

IN THE FAIR WORK COMMISSION

FAIR WORK ACT 2009

MATTER No: AM2015/1

**SECTION 156 – FOUR YEARLY ANNUAL REVIEW
OF MODERN AWARDS – FAMILY AND DOMESTIC
VIOLENCE**

**SUBMISSION OF THE AUSTRALIAN MEAT
INDUSTRY COUNCIL (AMIC) IN RESPONSE
TO ACTU SUBMISSIONS**

16 SEPTEMBER 2016

This Submission

This submission deals with the family/domestic violence Common Issue. The section headings contained herein are listed as follows:

1. Submission summary
2. Introduction
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6. The ACTU submissions (with brief AMIC comments);
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9. Legislation concerning domestic/family violence
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11. Assessment of claim against the MAO
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1. Submission Summary

1.1 For the summary we begin by extracting 6.4 and 6.5 and 8.13 from this submission:

6.4 *'.....the overall argument for involving the employer and mandating 10 days extra paid leave (no matter how large or small the employer or the makeup of the workforce) for a non-related work issue appears to be that family/domestic violence (meaning in a family or household situation) is a problem in society and impacts the employee victim and therefore must impact the employee's work in varying degrees when present at the workplace and this affects the employer and working with support is one method overseen by the employer whereby positive benefits can be bestowed as work is a motivator and one of the benefits is to grant 10 days paid leave per year to deal with certain matters and thereafter 2 days unpaid leave at the cost to the employer so that the worker does not have to, unnecessarily, eat into other accrued entitlements or take unpaid leave and such domestic/family violence paid leave should stand alone as an entitlement.*

6.5 *As we have stated or implied at various points in this submission, one could replace 'family/domestic violence' with other important social issues that severely impact employees and the same question for the Commission would need to be answered. How does a variation to awards as proposed by the ACTU draft clause satisfy ss.134 and 138?.....*

8.13 *Legal practitioners will know that many family and domestic violence incidents are followed by police intervention and are followed by the issuing of notices (however termed under relevant statutes) by the police that become the application to the court for final relief. Some family and domestic violence victims involve the medical profession, some do not. Some family and domestic violence victims have young children, some do not. Some family and domestic violence victims involve lawyers, some do not especially where the matter is taken forward by the police themselves. Some family and domestic violence*

victims seek counselling, some do not. Some family and domestic violence victims relocate and some do not. Some family and domestic violence victims are employed and some are not employed. Some applications before proceeding to mention or hearing are withdrawn. Some applications are dismissed for want of evidence or other reasons. The Commission would need to be appraised of evidence on each of these circumstances. No cogent or probative reasons have been advanced in the submission of the ACTU for 10 days paid leave at the employer's expense.'

- 1.2 This is a claim for paid leave over and above other leave entitlements or specific family/domestic violence flexibility entitlements under the Fair Work Act 2009. In other words, the claim, if successful, would mean the first type of paid leave to be sourced from a modern award and not the Act, including for every casual employee without qualification.
- 1.3 AMIC is of the view that, considering all forms of leave under the Fair Work Act 2009 have as their source the National Employment Standards (NES), an issue such as the ACTU claim is best left to Federal Parliament to fully consider given the obvious serious cost impact for employers, whether there is merit for any additional NES leave for a particular defined group given that the Act already provides for flexible workplace practises for that group and whether employers should meet the cost of another form of paid leave for a given group.
- 1.4 Parliament could also fully consider the differing coverage under various state and territory family/domestic legislation because the ACTU claim appears at odds with this coverage.
- 1.4 In the alternative, if the Commission considers the merit of the claim then, for reasons herein, the ACTU claim must be rejected when considered against the relevant sections of the Act.
- 1.5 The ACTU has proposed or raised no alternative so no submissions on alternatives are needed at this point.

2. Introduction

- 2.1 A 4 yearly review of the 122 modern awards (*awards*) is being conducted by the Fair Work Commission (*the Commission*) pursuant to s.156 of the Fair Work Act 2009 (Cth) [*the Act*].
- 2.2 The Commission determined the review involves, inter alia, an Award stage and Common issue stage.
- 2.3 As part of the review, the Australian Council of Trade Unions (*ACTU*) seeks to vary all awards by inserting a '*family and domestic violence*' leave provision for employees solely at the cost to employers. If successful, the claim would provide an employee, who claimed to be experiencing family and domestic violence, with 10 days paid leave per year plus other benefits and place conditions on the employer.
- 2.4 The Commission decided that the '*family and domestic violence*' matter should proceed as a common issue and be referred to a Full Bench. The Commission has stated that the referral of any common issue claims to a Full Bench '*simply relates to the process adopted for hearing and determination of the claims...*'¹
- 2.5 Various employer parties raised jurisdictional issues in response to the February 2015 drafts of the ACTU. On 15 June 2015 the ACTU filed an amended clause (*ACTU draft clause*) in response to jurisdictional objections raised by various employer parties.
- 2.6 By decision dated 22 October 2015 a Full Bench decided it would be premature to strike out any parts of the ACTU draft clause without hearing evidence.²
- 2.7 Pursuant to directions of the Commission, the ACTU has filed submissions and witness statements (though some or some parts are viewed confidential) in support of the ACTU draft clause. Not all evidence is therefore available to all parties.

¹ [2014] FWC 8583 at [15].

² [2015] FWC FB 5585.

- 2.8 The Commission invited parties to file submissions in response to the ACTU submissions by 15 September 2016.
- 2.9 This submission by the Australian Meat Industry Council (AMIC) is in response to the ACTU filed submissions and available evidence. AMIC, as a peak industry organisation, has an interest in a number of the modern awards but primarily the meat industry award.
- 2.10 AMIC opposes the ACTU draft clause, in entirety, for all the reasons contained in this submission.
- 2.11 AMIC does not intend to file evidence with this response submission.

3. The ACTU draft clause

3.1 The ACTU draft clause;

- defines family and domestic violence as *'any violent, threatening or other abusive behaviour by a person against a member of the person's family or household (current or former)'*;
- provides the employee alleging family and domestic violence – including a casual – with 10 days paid leave per year to attend to various purposes as described;
- provides that when the 10 days paid leave per year is exhausted an employee is entitled to 2 extra days of unpaid leave for each occasion of family and domestic violence;
- provides that, if an employer requests evidence, the employee is to produce evidence that would satisfy a reasonable person. This sub-clause then gives examples of documentary evidence that, it appears, must necessarily satisfy the employer beyond question;
- provides that the employer is to take measures to ensure information provided by the employee is kept confidential.

4. The Subject Matter

- 4.1 It seems obvious the ACTU draft clause is not a work related issue. The clause, primarily, relates to alleged incidents outside the workplace. It does not by any means pertain to the employment relationship between employer and employee (express or implied) unless, somehow, the alleged victim and the other family or household person are working at the same workplace. Any connection therefore between the alleged family/domestic violence and the employer is remote at best. No amount of evidence can dispute these simple propositions if incidents, unbeknown to the employer and over which the employer has no control, occur away from the workplace.
- 4.2 There appears to be some reference in the ACTU submission and evidence that alleged victims are contacted by perpetrators when working in the workplace whether by phone, email or other means etc. The evidence is not compelling and certainly does not relate across all industries covered by modern awards. Even if it did so, it could be remedied at the workplace by proper security policies and perhaps even involving assistance from authorities.
- 4.3 There are even a few audacious opinions in the ACTU evidence to the effect that personal leave is paid for by employers so why not family/domestic violence. Perhaps those expressing such opinions might consider the history of sick/personal leave in industrial instruments.
- 4.4 We doubt any party opposing the ACTU draft clause will submit that family or domestic violence (or violence in general for that matter) is not an important subject across all levels of society and beyond national borders. No amount of evidence led by the ACTU or any other party can possibly deny this conclusion. It is an important social issue with ever increasing public awareness.
- 4.5 However, the fact that the subject may be an important social issue is not the matter to be decided by the Commission when considering the ACTU draft clause. The Commission has no power to vary modern awards during the Review or, between reviews, to give effect to what may be generally

described as the most desirable social issues/policy outcomes. The Commission is not the social policy guardian of Australia. The Commission is not the Legislature. Yet this appears, with respect, to be the methodology and direction of the ACTU submission and evidence and the submission of others in support.

- 4.6 The jurisdiction of the Commission is not aloof from considering relevant social factors. S.132 of the Act gives a Guide to Chapter 2, Part 2-3 (Modern Awards) and states that modern awards are to *'provide a fair and relevant minimum safety net of terms and conditions, taking into account certain social and economic factors...'*
- 4.7 But the Commission is a creature of statute, in this case the Act. Core provisions in Chapter 2 of the Act concern the National Employment Standards (NES) and Modern Awards.³
- 4.8 Two of the primary provisions of the Act for the 4 Yearly Review (or where a party seeks to vary any of the modern awards) are ss.134 dealing with the Modern Award Objective (MAO) and 138 of the Act dealing with achieving the MAO 'only to the extent necessary'. We submit the ACTU has not climbed over the bar with respect to these provisions.
- 4.9 The Review is not unlimited. It is wide ranging but always within the parameters of the Act. We deal with these matters in the context of the ACTU draft clause later in the submission.
- 4.10 One might do well to remember what AiGroup submitted during the preliminary jurisdiction matter referred to in 2.5 and 2.6 above:

*'If family violence is to be dealt with through a specific clause in awards, why not street crime, drug dependence, alcohol dependence, illiteracy, homelessness, mental health, age discrimination, gender inequality, road accidents, traffic congestion, environmental degradation, and so on?..':*⁴

³ See s.41 of the Act.

⁴ Submission of 20 April 2015 at para.12 in matter AM2015/1.

- 4.11 Without appearing disrespectful, one could greatly expand this list i.e. *AVO applications in NSW between disputing and/or violent neighbours residing in houses or townhouses or apartments*. Why not victims of common assault in general. Why not mandate paid leave covering divorce proceedings filed by an award covered employee for subsequent meetings with lawyers, counsellors, psychologists and direction/mention and mediation/hearing dates dealing with custody/parental maintenance and financial/property matters. When persons file to dissolve a marriage it is unlikely to be withdrawn and, if involving financial and property disputes, they can be lengthy and protracted proceedings. For the ACTU draft clause if implemented, court proceedings may never be contemplated, nor commenced or even proceed to final hearing.
- 4.12 In 4.10 there was reference to substance abuse. Observe the public statistics that are common knowledge relating to the extent of substance abuse/illicit drug use and the cost impact is profound. It cannot be contended that all these matters and many other issues do not impact the mindset of the worker (and affect the employer) at or away from the workplace. Nevertheless, it is expected that issues of this kind be dealt with by the employer/employee at the workplace or outside with professional assistance.
- 4.13 It is a given that, most abnormal /stressful/depressive aspects of everyday living outside the workplace, affect employees (and perhaps employers) in varying degrees. The effects may exist for a considerable period. The Act and certain terms of the modern awards provide flexibility in these situations.
- 4.14 Unfortunately, the ACTU (and others) appear to have approached this matter as if the Commission is the social policy guardian of Australia.
- 4.15 Each of the subject matter mentioned in 4.10 to 4.12 may touch employees, employers and affect parts of workplaces overall but, it is a high bar to suggest any are subject matter *necessary* for inclusion of paid leave in modern awards. Awards are not a social policy document per se – they set minimum terms and conditions for the workplace in combination with the NES. If any of the matters referred to in 4.10 to 4.12 above touch employees

and the employer, they are matters to be addressed at each workplace with proper training and policies.

- 4.16 Likewise for family/domestic violence issues. AMIC thinks the Commission in this matter, governed by the Act, should draw a very firm line. It should not be the employer's role, as suggested by the ACTU and others, to provide mandated paid leave for family/domestic violence occurring outside the workplace for modern award employees in the manner sought by the ACTU. Activity and actions unrelated to the workplace need to be carefully considered by the Commission before placing even greater burdens on the employer in modern awards.

5 The 2014 Review

- 5.1 The *Preliminary Jurisdictional Issues Decision* of the Full Bench dealing with the Review has been extensively referred to by members of the Commission in dealing with review matters.⁵ Suffice, at this point, to simply refer to the summary at [60] where the Full Bench, *inter alia*, stated:

- (i) 'The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system [s.134(1)(g)];
- (ii) A party proposing a significant change must support the change 'by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation';
- (iii) 'The modern awards objective [s.134(1)] applies to the Review';
- (iii) 'The proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (s.138)';

⁵ [2014] FWCFB 1788.

- (iv) 'Any variation to a modern award arising from the Review must comply with s.136 of the FW Act and the related provisions which deal with the content of modern awards';

5.2 The ACTU claim is being advanced as part of the 4 Yearly Review of modern awards arising from s.156 of the Act. The ACTU asks the Full Bench to exercise its discretion pursuant to s.139 concerning the ACTU draft clause.

Section 134

5.3 Section 134(1) sets out the MAO. The objective of s.134 requires that the modern awards along with the NES provide a 'fair and relevant minimum safety net' of terms and conditions.

5.4 What is 'fair and relevant' is underpinned by the requirement for the Commission to consider the matters set out in s.134(1)(a) to (h) of the Act thereby creating a "minimum safety net". Note: we emphasise the word 'minimum' not 'maximum'.

5.5 As the Commission has stated '*the Commission's task is to balance the various s134 (1) considerations and ensure that modern awards provide a fair and relevant minimum safety of terms and conditions.*'⁶

Section 138

5.6 Section 138 outlines what may or must be included in a modern award.

5.7 The section limits the content of a modern award to matters 'only to the extent necessary' to achieve the MAO and works in conjunction with s.134.

5.8 Hence, with s.134 creating a minimum safety net, s.138 must relate 'only to the extent necessary' to create a minimum and relevant set of terms and conditions.

5.9 But s.138 does not exist in isolation. The totality of award terms and conditions and the NES come into play. Pertaining to the ACTU draft clause that must include a consideration of the present award terms and presently available NES entitlements.

⁶ Preliminary Issues Decision at [33].

5.10 We deal with the ACTU submissions in the context of ss.134 and 138 later in these submissions.

6. The ACTU Submissions (with brief AMIC comments)

6.1 Cut to the bare bones, the ACTU submission may be conveniently summarised as follows:

- (i) seeks to provide the Commission with an overview of the incidence and impact of family violence, both within and outside the workplace (*we don't understand the point at 1.8 of the submissions to imply that family violence physically exists in the workplace between workers but that the impact of family violence may extend, somehow, to the alleged victim at the workplace in various forms*);
- (ii) because of the impact on workplaces, says the ACTU, employers have a role to play together with government policy responses – see for example 1.8 of the submissions (*meaning the employer should bear the burden of mandated paid leave for award employees*);
- (iii) because family violence can affect any worker there is no need to restrict paid leave to permanent employees but it should also extend to non-permanents - see for example 2.7 of the submissions (*not to mention without any qualifying period and irrespective of most casuals under modern awards being employed when and if required and whose employment may terminate at the end of each day*);
- (iv) the ACTU application raises matters directly relevant to public interest, equity and good conscience, helps eliminate discrimination, pays regard to international obligations – see for example 3.17 of the submissions (*prima facie this may all be somewhat correct but an award variation of this magnitude primarily needs to satisfy ss.134 and 138*);
- (v) domestic violence is connected to the workplace in 2 key ways namely, domestic violence has direct and indirect adverse consequences for

victims and therefore the employer and second, working can provide support and other positive benefits – see for example 4.1 of the submissions (*these adverse consequences appear no different from the consequences of, say, a divorce proceeding [given the volume of marriages dissolved in this country each year not to mention separations of married and de-facto couples], imprisonment of a spouse, substance abuse by either spouse etc - working support is beneficial for all these circumstances but that it is not the issue where we are dealing with a novel claim such as the ACTU claim for paid leave*);

- (vi) present leave entitlements are inadequate for family violence and workplaces share a responsibility to take action and eliminate all forms of violence against women – see 4.34 to 4.52 of the submissions (*with respect how much paid leave should an employer have to bear considering the extra burdens imposed on national system employers under the Act since enactment*);
- (vii) the claim should be granted because an issue such as family and domestic violence leave cannot be left for collective bargaining to resolve and a minimum modern award entitlement is needed – see C of Section 4 of the ACTU submissions (*presumably therefore such an argument applies to every social issue that can be universally collectively bargained without being remotely relevant to ss.134 or 138 over the bargaining table*);
- (viii) there are barriers and a reluctance for victims to disclose and open up and employer confidentiality procedures are needed – see 4.84 to 4.98 of the ACTU submissions (*if leave such as the ACTU seeks is not necessary because of ss.134 and 138 the element of stigma can only be addressed by public education and mechanisms in place similar to the anti-bullying legislation or substance abuse. If the claim is granted the employer confidentiality clause may be useless and brief comments on this aspect appear in 8.18 below*).

- 6.2 The ACTU submission deals with definitions and terminology (section 5), impact (section 6), legal proceedings and time access (A of Section 6), cost factors of family and domestic violence (Section 7), government policy responses to the issue (Section 8), international obligations (Section 9). It attempts to deal with s.134 in passing (Section 10).
- 6.3 At this point, we provide two general comments on some of the matters mentioned in the previous paragraph.
- 6.4 First, at various sections of the ACTU submission, there is reference to family violence, then domestic violence, then family/domestic violence as if the terms are interchangeable. They are, of course, not interchangeable and we refer to this when considering the state and territory legislation. It should be noted that, in B of Section 5 of the ACTU submissions, there is a cursory attempt to deal with definitions and terminology but the submission is hardly adequate for a matter such as this where the Commission is being asked to mandate an extra 10 days paid leave over the NES.
- 6.5 Second, there is some reference in the ACTU submission (section 10) to ss.134 and 138 but – as we read the submission – the overall argument for involving the employer and mandating 10 days paid leave (no matter how large or small the employer or makeup of the workforce) for a non-related work issue appears to be that family/domestic violence (meaning in a family or household situation) is a problem in society and impacts the employee victim and therefore must impact the employee's work in varying degrees when present at the workplace and this affects the employer and working with support is one method overseen by the employer whereby positive benefits can be bestowed as work is a motivator and one of the benefits is to grant 10 days paid leave to deal with certain matters and thereafter 2 days unpaid leave at the cost to the employer so that the worker does not have to, unnecessarily, eat into other accrued entitlements or take unpaid leave and such domestic/family violence paid leave should stand alone as an entitlement.
- 6.6 As we have stated or implied at various points in this submission, one could replace '*family/domestic violence*' with other important social issues that

severely impact employees and the same question for the Commission would need to be answered. How does a variation to awards as proposed by the ACTU draft clause satisfy ss.134 and 138?

7. ACTU Evidence

7.1 The ACTU evidence consists of:

- (i) expert evidence, and
- (ii) other evidence.

7.2 Other employer parties will comment upon the ACTU expert evidence and AMIC wishes to make comments only on (ii) above.

7.3. The ACTU evidence, as sighted by AMIC, has as its basis the following underlying themes (not in any order of importance):

- an underpinning award paid leave provision is needed for family/domestic violence as bargaining outcomes are inconsistent and difficult; a modern award safety net needed as a clear direction and this should be with paid leave;
- family and domestic violence is gender orientated;
- disclosure and openness is a problem for women and leaves a stigma and recognising paid leave will encourage this aspect because problems may arise at work if it is raised with the employer;
- family/domestic violence is not just about physical violence but emotional and economic and control abuse and the adverse impact on health and children; the longer the violence the greater the impact; many alleged victims are low-paid and need financial help - paid leave will help;
- ∴ - employers needed to be pro-active on the issue (*one statement states that employers are not the primary cause of sick or parental leave but it is paid so likewise FV should be paid and it is one less stress on women*);

- paid leave will raise the employment profile for prevention and this will build on policies as paid leave is vital to health and dignity and care of children;
- training and education (of men and employers) is the key and raising public awareness and changing culture and workplaces can help; community must respond as it is a community wide responsibility;
- employment is a key pathway to escaping violence, needs of women affected by family violence include work which plays a key role, many women victims want to work but can't get a start, many women are denied work opportunities, economic empowerment is needed, women must be able to obtain secure employment;
- 'harassment' or 'abuse' may continue while the alleged victim is at work;
- an amount of paid leave should be provided as court processes and other matters may take time and victims are bewildered.

7.4 Considerable amount of this evidence was, itself, of a general nature and unrelated or only remotely related to the ACTU draft clause. For example, evidence of the need for women to work, women attempting to find work, the empowerment of work, lifting the profile of family/domestic violence, dealing with the subject in the open etc.

7.5 The need for training and education and lifting the profile of family/domestic violence – be it for employers or other groups - applies to many important social issues. The need to obtain work for self-esteem and financial independence also applies to many demographic groups including for mental illness or substance abuse. The need to obtain work to escape another pathway applies to other groups. AMIC agrees there needs to be extensive training and education and a cultural change concerning family/domestic violence but mandating 10 day's paid leave is removed from these 'needs'.

7.6 Bringing the issue concerning family/domestic violence into the open and continuing to raise the profile is important and no doubt employers have a role to play in this regard as with other social issues. But this is far removed from providing paid leave the equivalent of the personal/carer's leave

entitlement for a year under NES or half the annual leave entitlement for a full year of untaken leave under NES or near fifty-per cent of long service leave entitlement for 5 year's of service under some jurisdictions.

- 7.7 We have already mentioned that if the 'harassment' or 'abuse' continues at the workplace, most times there would be avenues available to end it. In the last resort, the authorities could be called. If the argument is that the victim has a fear of taking this last course of action in these circumstances then paid leave is not the answer. If an employer seeks to punish a victim as a result, then the Act and other legislation provide remedies.
- 7.8 Concerning enterprise agreements, the fact that some unions are negotiating for family/domestic clauses in agreements or that a miniscule number of agreements contain those clauses in a minority of the industries covered by awards does not appear an overwhelming argument for paid leave. The fact that employers query the need for such a clause over the negotiating table does not appear to be relevant. For every employer that answers 'no' to some claim around the negotiating table is not a reason for the Commission to insert a common issue provision because of rejection of the claim per se. The fact that unions want an award term so that the negotiations are easier is not relevant and hardly satisfies crucial provisions of the Act.
- 7.9 Concerning used entitlements, the meat industry has many employees that have next to no personal or annual leave entitlements at some point of time and well before the anniversary date of employment but that is not an argument to create another source of paid leave. There is evidence concerning the meat industry in other Review proceedings or Common issue matters where employees have no relevant leave remaining during stand down for shortage of stock or annual close down periods and take authorised leave without pay. Flexibility provisions appear in all modern awards and the NES to cater for such situations.
- 7.10 For family/domestic violence, flexibility provisions appear in the Act which was amended in 2013 to provide for flexible working arrangements for employees experiencing family violence.

- 7.11 We have commented about divorce or matrimonial breakdown matters earlier in the submission using this issue as a comparative example. Divorce proceedings before courts exercising Family Law Act 1975 (Cth) (FL Act) jurisdiction are prone to take far more time and are far more costly than appearances before the local courts. The courts could hear evidence concerning abuse, physical violence, emotional and psychological matters, economic abuse, gambling abuse etc similar to what is outlined here by the ACTU.
- 7.12 Head down on any given day to any local court when matters are being mentioned and there are employers and employees and unemployed persons, male or female present. One does not front up to a local court, head to the bar table, announce an appearance and expect to be instantly heard, whether for a mention or hearing matter. The system is what it is. Court matters may be resolved quick or not so quick. If contested, they usually fall into the latter category.
- 7.13 The ACTU has provided no probative evidence concerning the impact of the claim on employment costs or productivity or on the added regulatory burden. There are some throwaway lines in the submission where the ACTU concede impact but providing paid leave, says the submission, is a more desirable outcome. No doubt some ACTU evidence is relevant to the submission i.e. that family/domestic violence is a social issue of importance but, in our view, all this is not sufficient to conclude that every modern award should be varied in the manner sought by the ACTU.

8. AMIC'S positions on the ACTU draft clause

- 8.1 AMIC submits there are only two fundamental outcomes possible on the ACTU draft clause.

One outcome

- 8.2 AMIC's submits that 'family and domestic violence' and any leave for employees – paid or unpaid – is not a proper matter for the Commission to decide. In other words, this is glaringly a social policy subject best left to

Federal Parliament which dealt with the subject as recently as 2013. It is best left to that arm of the Constitution to decide re-visit the subject and whether leave, paid or unpaid, should be prescribed for 'family and/or domestic violence' (properly defined) for *national system employees* in addition to the other forms of leave contained in the NES. And for Federal Parliament to decide on any other limitations.⁷

- 8.3 The ACTU submission itself refers to government discussion and responses and development on the issue which is evolving: see section 8 of the ACTU submission.
- 8.4 There are, in our view, persuasive reasons why the Commission should consider adopting this approach irrespective whether the Commission concludes the ACTU draft clause is within jurisdiction.
- 8.5 S.139 is not couched in mandatory terms. Long Service Leave provisions, for example, appear to be within the ambit of s.139 (h) but are taken outside jurisdiction by s.155. Here, what the ACTU claims, likewise may come within the ambit of s.139 (h) but that is only the starting point of any debate.
- 8.6 Consider some basic issues raised by the ACTU draft clause:
 - It would be the first type of paid or unpaid leave for employees covered by the modern awards not sourced from the Act via the NES, meaning enacted by Parliament;
 - It would be the first type of paid leave available to casual employees since commencement of the Act – *of relevance is that the Act defines a long term casual in s.12 for the purpose of the Act and excludes certain casuals from accessing some rights under the Act available to permanent employees;*
 - It would be the first type of leave available to modern award employees only and not all *National System Employees* as defined in the Act;

⁷ In the Australian Human Rights Commission submission (for example) references to family/domestic violence leave in other countries show it mostly originates from legislation.

- It would be the first type of leave available to some employees at the workplace but not all employees;
- It would be the first type of leave that seems to overlap, in terms of availability, with other minimum entitlements provided in the NES i.e. requests for flexible working arrangements including for family/domestic violence, paid annual leave, paid personal carer's leave;
- It would be a type of leave that supposedly interacts wholly with specific state and territory legislation without even referring or paying any regard to the provisions of those statutes thus creating interpretation issues.

- 8.7 Take, for example, the meat industry and a meat processing or meat manufacturing establishment covered by the meat industry award. The award employee would be covered by the ACTU draft clause but the award covered employee's supervisor would not be covered. Then, a recently appointed supervisor one day before promotion was entitled to leave contemplated by the ACTU draft clause but thereafter not entitled though remaining entitled to all other forms of leave under the NES.
- 8.8 If this AMIC outcome prevails, in other words that it should be left to Federal Parliament as this submission suggests, let ACTU and others seek to persuade the members of the legislature to legislate for a change in the NES. If the ACTU and others cannot persuade Parliament then, in effect, the people's representatives have spoken.
- 8.9 AMIC submits that the ACTU submission itself shows the need for the matter to be considered by a more appropriate forum. The ACTU submission (and others in support) is a relevant social policy document summarising and referring to studies concerning family and domestic violence. It sits alongside other similar type studies that can be canvassed before, perhaps, a Parliamentary Inquiry. It is that type of submission as are others supporting the ACTU draft clause.

Primary outcome of AMIC

8.10 The ACTU seeks to vary all awards. Therefore, AMIC's primary position is that the ACTU draft clause brings into play the full force of the provisions of the Act. This leads to the obvious conclusion that, no matter how one approaches the ACTU draft clause, it is just not necessary to achieve the Modern Award Objective (MAO): ss.134, 138. The ACTU draft clause substantially offends the critical elements of the MOA and other provisions of the Act.

8.11 Consider the ACTU draft clause, under the banner of AMIC's primary outcome, in the context of the following matters:

- (i) The clause is misguided and appears simply to be an ambit claim like other ambit claims of the ACTU during the review i.e. the *Transitional* common issue and the *Casual Conversion* common issue and here in the ACTU submission – 'the ACTU maintains that 20 days is the more appropriate figure'⁸.
- (ii) The clause is not necessary to achieve the MAO, no matter how socially desirable and irrespective of the quantity and/or quality of the ACTU and other evidence;
- (iii) The clause offends important elements of the MAO and those not offended are vastly outweighed on balance by those offended;
- (iv) The clause is at odds with other relevant provisions of the Act i.e. s.136 and Division 3 of Part 2 -1;
- (v) The clause if adopted by FWC – we repeat - would be the first occasion whereby awards provide the primary source of a leave entitlement rather than the NES in the new modern award system leading to absurd results;
- (vi) The clause if adopted by FWC – again we repeat - would provide casuals with a first i.e. paid leave entitlements contained in modern awards unlike other leave entitlement prescribed in NES and,

⁸ See paragraph 10.6 of ACTU submissions.

irrespective of the fact that the employment of casuals under most of the awards terminates at the end of each day;

- (vii) The clause partly duplicates existing paid leave or other entitlements for permanent award employees i.e. in other words, if the ACTU claim was granted an employee can further pick and choose the leave that best suits the circumstance; the clause duplicates flexibility arrangements provided for in NES;
- (viii) The clause appears at odds when considered against the background of relevant state and territory legislation dealing with family/domestic violence including for meanings/definitions and coverage;
- (ix) The clause does not define the meaning of 'family' nor 'household' and is open to ambiguous interpretation. Relevant state and territory legislation particularise meanings in detail for good and cogent reasons;
- (x) The clause adds another unnecessary layer to the myriad of family and domestic violence definitions and procedure, even if under the guise of workplace regulation;
- (xi) The clause is anything but a '*simplified version derived from s. 4AB*' of FL Act as the ACTU submission states (4). To that extent alone, coverage sought within ACTU draft clause is misleading;
- (xii) The clause, if adopted, places the cost burden on all employers for alleged non-workplace incidents and/or alleged behaviour completely unrelated to the workplace (*in contradistinction to any other accident or incident or negligence occurring outside the workplace necessitating an employee to access other types leave, paid or unpaid*);
- (xiii) The clause pays no regard to the fact that many employers in Australia – perhaps a majority - are classified as small business;

- (xiv) The clause pays no regard to the fact that a large proportion of the employees employed in workplaces are classified as casual - approximately 25 per cent according to figures⁹ ;
- (xv) The clause, as drafted, is most possibly open to misuse;
- (xvi) The clause could give rise to possible disputation between employer and employee given the lack of particulars;
- (xvii) The clause prescribes the length of leave at odds with the rationale behind the making of modern awards i.e. minimum entitlements;
- (xviii) The clause provides – a discrete part says the ACTU – an onus on the employer to keep information supplied by the employee confidential when some of the relevant state and territory legislation provide that family and domestic violence matters may sometimes be heard in open court.

8.12 If the Commission is not, as we submit, the social policy guardian of Australia then *National System Employers* should not be asked, through the ACTU draft clause, to meet the cost of employee absence through no fault of the employer and over which they have no control and layered upon NES requirements for annual leave, long service leave, personal carer's leave, jury duty, compassionate leave, community service leave.

8.13 Legal practitioners will know that many family and domestic violence incidents are followed by police intervention and are followed by the issuing of notices (however termed under relevant statutes) by the police that become the application to the court for final relief. Some family and domestic violence victims involve the medical profession, some do not. Some family and domestic violence victims have young children, some do not. Some family and domestic violence victims involve lawyers, some do not especially where the matter is taken forward by the police themselves. Some family and domestic violence victims seek counselling, some do not. Some family and domestic violence victims relocate and some do not. Some family and

⁹ These figures were the subject of evidence in the Casual Conversion Common issue matter – AM2014/196.

domestic violence victims are employed and some are not employed. Some applications before proceeding to mention or hearing are withdrawn. Some applications are dismissed for want of evidence or other reasons. The Commission would need to be appraised of evidence on each of these circumstances. No cogent or probative reasons have been advanced in the submission of the ACTU for 10 days paid leave at the employer's expense.

- 8.14 Then there is the term 'household' appearing in the ACTU draft clause. It is not defined. Presumably however, it is possibly wide enough for two household members to be out on the town or in a dwelling, become inebriated, one 'king hits' the other, police are called, issue a notice and the victimised employee claims leave under the signature of a medical practitioner or nurse. One only needs to state examples like this to show a bridge too far for the MAO and s.138.
- 8.15 Certainly no case has been made, nor has the burden been discharged, in the ACTU written submissions, for 2 extra days of unpaid leave. The ACTU submission simply says that's appropriate: see 10.7 of the ACTU submissions.
- 8.16 From an evidentiary viewpoint, even if the ACTU draft clause passed the MAO and s.138 tests, the very minimum evidence an employee claiming family/domestic violence leave should provide to the employer should be the equivalent of an interim or provisional notice issued by the police or evidence that court proceedings have commenced for orders. Not, as what the ACTU submits, to be what a reasonable person could expect by way of evidence. If the ACTU draft clause was accepted, a doctor or nurse could issue a document and the victim may, have no intention of filing or pursuing the matter in court or using the leave for prescribed purposes in the ACTU draft clause. The Commission is entitled to take notice that, in certain circumstances, alleged victims do not seek court relief or, if applications are filed by individuals, they are dismissed for want of evidence. The latter especially so if there is considerable delay by the alleged victim in seeking relief.

- 8.17 If leave of the type being considered in this matter ever passed the MAO and s.138 tests, there is no doubt the amount of leave contained in the ACTU draft clause is excessive and any leave should be unpaid, not paid¹⁰. Irrespective of the valiant effort of the ACTU to lump the cost of another social policy matter on National System Employers, a case has not been made out.
- 8.18 Concerning the confidentiality claim, some family and domestic violence matters ending up in the local courts in some jurisdictions may not be heard in closed court. Here, the ACTU draft clause requires suppression at the behest of the employer when the names might be publicly available, be reported in a hardcopy of a daily tabloid, be reported in a local paper, simply found on the World Wide Web, on social media, on Facebook, on Twitter (all possibly with photos).
- 8.19 We leave it to other parties to make submissions concerning any jurisdictional arguments concerning the ACTU draft clause confidentiality provision.
- 8.20 The ACTU draft clause could well be the first in over 100 years of federal industrial legislation that seeks to insert in awards paid leave provisions for (as an example) threatening or violent behaviour or alleged common assault outside the workplace, unrelated to the workplace and, unbeknown to the employer and over which the employer has no control.

9. Legislation concerning domestic/family violence

- 9.1 We turn to consider, briefly, family and domestic violence legislation. Predominantly, it is a myriad of state and territory legislation. As well, there is the limited jurisdiction contained in the FL Act. Unless one understands the legislation around Australia, one is considering the subject in a vacuum.
- 9.2 The purpose of providing a very brief overview of the legislation is fourfold. First, to show that family and domestic violence legislation is primarily with

¹⁰ Again we rely on international comparisons found in submissions supporting the ACTU claim.

the legislative powers of the states and not Federal Parliament (for the latter it is simply an incidental power). Second, to highlight the differences in coverage of the legislation and the ACTU draft clause. Thirdly, the particularised meanings attached to family, relative, domestic partner etc in the various legislative schemes. Fourthly, to provide an understanding of available swift procedure to alleged victims in state and territory legislation.

- 9.3 The end result after a consideration of all the matters referred to in 9.2 will be to show the ACTU draft clause for what is namely, an ambit claim and nothing more. The ACTU draft clause pays no regard to the coverage or procedure or mechanism adopted in the state or territory legislative schemes.
- 9.4 If the ACTU draft clause, in respect of coverage, is wider than some of the meanings in relevant state and territory statutes, an alleged victim cannot seek assistance under the relevant family and domestic violence statute for relief and would be merely subject to general summary offences jurisdiction. If on the other hand, the definition is narrower, some family and domestic violence victims are not assisted by the ACTU draft clause via state or territory legislation.

The federal/state scenario

- 9.5 Family and domestic violence matters are generally dealt with under a prescribed law of a state or territory, not by an Act of the Federal Parliament. There is no single federal legislation dealing with the domestic or family violence because of constitutional limitation of the powers of the Commonwealth. Wherever federal legislation – such as the FL Act – deal with the subject it is because of the incidental power.
- 9.6 The effect of the Australian Constitution and (any) state referral of powers results in federal parliament having legislative power over marriage, divorce, parenting and financial and property matters on separation. Nothing more and nothing less. Referral of state powers enabled Federal Parliament to enact the *Family Law Amendment (De Facto Financial Matters and Other*

Measures) Act 2008 (Cth.). It was enacted only after the state referral of powers over de facto relationships to the Commonwealth.

- 9.7 Given the limits on the Commonwealth power outlined above, courts exercising jurisdiction pursuant to the provisions of the FL Act are not able to deal with family or domestic violence matters in general like courts of the states or territories dealing with family/domestic violence matters.
- 9.8 It was noted earlier the ACTU submits that the definition of family and domestic violence contained in the ACTU clause 'is a simplified version derived from s.4AB of the FL Act (1). It is not.
- 9.9 A cursory look at the provisions of the FL Act (and their purpose) show this is not so and that the Commission should be loathe to even consider the so-called ACTU abridged version of the definition of that Act. Most certainly, the FL Act has nothing to do with members of households in general.

The state and territory family and domestic violence legislation

- 9.10 Because family/domestic violence matters are a complex issue within a myriad of legislation of the states and territories, definitions/meanings of 'family and domestic violence' differ across jurisdictions. There has been some attempt at consistency but the gap is still wide. Coverage and other terms differ across jurisdictions.
- 9.11 The states and territories have adopted different terminology for family or domestic violence matters where relief is sought:
- Protection Orders (Qld)
 - Apprehended Domestic Violence Orders (NSW)
 - Intervention Orders (Vic & SA)
 - Domestic Violence Restraining Orders (WA)
 - Family Violence Order (TAS)
 - Domestic Violence Order (ACT & NT)

9.12 What follows is a brief overview of present state and territory legislation dealing with state and territory legislation.

Table 1

Federal - Family Law Act 1975

- (a) *The Act contains no general Objects;*
- (b) *The Act sets out the rights, duties, powers and liabilities of spouses as well as matters pertaining to the dissolution of marriage. The Act gives the power to courts to deal with de facto property and maintenance disputation; the Act contains incidental matters like family violence issues (but see below for the limited application);*
- (c) *S.4(1) gives the meaning of abuse in relation to a child; s.4(1) states that family violence order means an order made under prescribed state or territory law;*
- (d) *S.4AB defines family violence [for the purpose of the Act] and means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family or causes the family member to be fearful – examples are provided – assault, sexual assault, stalking, repeated derogatory taunts, intentionally damaging or destroying property, acts to animals, unreasonably denying financial autonomy, unreasonably withholding financial support, preventing family member from making or keeping connections with family/friends, depriving liberty; it then deals with child exposure ;*
- (e) *Part V11 of the Act is **headed Children**); S.60B sets out the Objects of Part V11 namely, 'to ensure that the best interests of the children are met....' by various powers of the courts;*
- (f) *Family violence is dealt with in Division 11 of Part VII and ss. 68N to 68T;*
- (g) *S.68N within Division 11 states that the purpose of Division 11 of Part V11 is simply to resolve inconsistencies between (i) family violence orders (of states or territories) (ii) certain orders/injunctions/arrangements under the FL Act in providing for time with a child (iii) ensuring that orders, injunctions and arrangements do not expose people to family violence;*
- (h) *Ss. 68P to 68T within Division 11 then deal with obligations of court making an order or granting injunction inconsistent with state or territory order (time with a child) and related matters;*
- (i) *S.114 provides for general injunctive relief in relation to protection of a person in proceedings under the Act;*
- (j) **Courts conferred with FL Act jurisdiction do not have power to make family and domestic violence orders in general compared to courts under state and territory statutes. The definition of 'family violence' pertains to Division 11 of Part V11 providing for children and their welfare. That is why the definition in 4(1) simply defines 'family violence orders' as state and territory orders. A court with FL Act jurisdiction can resolve inconsistencies with respect to (say) child visitation rights and state/territory orders. The notion of 'household' appears nowhere in the family violence definition.**

Table 2

Queensland – Domestic & Family Violence Protection Act 2012

- (a) *The main purpose of the Queensland Act is to protect against violence for those in a relevant relationship;*
- (b) *Sections 8(1) gives the meaning of domestic violence behaviour in a relevant relationship as physically or sexually abusive, emotionally or psychologically abusive, economically abusive, threatening or coercive or any other way that controls or dominates to the extent that fear for safety is the result. S.8(2) then provides an explanation by way of examples;*
- (c) *Ss. 9 covers the meaning of associated domestic violence (towards a child, relative, associate of the aggrieved); s.10 deals with a child exposed to domestic violence with examples;*
- (d) *ss.11 and 12 give meanings of emotional or psychological abuse with examples and meaning of economic abuse with examples;*
- (e) *Sections 13, for the purpose of domestic violence, provides the meaning of relevant relationship being an intimate, family or informal care relationship; Sections 14 to 20 give meanings to intimate personal relationship, spousal relationship, parent, engagement relationship, couple relationship, family relationship and relative, informal care relationship;*
- (f) *S.100 deals with early intervention where a police officer must investigate a claim of domestic violence if the officer reasonably suspects that domestic violence has been committed. ss. 101 to 114 provide the police with the power to issue a police protection notice (in a form prescribed by s.105) and are given wide ranging powers concerning the issuing of the notice; the notice is deemed to be an application to the court for a protection order;*
- (g) *The Act details who can apply for a court order under s.32 (the aggrieved, person authorised by the aggrieved, police officer)*
- (h) *The Act deals with the process and procedure and methodology once an application for an order is made including court process and procedure leading to the hearing of the matter, power to make temporary and final orders or dismiss the application.*
- (i) *The Act provides for a closed court although the court is given a discretion to open the court for a matter – ss.158 to 163;*
- (j) ***It is arguable that the definition of domestic violence behaviour in (a) to (c) above may be wider in certain respects than that appearing in the ACTU draft clause;***
- (k) ***The meanings attributed to family and other relationships in the Act do not cover, in our view, a member of a household as contemplated by the ACTU draft clause.***

Table 3

Victoria – Family Violence Protection Act 2008

- (a) *One of the main objects of the Act is to maximise safety for children and adults who have experienced family violence*
- (b) *S.5(1)(a) states that family violence is behaviour towards a family member that is physically or sexually abusive, emotionally or psychologically abusive, economically abusive, threatening, coercive or in any other way controls or dominates the family member or causes the family member to fear for their safety or that of another person; (1)(b) is behaviour of a kind referred to in (a) that causes a child to hear or witness to be exposed (with examples); s.5 (2) deals with assaulting or causing personal injury, sexual behaviour, intentionally damaging property, depriving liberty, injury to animals; s.6 gives the meaning of economic abuse with examples; s.7 gives the meaning of emotional or psychological abuse with examples;*
- (c) *Ss.8,9, and 10 provide the meaning of family member (it may include people who live to-gether), domestic partner and relative respectively;*
- (d) *Ss. 13 to 20 provide the police with powers including powers to direct persons, detention powers, search and seizure powers and procedures;*
- (e) *S.24 provides that a police officer who responds in person to an incident involving family violence may apply to another police officer (defined) for a family violence safety notice if certain grounds exist; Ss. 25 to 30 provide the procedure concerning the notice;*
- (f) *S.31 provides that the issue of a notice is taken to be an application for family violence intervention order though the Act details other persons who may apply for Family Violence Protection Orders namely, affected family member, a parent if the affected family member is a child, the guardian of the affected family member;*
- (g) *The Act deals with the process and procedure and methodology once an application for an order is made including court process and procedure leading to the hearing of the matter, power to make temporary and final orders or dismiss the application.*
- (h) *The Act provides for restriction on publication of proceedings with exceptions;*
- (i) ***Having regard to the meanings in ss.5 to 10 of this statute it is more than arguable that (i) the meaning of family violence behaviour in this Act is wider than that contained in the ACTU draft clause and (ii) one can argue that family member includes people living together.***

Table 4

South Australia - Intervention Orders (Prevention of Abuse) Act 2009

- (a) *The Act seeks to assist in preventing domestic and non-domestic abuse by issuing intervention (including an interim) orders against a defendant; includes orders concerning problem gambling and tenancy agreements;*
- (b) *S.6 sets out the grounds for issuing intervention orders namely, reasonable suspicion that the defendant will, without intervention, commit an act of abuse and the issuing of the order is appropriate in the circumstances;*
- (c) *S.8 sets out in detail the meaning of domestic and non-domestic abuse and act of abuse - physical, sexual, emotional, psychological or economic - with examples such a physical injury, emotional/psychological harm (examples), denial of financial, social or personal autonomy (examples), damage to property;*
- (d) *S.8 also gives the meaning for domestic abuse by a defendant namely, abuse by a defendant against a married partner, domestic partner (defined in s.2 as under the Family relationships Act 1975 which refers to close personal relationships), intimate personal relationship partner, child, stepchild or grandchild, brothers/sisters, related by blood/marriage, carers;*
- (e) *S.7 states that an intervention order may be issued for the protection of any person against whom it is suspected the defendant will commit an act of abuse or for any child who may hear or witness or be exposed to the effects of an act of abuse;*
- (f) *S.10 sets out what must be recognised and taken into account in determining whether to intervene including that 'abuse may involve overt or subtle exploitation of power imbalances and may consist of isolated incidents or patterns of behaviour';*
- (g) *S.12 sets out terms that may be included in any order;*
- (h) *S.18 provides that a police officer may issue an interim intervention order if there are grounds for issuing the order; the interim order is taken to be an application to the court; the interim order must require the defendant to appear in court at a specified time and place within 8 days of the order or if court not sitting at that place within 2 days after the court next sits at the place;*
- (i) *The Act deals with the process and procedure and methodology once an application for an order is made including court process and procedure leading to the hearing of the matter, evidence arrangements and power to make temporary and final orders or dismiss the application.*
- (j) *It is more than arguable that the meaning of abuse is wider than the ACTU draft clause given the meanings described above.***

Table 5

New South Wales – Crimes (Domestic and Personal Violence) Act 2007

- (a) *The purpose of this slightly complex Act is to protect persons from personal and domestic violence and covers the issuing by courts of apprehended domestic violence orders and apprehended personal violence orders and interim and final orders;*
- (b) *NSW does not define family violence but defines 'domestic violence offence' by referring to personal violence offences in the Crimes Act 1900 (NSW);*
- (c) *S.5 gives the meaning of domestic relationship - marriage, de-facto, intimate personal relationship, living in same household, long term resident in resid. facility, relative (defined in s.6), paid/unpaid carer*
- (d) *S.7 provides a meaning of intimidation (harassment or molestation, an approach made to a person, conduct that causes a reasonable apprehension of injury in a domestic relationship or violence to person or property); s.8 gives a meaning of stalking;*
- (e) *S.11 gives the meaning of domestic violence offence as personal violence offence committed by a person in a domestic relationship and s.16 provides for the making of apprehended domestic violence orders; s.17 provides for the matters to be considered by the court in making an order;*
- (f) *Ss.15 to 17 provide for the making of apprehended domestic violence orders by the court; ss.18 to 21 provide for the making of apprehended personal violence orders by the court; ss.22 to 24A provides for the making of interim orders;*
- (g) *Ss.25 to 34A cover the issuing of provisional orders (meaning interim apprehended domestic or personal orders) whereby a police officer may apply by telephone, facsimile or other device to an authorised officer or senior police officer; the issuing of a provisional order is taken to be an application for a final order under the Act;*
- (h) *The Act covers in deals with the process and procedure and methodology once an application for an order is made including court process and procedure leading to the hearing of the matter, evidence arrangements and power to make temporary and final orders or dismiss the application.*
- (i) ***The Act covers domestic violence and personal violence situations. The Act goes far wider that that covered by the ACTU draft clause. It is more than arguable that the offences outlined a domestic violence situation go beyond the ACTU draft clause.***

Table 6

WA – Restraining Orders Act 1997

- (a) Ss.3 to 6 deal with terms used;
- (b) s.4 states 'family and domestic relationship' means a relationship between married couples, de facto couples, related to each other and includes a situation where one of the persons is a child; the section defines 'other personal relationship' of a domestic nature in which the lives of the persons are interrelated;
- (c) S.6 defines 'act of family and domestic violence' and includes – assaulting/causing personal injury, depriving person of liberty, damaging person's property, behaving in manner that is intimidating, offensive or emotionally abusive, pursuing the person or a third person with intent to intimidate; 'act of personal violence' includes – assaulting/causing personal injury, depriving person of liberty, pursuing the person or a third person with intent to intimidate plus other matters;
- (d) S.8 to 10 deal with restraining orders generally; ss.11 to 16 deal with violence restraining orders;
- (e) S.25 provides that an application for a violence restraining order made be made in person by the person seeking protection, police officer, parent or guardian if child is the person to be protected;
- (f) Ss.17 to 24 provide for telephone applications for violence restraining orders;
- (g) S.26 provides that the applicant can choose whether to have hearing in absence of respondent;
- (h) Ss.30A to 30I provide that a police officer may make a police order if the officer believes a person has or is likely again to commit an act of family and domestic violence and outlines procedure including limited duration;
- (i) Ss.31A to 33 provide for interim orders leading to hearing where respondent is objecting or not objecting to final order;
- (j) The Act deals with the process and procedure and methodology once an application for an order is made including court process and procedure leading to the hearing of the matter;
- (k) **It is more than arguable that the meaning of abuse is wider than the ACTU draft clause given the meanings described above**

Table 7

ACT – Domestic Violence and Protection Orders Act 2008

The ACT Act seems to go beyond the ACTU draft clause and provides for protection for domestic and personal violence: ss. 6 to 17;

Concerning domestic violence the term seems to go beyond the ACTU coverage: s.13;

The Act provides for interim and final protections orders: Parts 4, 5, 6 and 7

The Act provides for emergency orders at the instigation of the police: Part 9. The emergency order is taken to be the application before the court.

NT – Domestic and Family Violence Act

The Act and the definition of domestic violence arguably goes beyond the ACTU draft clause in terms of coverage.

The Act provides for the making of domestic violence orders by the courts.

The Act also provides that authorised police officers may make domestic violence orders.

10. The ACTU draft clause in the context of family/domestic violence legislation

- 10.1 It appears obvious that most victims of family/domestic violence seeking protection or relief do so in local courts around the country, however named. Courts exercising jurisdiction under the FL Act are limited in jurisdiction concerning family violence as these courts have no general powers. As seen, the FL Act does not anywhere mention 'households'.
- 10.2 A number of pertinent conclusions result from the very brief analysis and perusal of the state and territory legislation and FL Act as follows:
- (i) The ACTU draft clause covers '*violent, threatening or other abusive behaviour by a person against a member of the person's family or household...*' without definitions or meanings;
 - (ii) Each state and territory legislation – even the FL Act (dealing primarily with child welfare in the context of family violence) particularise in some detail terms and meanings;

- (v) A number of the state and territory legislation go beyond family and domestic violence and deal with personal violence i.e. NSW, Victoria, SA, WA.
- (iv) It is arguable that some state and territory legislation is wider in application than the ACTU draft clause coverage of family and domestic violence i.e. repeated derogatory taunts/acts to animals/preventing a family member from making or keeping connections (FL Act), controls or dominates (Qld), damaging property, injury to animals (Victoria), emotional/psychological harm denial of financial, social or personal autonomy (SA), intimidating, offensive or emotionally abusive WA).
- (v) Such definitive conclusions for (iv) above must always depend on the circumstances but if this is arguable then perhaps alleged incidents coming within the wider state and territory legislation are not caught by the ACTU draft clause coverage;
- (vi) If on the other hand, the ACTU draft clause is wider than some of state family and domestic violence legislation i.e. Queensland and households, then any alleged victim is pushed into the summary offences legislation in those states or territories just like any victim of violence. If this scenario is played out then the power of police is not caught by the state and territory family and domestic violence legislation and may be narrower;
- (vii) Without definitions and meanings the ACTU Draft Clause is just plain problematic and would be the subject of disputation. More to the point, it is doubtful one could refer to all this legislation to interpret the ACTU draft clause if it came to be inserted into all awards and disputes arise;
- (viii) Each state and territory legislation provides a mechanism for the police to issue notices or protection orders when called to incidents within the family or domestic environment. These notices or protection orders are most often taken to be an application for final relief in the courts. Stressful as situations may be, there appears no justification for ten days paid leave to do prescribed matters that may never eventuate at

the expense to the employer nor for, subsequently, two days of paid leave for another incident;

- (ix) Concerning family/domestic proceedings (however described in each of the legislation) occurring in closed court, the state/territory legislation is varied. Matters could well be heard in open court with the public admitted. As with most matters, procedure lies within the power of the court yet, under the ACTU draft clause the employer is compromised.
- (ix) Copies of the notices or protection orders referred to in (viii) above are in the hands of the alleged victim and perpetrator. In any consideration of evidence requirements considered by the Commission, these should be taken into account as the minimum requirements to be shown to the employer.

- 10.3 Whether what we have submitted concerning the state and territory legislation coverage is finally conclusive or otherwise is really not the issue. It is arguable and this is the issue. The fact that it is arguable leaves the door open for dispute and hardly satisfies s.134(1)(g) of the Act.
- 10.4 Earlier, we described the state and territory family and domestic violence legislation as a myriad of legislation. There are substantial differences concerning the way each state addresses the issue. This was primarily the reason why we submitted that the matter should be left to Federal Parliament. The ACTU has simply disregarded all these relevant matters.
- 10.5 AMIC submits, concerning the ACTU draft clause, that it is not for a specialist tribunal such as the Commission dealing with workplace relations to become involved in a detailed consideration of a non-workplace related issues such as family and domestic violence (that takes place away from the workplace) no matter what views a Full Bench may have of the subject matter covered by the ACTU draft clause.
- 10.6 If the federal legislature in the future decides to deal with the matter through the Act then that would be the most desirable course of action.

11. Assessment of claim against the MAO

11.1 We outlined briefly earlier the rationale of ss.134 and 138 of the Act. The Commission is given the task of considering the various elements of the MAO to ensure that modern awards and the NES provide a fair and relevant minimum safety net of terms and conditions. However, some of the elements are written in terms of the 'need' to do something, while others are not.

11.2 We briefly comment on the relevant elements in s.134(1) in the context of the ACTU draft clause.

134(1)(a) - relative living standards and the needs of the low paid

11.3 These elements appear in other sections of the Act. They have been extensively considered in minimum wage reviews since 2010¹¹. In s.134(1)(a) they are related elements. However, as has been noted by employer parties in other common issue claims, simply categorising a class of employees as low paid cannot be sufficient alone to warrant the granting of a claim.

11.4 The ACTU and others rely upon the statistics as to the number of family/domestic violence incidents dealt with police each year: i.e. at 5.65 of the ACTU submissions. Not all these persons would be employed. If employed, not all these persons would fit within the 'permanent employment' category. Not all these persons would be award reliant. Not all these persons would fit into the 'low paid' category. Not all these incidents would be the subject of final court relief or even applications.

11.5 For the ACTU to submit that a number, even a large number of persons, who experience family and/or domestic violence are award reliant or low paid, cannot be sufficient to satisfy this MAO element. The Commission is being asked to consider a common issue claim extending over each and every modern award.

11.6. Again we refer to marriage and divorces as a comparative example. Public statistics show that over 50,000 marriages are dissolved each year. The

¹¹ See for example [2015] FWCFB 3500 at [301-311].

number of marriage or de-facto breakdowns occurring each year would substantially inflate this figure. The cost, monetary or otherwise, of these breakdowns would be substantial. Does all this warrant a common issue claim?

134(1) (b) - the need to encourage collective bargaining

- 11.7 The ACTU has placed great emphasis on this element. No matter how the ACTU case is viewed, it is simply that the ACTU and some other unions consider it most desirable to include the ACTU draft clause in modern awards for bargaining purposes.
- 11.8 The fact that clauses concerning family/domestic violence appear in a small number of enterprise agreements is not an issue. The fact that some unions are pressing for a term to be included in enterprise agreements is also not an issue. It might be the situation that a minority of unions are finding that negotiations stall concerning a family/domestic violence claim. That is the negotiating process. That is not a reason to insert the clause into all modern awards.
- 11.9 This element of s.134 needs to be weighed and balanced against other elements of s.134 and against the totality of the terms of each of the modern awards and the NES and considered against s.138.

134(1) (c) - the need to promote social inclusion through increased workforce participation

- 11.10 The ACTU submits that this element 'is at the heart of the ACTU's application: see 5.70 of submissions.
- 11.11 A theme continually occurring through ACTU submissions and evidence is that the need for work participation and accessing available jobs is paramount to counter the effects of family/domestic violence.
- 11.12 Ultimately, the comments in 11.11 above can only succeed by training and community awareness not by providing 10 days paid leave.

11.13 Indeed, mandating 10 days paid leave into modern awards could go against this element of s.134 in a variety of ways because of possible employer reaction.

134(1)(d) - the need to promote flexible modern work practices and the efficient and productive performance of work

11.14 AMIC submits that there is sufficient flexibility in modern awards and the NES to combat family and domestic violence issues. The Act was amended in 2013 to provide for this flexibility. The need to promote flexible work practices is hardly achieved by mandating 10 days paid leave plus an additional 2 days of unpaid leave.

11.15 The need to promote efficient and productive performance of work can extend to every possible social issue affecting an employee be it family/domestic violence, substance abuse, difficult children, divorce, marital breakdown etc.

134(1)(f) - the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;

11.16 This element of s134 requires the Commission to consider the impact.

11.17 The ACTU has produced little or next to no probative evidence on this critical element to be considered by the Commission. The ACTU admits that the introduction of paid leave will come at a cost: see 7.20 of ACTU submissions. The way the ACTU counters any argument concerning this element of s.134 is simply to state that the cost of family and domestic violence at present outweighs the cost to the employers of the ACTU draft clause. This is the only way they can argue given this element of s134 and because of the lack of evidence provided for the Commission to consider, as required.

11.18 With respect to the ACTU and others pushing for the ACTU draft clause, the present cost of family and domestic violence is not one primarily associated with employers. Employers cannot be linked to the cost of any litigation, nor medical or counselling assistance provided in situations of family or domestic

violence just as employers cannot be linked with the cost of other social issues.

- 11.19 This element of s.134 is critical, perhaps the most critical element of s134 in the context of the ACTU draft clause, considering it is a claim for paid leave outside the NES. One does need to be a trained mathematician to understand that adding 2 weeks of paid leave per year plus 2 days of unpaid leave for each additional incident to 4 weeks of paid annual leave and 2 weeks of paid personal leave plus other minimum NES paid leave requirements would substantially affect productivity and add to employment costs and the regulatory burden of employers. To grant 10 days paid leave to award covered casuals of any description, as if they be permanent employees, would be novel in the extreme.
- 11.20 The Applicant bears the onus to satisfy the Commission that this element of can be fully considered on the evidence. True, it is but one element for consideration but the ACTU claim is a serious and potentially burdensome case.
- 11.21 In years gone by, claims to reduce ordinary hours from 40 to 38 per week, increase sick leave from 5 to 8 days per year, increase the casual loading from 20 to 25 per cent etc were the subject of substantial economic material concerning the cost of the claim. Under the Act, claims to increase the minimum wage each year are the subject of detailed economic forensic material. Here, the ACTU draft clause for a person on the minimum wage would mean the payment of 3.8 per cent of a person's annual wage for no work plus continuity of service accruals plus payment of superannuation plus any other associated employer costs. One can only imagine the effect on a small business with say 1 to 15 employees of whom some or many are casual and permanents absent on personal leave.
- 11.22 The effect and impact of the ACTU draft clause would vary across industries yet the ACTU has provided no evidence across all industries. The employer parties cannot respond to 'nothing'.

134(1)(g) - the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

- 11.23 Given the earlier comments relating to the various state and territory legislation for family/domestic violence and the coverage and interpretation and evidentiary issues, it cannot be said that the ACTU draft clause satisfies this element of s.134. It does the opposite because the meanings are not defined with precision nor reference.
- 11.24 The fact that various state and territory legislation attempt to define terms with precision shows the extent how the ACTU draft clause offends this element of s.134. The fact that the ACTU draft clause may be wider or narrower than some of the state and territory legislation shows the difficulty. There are state differentials and although s.154 of the Act may not be entirely relevant the ACTU claim runs a parallel course.
- 11.25 Consider the predicament of an employer in Queensland for example. The employee resides in a household and goes to the employer with documentary evidence under the name of a doctor or nurse. The employer inquires whether the alleged victim is seeking court relief under the relevant state family violence legislation. The answer of the employee – if knowledgeable – would answer NO BECAUSE I'M NOT COVERED leaving the employer in a state of confusion. What if the employer operates across state borders? This increases the dilemma.
- 11.26 With these simple examples, the ACTU draft clause cannot be said to be a simple, easy to understand, stable and sustainable term for the modern awards.

134(1) (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.

- 11.27 This element requires the Commission to consider the likely impact of the ACTU draft clause in the context of the broader economy. Without evidence across all industries covered by the awards, the Commission would simply be left with an opinion rather than a consideration of the likely impact.

12. Other submissions

- 12.1 We can deal with these very briefly.
- 12.2 The submissions of The Australian Human Rights Commission (HRC), Victorian Labor Government and PwC do not essentially add much to the ACTU submissions.
- 12.3 We commented earlier on one particular point of emphasis in the submission of HRC namely, that where overseas countries or states have leave for family/domestic violence it has been legislated and in many of the references given it is unpaid leave. Australia has flexible work arrangements.
- 12.4 The submission of PwC is a submission covering the subject at large but must include persons who work, do not work, have occasional work, are retired – presumably the whole ambit. For the Commission to rely on such material when finally considering the claim would be dangerous.
- 12.5 The argument of all these three bodies is to refer to the supposed cost of family/domestic violence (including the vast bulk of costs having nothing to do with the employer) and then they take the quantum leap to conclude paid leave is necessary. None fully deal with the requirements of the Commission pursuant to ss. 134 and 138 of the Act which are mandatory for the Commission to consider. None deal fully with the ACTU draft clause in detail. None deal with the myriad of state/territory legislation. The Victorian government does not even refer to the Victorian legislation in the context of the ACTU clause. The Victorian government itself states it is pushing, through official channels, for a change to the Act.
- 12.6 The AMIC submissions herein generally relate to these three submissions.

13. Conclusion

- 13.1 As we stated at the beginning of this submission, family/domestic violence is an important social issue. 2013 amendments to the Act reflect this.
- 13.2 The Commission, in dealing with a novel claim like the one presented by the ACTU, cannot act upon suppositions and supposed opinions without a full cost and economic forensic analysis as undertaken in major claims under the Act and previous legislation for decades.
- 13.3 AMIC submitted, primarily, that the Commission is not the body to discharge such a function on an issue such as ACTU claim.
- 13.4 If the Commission concludes they are the body to deal with the matter then, a major claim such as the one offered by the ACTU providing an extra 10 of paid leave, would need a full-scale economic cost analysis for employers. The ACTU and other supporting parties have not undertaken that probative task. It is not the cost of family/domestic violence that is the primary issue, but the cost to industry and employers of such a claim.
- 13.5 If the Commission concludes it has enough material to consider the claim it must conclude that the claim is not necessary to give effect to the MAO.
- 13.6 We understand that the Commission is not limited to the claim as stated many times during the Review. However, any way the Commission turns will lead to the same result. A claim such as this mandating 10 days paid leave does not meet the requirements of ss.134 and 138.
- 13.7 The claim should be rejected.

Australian Meat Industry Council

16 September 2016