



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**VICE PRESIDENT WATSON
DEPUTY PRESIDENT GOOLEY
COMMISSIONER SPENCER**

AM2015/1

s.156 - 4 yearly review of modern awards

**Family and domestic violence leave clause
(AM2015/1)**

Melbourne

2.03 PM, THURSDAY, 1 DECEMBER 2016

Continued from 18/11/2016

PN2579

VICE PRESIDENT WATSON: Any changes in appearances? Ms Richards?

PN2580

MS M RICHARDS: May it please the Bench, I appear for the State of Victoria. My name is Melinda Richards.

PN2581

VICE PRESIDENT WATSON: Thank you.

PN2582

MR G JOHNSTON: If the Commission, please, Johnston is my name, initial G. I appear for the Australian Meat Industry Council.

PN2583

VICE PRESIDENT WATSON: Mr Johnston. Yes, Ms Burke?

PN2584

MS K BURKE: Thank you. Good afternoon, Members of the Full Bench. I am sure you will be delighted to hear I don't propose to read out the ACTU's final submissions filed on Monday and, in particular, the legal and the merit arguments that have been raised by the employers' submissions are not, to my reading, substantially very different from those in their September submissions. We have dealt with those comprehensively in our reply submissions, so I am not going to talk much about those issues either. Instead, in this address, what I would like to do is address eight points that have arisen from the employers' submissions that clearly put these issues in dispute.

PN2585

I will just tell you what they are. They are the use of the PSS, that is number 1; number 2 is about the disruption to employment that we say is associated with family and domestic violence; number 3 is the ACTU's proposition that there is no, or no adequate, safety net for award-covered employees; numbers 4 and 5 deal with the cost of family and domestic violence and the cost of the proposed entitlement and the benefit that we say will flow from that entitlement; number 6 deals with some operational matters; number 7 deals very briefly with the statutory test, and finally I will say something about necessity.

PN2586

The first matter that I want to address is the ACTU's use of data from the Personal Safety Survey and in particular Dr Cox's evidence about that survey. There appears to be a misunderstanding or two about what the PSS does and what we rely on it for. The AIG are critical of the PSS on the basis that it measures subjective experiences of family and domestic violence and, at paragraph 95 of their submissions, they say:

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By virtue of the fact that the PSS is a "victim survey", it does not attempt to derive its results against an objective standard. Rather, it seeks the views and opinions of self-identified victims of violence.

PN2588

They identify as an example the experience of being frightened and they say that a respondent's assessment of whether they were frightened is not assessed by any objective indicator or measure, and the Australian Chamber make a similar argument about the subjectivity of victims' experiences of violence as reported to the PSS.

PN2589

In response, I want to be very clear that it is absolutely the case that the PSS does not measure a person's experience against an "objective standard" and that is because the only objective measure of fear certainly that I could think of are the biological indicators that might manifest, such as increased heart rate, particular brain activity, dilated pupils, et cetera. I don't understand the AIG to be submitting that absent proof of these biological markers, you can never take anyone's word that they are frightened, for example, that their husband is going to kill them. The reality is that all emotional experiences are subjective as we are talking about people's experiences and their feelings. So to criticise the PSS for not measuring people's experience of violence by some sort of objective standard is, with respect, like criticising the sun for being a bit too bright. It is not helpful, it is not a valid criticism of the PSS and it does not undermine the PSS itself, which does exactly what it set out to do, which is measure people's, men and women's, experiences of violence.

PN2590

If the employers are arguing that the PSS is not reliable because whether or not somebody is a victim should be assessed against a reasonableness standard, then we say again that is not the purpose of the PSS and the employers have put no evidence before the Commission to enable it to find that the PSS is overstating rates of family and domestic violence because, for example, while people report being frightened, those feelings are unreasonable or excessively fragile and so the survey doesn't reliably capture people's experiences of victimisation and, of course, we say it would be surprising if such evidence existed given the near universal opinion of experts in the field, including as expressed in the Royal Commission report, that family and domestic violence is under reported.

PN2591

The AIG also criticise the PSS for not revealing anything about patterns of family and domestic violence and in particular they point to the evidence of Dr Flood, who stated that the PSS doesn't tell us anything about the context in which violence occurs. Now there is no "Aha" moment with this evidence from Dr Flood because the PSS is not a qualitative survey, it is not designed to identify causal relationships. Dr Cox explained that in her first report and again in her reply report. So because it is not a qualitative survey, it does not tell us anything about patterns of violence and, in part, that is why Dr Flood's evidence was necessary. So this is really a non-issue, we say, as far as criticism of the PSS is concerned. We don't rely on that survey to make findings about the context of domestic violence.

PN2592

One of the key reasons that the ACTU has brought this case is because, in our view, family and domestic violence rates are at a crisis point in Australia and it

has an impact on the workplace in a way that necessitates improvements to the safety net, and it is not just our view that this is a serious problem, it is the view of State and Commonwealth governments, and it is not really a view that is contested by the employer parties. When I am referring to "a crisis", I am not saying that rates of family and domestic violence are escalating, and this is relevant because AIG criticise the PSS for failing to demonstrate that rates of family and domestic violence are increasing. They do that at paragraph 78 and at 315 to 317.

PN2593

What the ACTU says is that family and domestic violence has been going on in this country for a long time. What has changed is that, as a community, we no longer think this is something that should be kept behind closed doors and so the awareness of the depth of the problem and the possible solutions has evolved. Unfortunately, what has not changed are prevalence rates, and this is acknowledged by the AIG in those same paragraphs at 315 to 317. It is the fact that rates of family and domestic violence are not declining that necessitates a response.

PN2594

The second matter I want to address is about the connection between family and domestic violence and employment disruption. The AIG state in their submissions, and I am looking at paragraph 106, that Dr Cox's evidence regarding labour force participation and experiences of violence shows that there is no statistically significant variation between the proportion of employed and unemployed women who experienced family and domestic violence from an intimate partner, and therefore - I quote from paragraph 107 of the AIG submissions - they say that this:

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confirms that the PSS does not establish any correlation or causal relationship between the employment status of a woman and the prevalence of intimate partner violence.

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There are three things we say that are wrong with the conclusion that the AIG seeks to draw from this evidence.

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First, as stated earlier, the PSS is a quantitative survey; it is not designed to identify causal relationships. It is not a valid form of criticism to attack the PSS for not doing something that it has never intended to do. So we do say that there is evidence of a connection between family and domestic violence and employment disruption, but we don't rely on the PSS for that. I will come to that evidence shortly.

PN2598

Second, the AIG's argument misunderstands what is meant by "statistically significant" in this context and Dr Cox addresses the precise point in her reply report, which was exhibit B2. This was not addressed by the AIG. So the absence of a statistically significant finding with respect to the relationship status of a woman and domestic violence simply shows that those figures are reliable.

PN2599

Third, the argument that the ACTU has failed to show a causal relationship between family and domestic violence and employment disruption, in my submission, elevates the evidentiary standard to a level it has never been required to meet. I should say that this argument that the ACTU has failed to establish causation between domestic violence and employment disruption is an argument that is levelled at a range of evidence called by the ACTU, not just the PSS, it is levelled against Dr Cortis's report and Ms Bignold's evidence, for example. In my submission, it would be wrong to require the ACTU or any party moving an award variation, which on occasion would include my friends, to have evidence establish that there is causation in either the legal or the factual sense between the harm, which in this case is family and domestic violence, and the effect of the harm, which in this example is employment disruption. It would be an error to require the moving party to establish this sort of causation before the Commission can find that an award variation is necessary.

PN2600

We do say it is proper that parties demonstrate an association between factual harm and statutory remedy and the ACTU has done this by adducing evidence about the disruptive effect that family and domestic violence has on workforce participation. The evidence that we rely on is identified and summarised at paragraphs 85 to 94 of our final submissions. I will not repeat those. But, in addition to the evidence that is listed there, I just want to also add the evidence of witnesses Jessica Stott, Karen Willis and Confidential Witness Number 4.

PN2601

In terms of employment disruption, we also rely on the unfair dismissal cases in this Commission of *Alexis King v D C Lee & L J Lyons* [2016] FWC 1664, which is summarised at paragraph 108 of our submissions, and the decision at first instance, on appeal and then on appeal to the Full Federal Court in *Moghim v Eliana Construction and Developing Group Pty Ltd*, which is an appeal from the decision at first instance of *Rowe C*, which was ultimately upheld. These cases are referred to in the employers' submissions as well and we say they provide good examples and good evidence of how family and domestic violence can and does disrupt employment.

PN2602

Finally under this heading, I need to address how some of the ACTU's evidence has been, we say, mischaracterised in the employers' submissions. The first is the evidence of Dr Cortis. The ACTU rely on the evidence of Dr Cortis in particular for this purpose: her Journeys Home research project examined how domestic violence is associated with financial hardship among a group of low income women. This aspect of her evidence is addressed at paragraphs 88 to 94 of the ACTU final submissions. One matter I need to address is the statement in the employers' submissions that:

PN2603

Any observations or findings from Journeys Home cannot be interpreted to apply to all victims of domestic violence.

PN2604

I would just like to draw the Full Bench's attention to paragraph 91 of our final submissions where we point out that the majority of women who are employed in the study were employed in industries with high levels of award reliance and, at paragraph 92, where we state the findings of the Cortis Report, which was that employment was likely to have a protective effect from the impact of family and domestic violence, which is a finding also that was consistent with the findings of the Royal Commission.

PN2605

The AIG also argue that the Horizons Report - this is Dr Cortis's Horizons Report - found the proportion of women who experienced family and domestic violence was close to the proportion of all women who were working and therefore this suggests that the experience of family and domestic violence does not have an adverse impact on the employment status of women. They make that point at paragraph 167. With respect, this is attributing causal findings to prevalence rates, which is not a proper use of those statistics.

PN2606

Finally, the evidence of Ms Bignold is sought to be undermined by the AiG and by ACCI because she works with vulnerable women who are not, it is put, representative of the general population. I just want to emphasise that Ms Bignold's evidence is that women who are homeless and seek help from the Sisters of Mercy through McAuley Works are vulnerable because as well as being victims of domestic violence, many of them have lost their jobs and have no financial security. So we say in this way her evidence represents in a very real way the consequences of harm that can occur once employment is disrupted because of family and domestic violence.

PN2607

The third matter that I want to address is the proposition that existing entitlements are sufficient to meet the needs of persons affected by family and domestic violence. The employers rely heavily on existing leave entitlements and other statutory provisions to say the needs of people affected in this way are already being met. In particular, they rely on personal leave, annual leave, long service leave and on the right to request a flexible working arrangement under section 65(1A)(e). The ACTU has addressed the inadequacy of each of these entitlements and more in our reply submissions at paragraphs 32 to 52 and in our submissions filed on Monday at 145 to 154.

PN2608

I just want to emphasise briefly three matters about the existing entitlements debate. First, none of the employer parties have addressed or even acknowledged the fact that casual employees have no access to the vast majority of paid leave entitlements. It is true that casuals are paid at 25 per cent loading to compensate for lost personal or annual leave, but the fact is there are also specific provisions in the Fair Work Act that acknowledge that casuals are not necessarily people working five hours on weekends. The whole purpose of the statutory definition of long-term casuals at section 12 covers people whose employment is sufficiently regular, systemic and lengthy so as to be entitled to certain protections, including from unfair dismissal.

PN2609

Nevertheless, the reality is casual employees do not have an entitlement to paid leave and, as a result, are not entitled to job security and have no safety net, and the size of the hole in this safety net is significant. 45 per cent of award-reliant employees are casual; 51 per cent of award-reliant women are casual employees. So the assertion that existing entitlements can meet the needs of employees subject to family and domestic violence has no work to do for over half of the female workforce that are the subject of this application. And for those workers that are employed on a permanent basis, while 52 per cent of award-reliant men are employed on a full-time basis, only 25 per cent of award-covered women are employed on a full-time basis. So the submission made by ACCI at paragraph 5.13 of their written submission that 10 days of paid personal/carer's leave is a statutory and modern awards minimum which applies universally is simply not the case.

PN2610

My second point is about the inadequacy of those entitlements and, as I said, this has been comprehensively addressed. There is no dispute that personal leave can meet some of the needs of persons affected by family and domestic violence but certainly not all of those needs, and going to court and going to lawyers and speaking to the police and moving out of home are not activities for which personal leave is appropriate or an eligible use of that entitlement. The fact is that family and domestic violence is the leading contributor to death, disability and ill health among Australian women aged between 15 and 44, and we say that the evidence called by the ACTU from employees who have experienced family and domestic violence at work shows that that experience results in a depletion of their personal leave, leaving them vulnerable when non-family domestic violence-related illnesses arise. So for the small proportion of full-time employees who have 10 days' personal leave a year, it is just not enough; there is still a need.

PN2611

The employers rely on annual leave to meet the need and the ACTU's response to this has always been that annual leave is for a specific purpose, which is rest and recreation, and that is really at the heart of the policy of having annual leave, which is to allow employees to rest and recover at least in part so they can be fit for work, and those are not just my views or the views of the ACTU. As part of the four-yearly review, employers, including the AIG and ACCI sought a variation to a number of modern awards to enable employers to compel employees who had accrued excessive leave to take that annual leave, and here I am quoting from the Full Bench decision, the citation of which is [2015] FWCFB 3406:

PN2612

ACCI relied on a number of research reports, including of international research, in support of the proposition that taking annual leave is critical to preventing burnout and poor health and contended that ensuring employees take annual leave "should ensure a more balanced, rested and (accordingly) productive workforce".

PN2613

That is at paragraph 61. The AIG submitted that:

PN2614

taking a break through a period of annual leave will have benefits for employees and their families and positive effects for businesses such as increased productivity and workforce morale and reduce work health and safety risks.

PN2615

That is at paragraph 68. These arguments were accepted by the Full Bench in the annual leave decision, which held that:

PN2616

The purpose of annual leave is to provide employees with a period of rest and recreation and to attend to their family and other commitments and to engage in social and community and personal interests.

PN2617

I am quoting there from paragraphs 116 and 312.

PN2618

In my submission, there is nothing in either of those propositions put by ACCI and AIG and accepted by the Full Bench that would hold if annual leave was used for purposes associated with family and domestic violence. You won't get a balanced, rested and productive workforce if they have used up all their annual leave to go to court and to relocate and they have nothing left. It is a mistake, in my submission, to contend, as the employers do, that annual leave should be used for dealing with the consequences of being subject to family and domestic violence. Annual leave is not general leave; it is a specific policy rationale underpinning the entitlement and it should not be disturbed in the way suggested by the employers.

PN2619

The third point I need to make about the safety net relates to enterprise bargaining. The argument here that is put against us is that an award clause isn't necessary because unions and employees can and do bargain for this entitlement and this demonstrates the system is working. But, just because clauses are included in enterprise agreements, this has nothing to say, no assistance to offer to award-covered employees, for obvious reasons. This case is not about whether or not parties can bargain for paid family and domestic violence leave and it would be an error, in my respectful submission, to find that an award clause is unnecessary because bargaining is available. It would be an error because that argument undermines the entire function of modern awards and the National Employment Standards as the repository of minimum terms and conditions of employment.

PN2620

We say the evidence about enterprise bargaining is only relevant in this way: first, it is to show that there are challenges associated with bargaining that could be overcome by the inclusion of award minima, and that is consistent with the decision of the Full Bench in the Fire Fighting Award Review, the citation of which is [2016] FWCFB 8025, and it is also relevant to demonstrate that a number of operational concerns identified by the employers don't actually appear

to be reflected in agreements made between parties to agreements about paid leave, in particular, the objections raised by the employer parties that the definition of family and domestic violence is too broad and could capture behaviour that they think does not warrant the entitlement.

PN2621

The employer parties also claimed that the ACTU has failed to demonstrate that existing entitlements are being depleted. Obviously, for half of the award-reliant workforce, there is nothing to be depleted, so we can't demonstrate that negative, it is true, but in terms of the depletion of entitlements for those employees who have them, the ACTU relies on the considerable amount of evidence to establish that proposition. I will just quickly identify it rather than describe it. It is the evidence of Sandra Dann, who was not cross-examined; the evidence of Confidential Witness Number 1; Confidential Witness Number 3, and Confidential Witness Number 4.

PN2622

I want to say something about Confidential Witness Number 3. This is a witness who needed to urgently relocate after her partner made threats to kill her and her children and the police said they couldn't protect her and she had to flee the State. On learning of those threats, her employer said, "Look, you can take your long service leave", but at that point, she had no other leave entitlements remaining to access and it is not reasonable to expect that employees will have access to long service leave.

PN2623

In addition to Confidential Witnesses 1, 3 and 4, we rely on the National Retailers Association letter to this Full Bench dated 2 November 2016 where the NRA state:

PN2624

Employees subject to family and domestic violence require additional leave beyond existing entitlements of up to 18 days.

PN2625

We also rely on the evidence given to the Royal Commission and reported in that report in Chapter 37, page 81, that victims often exhaust their leave entitlements when they must attend medical appointments and court appearances and organise accommodation and care for their family, and we rely on a number of observations made in the Australian Law Reform Commission Report that is listed in our tender bundle, and in particular at paragraphs 16.57, 16.63, 16.69 and 17.30. In each of those paragraphs, the ALRC refer to significant evidence they had heard that, in many cases, an employee experiencing family violence will quickly exhaust his or her leave entitlements.

PN2626

To reiterate this topic, 45 per cent of award-covered employees have no existing entitlements, including over 50 per cent of award-covered women and only 25 per cent of award-covered women are employed on a full-time basis. So the assertion that all employees have access to 10 days' personal leave and four weeks' annual leave is simply not correct and, for those employees with access to paid leave

entitlements, the evidence is those entitlements are not fit for purpose and are not sufficient to meet the needs of persons affected by family and domestic violence.

PN2627

The fourth and fifth matters that I want to address relate to the cost and the benefit of the matters that are the subject of this application. Just briefly, the cost to the national economy is addressed at paragraphs 60 to 69 of the ACTU final submissions and that is derived from the PWC report attached to Ms Eckersley's statement and the KPMG 2016 Report which is included in the ACTU tender bundle. The cost is \$22 billion. That is how much all violence against women is estimated to cost the national economy each year and the figure is slightly less, but still catastrophically high, at \$12,6 billion if it is limited to violence against women by their partners.

PN2628

The cost to employers is addressed at paragraphs 70 to 75 of our final submissions and the relevant figure is that the cost to employers just from replacing lost employees is \$96 million a year. If you add in the cost of victim and perpetrator absenteeism, the cost balloons to \$1.4 billion per year. That is from the 2016 KPMG Report.

PN2629

The cost to employees or, I should clarify, the fiscal cost to employees is felt in two ways: in employment disruption, which I have already addressed, and in lost income as well as expenditure, and these costs arise regardless of whether the abuse is physical or sexual or emotional or economic, although the scale and nature of losses from economic abuse will reflect that particular conduct. Lost income is estimated to cost the average female victim \$2000 per year and consumption costs of replacing damaged property, including furniture, a car or household items, is just over \$9000 per year. This is addressed further in our submissions at paragraphs 77 to 84.

PN2630

The cost of the proposed clause is also addressed in the ACTU's evidence and we rely on the reply report of Dr Martin O'Brien. Dr O'Brien's evidence was prepared in response to submissions of the Australian Chamber that included an estimate of the cost of the entitlement of \$205 million per year for one day's leave. I am going to stick with the one-day cost just for ease of comparison. Dr O'Brien looked at the ACCI submission and, in his evidence, he set out the flaws with that and, in particular the ACCI submission assumed the entire workforce, not just the award-covered employees that would have access to the entitlement, assumes that 35 per cent of all employees affected by family and domestic violence are affected by family and domestic violence each year. This is a figure that bears no resemblance to any existing data. It assumed that all employees were full-time employees, which we know is nowhere near the case for award-reliant employees, and it assumed that 100 per cent of those employees would take their full leave entitlements. Now, the result of those assumptions was that Dr O'Brien found that the ACCI calculations were substantially upward-biased and not reliable.

PN2631

After identifying those problems, Dr O'Brien looked at the available evidence to determine what would be reasonable assumptions about matters like the composition of the workforce, the target population and take-up rate and, in some cases, there was good data available, but not in all cases, and so certain assumptions had to be made based on what was available. We say this is an unremarkable phenomenon when performing a costs projection. To ensure that those assumptions were not artificially inflating the estimate, Dr O'Brien performed a sensitivity analysis, so he didn't just pluck numbers out of the air and pop them into his formula, he subjected them to a sensitivity analysis, and we have addressed the reliability of those assumptions comprehensively in our final submissions at paragraphs 198 to 226.

PN2632

The employers' submissions then identify a number of matters they say Dr O'Brien did not incorporate into his estimates which means that the estimates are likely to be low. I just want to address those quickly. It was put to him that he did not include violence from a member of a person's household. We have addressed that at paragraph 211 of our final submissions and, in short, household violence, we say, is not distinct from family violence in terms of impact. If you look at the Victorian legislation, there is a definition of family violence and household violence and we say both those things are captured. It was put to Dr O'Brien that he did not account for emotional and economic abuse and we have dealt with that at paragraphs 205 to 207 of our submissions. The data about the prevalence rates of economic and emotional abuse is in Dr Cox's report at paragraphs 7.24 to 7.26. Just to clarify, the PSS does record economic abuse and, as part of that definition, economic abuse falls under that umbrella.

PN2633

It was put to Dr O'Brien that he did not include anything about swap-over costs, but we say that to the extent that these are relevant, and it is just a proposition, they are very small because only 25 per cent of women employed under awards are full time, so if there are swap-over costs, we say they are likely to be low. Finally, it was put to Dr O'Brien that he did not include the administrative costs associated with implementing and monitoring a new form of leave. We say that employers will already have those systems, so any costs will be negligible.

PN2634

The final issue relates to take-up rates of entitlements. The employers have expressed concerns that the complex nature of family and domestic violence means that it captures a range of behaviours that are presently non-family and domestic violence situations, including ordinary, non-violent relationships where couples disagree and perhaps even use harsh words. This concern ignores the vital importance of context. Professor Humphreys was very clear about this in her evidence under cross-examination. I need to put this very uncontroversial proposition, which is that context is the factor that characterises behaviour as criminal or not. It is context that is the difference between a football game and physical assault, or, depending on how the game goes, grievous bodily harm. It is context that differentiates a disagreement between a couple from ordinary to violent and abusive behaviour and, yes, it is the subjective experiences of people in a relationship who determine what the context is and whether, for example,

cannoning into somebody is assault or taking a mark and whether harsh words and withholding money is an ordinary argument or abuse.

PN2635

When it comes to take-up rates, the employers want to have a bet each way. On one hand, they say the definition of family and domestic violence is so broad that it could capture a whole range of behaviour that, by implication, is not a proper or strong form of family and domestic violence and this would lead to a blow-out in cost. We say that proposition ignores the existing evidence about take-up rates which is addressed in our submissions and those rates are low. On the other hand, the argument is made, and I am referring here to the submission of the Australian Chamber, that only an extremely small proportion of employees will access the entitlement and so what follows from that, they say, is, "Well, what's the point of it if it's only going to be used by a small number of people?" We say this conflates the concept of utilisation and necessity. It may be that only one or two employees take paid domestic violence leave and certainly small take-up rates are consistent with the summary of the evidence that is in the submissions, but if they use that to escape from a violent relationship or enforce an intervention order, it could have very, very real and high value to the employee. So the value of the clause is very high and should not be equated with the take-up rate. I will come back to the necessity because that is what that ties into at the end.

PN2636

On the benefit side of the ledger, the central plank of the ACTU's case is that financial stability and therefore employment is crucial to enable people affected by family and domestic violence to leave violent relationships and recover from those relationships. We say the evidence shows a worker's economic status shapes their capacity to escape violent relationships and employment is central to economic power. That evidence is set out at paragraphs 171 to 177 of the ACTU final submissions, and that evidence is consistent with the findings of the Victorian Royal Commission Family and Domestic Violence Report which 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.

PN2637

It is, of course, necessary to look at the benefits to employers and the ACTU's case is that providing paid family and domestic violence leave will be beneficial to the employer as well in this way. First, it will be of benefit in retention rates. Currently, retention failure is costing employers \$96 million a year. That is in the KPMG 2016 Report. Second, and this follows from the first, a corollary of providing paid leave and therefore being able to retain your employees is that family and domestic violence operates as a tertiary prevention strategy.

PN2638

I just want to briefly outline this concept. Prevention strategy is characterised as primary, secondary and tertiary. There is a simple explanation of this in the PWC Report at page 19: primary prevention strategies are aimed to prevent violence before it occurs; secondary strategies involve early detection of risk or

manifestation of the problem; tertiary prevention strategies are designed to respond after violence has occurred, but not only do they support people who need support, they also enable safe escape from dangerous situations and, therefore, they will reduce or eliminate the opportunity for further violence to occur in the future.

PN2639

Thirdly, the evidence draws a direct link between paid family and domestic violence leave and increased employee productivity, and I refer to that evidence in our final submissions at paragraphs 174 to 177.

PN2640

This sixth matter that I want to address goes to the definition of family and domestic violence in the proposed clause and the operation of the entitlement. The complaint made throughout the employers' submissions is that the definition of family and domestic violence is too broad because it would capture a range of behaviour including physical violence, sexual violence, emotional abuse and economic abuse, but really the submissions are limited to those last two examples, economic abuse and emotional abuse. It seems to me that this complaint really goes to two issues. The first is whether Dr O'Brien's evidence properly captures the range of criminal behaviour that would lead to an employee needing time away from work to deal with it, and I have addressed that earlier. The second is this generalised complaint that the definition of family and domestic violence, not just in the clause but all statutory definitions, are too broad and it's too hard for employers to work out if the employee is really being subjected to family and domestic violence and therefore entitled to take leave.

PN2641

As the ACTU has made clear, the employer is not required to determine if family and domestic violence has occurred and this is because the entitlement is not enlivened if the employee is subject to family and domestic violence as the start and the end of the matter. Just to be very, very clear about this, this is not, "I had a fight with my boyfriend and I need a day of leave", this is, "I need to go to court to stop my husband from assaulting me, I need to escape my house." So in terms of the operation of the clause, we have drawn an analogy with personal leave. An employer is not required to determine if an employee is suffering a personal injury or illness. The eligibility for personal leave does arise in those circumstances and the employer can ask for evidence that the leave was for the purpose intended, i.e. that the employee was not fit for work, but the determination that the employee was not fit for work is made by the employee and her or his doctor, not by the employer. If the employer doesn't believe the employee, then the dispute provisions of the award are engaged and the matter is dealt with that way.

PN2642

However, it does seem that the objection to the breadth of the entitlement in this clause is not just about the cost and it's not just about the evidentiary requirements. In some cases, the objection is opaque, but really it is expressed in very clear and unambiguous terms by the AIG where they state - I am looking here at paragraph 491 - and this follows on from the debate about whether or not the employer has to determine whether or not family and domestic violence has occurred and they say:

PN2643

Even if the clause operated in the manner asserted by the ACTU -

PN2644

i.e. we say they don't have to determine it -

PN2645

we contend that employers would have to determine it anyway.

PN2646

They go on to say:

PN2647

It would plainly be ridiculous to simply expect that the safety net could operate on the basis that an employee assertion in this regard should simply be taken on trust. No other element of the safety net operates in this manner.

PN2648

With respect, that is an extraordinary statement to make. The AIG are saying that it is "ridiculous" for employers to believe their employees. The statement is also simply wrong. Employers are required to believe, for example, fathers and adoptive parents when they say they are having a baby and they want to take parental leave; employers are required to take employees at their word when they say they need to access compassionate leave or community service leave. True, they can ask for evidence in support and the ACTU domestic violence leave clause gives employers that same right.

PN2649

Finally, all of the family and domestic violence leave clauses in evidence before this Commission, not just those enterprise agreements that were referred to by the union witnesses, but the Spotless policy and the PWC policy contain very broad definitions of family and domestic violence that we say is appropriate, and it wasn't put to any of those witnesses in cross-examination, including Ms Eckersley, that the clause was too broad and caused any difficulties whatsoever. So there is no evidence underpinning this assertion that the clause is too broad.

PN2650

Yes, the ACTU is absolutely operating on the expectation that employers will believe their employees when they disclose family domestic violence. We are not just doing that because it is the right thing to do, which it is, but also because the evidence is that disclosure is difficult. Many people don't disclose their experiences of family and domestic violence because they are ashamed and they are embarrassed. We are also doing it because there is no evidence that people lie about experiencing family and domestic violence, and this is addressed in the Royal Commission report.

PN2651

I just want to take a step back. There are two points to make about the clause is too broad and is subjective, or, in the Australian Chamber's words, "objectively ambiguous". The starting position should always be that you believe your employee and in particular you believe them when they tell you that they have

been subject to family and domestic violence and need time off for that purpose, and I don't understand that I am putting a very controversial proposition there. The second point is that our clause enables the employer to require evidence that the leave is for the purpose stated. Now, the form of evidence can include evidence from a lawyer, a police officer, a doctor and a statutory declaration. There may be some doubt about the veracity of the statutory declaration, but if a statutory declaration is false, the consequence can be imprisonment, so it is not just a letter, it has got real significance.

PN2652

To the extent there is still disagreement about the mechanics of the clause, I am also instructed that if the Full Bench is minded to grant the variation to provide for some form of paid leave, then the ACTU would seek the Commission's assistance in conciliation with the employers about the mechanics and operation of the clause, not the fundamental entitlement that is the subject of this application. I understand that this post-decision conciliation process has been done in previous test cases and common issue award review hearings and the ACTU has shown willingness to respond to employers' genuine questions by making appropriate amendments, and that is evident in the amended clause that we have filed with our reply submissions.

PN2653

The penultimate matter I want to address relates to the statutory framework. The principles applicable to the four-yearly review, and I think I can say this with a reasonable degree of confidence in late 2016, are something that all participants in the modern award reviews are very familiar with. The relevant principles have been comprehensively addressed by the parties in written submissions, so I just need to refer to two matters.

PN2654

The first of those relates to common issue proceedings and award-specific evidence. Both the Australian Chamber and the Australian Industry Group complain that the ACTU has not led any evidence which will allow the Full Bench to review each award in its own right. This proposition fundamentally misunderstands the nature of a common issue proceeding. I am referring to the statement made by Ross P on 1 December 2014 (citation FWC 8583) where his Honour stated that a matter determined as a common issue will be referred to a Full Bench for determination as a stand-alone proceeding. In other common issue proceedings, for example annual leave, the substantive issue has been decided first, followed by the application of that determination to individual awards and that, we say, is the appropriate time to ventilate any award-specific issues.

PN2655

Just for completeness, I note that section 134(1)(g) requires the Commission to take into account the need for a simple, easy-to-understand and sustainable modern award system. The ACTU's claim is for a variation across all 122 modern awards and we say it is consistent with that section 134(1)(g), and in this we agree with the submissions of the AI Group to the Annual Leave Common Issue Full Bench when they stated that achieving a greater uniformity between individual awards will make the system simpler and easier to understand and that a reduction in variances between award entitlement would reduce the regulatory burden on

businesses required to apply multiple awards, consistent with section 134(1)(g) of the Modern Awards Objective, and I am quoting from paragraph 167 of the Annual Leave Common Issue decision. There are several. This one is [2015] FWCFB 3406. Needless to say, we agree with the Australian Industry Group, perhaps only on that point, but, nevertheless, any agreement is valuable.

PN2656

DEPUTY PRESIDENT GOOLEY: Noted.

PN2657

MS BURKE: The second point that relates to the statutory framework is the relevance of the enterprise bargaining and that relates to section 134(1)(b) which requires the Commission to take into account the need to encourage collective bargaining. Collective bargaining is something of a red herring in this case. I want to be very clear, this case is not about enterprise bargaining. The Commission has to take into account the impact of an award change on the decision to bargain, but the fact that parties can and do bargain about this entitlement does nothing to assist award-reliant employees and therefore it doesn't negate the necessity of an award variation.

PN2658

We rely on this evidence and some authorities about bargaining. First, that bargaining for family and domestic violence leave is difficult and it depends entirely on the willingness of employers to consider the issue. That is from the ACTU's industrial witnesses. Second, the decision to engage in bargaining involves a complex mix of factors and cannot be attributed to a single cause. That is from the Annual Wage Review of this year. The citation is [2016] FWCFB 3500 at paragraphs 527 and 538. Third, the available data demonstrates a positive correlation between business size and collective agreements with an increase in business size associated with an increase in the proportion of employees on collective agreements. Again I am quoting from the Annual Leave decision at paragraph 300. That finding is based on data from the ABS Employee Earnings and Hours Survey, and we say more about the connection between business size and enterprise bargaining in our final submissions at 134 to 142 and about bargaining generally at 155 to 170.

PN2659

The analysis by Jenni Mandel of the workplace agreements database in respect of enterprise agreements approved in the first six months of 2016 shows that the majority of agreements approved in that time with a paid family and domestic violence leave entitlement covered organisations with a large number of employees, and just to emphasise, in my submission, that is the only part of the Mandel analysis that can tell you anything about enterprise agreements per se. However, it doesn't follow from the proposition that was established by Ms Mandel's analysis of enterprise agreements approved in the first six months that paid family and domestic violence leave is only something suitable for large employers, and this is because small business is under represented in enterprise bargaining, and again that is confirmed by the findings in the Annual Wage Review, which is referred to in our submissions at paragraph 139.

PN2660

We rely on the decision in the Fire Fighters Modern Award Review, which I referred to earlier, handed down on 15 November and that is [2016] FWCFB 8025. In that case, the Full Bench varied the Fire Fighting Industry Award to provide for part-time employment, which was previously prohibited under the award. Victorian fire fighters are almost completely covered by an enterprise agreement, but what the Full Bench said in that case was that:

PN2661

Varying the Fire Fighting Award to permit part-time employment will encourage collective bargaining in respect of this issue.

PN2662

That is part-time work, "The current award terms", which prohibited part-time work:

PN2663

provide little incentive for the UFUA to bargain in respect of this issue – it can simply rely on what is effectively an award prohibition.

PN2664

So, accordingly, the Full Bench was satisfied in that case that by varying the modern award, the underlying safety net, that it would encourage collective bargaining within the meaning of section 134(1)(b) and we submit that the same considerations apply in this case.

PN2665

Finally, I want to address the necessity of this variation. Employers say that a new modern award entitlement is not necessary because employers do the right thing anyway, there are lots of employers out there who have a range of programs and they try and be supportive, and there is certainly some evidence about that. I have two points to make. First, we welcome the agreement between the parties that some kind of workplace response is needed, but the reality, as exposed by the evidence, is that not all employers are supportive; some simply don't know what to do and others are very unsupportive.

PN2666

There are a wide range of measures out there that could accurately be described as supportive of workplaces, and I am referring here to the White River Accreditation programs, to gender equality policies and to many other matters and policies that are designed to promote gender equality and tackle family and domestic violence, all of which the ACTU welcomes. But the case is not that these workplaces are not supportive but that the minimum support that all employees must have access to is a period of paid leave to allow them to attend to urgent, pressing and unavoidable matters without losing their employment or their financial security.

PN2667

We say the evidence is clear that access to this entitlement can actually prevent serious injury and, in extreme cases, loss of life because it is economic factors that determine whether or not a person remains in or escapes or returns to a dangerous relationship, and whilst some progress has been made through enterprise

bargaining and workplace policies, there are still far too many Australian employees, award-dependent employees, subject to family and domestic violence who can't access the leave they need to take care of their safety and their family's safety and, where they exist at all, current entitlements such as personal leave and annual leave, simply do not provide adequate protection and it is not appropriate, we say, to let entitlements relating to the safety and wellbeing of employees be left to the uncertainty of bargaining. It is not fair or reasonable that employees should have to rely on the good luck of having a good employer.

PN2668

We say the entitlement is necessary to ensure that the safety net of minimum employment conditions in this country remains both fair and relevant and that it is imperative that the employment safety net continues to respond to the real issues that employers and employees deal with in modern workplaces. The unacceptably high rates of family and domestic violence in Australia is exactly such an issue.

PN2669

Thank you. Those are my submissions.

PN2670

VICE PRESIDENT WATSON: Ms Burke, can you tell me where in your submissions you deal with the evidence that some employers are unsupportive of assisting employees the subject of domestic violence, not whether employers have agreed to provide leave or not, but evidence that they are unsupportive?

PN2671

MS BURKE: In Sandra Dann's statement - - -

PN2672

VICE PRESIDENT WATSON: In which part of the submissions do you deal with that?

PN2673

MS BURKE: I am sorry, I misunderstood. Can I take that on notice and provide you with the reference?

PN2674

VICE PRESIDENT WATSON: Yes, indeed, absolutely, by all means. Thank you, Ms Burke. Ms Richards?

PN2675

MS RICHARDS: May it please the Commission, excuse me a moment while we rearrange the Bar table. Thank you for the opportunity to make some oral submissions today. The Victorian Government made a written submission in May of this year in these proceedings with a view to assisting the Bench with its consideration of whether family violence leave should be included in modern awards. Today the Victorian Government appears to make some submissions in support of that written submission, to provide some further information about its own implementation of family violence leave across the Victorian public sector and overall to support the introduction of family violence leave and domestic violence leave in all modern awards.

PN2676

The Victorian Government takes the view that it is particularly well placed to provide some assistance to the Bench with its current task for two reasons. The first is that it has the benefit of the recent and comprehensive report of the Royal Commission into Family Violence which made several recommendations specifically directed at the workplace and the role of the workplace in responding to family violence, and the Victorian Government is in the process of implementing those recommendations along with all of the other recommendations of the Commission and, second, because of the government's own experience as an employer that is already implementing paid family violence leave across the Victorian public sector.

PN2677

While the Victorian Government is the only Australian government that is participating in these proceedings in the sense that it is appearing to make oral submissions, it is not the only government to support the inclusion of paid family violence leave in modern awards and, in that regard, I would draw the Bench's attention to two other written submissions. The first is the submission of the Queensland Government dated 14 November and the second is the submission of the Government of the Australian Capital Territory, which was provided on 23 November. Both of those submissions are broadly consistent with the position that the Victorian Government takes that paid family violence leave should be included in modern awards. It is probably also notable that no government has appeared or made a submission opposing the ACTU's application in this proceeding.

PN2678

The Victorian Government understands, as I think all parties in this proceeding do, that the issue of family violence is multi-faceted and complex and there is no one single solution that will end it. We know that family violence leave of itself will not eliminate family violence in the community. That is the work and objective of a huge range of policies, initiatives and services such as those that are set out in the Victorian Government's Ending Family Violence, Victoria's Plan for Change to coordinate the efforts of government, the community and employers to bring about lasting change. However, family violence leave can provide practical, everyday support to victims to reduce the harm that is caused by family violence and it is one of many ways in which harm can be minimised and, at the same time, safety and dignity of victims can be restored.

PN2679

The purpose of the leave is not only to allow for employees to take time away from work to attend to urgent matters. Employment and economic security is a pathway out of violent relationships. An entitlement to take leave will help to maintain employment during a difficult period, as will a person's knowledge that they have the support of their employer to get through that difficult period. The inclusion of family violence leave entitlements in modern awards could also have a broader positive impact by contributing to cultural change and increased awareness about the prevalence and impact of family violence, which may in turn contribute to a reduction in family violence.

PN2680

In the Victorian public sector, the provision of family violence leave to employees allows victims to access both paid and unpaid time off to attend appointments or court appearances or to take urgent steps to relocate. I will come to the detail of the provisions as they are being rolled out across the public sector in a while, but the availability of that leave reinforces to Victorian public sector employees that, as an employer, the government takes the issue of family violence seriously and that they work in a safe and supportive workplace where they are free to access, as necessary, assistance that they might need. It is the Victorian Government's intention to model best practice initiatives and lay the foundations for other employers to follow in order to respond to the issue of family violence in all workplaces in Victoria.

PN2681

While the Victorian Government supports the inclusion of paid leave entitlements in modern awards to deal with the effects of family violence, it recognises that there are a range of ways in which this might be achieved. The Victorian Government's model clause, which I will go to in a while, is appropriate for it, as a large employer with considerable capacity, to include in public sector enterprise agreements. The government understands that an entitlement equivalent to its model clause is not suitable for inclusion in the safety net of minimum entitlements.

PN2682

The government notes, as it has stated in its written submissions, that there is likely to be an initial cost impost on small business employers and that education and implementation material will be needed to ameliorate those costs.

PN2683

The thrust of the Victorian Government's submission here today is to urge the Commission to accept that it is necessary for modern awards to include an entitlement to paid family violence leave, but it is, of course, a matter for the Commission to determine the amount of leave, the eligibility criteria and the other machinery aspects that are needed to facilitate the taking of that leave based on all the material that it has received in the course of this review.

PN2684

As foreshadowed in the brief outline of submissions conveyed by the Victorian Government Solicitor's Office in a letter on Monday, the government proposes to address three matters in its submissions today. The first is to provide a brief overview and take the Bench to relevant parts of the report and recommendations of the Royal Commission into Family Violence and note the Victorian Government's response to those relevant recommendations. The second is to outline the rationale behind and the detail of the government's decision to introduce entitlements to family violence leave in enterprise agreements that cover Victorian public sector employees, and the third matter that I will go to is the adoption and implementation of family violence leave entitlements in the Victorian public sector.

PN2685

To help with that, can I hand up a small bundle of documents that I will refer to during submissions. There are four documents in the bundle and I will just ask

my instructor to provide those along the Bar table as well. The first document is an extract from the Victorian Government's Public Sector Industrial Relations Policies 2015, section 3, the government's Industrial Relations Principles and part 3.4 of those principles relates to family violence. The second document is the model family violence leave clause that is also included in those industrial relations policies for inclusion in Victorian public sector enterprise agreements. The third document is clause 48 from the recently approved Victorian Public Sector Service Enterprise Agreement, and then the final document is a spreadsheet documenting the inclusion of family violence leave entitlements in Victorian public sector enterprise agreements. I will go to each of those in the course of what I have to say this afternoon.

PN2686

The first matter I wanted to address is the Victorian Royal Commission into Family Violence. By way of background, after its election in November 2014, the Andrews government implemented a pre-election commitment to establish Australia's first Royal Commission into family violence. This commitment was, in part, a response to the tragic death of 11 year old Luke Batty, who was killed by his father in early 2014 at a cricket ground in Tyabb to the south-east of Melbourne. His mother's dignified advocacy after his death brought to the fore the prevalence of family violence in the community, the alarming number of family violence-related deaths in Victoria and across Australia, and the acute need for a more effective response to family violence.

PN2687

The Royal Commission was established formally in February 2015 and its task was to identify the most effective ways to prevent family violence, improve early intervention so as to identify and protect those at risk, to support victims, particularly women and children and address the impacts of violence on them, to make perpetrators accountable, to develop and refine systemic responses to family violence, including in the legal system, and by police, corrections, child protection, legal and family violence support services, to better coordinate community and government responses to family violence and to evaluate and measure the success of strategies, frameworks, policies, programs and services introduced to put a stop to family violence.

PN2688

The Commission undertook this considerably sized task by building on decades of local and international research, activity and advocacy directed to preventing family violence and mitigating its effects. It informed itself through community consultations, written submissions, public hearings, data collection, literature reviews, commissioned research and discussion with experts, and it heard, as the Full Bench has received, personal accounts from a diverse range of people with experience of family violence.

PN2689

The Royal Commission's comprehensive six-volume report was delivered in March of this year and extracts of that report that are relevant to these proceedings are included in the ACTU's tender bundle behind tab 3. It is Chapter 37 of the report that deals specifically with the workplace and, of course, that is the one that is most relevant to these proceedings and I will go to that shortly, but, before I do

so, I thought it might be helpful to put that chapter in the broader context of the report by highlighting some relevant findings that you will find in the Summary chapter, which also is included in the ACTU's tender bundle at tab 3.

PN2690

VICE PRESIDENT WATSON: Ms Richards, what has the Victorian Government done in relation to Recommendation 191 of the report? I ask that because one of the other parties has said that this issue is more appropriately dealt with in that manner?

PN2691

MS RICHARDS: Recommendation 191 is the one recommending that the Victorian Government take steps through COAG to have paid family violence leave included in the National Employment Standards.

PN2692

VICE PRESIDENT WATSON: Yes.

PN2693

MS RICHARDS: That is being pursued by the Premier at COAG level. I am instructed that a letter has been written to the other heads of Australian governments seeking to place the matter on the agenda.

PN2694

VICE PRESIDENT WATSON: When would that be considered?

PN2695

MS RICHARDS: Excuse me?

PN2696

VICE PRESIDENT WATSON: When would that be considered?

PN2697

MS RICHARDS: I understand it is on the agenda for next month, at least for discussion, but perhaps I could seek some instructions and provide a copy of that letter, if it is available, and at least give some more detail about that.

PN2698

VICE PRESIDENT WATSON: I don't know whether a copy of the letter really adds anything, but it doesn't appear that the Royal Commission recommended that the Victorian Government support this application, rather it made a recommendation of a different course.

PN2699

MS RICHARDS: Yes.

PN2700

VICE PRESIDENT WATSON: And that is a course that other employers also point to.

PN2701

MS RICHARDS: It is true that that is the recommendation, but there is some discussion around the recommendation that I will take the Bench to shortly that is a little more nuanced than the recommendation itself and it is clear from Chapter 37 that the Commission was aware that these proceedings were in train, was aware that the matter was before this Bench and made a suggestion to the Victorian Government that it make a submission to these proceedings, which we are doing here today and, rather than telling this Commission how to exercise its jurisdiction, expressed a view about how the Victorian Government might influence the outcome here. But I will go to that aspect of the chapter in a short time.

PN2702

VICE PRESIDENT WATSON: I didn't see that recommendation. You say in your submission there are three recommendations directed at the workplace and you set them out, but I don't see one to advocate a clause be inserted in all modern awards.

PN2703

MS RICHARDS: Yes, it is not in the recommendations, it is in the text of the report. Do the Members of the Bench have the ACTU's tender bundle and the extracts of the Royal Commission's report?

PN2704

VICE PRESIDENT WATSON: We have it somewhere, but if you can give us the page references, we will look it up.

PN2705

MS RICHARDS: I certainly will. I would like, if I may, to provide the broader context before I go to the particulars of Chapter 37?

PN2706

VICE PRESIDENT WATSON: Yes.

PN2707

MS RICHARDS: I will give page references as I go through so that you can cross-reference between the transcript and the Royal Commission's report. So there are two parts of the report that I want to go to now. One is the Summary and Recommendations chapter and then, in a little while, I will go to Chapter 37. In the Summary and Recommendations chapter, the Commission concludes, at pages 5 to 6, that while Victoria has strong foundations on which to build its future response to family violence, there are a number of gaps and obstacles that limit the effectiveness of its response. There's a wide range of limitations that are listed on page 6 of the Summary, but they include, relevantly to these proceedings, the many different forms and manifestations of family violence that are insufficiently recognised and responses that are not tailored to the particular circumstances and needs of diverse victims, and insufficient focus on helping victims to recover from the effects of violence and rebuild their lives, and an inadequate investment in measures designed to prevent and respond to family violence.

PN2708

The Commission went on to find, at page 7 of the Summary, that there is an opportunity to transform the way in which we address family violence in Victoria which requires new ways of thinking and collaborating. While much of the responsibility for this transformation falls on government, there is a need to broaden responsibility for addressing family violence which requires each component part of the system to reinforce the work of others, to look outwardly and be open to new ideas and solutions, which is an observation that resonates in this proceeding.

PN2709

At page 11 of the Summary, the Royal Commission identified a need to move beyond a crisis response, that family violence prevention, early intervention and recovery measures need to be reinforced, the Commission found, by measures that support and build the capabilities and resilience of those affected. The incidence and severity of family violence can escalate when people do not have the social and economic conditions that they need to thrive or are deprived of the conditions that are protective against family violence risk.

PN2710

In relation to recovery, the Commission noted, at page 12, that stable housing and employment and participation in community life is central to the wellbeing of victims of family violence and their ability to rebuild their lives. Victims need individually-tailored measures to support them to attain economic security and independence, secure housing and health and wellbeing.

PN2711

As to the way forward, the Commission recognised, at page 16 of the Summary, that there are complexities associated with preventing and responding to family violence; there is no simple solution, no single source of expertise, no guarantee that solutions that are advanced today will continue to be the most appropriate solutions in the future. At the core of the Commission's recommendations is a call for a long-term approach, one that is bipartisan, that requires all parts of government to work together and involves the entire community. Solving family violence is not a technical science, the Commission told us, and calls for sustained effort and shared commitment to building a culture of non-violence and gender equality. The Commission expressed confidence, perhaps also hope, that this will be possible with a collaborative effort on the part of government, non-government organisations and the community. There is a strong message that there is a burden to be shared across the entire community.

PN2712

Financial security was identified as one of the three pillars of recovery - that appears at pages 29 and 30 of the Summary - the other two pillars being secure and affordable housing and health and wellbeing. The effects of family violence can include financial insecurity and poverty and securing and keeping paid employment can help victims to become financially secure and to recover from the consequences, both economic and non-economic, of family violence. Chapter 21 of the report is included in the ACTU's tender bundle and it deals in more detail with financial security and its importance to recovery.

PN2713

The workplace, of course, is part of the community in which family violence occurs and it can play an important role in preventing and responding to family violence. This is dealt with at page 39 of the summary and then in more detail from Chapter 37. In Chapter 37, the Royal Commission noted that workplaces reflect the breadth and diversity of the community and offer a key opportunity to reach people who are affected by family violence, to support them and help them to secure their safety. The Commission identified workplaces as important sites for dealing with family violence because the effects of violence can reach into them and because attitudes and cultures that prevail in them can influence the level to which violent behaviour is supported or condoned.

PN2714

To go to Chapter 37 and the detail of it, it is structured in three sections. The first section looks at the factors that make workplaces and workplace culture important in preventing or countering family violence and at initiatives that have been developed and implemented in Victorian workplaces. Critical findings in that section are that employment can be a protective factor against family violence, particularly when the employer and colleagues support an employee who is experiencing family violence. You will find those conclusions at pages 72 and then again at 74 to 75 in that chapter. The other critical finding in that section is that family violence can have negative effects on a victim's employment which can in turn compound the overall effects of the violence on that person, and you will find that conclusion at page 72.

PN2715

The second section of the chapter discusses the adoption and implementation of paid family violence leave and the roles and functions of workplace regulators in protecting workers from the effects of family violence. The discussion of family violence leave is at pages 81 through to 86. It is a balanced discussion which acknowledges employer concerns as well as the benefits to employees experiencing family violence of access to leave to deal with its effects.

PN2716

The potential to incorporate family violence leave in the National Employment Standards is referred to at page 84 and these proceedings are also noted at pages 84 to 85, and there is reference at pages 84 to 85 to some of the initial submissions that were made by the ACTU and the AIG preparatory to these hearings.

PN2717

The final section of Chapter 37 makes recommendations for the way forward, which culminates in the three recommendations that were extracted in the written submission that you referred to a moment ago, Vice President. The first recommendation is Recommendation 190 which is that:

PN2718

The Victorian Government ensure that the inclusion of family violence leave in all public sector enterprise agreements is accompanied by access to suitable support services and referrals, as well as adequate planning, training and resources to equip managers and human resources staff to communicate and implement the leave entitlements.

PN2719

The discussion that is related to this recommendation appears at pages 90 to 91 in the chapter and, in essence, it urges the Victorian Government to continue to model best practice in Victorian public sector workplaces by providing all public sector employees with an entitlement to paid family violence leave.

PN2720

As I will outline shortly, this was a commitment that the Victorian Government had already made. It was one that was welcomed by the Commission both because of the practical benefits to individuals whose working lives are disrupted by family violence and because of the message that that gives from the government to its workforce that it takes the impact of family violence on individuals seriously.

PN2721

The Royal Commission noted in that discussion that the implementation of family violence leave should be accompanied by adequate information and support for employees and also training and resources for managers and human resources staff, and it recommended that in implementing the commitment to provide family violence leave for employees, the Victorian Government should take the measures that are set out at page 90 of the report, including that any requirement to provide evidence of entitlement is not too onerous, that employees' confidentiality is maintained as far as possible and all concerned are trained and equipped to respond suitably to disclosures of family violence.

PN2722

That then bring me to Recommendation 191, which is:

PN2723

The Victorian Government, through the Council of Australian Governments, encourage the Commonwealth Government to amend the National Employment Standards in Part 2-2 of the Fair Work Act 2009 (Cth) to include an entitlement to paid family violence leave for employees (other than casual employees) and an entitlement to unpaid family violence leave for casual employees.

PN2724

The discussion that supports this recommendation is at page 91. It is just a couple of paragraphs. In that discussion, the Commission suggested that the Victorian Government might also consider making a submission to the Fair Work Commission in these proceedings in support of the inclusion of family violence leave in all modern awards, and there is even a reference made there to the direction that the Commission had made about the making of submissions.

PN2725

In answer, and I know it has taken me a while to come to this, Vice President, but in answer to your question, while Recommendation 191 specifically is directed to making efforts to bring about amendment to the National Employment Standards, the Commission did also urge the government to participate in this proceeding and do what it could to influence the deliberations of this Bench in favour of including family violence leave of some form in modern awards, and that is really the

reason why the Victorian Government is represented here today, in keeping with that suggestion.

PN2726

The final recommendation, Recommendation 192, is one that really does not touch on these proceedings. It relates to the implementation of the Our Watch Workplace Equality and Respect Project, which aims to equip key workplaces with the knowledge, skills and resources to create gender-equitable structures, norms and practices in those workplaces.

PN2727

The Victorian Government is committed to implementing all of the Royal Commission's 227 recommendations and just last week it announced its detailed response titled "Ending Family Violence, Victoria's Plan for Change", which outlines how it is going to deliver on each of those recommendations, including the three recommendations just discussed. That is a response that sits within a broader 10-year plan on ending family violence, which provides a long-range plan for delivering on all of those 227 recommendations.

PN2728

The second matter I wanted to cover was the government's decision to introduce family violence leave across the Victorian public sector. As the Commission noted in Chapter 37 of its report on page 83, the Victorian Government announced back in August of last year that all future Victorian public sector enterprise agreements would contain a family violence leave clause as part of its broader policy response to ending family violence.

PN2729

In this respect, the government wears two hats. The first is as a government coordinating a whole of government policy response to develop and refine systemic responses to family violence, and the second hat, of course, is as an employer of approximately 277,000 public sector employees across Victoria across many different industries and occupations.

PN2730

The Victorian Government's decision to introduce family violence leave across the Victorian public sector stems from its belief that workplaces that are safe and inclusive of women and receptive to reducing the burden and hardship of family violence are critical to reinforcing the social norms of respect, non-violence and equity. It recognises that both government and workplaces have a role in and a responsibility for responding to family violence.

PN2731

That commitment to developing and maintaining workplaces that support victims of family violence is now reflected in the Victorian Government's Industrial Relations Principles incorporated in its 2015 Statement of Public Sector Industrial Relations Policies. That is the first document in the bundle that I handed up at the outset. Principle 3.4 deals with family violence and it requires Victorian public sector employers to incorporate the standard family violence clause, which includes a paid family violence leave entitlement, into all enterprise agreements, to provide access to suitable support services and referrals, as well as planning,

training and resources to equip managers and human resources staff to communicate and implement the family violence leave entitlement and to implement best practice programs developed and set out in the Our Watch Equality and Respect Project Report that was the subject of Recommendation 192 of the Commission.

PN2732

That then brings me to the third matter that the Government of Victoria wants to address in these submissions, which is the introduction and extent and implementation of family violence leave entitlements in the Victorian public sector. After the announcement in August 2015 that all future public sector enterprise agreements would contain a family violence clause, the Victorian Government, in consultation with Victorian Trades Hall Council and various government departments and agencies, developed a model family violence clause for inclusion in Victorian public sector agreements. That is the second document in the bundle I handed up and it is one of a number of model clauses and it is number 4, Family Violence Leave. So the government is now in the process of implementing those entitlements across the Victorian public sector as enterprise agreements roll over. Given its fairly recent introduction and because there are a range of different payroll and recording systems, data is still a bit limited as to the take-up leave, but towards the end of my submissions, I will come to the data that we do have available at the moment.

PN2733

The model clause has a number of key elements and some of them differ from the clause that is put forward by the ACTU in this proceeding. It is intended to be a best practice standard for enterprise bargaining in the Victorian public sector and, as such, it is considerably more generous than the ACTU's proposed clause. I wanted to note some key elements of the model clause.

PN2734

The first is the definition of family violence, which you see in clause 4.2:

PN2735

Family violence is defined to include physical, sexual, financial, verbal or emotional abuse by a family member as defined by the Family Violence Protection Act 2008.

PN2736

The definition of family violence in section 5 of the Family Violence Protection Act was, in turn, developed in response to a Victorian Law Reform Commission report reviewing family violence laws. That was a 2006 report. The report noted that the legislation then existing did not have a definition of family violence and it recommended that there should be one and that the new Act should include a definition that makes clear what behaviour constitutes family violence, it should include both physical and non-physical forms of family violence and it should cover all family relationships that exist in Victoria.

PN2737

The report concluded that it was particularly important to recognise the broad nature of family violence because that would identify unacceptable behaviour and

would validate the experiences of victims. It was also important, the Victorian Law Commission recommended, to ensure that the definition covered the whole range of persons who might need legal protection.

PN2738

The definition that we now have in Victoria in the Family Violence Protection Act, which was actually the definition of family violence that was used for the Royal Commission to define the scope of its inquiry, covers pretty similar ground to the definition that is put forward by the ACTU. It has been applied in Victoria in a range of legal matters, most significantly in the very high volume of family violence intervention order applications that are dealt with daily in the Magistrates' Court here and, as far as the Victorian Government is aware, there's not been any great issue with the scope and application of the definition. While there are plenty of issues in the family violence sector, the definition of family violence is not one of them. I looked for and did not find any record of any appeal to a superior court from a determination of the Magistrates' Court using and applying that definition of family violence. Consistent with that, it is Victoria's submission that the definition that we use in our model clause might be a useful format for the Commission to consider and it is also supportive of the ACTU's submission that a broad definition of family violence does not create uncertainty or difficulty.

PN2739

The next key feature of the clause is that it provides for 20 days' paid leave. This is because in the government's view maintaining continuity of employment is critical to the ongoing financial independence and wellbeing of victims and the 20-day entitlement is intended to reflect the complex and sometimes time-consuming matters that can arise that will prevent an employee from attending work while ensuring that they have a lifeline to their job when they are able to return to work. The 20-day entitlement is not cumulative and it can be taken consecutively or as single days or as a fraction of a day, as need be.

PN2740

The third feature of the clause is confidentiality. As a number of witnesses have indicated during these proceedings, it is apparent that unless there is provision for treating disclosure of a person's experience of family violence in strict confidence, that will be a barrier for employees seeking to access the leave, and so the model clause provides at 4.4(b) that:

PN2741

All personal information concerning family violence will be kept confidential in line with the employer's policies and relevant legislation. No information will be kept on the employee's personnel file without their express written permission.

PN2742

Part of addressing concerns related to confidentiality is ensuring that employees understand that there are processes and procedures about how their disclosure will be treated and setting out that obligation in the clause for the employer is a useful way to convey that to employees who may need to access the leave. It is also the Victorian Government's view that supporting policy is useful to fill out that

obligation. To date, and it is still quite early days, but to date, the government has received no feedback from any department or agency that this obligation has created any practical impediment or issues for managers who are responsible for administering this new form of leave. Instead it would appear that discretion is being exercised in requesting employees to provide documentation in support of their requests. Subject to a department or agency's particular payroll system, the leave can simply be noted as special leave or similar and only those staff members who need to know the reason for the leave are informed and that is usually limited to the manager of the particular employee.

PN2743

The fourth particular feature that we wanted to draw attention to was that eligibility to take leave is extended for carers or those who support a person who is experiencing family violence. This was included in recognition of the role that support persons can play in responding to family violence.

PN2744

DEPUTY PRESIDENT GOOLEY: Ms Richards, they don't get the 20 days, they can just get access to their personal leave to provide that support. That's right, isn't it?

PN2745

MS RICHARDS: Bear with me.

PN2746

DEPUTY PRESIDENT GOOLEY: I think it is 4.5(b).

PN2747

MS RICHARDS: Yes, that's correct. The final matter to draw attention to is at 4.6, which provides for individual support, so support that is not leave. It is a clause that provides that the government will approve any reasonable request of an employee who is experiencing family violence to support in the nature of changes to rosters or duties or the location of work or simply changing contact information so that the person no longer experiences harassment at work. It was considered that it was necessary to include this in the model clause notwithstanding the existing ability that employees have under section 65 of the Fair Work Act to request a flexible working arrangement because it was more specific and more focused and more shaped to the particular needs of people experiencing family violence.

PN2748

By virtue of the broad definition that I referred to earlier, the model clause will enable a broader range of employees to access the entitlement and it will also enable employees and, may I say, employers alike to utilise the dispute resolution procedures contained in the relevant enterprise agreement in order to resolve any disputes that might arise. That is particularly important given that a dispute can't be raised or pursued in relation to a request for a flexible working arrangement under section 65.

PN2749

Now I come to the rolling out of this clause across the Victorian public sector. As at June 2015, the Victorian public sector comprised seven departments, 10 administrative offices and 23 other bodies that form the Victorian Public Service and we had more than 3000 public entities, about 1800 of which employed staff. So the Victorian public sector in total comprises about 277,000 full-time equivalent employees of whom nearly 38,000 or 14 per cent are employed in the Victorian Public Service, core public service, and the balance are employed in public entities. Together that is equivalent to 9.4 per cent of the Victorian workforce.

PN2750

There are 155 enterprise agreements that cover that workforce across the Victorian public sector. One of the main ones, of course, is the Victorian Public Service Agreement. That was reached in principle in December 2015 and was approved by this Commission as the Victorian Public Service Enterprise Agreement 2016 in May of this year and it commenced on 18 May. It covers the seven core departments and a number of other agencies, totalling 42 departments and agencies altogether and covers about 30,000 employees. Clause 48 of the VPS Agreement, which is the third document in the bundle that I handed up, makes provision for paid family violence leave in the terms of the model clause that I have just been through.

PN2751

The last of the four documents in our bundle is a spreadsheet that documents the extent of family violence leave provisions in the Victorian public sector. In summary, since the beginning of 2015, there have been 44 public sector agreements approved by the Victorian Government that have included provision for some form of family violence leave and other supports. These agreements include those covering nurses, which covers 34,600 full-time equivalent employees, and Victoria Police, with not quite, but almost, 15,000 police officers covered, or full-time equivalent officers. That is in addition to the VPS Agreement. Of the 44 agreements that have been concluded, although not all have yet been approved, 29 have included the model clause and an entitlement to 20 days' leave. Of the remaining agreements, most of them provide for a smaller amount of paid family violence leave. For example, the Victoria Police Agreement provides for 10 days' paid leave, and there is a handful that provide only for discretionary leave.

PN2752

VICE PRESIDENT WATSON: If the model clause is varied in some such way by a lesser entitlement, what you put in the final column would be "No"?

PN2753

MS RICHARDS: Yes, that's correct. All of these agreements contain some provision for leave, so in the final column where "Yes" appears, if you go to the particular clause that is listed in the penultimate column, you will find the model clause and the other agreements contain something that is not as generous as the model clause. At the end of the spreadsheet, you will see a number 91,000, which is the number of full-time equivalent Victorian public sector employees with access to some form of family violence leave. That translates to about 105 individual employees on a head count basis who have accessed some form of

leave. That is a figure that will increase significantly over the coming months with the approval of a number of health sector agreements that will cover about 104,000 further employees, and it is anticipated that bargaining for an agreement to replace the Victorian Government Schools Agreement 2012 will be finalised early next year, and when that happens and that agreement is approved, there will be another 70,000 employees who have access to 20 days' paid family violence leave.

PN2754

There are a number of smaller enterprise agreements that cover small numbers of employees that are yet to expire and, of course, they don't yet include the entitlement to paid family violence leave, but when they come up for renegotiation, they will include that entitlement, or the replacement agreement will, and the government estimates that the number of employees that are covered by these agreements that are yet to be renegotiated, not including the schools agreement, are about 112,000 people.

PN2755

When that entitlement is fully rolled out across all of the Victorian public sector, which would be anticipated to occur by 2020, about 270,000 public sector employees in Victoria will have access to leave and most of them will have access to family violence leave well before that date. That is especially significant when one considers that as at the middle of last year, June 2015, two-thirds of the Victorian Public Service workforce was female. The high proportion of women in the public sector is driven by their high representation in two large areas of public sector employment, public health and government schools, where nudging 80 per cent, 79 per cent and 77 per cent respectively, of the workforce is female.

PN2756

Finally to the implementation of family violence leave and the experience that the government has had of that in particular in the last six months after the approval of the VPS Agreement. While there has been central direction from government to include the model clause in enterprise agreements, the implementation of it is a matter for individual departments and agencies and there is some variation. Guidance about the implementation is provided but ultimately each department and agency has to adopt an approach that suits it and its business processes and its payroll systems and approaches will vary with size and capacity.

PN2757

One issue that has been raised in this proceeding is requests for leave. The manner in which an employee makes a request for leave is going to depend very much on the relevant process of the individual department or agency. The policy position with respect to family violence leave is that there should be considerable flexibility to accommodate the sensitivities associated with the disclosure of what can be very personal information. For instance, if, for some reason, the employee is uncomfortable about speaking to their immediate manager, they can seek assistance and advice from their human resources business partner or another relevant manager who can also approve the leave.

PN2758

Where an employee requests family violence leave, the manager or the person who is dealing with the request will discuss the specific needs that that individual has. It is contemplated that everybody's circumstances will be different and so managers will need to approach each application on a case by case basis. For instance, where the employee doesn't want the manager to detail the reason for seeking leave in the HR system once they have spoken in confidence with their manager, the manager has discretion to omit the reason for the leave in the system and simply note it as special leave as a code in the payroll system.

PN2759

Unless it is necessary, it is contemplated that most leave applications will be requested and authorised without the need for any evidentiary documentation. It is anticipated that documentation will only be requested in a small number of cases. However, the model clause does provide for the right of an employer to request evidence where it is considered necessary and the forms of evidence that can be requested include - well, it is evidence to satisfy the employer not that family violence has occurred but that leave is being taken for an appropriate purpose that is connected to the employee's experience of family violence. So the evidence can include a document issued by the police, it can include a court documents, something from a registered health practitioner or a family violence support service, a district nurse or a maternal and child healthcare worker or a lawyer. It is the government's - - -

PN2760

VICE PRESIDENT WATSON: Ms Richards, a couple is experiencing difficulties and decides to separate. They then are engaged in a dispute over property and income and one of the parties believes the other party is engaging in emotional abuse by way of their approach towards financial matters. Can that person access family violence leave to prepare for and attend the Family Court in relation to interim orders and property settlement in those circumstances?

PN2761

MS RICHARDS: If the person is experiencing economic abuse and needs time off work to attend to the effects of that, then the answer is yes. I do echo Ms Burke's submissions earlier that context is everything. Not every separation where there are financial issues between a separating couple will involve economic abuse.

PN2762

VICE PRESIDENT WATSON: Under your processes, is there some requirement to establish that a person is subject to emotional abuse by way of a dispute over economic matters?

PN2763

MS RICHARDS: No. The evidence requirement is invoked at the employing department or agency's discretion, so there may not be a requirement for evidence and the employee makes the request and it is dealt with on its face. If the employer decides it is necessary, evidence can be required and clause 48.4 sets out what may be required. Evidence of family violence may be required and can be in the form of an agreed document issued by any of those agencies/services that I identified and a signed statutory declaration can also be offered as evidence.

PN2764

VICE PRESIDENT WATSON: Can a lawyer say that the approach of the estranged partner constitutes emotional abuse?

PN2765

MS RICHARDS: That may be one form of evidence that is proffered, yes.

PN2766

COMMISSIONER SPENCER: Is that first line in 48.4, "an agreed document", is that to be interpreted as an agreed document between employer and employee?

PN2767

MS RICHARDS: That is the way I read it.

PN2768

COMMISSIONER SPENCER: Yes.

PN2769

MS RICHARDS: That there will be a discussion between the employee concerned and their manager, the manager says, "All right, we need some evidence", and depending on the employee's individual circumstance, the evidence that is required may vary.

PN2770

VICE PRESIDENT WATSON: Something might be provided but the employer may not agree that it is sufficient.

PN2771

MS RICHARDS: Indeed. "Agreement" suggests that there will be some accord about the sufficiency of the evidence. These are not new issues. The subject matter might be different but the form of evidence that is satisfactory to validate an entitlement to sick leave can also be the subject of discussion between an employee and an employer and an employee may proffer something that is initially not satisfactory and the employer may ask for more. So it is not a new issue from a human resources point of view; it is a different subject matter. It is the Victorian Government's belief that that requirement will be sufficient to ensure that the provision is not misused and early indications are that that belief is being borne out.

PN2772

I next want to say something about training. I am getting close to the end. Part of the successful implementation of this clause is ensuring that all relevant staff have the training to ensure that employees who are experiencing family violence are appropriately supported in the workplace. That forms part of the government's, as employer, general health and wellbeing training. Training has been provided across departments and agencies where this clause applies. At this stage, it is targeting managers and human resources staff, although it is intended over time that it will be provided to a broader range of employees. The type of training that is being delivered depends on the particular needs of the department and the role of the staff member, but, in most instances, it is about two hours of training, although more in-depth training can be provided for contact officers or human

resources staff and that can be a day-long course. There are generally two modules that are provided: Family Violence, Prevalence and Dynamics and Family Violence in the Workplace, Responses and Skills. In particular, the training deals with privacy, assisting participants to develop an understanding of privacy regarding the receipt of family violence information and the role and responsibility that the recipient of the information has in collecting it and using it and disclosing personal information. The training costs an average of \$200 per participant.

PN2773

Finally, I just want to touch on monitoring and data collection and take-up rates. The implementation of the leave is only in its infancy, it has only been in operation in the Victorian Public Service for about six months and it is a work in progress assessing the best way for the data to be usefully collected, which is made a little more complex by the strict confidentiality requirements surrounding the entitlement. The initial take-up rates that we are aware of of the family violence leave now available under the VPS Agreement are modest and there is no indication of any trend of overuse or the likelihood of any significant cost burden.

PN2774

At the beginning of this week, the data that was available was available for five departments, five of the seven, so the Department of Economic Development, Jobs, Transport and Resources, the Department of Environment, Land, Water and Planning, the Department of Justice and Regulation and the two smaller central departments, Premier and Cabinet and Treasury and Finance. We don't, as yet, have data for Health and Human Services or Education and Training, bearing in mind that a number of employees in those two departments are covered by other agreements other than the VPS Agreement. But across the five departments that we do have data for, there have been 26 applications for family violence leave for a total of 14,789 employees - it is a head count figure. So it is early days and it can only be an indicative figure at this stage, but over the first six months, there has been a take-up rate of 0.18 per cent. So there has certainly not been a deluge of applications and there is no corresponding cost concern.

PN2775

In our submission, the experience of the Victorian Government to date is completely consistent with the evidence that has been received in these proceedings about the very modest take-up rate of the leave when it is available.

PN2776

Unless there are any other questions? I will find out what I can about where the COAG discussions are up to and if I may provide that information in a letter from my instructors?

PN2777

VICE PRESIDENT WATSON: Yes, thank you, Ms Richards.

PN2778

MS RICHARDS: Thank you. If I may ask to be excused from further attendance today?

PN2779

VICE PRESIDENT WATSON: Yes.

PN2780

MS RICHARDS: Thank you.

PN2781

VICE PRESIDENT WATSON: I understand the other parties will be giving brief submissions in reply tomorrow. Ms Burke?

PN2782

MS BURKE: Thank you, Vice President. You had a question before Ms Richards' submissions about where in the ACTU's submissions we deal with employers that are unsupportive. I can give you some references. In our primary submissions at paragraphs 4.18, 4.45 to 47, 4.89 to 90, 8.26; in our reply submissions at paragraphs 51(b) and 51(h), and in our final written submissions at paragraphs 87 and 108, which is the summary of the King v Lee and Lyons case, and I added another case to that summary on my feet which is the Moghimi case. I just want to emphasise that the way that we use that evidence is very limited. We don't focus on whether a workplace is supportive or not because our focus is on the statutory requirement that the minimum standards be enforceable and be guaranteed. So while we acknowledge that there are employers out there who are providing support, we say that this ad hoc and frankly revocable support is not sufficient to meet the safety net requirement that we are focused on under the statute.

PN2783

Finally, while I am on my feet, I need to remember to tender the ACTU's tender bundle.

PN2784

VICE PRESIDENT WATSON: We are marking certain things, not everything necessarily, but we will mark that tender bundle exhibit B28.

EXHIBIT #B28 ACTU TENDER BUNDLE

PN2785

MS BURKE: Thank you.

PN2786

MS RICHARDS: Perhaps I should ask to tender the bundle of documents that I handed up at the beginning as well.

PN2787

VICE PRESIDENT WATSON: Yes, we will mark that bundle exhibit V1.

EXHIBIT #V1 TENDER BUNDLE OF VICTORIAN GOVERNMENT SOLICITOR'S OFFICE

PN2788

MS RICHARDS: May it please the Commission.

PN2789

VICE PRESIDENT WATSON: We will adjourn until 10 am tomorrow.

ADJOURNED UNTIL FRIDAY, 02 DECEMBER 2016

[4.06 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs

EXHIBIT #B28 ACTU TENDER BUNDLE PN2784

**EXHIBIT #V1 TENDER BUNDLE OF VICTORIAN GOVERNMENT
SOLICITOR'S OFFICE PN2787**