employed in Wave 1, and 20 per cent (of all women in the study) reported they were victims of family and domestic violence in the six months prior to Wave 1,¹⁰² with no statistically significant difference between rates of family and domestic violence experienced by employed and unemployed women.¹⁰³

⁹⁹ Dann Statement, [19]–[29], [35], [42].

¹⁰⁰ Statement of Julie Kun tendered and marked as **Exhibit B12 (Kun Statement)**, [54].

¹⁰¹ Kun Statement, [43].

¹⁰² Cortis Report, [30].

¹⁰³ See Cortis Report, [32].

90. Dr Cortis was cross-examined about the applicability of findings from *Journeys Home* to the target population of the ACTU’s proposed clause. Her evidence was that:

...Our analysis of Journeys Home showed that domestic violence has a profound economic effect on women's situations. We used measures of financial hardship that are accepted poverty measures, and found that domestic violence contributes to much higher rates of financial hardship. For example, going without food due to shortage of money, having difficulty paying electricity bills.¹⁰⁴

91. The analysis performed by Cortis and Bullen involved, in part, tracking economic indicators of wellbeing for those women who reported experiencing domestic violence in the six months prior to Wave 1, and those who did not. Cortis acknowledged that the findings from *Journeys Home* “may not reflect the economic impact of DV for women for whom asset or income levels... would make them ineligible of income support payments”.¹⁰⁵ However, the vast majority of employed women in the study were employed in ANZSIC classifications in which there are high levels of award reliance, particularly food and beverage services, social assistance services, and retail,¹⁰⁶ meaning that findings in the Cortis Report about employed women are relevant and applicable to the award-covered employee population.

92. The key findings from *Journeys Home* as set out in the Cortis Report were that:

- (a) Women who reported violence in more than one wave of the study were significantly less likely to be employed in Wave 6 (the final wave of the study), demonstrating adverse employment impacts where exposure to violence was prolonged;¹⁰⁷
- (b) Violence reduces economic wellbeing. For low-income women, the findings were unequivocally that “women affected by violence fared much worse on other indicators of financial hardship”;¹⁰⁸ and
- (c) Employment was associated with higher incomes, and on most measures, significantly lower rates of financial hardship, underlining the potential for employment to protect women from some of the economic harms associated with violence.¹⁰⁹

¹⁰⁴ Transcript, Tuesday 15 November 2016, PN 1047.

¹⁰⁵ Cortis *Horizons* report, 19.

¹⁰⁶ Cortis Report, [42];

¹⁰⁷ Cortis Report, [39].

¹⁰⁸ Cortis *Horizons* report, x.

¹⁰⁹ Cortis Report, [44], [50].

93. Dr Cortis' evidence, which is based on the findings from the *Journeys Home* survey, but also on previous research conducted by her and published in an ANROWS 'Landscapes' paper titled *Building Effective Policies and Services to Promote Women's Economic Security following Domestic Violence: State of Knowledge Paper*,¹¹⁰ is that participation in employment, education, and training are particularly important to enable recovery from violence, because this offers women opportunities to improve their independence and security following violence.¹¹¹
94. Dr Cortis' evidence was not addressed by any employer party in their submissions,¹¹² and was not disturbed by cross-examination.

3 *The needs of persons affected by family and domestic violence*

95. The needs of persons affected by family and domestic violence are numerous. There are many urgent and necessary tasks that need to be attended to in a short time in order to recover from violence and to leave an abusive relationship.
96. Aside from the obvious trauma associated with violence and abuse, the sheer logistical challenge of seeking support for family and domestic violence should not be underestimated. It bears stating the obvious that many support services, particularly courts, counsellors, schools, and refuges, only operate during business hours. Further, the nature of family and domestic violence means that accessing support services is rarely something that can be done in an orderly and predictable manner outside of working hours.
97. Paid family and domestic violence leave is necessary to enable women and men to attend to these tasks, while simultaneously maintaining security of employment and financial stability.
98. The ACTU has addressed the needs of persons affected by family and domestic violence in considerable detail in at Chapter 6 of the ACTU primary submissions, and relies on the report of Professor Humphreys as providing a broad overview of the needs of persons affected by family and domestic violence. These submissions provide a summary of that material.

¹¹⁰ Attached to the statement of Dr Cortis and marked NC-4 (**Cortis Landscapes paper**).

¹¹¹ Cortis Report, [61]. Although the Cortis Report focused exclusively on domestic violence against women, there is no reason that her findings with respect to the importance of employment to enable recovery from violent relationships are not applicable to male victims of family and domestic violence.

¹¹² Although Dr Cortis' report was under embargo at the time of filing in May 2016, employer parties were provided with the embargoed copies for use in this proceeding.

Health

99. Family and domestic violence has a substantial impact on health. Among women aged between 15 and 44, intimate partner violence is the leading contributor to death, disability and ill-health in Australia, and is more damaging than any other risk factor for chronic disease, including smoking.¹¹³ These figures have been unchanged for over ten years.¹¹⁴
100. Marilyn Beaumont, the Chair of the Australian Women's Health Network, gave evidence about her work in health, both as a practitioner and consultant, and the role of the workplace as a crucial setting for minimising the impact of family and domestic violence on health. Ms Beaumont's evidence, which was subject to cross-examination but not undermined by that process, was that the physical injuries and mental harm caused by family and domestic violence can be profound, and require extensive consultation with hospital, medical, and counselling specialists.¹¹⁵
101. The ACTU otherwise refers to and repeats its primary submissions at paragraphs 6.12 to 6.22.

Children

102. Family and domestic violence has a significant impact on children. The evidence is that children exposed to family and domestic violence are significantly more likely to manifest higher rates of depression, anxiety, and behavioural problems.¹¹⁶ Women are overwhelmingly the carers of young children, and so assume responsibility for attending to those problems, which can deplete carer's leave entitlements. The evidence of Professor Humphreys is of central importance to the understanding of the impact of family and domestic violence on children.
103. The ACTU addressed the impact of family and domestic violence on children and family, and the consequential need for their parents, as employees affected by family and domestic violence, to take time away from work to attend to those needs, at paragraphs 6.23 to 6.25 of the ACTU primary submissions.

¹¹³ See primary submissions, [6.13].

¹¹⁴ For the most recent figures, see the report published by ANROWS on 30 October 2016, *Horizons: Examination of the Burden of Disease of IPV against Women in 2011*, and <http://www.theage.com.au/lifestyle/news-and-views/study-confirms-intimate-partner-violence-is-leading-health-risk-factor-for-women-20161104-gshy6a.html>.

¹¹⁵ Statement of Marilyn Beaumont, tendered and marked as **Exhibit B7 (Beaumont Statement)**, [15]–[27].

¹¹⁶ Humphreys Report, [6.2].

Legal proceedings

104. The Full Bench heard evidence from Emma Smallwood, formerly of the Women’s Legal Service Victoria and now of Legal Aid Victoria, about the numerous interactions that a person affected by family and domestic violence can have with the legal system.
105. These interactions can be complex and time-consuming, given that:
- (a) Multiple jurisdictions can be involved: intervention order proceedings in Magistrates’ Courts; children and property matters in the Federal Circuit Court; and divorce proceedings in the Federal Circuit Court and/or the Family Court; as well as victim of crime assistance proceedings in state tribunals; and criminal proceedings in state courts arising out of physical and/or sexual violence;
 - (b) An applicant will have little control over the timing or duration of each matter. In Ms Smallwood’s experience, the average time for a single matter to be heard and determined is between four and six months, although family law matters typically take between one and two years to resolve;
 - (c) Court hearings are always during working hours; and
 - (d) Applying for and participating in legal proceedings is not always a choice for victims and, even where victims have some control over their participation in proceedings, the nature of the choice is illusory in circumstances where the personal safety of the victims and their children is at stake.
106. Ms Smallwood’s evidence was not challenged in cross-examination, and was not addressed in any employer party’s submissions. The ACTU refers to and repeats its primary submissions concerning Ms Smallwood’s evidence at paragraphs 6.5 to 6.11.
107. Further evidence on the complex and time-consuming nature of legal proceedings related to family and domestic violence and the impact on workplace participation and attendance was provided by Samantha Parker, Generalist Advocacy Worker at the Western Sydney Women’s Domestic Violence Court Advocacy Service,¹¹⁷ and Karen Willis OAM, Executive Officer of Rape and Domestic Violence Services Australia.¹¹⁸ Neither Ms Parker nor Ms Willis were cross-examined.

¹¹⁷ Statement of Samantha Parker, tendered and marked as **Exhibit B20 (Parker Statement)**.

¹¹⁸ Statement of Karen Willis OAM, tendered and marked as **Exhibit B22 (Willis Statement)**, [27]–[30].

108. The complexities involved in needing time away from work to attend legal proceedings arising out of family and domestic violence was the subject of unfair dismissal proceedings in the Fair Work Commission in *King v D.C Lee & L.J Lyons* [2016] FWC 1664. Ms King, a lawyer, was required to attend hearings regarding criminal charges against her former partner arising out of domestic violence, in April, July, and September 2015. The September hearing was listed for hearing at 9.30am and Ms King sought and obtained permission from her employer to attend Court that morning, on the understanding that the matter was likely to be completed by 11.00am. The night before the hearing, Ms King was told by her solicitors that the matter was unlikely to be heard until 12.00pm; accordingly, Ms King agreed to attend Court for a partner at her firm in the morning (on a work-related matter) and then planned to attend her own matter from 12.00, although she did not inform her supervisors about the delay in her own matter. Ms King was dismissed the following evening because she had not returned to the office by 11.00am as previously foreshadowed and because, on the employer's case, she had failed to adhere to attendance standards expected of her throughout her employment.
109. In finding that Ms King had been unfairly dismissed, Johns C considered that the shame Ms King felt in relation to the domestic violence incident, her continued efforts to balance her work and personal commitments, and the subsequent legal proceedings (both criminal and property settlement proceedings) provided an explanation for Ms King's failure to tell her employer that the September hearing had been delayed by several hours and was a relevant consideration as to whether the dismissal was harsh, unjust or unreasonable. Johns C noted that the existence of a domestic and family violence leave policy may have ameliorated the circumstances that led to Ms King's dismissal. Johns C wrote:

Although it has not influenced my decision in relation to this matter one is left to wonder whether events might have been different if the respondent had had a policy in relation to paid domestic and family violence leave. It is not common for employers to have such a policy and I make no criticism of the respondent for not having one, but the existence of such a policy would have sent a very clear message to the respondent's employees that it attaches no stigma to the victims of domestic and family violence and that it would support them to recover, attend court and medical appointments, seek legal advice and make alternative living arrangements without the repercussion of adverse action being taken in relation to their employment. Increasingly, employers are turning their mind to policies in relation to paid domestic and family violence leave or the inclusion of such an entitlement in enterprise agreements. This is to be encouraged.¹¹⁹

¹¹⁹ *King v DC Lee & LJ Lyons* [2016] FWC 1664, [56].

Finances

110. As set out above at paragraphs 53 to 59, and 76 to 94, substantial economic harm is a consequence of family and domestic violence, whether in the form of economic abuse, or as a consequence of physical and sexual violence.
111. The ACTU relies on the evidence of Bernadette Pasco and Julie Kun about the services necessary to deal with the increasing likelihood that financial abuse is part of women's experience of family and domestic violence.
112. Ms Pasco is the Manager, Special Projects of the Financial and Consumer Rights Council. She gave evidence that working with clients affected by family and domestic violence often involves complex legal and financial issues, such as joint and several liability; because clients affected by family and domestic violence are often traumatised, financial counsellors need to allow more time, and multiple appointments for such clients.¹²⁰ Ms Pasco gave evidence that in her experience as a financial counsellor of six years, women are likely to experience significant financial detriment as a direct result of family and domestic violence, because of difficulties associated with maintaining employment.¹²¹
113. Ms Kun gave evidence of the increasing presentation of women experiencing financial abuse as part of their experience of family and domestic violence.¹²² Ms Kun and WIRE have performed research and published reports and material relating to the prevalence of financial abuse. Her evidence, which was not challenged in cross-examination, is that financial abuse *"is less well-known than other forms of violence"*, and *"there is poor public awareness or understanding of the issues by professionals, service providers, and legal or financial support services industries"*.¹²³ Accordingly, the combination of the nature of financial harm and the unfamiliarity at the client and industry levels with financial abuse as a form of family and domestic violence means that responding to this aspect of family and domestic violence can be complex.
114. The ACTU otherwise refers to and repeats paragraphs 6.32 to 6.38 of its primary submissions.

Housing

115. Arguably the most urgent need that arises from being subject to family and domestic violence is the need to flee the home to escape violence and protect life.

¹²⁰ Statement of Bernadette Pasco, tendered and marked as **Exhibit B13 (Pasco Statement)**, [22]–[24].

¹²¹ Pasco Statement, [39].

¹²² Kun Statement, [22].

¹²³ Kun Statement, [21], [34].

116. No paid leave entitlement under the National Employment Standards or otherwise is available to meet the need to urgently relocate due to family and domestic violence leave. Annual leave is discretionary; personal leave requires that a person be suffering from a physical injury or illness; and the right to request a flexible working arrangement is not fit for purpose, not in the least because employers have 21 days to respond to any request.
117. Family and domestic violence has a profound impact on housing, and is the most common reason that people give for seeking assistance from government-funded homelessness services. Research reported in the Commonwealth Government's *National Plan to Reduce Violence Against Women and their Children* shows that half of women with children seeking assistance from homelessness services are doing so because of family and domestic violence.¹²⁴ KPMG reported data showing that one in three individuals required assistance from specialist homelessness services because of domestic violence, and 64 per cent of those individuals were women.¹²⁵
118. Jocelyn Bignold is the CEO of McAuley Community Services for Women, which provides an integrated family violence and homelessness service for women, including 24-hour accommodation with an 80-bed capacity, and employment support. Ms Bignold has 25 years experience in community services, policy development, management and advocacy, including in relation to adults and families experiencing homelessness and family violence. Ms Bignold gave evidence, based on her experience, that many women who leave an abusive partner are financially disadvantaged due to the cost of setting up a new home or using leave to care for traumatised children.¹²⁶ Ms Bignold was not cross-examined, and her evidence was not addressed in any employer party submission.
119. The impact of family and domestic violence on housing is addressed in the ACTU primary submissions at paragraphs 6.26 to 6.31.

4 *Family and domestic violence disproportionately affects women*

120. In performing its functions and exercising its powers, the Commission must take into account the need to respect and value the diversity of the workforce by helping to prevent and

¹²⁴ Commonwealth Government, *National Plan to Reduce Violence Against Women and their Children 2010–2022*, 7.

¹²⁵ KPMG 2016 Report, 16.

¹²⁶ Bignold Statement, [62].

eliminate, *inter alia*, discrimination on the basis of sex, and family or carer's responsibilities.¹²⁷

121. Further, the Commission is required to ensure that modern awards provide a *fair and relevant* minimum safety net of terms and conditions of employment. What is 'fair' and 'relevant' may on occasion differ according to the needs of men and women. For example, a minimum safety net that failed to accommodate the needs of pregnant employees could not be described as 'fair and relevant' to women.
122. The Full Bench heard evidence from Dr Michael Flood, Associate Professor at the University of Wollongong, about the differences in men's and women's experiences of family and domestic violence.
123. Dr Flood's evidence is that intimate partner violence is highly gendered. Women are disproportionately affected by family and domestic violence in two ways.
124. First, the prevalence statistics reveal that women are three times more likely than men to be victims of family and domestic violence.¹²⁸ While there is no dispute that men can be and are victims of family and domestic violence, most intimate partner violence is by men against women, meaning that "*family violence among adults is overwhelmingly a crime against women*".¹²⁹
125. Second, the impact of family and domestic violence on women is more severe than men. Dr Flood gave evidence that women are more likely than men to sustain severe or more frequent injury,¹³⁰ and fear for their lives.¹³¹ The nature of the experience also differs according to gender. Women are more likely than men to be subjected to frequent, prolonged and extreme violence,¹³² and to be subject to sexual assault as part of their experience of intimate partner violence: of victims of intimate partner violence, 12 times as many women as men suffered sexual assault.¹³³
126. Women's worse health outcomes from family and domestic violence are not the result of being 'weaker' than men, but accurately reflect the severity of the violence to which they are

¹²⁷ Section 578(c) of the FW Act.

¹²⁸ One in four women and one in twelve men have experienced family and domestic violence since the age of 15.

¹²⁹ Flood Report, [3.6].

¹³⁰ Flood Report, [4.2]–[4.6].

¹³¹ Flood Report, [3.31], [4.7]–[4.10].

¹³² Flood Report, [3.21]–[3.23].

¹³³ Flood Report, [3.26].

subjected.¹³⁴ This is supported by the evidence from Vic Health and ANROWS that among women aged between 15 and 44, intimate partner violence is the leading contributor to death, disability and ill-health in Australia, and is more damaging than any other risk factor for chronic disease, including smoking.¹³⁵

127. This is not to say that men and women who are subject to the exact same act of physical violence will not have a similar or the same response in terms of injury and trauma. The point is that family and domestic violence does not just manifest as physical abuse. Focussing only on physically aggressive acts with no context (such as the history of violence in the relationship), suggests that women are moderately more likely than men to be victims of family and domestic violence. However, “*a pattern of stark gender asymmetry*” emerges when considering the full gamut of family and domestic violence, which includes sexual, psychological, and emotional abuse.¹³⁶
128. Neither of the propositions set out above discount the impact of family and domestic violence on men. However, the evidence in support of those propositions means it is misleading to characterise family and domestic violence as gender neutral.
129. While the ACTU draft clause is properly gender neutral in application, that does not mean that the experience of family and domestic violence is gender neutral, nor that the failure to provide paid leave to persons affected by family and domestic violence affects women and men in the same way.
130. Gender inequality is the root cause of violence against women,¹³⁷ and is the most substantial variable when considering differences in patterns of victimisation and perpetration of family and domestic violence.¹³⁸ It is for this reason that primary prevention strategies focus on eradicating gender discrimination.¹³⁹ Being a victim of family and domestic violence is not a protected attribute under anti-discrimination legislation. However, the absence of paid leave for persons affected family and domestic violence acts as a form of indirect discrimination against women.

¹³⁴ Flood Report, [4.10].

¹³⁵ See ANROWS, *Horizons: Examination of the Burden of Disease of IPV against Women in 2011*, available at <http://anrows.org.au/publications/horizons/examination-the-burden-disease-intimate-partner-violence-against-women-in-2011>

¹³⁶ Flood Report, [3.38].

¹³⁷ See ACTU primary submissions, [5.73]–[5.78].

¹³⁸ ANROWS PSS Report, 2.

¹³⁹ Flood Report, [5.5].

131. Indirect discrimination on the basis of sex is prohibited by s. 5 of the *Sex Discrimination Act 1984* (Cth) (**the SDA**). In *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, Sackville J described indirect discrimination as “conduct which, although ‘facially neutral’, has a disparate impact on men and women”.¹⁴⁰
132. In an employment setting, a woman will be discriminated against on the ground of her sex where an employer imposes a condition, requirement, or practice that has the effect of disadvantaging women, and which is not reasonable in the circumstances. The words ‘condition, requirement or practice’ “should be construed broadly”,¹⁴¹ and the concept been held to include, relevantly, the requirement to be available to work full-time (which discriminates against women who are parents, particularly of babies and young children),¹⁴² and the identification of candidates for redundancy on a ‘last on, first off’ basis, following a prolonged period of discrimination against women as candidates for employment.¹⁴³
133. In a number of sex discrimination cases concerning a refusal to permit part-time work following the birth of a child, courts and tribunals have accepted, sometimes without specific evidence but as a matter of judicial notice, that women are the primary caregivers of children, particularly babies and young children, that the requirement to work full-time therefore imposes ‘disadvantage’ on women within the meaning of s. 5 of the SDA.¹⁴⁴
134. It is not necessary, in this case, for the Full Bench to rely on judicial notice of the fact that women are disproportionately the victims of family and domestic violence.¹⁴⁵
135. The absence of paid family and domestic violence leave disadvantages women, and disproportionately impacts women in the following way:
- (a) Women are overwhelmingly the victims of intimate partner violence.¹⁴⁶
 - (b) Women are overwhelmingly the carers for children.¹⁴⁷
 - (c) Of the 1.86 million employees covered by modern awards, 57 per cent are women, and 51 per cent of those women are in casual, and therefore unstable, employment.

¹⁴⁰ At 97.

¹⁴¹ *Australian Iron & Steel v Banovic* (1989) 168 CLR 165 (**Banovic**), 185.

¹⁴² Per *Escobar v Rainbow Printing Pty Ltd (No 2)* [2002] FMCA 122 (**Escobar**), [33], [37].

¹⁴³ As occurred in *Banovic*.

¹⁴⁴ See, eg, *Hickie v Hunt & Hunt* [1998] HREOCA 8 [6.17.10]; approved in *Escobar*, [33]; and *Mayer v Australian Nuclear Science & Technology* [2003] FMCA 209, [70]; *Howe v Qantas Airways Ltd* [2004] FMCA 242.

¹⁴⁵ See paragraph 124 above.

¹⁴⁶ Flood Report at [3.9]

¹⁴⁷ See paragraphs 133 above and 136 below.

- (d) Award workers are some of the lowest paid workers in Australia.¹⁴⁸
- (e) Women are overrepresented among the award reliant and low paid.¹⁴⁹ Women are significantly more likely to be paid at the award rate than are men at all levels of the award structure.¹⁵⁰
- (f) These factors are exacerbated by the gender pay gap of approximately 17 per cent in Australia.¹⁵¹
136. For the 49 per cent of award-covered women with paid leave entitlements, the requirement that they use their paid annual and personal leave to, for example, attend multiple court hearings or move into emergency housing, has the effect that women will have less access to leave for illness and leisure than their male counterparts. The situation is compounded by the fact, accepted by the Full Bench of the AIRC in the *Parental Leave Test Case 2005*¹⁵² as well as in the authorities identified above, that women are more likely than men to be the primary caregivers of children, meaning women's paid leave entitlements are often further depleted to attend to caring responsibilities, whether arising out of family and domestic violence or otherwise. The same compounding factor is likely to be absent in the case of men affected by family and domestic violence. And of course, the 51 per cent of award-covered women employed as casuals who have no paid leave entitlements, and therefore no alternative but to attend to urgent matters if and when they arise, are faced with a real, but unacceptable and unreasonable, choice between their employment and their safety.
137. The fact that family and domestic violence disproportionately affects women is also relevant to the consideration of s. 134(1)(c) of the modern awards objective, which requires the Commission to take into account the need to promote social inclusion through increased workforce participation, and to s. 134(1)(e) concerning the principle of equal remuneration for work of equal or comparable value.

¹⁴⁸ See paragraph 138 et seq below.

¹⁴⁹ *Annual Wage Review 2015–2016* [2016] FWCFB 3500, [576].

¹⁵⁰ *Ibid*, [575].

¹⁵¹ *Ibid*, [559].

¹⁵² *Parental Leave Test Case 2005* (2005) 143 IR 245, Part 3.4, esp [62]–[65].

5 *Award-covered employees affected by family and domestic violence have no safety net*

138. There are 1.86 million award-covered employees in Australia, comprising 18.8 per cent of all employees.¹⁵³ Over 57 per cent of award-covered employees are women.¹⁵⁴ Award reliance is higher in small businesses and in the private sector.¹⁵⁵
139. During the *2015-16 Annual Wage Review*, the Full Bench found that small businesses (those with 1–19 employees) have a relatively high rate of award reliance, employing about 38 per cent of award-reliant workers. However, because about 60 per cent of small businesses have no employees (as distinct from their owners), small businesses are not disproportionately large employers of award-reliant workers when compared with businesses of other sizes.¹⁵⁶
140. While business size is one indicator of the likelihood of award reliance, other factors including industry, location and job classification of employees are also significant. The industries with the highest proportion of employees reliant on award rates of pay are accommodation and food services, administrative and support services, retail trade, other services and health care and social assistance.¹⁵⁷
141. By contrast, federal and state enterprise agreements cover 41.2 per cent of all Australian employees,¹⁵⁸ and a significant proportion of the public sector workforce is covered by federal and state agreements – only around 16 per cent of private-sector employees are covered by agreements under the FW Act.¹⁵⁹ Large enterprises have the highest proportion of agreements (72 per cent), followed by medium sized enterprises (27 per cent), then small enterprises (8.8 per cent).¹⁶⁰ Data from the Australian Workplace Relations Study indicates that the most common reasons cited by enterprises for not engaging in bargaining are that award rates and

¹⁵³ Australian Bureau of Statistic, *Employee Earnings and Hours*, Australia, May 2014, Cat. No 6306.0 (**ABS EEH Survey, May 2014**) (cited in the *Annual Wage Review 2015–2016* [2016] FWCFB 3500, [1], [287], Table 4.9.

¹⁵⁴ ABS EEH Survey, May 2014; Data Cube No 63060D005_201405, Table 2 (all percentages calculated by author).

¹⁵⁵ Yuen, Rozenbens and Farmakis-Gamboni, *Award Reliance and Business Size: A Data Profile Using the Australian Workplace Relations Study* (Fair Work Commission Research Report 1/2015), Chapter 3.1.

¹⁵⁶ *Annual Wage Review 2015–2016* [2016] FWCFB 3500, [284]–[286], [306].

¹⁵⁷ *Ibid.*

¹⁵⁸ Department of Employment, *Trends in Federal Enterprise Bargaining*, June Quarter 2016, 4.

¹⁵⁹ Fair Work Act Review Panel Report, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, November 2012, page 58.

¹⁶⁰ O’Neill, *General Manager’s Report into developments in making enterprise agreements under the Fair Work Act 2009 (Cth) 2012-2015*, November 2015, 35 (Table 5.8).

conditions are adequate; employers would prefer to negotiate with individuals; and agreements are too difficult to implement.¹⁶¹

142. Award-reliant employees are generally low paid, and fall behind in terms of wage and/or household income when compared to other wage earners and to household income measurements in Australia.¹⁶²

Many employees have no paid leave entitlements

143. Nearly half of award-covered employees have no paid leave entitlements at all under modern awards: 45 per cent of all award-covered employees are employed on a casual basis.¹⁶³
144. There is a clear gender split between how men and women are employed. More than half of award-covered male employees are employed on a full-time basis (52 per cent); by contrast, 75 per cent of award-covered women are employed on a casual (51 per cent) or part-time (24 per cent) basis.¹⁶⁴

Existing entitlements are not fit for purpose

145. The employer parties argue that paid leave for persons affected by family and domestic violence is not necessary, within the meaning of s. 138 of the FW Act, because certain employees are able to access existing leave entitlements, whether through statutory entitlements, enterprise agreements, or workplace policies; and that employees have access to a range of other statutory rights and protections, specifically general protections, unfair dismissal, and anti-discrimination law, and a right to request flexible working arrangements.
146. The following points are made in response.
147. First, the reliance by employer parties on existing paid leave entitlements to meet the needs of persons affected by family and domestic violence is an acknowledgement that paid time off work is necessary for employees to attend to activities arising out of family and domestic violence, including court proceedings, medical appointments, and most urgently, moving out of home and finding alternative accommodation at short notice.

¹⁶¹ AWRS First Findings report, 29 January 2015, Table 4.4.

¹⁶² *Annual Wage Review 2015–2016* [2016] FWCFB 3500, [369], [449], [462].

¹⁶³ ABS EEH Survey, May 2014; Data Cube No 63060D005_201405, Table 2 (all percentages calculated by author).

¹⁶⁴ ABS EEH Survey, May 2014; Data Cube No 63060D005_201405, Table 2 (all percentages calculated by author).

148. Second, reliance on existing paid leave entitlements is only relevant to 55 per cent of the award-reliant workforce; 45 per cent are employed on a casual basis and so the argument that existing entitlements are sufficient cannot apply to those workers.
149. Third, existing paid leave entitlements are not designed to, and do not, meet the needs of persons affected by family and domestic violence. The ACTU has addressed in detail each provision relied on by the employer parties in the ACTU reply submissions dated 5 October 2016, at paragraphs 32 to 46, as well as in the ACTU primary submissions at paragraphs 4.34 to 4.52, and repeats and relies on those submissions here. Certain aspects of those arguments are emphasised below.
150. While an employer must not unreasonably refuse to agree to an employee's request to take *annual leave*, the period of leave must be agreed between the employer and the employee. Many workplaces mandate compulsory take-up of annual leave (for example, around Christmas), or prioritise business needs over employee reasons for taking leave, as confirmed by Brad Gandy of the ASU.¹⁶⁵ Employer discretion to grant a period of leave is of no assistance to a woman who needs to leave her home in urgent circumstances. Further, the ordinary purpose of annual leave is for rest and recreation to enable a refreshed return to work. This is difficult to achieve if annual leave is used for crisis response.
151. *Personal leave* (sick/carer's leave) and compassionate leave are expressly for persons suffering a personal injury or illness, or to care for someone in those circumstances. This form of leave can meet some of the needs of family and domestic violence victims but certainly not all. This was acknowledged by several witnesses during the hearing. Professor Cathy Humphreys stated that a person affected by family and domestic violence leave with "*a housing problem, a justice problem, a child protection problem*" will not be able to access personal leave.¹⁶⁶ Debra Eckersley of PWC stated that when discussing the provision of 10 days paid family and domestic violence leave with the executive board of PWC, she explained that:

there are a number of activities or attendances or needs that an individual experiencing family and domestic violence may need to attend that do not fall within... the definition of personal and carer's leave... whether they be court attendances, counselling, relocation, any of those kinds of things... in a high trust organisation, we would not want to encourage our employees to effectively lie to use to take that leave [by requiring employees to tell us] they're actually sick when really maybe they're not sick at that time.¹⁶⁷

¹⁶⁵ Gandy Statement, [14]; and see transcript, Wednesday 16 November 2016, PN 1572.

¹⁶⁶ Transcript, Tuesday 15 November 2016, PN 1245.

¹⁶⁷ Transcript, Thursday 17 November 2016, PN 1925.

152. ***Flexible working arrangements*** granted under s. 65(1A)(e) of the FW Act are designed for ongoing situations, not emergency or ad hoc needs (clearly illustrated by s. 64(4) of the FW Act which provides the employer must respond within 21 days). Moreover, the right to request a flexible working arrangement under s. 65(1A)(e):
- (a) Is limited to persons experiencing violence from a member of their family, and is therefore narrower in scope than the proposed ACTU clause;
 - (b) Does not guarantee that the request will be granted; and
 - (c) Does not provide the employee with any appeal or review rights. Per s. 44(2) of the FW Act, the reasonableness or otherwise of the employer's response is not reviewable, unless the entitlement is replicated in an enterprise agreement, providing access to the dispute resolution procedure in the agreement.
153. ***Workplace policies*** are ad hoc, often unenforceable, and entitlements in policies can be unilaterally removed by the employer. It is not fair or relevant to leave employees' safety to the discretion of their employers, nor is it fair to leave it to employers to work out the best way to assist employees without any guidance.
154. ***Statutory protections*** such as the right to bring general protections and unfair dismissal claims are not preventative but remedial. Moreover, as set out above, while employees can in fact be discriminated against on the basis of their status as a victim of family and domestic violence, there is no statutory protection for persons affected by family and domestic violence, which is not a 'protected attribute' in any state or national anti-discrimination legislation.

Enterprise bargaining

155. The Full Bench heard evidence from a number of union officials who deposed to efforts to include paid leave provisions in enterprise agreements. The AIG tendered a statement from Ms Mandel, a lawyer employed by the Australian Industry Group, regarding the number of enterprise agreements with paid domestic violence leave clauses held by the Commonwealth Department of Employment's Workplace Agreements Database (**WAD**).¹⁶⁸
156. The relevance and the utility of the evidence about the contents of enterprise agreements must be carefully defined.

¹⁶⁸ Statement of Jenni Mandel, tendered and marked as **Exhibit F4 (Mandel Statement)**.

157. At the outset, the obvious statement must be made that per s. 57 of the FW Act, the existence of paid family and domestic violence leave clauses in enterprise agreements does not assist award-covered employees whose workplaces are not covered by an enterprise agreement. Award-reliant employees do not have power to bargain, and do not receive the benefits that come from bargaining.
158. The content of domestic violence leave clauses in enterprise agreements must be treated with caution for the purposes of the four yearly review of modern awards. In the Full Bench decision relating to the review of the *Fire Fighting Industry Award*, the Full Bench endorsed the following observation made in the *4 Yearly Review – Annual Leave Decision*:
- We are conscious of the need to exercise care when assessing the provisions in enterprise agreements in the context of a review of modern awards. Enterprise agreements are negotiated by the parties and approved by the Commission against various statutory criteria. The legislative context relevant to the review of modern awards is quite different.¹⁶⁹
159. Accordingly, the evidence of terms in enterprise agreements cannot be relied on in support of an argument that paid leave is not ‘necessary’ for award-covered employees. Enterprise agreements are negotiated between the parties; by comparison, modern awards do not have ‘parties’, and the only scope to amend their terms is by this process or pursuant to Part 2-3, Division 5 of the FW Act. For that reason, the line of cross-examination pursued by ACCI of the industrial witnesses (Jackson, Doleman, Gandy, O’Neil and Kemppi) concerning their approach to bargaining does not assist the Commission to determine whether a modern award term providing for paid family and domestic violence leave is necessary and meets the modern awards objective.
160. There are further serious limitations on the conclusions that can be drawn from data provided by the WAD.
161. The WAD is maintained by the Commonwealth government Department of Employment. The WAD holds over 140,000 enterprise agreements made since 1991.¹⁷⁰
162. Ms Mandel’s employer sought information about ‘domestic violence provisions’ in all current agreements on the WAD, and information about ‘domestic violence provisions’ in all agreements approved in the first six months of 2016,¹⁷¹ as well as the text of any such clauses.

¹⁶⁹ *Fire Fighting Award Decision*, [113].

¹⁷⁰ See **Exhibit B26**.

¹⁷¹ Since 1 January 2016, the WAD has coded more detail about the content of family and domestic violence clauses in its database. Before 1 January 2016, the WAD only recorded if an agreement had a family and domestic violence clause, but not any detail about the content of that clause: see PN 2388–2400 and **Exhibit B27**.

In response, the WAD provided Ms Mandel with an Excel spreadsheet containing a list of 1,149 agreements said to be ‘current’ agreements with domestic violence provisions, and a separate list of 323 agreements approved in the first six months of 2016 that contained family and domestic violence clauses. Ms Mandel then performed some analysis of the two sets of agreements with respect to the number and nature of domestic violence clauses.

163. The limitation on the use of WAD data arises because the WAD defines a ‘current agreement’ as one that has not passed its nominal expiry date. However, per ss. 54 and 58 of the FW Act, an agreement that has past its nominal expiry date remains in operation until it is terminated or replaced by a later agreement. The list of 1,149 ‘current agreements’ provided by the WAD to Ms Mandel’s employer all had nominal expiry dates on or after 30 June 2016, which the WAD represented constituted 7.9 per cent of all ‘current agreements’ (ie agreements not past their nominal expiry date).
164. That is, the WAD did not provide Ms Mandel with any agreements that had past their nominal expiry date but were still operational. Neither the WAD nor Ms Mandel’s analysis contains any information to permit a conclusion that the 1,149 agreements provided to Ms Mandel are representative of the universe of operational enterprise agreements or not. In the circumstances, no reliable conclusions can be drawn from Ms Mandel’s analysis of the 1,149 agreements at paragraphs 10–25 of her statement that would be applicable to all operational enterprise agreements.
165. Further, although Ms Mandel’s analysis of family and domestic violence clauses in the 323 agreements approved between 1 January and 30 June 2016 could be said to be representative of agreements approved in that period, there is no basis from which to claim that those agreements are representative of operational agreements more broadly.
166. During cross-examination, Ms Mandel conceded that she was not able to say whether there were, or were not, any number of operational enterprise agreements with family and domestic violence clauses that had passed their nominal expiry date, and accordingly, whether the two sets of agreements analysed by her (the 1,149 and the 323) were representative of all operational agreements, or not.¹⁷²
167. Accordingly, the relevance of evidence presented by the ACTU about enterprise bargaining around family and domestic violence leave is confined to two propositions:¹⁷³ first, that the capacity and ability to engage in enterprise bargaining is no guarantee that paid leave will be

¹⁷² Transcript, Friday 18 November 2016, PN 2438–2444; PN 2470–2473; PN 2486–88.

¹⁷³ Set out in more detail at paragraph 51 of the ACTU reply submissions.

included in an agreement, which goes to the need for agreement-covered employees of an award safety net; and second, that there is no evidence before the Full Bench that enterprises with family and domestic violence leave clauses are experiencing any of the difficulties identified by the employer parties as likely to arise by reason of the inclusion of paid leave in modern awards. This point is addressed further below at paragraph 192.

168. As to the first proposition, the evidence demonstrates that if there is no appetite on the part of the employer to provide paid family and domestic violence leave, the entitlement is unlikely to be delivered through bargaining.
169. Brad Gandy of the AWU gave evidence that the Spotless Group declined to accept a claim for paid family and domestic violence in the *Spotless (Alcoa Sites) Enterprise Agreement 2016*, in part (at least initially) because of a misunderstanding by the Spotless Group that paid family and domestic violence leave was provided for in the NES.¹⁷⁴ Sunil Kemppi of the CPSU gave evidence that the PSU group within the CPSU has been bargaining with 99 Commonwealth agencies since the nominal expiry of Australian Public Service enterprise agreements on 30 June 2014, and that despite the endorsement by members of a claim for 20 days paid family and domestic violence leave, agencies are prevented from negotiating about this matter by the Commonwealth government's Public Sector Workplace Bargaining Policy.¹⁷⁵ Similarly, Michelle Jackson of the ASU and Michele O'Neil of the TCFU gave evidence of circumstances in which employer unwillingness to bargain led to stalemate on the issue.¹⁷⁶ None of this evidence was not disturbed on cross-examination.¹⁷⁷
170. The evidence also demonstrates there is a high degree of variability in bargaining outcomes. For example, Michelle Jackson gave evidence that the family and domestic violence clauses in enterprise agreements negotiated by the ASU contain paid leave; unpaid leave; no leave; supportive provisions; and leave that is entirely discretionary.¹⁷⁸

¹⁷⁴ Annexures 3 and 4 to the Statement of Brad Gandy, tendered and marked as **Exhibit B10 (Gandy Statement)**.

¹⁷⁵ Statement of Sunil Kemppi, tendered and marked as **Exhibit B15 (Kemppi Statement)**, [16]–[19], [25], [26].

¹⁷⁶ See statement of Michelle Jackson, tendered and marked as **Exhibit B8 (Jackson Statement)**, [16]; Statement of Michele O'Neil, tendered and marked as **Exhibit B14 (O'Neil Statement)**, [20], [31]–[33].

¹⁷⁷ Transcript, Tuesday 15 November 2016, PN 1354–1396 (Jackson XXN); Transcript, Wednesday 16 November 2016, PN 1556–60 (Gandy XXN); Transcript, Thursday 17 November 2016, PN 2096–2122 (O'Neil XXN) and PN 2191–2195 (Kemppi XXN).

¹⁷⁸ Statement of Michelle Jackson, tendered and marked as **Exhibit B8**.

6 *Employment and recovery from family and domestic violence*

171. Financial stability, and therefore employment, is crucial to enable women and men affected by family and domestic violence to leave violent relationships, and to recover from those relationships. The evidence is that workers' economic status shapes their capacity to escape violent relationships, and employment is central to economic power.
172. In the extensive literature review on the role of economic security with respect to family and domestic violence conducted by Cortis and Bullen, the authors found that economic security gives women "*alternatives to abusive relationships, and the means to avoid and leave abusive partners*".¹⁷⁹ Without economic resources, leaving a violent relationship is extremely difficult; further, economic disadvantage is "*a barrier to achieving safety, security, independence, and wellbeing following violence*".¹⁸⁰
173. Following extensive consultation, hearings, and research, the Victorian *Royal Commission into Family and Domestic Violence* Report found that "*victims of family violence are more likely than other women to experience financial difficulty and many women experience poverty as a result of family violence, regardless of their prior economic circumstances.*" Significantly, the Commission also heard evidence that "*financial security is a significant protective factor in victims gaining freedom from abusive partners*".¹⁸¹
174. The ACTU also relies on research conducted in New Zealand about the effect on productivity of paid family and domestic violence leave. This study is addressed in the ACTU primary submissions at paragraph 7.24. The primary finding from the study bears repeating: for every woman whose experience of violence was prevented as a result of the workplace protections in a particular year, an average of \$3,371 (a conservative estimate) in production-related costs can be avoided.¹⁸²
175. The evidence of Julie Kun, CEO of WIRE, illustrates the connection between employment and recovery from family and domestic violence. Based on her experience as CEO of WIRE, as well as her work for the Australian Services Union supporting the bargaining team involved in the negotiation of the *Surf Coast Shire Council Enterprise Agreement* (the first

¹⁷⁹ Cortis *Landscapes* paper, 2.

¹⁸⁰ Cortis *Landscapes* paper, 8.

¹⁸¹ RC Report, Volume IV, Chapter 21 'Financial Security', 93.

¹⁸² Kahui S, Ku B, Snively S, *Productivity Gains from Workplace Protection of Victims of Domestic Violence* (commissioned by the New Zealand Public Service Association), March 2014, ii, at ACTU tender list, document 7.

enterprise agreement to contain paid family and domestic violence leave), Ms Kun gave evidence that:

- (a) Women without paid leave entitlements have to choose between being safe and being poor.¹⁸³
- (b) In her experience, the most effective way to counter poverty for women affected by family and domestic violence is meaningful and decently paid employment.¹⁸⁴

176. Other witnesses called by the ACTU gave evidence about the importance of employment to recovery. This evidence was not challenged on cross-examination:

- (a) Marilyn Beaumont gave evidence, derived from her experience as a public health specialist and workplace consultant, that while poor socio-economic wellbeing can result from family and domestic violence, adverse impacts on health and wellbeing can be minimised by a supportive workplace, which can be encouraged by the provision of paid leave.¹⁸⁵ The evidence points to a clear line between economic security, and health and wellbeing, which is why continuity of employment is necessary to enable victims of family and domestic violence to recover from the impact of violence.
- (b) Jocelyn Bignold gave evidence that employment is a key pathway to escaping violent relationships because it provides income and social support, which is necessary to achieve the financial independence required to make choices about matters such as housing, and children's needs.¹⁸⁶ Ms Bignold was not cross-examined.
- (c) Jessica Stott, Women's Support Worker at WIRE, provided examples from her work at WIRE of situations where family and domestic violence and employment interact. It is clear from those examples that the response of the employer can be a significant support to a person affected by family and domestic violence.¹⁸⁷ Ms Stott was not cross-examined.
- (d) Confidential Witness 1 gave evidence of the support she received from two employers. The first required her to use her existing leave entitlements to attend court,

¹⁸³ Kun Statement, [22].

¹⁸⁴ Kun Statement, [46]–[58].

¹⁸⁵ Statement of Marilyn Beaumont, tendered and marked as **Exhibit B7 (Beaumont Statement)**, [22], [28]–[41], [48]–[50]; and see Transcript, Tuesday 15 November 2016, PN 1304.

¹⁸⁶ Bignold Statement, [28]–[31], [60], [61].

¹⁸⁷ Statement of Jessica Stott, tendered and marked as **Exhibit B21**. See especially [21]–[27].

but was supportive in terms of granting leave requests and not “giving her a hard time” for needing time away from work to attend Court. However, her second employer provided paid family and domestic violence leave. Confidential Witness 1 utilised the leave to attend meetings with her solicitor and to attend Court. The paid leave entitlement assisted her to meet her legal costs arising from the violence of over \$6,000.¹⁸⁸

177. The evidence presents a clear picture of the central importance of employment to recovery from family and domestic violence. Conversely, lack of financial security can have a profoundly deleterious impact on a person’s ability to recover from violence and participate in employment. Without a clear workplace entitlement to paid family and domestic violence leave, employees are reliant on the goodwill of individual employers for job stability. This is neither fair nor relevant within the meaning of s. 134(1) of the FW Act.

7 *The operation of the proposed clause*

178. The ACTU has addressed the operation of the proposed clause in extensive detail in the reply submissions at paragraphs 88 to 139, and relies on those submissions.
179. During cross-examination of witness called by the ACTU and others, the employer parties put propositions that suggested that a broad definition of family and domestic violence could (wrongly) capture behaviour that was not ‘violence’ in the sense intended by the ACTU’s proposed clause.¹⁸⁹
180. The notion that a broad definition of family and domestic violence is potentially problematic and would cause employers difficulty in ‘working out’ if family and domestic violence had occurred was not supported by any evidence, and is a false concern that appears to be predicated on the assumption that employees will misuse an entitlement to paid leave to attend to activities arising from family and domestic violence. The ACTU strongly rejects any argument, if made by the employer parties, that a broad definition of family and domestic violence will allow employees to ‘rort’ an entitlement to paid leave. Such an assumption is both completely unsupported by any evidence called or identified by the employer parties, and contradicted by evidence and research relied on by the ACTU.¹⁹⁰

¹⁸⁸ Statement of Confidential Witness 1, tendered and marked as **Exhibit B23**.

¹⁸⁹ See, eg, Transcript, Tuesday 15 November 2016, PN 1171–1201 (XXN of Humphreys); Transcript, Thursday 17 November 2016, PN 1996–2005 (XXN of Kun).

¹⁹⁰ See, eg, RC Report, Vol IV, Chapter 24, 200-201 (no empirical evidence of false allegations); see footnote 66 above, and see ACTU primary submissions, [5.34], n 117.

181. The concern that employers would not be able to ascertain for themselves if family and domestic violence had occurred is based on a misapprehension of the purpose and intended operation of the clause. There is no requirement that employers must be satisfied that family and domestic violence has in fact occurred. The entitlement to leave arises on the employee notifying the employer that she or he has to attend to activities related to the experience of being subjected to family and domestic violence (per cl. X.2.1). An employer may ask for evidence of the purpose for which leave is sought, and if requested, the employee must provide that evidence, which must be of a quality that would satisfy a reasonable person that the leave is for the purpose intended, per cl. X.3.2. As with employee requests for personal leave, the employer's inquiry is limited to ensuring the leave is being sought for a proper purpose, and not directed to ascertaining the exact and complete nature of the employee's personal circumstances giving rise to the request.
182. The ACTU accepts that there is necessarily a subjective element involved in an assessment of whether or not family and domestic violence has occurred, particularly for non-physical forms of abuse where injuries are not readily visible. However, the assessment of whether family and domestic violence has occurred can and should only be undertaken by family and domestic violence specialists. The proposed clause does not require an employer to conduct an investigation into the employee's allegations or make an assessment of whether or not the employee is being subjected to family and domestic violence. The ACTU submits that the definition of family and domestic violence is clear, appropriate and suitable for the purpose of determining eligibility for the entitlement to paid leave in the proposed modern award clause.
183. During the hearing, the Commission asked about the scope for employers to negotiate around the timing of family and domestic violence leave.¹⁹¹ The ACTU submits there is nothing in the proposed clause that would prevent an employer from asking an employee if they could, for example, make an appointment on a day that suits both parties. However, as stated, if the employee is unable to meet the employer's request – which may occur in circumstances where, for example, she or he has to attend court hearings or to move out of home urgently – and the employee's circumstances meet the eligibility requirements of the clause, including the notice and evidence requirements, the employee is entitled to take the leave requested.
184. The employee's right to take leave is not absolute. In addition to the evidentiary requirements discussed above, the clause requires an employee to give the employer notice 'as soon as reasonably practicable' of their request to take leave under this clause.

¹⁹¹ Transcript, Tuesday 15 November 2016, PN 970 et seq.

185. The ACTU's proposed modern award clause contains similar, but not identical, requirements to those under s. 107 of the FW Act, which sets out the notice and evidence requirements for access to personal leave. Section 107 requires an employee to provide 'notice as soon as practicable' and expressly states that the notification may be at a time *after* the leave has started. The clause also requires the employee to advise the employer of the period or expected period of the leave; and states that an employee is not entitled to take leave unless the notice and evidence requirements are complied with.
186. The ACTU intends that the family and domestic violence leave clause will operate in a similar manner to paid personal leave. The purpose of the requirement for notification in the ACTU's proposed clause is to enable the employer to make arrangements to cover the employee's absence. As with personal leave, it is expected that family and domestic violence leave may be accessed both for activities that are urgent and unpredictable (including relocation and safety arrangements) as well as for events that are scheduled in advance (including court dates and counselling appointments).
187. While it is correct that the employee is entitled to provide a statutory declaration outlining the reasons for their leave request (as well as other forms of evidence such as letter from police, a lawyer or a family violence service), the employer is entitled to refuse to accept it where they are not reasonably satisfied that the statutory declaration demonstrates that the leave is for a purpose covered by the clause. If a dispute arises and the matter cannot be resolved at the workplace level, the question of whether or not the evidence is reasonable then becomes the subject of a dispute before the Commission.

Confidentiality

188. In August 2015, a Full Bench (Hatcher VP, Acton SDP and Spencer C) considered whether the Commission had jurisdiction to order that the confidentiality obligation in proposed clause X.3.3 (since amended but not in a way that undermines the holding from that decision) be included in a modern award. The Full Bench held that it would not be prepared to conclude that the confidentiality clause was beyond jurisdiction without hearing the evidence.¹⁹² At paragraph 21 of the judgment, the Full Bench stated that:

We consider that if there was evidence demonstrating the confidentiality requirement in clause X.3.3 was necessary in order for the proposed leave entitlement to operate effectively (for example because without confidentiality employees might not be prepared to disclose anything about domestic violence incidents and thus would not be able to access the entitlement), it would be reasonably arguable that clause X.3.3 was

¹⁹² *Family and Domestic Violence Clause; Family Friendly Work Arrangements Clause* [2015] FWCFB 5585, [21].

authorised by s. 139(1)(h) as a term which was about “*leave*” or “*arrangements for taking leave*” and/or by s. 142(1) as “*incidental to a term that is permitted... to be in a modern award*” and “*essential for the purpose of making a particular term operate in a practical way*”.¹⁹³

189. As set out in the ACTU reply submissions, and repeated here, the only matter for determination by this Full Bench with respect to the confidentiality clause is whether there is sufficient evidence to satisfy the Commission that cl. X.3.3 is *about* leave or arrangements for taking leave, or *incidental to and necessary for* the practical operation of leave provision.
190. The employer parties did not cross-examine any witness about their evidence as to the need for confidentiality. No evidence was led to rebut the proposition that confidentiality is necessary to enable the clause to operate in practical way. In such circumstances, the ACTU submit that the Full Bench has very good reasons for accepting the evidence regarding the need for confidentiality.
191. The following evidence and material supports the ACTU’s contention that confidentiality is necessary to enable the practical operation of the clause:
- (a) The evidence of Fiona McCormack at paragraph 42 of her statement that “*it is critical that women feel safe to disclose family violence and that when they do, they know that their disclosure will be kept confidential.*” Ms McCormack was not cross-examined.
 - (b) The evidence of Marilyn Beaumont at paragraphs 51 to 56 of her statement, including that “*trust cannot be achieved unless the woman can be absolutely confident that her story will be kept confidential*”. Ms Beaumont’s evidence is based on her extensive experience as working as a psychiatric nurse, Federal Secretary of the Australian Nurse’s Federation, workplace consultant, and expertise in public health. Her evidence about the need for confidentiality when disclosing family and domestic violence was not subject to any cross-examination, and was not addressed in any of the employer submissions.
 - (c) The evidence of ACTU Confidential Witness 3 at paragraphs 47–48. This witness was not cross-examined.
 - (d) The evidence of Debra Eckersley of PWC is that without the knowledge that information about domestic violence would be kept confidential, employees “*would*

¹⁹³ Ibid.

not ask for the assistance available under the Policy, making the Policy ineffective".¹⁹⁴ Ms Eckersley was not challenged about the need for confidentiality.

- (e) The research and material cited in the ACTU primary submissions at paragraphs 4.84 to 4.98.
- (f) The inclusion of confidentiality obligations in the Victorian Government's model clause, now included at cl. 48.4(b) of the *Victorian Public Service Enterprise Agreement 2016*.¹⁹⁵
- (g) The research cited by the Australian Human Rights Commission that "*concerns about confidentiality appear to be key barriers in using family and domestic violence leave clauses*".¹⁹⁶

192. Finally, it is relevant to note that of the 19 clauses in enterprise agreements and workplace policies in evidence before the Full Bench:¹⁹⁷

- (a) All contained broad and expansive definitions of family and domestic violence.
- (b) All included clauses providing for the confidentiality of employee disclosure about family and domestic violence;
- (c) No witness was cross-examined about either of these matters, and no evidence was put before the Commission to suggest that broad definitions of family and domestic violence and/or confidentiality obligations were unworkable.

8 *The cost of the proposed entitlement*

193. The ACTU filed evidence by labour economist Dr Martin O'Brien about the cost of the proposed entitlement.¹⁹⁸

194. Dr O'Brien's report is the only evidence before the Commission about the cost of the proposed entitlement. His report was prepared in response to a submission by ACCI about the proposed cost of the ACTU proposal. Although Dr O'Brien refers to the ACCI submission in

¹⁹⁴ Eckersley Statement, [17], and see [36] and [38].

¹⁹⁵ See Victorian Government submission, Attachment 1, cl. 1.4(b).

¹⁹⁶ See Australian Human Rights Commission submissions, [72].

¹⁹⁷ The 19 clauses are the PWC clause in the Eckersley Statement, the Spotless policy and the AWU model clause attached to the Gandy Statement, the MUA model clause attached to the Doleman Statement, the CPSU model clause attached to the Kemppi Statement, the four agreements attached to the O'Neil Statement, and the ten agreements attached to the Jackson Statement.

¹⁹⁸ Dr O'Brien's report was at Annexure MO-4 of the Statement of Dr Martin O'Brien dated 17 October 2016, tendered and marked as **Exhibit B3 (O'Brien Report)**.

his report, the ACCI estimates are not in evidence, were not tested in cross-examination, and in any event, for the reasons identified by Dr O'Brien and set out below, contain neither safe nor reliable estimates of the cost of the ACTU's proposed clause. Instead, the calculations in the ACCI "*provided an unrealistically high base line of direct costs*".¹⁹⁹

195. Dr O'Brien's evidence was that the cost of providing one day's paid leave per annum to a proportion of the target population of the entitlement, would be \$2.96 million per year. By contrast, the ACCI calculation of the cost of providing one day's paid leave per annum to a differently constituted proportion of the target population was \$205 million per year. The difference between Dr O'Brien's evidence and the ACCI submission lies in the assumptions used by Dr O'Brien which, in contrast to the ACCI assumptions, were evidence-based, data-driven, reasonable, and credible. By contrast, scrutiny of the explicit and implicit assumptions used by ACCI "*show that there are numerous facets of the methodology that have an unambiguous consequence of introducing an upward bias to the cost estimates*".²⁰⁰
196. As set out above, KPMG estimate the annual cost to employers of search, hiring and retraining employees who have left the workforce due to family and domestic violence at \$96 million per year. This is exclusive of the cost of absenteeism of victims and perpetrators, which is estimated at a further \$860 million per year. Taking the relatively smaller figure of \$96 million per annum, the cost of providing one day's paid leave per annum is a remarkably small proportion – just over three per cent – of the expenditure already incurred by Australian employers each year due to family and domestic violence.
197. In his report, Dr O'Brien explained why the cost of one day's leave cannot simply be multiplied by five and ten to obtain the cost of providing five days' or ten days' leave, as was done in the ACCI submission.²⁰¹ However, even taking this simplistic approach to estimation, the cost of providing 10 days paid family and domestic violence leave to the target population would still be less than one third of the \$96 million annual loss already incurred by Australian employers, ie, \$29.6 million per year.

¹⁹⁹ O'Brien Report, [2.24].

²⁰⁰ O'Brien Report, [2.4].

²⁰¹ See O'Brien Report, [2.13], [2.16] and below.

The basic formula

198. In calculating the cost of the proposed entitlement, Dr O'Brien adopted the basic formula used in the ACCI submission, where:

$$\begin{aligned} \text{Family and domestic violence leave cost} = \\ & \text{(a) adjusted workforce number taking leave, } x \\ & \text{(b) daily wage, } x \\ & \text{(c) days leave/year.} \end{aligned}$$

199. In performing any costing exercise, the assumptions that operate the formula must be based on available data where possible, or otherwise on rational arguments.²⁰² The following paragraphs set out the source of Dr O'Brien's assumptions, and the basis for their reliability.

Assumption (a)(i) – adjusted workforce

200. In their submission, ACCI:

- (a) Assumed that the relevant workforce was the entire Australian workforce. However, the award-reliant working population is only around 18 per cent of the entire workforce. Accordingly, the ACCI workforce resulted in a “substantial upward bias” to cost estimates.²⁰³
- (b) Reduced the workforce by 17 per cent to account for the public sector, but without explaining the basis on which this was done. Further, the ACCI submission contained a mathematical error whereby the percentage deducted from the entire workforce was 13 per cent, not 17 per cent – meaning the ACCI target population was larger by 4 per cent than intended.²⁰⁴
- (c) Disaggregated the workforce population by industry. While this is appropriate,²⁰⁵ public sector employment is not equally dispersed across ANZSIC classifications – for example, ABS data records no public sector employees in the Accommodation and Food Services classification.²⁰⁶

²⁰² O'Brien Report, [2.2].

²⁰³ O'Brien Report, [2.15].

²⁰⁴ See O'Brien Report, [2.8].

²⁰⁵ See O'Brien Report, [1.7].

²⁰⁶ O'Brien Report, [2.9], [2.19].

201. Consistent with the ACTU's proposed clause, Dr O'Brien assumed that the relevant workforce was the award-reliant employee population of 1.86 million.²⁰⁷ Using the ABS *Employment and Earnings, Public Sector* survey (2015), Dr O'Brien adjusted each ANZSIC employee population for public sector employees, on the basis that the majority of state public sector employees already have access to paid family and domestic violence leave.²⁰⁸

Assumption (a)(ii) – target population

202. The ACCI submission assumed that 35 per cent of the workforce (25 per cent of women and 10 per cent of men) (a) would be affected by family and domestic violence and (b) would take time off work as a result. This equates to a total of 1,525,533 employees per year, or over one million women and over 400,000 men taking leave per year.

203. This assumption is manifestly unreliable and a gross overestimate.²⁰⁹ There is no study, data, or research to support the assumption that 35 per cent of the workforce, or 25 per cent of women and 10 per cent of men, are affected by family and domestic violence each year. The evidence is that one in four women, or 25 per cent of all women in Australia, have been subjected to family and domestic violence since the age of 15.²¹⁰ This is a lifetime, not yearly, prevalence statistic.

204. Dr O'Brien relied on the evidence from the PSS to inform his assumption about the target population, which is appropriate and reasonable as the PSS is the most comprehensive quantitative study of interpersonal violence in Australia, designed to determine how often interpersonal violence occurs and how many people are affected by it. It is a systematic and statistically rigorous survey. The evidence in the PSS that 2.1 per cent of all women experienced at least one incident of violence by an intimate partner over a 12 month period; and 0.6 per cent of all men experienced violence from a cohabitating partner.²¹¹ The available data in the PSS for male victimhood is limited to violence from a cohabitating partner; to ensure comparable take-up estimates, Dr O'Brien adjusted the figure upward to 0.84 per cent of men (ie, including non-cohabitating partners).²¹²

205. This part of the PSS data is limited to physical violence and sexual assault (ie, excluding threat) by a male cohabitating partner (ie, excluding non-cohabitating partners and violence

²⁰⁷ O'Brien Report, [3.12].

²⁰⁸ See O'Brien Report, [3.15].

²⁰⁹ O'Brien Report, [2.20].

²¹⁰ Cox Report [7.2]; O'Brien Report, [2.11]–[2.12].

²¹¹ O'Brien Report, [2.12].

²¹² O'Brien Report, [3.5].

from non-partner family members). To ensure that a broader range of violent behaviour was captured including ‘family’ violence (ie, between parents and children over 15)²¹³ consistent with the ACTU clause, Dr O’Brien increased the proportion of affected employees who would take time off work and therefore utilise the entitlement, by 50 per cent, leading to a target population of 3.15 per cent of affected women, and 1.26 per cent of affected men.²¹⁴ Dr O’Brien was asked if he made any further adjustment for ‘abusive’ behaviour (consistent with the language used in the ACTU clause), and confirmed that it would be necessary to increase his estimates to factor for ‘abuse’.²¹⁵

206. Dr Cox gives evidence that one in 20 women in Australia had experienced emotional abuse by a former or current cohabiting partner in the 12 months prior to the survey (406,800, 4.7 per cent). Given that many women experience both physical and emotional abuse,²¹⁶ it is likely that this figure is an overestimation of the total number of woman impacted. Table 32 of the ABS data sets published with the PSS show that 2.8 per cent of males have experienced emotional abuse in the preceding 12 months.
207. It is plausible to say that in total, no more than 6.8 per cent (2.1 per cent of women who have experienced violence in the preceding 12 months plus the 4.7 per cent of women who have experienced emotional abuse in the last 12 months) of women have experienced either violence or abuse in the last 12 months. Assuming that 50 per cent of women who experienced emotional abuse have already been counted in the 2.1 per cent of women who experienced violence, the total number of women who have experienced either emotional abuse or violence in the preceding 12 months can be estimated to be 5.75 per cent. Adding 50 per cent to account for *family* and *household* violence, the figure is 8.625 per cent. Using the figures from Dr O’Brien’s report for males, and applying the same assumptions in terms of the overlap between the categories of abuse and violence, the number of men who have experienced either emotional abuse or violence in the preceding 12 months can be estimated to be 3.22 per cent; by adding 100 per cent (because men are more likely to than women to be assaulted by a non-family member or partner) to account for family/household violence, the figure is 6.44 per cent.
208. Applying these revised figures, the estimate of the total cost across all industries is \$10,420,586 for award covered employees, which is 5 per cent of the estimate in ACCI’s

²¹³ See Transcript, Monday 14 November 2016, PN 594.

²¹⁴ O’Brien Report, [3.6].

²¹⁵ See Transcript, Monday 14 November 2016, PN 672–676.

²¹⁶ Dr Cox gives evidence at [7.18] of her expert report that about half the women who reported having experienced violence by their current cohabiting partner also reported emotional abuse.

submissions. If enterprise agreements are included, the total costs increase to \$41,758,048, which is 20.36 per cent of the ACCI estimate.

209. In response to a question from the Commission, Dr O'Brien said that he did not make any specific adjustment for rates of violence from a member of a person's 'household' as compared with 'family' violence.²¹⁷
210. The ACTU proposed clause applies to persons affected by family or domestic violence inflicted by a current or former partner, or a member of the person's family or household. A household member is intended to capture violence from a person who regularly resides with the other person but who is not a family member or current or former partner, such as a carer.
211. In his initial report Dr O'Brien applied a 50 per cent increase to the intimate partner violence figures from the PSS to account for the broader category of 'family' violence (as opposed to domestic, or intimate partner, violence). It is submitted that this adjustment is appropriate and reasonable and no further adjustment is required to account for 'household' violence as distinct from family violence.

Assumption (b) – daily wage

212. The ACCI submission assumed that paid family and domestic violence leave would be paid at the minimum wage rate of \$17.70 per hour. The ACTU's proposed clause expressly provides for the payment of leave at the ordinary rate of pay. The use of the minimum wage in the ACCI calculation clearly provided a low base line for the cost of the proposed clause, but the effect of other erroneous assumptions mitigated any depressing effect from that low base line. In particular, the ACCI submission assumes that each employee taking paid family and domestic violence is a full-time employee working 7.6 hours per day. This assumption is not disclosed in the ACCI submission but is apparent from the calculations, and therefore "*imparts an upward bias to the cost estimate via the daily wage variable*".²¹⁸
213. Moreover, the assumption that all employees are employed on a full-time basis and therefore entitled to paid leave at a rate of 7.6 hours per day, lead to a substantial upward bias of the ACCI submission on costings. As set out above at paragraph 144, only 25 per cent of award-covered female employees and 52 per cent of award-covered male employees are employed on a full-time basis.

²¹⁷ See Transcript, Monday 14 November 2016, PN 660–670.

²¹⁸ O'Brien Report, [2.6].

214. Dr O'Brien's model based the hourly wage cost of leave on average hourly earnings data,²¹⁹ and, in the absence of any data regarding the number of shifts worked by part-time employees, assumed that while full-time employees were paid 7.6 hours per day, part-time employees would be paid 75 per cent of the full-time rate, or 5.7 hours per day.²²⁰
215. In cross-examination, Dr O'Brien acknowledged that he did not make any separate reduction for casual employees.²²¹ Given the diversity of working hours among casual employees, this would be a difficult exercise to perform. However, the variety of working hours among casual employees – anywhere between two and 40 hours per week – mean that it is unlikely that Dr O'Brien's estimates would *increase* by allowing for casual rates, and would likely *decrease*, because casuals generally work less than full-time hours.

Assumption (c) – take-up rates

216. The ACCI submission assumes that *all* employees who experience family and domestic violence in a year will take time off work (ie, the **take-up rate**). The take-up rate is therefore 100 per cent of the affected population, which on ACCI's estimate, is 35 per cent of the workforce. As addressed above, ACCI's estimate of the affected population is not based in fact.
217. In the year prior to the 2012 PSS, over 25 per cent of women who experienced physical violence and 20 per cent who experienced sexual assault, from a male cohabitating partner took time off in the 12 months following the incident. The population from which the 25 and 20 per cent figures are taken must be restated – only 2.1 per cent of all women in Australia in a 12 month period were affected by family and domestic violence, and 0.6 per cent of all men (increased to 3.15 per cent of women and 1.26 per cent of men by O'Brien for the purposes of the cost estimate performed by him).

What do we know about take-up rates?

218. While there is no national comprehensive survey of take-up rates of paid family and domestic violence leave entitlements, it is possible to derive reasonable assumptions about take-up rates from the available data, which is set out in the table below. Some of that material (indicated in the table) was used by Dr O'Brien to form the basis of an assumption that the take-up rate

²¹⁹ O'Brien Report, [3.3], [4.2].

²²⁰ O'Brien Report, [3.4], [4.3].

²²¹ Transcript, Monday 14 November 2016, PN 577.

would be 50 per cent of the target population of 3.15 per cent of women and 1.26 per cent of men.²²²

219. As can be seen from the following table, while there is a high level of uncertainty about take-up rates (as was acknowledged, appropriately, by Dr O'Brien in cross-examination),²²³ the available data demonstrates that take-up rates are generally low, meaning Dr O'Brien's assumption that 50 per cent of affected employees would take up the entitlement is unlikely to be an underestimate and could even be an overestimate.

Source	Take-Up Rates	Note
Personal Safety Survey (Cox Report).	Of the 2.1 per cent of women who experienced family and domestic violence in the 12 months prior to the PSS, 25 per cent of women who experienced physical violence from a male cohabitating partner, and nearly 20 per cent who experienced sexual assault from a male cohabitating partner took time off work in the 12 months following the incident.	Limited to female employees who experienced male cohabitating violence from current partner in previous 12 months.
Personal Safety Survey (Cox Report).	Of the 2.1 per cent of women who experienced family and domestic violence in the 12 months prior to the PSS: <ul style="list-style-type: none"> Between 23 and 40 per cent contacted police. Between 61.9 per cent and 94 per cent of women who experienced partner violence in the past year sought advice or support. 	These figures cover violence from both a current and a past partner, and are not limited to employed people. The figures also include assistance sought from friends and family members, not just professionals. See O'Brien [3.9].
PWC Policy: 10 days paid leave. See Exhibit S1 .	5 employees have accessed the policy since the introduction on 23 November 2015. Not all have sought leave. See PN 1752.	
<i>Telstra Enterprise Agreement 2015–2018</i> , cl 33.3: 10 days paid leave. (Document 11 in the ACTU tender list).	22 out of 32,000 in six months. The average leave taken is 2.3 days: <i>Male Champions of Change</i> Report, 17.	Earlier take-up data (17 employees) referred to by O'Brien at [3.7].
South Coast Shire Council, in correspondence to the Fair Work Commission dated 16 September 2016.	Two employees since the introduction of the policy in 2013, at a cost of \$2,324.	
Greater Dandenong Shire Council, in correspondence to the Fair Work Commission dated 15 November 2016.	Since the introduction of paid leave three years ago, 7 out of 940 people have accessed paid leave. This equates to 0.7 per cent of employees in total, or less than 0.25 per cent of employees per year.	

²²² O'Brien Report, [3.11].

²²³ See Transcript, Monday 14 November 2016, PN 636.

Source	Take-Up Rates	Note
ACTU/UNSW, <i>Implementation of Domestic Violence Clauses – An Employer’s Perspective</i> (Breckenridge, Cale, et al). (Document 6 in the ACTU tender list).	35 per cent of 102 workplaces reported a request for DV leave. Average time off for paid leave was 43 hours per person, and average time off for unpaid leave = 19 hours (after controlling for outliers) per person.	See O’Brien at [3.7].
UNSW, <i>Domestic and Family Violence Clauses in Your Workplace: Implementation and Good Practice</i> (McFerran, Cortis, Trijbetz) (June 2013). (Document 8 in the ACTU tender list).	41.9 per cent of respondents reported having to take time off work because of the violence.	
McFerran, <i>Safe at Home, Safe at Work? National Domestic Violence and the Workplace Survey</i> . (Document 9 in the ACTU tender list).	Of the 5 per cent of the 3,611 respondents who had experienced DV in the past 12 months, 10 per cent reported taking time off work: see 6, 10.	

220. Next, the ACCI submission calculates that the cost of providing leave on one day can simply be multiplied by five and ten to obtain the cost of providing five and ten day’s leave.

221. This assumption compounds earlier inaccurate assumptions by ACCI about the number of eligible employees, their employment status (ie, all full time), and take-up rates. However, as set out by O’Brien, this assumption “ignores any pro rata issues and means that all part-time and casual employees would be eligible to take five or ten days’ paid leave”, and also “assumes that all of those taking one day’s leave would also require five or ten days”, leading to an overestimate of the cost.²²⁴

Dr O’Brien’s estimate is reliable

222. In addition to basing assumptions that underpin the methodology on available data, Dr O’Brien conducted sensitivity testing to determine how responsive his estimates were to key assumptions, noting that some assumptions were based on more robust data than others.²²⁵

223. The result of Dr O’Brien’s estimate of the cost of providing one day’s paid leave per annum is set out in detail at Table 1 of his report. An abridged version is set out below, with the ACCI estimate in the last row for comparison purposes.

²²⁴ O’Brien Report, [2.16], [2.23].

²²⁵ See O’Brien Report, [3.16]–[3.20], [4.12]–[4.14].

	Total workforce	Population Affected	Population Taking Up Leave	x daily rate
O'Brien	1.86 million (award only, less public service).	3.15% F 1.26% M <i>Total 33,240</i>	1.575% F 0.63% M <i>Total 16,620</i>	\$2.96 million (1.4% of ACCI estimate)
ACCI	10.25 million (all less 13 per cent).	25% F 10% M <i>Total 1,525,553</i>	25% F 10% M <i>Total 1,525,553</i>	\$205 million.

224. When combining the cost of both award and collective agreements, the total estimated cost is \$11.9 million per annum, or 5.8 per cent of the ACCI estimate.²²⁶
225. During cross-examination, Dr O'Brien agreed that his costing did not include any administrative cost related to managing leave, or disruption in terms of lost productivity.²²⁷ No evidence was put to Dr O'Brien about the cost of these matters, and any subsequent representation of those costs, out of fairness to the witness, should not be admitted. However, it is relevant to note that unless employers only employ casual workers, employers will already have administrative processes in place for managing leave, and employers regularly adjust the inputs of their workforce management systems to, for example, adjust for minimum wage increases, parental leave, and the like. Accordingly, to the extent administrative costs exist at all, they are likely to be small. Further, the cost of lost productivity due to employees being on leave to attend to matters relating to family and domestic violence is a cost that is already being incurred by employers. Both KPMG and PWC estimate the cost of lost productivity due to violence against women to be between \$2.031 and \$1.9 billion per year.
226. The evidence of Dr Martin O'Brien is reliable, properly calculated, and should be accepted by the Commission. Even where revised figures are used to account for the broader category of emotional abuse, Dr O'Brien's report demonstrates that the cost of providing paid family and domestic violence leave is considerably less than the cost already incurred by employers of \$96 million per year in search, hiring, and retraining employees to replace those who have left the workforce due to family and domestic violence.

²²⁶ O'Brien Report, [4.11].

²²⁷ See Transcript, Monday 14 November 2016, PN 639.

C MEETING THE STATUTORY TEST

Sections 3 and 578 of the Fair Work Act

227. Section 578 of the FW Act requires the Commission to take into account the objects of the FW Act in performing its functions and exercising its powers.
228. Section 3(a) provides that one of the FW Act's objects is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by "*providing workplace relations laws that... take into account Australia's international labour obligations*".
229. The ACTU's primary submissions at paragraphs 9.1 to 9.39, and reply submissions at paragraphs 66 to 71, and the Australian Human Rights Commission's submissions dated 12 May 2016 and 14 October 2016, address the ways in which the inclusion of paid family and domestic violence leave in all modern awards will assist Australia to comply with its international labour and human rights obligations.
230. Since those submissions were filed, relevant developments have taken place in relation to the meeting of experts referred to at paragraph 9.15 of the ACTU's primary submissions.
231. As previously outlined, the International Labour Organization's (ILO) International Labour Conference (ILC) will begin the process of setting a new standard on violence against women and men in the world of work at its meeting in June 2018. In the lead up to this meeting, the ILO Governing Body (GB) is reviewing violence in the world of work, including its gender dimensions, its impact on workers and enterprises, and responses in national and international laws and regulations, collective agreements and enterprise policies.
232. A Meeting of Experts on Violence against Women and Men in the World of Work, convened to assist the GB with its deliberations, met from 3–6 October 2016 (**meeting of experts**). Australia chaired the meeting and experts were drawn from Argentina, Australia, Belgium, Canada, India, Rwanda, South Africa and Sweden. As with all ILO forums, workers, employers and national governments were represented.
233. Relevantly, the meeting of experts adopted the following conclusions:²²⁸
1. Domestic violence and other forms of violence and harassment are relevant to the world of work when they impact the workplace;

²²⁸ International Labour Organisation, Meeting of Experts on Violence against Women and Men in the World of Work, Conclusions Adopted by the Meeting, MEVWM/2016/6, Geneva, 3–6 October 2016

2. Violence in the world of work affects:
 - a) workplace relations, worker engagement, health, productivity, quality of public and private services, and enterprise reputation, and
 - b) labour market participation and, in particular, may prevent women from entering the labour market, especially in male-dominated sectors and jobs, and remain therein;
3. “Violence” should be described as “violence and harassment”, in order to capture the continuum of unacceptable behaviours and practices that are likely to result in physical, psychological or sexual harm or suffering;
4. While international labour standards relevant to the elimination of violence and harassment do exist,²²⁹ these instruments do not define violence and harassment, provide guidance on how to address its various manifestations, or cover all workers, and lack an integrated approach essential to addressing violence and harassment in the world of work. For this reason, the meeting of experts agreed on the need for the development of a new standard altogether;
5. Violence and harassment in the world of work persists and must be tackled as a matter of urgency, with particular attention paid to the gender dimensions of violence;
6. An integrated approach to addressing violence and harassment in the world of work is needed, delineating clear responsibilities for public and private employers, workers and their respective organizations, and governments in dealing with violence and harassment, and joint strategies and collaboration are also important;
7. Collective agreement clauses could address the effects of domestic violence. The workplace provides an entry point to mitigate the effects, and employers could be allies to address such violence, though they are not responsible for it. Clauses could, for example, include provision of support for and leave to victims, and connecting victims to community services.

234. Section 578(c) of the FW Act requires the Commission to take into account equity, good conscience, and the merits of the matter when performing functions (such as the modern awards review) and exercising powers (such as granting applications for award variation). The ACTU has addressed the merits of its case throughout these submissions. We consider that good conscience requires the Full Bench to recognise the fact that a whole of community response is necessary to eradicate family and domestic violence and reduce the impact on victims and survivors.

²²⁹ For example, Forced Labour Convention, 1930 (No. 29); Protocol of 2014 to the Forced Labour Convention, 1930; Abolition of Forced Labour Convention, 1957 (No. 105); Worst Forms of Child Labour Convention, 1999 (No. 182); Indigenous and Tribal Peoples Convention, 1989 (No. 169); Maritime Labour Convention, 2006 (MLC, 2006); HIV and AIDS Recommendation, 2010 (No. 200); Domestic Workers Convention, 2011 (No. 189); and Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204); Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); and Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Occupational Safety and Health Convention, 1981 (No. 155); and Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187).

Section 134(1) – enforceable, fair and relevant, guaranteed minimum terms and conditions

235. The current safety net of terms and conditions is not ‘fair’, as mandated by s. 134(1) of the FW Act. It is not fair because the absence of paid family and domestic violence leave requires many employees, who are also victims of crime, to use paid leave intended for leisure or illness to attend to activities directed to recovery from family and domestic violence. A significant proportion of employees are required to take unpaid leave, compounding the economic disadvantage suffered by persons affected by family and domestic violence.
236. The evidence has established that employment is essential to recovery from family and domestic violence, and that a supportive workplace can have a significant positive impact on employees’ health and wellbeing. Employees should not have to rely on luck or the discretion of their employer to be supported when seeking to recover from family and domestic violence. It is for this reason that paid family and domestic violence leave should be included in all modern awards and not left to policy or enterprise bargaining.

Section 134(1)(a) – the needs of the low-paid

237. In the *Annual Wage Review 2015–2016*, the Fair Work Commission Expert Panel acknowledged that the available information, as a whole, suggested that the majority of award-reliant employees are probably also low-paid,²³⁰ and that “*there is no doubt that the low paid and award reliant have fallen behind wage earners and employee households generally in over the past two decades*”.²³¹
238. It is reasonable to assume that a proportion of those award-reliant employees who are low paid may be affected by family and domestic violence. For those employees, financial stability is critical. Paid family and domestic violence leave would ensure that low-paid workers are not further disadvantaged by being required to take unpaid leave, or to jeopardise their employment, in order to meet the needs arising out of being subjected to family and domestic violence.

Section 134(1)(b) – the need to encourage collective bargaining

239. The evidence before the Commission establishes that paid leave for persons affected by family and domestic violence is present in some enterprise agreements, although Ms Mandel’s

²³⁰ By reference to the two-thirds of median weekly earnings benchmark: *Annual Wage Review 2015–2016* [2016] FWCFB 3500, [369], [449].

²³¹ *Annual Wage Review 2015–2016* [2016] FWCFB 3500, [372].

evidence about the contents of the WAD does not allow the Commission to make any finding about the scope of enterprise coverage.²³²

240. The evidence of union officials Ms Jackson (the ASU), Mr Doleman (the MUA), Mr Gandy (the AWU), Ms O’Neil (the TCFUA) and Mr Kemppi (the CPSU) concerned efforts during bargaining to include paid leave provisions in enterprise agreements. The unchallenged evidence of each of those witnesses was that including domestic violence leave provisions was difficult and depended entirely on the willingness of employers to consider the clause. The variation of modern awards to include paid leave would both encourage collective bargaining and produce greater efficiencies in bargaining in respect of this issue by providing a clear and consistent minimum benchmark.
241. The employer parties argue that incorporating paid leave for persons affected by family and domestic violence would discourage collective bargaining.²³³ The employer parties put no evidence before the Full Bench in support of that proposition. The evidence that exists about the relationship between increases in the minimum wage (and by extension here, increases in the cost of employment through the provision of paid leave) and collective bargaining is that minimum wage increases do *not* discourage collective bargaining.²³⁴ The decision to engage in bargaining involves a “*complex mix of factors*” and cannot be attributed to a single cause.²³⁵
242. In the review of the *Firefighting Industry Award*, the Full Bench considered an application by the Victorian fire services to remove the prohibition on part-time work in the modern award. The variation was opposed by the United Firefighters’ Union of Australia (UFUA). The variation was permitted, with the Full Bench holding that:

... varying the Fire Fighting Award to permit part-time employment... will encourage collective bargaining in respect of this issue. The current award terms provide little incentive for the UFUA to bargain in respect of this issue – it can simply rely on what is effectively an award prohibition on part-time employment... Accordingly, we are satisfied that varying the Firefighting Award in the manner described will ‘encourage collective bargaining’ within the meaning of s. 134(1)(b).²³⁶

243. The ACTU submits that the same considerations would apply in this case.

²³² See paragraph 160 and following above.

²³³ See AIG submissions, [572]–[573].

²³⁴ *Annual Wage Review 2015–2016* [2016] FWCFB 3500, [523].

²³⁵ *Annual Wage Review 2015–2016* [2016] FWCFB 3500, [527], [538].

²³⁶ *Fire Fighting Award Review*, [142].

Section 134(1)(c) – social inclusion

244. Section 134(1)(c) requires the Commission to ensure that modern awards, together with the NES, to promote social inclusion through increased workforce participation. This has been interpreted to mean increased employment.²³⁷
245. The ACTU rely on the evidence set out above that demonstrates how family and domestic violence disrupts employment and precludes workforce participation. This dis-employment effect is particularly egregious for women.
246. ‘Social inclusion’ requires more than simply having a job. In the *Annual Wage Review 2015–2016*, the Expert Panel endorsed the proposition that a job with inadequate pay can create social exclusion if the income level limits the employee’s capacity to engage in social, cultural, economic, and political life.²³⁸ It follows that a job with inadequate safety net protections against the employment disruption that can occur as a result of needing time away from work to attend to matters arising from family and domestic violence can contribute to social exclusion and is contrary to the modern awards objective.

Section 134(1)(d) – flexible modern work practices and efficient and productive work

247. The ACTU submits that this sub-section is neutral to the application.

Section 134(1)(da) – the need for additional remuneration in prescribed circumstances

248. The ACTU submits that this sub-section is neutral to the application.

Section 134(1)(e) – equal remuneration principle

249. Family and domestic violence disproportionately affects women, who are already disadvantaged participants in the workforce thanks to the gender pay gap, the reality that women shoulder the bulk of caring responsibilities; and the likelihood that women will be employed on a casual or part-time basis.
250. Existing leave entitlements are ‘facially neutral’, in that they apply equally to men and women. However, the appearance of neutrality disguises the fact that women affected by family and domestic violence who are required to deplete their personal and annual leave resources are subject to additional indirect discrimination with respect to the treatment of leave. For these reasons, women are not receiving leave entitlements on equal terms to men.

²³⁷ *Annual Wage Review 2015–2016* [2016] FWCFB 3500, [465].

²³⁸ *Annual Wage Review 2015–2016* [2016] FWCFB 3500, [467].

This matter is also relevant to s. 578(c) of the FW Act, which requires the Commission to help to prevent and eliminate discrimination.

251. In the *Annual Wage Review 2015–2016*, the Full Bench held that women’s overrepresentation among the award reliant and low paid, together with the gender pay gap, was a factor in favour of an increase in the modern award minimum wage.²³⁹ The ACTU submits that the same considerations are applicable here. The grant of paid family and domestic violence leave will reduce the fiscal impact of the disproportionate levels of family and domestic violence against women.

Section 134(1)(f) – productivity, employment costs, and the regulatory burden and section 134(1)(h) – performance of the national economy

252. Family and domestic violence already has a significant negative impact on productivity and employment costs, and on the national economy. The ACTU refers to and repeats these submissions insofar as they address the impact of family and domestic violence on the national economy, lost productivity, and employment costs.
253. The ACTU acknowledges that the initial provision of the entitlement will increase employment costs. However, those costs are likely to be in the vicinity of between \$2.96 and \$29.6 million, and not anything close to the grossly over-estimated costs in the ACCI submission. In our submission, the cost of providing paid family and domestic violence leave are reasonable and proportionate having regard to the needs of employees, the cost of family and domestic violence to the national economy, and the cost of inertia, estimated by PWC to accumulate to \$323.4 billion over a 30 year period to 2045.
254. The proposed clause is intended to support employees to safely leave violent relationships without jeopardising their financial security. Over time, it is expected that this will result in a reduction in family and domestic violence, ie, that was occurring in relationships that have ended. In this way, paid family and domestic violence leave operates as a tertiary prevention strategy. Tertiary prevention strategies (response or intervention) refer to responses set in motion after violence has occurred; they aim to reduce consequences and impact of violence, and prevent recurrence.
255. By reducing future violence, the proposed clause will contribute to the reduction in productivity losses and employment costs that are directly attributable to family and domestic violence, and are already being borne by employers. Further, by shouldering some of the cost

²³⁹ *Annual Wage Review 2015–2016* [2016] FWCFB 3500, [575], [578].

of family and domestic violence, which is disproportionately and unfairly borne by victims, and to a lesser extent state and federal governments, the burden to the national economy will be dispersed.

Section 134(1)(g) – a simple, easy to understand, and sustainable modern award system

256. The ACTU has addressed the operational concerns raised by the employer parties at paragraphs 178 to 192 above. The application of a common entitlement across all modern awards will be simpler and easier to understand than a piecemeal approach.

Conclusion

257. The ACTU recognises that no single initiative will prevent family and domestic violence.

258. But just as sick leave does not prevent illness, employers provide sick leave as part of the whole-of-community response to illness. Sick leave, along with health and medical services, education around public health, and primary prevention strategies, plays an important role in the community's response to illness, by allowing employees who are unwell time to recover and to return to work.

259. In the same way, paid family and domestic violence leave to allow people to attend court, or see a counsellor, or make arrangements for emergency accommodation, will help prevent the financial instability that is so devastating to a person's attempt to recover from a violent relationship.

260. By providing paid leave, employers will enable employees to safely escape violent relationships while maintaining their employment, which will help prevent future violence, and will allow workplaces to be part of the solution to a complex and pervasive problem.

28 November 2016

K Burke