



DECISION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Family & Domestic Violence Leave

Clause

(AM2015/1)

VICE PRESIDENT WATSON
DEPUTY PRESIDENT GOOLEY
COMMISSIONER SPENCER

MELBOURNE, 27 FEBRUARY 2017

4 yearly review of modern awards – common issue – Family and Domestic Violence Leave Clause.

Decision of Vice President Watson

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Introduction and Summary

[1] On 17 March 2014 the President issued a statement in relation to the four yearly review of all modern awards required by s.156 of the *Fair Work Act 2009* (the Act). As part of this review, interested parties were invited to identify ‘common issues’, being those that affect most or all modern awards and are capable of being dealt with efficiently at once, rather than on an award-by-award basis.

[2] At a conference convened on 29 September 2014 the Australian Council of Trade Unions (ACTU) identified the inclusion of “a domestic violence clause that relates to leave” in the majority or all of the modern awards as an issue it sought to pursue.

[3] On 28 October 2014 the ACTU filed with the Commission its outline of claim in relation to a family and domestic violence leave clause. The outline also involved a related claim regarding the right of a worker to request a change in working arrangements. At the

time of this decision, this element of the claim remains at the consideration of a separately constituted Full Bench.

[4] On 13 February 2015 the ACTU filed its draft family and domestic violence leave clause for inclusion in all modern awards. On 15 June 2015 it filed an amended draft in response to jurisdictional objections made by a number of employer parties. On 22 October 2015 a Full Bench of this Commission issued a decision¹ declining to strike out further elements of the ACTU's amended claim for an alleged lack of legal foundation. This bench was constituted shortly thereafter to determine the merits of the application. I made directions for filing of material by parties in support of the claim and by those opposed, with an opportunity for the ACTU to file submissions in reply. Following the filing of employer submissions in opposition to the claim an amended claim was filed by the ACTU on 5 October 2016 in its submissions in reply. The draft clause is set out at paragraph 15 below.

[5] The ACTU, the Australian Chamber of Commerce & Industry (ACCI), the Australian Industry Group (Ai Group) and other interested parties were directed to file comprehensive written submissions and other material between June and September 2016. On 27 October 2016 I conducted a directions hearing for the scheduling of evidence to be heard. The substantial hearing of evidence in this matter was listed in Melbourne for 14 – 18 November 2016. The hearing of final oral submissions was listed for 1 – 2 December 2016 and the matter was completed on those days.

[6] At the hearing of this matter, Ms K Burke of counsel appeared with Ms S Ismail on behalf of the ACTU. Mr N Ward of counsel appeared with Mr J Arndt on behalf of ACCI. Mr B Ferguson of counsel appeared with Ms R Bhatt for Ai Group. Ms M Richards SC, Crown Counsel, appeared with Ms L McNeil on behalf of the State of Victoria. Mr G Johnston appeared on behalf of the Australian Meat Industry Council.

[7] The test for assessing the claim is well established. It essentially involves a broad discretion and the application of ss.156, 134 and 134 of the Act. The ultimate question is whether the insertion of family and domestic violence leave is necessary to achieve the objective of a fair and relevant safety net of terms and conditions. The consideration is required to take account of relevant factors in s.134.

[8] A consideration of context is important to this assessment. The context includes the current make-up of the safety net. Leave entitlements are established by the legislature and are provided on a standard uniform basis to all national system employees in the National Employment Standards (the NES) in the Act. Awards refer to those standards and contain limited additional machinery provisions. The Commission has consistently avoided supplementation of the NES leave standards in awards and has declined to insert additional leave entitlements, including in relation to leave of the nature now proposed. The new form of leave is intended to be available in circumstances where personal/carer's leave or annual leave are currently available. It also seeks to extend the circumstances for taking leave beyond the circumstances of these forms of leave and to make the new form of leave available to a broader class of employees. To that extent the ACTU seeks a departure from the NES and the previous approach of the Commission.

[9] Domestic violence is a serious and pervasive social problem. It affects various aspects of contemporary Australian society including community safety, policing, law enforcement, relationships, families and workplaces. Its incidence and effects have been comprehensively

studied. It is broadly accepted that the problem requires a whole of community response and there can be no single solution to the problems it creates.

[10] In my view any responsible employer should be aware of the potential for its employees to experience domestic violence and be open to assisting them deal with the problems. The best examples of an approach to the problem appear to be when employees feel they can be open with their manager, and in a cooperative and collaborative manner, develop solutions to assist the employee deal with the issues while remaining in productive employment. Such an approach is in the best interests of affected employees and employers.

[11] As explained in this decision the ACTU claim is of a different nature. It seeks to introduce a form of leave that can be taken without prior approval, and is available in a broad and somewhat uncertain range of circumstances. In my view this approach to the problem of domestic violence runs the risk of undermining the level of trust at the workplace and causing significant uncertainty and cost for employers.

[12] Australia has a relatively high safety net of terms and conditions. Family and domestic violence leave is not a feature of the safety net in other western economies. In all of the circumstances I have concluded that the ACTU claim is not necessary to achieve a fair and relevant minimum safety net of terms and conditions of employment. The claim should be rejected.

[13] Consistent with recommendations of a Royal Commission, the Victorian Government has sought to raise the issue of domestic violence leave being addressed by the Council of Australian Governments (COAG) and considered to be part of the NES. Given the need for a whole of community response to domestic violence there is much to commend in such an approach.

[14] These matters are explained more fully in this decision.

The Claim

[15] As noted above, the ACTU amended its claim in the course of filing its submissions in reply to submissions made by employers in relation to its original claim. The amended claim is to insert a clause into every modern award in the following terms:

“FAMILY AND DOMESTIC VIOLENCE LEAVE

X.1 Definition

For the purpose of this clause:

Family and domestic violence is any violent, threatening or other abusive behaviour by a person against a current or former partner or member of the person's family or household.

Employee includes part-time and casual employees.

Sensitive personal information means information that identifies the employee and discloses their experience of being subjected to family and domestic violence.

X.2 Family and Domestic Violence Leave

X.2.1 An employee is entitled to 10 days per year of paid family and domestic violence leave for the purpose of attending to activities related to the experience of being subjected to family and domestic violence.

Such activities may include (but are not limited to):

- (a) attending legal proceedings, counselling, appointments with medical, financial or legal professionals; and/or
- (b) relocation or making other safety arrangements.

X.2.2 An employee's paid yearly entitlement to family and domestic violence leave:

- (a) becomes available in full, on and from the first day of each year of employment; and
- (b) is payable at the ordinary hourly rate applicable to the classification of the employee under the award, including shift loadings and penalties but not including any over-award payments; and
- (c) does not accrue from year to year; and
- (d) is not payable on termination of employment.

X.2.3 Upon exhaustion of the leave entitlement in clause X.2.1, employees will be entitled to up to 2 days unpaid family and domestic violence leave on each occasion for the purpose of attending to activities related to the experience of being subjected to family and domestic violence.

X.2.4 Family and domestic violence leave may be taken as:

- (a) a continuous period;
- (b) a single period of one day;
- (c) any separate period/s of less than one day which the employer and employee agree.

X.2.5 Family and domestic violence leave is in addition to other leave entitlements in modern awards and the National Employment Standards.

X.3 Notice and Evidentiary Requirements

X.3.1 The employee shall give his or her employer notice as soon as reasonably practicable of their request to take leave under this clause.

X.3.2 If required by the employer, the employee must provide evidence that would satisfy a reasonable person that the leave is for the purpose as set out in clauses X.2.1 and X.2.3. Such evidence may include a document issued by the police service, a court, a doctor (including a medical certificate), district nurse, maternal and child health care nurse, a family violence support service, a lawyer or a statutory declaration.

X.3.3 Sensitive personal information provided by the employee to the employer for the purposes of seeking leave under this clause will be kept confidential to the extent possible, except where disclosure is required by law or to prevent a serious threat to the life, health and safety of any individual.”

Evidence

[16] Evidence was given by a number of persons. A brief summary of that evidence follows.

[17] *Professor Cathy Humphreys*. Professor Humphreys is a Professor of Social Work at the University of Melbourne, and is an expert in research, policy and practice in the area of family and domestic violence. At the request of the ACTU, Professor Humphreys authored a report providing her opinion on the following:²

- the definition or definitions of family and domestic violence including reference to how the community’s understanding of family and domestic violence is informed by community attitudes;
- the emotional and mental impact of family and domestic violence on victims and the way in which these consequences may create barriers to leaving violent and abusive relationships;
- the types of services and action that are needed to address the consequences of violence and abuse to remove barriers;
- the nature of post-separation violence, and the types of services and action that are needed to ensure victims are able to more effectively recover from family and domestic violence;
- the needs of victims who choose not to leave their partner, and how those needs can be addressed;
- the impact of family and domestic violence on children, in both the short and long term, and the needs of children and mothers in addressing those impacts; and
- the impact of family and domestic violence on the relationship between women and their children.

[18] Professor Humphreys’ report concluded that while women are “most in danger of losing their employment when they are experiencing domestic or family violence ... employment may be their greatest source of security and recovery in relation to the violence

they face.”³ She stated that the pathway out of domestic and family violence requires access to health, housing, financial, justice and child protection support, and that an entitlement for leave in order to secure the relevant services is an important step.

[19] Professor Humphreys concluded that “the workplace is potentially an important arena in which to counter domestic and family violence”⁴ and that an entitlement to leave would permit workplaces to play a greater role in providing solutions for sufferers of family and domestic violence.

[20] *Dr Peta Cox.* Dr Peta Cox is a Senior Research Officer for the Australian National Research Organisation for Women’s Safety (ANROWS). Dr Cox’s evidence was based on an ANROWS publication analysing the Personal Safety Survey 2012 (PSS), a study administered by the Australian Bureau of Statistics which examined interpersonal violence in Australia. The study was completed by 17,000 people. Dr Cox’s analysis related mostly to women.⁵ Dr Cox’s report considered the different ways in which men and women experience violence such as the gender of the perpetrator, the location that the violence occurred (at home or in public) and whether the perpetrator was known to the victim.

[21] The survey found that 1 in 4 women and 1 in 12 men in Australia had experienced violence by an intimate partner since the age of 15.⁶ In the 12 months prior to the 2012 PSS, 1 in 50 women and less than 1 in 100 men experienced violence by an intimate partner. 62% of those women were employed at the time of the violence. This is 2.3% of all women employed. Dr Cox’s report also examined the experience of women who are victims of family and domestic violence including their labour force participation, education and demographics. The report also considered the results of the violence including reporting to police, attendance at court, time absent from work and psychological impacts.

[22] *Dr Michael Flood.* Dr Flood is an Associate Professor in Sociology and a Research Fellow at the University of Wollongong. He was engaged by the ACTU to address three specific questions.⁷ Simply put, those questions were:

- What are the primary drivers of violence against women?
- What is the academic basis for family and domestic violence being considered ‘gendered violence’?
- What are the ways in which family and domestic violence impact upon men and women differently?

[23] The primary drivers of violence against women identified by Dr Flood are gender inequalities, however, he also identified a number of contributing factors. These factors can be divided into two categories. First, factors associated with the practice of violence in general (such as childhood victimisation, high levels of public and intra-community violence, media representations normalising violence, the impact of natural disasters, civil conflict and war). Secondly, factors which compound gender inequalities and weaken social norms (such as drug and alcohol use, poverty, social isolation and rapid social and economic change).⁸ Dr Flood also gave evidence that “family violence is overwhelmingly a crime against women”.⁹

[24] *Dr Natasha Cortis.* Dr Cortis is a Research Fellow at the Social Policy Research Centre at the University of New South Wales. Dr Cortis has led a research project about

women's economic security following violence since December 2014. Her report examines the economic dimensions of family and domestic violence including how economic matters can be a feature of violence and the financial impact on women's economic security.

[25] Dr Cortis drew on a number of other reports and concluded that although women who are subject to violence have similar workforce participation rates to those who do not, they suffer much higher levels of financial hardship and stress. Maintaining employment through periods of violence and separation from a violent partner provides a way to reduce the financial impacts and improve economic independence.¹⁰

[26] *Dr Martin O'Brien.* Dr O'Brien is a senior lecturer in economics in the School of Accounting and Economics at the University of Wollongong and was invited to provide an expert opinion on the methodology adopted by ACCI to examine the direct cost of ACTU's claim addressing:

- the adequacy of the mythology;
- assessment of the inputs/assumptions and the outputs/results;
- whether any alterations to the methodology are required; and
- if required, alternative estimates on the potential cost of the ACTU's claim.¹¹

[27] Dr O'Brien concluded that many facets of the formula used by ACCI to estimate the direct cost per year of the ACTU's claim are adequate.¹² However, Dr O'Brien identified fundamental weaknesses within the methodology which in turn affect the accuracy, usefulness and validity of the direct cost estimates. These defects included the failure to take into account part-time work,¹³ the level of assumed access to the leave which is not supported by publicly available data,¹⁴ and the assumption that all employees who experience family violence will need to take leave.¹⁵

[28] Dr O'Brien's report presents an alternative cost estimate using the same basic formula as used by ACCI but using different, publicly available data. The total cost of the ACTU's claim as estimated by Dr O'Brien is \$11.9 million per annum, which is 5.8% of the estimate provided by ACCI.¹⁶

[29] *Jessica Stott.* Ms Stott is employed as a women's support worker at the Women's Information Referral Exchange (WIRE). Ms Stott provided examples of situations that clients have discussed with her to assist in the understanding of the sort of workplace issues that arise for women who consult WIRE.

[30] Examples included a woman who had been subject to verbal and emotional abuse by her husband and who worked for the same employer as her husband. In the example, the woman had approached her employer with safety concerns which resulted in her dismissal "for her own safety".¹⁷ This in turn resulted in financial hardship, isolation and housing insecurity.¹⁸

[31] Another example described an employer who was supportive of a woman who suffered physical injuries from domestic violence, offering time off work and other support.¹⁹

The woman stated that this was the best support she had during her experience and enabled her to keep her job.²⁰

[32] *Jocelyn Bignold*. Ms Bignold is the CEO of McAuley Community Services for Women (MCSW). Ms Bignold stated that supporting women experiencing family violence in relation to their employment needs has emerged as a priority for MCSW.²¹

[33] Ms Bignold detailed the ways in which family violence can affect the workplace, including attendance at work, abusive behaviours occurring whilst the woman is at work and the stress caused by the violence affecting the woman at work. Ms Bignold stated that these issues contribute to disrupted work histories, difficulties obtaining references leading to difficulties in finding new employment.²² Women are also financially disadvantaged when required to utilise their sick, annual and long service leave to manage such situations. Ms Bignold stated that many women do not feel confident enough to ask their employers for flexible working arrangements, including time off work, and see resignation as their only option.²³ This can cause unemployment or dependence on welfare. In some instances this results in women returning to situations of violence in order to maintain housing and financial security. Ms Bignold stated that paid leave would assist women to manage multiple financial impacts and help them retain their job.

[34] Ms Bignold stated that securing long-term employment is critical to reducing incidences of violence against women and is the key pathway to escaping violent relationships. Sustained employment provides financial security, independence, social networks and increased self-esteem. The MCSW had an employment and employer education program, McAuley Works, to help their clients secure jobs and provide access to training. The program was discontinued as of June 2015 due to insufficient funding. Outcomes measured at the time of closure included 45 women no longer relying on Centrelink payments, leading to an estimated saving of \$1 million for the Australian tax-payer.²⁴ Ms Bignold concluded her statement by expressing support for family and domestic violence leave as an important way for victims to maintain secure employment.

[35] *Sandra Dann*. Ms Dann is the Director of the Working Women's Centre SA Inc (WWC). In her evidence, Ms Dann identified the types of workplace impacts that women indicate when they are in an abusive relationship including but not limited to repeated lateness for work, personal calls whilst at work, a family member coming to the workplace and causing trouble and taking too much personal leave.²⁵

[36] Ms Dann identified instances where women are denied further opportunities at work, bullied out of their position or terminated after they have revealed to their employer that they have or are experiencing domestic violence.²⁶ Ms Dann states that where industrial instruments mention family and domestic violence, there is at least an expectation that the violence and all of its implications are considered. Ms Dann states that there is no readily available course of action for clients who were discriminated against because of their experience of domestic violence.²⁷

[37] Ms Dann stated that women who manage domestic violence and abuse for long periods often have very little or no remaining leave to access. Ms Dann stated that the WWC support the provision of paid leave for workers experiencing family and domestic violence.²⁸ According to Ms Dann, the capacity of women to access specialist leave would alleviate one

significant stress on women. Further, she contended that paid leave clauses signal to workplaces that there is a need to think more broadly about associated safety and risks.

[38] *Karen Willis OAM.* Ms Willis is the Executive Officer of Rape & Domestic Violence Services Australia. Ms Willis gave evidence that the impact of family and domestic violence is trauma to the victim, and that recovery from trauma is staged process with implications for employees at each stage.²⁹

[39] Ms Willis' evidence was that family and domestic violence can impact upon a person's working life in a number of ways. Victims may be increasingly absent from work and exhibit performance issues, leading to lost productivity. This was considered a result of trauma and illness experienced as a result of the violence.³⁰ Victims may be forced, by an offender, to resign from their job and may have efforts to undertake study and training sabotaged.³¹ Victims may also require time off work for the purpose of attending or preparing for court proceedings³² or to leave an abusive relationship and establish safety.³³

[40] Ms Willis gave evidence that one of the biggest advantages for a person who is experiencing or has experienced family or domestic violence is to have an independent income. She stated, "the income gives them the capacity to re-establish a life for them and their children in a much shorter time frame than would otherwise be the case" and that the workplace can be an important part of the victim's support network when experiencing this family and domestic violence.³⁴

[41] *Fiona McCormack.* Ms McCormack is the CEO of Domestic Violence Victoria (DV Vic). Ms McCormack discussed the highly complex "family violence system" which involves a range of sectors and agencies including the police, the legal, housing, and income support systems, child protection and corrections, as well as specialist family violence services. She stated, "navigating the system is extremely time consuming and demanding, at worst, women and children can fall through the gaps and their safety is put at risk".³⁵ Ms McCormack gave evidence that where a formalised leave arrangement exists, women experiencing family violence have one less significant stress in their lives, being the fear of losing their job.³⁶

[42] Ms McCormack's evidence suggested that when women first raise concerns and are met by an uninformed response, they can be reluctant to seek support again. This significantly increases the risk of harm. In the context of employment, Ms McCormack stated that it is crucial for women to have access to adequate leave to ensure that they are able to access appropriate services while remaining in stable employment.³⁷

[43] Ms McCormack also said that it is critical for women to feel safe in disclosing family violence and that when they do, they know that their disclosure will be kept confidential.³⁸

[44] *Bernadette Pasco.* Ms Pasco is the Manager of Training, Sector Development and Special Projects at the Financial and Consumer Rights Council, the peak and professional association for financial counsellors in Victoria.³⁹ Ms Pasco gave evidence that victims of family violence, including financial abuse, are frequently seen by financial counsellors.⁴⁰

[45] Ms Pasco's evidence went to the economic and financial impact of family violence as both a manifestation of family violence and a hardship encountered after a victim has left an abusive relationship. She gave evidence of the way that family violence can take the form of economic abuse, and how it can continue even after the relationship has ended.⁴¹ She stated

that it can also be used as a way of maintaining control when a person attempts to leave the relationship.⁴² Ms Pasco gave evidence that financial counselling can assist victims of family violence negotiate with creditors and debt collectors, access formal hardship schemes, and explaining and assisting with debt options.⁴³

[46] *Samantha Parker.* Ms Parker is an advocacy worker at the Western Sydney Women's Domestic Violence Court Advocacy Service, in relation to Apprehended Domestic Violence Orders (ADVOs). She stated that while ADVOs can help to protect women from domestic violence, obtaining an ADVO usually requires women to attend court (often on multiple occasions) which can require them to take time off work.⁴⁴ Ms Parker described the process undertaken to obtain an ADVO,⁴⁵ and stated that non-attendance by the women the order is sought to protect can be disadvantageous. She also estimated that the process can take at least one day in court where an application is not being contested by the defendant, and at least four days if the matter is being contested.⁴⁶

[47] Ms Parker gave evidence that women in paid employment often express concern over their need to absent themselves from work in order to attend court proceedings, particularly if the proceedings require their attendance on multiple days. She stated that women in this situation may have already taken leave immediately prior to this for the purposes of seeking alternative accommodation, medical appointments, and income support. Ms Parker's evidence was that paid employment provides women who are the victims of domestic violence with the means to achieve security for their family, and that as a result, they are often reluctant to take further leave.⁴⁷

[48] *Marilyn Beaumont.* Ms Beaumont is the chairperson of the Australian Women Health Networks (AWHN) National Board and made her statement on behalf of the AWHN. The AWHN is a member-based organisation, with a diverse range of members across all states and territories with an interest in women's health and wellbeing.⁴⁸ Ms Beaumont acknowledged that domestic violence is not always physical violence, and that it may also encompass emotional and economic abuse.⁴⁹

[49] Ms Beaumont gave evidence of both the physical and mental effects of domestic violence. She cited her experience as a nurse in hospital emergency departments,⁵⁰ as a psychiatric nurse, and her work in the areas of homelessness services and women's health.⁵¹ Ms Beaumont gave specific evidence about a pilot project she worked on with Linfox to promote gender equality and non-violent norms in a male dominated workforce.⁵² The pilot was expanded and included training to prevent violence and to support those experiencing domestic violence. The program, now called "Take a Stand" is being implemented in workplaces across Australia.⁵³

[50] Ms Beaumont also gave her opinion about the importance of paid family and domestic violence leave. Her reasons for this were two-fold. First, women are both disproportionately affected by domestic violence and overwhelmingly the primary carers of children or sick or elderly family members. Women tend to use personal/carer's leave for these purposes and according to Ms Beaumont, it is unfair that they should carry the greater burden of further time away from work. Secondly, access to family and domestic violence leave would make it more likely that organisations will develop and implement workplace policies and capacity to provide support.⁵⁴ Ms Beaumont concluded that for victims of domestic violence, maintaining employment in a supportive workplace is an important contributor to women's economic security, health and wellbeing.⁵⁵

[51] *Emma Smallwood*. Ms Smallwood is a senior lawyer and family violence program manager, currently employed by Legal Aid Victoria. She was previously employed by the Women’s Legal Service Victoria (WLSV) and gave evidence on their behalf. Ms Smallwood is the author of a research report published by WLSV entitled *Stepping Stones: Legal Barriers to Economic Equality After Family Violence* (the Stepping Stones Report). The report followed a project investigating economic abuse, financial impacts of family violence and the different legal and financial barriers encountered by women who are victims of domestic violence.⁵⁶ Some of the recommendations set out in the Stepping Stones Report were adopted by the Victorian Royal Commission into Family Violence.⁵⁷

[52] Ms Smallwood stated that she carried out most of the interviews that formed the basis for the Stepping Stones Report. A number of common themes emerged from the interviews including the financial penalty and hardship endured by women experiencing family violence, the importance of obtaining financial independence, the difficult and lengthy nature of interactions with different legal systems and the fact that these interactions becoming more difficult because of deliberate actions of the perpetrator.

[53] The statement of Ms Smallwood included excerpts from the interviews including one with “Nicole”, who lost her job as a result of having to take time off after experiencing family violence and was left facing homelessness with considerable debt.⁵⁸ Ms Smallwood also examined the limitations of the legal and financial systems currently in place which require women to bear the majority of the burden in terms of protecting themselves and their children. She expressed the opinion that it is essential for women to have work arrangements that allow them to take action to protect themselves without further financial penalty. Access to paid leave would result in benefits to victims of family violence and prevent further loss of financial security.⁵⁹

[54] *Julie Kun*. Ms Kun is the CEO of Women’s Information and Referral Exchange (WIRE), a women’s support organisation, having previously worked for the Australian Services Union (ASU). In her evidence, Ms Kun provided an overview of the services provided by WIRE, such as the Support Line and Information Centre.⁶⁰

[55] Ms Kun gave evidence concerning financial abuse as a manifestation and a result of family violence. She stated that it is different to other forms of family violence in that it can continue long after the relationship is over, and can result in women experiencing dire poverty.⁶¹ She outlined three specific timeframes during which financial abuse commonly occurs:

- “During the relationship - as evidenced by controlling behaviour, such as preventing the abused victim from working, or limiting their access to shared money;
- After the relationship - in the refusal to pay child support, or forcing women to pay off debts that the women have not accrued or benefited from; and
- As a consequence of the relationship - the financially abused victim has limited economic resources or opportunities for ongoing employment.”⁶²

[56] Ms Kun's evidence was that women do not typically ask for time off work to deal with family violence related situations in workplaces that do not provide for family violence leave.⁶³ She stated that where employers provided support such as family violence leave, victims of family violence are given a greater number of avenues from which to seek assistance, and help to end the abuse they experience.⁶⁴

[57] *Michele O'Neil*. Ms O'Neil is the elected national secretary of the Textile, Clothing and Footwear Union of Australia. She gave evidence about the union's bargaining strategy which has included a strategy to incorporate paid family and domestic violence leave provisions in TCF industry enterprise agreements.⁶⁵ As a result of this strategy, 4 of the 57 enterprise agreements covering TCF workers now include domestic violence leave clauses.⁶⁶ This entitlement to paid leave ranges from 2 days to 10 days.⁶⁷

[58] Ms O'Neil's evidence also examined enterprise agreement negotiations that had not resulted in obtaining an entitlement to paid domestic violence leave. Ms O'Neil stated that the reasons given by employers for rejecting this type of clause included the absence of domestic violence as an issue in their workplaces, employers providing employees leave without the need for a dedicated clause, and a perceived inadequate utilisation of the leave to justify the need for a dedicated family and domestic violence leave clause.⁶⁸

[59] Finally, Ms O'Neil's statement considered the nature of the TCF industry, which predominately consists of women. A significant number of these women had non-English speaking backgrounds. In this context, Ms O'Neil stated that the loss of a day's pay or more can be significant, and financial pressure is compounded when a woman is required to have several absences due to the experience of family or domestic violence.⁶⁹ Ms O'Neil also noted the importance of the proposed confidentiality requirement in her industry.⁷⁰

[60] *Sunil Kemppi*. Mr Kemppi is a Senior Industrial Officer of the Community and Public Sector Union. He gave evidence about the current round of Australian Public Service (APS) bargaining affecting at least 99 agencies.⁷¹ Members across the APS have endorsed bargaining claims which include provisions for employees affected by family or domestic violence in all agreements.⁷² The claim includes 20 paid days leave, access to flexible work arrangements and availability of appropriate support networks.⁷³ Personal/carer's leave does not cover circumstances such as court appearances or appointments related to family or domestic violence.⁷⁴

[61] Mr Kemppi stated that enterprise bargaining in his industry has been largely informed by Australian Government workplace bargaining policies. During bargaining, representatives of APS agencies have regularly raised these policies as barriers for improvement and preservation of current conditions.⁷⁵ Mr Kemppi gave examples of several government agencies that would not include family and domestic violence leave in proposed agreements as they do not fall within these bargaining policies.⁷⁶

[62] According to Mr Kemppi, an industrial strategy is required to enable victims of family or domestic violence to obtain the help they need without risking their employment.⁷⁷ He gave evidence that a dedicated clause would provide a relevant safety net and allow bargaining to proceed on the basis that family violence was a basic entitlement rather than an enhancement to existing conditions.⁷⁸

[63] *Michelle Jackson*. Ms Jackson is employed as a Branch Co-ordinator by the Victorian and Tasmanian Authorities and Services Branch of the ASU. Her role involves the negotiation of enterprise agreements. Ms Jackson gave evidence that approximately 2000 of the ASU's members in the social and community services industry are not covered by an enterprise agreement, instead deriving the terms and conditions of their employment from the relevant modern award.⁷⁹

[64] Ms Jackson stated that while some of the enterprise agreements covering ASU members include provisions for family and domestic violence leave, bargaining outcomes are inconsistent. She provided the example of different enterprise agreements covering different departments within a single employer, where the bargaining power and priorities of the members in each department affect the entitlement to family and domestic violence leave enjoyed by the employees.⁸⁰ It was suggested that in male-dominated industries, women in the workplace are not always able to gain the support of their male colleagues in the pursuit of these sorts of provisions.⁸¹ She further pointed out that there is no minimum standard in modern awards against which to apply the better off overall test contained in the Act in relation to family or domestic violence.⁸²

[65] Ms Jackson pointed to the *Surf Coast Shire Council Enterprise Agreement No. 7 2010-2013* as an example of an enterprise agreement that includes best practice entitlements, such as confidentiality obligations, risk assessment training, flexible working arrangements and the ability to access carer's leave in order to accompany a victim of family violence to court.⁸³ Ms Jackson also gave evidence that in both the Surf Coast Shire Council and Greater Dandenong City Council, approximately 0.2% of staff access the enterprise agreement entitlement to domestic violence leave in any given year.⁸⁴

[66] Ms Jackson provided three examples of objections raised by employers to the inclusion of paid family and domestic violence leave in enterprise agreements. These objections focused on the cost to the employer, the potential for employees to disingenuously claim access to the leave, and the need for employees to have an annual entitlement to such leave. She submitted that an award entitlement to paid family and domestic violence leave would overcome these issues.⁸⁵

[67] *Brad Gandy*. Mr Gandy is the Australian Workers' Union (AWU) Western Australia Assistant Branch Secretary. He has previously worked as an organiser for the branch, and has been involved in the negotiation of enterprise agreements. Mr Gandy gave evidence concerning his attempts to introduce an entitlement to paid family violence leave into the agreement being negotiated to replace the *Spotless Facility Services trading as Alliance Catering (Alcoa Sites) Enterprise Agreement 2013*. He stated that despite some promising conversations with the Spotless personnel in Western Australia, the proposal was ultimately rejected by Spotless' head office in Melbourne. This was due to Spotless' view that family and domestic violence leave was already provided for by the NES. Mr Gandy gave evidence that his request for an explanation of how the NES already provides for this leave went unanswered by Spotless.⁸⁶

[68] Mr Gandy stated that for the employees who would be covered by the agreement being negotiated, accessing paid leave (such as annual leave) is difficult owing to the small teams in which employees work. He stated that the timing of annual leave is discretionary and is only approved with consideration of business requirements.⁸⁷

[69] Despite not succeeding in introducing family violence leave into the enterprise agreement referred to above, Mr Gandy stated his intention to attempt to introduce the same or a similar clause into other agreements.⁸⁸

[70] *Mick Doleman*. Mr Doleman is the executive officer of the Maritime International Federation. He has worked in the maritime industry, as either a seafarer or union official with the Maritime Union of Australia (MUA), since 1970.⁸⁹ Mr Doleman is also an ambassador of White Ribbon—a male-led organisation raising public awareness of violence against women.⁹⁰ Mr Doleman stated that changing workplace culture is crucial.⁹¹ He gave evidence of his involvement with White Ribbon, and of his suggestion to the organisation that it pursue engagement in workplaces (particularly male-dominated workplaces).⁹²

[71] Mr Doleman gave evidence about the MUA's draft domestic violence leave clause, which is submitted in negotiations for every enterprise agreement. The clause includes 10 days of paid leave. He stated that the view of the MUA's National Council is that it will not ratify an agreement unless it contains a domestic violence clause.⁹³ Mr Doleman stated that in his experience, support for a safety net clause for domestic violence has been unanimous, and that no MUA officials have reported opposition from male union members when discussing such clauses. He said that some opposition has been faced from employers who have suggested that such a clause would be misused by employees.⁹⁴

[72] *Debra Eckersley*. Ms Eckersley is the Human Capital leader for PricewaterhouseCoopers (PwC) in Australia. Ms Eckersley's evidence details PwC's experience of introducing a Family and Domestic Violence and Sexual Assault policy (the Policy) in 2015. The Policy is set out at Annexure A to Ms Eckersley's statement. Ms Eckersley stated that the experience has confirmed to PwC the importance of the provision of paid family and domestic violence leave and an accompanying confidentiality obligation.⁹⁵

[73] Ms Eckersley stated that prior to the Policy's introduction, PwC had no formal response to domestic and family violence or sexual assault matters and that it was likely that these matters were previously dealt with in an ad hoc manner. Considerations in approving the Policy included the estimated cost of domestic and family violence to the economy and employers, PwC's duty of care to employees to provide a safe workplace, and the impact on work attendance and performance.

[74] A confidentiality clause was included in the Policy to address concerns that the Policy may otherwise be ineffective and potential safety risks from broader disclosure.⁹⁶ Ms Eckersley suspects that before the Policy, some staff experiencing family and domestic violence or sexual assault may have not disclosed their experience and instead accessed other forms of leave or resigned.⁹⁷ She considers the confidentiality clause has encouraged staff to access the Policy. Ms Eckersley considers the Policy has sent a strong message of support to employees and put in place a customised response.⁹⁸

[75] Ms Eckersley's evidence was that, while there is benefit in organisations like PwC demonstrating best practice, there needs to be a floor of minimum benefits to provide a fair minimum standard. She stated that if employers are left to develop their own policy, a universal and consistent approach to family and domestic violence will not eventuate.⁹⁹

[76] *Jenni Mandel*. Ms Mandel is employed by the Ai Group as a Workplace Relations Policy Advisor. In September 2016 Ms Mandel analysed and summarised information

provided by the Department of Employment from the Workplace Agreement Database on enterprise agreements containing domestic violence provisions (WAD data) at the request of Ai Group.¹⁰⁰

[77] In particular, she analysed:

- the proportion of the total number of agreements as at 30 June 2016 that have domestic violence provisions;
- the proportion of the total number of employees covered by enterprise agreements current as at 30 June 2016 who are covered by domestic violence provisions;
- the characteristics of enterprise agreements current as at 30 June 2016 which contain domestic violence provisions; and
- the characteristics of enterprise agreement approved in 2016 which contain domestic violence provisions and of those that contain paid domestic leave provisions.

Ms Mandel set out the results of her analysis in her witness statement.

[78] Ms Mandel found there were 1,149 enterprise agreements current as at 30 June 2016 with some type of provision dealing with domestic violence (not necessarily leave provisions), equating to 7.9% of all enterprise agreements. A total of 819,805 employees were covered by enterprise agreements with some type of provision dealing with domestic violence, equating to 37.8% of all employees covered by enterprise agreements current as at 30 June 2016. Ms Mandel's analysis also considered numbers of agreements containing a family and domestic violence leave clause by sector, state, union and industry.

[79] Ms Mandel found that 323 agreements (15%) of all enterprise agreements approved from 1 January 2016 to 30 June 2016 contain some type of provision dealing with domestic violence. Of the 323 containing such a provision, 38.4% contain paid domestic violence leave entitlements and 6.5% contain unpaid leave entitlements. 35.6% contain provisions allowing access to other forms of leave for domestic violence purposes.

[80] Ms Mandel also analysed the 124 enterprise agreements approved in the 2016 period with paid family and domestic violence leave. As was found in relation to all agreements current as at 30 June 2016 containing domestic violence leave provisions, the industries with the greatest proportion of agreements approved in the 2016 period with paid domestic violence leave were Health Care and Social Assistance (approximately 32.3%), Public Administration and Safety (approximately 13.7%) and Education and Training (13.7%). 79.8% of the enterprise agreements are in the private sector. Enterprise agreements applying in Victoria accounted for 37.9% of all agreements approved in the 2016 period containing paid family and domestic violence leave. South Australia accounted for the second highest proportion of 13.7%.

[81] In relation to the number of days of paid family and domestic violence leave provided by the agreements, Ms Mandel found that of the 124 enterprise agreements, 10.5% provide for more than 10 days' paid leave, 18.5% provide for 10 days' paid leave, 29.8% provide for 5–9 days' paid leave, 20.2% provide for 1–4 days' paid leave, and 21% provide for paid leave that varies in length.

Submissions

[82] Oral or written submissions were made by the following bodies:

- The Australian Human Rights Commission;
- The Victorian State Government;
- The Australian Council of Trade Unions;
- Pricewaterhouse Coopers;
- The National Retail Association;
- The Queensland State Government;
- The Surf Coast Shire Council;
- Aged Care Services Group Pty Ltd;
- The National Farmers' Federation;
- The Australian Meat Industry Council;
- The Australian Chamber of Commerce and Industry;
- The Australian Federation of Employers and Industries;
- The Pharmacy Guild of Australia;
- The Australian Industry Group;
- The National Foundation for Australian Women;
- The Northern Territory Working Women's Centre;
- The ACT Government;
- Women's Health Tasmania;
- Brisbane Catholic Education; and
- The Australian Retailers Association and Master Grocers Australia.

[83] The submissions were either in favour of or against the ACTU's application. An understanding of the nature of those submissions can be gleaned from the summaries of submissions advanced by the ACTU, ACCI and Ai Group.

[84] *ACTU*. After the hearing of the evidence in the matter the ACTU submitted:

“1. The ACTU has brought this application for paid domestic violence leave as part of the four yearly review of modern awards conducted by the Fair Work Commission. The question for the Commission is whether paid family and domestic violence leave is necessary to meet the modern awards objective to provide a guaranteed fair and relevant minimum safety net of enforceable terms and conditions of employment.

2. It is the ACTU's case that paid family and domestic violence leave is a necessary part of the safety net of minimum terms and conditions, in the most literal sense of that term.

3. Family and domestic violence is a crime, and a pervasive social harm. Rates of family and domestic violence in Australia are at a crisis point. Family and domestic violence is the leading contributor to death, disability and ill-health among Australian women aged between 15 and 44. Unlike other forms of crime, family and domestic violence takes place in the home, frequently recurs, and takes multiple forms of abusive and criminal behaviour including physical and sexual assault and threat, emotional abuse, stalking, theft, and property damage.

4. The ACTU's application proceeds from the basic premise that family and domestic violence is a workplace issue in Australia.

5. It is a workplace issue in the way that many other events in employee's lives, including illness and parenthood, interact with and are accommodated by the workplace. It is a workplace issue because financial stability and therefore employment are crucial to enable persons affected by family and domestic violence to leave violent relationships, and to recover from violence. It is a workplace issue because workers' economic status shapes their capacity to escape violent relationships, and employment is central to economic power. It is a workplace issue because violence against women is estimated to cost the Australian economy \$22 billion per year, including \$1.3 billion in lost productivity, victim and perpetrator absenteeism, and the cost of replacing employees who have left the workforce, either through injury or death, due to family and domestic violence.

6. There are 1.86 million employees in Australia reliant on modern awards for their terms and conditions of employment. Only 55 per cent of those employees receive paid leave entitlements. For those employees who may be subjected to family and domestic violence, existing leave entitlements can be quickly consumed and are unfit for the purposes of attending court, urgently moving out of home, and seeking specialist support services. Moreover, over 45 per cent of award-reliant employees are employed on a casual basis, including 51 per cent of all award-reliant women. Casual employees have no paid leave entitlements to rely on should they need to attend to activities arising out of being subject to violence or abuse from their partners or families. Casual employees, and permanent employees with depleted leave reserves face an unacceptable choice between their safety and their paycheque. This is not fair or relevant. Minimum standards are necessary to ensure that no employee is forced to make this choice.

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

[85] In relation to the statutory test the ACTU submitted:

“Sections 3 and 578 of the Fair Work Act

227. Section 578 of the FW Act requires the Commission to take into account the objects of the FW Act in performing its functions and exercising its powers.

228. Section 3(a) provides that one of the FW Act's objects is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by 'providing workplace relations laws that... take into account Australia's international labour obligations'.

229. The ACTU's primary submissions at paragraphs 9.1 to 9.39, and reply submissions at paragraphs 66 to 71, and the Australian Human Rights Commission's submissions dated 12 May 2016 and 14 October 2016, address the ways in which the inclusion of paid family and domestic violence leave in all modern awards will assist Australia to comply with its international labour and human rights obligations.

230. Since those submissions were filed, relevant developments have taken place in relation to the meeting of experts referred to at paragraph 9.15 of the ACTU's primary submissions.

231. As previously outlined, the International Labour Organization's (ILO) International Labour Conference (ILC) will begin the process of setting a new standard on violence against women and men in the world of work at its meeting in June 2018. In the lead up to this meeting, the ILO Governing Body (GB) is reviewing violence in the world of work, including its gender dimensions, its impact on workers and enterprises, and responses in national and international laws and regulations, collective agreements and enterprise policies.

232. A Meeting of Experts on Violence against Women and Men in the World of Work, convened to assist the GB with its deliberations, met from 3–6 October 2016 (meeting of experts). Australia chaired the meeting and experts were drawn from Argentina, Australia, Belgium, Canada, India, Rwanda, South Africa and Sweden. As with all ILO forums, workers, employers and national governments were represented.

233. Relevantly, the meeting of experts adopted the following conclusions:

- '1. Domestic violence and other forms of violence and harassment are relevant to the world of work when they impact the workplace;
2. Violence in the world of work affects:
 - a) workplace relations, worker engagement, health, productivity, quality of public and private services, and enterprise reputation, and
 - b) labour market participation and, in particular, may prevent women from entering the labour market, especially in male-dominated sectors and jobs, and remain therein;
3. "Violence" should be described as "violence and harassment", in order to capture the continuum of unacceptable behaviours and practices that are likely to result in physical, psychological or sexual harm or suffering;
4. While international labour standards relevant to the elimination of violence and harassment do exist, these instruments do not define violence and harassment, provide guidance on how to address its various manifestations, or cover all workers, and lack an integrated approach essential to addressing violence and harassment in the world of work. For this reason, the meeting of experts agreed on the need for the development of a new standard altogether;

5. Violence and harassment in the world of work persists and must be tackled as a matter of urgency, with particular attention paid to the gender dimensions of violence;

6. An integrated approach to addressing violence and harassment in the world of work is needed, delineating clear responsibilities for public and private employers, workers and their respective organizations, and governments in dealing with violence and harassment, and joint strategies and collaboration are also important;

7. Collective agreement clauses could address the effects of domestic violence. The workplace provides an entry point to mitigate the effects, and employers could be allies to address such violence, though they are not responsible for it. Clauses could, for example, include provision of support for and leave to victims, and connecting victims to community services.’

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

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

235. The current safety net of terms and conditions is not ‘fair’, as mandated by s. 134(1) of the FW Act. It is not fair because the absence of paid family and domestic violence leave requires many employees, who are also victims of crime, to use paid leave intended for leisure or illness to attend to activities directed to recovery from family and domestic violence. A significant proportion of employees are required to take unpaid leave, compounding the economic disadvantage suffered by persons affected by family and domestic violence.

236. The evidence has established that employment is essential to recovery from family and domestic violence, and that a supportive workplace can have a significant positive impact on employees’ health and wellbeing. Employees should not have to rely on luck or the discretion of their employer to be supported when seeking to recover from family and domestic violence. It is for this reason that paid family and domestic violence leave should be included in all modern awards and not left to policy or enterprise bargaining.

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

237. In the *Annual Wage Review 2015–2016*, the Fair Work Commission Expert Panel acknowledged that the available information, as a whole, suggested that the majority of award-reliant employees are probably also low-paid, and that ‘there is no doubt that the low paid and award reliant have fallen behind wage earners and employee households generally in over the past two decades’.

238. It is reasonable to assume that a proportion of those award-reliant employees who are low paid may be affected by family and domestic violence. For those employees, financial stability is critical. Paid family and domestic violence leave would ensure that low-paid workers are not further disadvantaged by being required to take unpaid leave, or to jeopardise their employment, in order to meet the needs arising out of being subjected to family and domestic violence.

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

239. The evidence before the Commission establishes that paid leave for persons affected by family and domestic violence is present in some enterprise agreements, although Ms Mandel’s evidence about the contents of the WAD does not allow the Commission to make any finding about the scope of enterprise coverage.

240. The evidence of union officials Ms Jackson (the ASU), Mr Doleman (the MUA), Mr Gandy (the AWU), Ms O’Neil (the TCFUA) and Mr Kemppi (the CPSU) concerned efforts during bargaining to include paid leave provisions in enterprise agreements. The unchallenged evidence of each of those witnesses was that including domestic violence leave provisions was difficult and depended entirely on the willingness of employers to consider the clause. The variation of modern awards to include paid leave would both encourage collective bargaining and produce greater efficiencies in bargaining in respect of this issue by providing a clear and consistent minimum benchmark.

241. The employer parties argue that incorporating paid leave for persons affected by family and domestic violence would discourage collective bargaining. The employer parties put no evidence before the Full Bench in support of that proposition. The evidence that exists about the relationship between increases in the minimum wage (and by extension here, increases in the cost of employment through the provision of paid leave) and collective bargaining is that minimum wage increases do not discourage collective bargaining. The decision to engage in bargaining involves a ‘complex mix of factors’ and cannot be attributed to a single cause.

242. In the review of the *Firefighting Industry Award*, the Full Bench considered an application by the Victorian fire services to remove the prohibition on part-time work in the modern award. The variation was opposed by the United Firefighters’ Union of Australia (UFUA). The variation was permitted, with the Full Bench holding that:

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

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

Section 134(1)(c) – social inclusion

244. Section 134(1)(c) requires the Commission to ensure that modern awards, together with the NES, to promote social inclusion through increased workforce participation. This has been interpreted to mean increased employment.

245. The ACTU rely on the evidence set out above that demonstrates how family and domestic violence disrupts employment and precludes workforce participation. This dis-employment effect is particularly egregious for women.

246. ‘Social inclusion’ requires more than simply having a job. In the *Annual Wage Review 2015–2016*, the Expert Panel endorsed the proposition that a job with inadequate pay can create social exclusion if the income level limits the employee’s capacity to engage in social, cultural, economic, and political life. It follows that a job with inadequate safety net protections against the employment disruption that can occur as a result of needing time away from work to attend to matters arising from family and domestic violence can contribute to social exclusion and is contrary to the modern awards objective.

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

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

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

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

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

249. Family and domestic violence disproportionately affects women, who are already disadvantaged participants in the workforce thanks to the gender pay gap, the reality that women shoulder the bulk of caring responsibilities; and the likelihood that women will be employed on a casual or part-time basis.

250. Existing leave entitlements are ‘facially neutral’, in that they apply equally to men and women. However, the appearance of neutrality disguises the fact that women affected by family and domestic violence who are required to deplete their personal and annual leave resources are subject to additional indirect discrimination with respect to the treatment of leave. For these reasons, women are not receiving leave entitlements on equal terms to men. This matter is also relevant to s. 578(c) of the FW Act, which requires the Commission to help to prevent and eliminate discrimination.

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

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

252. Family and domestic violence already has a significant negative impact on productivity and employment costs, and on the national economy. The ACTU refers to and repeats these submissions insofar as they address the impact of family and domestic violence on the national economy, lost productivity, and employment costs.

253. The ACTU acknowledges that the initial provision of the entitlement will increase employment costs. However, those costs are likely to be in the vicinity of between \$2.96 and \$29.6 million, and not anything close to the grossly over-estimated costs in the ACCI submission. In our submission, the cost of providing paid family and domestic violence leave are reasonable and proportionate having regard to the needs of employees, the cost of family and domestic violence to the national economy, and the cost of inertia, estimated by PWC to accumulate to \$323.4 billion over a 30 year period to 2045.

254. The proposed clause is intended to support employees to safely leave violent relationships without jeopardising their financial security. Over time, it is expected that this will result in a reduction in family and domestic violence, ie, that was occurring in relationships that have ended. In this way, paid family and domestic violence leave operates as a tertiary prevention strategy. Tertiary prevention strategies (response or intervention) refer to responses set in motion after violence has occurred; they aim to reduce consequences and impact of violence, and prevent recurrence.

255. By reducing future violence, the proposed clause will contribute to the reduction in productivity losses and employment costs that are directly attributable to family and domestic violence, and are already being borne by employers. Further, by shouldering some of the cost of family and domestic violence, which is disproportionately and unfairly borne by victims, and to a lesser extent state and federal governments, the burden to the national economy will be dispersed.

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

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

[86] Its conclusion was expressed as follows:

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

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

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

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

[87] *ACCI*. ACCI submitted:

“1. POSITION IN SIMPLICITER

1.1 The Australian Chamber abhors violence in any form.

1.2 These proceedings have canvassed in detail the difficult circumstances of persons experiencing family and domestic violence, and the effect that such experience can have on people's lives.

1.3 Particularly for those most vulnerable to the effects of family and domestic violence (the group whom the ACTU has principally focussed) and particularly in its most serious forms, family and domestic violence is a repulsive form of crime which cannot be accepted or tolerated.

1.4 While little reference was made in these proceedings to the perpetrators of family and domestic violence, there is no doubt or argument that family and domestic violence exists within Australia and that it is ‘a social issue’. Like any social issue, family and domestic violence is complex and gives rise to a raft of social, cultural, legal and human challenges.

1.5 These proceedings have also disclosed that the Australian system (in a legal, housing and social sense) can improve its support for those experiencing family and domestic violence.

1.6 If these proceedings were a social or political debate, the questions raised by it may well be answered differently.

1.7 This is not a social policy debate however. This is an industrial proceeding within the context of the 4 Yearly Review about minimum standards of employment contained in individual modern awards which are to be reviewed in their own right and weighed against the requirements of ss 134, 138 and 156 of the *Fair Work Act 2009* (Cth) (Act).

1.8 In the submission of the Australian Chamber, this case therefore renders down to a simple question.

1.9 Has a sufficient case been put before the Full Bench to warrant the exercise of its discretion to insert 10 additional days of paid leave for all award covered employees into all modern awards (DVL)?

1.10 It is our submission that in order to do so, the Commission would need to be satisfied that such an exercise of discretion would be in satisfaction (only to the extent necessary) of the modern awards objective.

1.11 Such a case has not been made out.

1.12 The evidence has disclosed that those persons experiencing family and domestic violence who require flexibility in relation to their permanent work arrangements can currently access a minimum of 10 days paid personal/carer's leave where they require time off because of a personal illness or personal injury. This may include time off required to see a health provider such as a medical practitioner, physiotherapist, dentist, psychologist or therapist. Such persons can access the same bank of leave to provide care or support to a member of their immediate family who requires care or support because of personal injury or an unexpected emergency as a result of family and domestic violence.

1.13 For any leave which would not fit within the framework of personal/carer's leave, namely leave required to attend court, financial counselling or to relocate (or for any personal/carer's leave that was in excess of 10 days) permanent employees are currently able to access 4 weeks of paid annual leave.

1.14 The case of the ACTU does not disclose evidence of a pattern of employees subject to family and domestic violence exhausting their paid leave entitlements. Neither does the evidence disclose a rationale or necessity for 10 days paid leave to all employees.

1.15 The evidence has also disclosed that employees and unions can and do bargain for DVL in the context of enterprise agreements.

1.16 No attempt has been made to put on evidence relating to the specific circumstances of any individual modern award. The case of the ACTU instead seeks to establish family and domestic violence as a major social issue at large that has some intersection with the workplace. This approach cannot be easily reconciled with the relevant provisions of the Act or the requirements of the Preliminary Issues Decision.

1.17 For these reasons, with respect, no reasonable reading of the evidence as filed could conclude that the grant of 10 additional paid leave days to all workers is 'necessary' within the meaning of s 138 of the Act."

[88] In relation to the statutory tests ACCI submitted:

“12. REQUIREMENTS OF THE ACT

12.1 Ultimately, beyond the scope of social discourse, the Full Bench will be required to apply the requirements of the Preliminary Issues Decision and the Act to the evidence presented before it. The legislative requirements applying to these

proceedings were canvassed comprehensively in our initial submission and will be addressed in our oral submission.

12.2 In summary, this framework provides as follows:

- (a) Given that the ACTU claim is substantive and material, a compelling case supported by probative evidence is required to be advanced by the ACTU.
- (b) In exercising any discretion, the Full Bench can only include in modern awards (relevantly for these proceedings) terms about matters in section 139 of the Act and section 142.
- (c) Each award must be considered in its own right against the modern awards objective.
- (d) To vary an award, the case satisfying the requirements of the Preliminary Issues Decision must be made out for that award.
- (e) In exercising any discretion the Full Bench can only vary an award 'to the extent necessary' to meet the modern awards objective. If a claim goes beyond what is necessary to achieve the modern awards objective, the Full Bench has acted outside of its jurisdiction.
- (f) At the heart of the modern awards objective is the setting of a fair and relevant minimum safety net.
- (g) The focus here is on minima.
- (h) The starting point for this matter is that each of the modern awards that are subject to the claim prima facie met the modern awards objective at the time they were made.

12.3 Section 134(1) of the Act sets out the modern awards objective.

134(1)(a) Relative Living Standards and the Needs of the Low Paid

12.4 The difficulty in assessing this limb of the modern awards objective in these proceedings is that much of the evidence provided by the ACTU either cannot be disaggregated by socio-economic status (such as the PSS) or otherwise concerns persons not in the workforce.

12.5 It was established by Ms McFerran and Dr Cox that socioeconomic status does not affect the likelihood of being a victim of family and domestic violence however it appears that the more educated you are the more likely you are to be a victim of violence.

12.6 The ACTU has advanced no probative evidence as to why the grant of leave as claimed goes to this limb of the modern awards objective.

12.7 The evidence as to the likely take-up of the proposed leave is also relevant to this limb. If the evidence of Dr O'Brien is correct, the demand and use for this entitlement is not at a level which would warrant a wholesale recalibration of the leave model under modern awards.

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

12.8 As noted above, DVL is currently the subject of enterprise bargaining in a number of contexts and industries.

12.9 To introduce it as a uniform entitlement, particularly at the level of 10 days, would be to remove the impetus of employees to bargain for the entitlement. As was disclosed by the evidence, in the right circumstances, DVL appears to represent an opportunity for unions, employees and employers to agree on a common and relevant position in the context of an individual workplace.

12.10 To externally impose a 10 day minimum condition on all employees would be to remove considerable impetus to bargain around the issue and therefore could not be said to encourage collective bargaining. As identified above with reference to Mr Kemppi's evidence, merely removing any difficulty for unions to achieve claims for 10 days DVL in enterprise bargaining does not encourage collective bargaining within the meaning of the Act.

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

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

12.12 It appears that it is the existence of employment and a level of control or autonomy over finances which is critical in the assessment of the effects of family and domestic violence, not the existence of an entitlement to paid leave.

12.13 It is significant that those most affected (and socially excluded) by family and domestic violence are those subject to domestic violence who are unemployed, having no control over financial resources and no control over assets.

12.14 While some evidence has been produced which goes to the importance of maintaining employment for those experiencing family and domestic violence, we are unable to identify any evidence which establishes that employees have been terminated by reason of their experience of family and domestic violence. If such evidence had been brought, it would be relevant to note the protections that employees currently have against such actions including access to the unfair dismissal jurisdiction.

12.15 The evidence simply supports a proposition that persons in the workforce may need to absent themselves from time to time from being at work because of the impact of family and domestic violence. As we develop above, no case has been made to establish that the existing forms of leave are insufficient to achieve this aim.

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

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

134(1)(da) - The need to provide additional Remuneration

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

134(1)(e) - The principle of equal remuneration for work of equal or comparable value

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

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

12.19 As developed above, no credible costs evidence has been put forward by the ACTU which could satisfy the Full Bench of the costs arising from the ACTU's claim.

12.20 Particularly with respect to the 'swap-over' costs between leave which would have been taken as paid personal/carer's or annual leave and the new entitlement, no assessment has been made to assess the financial impact of the claim.

12.21 The fact is that the claim will impact business and administration costs. There is simply no authoritative evidence before the Full Bench to assess or understand these costs in granting the claim.

134(1)(g) - the need to ensure a simple, easy to understand stable and sustainable modern award system for Australia

12.22 As developed above, the creation of an entitlement that would be triggered in objectively ambiguous circumstances and which would only apply to an extremely small proportion of the working population is likely to reduce the simplicity of the modern awards system.

12.23 Introducing a new and complex benefit is the opposite of simplicity and the more added to the safety net by definition increases the likelihood of instability.

134(1)(h) - the likely impact of exercising modern award powers on employment growth, inflation and the sustainability performance and competitiveness of the national economy

12.24 This limb of section 134 requires the Commission to consider the likely impact of exercising its power in the context of the broader economy.

12.25 As noted above, the Full Bench has not been placed in a position where it can reasonably identify a cost on the proposed entitlement. In light of this position, we submit that it would be inappropriate to impose an additional requirement without having been able to assess the likely costs ramifications.”

[89] It concluded by submitting:

“13.1 In the view of the Australian Chamber, these proceedings can be summarised in a set of relatively simple propositions:

(i) while the certain witnesses have expressed a disinclination against the taking of personal/carer’s leave and annual leave to address matters relating to family and domestic violence, no case has been made that an additional form of leave is appropriate or necessary;

(ii) the circumstances giving rise to an entitlement to take leave in cases of family and domestic violence are in part addressed by the granting of 10 days paid personal/carer’s leave to all employees;

(iii) for the remaining circumstances which do not concern the health of an employee or their carer responsibilities (such as attendance at court, counselling or with an advisor), employees are entitled to take annual leave;

(iv) no evidence has been led which would allow the Full Bench to review each of the 122 modern awards in their own right;

(v) the imposition of DVL into Modern Awards would be piecemeal when assessed against family and domestic violence as a social issue. The ACTU claim will do nothing for the unemployed or for the ‘award-free’;

(vi) parties can and do bargain for DVL entitlements, with some employers introducing a formal entitlement even outside the context of bargaining;

(vii) even without formal entitlements to DVL in enterprise agreements and policies, the Full Bench has before it evidence that employers can and do exercise discretion assist employees who are experiencing family and domestic violence.

13.2 In our respectful submission, the ACTU has not established a sufficient case having regard to the requirements of the Preliminary Issues Decision or the Act and as such the Full Bench should refuse the ACTU’s application.”

[90] *Ai Group*. Ai Group submitted:

“4. Whilst Ai Group acknowledges that family and domestic violence is an important social issue, we oppose the grant of the ACTU’s claim. It is our view that the introduction of the proposed paid leave entitlement to the modern awards system is not appropriate. Importantly, the Commission’s power to allow the claim is confined by the operation of the relevant statutory provisions which we outline below. For present

purposes, it is sufficient to note that the case mounted by the ACTU does not enable the Commission to conclude that the provision proposed is necessary in order to achieve the modern awards objective, as contemplated by s.138 of the Act.

2. Ai GROUP'S POSITION ON THE COMMUNITY PROBLEM OF FAMILY AND DOMESTIC VIOLENCE AND ON THE ACTU'S CLAIM

5. Ai Group's position on the community problem of family and domestic violence and on the ACTU's claim, can be summarised as follows:

a. Family and domestic violence is a community problem. Federal and State governments, police forces, courts, community services organisations, health professionals, the legal profession, the media, employers, employees and many others in the community, all have roles to play in addressing the problem.

b. The problem of family and domestic violence is currently receiving considerable attention by the Federal and State Governments.

c. Ai Group supports the many programs and forms of assistance that have been implemented by governments, police forces, courts, community groups, and others to address the issue.

d. Ai Group supports appropriate initiatives to educate employers about the issue of family and domestic violence and the role that employers can play in assisting employee victims, e.g. through company human resource policies and flexible work arrangements.

e. The key to success with this important issue is to engage with employers in a positive way, rather than the unions seeking to impose a costly 'one size fits all' paid leave entitlement upon employers. Employers have different capacities to provide support to employees experiencing family and domestic violence.

f. Many large employers have relevant policies to assist employees who are victims of family and domestic violence, e.g. employee assistance programs (EAPs). Often these policies are broader than simply dealing with family and domestic violence; they provide assistance to employees faced with various hardships.

g. Smaller employers often do not have written policies but they typically adopt a reasonable and compassionate approach when their employees suffer genuine hardships.

h. Employers are required to deal with the impact that numerous social problems have on the lives of their employees, such as mental health issues, relationship breakdown, drug dependence, alcohol dependence, domestic violence and crime generally. Family and domestic violence is only one of many social problems that can have a serious impact on employees.

- i. Work health and safety (WHS) legislation requires that employers provide safe workplaces and ensure the health and safety of workers.
- j. The FW Act provides for various forms of paid and unpaid leave which employees experiencing family and domestic violence or other serious difficulties in their personal lives are able to access. In addition, the FW Act provides substantial protections for employees who need to be absent for such reasons, e.g. the general protections and unfair dismissal laws.
- k. The National Employment Standards (NES) provide employees who are victims of family and domestic violence with the right to request flexible work arrangements.
- l. These days the main leave entitlements are dealt with in the NES, not modern awards. Awards should not contain a major new category of leave entitlement. It is the role of the Commonwealth Parliament to determine the major categories of leave entitlements for employees and, to date, Parliament has not supported the creation of paid domestic violence leave entitlements.
- m. If specific leave entitlements were included in awards for domestic violence, the unions could be expected to pursue specific leave entitlements for a myriad of other social problems such as mental health issues, relationship breakdown, drug dependence, alcohol dependence and crime generally. All social problems interact with the workplace in one way or another.
- n. Paid family and domestic violence leave exists in very few countries. Numerous countries with very generous employment entitlements do not have this leave entitlement.
- o. Section 138 and the modern awards objective do not permit the Commission to grant the ACTU's claim.

[91] In relation to the statutory tests it submitted:

“19.1 A fair safety net

720. The notion of ‘fairness’ as contained in s.134(1) of the FW Act suggests the need to finely balance competing interests and considerations in order to establish a safety net that is reasonable, just and equitable.

721. Consideration as to whether the safety net is ‘fair’ is not limited to the rights and interests of employees. Rather, it must be also assessed from the perspective of employers. This was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues:

‘[109] ... It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide ‘a *fair* and relevant minimum safety set of terms and conditions’. Fairness is to be assessed from the perspective of both employers and employees.’

722. A similar point was made by Justice Giudice in *Shop, Distributive and Allied Employees' Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, in respect of the provision in the former Workplace Relations Act 1996 which required the AIRC to 'ensure a safety net of fair minimum wages and conditions of employment ...':

'In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups ...'

723. The ACTU's claim appears to hinge primarily on broad ideals of fairness. The case mounted by it calls upon the Commission to determine whether the safety net, as it currently operates, provides a fair safety net to employees experiencing family and domestic violence and, proceeding on the basis that this is not so, it asks the Commission to find that it is necessary to include the provision it has proposed in all modern awards in order to achieve this.

724. A key element of the ACTU's broad appeal to notions of fairness is their implicit contention that the burden or cost of family and domestic violence incurred by victims should be shared by employers. At paragraph 1.5 the ACTU contends:

'The modern award safety net has evolved on the basis of whether particular conditions of employment are a necessary or desirable minimum for workers and whether such conditions are achievable given the impact on employers and the economy generally. The ACTU believes that victims shoulder too great a proportion of the burden and cost of family violence, a cost that is shared by government, the community and employers. A minimum safety net of family and domestic violence leave is necessary to balance the share of the burden.'

725. In response, it is firstly necessary to clarify that the modern award safety net has not 'evolved' in the manner suggested. The ACTU appears to have completely forgotten the approach adopted under the Part 10A award modernisation process and instead seek to suggest that the modern award safety net was a product of a far more organic or piecemeal evolution.

726. Regardless, the reference to a 'desirable' minimum for workers is entirely inappropriate in the current legislative framework. Awards may only contain terms that are necessary to achieve the modern awards objective. Pursuant to s.134(1), certain matters must be taken into account in ensuring modern awards constitute a 'fair and relevant minimum safety net'. Suffice to say that this includes far more than an assessment of what is, '*...achievable given the impact on employers and the economy more generally.*'

727. Crucially, as already identified, the concept of fairness contemplated in the context of s.134(1) is to be considered from the perspective of both employers and employees. It may easily be accepted that it is not fair that employees suffer the various negative impacts that flow from family and domestic violence. This includes

the cost of being unable to work. However, it does not follow that is fair to simplistically seek to shift an element of the burden or cost flowing from such unacceptable and in some instances criminal conduct to employers.

728. The ACTU believes that victims shoulder too much of the burden and cost of family and domestic violence. This is an understandable concern. However, it should not be accepted that it is fair to transfer such costs to employers in the manner proposed by the ACTU.

729. A fundamental difficulty with this proposition is that it simply assumes that it is appropriate that employers meet the cost of additional paid leave. This is inherently unfair given that family and domestic violence is a problem that is often, if not almost always, largely beyond an employer's direct control. It is not fair that an employer of an employee experiencing family and domestic violence incur further additional costs as a consequence of what is a broader societal problem.

730. Even if there are policy grounds for ensuring that persons who are the victims of family or domestic violence receive support in the form of paid leave, it does not follow that employers should provide such payment. Although the circumstances are of course very different, obvious conceptual parallels can be drawn between paid parental leave and paid family and domestic violence. In the context of parental leave it might be considered 'unfair' that women suffer a loss of income as a consequence of the necessity of their absence from work accompanying the birth of a child. Nonetheless, the safety net does not provide that such leave must be paid for by the employer. However, the Commonwealth Government has implemented a system of publically funded paid parental leave. One of the key policy arguments which supported public funding of paid parental leave was to ensure that pregnant workers were not more costly for employers to hire and retain than other workers.

731. One of the primary arguments put by the ACTU is that it is *unfair* that employees experiencing family and domestic violence are compelled to access pre-existing leave entitlements such as annual leave, personal/carer's leave and long service leave.

732. Later in this section of our submission we deal with the nature of the minimum safety net. The leave entitlements found in the safety net have predominantly been developed by Parliament and are crafted in appropriately broad terms. For instance, personal/carer's leave can be taken if an employee is not fit for work because of any personal illness or injury affecting them. The Act does not confine the application of s.97(a) by reference to illness or injury that is caused in a specific way. That is, the Act does not regulate access to personal/carer's leave by limiting the circumstances in which the illness or injury was inflicted. As such it is sufficiently broad to cover some circumstances faced by victims of domestic violence.

733. Family and domestic violence is an issue that has prevailed in society since a time well before the commencement of the Fair Work regime. That the potential impact of family and domestic violence might include personal illness or injury that renders an employee unfit for work is not new. Despite this, when crafting the entitlement to personal/carer's leave in the NES and when determining the quantum of the leave that could be accessed, Parliament considered that the relevant provisions struck an appropriate balance.

734. The issue of fairness should also be considered in the context of other circumstances in which an employee may be required to access their personal/carer's leave to an extent that this ultimately results in the exhaustion of the entitlement. For instance, a terminal illness may result in an employee requiring more than 10 days of personal/carer's leave. Similarly, if an employee's child is seriously ill such that they require care and support, this too may necessitate 10 or more days of leave. The ACTU's claim appears to suggest that the unfairness facing an employee experiencing family and domestic violence is different in nature or perhaps more acute than for that of those in the above circumstances; a proposition that, in our view is not made out and should not be accepted.

735. Similar arguments are also made with reference to annual leave. The ACTU submits that accessing annual leave is inconsistent with its purpose, that being rest and recreation. The relevance of this observation is somewhat undermined by the changes in the regulation of leave generally since the early evolution of annual leave as an industrial standard.

736. Even accepting that historically the purpose underpinning the provision of annual leave entitlements was to ensure that employees were able to be absent from work for that purpose, the circumstances in which annual leave can or must be accessed are now considerably less stringent than under previous regimes.

737. The Act does not prescribe any limitations upon the circumstances in which annual leave can be taken. Nor does it impose any requirements to take annual leave within certain prescribed timeframes. Indeed it does not even mandate that leave must be taken. Rather, annual leave accumulates throughout the duration of an employee's service with the employer and is ultimately cashed out upon termination of employment if it remains untaken. In this Review, the vast majority of modern awards have been varied to allow the cashing out of annual leave during employment and the taking of leave in advance of its accrual.

738. Whilst the taking of annual leave for its originally intended purpose might previously have been deemed sacrosanct, the current legislation has improved an employee's ability to take or otherwise benefit from annual leave entitlements. The importance of retaining such leave for its arguably historically intended purpose is also somewhat modified by the introduction or enhancement of other specific leave entitlements such as personal/carer's leave and compassionate leave.

739. Considerations pertaining to the potential unfairness of the particular clause proposed and the manner in which the provision would operate must also be weighted by the Commission. The proposed clause does not balance the needs and interests of employees and employers. We make this submission particularly in light of the very broad application of the clause and the problematic way in which it would operate. When consideration is given to the many circumstances in which the provision could be accessed, the absence of any obligation on an employee or discretion of an employer as to how or when the leave is accessed, it has the potential to operate in ways that are particularly unfair to employers. We have previously provided some examples that are illustrative of this possibility.

19.2 A relevant safety net

740. We do not consider that the proposed clause can form part of a relevant safety net, when nowadays, for valid reasons, the main types of leave are dealt with in legislation, not in awards. Under the current workplace relations system, it is the role of Parliament to determine whether a major new category of leave should be implemented.

741. Also, to the extent that the proposed clause provides for an entitlement to leave to perpetrators of family and domestic violence, we do not consider that it can form part of a relevant safety net. The provision of such an entitlement to an individual who has engaged in behaviour that is threatening, violent or abusive and potentially criminal in nature is inconsistent with community expectations and societal norms. Indeed, this is reflected in the policy position of the ACTU as set out in its submissions.

19.3 A minimum safety net

742. The modern awards system, along with the NES, provides a *minimum* set of terms and conditions. That is, they represent the floor of entitlements that must be afforded to all employers and employees.

743. The very notion of a minimum safety net suggests that the relevant set of terms and conditions represent the very basic, essential rights and protections that must be afforded to all employees and employers. The concept of a minimum safety net does not contemplate the introduction of additional benefits that, as we demonstrate below, overlap considerably with pre-existing entitlements in the absence of there being any clear justification for such an expansion.

744. It is not the role of the safety net or the Commission as the arbitrator of part of that safety net, to mandate terms and conditions that are designed to advance Australia's standing internationally, or to promote over-award outcomes. Rather, a minimum safety net must be such in its design that it can reasonably be applied to the full gamut of employees and businesses (by reference to size, industry, nature of operations, composition of workforce and so on) despite being uniform in its terms.

745. The restraint shown by the Legislature in providing for paid leave entitlements that are limited to situations in which an employee cannot attend work by virtue of certain specific personal circumstances, in addition to a single generalised entitlement to annual leave, is reflective of this. The absence of prescriptive obligations or restrictions as well as the ability to supplement or to some extent, deviate from them by way of modern award or enterprise agreement terms is also reflective of an implicit recognition of the role of the safety net. This has been furthered by the general absence of modern award terms that create new categories of leave.

746. In our view, the grant of the ACTU's claim would represent an unwarranted and inappropriate expansion of the minimum safety net. In effect, it would introduce a new category of leave that could be accessed by any award covered employee in a very broad range of circumstances that may be accommodated by way of pre-existing elements of the safety net. In addition, the ability of employers to comply with and accommodate various elements of the proposed clause, and the impact that it would

have on their operations, would vary considerably. It cannot be assumed that the provision sought can be implemented by all award covered employers without significant additional costs and operational implications.

747. It is of course relevant to consider the potential implications that the ACTU's claim might have upon the initiatives taken by individual employers to address family and domestic violence as a broader social issue, some examples of which we have highlighted earlier in this submission. Further, a range of benefits and entitlements are afforded by employers to victims of domestic violence leave, often in the form of enterprise agreement provisions or workplace policies.

748. We consider that the introduction of a significant new leave liability to the minimum safety net will likely discourage employers from developing specific and innovative ways in which it can support victims of family and domestic violence that are tailored to the needs of its business and its workforce. This is an undesirable outcome that should not be encouraged by the Commission.

749. By way of example, the evidence of Marilyn Beaumont, relied upon by the ACTU, goes to a training program implemented at Linfox, which employs a predominantly male workforce. The program was intended to 'promote gender equality and non-violent norms'. The makeup of Linfox's workforce may have encouraged it to offer a training program of this nature to its employees. It can reasonably be expected, however, that if the safety net were amended to include the provision proposed by the ACTU, noting that it is potentially so broad that it may apply to employees who are perpetrators of violent or abusive behaviour, employers may be less inclined to expending resources that are directed towards formulating and executing enterprise specific initiatives that are potentially of greater relevance and value to its workforce.

750. The ACTU refers repeatedly in its submission to the need for a 'whole of community' approach to tackling family and domestic violence. It would appear to us that allowing employers the scope and the resources to discover and adopt customised solutions to assisting victims of domestic violence as well as broader approaches that have the potential to gradually permeate community attitudes is consistent with the ACTU's calls. Indeed activities such as the aforementioned training program or the White Ribbon accreditation program that Mr Doleman speaks of constitute forms of 'primary prevention' and, to the extent that businesses have the capacity to adopt them, they are worthwhile initiatives.

751. The provision proposed by the ACTU is not appropriate for inclusion in a minimum safety net. Rather, for the various reasons we have earlier identified, the matter is one that should more appropriately be left to individual enterprises. The introduction of a 'one size fits all' award term is likely to have an adverse effect on the progress that might otherwise be made through employers adopting creative and innovative ways to assist victims of domestic violence as well as to address the broader underpinning issues associated with the causes of family and domestic violence.

19.4 The National Employment Standards

752. An assessment as to whether a provision is necessary to achieve the modern awards objective necessarily requires that consideration be given to the NES. This is because s.134(1) requires the Commission to ensure that modern awards, *together with the NES*, provide a fair and relevant minimum safety net. For the purposes of s.138, the terms of an award are not to be considered in isolation from the FW Act.

753. The NES represent the minimum safety net that applies to all national system employees and employers, both award free and award covered. It is a set of terms and conditions that have been considered sufficient and appropriate by the Legislature. The relevant provisions of the Act are designed to balance the needs of the employees whilst affording employers the necessary rights and flexibilities. It represents a carefully balanced set of standards that have been crafted for the purposes of ensuring that employees are adequately protected, whilst bearing in mind the operational realities that face businesses.

754. Earlier in this submission, we have identified the various NES entitlements that, in different ways, allow employees experiencing family and domestic violence the ability to access leave or other forms of flexibility. This includes annual leave, paid personal/carer's leave, unpaid carer's leave and the right to request flexible working arrangements.

755. There is some evidence (primarily anecdotal in nature) that might suggest that in certain limited circumstances, the leave accruals of some employees are exhausted by virtue of their experience of family and domestic violence. However, there is certainly no evidence that demonstrates that this is the case in all or even most situations. It is relevant to note that both annual leave and personal/carer's leave accumulate from year to year and so it can reasonably be inferred that some employees experiencing family and domestic violence may have access to more than the annual entitlement afforded by the statute. It is also relevant to note that virtually all modern awards now enable an employee to take annual leave in advance of its accrual, by agreement with their employer.

756. There is limited if any evidence before the Commission that might suggest that many of the circumstances that would render an employee eligible to access family and domestic violence leave under the ACTU's proposed clause cannot effectively be managed by way of flexible working arrangements pursuant to s.65(1). There is certainly no evidence that where such requests have been made, they have unreasonably been refused, contrary to s.65(5).

757. It our contention that the aforementioned elements of the NES ensure that modern awards are achieving their legislated objective. The ACTU has not advanced material that seriously contradicts this proposition.

19.5 Relative living standards and needs of the low paid (s.134(1)(a))

758. *The Annual Wage Review 2014 – 2015* decision dealt with the interpretation of s.134(1)(a) (emphasis added):

[310] The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates

determined by the annual wage review with those of other groups that are deemed to be relevant.

[311] The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a “decent standard of living” and to engage in community life, assessed in the context of contemporary norms.’

759. The term ‘low paid’ has a particular meaning, as recognised by the Commission in its *Annual Wage Review* decisions:

‘[362] There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach.’

760. The ACTU has not undertaken the analysis required by s.134(1)(a). Indeed it has not sought to address this element of s.134(1)(a) in any meaningful way. It would appear that the ACTU does not seek to rely on it and accordingly, we consider it sufficient to note for present purposes that the clause it has proposed would apply to all employees, regardless of whether they are ‘low paid’. To the extent that the ACTU seeks to argue that all award-reliant employees are necessarily low paid, we draw attention to the aforementioned decisions which highlight that quite clearly, this is not the case.

19.6 The need to encourage collective bargaining (s.134(1)(b))

761. The submissions and the evidence of the ACTU complain of difficulties faced by the union movement in achieving the inclusion of provisions in enterprise agreements that provide for leave entitlements of the nature here sought.

762. Any difficulty securing enterprise agreement provisions relating to a particular above award entitlements does not establish that such an entitlement is a necessary element of a fair and relevant minimum safety net as contemplated by s.134(1). It is not the role of modern awards to assist one party to obtain a better or particular outcome through enterprise bargaining. Indeed this is contrary to the very rationale for enterprise bargaining, which is instead premised on the desirability of setting terms and conditions at the enterprise level.

763. In considering whether family and domestic violence leave constitutes a necessary award term, the Full Bench must instead be primarily guided by the modern awards objective and relevantly, pursuant to s.134(1)(b), the need to encourage enterprise bargaining.

764. Section 134(1)(b) does not speak to the need to enhance the bargaining position of either party. Rather, it dictates that the Commission must have regard to the policy

objective of promoting enterprise bargaining. Accordingly, the principal enterprise bargaining related consideration of relevance to whether the claim should be granted must be whether it will encourage parties to engage in enterprise bargaining.

765. The inclusion of a family and domestic violence leave provision in awards would remove an incentive for employees and unions to engage in enterprise bargaining by delivering, at least in part, an outcome that the ACTU material suggests is strongly desired by at least some unions and employees. Having regard to s.134(1)(b) this is a matter that must weigh against granting the claim.

766. The inclusion of a family and domestic violence leave clause in awards will be a factor that may, to some extent, discourage employers from engaging in enterprise bargaining by leaving less room to bargain over such matters and by raising the threshold for the application of the better off overall test.

767. We acknowledge the ACTU's observation that there are a range of 'supportive elements' relating to domestic violence included in enterprise agreements and that they intend to 'leave space' for these entitlements to be determined at the workplace level. However, if it is accepted that such matters are appropriately dealt with at the workplace level it is unclear why a different approach should be adopted in relation to leave. A 'one size fits all' approach to this issue should be similarly avoided.

768. We also observe that there is a risk that if awards were to deal with family and domestic violence related matters, some employers may form the view that such treatment represents a fair and relevant standard and consequently cease to provide any additional or separate entitlements. That is, the award clause could come to represent a 'ceiling' on employee entitlements.

769. The grant of the ACTU's claim is contrary to the need to encourage enterprise bargaining.

19.7 The need to promote social inclusion through increased workforce participation (s.134(1)(c))

770. In a recent decision of the Commission, a Full Bench explained the meaning of s.134(1)(c) of the FW Act in the following terms: (emphasis added)

‘[166] ... The social inclusion referred to in this context is employment. In other words, s.134(1)(c) requires the Commission to take into account the need to promote increased employment.’

771. Accordingly, s.134(1)(c) requires the Commission to have regard to the need to improve overall labour force participation rates.

772. The ACTU submits that this consideration is ‘at the heart of the ACTU's application’. It argues that ‘women who have experienced domestic violence are associated with a more disrupted work history, casual and unstable employment’ and that ‘workplace support logically leads to greater retention of women in employment’.

773. We note at the outset that s.134(1)(c) does not contemplate that consideration be given to the basis upon which employees are engaged. The engagement of employees experiencing family and domestic violence on a casual basis rather than a permanent basis is not relevant to this statutory provision.

774. In any event, the ACTU acknowledges that there is no established causal link between the experience of family and domestic violence and casual employment. In our view, to the extent that there is any correlation between the two, this can readily be explained by the fact that the ACTU's evidence establishes that a significant proportion of employees experiencing family and domestic violence are women, and a significant proportion of employees engaged on a casual basis are also women; a contention with which we do not anticipate that the ACTU will quibble given its recent arguments to this effect as part of its campaign to introduce casual conversion provisions across the modern awards system. Furthermore, as was noted by Ms Bignold in relation to McAuley Works:

‘Women presented with a variety of past experiences of employment and levels of education or qualifications. In our experience, quite a few women wanted to trial casual work to see how they would manage with the competing needs of children and ongoing health issues.’

775. The ACTU's contentions regarding the employment status of women experiencing family and domestic violence are directly contradicted by the evidence of its own expert witness. As we have earlier identified Dr Cox's report reveals that there is no statistically significant variation between:

- the proportion of employed women and the proportion of unemployed women (including women not in the workforce) who experienced male cohabiting partner violence;
- the proportion of employed women and the proportion of unemployed women (including women not in the workforce) who experienced intimate partner violence;
- the proportion of employed women, the proportion of unemployed women, and the proportion of all women nationally who experienced cohabiting partner violence; and
- the proportion of employed women, the proportion of unemployed women, and the proportion of all women nationally who experienced intimate partner violence.

776. This analysis suggests that neither any correlation nor causal relationship is established by the PSS between the employment status of a woman and the prevalence of male cohabiting partner violence or intimate partner violence.

777. Furthermore, the ACTU relies on the PSS to assert that ‘around 62 per cent of women who experienced family and domestic violence in the last 12 months were in paid work’. That is, the majority of women who experienced family or domestic violence were employed. This statistic must be read in the context of data that reveals female participation in the workforce generally. The August 2016 Labour Force data released by the ABS reveals that 55.8% of all females aged 15 years and over are employed. Accordingly, the proportion of women experiencing family and domestic

violence who are employed is greater than the proportion of all women who are employed. This data supports the proposition that there is no clear correlation between female workforce participation and the experience of family and domestic violence.

778. Apart from some anecdotal evidence, there is no material before the Commission that establishes that the experience of family and domestic violence precludes employees from participating in the workforce.

779. Nor is there a sufficient evidentiary basis for the proposition that the inclusion of the clause sought will increase workforce participation. Given that some employers presently afford their employees leave entitlements by way of enterprise agreements or otherwise, it would be open to the ACTU to call evidence that goes to the factors flowing from the operation of such an entitlement that assist employees experiencing family and domestic violence to gain and/or retain employment. It has not, however, done so.

780. To the extent that it is alleged that employees are unfairly dismissed or are the subject of adverse action, we refer to an earlier section of our submission in which we have dealt with the effectiveness of the relevant statutory provisions that afford such employees appropriate protections.

781. In our view, the case mounted by the ACTU does not establish that the provision sought will promote social inclusion through increased workforce participation.

19.8 The need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d))

782. Virtually any form of leave taken by employees can have an adverse impact upon the need to promote flexible modern work practices and the efficient and productive performance of work. This is because staff absences have an impact not only on employment costs incurred by an employer, but can also cause disruption to an employer's operations.

783. In some circumstances, it may not be possible for an employer to engage relief staff to cover the absent employee. To the extent that this adversely affects the efficiency with which the relevant work is performed in the employee's absence or the indeed whether the work can be performed at all, the creation of a new form of leave is inconsistent with s.134(1)(d).

784. However, an employer's access to relief staff is not necessarily the end of the matter. For instance, if the replacement employee does not possess the necessary skills, knowledge or experience to undertake the work ordinarily performed by the absent employee, this self-evidently will undermine the need to promote flexible modern work practices and the efficient and productive performance of work.

785. The difficulties arising from staff absences are particularly acute in the context of current proceedings given that the clause does not afford employers any discretion to manage the taking of the leave. Paid or unpaid leave could be taken by an employee with little or no notice, without any engagement between the employee and the employer as to how or when the leave might be accessed, having regard to the

employee's personal circumstances, the purpose for which the leave is to be taken and the employer's operational requirements. We have previously distinguished the operation of the proposed clause to personal/carer's leave and compassionate leave, which are similarly non-discretionary. The justification that might there apply to the taking of those forms of leave do not necessarily arise in the context of these proceedings, given the very vast range of circumstances in which the leave might be accessed.

19.9 The Need to Provide Additional Remuneration for Employees Working in Various Circumstances (s.134(1)(da))

786. This is a neutral consideration in this matter.

19.10 The Principle of Equal Remuneration for Work of Equal or Comparable Value (s.134(1)(e))

787. The ACTU submits that s.134(1)(e) 'has some work to do and should be given due weight'.

788. The notion of 'equal remuneration for work of equal or comparable value' is defined by the Act. The phrase appears in s.12 of the Act (the dictionary), with a reference to s.302(2). Section 302 falls within Division 2 of Part 2-7 (Equal Remuneration) of the Act. Section 302(2) states:

'Equal remuneration for work of equal or comparable value means equal remuneration for men and women workers for work of equal or comparable value.'

789. Consideration given to whether an award provides equal remuneration for work of equal or comparable value requires an assessment of whether men and women workers receive equal remuneration for work of equal or comparable value.

790. The ACTU has not undertaken the requisite analysis necessary to establish that s.134(1)(e) is of any relevance to these proceedings. That is, the ACTU has not established that certain female workers are not receiving equal remuneration for work of equal or comparable value performed by male workers. As the Commission is of course aware, the equal remuneration principle has been the subject of specific proceedings that were of significant size and magnitude, and involved large evidentiary cases. The application of the provision is inherently complex. It requires careful analysis and detailed consideration of the identified group of employees. Self-evidently, the ACTU has not done so for the purposes of these proceedings.

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

791. Perhaps one of the greatest difficulties to arise from the ACTU's case is that the material presented does not enable the Commission to properly assess the potential impact of the claim.

792. Fundamental to understanding the extent to which the proposed clause may be utilised, is identifying the proportion of employees who are experiencing family and domestic violence, as defined by the ACTU. This material is available, to some extent, in a piecemeal manner. That is to say, there is various data presented by the ACTU that goes to different forms of violent, threatening or abusive behaviour perpetrated by various persons that may satisfy the definition at clause X.1. However, consistent with Dr O'Brien's evidence, this information does not enable the Commission to determine the number of employees who might in fact be eligible to take leave pursuant to the proposed clause. Notably, there is no evidence in relation to the prevalence of certain forms of abuse, such as economic abuse, which is apparently notoriously difficult to identify.

793. Little is known about the extent to which those experiencing family and domestic violence may in fact seek to access the leave. We have earlier dealt with the ACTU's treatment of this issue and Dr O'Brien's costings. As we there set out, the material does not enable the Commission to make any clear or reliable assessment in this regard. This difficulty is compounded by the fact that the effect of introducing the entitlement across the modern awards system, on the extent to which employees seek to take such leave, is also not known. Nor can we identify the cost implications that will arise from such employees no longer accessing other forms of leave, such as annual leave or personal/carer's leave.

794. These difficulties are compounded by the gendered approach adopted by the ACTU in these proceedings. There is little probative evidence that goes to the prevalence of males being subjected to family and domestic violence as defined, the precise consequences that can arise from that violence, the impact that is felt, the extent to which those impacts necessitate an absence from work, the purposes for which such leave is sought and so on.

795. The ACTU's evidentiary case does not reveal current practices adopted by employers in response to requests for leave from employees experiencing family and domestic violence. The evidentiary case does not, for instance, provide any indication of the purposes for which employees experiencing family and domestic violence access leave and the frequency with which they do so. That is to say, is leave primarily sought due to personal illness or injury resulting from family and domestic violence? If so, is personal/carer's leave being accessed? If so, what impact does this have on the employee's leave balance? To what extent does this result in employees leave balances in fact being exhausted? Are employees accessing annual leave in the alternate? If so, are requests for annual leave in such circumstances typically granted or declined? To what extent are annual leave balances in fact being depleted as a result (if at all)? To what extent can the needs of employees experiencing family and domestic violence be facilitated through flexible working arrangements? Are such arrangements sought? If so, are they effective? If they are being declined, on what basis?

796. The current practices of employers in dealing with employees experiencing family and domestic violence are of obvious relevance to these proceedings, as the manner in which such situations are presently accommodated by employers will have a bearing on the potential impact of the claim. Regrettably, the ACTU has not sought to call probative evidence that would assist the Commission in this regard.

797. That the introduction of a new leave entitlement will increase employment costs is a trite observation. Those employment costs arise in the form of payment made to the employee taking the leave as well as replacement employees and any other indirect costs that arise. Similarly, the increased regulatory burden that will flow from the proposed clause is self-evident. We have earlier addressed the impact that the claim would have on productivity, with reference to s.134(1)(d).

798. Whilst the precise macroeconomic impact of the ACTU's claim is impossible to discern based on the material that it relies upon, it is clear that the microeconomic impact on businesses, including small businesses, would be significant. That every employer, or even the majority of employers, will not be met with a request to take family and domestic violence leave pursuant to the proposed clause is not a sufficient or appropriate answer. Section 134(1)(f) requires that consideration be given to the impact on individual businesses. In this context, it is important to note that for the reasons we have earlier explained, requests to access the leave from an employee (or employees), bearing in mind the broad application of the clause and the seemingly indefinite access to unpaid leave, could be profound.

The impact on small business

799. In performing its functions under Part 2-3 of the FW Act, in addition to the modern awards objective the Commission is required to take into account the object of the Act in s.3.

800. Subsection 3(g) of the Act requires that the special circumstances of small and medium businesses be acknowledged, and of course taken into account.

801. Small businesses are vital to the Australian economy. As such, the Commission needs to give specific consideration to the impacts of granting the ACTU's claims on such businesses.

802. The *ABS Australian Industry, 2014-15* (8155.0) report (published on 17 June 2016) shows that as at the end of June 2015, 4,761,000 people worked for businesses with less than 20 people (44.8% of workers).

803. A much higher proportion of the employees of small businesses are award reliant than the employees of larger businesses.

804. Table 19.1 below is extracted from ABS Cat. No. 6306 – *Employee Earnings and Hours, Australia, May 2014*, released in late-January 2015. It shows that a much higher proportion of the employees of employers with under 20 employees are award reliant than the employees in each of the larger size categories.

Table 19.1: Employees reliant on award only, by employer size

Employer size	Number of employees
Under 20 employees	705,900
20 – 49 employees	366,600
50-99 employees	171,500

100-999 employees	353,500
1000 and over employees	263,300
Total	1,860,700

805. Table 19.2 below is also extracted from ABS Cat. No. 6306. It shows that of all the business size categories, the employees of businesses with less than 20 employees are least likely to be covered by a collective agreement.

Table 19.2: Employees covered by collective agreements, by employer size

Employer size	Number of employees
Under 20 employees	126,700
20 – 49 employees	203,800
50-99 employees	201,800
100-999 employees	1,289,000
1000 and over employees	2,248.80
Total	4,070,100

806. As a result of the high degree of award reliance and the low incidence of collective agreements, small businesses will be particularly hard hit by the unions' claim. Unlike many businesses with enterprise agreements, if awards are varied in line with the ACTU's claim, small businesses will be impacted from the date of the award variations.

807. Leave and other employee absences are typically very difficult for small businesses to manage given that there are fewer remaining employees to cover for absent employees.

19.12 The Need to Ensure a Simple, Easy to Understand, Stable and Sustainable Modern Awards System for Australia that Avoids Unnecessary Overlap of Modern Awards (s.134(1)(g))

Simple and easy to understand

808. We refer to that section earlier in our submission where we have detailed various concerns that arise from the drafting of the provision sought. Whilst many of the matters are substantive in nature, others exhibit that the manner in which the provision has been drafted is by no means simple and easy to understand. Issues pertaining to the rate at which an employee is to be paid is one such example.

809. Accordingly, the provision proposed by the ACTU is inconsistent with the need to ensure a simple and easy to understand modern awards system.

Stable and sustainable system

810. The need to maintain a stable and sustainable modern awards system tells strongly against the grant of the ACTU's claim.

811. The insertion of the provision sought would result in a significant expansion of the safety net, as it would effectively introduce a new category of paid leave. For reasons we have earlier articulated, it cannot be assumed that the impact that this will have on business can necessarily be accommodated or absorbed.

812. Coupled with this is the likelihood that the creation of a new leave entitlement for employees experiencing family and domestic violence may result in calls for additional forms of leave or other benefits for those employees who face different types of adversity. We acknowledge that if such a claim were advanced to vary the awards, it must necessarily satisfy the relevant statutory criteria in order to be effected. However, an acceptance that provision should be made for leave in circumstances of family and domestic violence may give rise to arguments that other challenging personal circumstances cannot readily be distinguished from it and therefore, specific provision should also be made for them in the safety net.

813. Put another way, we are concerned that if the ACTU's claim is granted, it may be seen as a precedent for similar claims that are subsequently made by the union movement. The ability of respondent parties and the Commission to set apart different social issues (having regard to their causes and implications), would, to some extent, be stymied.

814. A gradual expansion of the safety net would result in circumstances whereby an employee may have access to multiple forms of leave for a particular occasion at his or her discretion. In some cases, an employee may be able to select which form of leave is taken because the circumstance giving rise to their need for leave would in fact render them eligible to access multiple forms of leave (as is the case with the proposed family and domestic violence leave clause).

815. The cumulative effect of this growth of the safety net is not sustainable. It would continue to increase the cost and other implications faced by employers without regard for the extent to which this can in fact be borne by employers, including small businesses.

816. For these reasons, the ACTU's claim should be rejected.

19.13 The Likely Impact of any Exercise of Modern Award Powers on Employment Growth, Inflation and the Sustainability, Performance and Competitiveness of the National Economy (s.134(1)(h))

817. To the extent that the ACTU's claim is contrary to the considerations listed at ss.134(1)(b), 134(1)(d), 134(1)(f) and 134(1)(g), it may also undermine employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

19.14 Performance of the Commission's functions

818. In performing its functions, including its functions under s.156 of the Act, the Commission is required to take into account the objects of the Act and the objects under relevant parts of the Act, including the objects under Part 5-1 (see s.578).

819. Subsection 577(d) of the Act requires that the Commission perform its functions in a manner that promotes harmonious workplace relations. This object is consistent with the very longstanding role of the AIRC and its predecessors to prevent industrial disputes.

820. For the reasons set out in this submission, the unions' proposed family and domestic violence leave clause is extremely vague and uncertain, in terms of:

- The definition of family and domestic violence;
- The circumstances for which the leave could be taken;
- The proof that would be required to establish that the employee has been subjected to family and domestic violence;
- The proof that would be required to establish that the employee needs to take leave for a legitimate purpose;
- Whether perpetrators of violence can access leave;
- The extent of an employer's confidentiality obligation; and
- The rate of pay for the period of leave.

821. Given the uncertainties, the proposed clause would be a recipe for disharmony and disputation. Employers would not have the ability to effectively administer the entitlement. Also, the Commission would not have the means to effectively resolve disputes that arose about the entitlement.

822. Accordingly, to grant the claim would be inconsistent with the ss.577 and 578 of the Act." (References omitted)

[92] It concluded:

"838. As can be seen, paid leave entitlements for employee's experiencing family and domestic violence are available in only a very small number of other countries; a matter that the ACTU appears to acknowledge. It cannot be argued that such entitlements are a common feature of workplace relations frameworks internationally.

839. Australia is a medium sized, very open economy. Australian businesses often struggle to compete with international firms that have much lower costs. Australia cannot afford to lead the world in terms of the generosity of its leave entitlements.

...

840. For the reasons set out in this submission, The ACTU has failed to establish that that the provision it has proposed is "necessary" in order to achieve the modern awards objective in any of the 122 modern awards.

841. Accordingly, the claim should be dismissed by the Commission."

The Legislative Test

[93] There is no dispute between the parties represented in the proceedings as to the test that is required to be applied to the application. The nature of the test has been summarised in various Full Bench decisions.

[94] In reviewing each award the Commission must have regard to the modern awards objective in s.134 of the Act. The modern awards objective is to “ensure that modern awards, together with the NES, provide a fair and relevant safety net of terms and conditions”, taking into account the particular considerations identified in ss.134(1)(a) to (h) (the s.134 considerations). The objective is very broadly expressed.

[95] While the Commission must take into account the s.134 considerations, the relevant question is whether the modern award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions. Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.

[96] Section 138 of the Act is also relevant, it emphasises the importance of the modern awards objective in these terms:

“A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.”

[97] What is “necessary” in a particular case is a value judgment, taking into account the s.134 considerations, to the extent that they are relevant, having regard to the submissions and evidence directed to those considerations.

[98] Each award must be reviewed in its own right. However more than one award can be reviewed at the same time.¹⁰¹ The ACTU submits that the common claim in this matter is part of the review of each of the 122 modern awards.

The Nature and Context of the Claim

[99] The proposed family and domestic violence leave clause seeks the creation of a new form of leave that is available “for the purpose of attending to activities related to the experience of being subjected to family and domestic violence.” To the extent that the activities involve the employee or a member of the employee’s household recovering from the physical or emotional effects of domestic violence, the leave is intended to be available as an alternative to personal/carer’s leave.

[100] Family and domestic violence leave is also properly viewed as a supplementation of personal/carer’s leave in three respects. First, it provides an additional quantum of personal/carer’s leave for the circumstances covered by both forms of leave. The quantum of personal/carer’s leave under the NES is 10 days per year and accumulates from year to year. The claim for family and domestic violence leave is for a further 10 days of paid leave per year (which does not accumulate from year to year) and a further two days of unpaid leave for each additional occasion of domestic violence after the paid leave entitlement is exhausted.

[101] Secondly, the claim expands on the circumstances of personal/carer’s leave. Under the NES, personal/carer’s leave is available either because the employee is not fit for work because of personal illness or personal injury, or to provide care or support for the employee’s immediate family, or a member of the employee’s household who requires support because of illness, injury or an unexpected emergency. Family and domestic violence leave is intended to

be available for activities that include attending legal proceedings, counselling, appointments with medical, financial or legal professionals, relocation or making other safety arrangements.

[102] Thirdly, family and domestic violence leave is intended to be available to full time, part-time and casual employees. Casual employees are not entitled to paid personal/carer's leave (or paid annual leave) under the NES.

[103] Other forms of leave, including annual leave, may also be available for the circumstances for which family and domestic violence leave may be taken. Under the NES, annual leave accrues progressively during each year of service and accumulates from year to year. Paid annual leave may be taken for a period agreed between an employer and employee.

[104] The scheme of the Act is to provide terms and conditions of employment from the NES, modern awards, enterprise agreements and workplace determinations. The NES apply to all national system employees and cannot be displaced. Only one of the other types of instrument can apply to an employee at a particular time. Of the ten NES entitlements, five relate to various forms of leave. These are parental leave, annual leave, personal/carer's leave, community service leave and long service leave.

[105] Modern awards were established by a seven member Full Bench in an intensive period from 2008 – 9. In the course of replacing many thousands of pre-existing awards with 122 modern awards, the Full Bench was required to consider the interaction between the NES and the terms of awards. The Full Bench repeatedly avoided supplementation of the NES by rejecting award provisions which provided additional entitlements to leave and other matters dealt with in the NES. For example, in relation to the *Black Coal Industry Award* the Full Bench said¹⁰²:

“**[165]** When the exposure draft was published we saw merit in the submissions of the CMIEG seeking the removal of pressing domestic need leave from the award but were inclined to think it better that the matter be addressed in a variation application after the modern award had commenced to operate. In light of the limitations in the Fair Work Bill on variation of modern awards we have revisited the issue. The entitlement to pressing domestic need leave was introduced into a federal award applying to production employees in New South Wales by the Coal Industry Tribunal in 1973 as part of a clause headed Compassionate Leave. This was at a time when carer's and compassionate leave were not a common feature of federal awards. With the widespread introduction of personal/carer's leave the rationale for the inclusion of pressing domestic need leave is substantially removed. Nevertheless, the entitlement to pressing domestic need leave remains in the two key pre-reform awards applying to the vast majority of employees in the black coal mining industry. The clause providing for pressing domestic need leave puts no limit on the number of occasions in a year that an employee is entitled to pressing domestic need leave (with payment for the first day of each period of leave). In this respect the clause is most unusual. We accept the argument that such an entitlement is not appropriate in an award intended to provide a fair 'minimum' safety net of enforceable terms and conditions of employment for employees.”

[106] In relation to the *Fire Fighting Industry Award* the Full Bench said¹⁰³:

“[71] One area requiring specific comment is the area of leave. We have excluded from the exposure draft a number of leave entitlements appearing in the Victorian Fire Award on the basis that they seem excessive or inappropriate as part of a minimum safety net. We will, of course, consider submissions in support of the partial or complete inclusion of those leave entitlements in the award that we finally make. In relation to pressing necessity leave, we note that we rejected a claim for the inclusion of this category of leave in the modern award for the black coal mining industry notwithstanding that it appeared in a pre-reform award applying generally in the industry and notwithstanding the consent of the industry parties to the maintenance of that form of leave.”

[107] It subsequently said¹⁰⁴:

“[54] In relation to personal/carer’s leave and parental leave, consistent with our approach generally, we have decided not to supplement the National Employment Standards (NES). We are not persuaded that the pressing necessity leave, special leave and study leave provisions in the *Victorian Firefighting Award* are appropriate for inclusion in a modern award that is intended to be a safety net.”

[108] In relation to the *Local Government Award* the Full Bench said¹⁰⁵:

“[144] In relation to personal/carer’s leave and community service leave we have not accepted some of the agreed changes to those clauses. For reasons that we have explained elsewhere we now do not regard it as appropriate to supplement personal/carer’s leave or to provide for entitlements in relation to jury service that exceed those in the NES unless there are special circumstances.”

[109] In relation to the *Airport Employees Award* the Full Bench said¹⁰⁶:

“[10] The AMWU and CPSU seek to carry over a provision from the relevant predecessor award to the effect that absence on paid parental leave is regarded as service for all purposes. The significance of this change appears to be in relation to the accrual of other leave entitlements including annual leave, long service leave and personal leave. These entitlements arise from the National Employment Standards (NES) and not the modern award. We are reluctant to modify the effect of the NES in relation to these entitlements. Our general approach has been to allow such leave to be dealt with by the NES without variation or supplementation on an award by award basis. The proposed variation is rejected.”

[110] The Full Bench said the following in relation to jury service leave¹⁰⁷:

“[103] We have given further consideration to whether modern awards should supplement the NES in relation to the amount of jury service leave to which an employee is entitled. The NES provides that jury service leave should be limited to 10 days. So far as we know jury service leave provisions in awards and NAPSAs are not subject to any cap at all. If we were to maintain an unlimited entitlement it would be necessary to supplement the NES in every modern award. Such a course would be inconsistent with the NES and tend to undermine it.

[104] A similar consideration arises in relation to the rate of pay while on jury service leave. For similar reasons we shall not make general provision for a rate of pay other than the base rate as defined in the NES. It follows that the standard community service leave clause will simply refer to the NES.”

[111] In relation to annual leave the Full Bench said¹⁰⁸:

“[30] It has not been practical to develop a single model clause for annual leave. While the drafts generally provide for the employer to require that arrears of annual leave be taken the drafts are not uniform. It is not appropriate to supplement the annual leave entitlements provided for in the NES unless it is necessary to maintain the safety net. Depending upon the circumstances of the industry and the existing award arrangements provision may be required for a shift worker definition, annual close down, holiday pay, annual leave loading and payment on termination.”

[112] In relation to compassionate leave in the *Aluminium Industry* the Full Bench said¹⁰⁹:

“[36] We accept the union submission that a critical mass exists in the underlying awards and NAPSAs for an annual leave loading of 20% rather than 17.5% and have amended the annual leave clause accordingly. However, we are disinclined to supplement the National Employment Standards (NES) entitlement to compassionate leave notwithstanding that most of the underlying awards contain an entitlement to compassionate leave that is greater than the NES standard.”

[113] A similar approach was adopted in relation to the *Hair and Beauty Industry Award*. The Full Bench said¹¹⁰:

“[9] The SDA seeks to supplement the National Employment Standards (NES) in relation to compassionate leave. Modern awards generally do not provide for the supplementation of the minimum entitlements in the NES on an award by award basis and nothing was advanced which would lead us to depart from that approach in this case. We reject the claim.”

[114] The conscious decision of the Commission not to supplement the NES resulted in awards making reference to the NES for annual leave, personal/carer’s leave, community service leave and other NES matters such as public holidays. Any further provisions are of a machinery nature and do not affect the underlying NES entitlement. The approach ensured that entitlements created by the NES are not complicated by supplementary award provisions consistent with the requirement in the modern awards objective that the award system is simple, easy to understand, stable and sustainable. In my view it is not appropriate to depart from that clear approach.

[115] There can be no doubt on the evidence before the Commission that family and domestic violence is a significant social issue. The Royal Commission into the matter established by the Victorian Government provides a clear indication of its pervasiveness in current Australian society. In its Final Report the Royal Commission said:

“Workplaces reflect the breadth and diversity of the community and offer an important opportunity to reach people who are affected by family violence, to provide support for them, and to help them take steps to secure their safety. They are also important sites

for preventing and responding to family violence because the effects of violence reach into workplaces and because attitudes and cultures that prevail in workplaces can influence the level to which violence against women is supported or condoned.”

[116] Included in the Royal Commission’s recommendations are the following:¹¹¹

“Recommendation 190

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.

Recommendation 191

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 FW Act 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 (within 12 months).

Recommendation 192

On receipt of Our Watch’s Workplace Equality and Respect Project final report, the Victorian Government should:

- Begin implementing best-practice workplace programs in all public sector workplaces in order to:
 - enable them to build respectful and gender equitable cultures;
 - ensure that they have suitable policies for family violence victims;
 - provide adequate responses to and not allow for collusion with family violence perpetrators; and
 - build skills and support staff in taking bystander action.
- Support the maintenance of the project’s proposed web-based portal or database of program models, tool kits, training resources and packages for application and use in all workplaces.
- Review and report on options for using existing regulatory frameworks and government procurement policies to support all Victorian employers in implementing best-practice family violence policies (within 12 months of receipt of the final report).”

[117] The Council of Australian Governments (COAG) has resolved to consider this matter after this Full Bench delivers its decision.

[118] In 2013 Parliament amended the Act to expand on the circumstances in which an employee could request flexible working arrangements under s.65 of the Act. Those

circumstances include where “the employee is experiencing violence from a member of the employee’s family”. The employer may only refuse such a request on reasonable business grounds. There is no evidence before us of the operation of this provision which enables us to conclude that this avenue is providing adequate assistance to employees. It is likely that informal approaches, on a case by case basis, arising from discussions at the workplace are commonplace in the case of domestic violence that affects the work of an employee.

[119] The evidence establishes that various approaches to family and domestic violence have been developed at particular workplaces. Some have detailed policies. Some provide access to leave. Leave entitlements vary and could involve paid or unpaid leave. Some of the entitlements are contained in enterprise agreements. PwC has a detailed policy that covers sexual assault victims as well as victims of family and domestic violence. Its head of Human Capital said the following in relation to the development and intent of the policy:

“15. We decided that our approach should include more than just paid leave, although this was essential, and extend to a wider range of support, including short term financial assistance and safety planning, particularly around how work could be performed. We also decided, consistent with our philosophy across all people policies, that our approach should be gender-blind as we recognised that whilst the published statistics show that most victims are female, men can be and are victims of domestic violence.

16. Most importantly, we wanted our staff to recognise that this was a societal issue the firm was aware of; that it could impact on their ability to perform their work and stay connected to the workforce; and we wanted to support them through any experience of domestic or family violence or sexual assault that they may be experiencing.”

Modern Awards Objective Factors

[120] The overall consideration of whether family and domestic violence leave is necessary to provide a fair and relevant minimum safety net needs to be considered with the benefit of a consideration of the specific factors in s.134 of the Act. I consider them in turn.

[121] *Relative living standards and the needs of the low paid.* The ACTU submitted that it is reasonable to assume that a proportion of award-reliant employees who are low paid may be affected by family and domestic violence and that paid family and domestic violence leave would ensure that low-paid workers are not further disadvantaged by being required to take unpaid leave, or to jeopardise their employment, in order to meet the needs arising out of being subjected to family and domestic violence.

[122] While this may be true, victims of domestic violence could be affected severely or less severely regardless of the level of their pay. The evidence falls short of establishing that low paid workers need this form of leave – and it does not appear to be contended otherwise.

[123] *The need to encourage collective bargaining.* It is doubtful that granting the claim would either encourage or discourage bargaining. The evidence suggests that some unions are pursuing claims for domestic violence leave and are having mixed success. Speculating on the effect of granting the claim on bargaining dynamics does not appear to be a significant factor in this case.

[124] *The need to promote social inclusion through increased workforce participation.* To the extent that domestic violence disrupts employment, it may also preclude workforce participation for those affected. This factor provides some support for the notion that steps to assist victims to stay in employment should be encouraged. However, it would be an overstatement to say that domestic violence leave will materially affect workforce participation or social inclusion.

[125] *The need to promote flexible work practices and the efficient and productive performance of work.* The employers submit that this factor points against granting the claim because an absence from work can disrupt an operation. However, it is important to consider this matter in the context of a victim of domestic violence who needs to absent themselves for medical, legal, safety or other reasons. The best way for this to be addressed is through an open and collaborative approach between the employee and the employer. Consideration and flexibility is likely to enhance efficiency and productivity rather than an unsympathetic approach. However, taking leave pursuant to a right to do so, when other mutually acceptable approaches may be available, could adversely affect efficiency and productivity.

[126] *The need to provide additional remuneration for overtime and other circumstances.* It is not contended that this factor has particular relevance to family and domestic violence leave.

[127] *The principle of equal remuneration for work of equal or comparable value.* The ACTU contends that the higher incidence of women experiencing domestic violence means that leave entitlements that are otherwise gender neutral are not received by women on equal terms. Assuming that this factor extends to leave as well as remuneration, it involves considerable speculation as to the incidence and need for leave such as personal/carer's leave. I do not consider that there is an appropriate basis to find that this factor has real significance to the claim for domestic violence leave.

[128] *The likely impact on business, including productivity, employment costs and regulatory burden.* The ACTU contends that additional costs would be reasonable, proportionate and occur against the background of the existing cost of domestic violence. It contends that by reducing future violence, the proposed clause will contribute to a reduction in productivity losses and employment costs.

[129] The actual cost of the claim cannot be accurately assessed on the material before the Commission. It is one thing to consider paid leave being granted for genuine cases of physical domestic violence necessitating absence from the workplace. However the claim extends to leave for the purposes of "attending to activities related to the experience of being subject to" "threatening or other abusive behaviour" by a member of a person's family or household. The leave can be taken without prior approval. However, if requested by the employer, the employee must provide evidence that would satisfy a reasonable person that the leave is for the stated purpose. This test does not incorporate a notion of necessity. It does not require the employee to show that the absence was necessary at the particular time – only that it was for a specified purpose.

[130] For example, evidence of an appointment with a financial advisor would presumably satisfy a reasonable person that the leave is for a stated purpose falling within the description of "attending ... appointments with a ... financial ... professional". However, there does not

appear to be any requirement to demonstrate that advice could only be obtained during working hours, or that obtaining financial advice necessitated an absence from work. If a right to take paid leave for such purposes is created, would employees utilise that right even though they do not need to do so in order to obtain advice?

[131] The concept of domestic violence is expressly said to include emotional abuse arising from financial conflict. It may be, for example, that both parties to a contested family law property settlement could seek paid leave to attend to family law proceedings under this wording. Or verbal abuse of members of a shared household could justify paid leave to recover from the trauma caused by a heated argument.

[132] The ACTU amended its claim after the employers' submissions and evidence was filed in order to address concerns about the potential reach of the proposed new form of leave. Nevertheless questions as to the breadth of the right to leave continued to arise from the amended wording. Examples such as those above were raised in the proceedings. No satisfactory answers were given as to whether the entitlement was intended to be available in these circumstances. As the circumstances of the proposed entitlement are uncertain, so too is the cost. The costs could well be significant.

[133] In a large business, an occasional absence from work may not have a significant impact on the business. However in a small business, unplanned absences could have a much greater impact. It is especially important to approach new forms of paid leave which can be taken without advanced notice with care. The desirability of an open and cooperative approach is perhaps more important in small businesses. The problems arising from uncertainty as to the precise reach of the proposed entitlement are magnified in small businesses.

[134] There are further particular problems arising from the application of the proposed leave to casual employees – especially in industries with a high incidence of casual employment.

[135] The ACTU has not sought to mount its case in relation to any particular industry and has not addressed the circumstances of each industry award. Its failure to do so has created additional difficulties in assessing the impact of its claim on all industries covered by the 122 modern awards.

[136] *The need to ensure a simple, easy to understand, stable and sustainable modern award system.* The ambiguities associated with the circumstances when leave may be available are contended by the employers to make this factor an important consideration. Indeed it would be undesirable for a new form of leave to be made available if it has an uncertain application. This is especially so if the leave can be taken without prior approval. In my view this is a significant factor against the granting of the claim.

[137] *The likely impact on employment growth, inflation and the Australian economy.* The ACTU has considered this factor in conjunction with the microeconomic factor of the impact on business. Ambiguity associated with the extent to which the right to take leave can be exercised makes a precise assessment impossible. If the costs to a business can be significant, the costs to the economy can also be significant.

Is Domestic Violence Leave Necessary to Achieve the Modern Awards Objective?

[138] Family and domestic violence leave is not part of the current award safety net. Lesser entitlements for similar purposes in limited industries were removed from the award safety net during the award modernisation process in 2009. The essence of the ACTU claim is that the extent of family and domestic violence requires a whole of community response. It contends that a right to paid leave, while not of itself capable of preventing domestic violence, will help prevent financial instability that is devastating to a person's attempt to recover from a violent relationship. The aim is to enable employees to safely escape violent relationships, prevent future violence and be part of the solution to a complex and pervasive problem. It seeks the right to take leave in a standard form in all 122 modern awards.

[139] The question the Commission must consider is whether inserting such a provision is necessary to provide a fair and relevant minimum safety net for each of the awards.

[140] There can be no doubt that family and domestic violence is widespread in Australian society. It has implications for community safety, policing, law enforcement, family and other relationships, education and workplaces. There can also be no doubt that employers should be aware of the problem and adopt approaches that assist affected employees and limit the impact of the problem on their business.

[141] There is much to commend in the approach of PwC in this regard. Through a deliberate and publicised policy, it seeks to ensure that it is aware of instances of domestic violence that affect employees and work constructively with the employee to assist the employee deal with the issue. Paid leave may or may not be part of the solution in a particular case. Such an approach is likely to maintain the positive benefits of employment for the employee and the employer. The same outcome is likely through a case by case approach by a considerate manager or small business employer. Such an approach should be a feature of any high trust working environment and be standard practice for any caring and successful manager.

[142] In my view the element of openness, and a collaborative approach to solutions, is fundamental to successfully dealing with the problem. If the underlying problems are not communicated, and only the ramifications of domestic violence are apparent, it is likely that the causes will not be understood and the responses will be more severe for the employee and the employer.

[143] The ACTU claim does not mandate an open, positive, considerate and collaborative approach and nor can a uniform award provision be expected to do so. A right to take leave without prior approval for a myriad of different purposes and with uncertain parameters may do more to undermine trust than promote it. If an employer is not aware of the underlying problem, and is not part of developing an appropriate solution to the problem, it is less likely to see the benefits of its employees taking paid leave. If employees seek to take paid leave for purposes which are regarded as having a tenuous link with actual physical violence, the entitlement may lead to a deterioration in workplace relationships. Such implications will not provide greater fairness to employees or employers.

[144] In my view the grant of a new form of leave in itself will have uncertain consequences. A better approach is to build awareness of the issue and to encourage a considerate, collaborative and flexible approach by employers and affected employees.

[145] There is little international precedent for a standard form of leave of the kind sought. The Commission has firmly rejected attempts to supplement the NES with modified forms of leave. The wisdom of that approach is emphasised when the problem being addressed requires a whole of community response. The Victorian Government has followed the recommendation of its Royal Commission by raising the matter with COAG. There is wide support for the matter being considered in that forum and such an approach obviously has much to commend it.

Conclusion

[146] In all of the circumstances I am not satisfied that the family and domestic violence leave claim by the ACTU is necessary to provide a fair and relevant minimum safety net of terms and conditions. It follows that the ACTU claim should be rejected. This matter has been before this Full Bench since November 2015. The evidence, submissions and hearings were comprehensively and completely dealt with by 2 December 2016. The other members of the Full Bench are not presently able to issue their decision. In accordance with ss.618 and 619(2) of the Act the decision of the majority of members of the Full Bench prevails. That majority position will be determined after the publication of this decision and the subsequent decisions of the other members of this Full Bench.



VICE PRESIDENT

Appearances:

Ms K Burke of counsel with Ms S Ismail for the ACTU.

Mr N Ward with Mr J Arndt for ACCI.

Mr B Ferguson with Ms R Bhatt for Ai Group.

Ms M Richards SC, Crown Counsel, with Ms L McNeil for the State of Victoria.

Mr G Johnston for the Australian Meat Industry Council

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¹ [2015] FWCFB 5585.

² Statement of Professor Cathy Humphreys (27 May 2016), annexure CH-2, p2.

³ Ibid annexure CH-3, 8.1.

⁴ Ibid.

⁵ Expert report of Dr Peta Cox (26 May 2016), para 1.2.

⁶ Ibid annexure PC-3, para 7.2.

⁷ Statement of Michael Flood (6 May 2016), para 8 and MF-2.

⁸ Ibid part 5.

⁹ Ibid para 3.6.

¹⁰ Dr N Cortis, *Women's economic security and domestic violence: the role of employment, employment support and employment protection* (26 May 2016), para 70.

¹¹ Expert Report of Dr Martin O'Brien (17 October 2016), page 1.

¹² Ibid 1.5.

¹³ Ibid 2.6.

¹⁴ Ibid 2.11.

¹⁵ Ibid 2.21.

¹⁶ Ibid 4.11.

¹⁷ Statement of Jessica Stott (10 November), paras 10-12.

¹⁸ Ibid para 13.

¹⁹ Ibid paras 22 – 23.

²⁰ Ibid paras 25 – 27.

²¹ Statement of Jocelyn Bignold (undated), para 11.

²² Ibid para 23.

²³ Ibid para 23.3.

²⁴ Ibid para 46.

²⁵ Statement of Sandra Dann para 20-21.

²⁶ Ibid paras 22, 25, 27, 29.

²⁷ Ibid para 30.

²⁸ Ibid para 40.

²⁹ Statement of Karen Willis OAM (undated), para 9.

³⁰ Ibid paras 21-23.

³¹ Ibid paras 24-26.

³² Ibid paras 27-34.

- ³³ Ibid paras 35-41.
- ³⁴ Ibid para 50.
- ³⁵ Statement of Fiona McCormack (undated), para 16.
- ³⁶ Ibid para 34.
- ³⁷ Ibid para 40.
- ³⁸ Ibid para 42.
- ³⁹ Statement of Bernadette Pasco (undated), para 8.
- ⁴⁰ Ibid para 19.
- ⁴¹ Ibid paras 39, 41.
- ⁴² Ibid para 42.
- ⁴³ Ibid para 44.
- ⁴⁴ Statement of Samantha Parker (undated), para 6.
- ⁴⁵ Ibid paras 8-15.
- ⁴⁶ Ibid para 16.
- ⁴⁷ Ibid paras 17-18.
- ⁴⁸ Statement of Marilyn Beaumont (undated), para 10.
- ⁴⁹ Ibid para 14.
- ⁵⁰ Ibid paras 24-26.
- ⁵¹ Ibid para 27.
- ⁵² Ibid para 31.
- ⁵³ Ibid para 35.
- ⁵⁴ Ibid paras 46-47.
- ⁵⁵ Ibid para 56.
- ⁵⁶ Statement of Emma Smallwood (undated), para 7.
- ⁵⁷ Ibid para 9.
- ⁵⁸ Ibid para 29 and EM-2.
- ⁵⁹ Ibid para 57-58.
- ⁶⁰ Statement of Julie Kun (undated), paras 11-20.
- ⁶¹ Ibid para 21.
- ⁶² Ibid para 37.
- ⁶³ Ibid para 47.
- ⁶⁴ Ibid para 52.
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- ⁶⁶ Ibid para 26.
- ⁶⁷ Ibid para 28.
- ⁶⁸ Ibid para 32.
- ⁶⁹ Ibid para 39.
- ⁷⁰ Ibid para 44.
- ⁷¹ Statement of Sunil Kempfi (undated), para 9.
- ⁷² Ibid para 12.
- ⁷³ Ibid para 12.
- ⁷⁴ Ibid paras 14 – 15.
- ⁷⁵ Ibid para 18.
- ⁷⁶ Ibid paras 22-26.
- ⁷⁷ Ibid para 28.
- ⁷⁸ Ibid para 29.

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- ⁸⁰ Ibid para 11.
- ⁸¹ Ibid para 15.
- ⁸² Ibid para 11.
- ⁸³ Ibid para 12.
- ⁸⁴ Ibid paras 18-19.
- ⁸⁵ Ibid paras 16-17.
- ⁸⁶ Statement of Brad Gandy (27 May 2016), paras 4-11.
- ⁸⁷ Ibid para 14.
- ⁸⁸ Ibid para 16.
- ⁸⁹ Statement of Mick Doleman (27 May 2016), paras 2-4.
- ⁹⁰ Ibid paras 5, 7.
- ⁹¹ Ibid para 9.
- ⁹² Ibid para 8.
- ⁹³ Ibid para 11.
- ⁹⁴ Ibid paras 12-13.
- ⁹⁵ Statement of Debra Maree Eckersley (20 June 2016), para 45.
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- ⁹⁷ Ibid para 35.
- ⁹⁸ Ibid para 37.
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- ¹⁰⁴ [2009] AIRCFB 945.
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- ¹⁰⁶ [2010] FWAFB 286.
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