



DECISION

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

4 yearly review of modern awards – Family and Domestic Violence Leave (AM2015/1)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT GOOLEY
COMMISSIONER SPENCER

MELBOURNE, 26 MARCH 2018

4 yearly review - Family and Domestic Violence Leave – Determination of Model Term for Unpaid Leave.

Chapters	Page	Paragraph
1.	Introduction	4
	1.1 Background	[1]
	1.2 The Process	[16]
2.	Legislative Framework for the Review	9
3.	Family and Domestic Violence: The Evidence	18
4.	Accessing personal/carer's leave - jurisdiction	27
5.	Unpaid Leave	37
	5.1 The preliminary view	[159]
	5.2 The model term	[191]
	5.3 Jurisdiction and the modern awards objective	[270]
6.	Next Steps	59
	ATTACHMENTS	
	Attachment A – List of Statements issued	69
	Attachment B – List of Submissions filed	70
	Attachment C – List of modern awards to be varied	73
	Attachment D – List of cases	76

ABBREVIATIONS

Act	<i>Fair Work Act 2009</i> (Cth)
ABI	Australian Business Industrial and the New South Wales Business Chamber
ABS	Australian Bureau of Statistics
ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
ADFVC	Australian Domestic and Family Violence Clearinghouse
AFPCS	Australian Fair Pay and Conditions Standard
AI Act	<i>Acts Interpretation Act 1901</i> (Cth)
Ai Group	Australian Industry Group
Amended Claim	ACTU claim for family and domestic violence leave of 15 June 2015 reproduced at [4] of this decision
AMIC	Australian Meat Industry Council
APSC Commission	Australian Public Service Commission Fair Work Commission
GVRN	Gendered Violence Research Network (University of New South Wales)
ILO	International Labour Organization
Majority Decision	[2017] FWCFB 3494
Minority Decision	[2017] FWCFB 1133
MEA	Master Electricians Australia
National Plan	Department of Social Services (2011), <i>National plan to reduce violence against women and their children 2010–2022</i> , Australian Government
NatRoad	National Road Transport Association
NES	National Employment Standards
PwC	Price Waterhouse Coopers
Review	4 yearly review of modern awards
SDA	Shop, Distributive and Allied Employees Association
VicHealth Report	VicHealth and Department of Human Services (2004), <i>The health costs of violence: measuring the burden of disease caused by intimate partner violence</i> , Victorian Government
WR Act	<i>Workplace Relations Act 1996</i> (Cth)

List of charts

Chart 1	Experience of violence by current/previous partner since the age of 15 years, by labour force status, all persons
Chart 2	Experience of violence by current partner since the age of 15 years, females, by frequency of violence

List of tables

Table 1	Experience of assault since the age of 15 years, whether took time off work in the 12 months after the most recent incident of violence, by type of assault and gender of perpetrator
Table 2	Domestic Violence Clauses and Leave

1. Introduction

1.1 Background

[1] Section 156 of the *Fair Work Act 2009* (Cth) (the Act) provides that the Fair Work Commission (the Commission) must conduct a review of all modern awards every four years (the Review).

[2] As part of the Review, the Australian Council of Trade Unions (ACTU) made a claim to include an entitlement to 10 days' paid domestic violence leave in all modern awards¹. The ACTU claim was opposed by a number of Employer parties on both jurisdiction and merits grounds. The Australian Industry Group (Ai Group) and the Australian Chamber of Commerce and Industry (ACCI) submitted that the jurisdictional objections to the claim should be determined as a threshold issue.

[3] On 1 December 2014, the Commission published a [Statement](#) confirming that jurisdictional objections advanced by the Employer parties would be dealt with as a threshold issue. The following four jurisdictional issues were identified by the Employer parties and set out in [Directions](#) published on 10 June 2015:

- '(i) Are any elements of the claims of the ACTU or individual unions inconsistent with Part 2-1 or Part 2-2 of the *Fair Work Act 2009*?
- (ii) Do any elements of the claims of the ACTU or individual unions require terms that are not permitted to be included in a modern award under Part 2-3 of the *Fair Work Act 2009*?
- (iii) Are any elements of the claims of the ACTU or individual unions inconsistent with Part 6-2 of the *Fair Work Act 2009*?
- (iv) Do any elements of the claims of the ACTU or individual unions purport to give the Commission powers which it does not have under the *Fair Work Act 2009*?²

[4] After the filing of submissions in relation to the jurisdictional issues, the ACTU filed an amended claim for family and domestic violence leave (the Amended Claim), as follows:

'FAMILY AND DOMESTIC VIOLENCE LEAVE

X.1 Definition

For the purpose of this clause, family and domestic violence is defined as any violent, threatening or other abusive behaviour by a person against a member of the person's family or household (current or former).

X.2 Family and Domestic Violence Leave

X.2.1 An employee, including a casual employee, experiencing family and domestic violence is entitled to 10 days per year of paid family and domestic violence leave for the purpose of:

- (a) attending legal proceedings, counselling, appointments with a medical or legal practitioner;
- (b) relocation or making other safety arrangements; or
- (c) other activities associated with the experience of family and domestic violence.

X.2.2 Upon exhaustion of the leave entitlements in clauses X.2.1, employees will be entitled to up to 2 days unpaid family and domestic violence leave on each occasion.

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 clause X.2.1. 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 The employer must take all reasonable measures to ensure that any personal information provided by the employee to the employer concerning an employee's experience of family and domestic violence is kept confidential.³

[5] The Amended Claim had the effect of removing a substantial part of the Employer parties' jurisdictional objections, with the only outstanding objection being to clause X.3.3. The Employer parties submitted that clause X.3.3, which dealt with confidentiality, could not be included in a modern award because it was not 'about' a matter in s.139(1) of the Act and was not an incidental or machinery term as permitted by s.142. The ACTU submitted that the clause was incidental to the entitlement in clause X.2 and was essential to making the leave entitlement operate in a practical way (within the meaning of s.142(1)).

[6] On 22 October 2015, a Full Bench issued a [decision](#) in relation to the jurisdictional objections.⁴ The Full Bench held that, without hearing the evidence, they were unable to conclude that clause X.3.3 of the proposed family and domestic violence leave clause was beyond jurisdiction. The Full Bench noted:

'It was accepted by the employer parties that the substantive provisions of the Family and Domestic Violence Leave clause, which would establish an entitlement to 10 days per year domestic and violence leave to be taken for specific identified purposes, were authorised by s.139(1)(h) as terms which could be included in a modern award because they were about "leave". We consider that if there was evidence demonstrating that the confidentiality requirement in clause X.3.3 was necessary in order for the proposed leave entitlement to operate effectively (for example because without confidentiality employees might not be prepared to disclose anything about domestic violence incidents and thus would not be able to access the entitlement), it would be reasonably arguable that clause X.3.3 was authorised by s.139(1)(h) as a term which was about "leave" or "arrangements for taking leave" and/or by s.142(1) as "incidental to a term that is permitted ... to be in the modern award" and "essential for the purpose of making a particular term operate in a practical way".⁵

[7] The decision went on to confirm that the matter would proceed to a final hearing before a Full Bench.

[8] A Full Bench consisting of former Vice President Watson, Deputy President Gooley and Commissioner Spencer was then constituted to determine the Amended Claim. The matter was heard from 14 to 18 November 2016 and 1 to 2 December 2016.

[9] On 27 February 2017 former Vice President Watson issued a [decision](#) rejecting the Amended Claim (the Minority Decision).⁶ The Vice President found:

‘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.’⁷

[10] However, the Vice President concluded:

‘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.’⁸

[11] On 3 July 2017, Deputy President Gooley and Commissioner Spencer issued a joint [decision](#) (the Majority Decision) which also rejected the Amended Claim.⁹ The Majority Decision stated:

‘We have formed the preliminary view that it is necessary to make provision for family and domestic violence leave but for reasons explained in this decision, have decided to dismiss the ACTU’s application because we are not satisfied, at this time, that it is necessary to provide ten days paid family and domestic violence leave to all employees covered by modern awards. We have however, formed the preliminary view that all employees should have access to unpaid family and domestic violence leave and in addition we have formed the preliminary view that employees should be able to access personal/carer’s leave for the purpose of taking family and domestic violence leave. We note that the parties have not had an opportunity to make submissions or call evidence on these matters and we intend to provide the parties with such an opportunity prior to finalising our decision.’¹⁰

[12] This decision addresses the ‘preliminary views’ expressed in the Majority Decision.

[13] After the Majority Decision was handed down, the President reconstituted the Full Bench in this matter pursuant to s.622 of the Act, with the President replacing Vice President Watson (who had resigned) as the third member of the Full Bench.

[14] Pursuant to s.623 of the Act, the President has taken into account everything that occurred before the Commission, and everything that the Commission did, in relation to the matter before the President began to deal with the matter.

[15] The next section sets out the steps taken following the reconstitution of the Full Bench.

1.1 The Process

[16] A Mention was held on 21 July 2017, at which there was general support for the Commission providing some guidance about the issues to be addressed in submissions on the preliminary views in the Majority Decision.

[17] In a [Statement](#) issued on 24 July 2017,¹¹ the reconstituted Full Bench made clear that in determining the remaining issues, the Full Bench would have regard to all of the submissions and evidence filed in the proceedings. A list of that material was attached to the Statement.

[18] A further [Statement](#) was issued on 3 August 2017¹² (the August 2017 Statement) which, in summary:

- attached a revised list of submissions and evidence filed in the proceedings;
- confirmed that the *Australian Government Industry Award 2016* would be considered as part of the Amended Claim and that any outcome may apply to that award;
- finalised the list of issues to be addressed in these proceedings; and
- made some observations regarding the implementation of any outcome from these proceedings.

[19] In relation to the last mentioned point, the Full Bench said:

‘In the event that the Full Bench confirms the preliminary views in respect of unpaid leave and access to personal/carer’s leave for the purpose of taking family and domestic violence leave, the likely outcome will be a model term.

If any party wishes to contend that such a model term should *not* be inserted into a particular award or that a tailored industry specific approach should be adopted, then they should set out their position ... Any awards so identified will be the subject of further proceedings after the resolution of a model term.

To be clear, if a model term(s) is determined as part of these proceedings and we are satisfied that such a term is necessary to achieve the modern awards objective then it will be inserted into each modern award except those modern awards [for] which a party has indicated a preference for a different approach’.¹³

[20] Submissions were received in response from the following parties:

- (i) [Ai Group](#);
- (ii) [Australian Public Service Commission \(APSC\)](#);
- (iii) [National Road Transport Association \(NatRoad\)](#);
- (iv) [Australian Meat Industry Council \(AMIC\)](#);
- (iv) [ACCI](#); and
- (v) [ACTU](#).

[21] A [summary of these submissions](#) was published on 15 September 2017.

[22] A [Research Reference List](#) was also published on 15 September 2017. The Research Reference List included a non-exhaustive list of the research materials and data sources that parties had referred to in their submissions, together with further publications identified by Commission staff as relevant to the proceedings.

[23] In order to assist parties to prepare their submissions, Commission staff also published a [Background Paper](#) exploring a number of issues relating to the form and content of a model term that would give effect to the preliminary views in the Majority Decision. The Background Paper identified the five key elements to be considered in drafting a model term:

- (i) the definition of ‘family and domestic violence’ for the purposes of the term;
- (ii) the purpose of the leave (i.e. in what circumstances an employee can access the leave and which employees may take the leave);
- (iii) unpaid leave;
- (iv) the evidence requirements; and
- (v) privacy considerations.

[24] The Background Paper examined each of these elements and provided various options as to how they might be dealt with in a model term. The Background Paper also posed a number of questions to the parties in relation to these issues.

[25] A [Statement](#) issued on 6 October 2017¹⁴ noted that submissions in reply had been received from the following parties:

- (i) [ACCI](#)
- (ii) [AMIC](#)
- (iii) [Ai Group](#)
- (iv) [Transport Workers’ Union of Australia](#)
- (iv) [ACTU](#)
- (v) [Master Electricians Australia \(MEA\)](#).

[26] The Statement also noted that a conference would be held on 13 October 2017 before the President and identified the issues for discussion at that conference.

[27] Conferences were held before the President on 13, 18, 19 and 20 October 2017 and were attended by representatives of the ACTU, Ai Group, ACCI, AMIC, NatRoad, MEA, the Pharmacy Guild of Australia and the Community and Public Sector Union. At the conferences, there was a measure of agreement reached in relation to some aspects of a draft model unpaid family and domestic violence leave term. We return to this matter in Chapter 5.

[28] A list of the Statements issued in this matter is at **Attachment A**. A list of submissions filed by the parties is at **Attachment B**.

2. Legislative Framework for the Review

[29] Section 156 of the Act requires the Commission to conduct a 4 yearly review of modern awards as soon as practicable after 1 January 2014.

[30] Subsection 156(2) provides that the Commission must review all modern awards and may, among other things, make determinations varying modern awards. In this context ‘review’ has its ordinary and natural meaning of ‘survey, inspect, re-examine or look back upon’.¹⁵

[31] Section 156 clearly delineates what must be done in a Review, what must not be done and what may be done. Further, where the legislative intent of the section is to qualify a discretion this is done expressly, as in s.156(3) - the Commission *may* vary modern award minimum wages ‘only if’ it is satisfied that the variation is justified by work value reasons. This may be contrasted with the discretion in s.156(2)(b)(i) to make determinations varying modern awards in a Review, which is expressed in general, unqualified, terms.

[32] If a power to decide is conferred by a statute and the context (including the subject-matter to be decided) provides no positive indication of the considerations by reference to which a decision is to be made, a general discretion confined only by the scope and purposes of the legislation will ordinarily be implied.¹⁶ However, a number of provisions of the Act which are relevant to the Review operate to constrain the breadth of the discretion in s.156(2)(b)(i). In particular, the Review function is in Part 2-3 of the Act and hence involves the performance or exercise of the Commission’s ‘modern award powers’ (see s.134(2)(a)). It follows that the ‘modern awards objective’ in s.134 applies to the Review. Section 138 (achieving the modern awards objective) also applies.

[33] A range of other provisions of the Act are relevant to the Review: s.3 (object of the Act); s.55 (interaction with the National Employment Standards (NES)); Part 2-2 (the NES); s.135 (special provisions relating to modern award minimum wages); Divisions 3 (terms of modern awards) and 6 (general provisions relating to modern award powers) of Part 2-3; s.284 (the minimum wages objective); s.577 (performance of functions etc by the Commission); s.578 (matters the Commission must take into account in performing functions etc), and Division 3 of Part 5-1 (conduct of matters before the Commission).

[34] Any variation of a modern award arising from the Review must comply with the requirements of the Act relating to the content of modern awards. Division 3 of Part 2-3 deals with the terms of modern awards, in particular terms that *may* or *must* be included in modern awards, and terms that *must not* be included in modern awards. Division 3 includes s.138. This Division also prohibits award terms that contravene s.55 (which deals with the interaction between the NES and modern awards). These provisions, in an appropriate case, may operate to constrain the discretion in s.156(2)(b)(i).¹⁷

[35] Division 6 of Part 2-3 also contains specific provisions relevant to the exercise of modern award powers which apply to the Review. If the Commission were to make a modern award, or change the coverage of an existing modern award in the Review, then the requirements in s.163 would need to be satisfied. Sections 165 and 166 deal with when variation determinations come into operation. Variation determinations arising from the Review will generally operate prospectively, unless the variation is made under s.160 (which deals with variations to remove ambiguities or uncertainties, or to correct errors: see

ss.165(2)(a) and 166(3)(a)) and the Commission is satisfied that there are exceptional circumstances that justify retrospectivity (ss.165(2)(b) and 166(3)(b)).

[36] The general provisions relating to the performance of the Commission's functions in Division 2 of Part 5-1 of the Act also apply to the Review. Sections 577 and 578 are particularly relevant in this regard. Section 577 states:

'577 Performance of functions etc by the FWC

The FWC must perform its functions and exercise its powers in a manner that:

- (a) is fair and just; and
- (b) is quick, informal and avoids unnecessary technicalities; and
- (c) is open and transparent; and
- (d) promotes harmonious and cooperative workplace relations.

Note: The President also is responsible for ensuring that FWC performs its functions and exercises its powers efficiently etc (see section 581).'

[37] Section 578 states:

'578 Matters the FWC must take into account in performing functions etc

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

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

[38] As stated in s.578(a), in performing functions and exercising powers under a part of the Act (including the Review function under Part 2-3) the Commission must take into account the objects of the Act and any particular objects of the relevant part. The object of Part 2-3 is expressed in s.134 (the modern awards objective). The object of the Act is set out in s.3, as follows:

'3 Object of this Act

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

- (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and

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

[39] In conducting the Review the Commission is able to exercise its usual procedural powers, contained in Division 3 of Part 5-1 of the Act. Importantly, the Commission is not bound by the rules of evidence and procedure (s.591) and may inform itself in relation to any matter before it in such manner as it considers appropriate (s.590(1)).

[40] Section 156 imposes an obligation on the Commission to review *all* modern awards and each modern award must be reviewed in its own right. The requirement in s.156(5) to review each modern award ‘in its own right’, is intended to ensure that the Review is conducted ‘by reference to the particular terms and the particular operation of each particular award rather than by a global assessment based upon generally applicable considerations’.¹⁸ However, while the review of each modern award must focus on the particular terms and operation of the particular award, this does not mean that the review of a modern award is to be confined to a single holistic assessment of all of its terms.¹⁹ Further, s.156(5) provides that the requirement that each modern award be reviewed in its own right does not prevent the Commission from reviewing two or more modern awards at the same time.

[41] While s.156(5) does not confine the review of a modern award to a *single* holistic assessment of all of its terms, a single holistic assessment of each modern award will be required prior to the conclusion of the Review. Such an assessment will be necessary so that each modern award is reviewed, in its own right, to ensure that it achieves the modern awards objective and only includes terms to the extent necessary to achieve that objective.

[42] In *CFMEU v Anglo American Metallurgical Coal Pty Ltd (Anglo American)*²⁰ the Full Court of the Federal Court discussed the nature of the Commission’s task in conducting the Review:

‘The terms of s 156(2)(a) require the Commission to review all modern awards every four years. That is the task upon which the Commission was engaged. The statutory task is, in this context, not limited to focusing upon any posited variation as necessary to achieve the modern awards objective, as it is under s 157(1)(a). Rather, it is a review of the modern award as a

whole. The review is at large, to ensure that the modern awards objective is being met: that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions. This is to be achieved by s 138 – terms may and must be included only to the extent necessary to achieve such an objective.

Viewing the statutory task in this way reveals that it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern award [sic] objective. Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.²¹

[43] The Review is to be distinguished from *inter partes* proceedings. The Review is conducted on the Commission’s own motion and is not dependent upon an application by an interested party. Nor is the Commission constrained by the terms of a particular application.²² The Commission is not required to make a decision in the terms applied for (s.599) and, in the Review, may vary a modern award in whatever terms it considers appropriate, subject to its obligation to accord interested parties procedural fairness and the application of relevant statutory provisions as outlined above.

[44] In *4 Yearly Review of Modern Awards - Penalty Rates (Hospitality and Retail Sectors)*²³ the Full Bench summarised the general propositions applying to the Commission’s task in the Review, as follows:

- ‘1. The Commission’s task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are ‘necessary to achieve the modern awards objective’ (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission’s consideration is upon the terms of the modern award, as varied.
2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.
3. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. For example, the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made. The particular context in which those decisions were made will also need to be considered.
4. The particular context may be a cogent reason for not following a previous Full Bench decision, for example:
 - the legislative context which pertained at that time may be materially different from the FW Act;
 - the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision; or

- the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.'²⁴

[Endnotes omitted]

[45] We now turn to the relevance of the 'modern awards objective' to the Review.

[46] The modern awards objective is set out in s.134 of the Act:

'134 The modern awards objective

What is the modern awards objective?

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid; and
- (b) the need to encourage collective bargaining; and
- (c) the need to promote social inclusion through increased workforce participation; and
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
- (da) the need to provide additional remuneration for:
 - (i) employees working overtime; or
 - (ii) employees working unsocial, irregular or unpredictable hours; or
 - (iii) employees working on weekends or public holidays; or
 - (iv) employees working shifts; and
- (e) the principle of equal remuneration for work of equal or comparable value; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the *modern awards objective*.

When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of the FWC's *modern award powers*, which are:

- (a) the FWC's functions or powers under this Part; and

(b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).'

[47] The modern awards objective is to 'ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in ss.134(1)(a) to (h) (the s.134 considerations). The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.²⁵ No particular primacy is attached to any of the s.134 considerations²⁶ and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[48] Section 138 of the Act emphasises the importance of the modern awards objective:

'138 Achieving the modern awards objective

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.'

[49] To comply with s.138, the terms included in modern awards must be 'necessary to achieve the modern awards objective'.

[50] In *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)*²⁷ Tracey J considered what it meant for the Commission to be satisfied that making a determination varying a modern award (outside a 4 yearly review) was 'necessary to achieve the modern awards objective' for the purposes of s.157(1). His Honour held:

'The statutory foundation for the exercise of FWA's power to vary modern awards is to be found in s 157(1) of the Act. The power is discretionary in nature. Its exercise is conditioned upon FWA being satisfied that the variation is "necessary" in order "to achieve the modern awards objective". That objective is very broadly expressed: FWA must "provide a fair and relevant minimum safety net of terms and conditions" which govern employment in various industries. In determining appropriate terms and conditions regard must be had to matters such as the promotion of social inclusion through increased workforce participation and the need to promote flexible working practices.

...

The question under this ground then becomes whether there was material before the Vice President upon which he could reasonably be satisfied that a variation to the Award was necessary, at the time at which it was made, in order to achieve the statutory objective.

...

In reaching my conclusion on this ground I have not overlooked the SDA's subsidiary contention that a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action. Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or

merely desirable. It was open to the Vice President to form the opinion that a variation was necessary.’²⁸

[51] The above observation – in particular the distinction between that which is ‘necessary’ and that which is merely ‘desirable’ – is apposite to s.138, including the observation that reasonable minds may differ as to whether a particular award term or proposed variation is necessary, as opposed to merely desirable. What is ‘necessary’ to achieve the modern awards objective 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 context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.²⁹

[52] If a modern award is not achieving the modern awards objective then it is to be varied so that it only includes terms that are ‘necessary to achieve the modern awards objective’. In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission’s consideration is upon the terms of the modern award as proposed to be varied.

[53] The terms of s.138 do not require that the Commission be satisfied that a particular *variation proposed* by a party is *necessary* to achieve the modern awards objective. Such an approach would inappropriately focus attention on the particular variation proposed, rather than on the terms of the modern award as proposed to be varied.³⁰ In *4 Yearly Review of Modern Awards - Preliminary Jurisdictional Issues*³¹ the Full Bench considered what had to be demonstrated by the proponent of an award variation and concluded that:

‘... To comply with s.138 the formulation of terms which must be included in modern award[s] or terms which are permitted to be included in modern awards must be in terms ‘necessary to achieve the modern awards objective’... In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.’³²

[54] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations.³³ Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives. As the Full Court of the Federal Court said in *National Retail Association v Fair Work Commission*:³⁴

‘It is apparent from the terms of s 134(1) that the factors listed in (a) to (h) are broad considerations which the FWC must take into account in considering whether a modern award meets the objective set by s 134(1), that is to say, whether it provides a fair and relevant minimum safety net of terms and conditions. The listed factors do not, in themselves, however, pose any questions or set any standard against which a modern award could be evaluated. Many of them are broad social objectives. What, for example, was the finding called for in relation to the first factor (“relative living standards and the needs of the low paid”)? Furthermore, it was common ground that some of the factors were inapplicable to the SDA’s claim.

The relevant finding the FWC is called upon to make is that the modern award either achieves or does not achieve the modern awards objective. The NRA’s contention that it was necessary for the FWC to have made a finding that the Retail Award failed to satisfy at least one of the s 134(1) factors must be rejected.’³⁵

[55] In *Anglo American* the Court also considered the expression ‘only to the extent necessary to achieve the modern awards objective’ in s.138:

‘... The words “only to the extent necessary” in s 138 emphasise the fact that it is the minimum safety net and minimum wages objective to which the modern awards are directed. Other terms and conditions beyond a minimum are to be the product of enterprise bargaining, and enterprise agreements under Pt 2-4’.³⁶

[56] The modern awards objective is very broadly expressed³⁷ and the matters which may be taken into account are not confined to the s.134 considerations. As the Full Court of the Federal Court observed in *Shop, Distributive and Allied Employees Association v The Australian Industry Group*³⁸ (*Penalty Rates Review*):

‘... What must be recognised, however, is that the duty of ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions itself involves an evaluative exercise. While the considerations in s 134(a)-(h) inform the evaluation of what might constitute a “fair and relevant minimum safety net of terms and conditions”, they do not necessarily exhaust the matters which the FWC might properly consider to be relevant to that standard, of a fair and relevant minimum safety net of terms and conditions, in the particular circumstances of a review. The range of such matters “must be determined by implication from the subject matter, scope and purpose of the” Fair Work Act (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39-40).’³⁹

[57] In the context of the Review, variation of a modern award may be warranted if it is established that there has been a material change in circumstances since the making of the award, but the Commission’s power to vary the award is not conditional on it being satisfied that there has been such a change in circumstances.⁴⁰ For example, a modern award might be found not to comply with the modern awards objective ‘where considerations, which were extant but unappreciated or not fully appreciated on a prior review, are properly brought to account.’⁴¹

[58] The modern awards objective is a composite expression which requires that modern awards, together with the NES, provide ‘a fair and relevant minimum safety net of terms and conditions’, taking into account the matters in ss.134(1)(a)-(h).⁴² As the Full Court observed in the *Penalty Rates Review*:

‘... It is apparent that “a fair and relevant minimum safety net of terms and conditions” is itself a composite phrase within which “fair and relevant” are adjectives describing the qualities of the minimum safety net of terms and conditions to which the FWC’s duty relates. Those qualities are broadly conceived and will often involve competing value judgments about broad questions of social and economic policy. As such, the FWC is to perform the required evaluative function taking into account the s 134(1)(a)-(h) matters and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance. It is entitled to conceptualise those criteria by reference to the potential universe of relevant facts, relevance being determined by implication from the subject matter, scope and purpose of the Fair Work Act.

...

... As discussed “fair and relevant”, which are best approached as a composite phrase, are broad concepts to be evaluated by the FWC taking into account the s 134(1)(a)-(h) matters and such other facts, matters and circumstances as are within the subject matter, scope and purpose

of the Fair Work Act. Contemporary circumstances are called up for consideration in both respects, but do not exhaust the universe of potentially relevant facts, matters and circumstances'.⁴³

[59] Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question. As the Full Court observed in the *Penalty Rates Review*:

'it cannot be doubted that the perspectives of employers and employees and the contemporary circumstances in which an award operates are circumstances within a permissible conception of a "fair and relevant" safety net taking into account the s.134(1)(a)-(h) matters.'⁴⁴

[60] Finally, the expression 'minimum safety net of terms and conditions' in s.134(1) was considered in *4 Yearly Review of Modern Awards - Penalty Rates (Hospitality and Retail Sectors)*, in which the Full Bench rejected the proposition that the reference to a 'minimum safety net' in s.134(1) means the 'least ... possible' to create a 'minimum floor':

'the argument advanced pays scant regard to the fact the modern awards objective is a composite expression which requires that modern awards, together with the NES, provide 'a fair and relevant minimum safety net of terms and conditions'. The joint employer reply submission gives insufficient weight to the statutory directive that the minimum safety net be 'fair and relevant'. Further, in giving effect to the modern awards objective the Commission is required to take into account the s.134 considerations, one of which is 'relative living standards and the needs of the low paid' (s.134(1)(a)). The matters identified tell against the proposition advanced in the joint employer reply submission.'⁴⁵

[61] We conclude our general observations about the modern awards objective by noting that the nature of modern awards under the Act is quite different from the awards made under previous legislative regimes.⁴⁶ In times past awards were made in settlement of industrial disputes. The content of these instruments was determined by the constitutional and legislative limits of the tribunal's jurisdiction, the matters put in issue by the parties (i.e. the 'ambit' of the dispute) and the policies of the tribunal as determined from time to time in wage fixing principles or test cases. An award generally only bound the employers, employer organisations and unions which had been parties to the industrial dispute that gave rise to the making of the award and were named as respondents. Modern awards are very different to awards of the past.

[62] Modern awards are not made to prevent or settle industrial disputes between particular parties. Rather, the purpose of modern awards, together with the NES and national minimum wage orders, is to provide a safety net of fair, relevant and enforceable minimum terms and conditions of employment for national system employees (see ss.3(b) and 43(1)). They are, in effect, regulatory instruments that set minimum terms and conditions of employment for the employees to whom the modern award applies (see s.47).

[63] Nor are there named respondents to modern awards. Modern awards apply to, or cover, certain persons, organisations and entities (see ss.47 and 48), but these persons, organisations and entities are not 'respondents' to the modern award in the sense that there were named respondents to awards in the past. The nature of this shift is made clear by s.158 which sets out who may apply for a determination making, varying or revoking a modern award. Under previous legislative regimes, the named respondents to a particular award would automatically have the requisite standing to make such applications; that is no longer the case.⁴⁷

3. Family and Domestic Violence: The Evidence

[64] A list of evidence and submissions filed in the proceedings was attached to the August 2017 Statement. A list of expert reports and witness statements is set out below:

- Exhibit ACTU B-1: Dr Peta Cox, *Expert report by Dr Peta Cox*, (Cox Report).⁴⁸
- Exhibit ACTU B-2: Dr Peta Cox, *Supplementary report of Dr Peta Cox*, (Cox Supplementary Report).
- Exhibit ACTU B-3: Dr Martin O'Brien, *Expert report of Dr Martin O'Brien*, (O'Brien Report).⁴⁹
- Exhibit ACTU B-4: Dr Michael Flood, *Expert report of Dr Michael Flood*, (Flood Report).⁵⁰
- Exhibit ACTU B-5: Dr Natasha Cortis, *Women's economic security and domestic violence: the role of employment, employment support and employment protection*, (Cortis Report).⁵¹
- Exhibit ACTU B-6: Professor Cathy Humphreys, *Expert report of Professor Cathy Humphreys*, (Humphreys Report).⁵²
- Exhibit ACTU B-7: Witness Statement of Ms Marilyn Beaumont.⁵³
- Exhibit ACTU B-8: Witness Statement of Ms Michelle Jackson.⁵⁴
- Exhibit ACTU B-9: Witness Statement of Mr Mick Doleman.⁵⁵
- Exhibit ACTU B-10: Witness Statement of Mr Brad Gandy.⁵⁶
- Exhibit ACTU B-11: Witness Statement of Ms Emma Smallwood.⁵⁷
- Exhibit ACTU B-12: Witness Statement of Ms Julie Kun.⁵⁸
- Exhibit ACTU B-13: Witness Statement of Ms Bernadette Pasco.⁵⁹
- Exhibit ACTU B-14: Witness Statement of Ms Michele O'Neill.⁶⁰
- Exhibit ACTU B-15: Witness Statement of Mr Sunil Kemppi.⁶¹
- Exhibit ACTU B-16: Ms Ludo McFerran, *Expert report of Ludo McFerran: Family and domestic violence and the workplace* (McFerran Report).⁶²
- Exhibit ACTU B-17: Witness Statement of Ms Jocelyn Bignold.
- Exhibit ACTU B-18: Witness Statement of Ms Sandra Dann.
- Exhibit ACTU B-19: Witness Statement of Ms Fiona McCormack.

- Exhibit ACTU B-20: Witness Statement of Ms Samantha Parker.
- Exhibit ACTU B-21: Witness Statement of Ms Jessica Stott.
- Exhibit ACTU B-22: Witness Statement of Ms Karen Willis.
- Exhibit ACTU B-23: Confidential.
- Exhibit ACTU B-24: Confidential.
- Exhibit ACTU B-25: Confidential.
- Exhibit Pricewaterhouse Coopers (PwC) S-1: Witness Statement of Ms Debra Eckersley.⁶³
- Exhibit Ai Group F-4: Witness Statement of Ms Jenni Mandel.⁶⁴

[65] Based on a consideration of the evidence, the Majority Decision made the following findings:

1. Family and domestic violence has a significant adverse impact on those who experience such violence.⁶⁵
2. While men can, and do, experience family and domestic violence, such violence is a gendered phenomenon that disproportionately affects women.⁶⁶
3. The effects of family and domestic violence are far reaching and extend beyond the individual directly affected to their families and the general community.⁶⁷
4. Family and domestic violence has a real and tangible impact on employees and employers in the workplace.⁶⁸
5. Employees who experience family and domestic violence often face financial difficulties as a result, such as relocation costs or becoming a sole parent; and may suffer economic harm as a result of disruption to workplace participation.⁶⁹

[66] We agree with the above findings. The Majority were satisfied that ‘the circumstances faced by employees who experience family and domestic violence require a special response’.⁷⁰ We accept and adopt that conclusion.

[67] This is a community issue and requires a community response. As the Council of Australian Governments states in the ‘National Plan to Reduce Violence Against Women and their Children’⁷¹ (the National Plan):

‘Whilst there are many forms of violent behaviour perpetrated against women, domestic violence and sexual assault are the most pervasive forms of violence experienced by women in Australia, and require an immediate and focussed response’.

[68] While we adopt the findings set out above we do wish to say something further about the extent of family and domestic violence and the pervasive nature of its impact.

[69] We first turn to the definition of ‘family and domestic violence’. There is no single generally accepted definition, but at the core of family and domestic violence is the perpetrator’s need to maintain control and dominance over the victim.⁷²

[70] Dr Flood describes intimate partner violence or domestic violence as involving:

‘a systematic pattern of power and control exerted by one person against another, involving a variety of physical and non-physical tactics of abuse and coercion, in the context of a current or former intimate relationship.’⁷³

[71] The definition of family and domestic violence was the subject of discussion during the series of conferences of interested parties in October 2017. We deal with the outcome of those conferences in more detail in Chapter 5. Here we simply note that the parties agreed upon the following definition:

‘family and domestic violence means violent, threatening or other abusive behaviour by a family member of an employee that seeks to coerce or control the employee and that causes them harm or to be fearful.’

[72] As mentioned in the Majority Decision, family and domestic violence is a gendered phenomenon which disproportionately affects women. Based on an analysis of the available material, Dr Flood found that among those subjected to intimate partner violence, women are more likely than men to:

- be subjected to frequent, prolonged and extreme violence;
- be sexually assaulted;
- sustain injuries;
- fear for their lives; and
- experience other negative consequences, such as psychological harm.⁷⁴

[73] Domestic and intimate partner homicides represent the highest proportion of any category of homicides in Australia. At least one woman a week is killed by a partner or former partner.⁷⁵ Family and domestic violence is the leading contributor to death, disability and ill-health among Australian women aged between 15 and 44.

[74] The Australian Institute of Criminology reported that of the 2,631 homicide incidents in Australia over a 10-year period (to 30 June 2012), 1,088 or 41 per cent were classified as domestic/family homicides.⁷⁶ Intimate partner homicides account for 23 per cent of all homicides in Australia.⁷⁷ The majority of victims of domestic/family homicides were female and accounted for 75 per cent of victims in intimate partner homicides. The offenders were usually male.⁷⁸

[75] Within the category of domestic/family homicides, intimate partner homicides account for 56 per cent of deaths. Children comprised the second most frequent group of victims, accounting for 21 per cent of deaths.⁷⁹

[76] The Personal Safety Survey (PSS) conducted by the Australian Bureau of Statistics (ABS) collects information about the nature and extent of violence experienced by men and women since the age of 15 years and their experience of violence in the 12 months prior to the survey. The ABS has conducted the PSS on two occasions (2005 and 2012) and undertook the Women's Safety Survey in 1996. The design of each survey is similar but not comparable in every way.

[77] The most relevant data for our purposes is the statistics in relation to partner violence. Partner violence refers to any incident of sexual assault, sexual threat, physical assault or physical threat by a current and/or previous partner. The term 'partner' in the PSS is used to describe a person the survey respondent lives with, or lived with at some point, in a married or de facto relationship. It includes a partner the survey respondent is living with at the time of experiencing violence; or a partner the survey respondent is no longer living with at the time of experiencing violence. The PSS also uses the term 'intimate partner' to describe a 'partner' as defined above or a boyfriend/girlfriend or date or an ex-boyfriend/ex-girlfriend.

[78] Dr Cox gave evidence about findings from the PSS.

[79] As to the prevalence of partner violence against women Dr Cox's evidence, based on PSS data, was as follows:

'One in four women in Australia have experienced violence by an intimate partner they may or may not have been living with (25.1% or 2,194,200) - approximately two-thirds of these women have lived with the violent partner at some time (16.9% or 1,479,900).

Of women who have lived with their violent partner, most had experienced more than one incident of violence. For instance, 73% of women who had experienced violence by a former cohabiting partner reported that the violence occurred more than once: this is close to a million women (925,100). Of these women who had experienced abuse more than once, 347,900 women reported having experienced abuse all or most of the time, with 197,200 reporting abuse that had happened a little of the time.

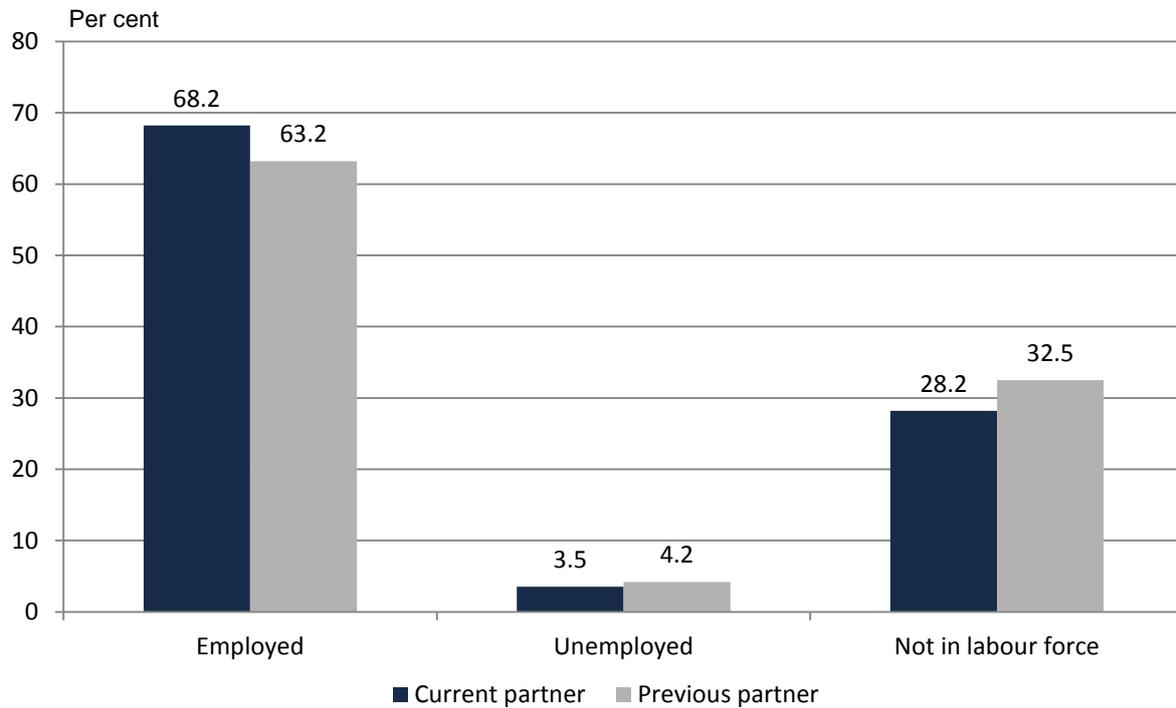
One in fifty women in Australia experienced at least one incident of violence by an intimate partner (including cohabiting and non-cohabiting) in the 12 months prior to the PSS survey (2.1%, 186,900): when limited to cohabiting partner, this drops to 1.5% (132,500).

Women who have experienced male intimate partner violence represent two thirds of all women who have experienced violence by a male.⁸⁰

[80] Family and domestic violence is ubiquitous. One in four women in Australia have experienced such violence (or almost 2.2 million women). Family and domestic violence affects not only those who suffer it, but the children who are exposed to it, extended families, friends and work colleagues. The Majority and Minority Decisions addressed this evidence and we do not propose to repeat that analysis.

[81] The PSS also produces data about the impact of family and domestic violence and workplaces.

[82] Chart 1 is based on data from the 2005 PSS and shows that most people who had experienced violence since the age of 15 years, whether by a current or previous partner, were employed.

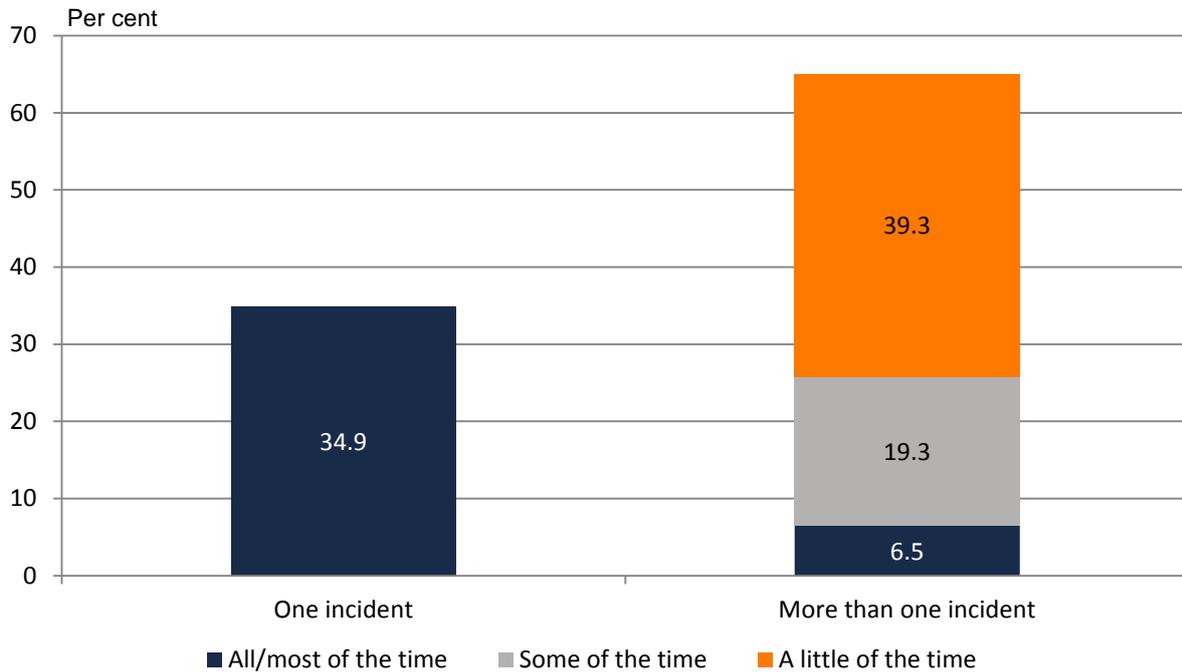
Chart 1⁸¹**Experience of violence by current/previous partner since the age of 15 years, by labour force status, all persons**

Note: Estimate of unemployed for those who experienced violence by current partner has a relative standard error of 25% to 50% and should be used with caution.

[83] Chart 2 is based on data from the 2012 PSS and shows the proportion of females who had experienced violence by a current partner since the age of 15 years, by frequency of violence.

[84] Almost two-thirds (65.1 per cent) of females who had experienced current partner violence since the age of 15 years reported that their current partner had been violent more than once.

Chart 2⁸²
Experience of violence by current partner since the age of 15 years, females, by frequency of violence



Note: Estimate of all/most of the time for has a relative standard error of 25% to 50% and should be used with caution.

[85] The same data shows that around the same proportion of males who had experienced current partner violence since the age of 15 years reported that their current partner had been violent more than once. In addition, of those males who had experienced previous partner violence since the age of 15 years, around a half reported that their previous partner had been violent more than once. In comparison, 73.0 per cent of females who had experienced previous partner violence since the age of 15 years reported that their previous partner had been violent more than once.⁸³

[86] Table 1 shows the number and proportion of males and females who took time off work in the 12 months after the most recent incident of violence, by type of assault and gender of perpetrator.

[87] This data does not identify the relationship of the perpetrator to the victim, so family/domestic violence incidents cannot be determined.

[88] Males who had experienced assault since the age of 15 years were most likely to have been physically assaulted by another male, and were more likely to take time off work relative to other cases of violence.

[89] Females who had experienced assault since the age of 15 were most likely to have been physically assaulted by a male, and were most likely to take time off work relative to other cases of violence.

Table 1⁸⁴

Experience of assault since the age of 15 years, whether took time off work in the 12 months after the most recent incident of violence by type of assault and gender of perpetrator

	Took time off work during the 12 months after the most recent incident ^(a)		Did not take time off work during the 12 months after the most recent incident ^(a)		Did not work during the 12 months after the most recent incident ^(a)		Total persons who experienced assault ^(a)	
	'000	%	'000	%	'000	%	'000	%
Males who have experienced assault since the age of 15^(b)								
Sexual assault by a male	np	**2.8	*59.1	81.7	np	np	72.3	100.0
Sexual assault by a female	**8.3	**6.4	107.2	82.1	*15.1	*11.6	130.6	100.0
Physical assault by a male	199.2	8.6	1,718.8	74.0	404.8	17.4	2,322.8	100.0
Physical assault by a female	*47.5	*6.5	576.4	79.4	102.1	14.1	726.0	100.0
Females who have experienced assault since the age of 15^(b)								
Sexual assault by a male	93.2	10.9	453.7	53.2	306.0	35.9	852.8	100.0
Sexual assault by a female	**2.1	**8.3	16.2	63.8	*7.1	*28.0	25.4	100.0
Physical assault by a male	238.6	13.9	968.9	56.5	508.8	29.6	1,716.3	100.0
Physical assault by a female	22.9	5.1	271.7	60.6	153.4	34.2	448.0	100.0

Note: *estimate has a relative standard error of 25% to 50% and should be used with caution.

**estimate has a relative standard error greater than 50% and is considered too unreliable for general use.

(a) Components are conceptually unable to be added together to produce an aggregated total about 'time off work'. Persons may have experienced more than one of the four different types of assault and are included separately for each type they have experienced. As a person's actions will differ depending on the type of violence they experience, conceptually it would be invalid to add together actions for all of the different types of violence. For example, if a person had taken time off work for their most recent incident of physical assault by a male but had not taken time off work for their most recent incident of sexual assault by a male, it is impossible to calculate an estimate of whether or not time was taken off work for "violence" - as it both has and hasn't been.

(b) Excludes incidents that occurred more than 20 years ago.

[90] The emotional and personal costs of family and domestic violence cannot be measured; but some of its effects can, including the impact on health and children, and the employment and financial consequences. We wish to briefly canvass these effects below, focusing on employment and financial consequences.

Impact on health

[91] The Victorian Health Promotion Foundation reviewed the health costs of violence in a 2004 report titled *The Health Costs of Violence: Measuring the Burden of Disease Caused by Intimate Partner Violence* (VicHealth Report).⁸⁵

[92] The VicHealth Report found that intimate partner violence is the leading contributor to death, disability and ill-health in Australian women aged 15 to 44 in Victoria. Intimate partner violence was also found to be more damaging to the health of women aged 15 to 44 than any other well-known risk factors for chronic disease, including high blood pressure, obesity and smoking.⁸⁶

[93] Family violence can also exacerbate existing mental health problems and increase the risk of subsequent depression.⁸⁷

Impact on children

[94] Children living with domestic violence have much higher rates of depression and anxiety and trauma symptoms.⁸⁸

Employment and financial consequences

[95] Women who are experiencing or have experienced domestic violence have a more disrupted work history; are on lower personal incomes; have had to change jobs frequently; and are more likely to be employed in casual and part-time work, than women with no experience of violence.⁸⁹

[96] The PSS has found that about 145,700 employed women took time off work as a result of their most recent incident of physical assault by a male cohabitating partner. For employed women who had been sexually assaulted by a male cohabitating partner, about 29,000 took time off work as a result of their most recent incident.⁹⁰

[97] Dr Cox observed that the PSS confirmed that separation from a violent partner is difficult, and is associated with an elevated risk of violence on separation, and with financial hardship following separation.⁹¹ Two out of three women who left violent partners moved away from their homes, and seven out of 10 women who left violent relationships reported leaving behind property or assets.⁹²

[98] As to the financial impact of such violence, Confidential Witness 1 gave evidence of incurring legal costs of over \$6,000 to prepare for one court attendance.⁹³ Confidential Witness 3 gave evidence that over the period of an abusive relationship that continued for three years, she lost over \$90,000.⁹⁴

[99] Family and domestic violence may give rise to complex legal proceedings in multiple jurisdictions. In her evidence, Ms Smallwood (a senior lawyer at Women's Legal Services, Victoria) provided an example of a 'typical client' who may have:

- (a) children and property matters in the Federal Circuit Court, as well as urgent interim applications in relation to the same proceedings;
- (b) divorce proceedings in the Federal Circuit Court or Family Court;
- (c) intervention order proceedings in the Magistrates' Court;
- (d) criminal proceedings;
- (e) Victim of Crime assistance proceedings; and
- (f) debt issues that require resolution through the relevant agencies.⁹⁵

[100] Such a client will have little control over the timing of these matters or how long they will take to resolve. Court hearings will usually be during working hours and there is limited flexibility with respect to hearing dates, which are set by the court.⁹⁶

[101] Around 62 per cent of women who experienced domestic violence in the last 12 months were in paid work.⁹⁷

[102] Employment is an important pathway out of violent relationships. Sustained periods of employment can provide financial security, independence, social networks and increased self-esteem.⁹⁸ This point is reinforced by the experiences of the ACTU confidential witnesses, who each spoke about the different kinds of support they received from their employers at various times.

[103] We conclude this Chapter by noting that a number of Australian studies have sought to assess the aggregate cost of violence against women, particularly domestic violence. The ACTU referred to the most recent report by PwC, *A High Price to Pay – the Economic Case for Preventing Violence Against Women*⁹⁹ (PwC Report). The PwC Report was submitted to the Victorian Royal Commission into Family Violence in November 2015 and used data based on the 2012 PSS.

[104] Two other reports are also relevant. KPMG prepared a report in conjunction with the National Plan in 2009, *The Cost of Violence Against Women and their Children*¹⁰⁰ (KPMG Report), and Access Economics was commissioned by the Office of the Status of Women in 2004 to prepare *The Cost of Domestic Violence to the Australian Economy*¹⁰¹ (Access Economics Report).

[105] Using an estimate of 470,309 women who experienced partner violence in the year 2014-15,¹⁰² the PwC Report found that the cost to the Australian economy of women experiencing physical violence, sexual violence or emotional abuse by a partner is \$12.6 billion. The PwC Report estimated the cost of lost productivity as a result of domestic violence as \$2.1 billion.¹⁰³

[106] The Victorian Government, Royal Commission into Family Violence Report summarised the findings of the three reports as follows:¹⁰⁴

Report	Scope	Year	Estimate
Access Economics	Domestic violence (male and female victims)	2002/03	\$8.1 billion
KPMG	Domestic violence against women and children (excludes male victims) and non domestic sexual assault (excludes male victims)	2007/08 2021/22	\$13.6 billion \$15.6 billion
PwC	Partner violence – physical violence, sexual violence or emotional abuse by current or previous partner perpetrated against women (excludes male victims)	2014/15	\$12.6 billion
PwC	All violence against women - physical violence, sexual violence or emotional abuse (by a partner) or stalking by any person perpetrated against women (excludes male victims)	2014/15	\$21.6 billion

[107] In the following two Chapters we deal with the preliminary views expressed in the Majority Decision.

4. Accessing personal/carer's leave - jurisdiction

[108] As related earlier, the Majority Decision expressed the preliminary view that 'employees should be able to access paid personal/carer's leave for the purpose of taking family and domestic violence leave'.¹⁰⁵

[109] The August 2017 Statement¹⁰⁶ attached a list of issues to provide guidance to the parties as to the matters to be addressed in written submissions on this preliminary view. The first issue in relation to the proposed extension of the NES personal/carer's leave entitlement to family and domestic violence leave was jurisdictional:

'Does the Full Bench have jurisdiction to extend the NES entitlement to personal/carer's leave to incorporate domestic violence leave?'

[110] Submissions on this issue were lodged by the ACTU, ACCI, AMIC, NatRoad and Ai Group.

[111] The ACTU, ACCI, AMIC, NatRoad and Ai Group all submit that the Commission does *not* have jurisdiction to provide for paid personal/carer's leave under the NES to be taken for reasons relating to family or domestic violence in circumstances not already covered by the NES, albeit for varying reasons.

[112] The August 2017 Statement refers to the Background Paper prepared by Commission staff, which identified key issues in the drafting of a family and domestic violence leave model term and set out three proposed model terms for consideration. For the purpose of considering the jurisdictional question, it is not necessary to settle these drafting issues. It suffices to assume that any award term extending the paid personal/carer's leave entitlement to incorporate family and domestic violence leave, will entail an entitlement to take the leave for reasons related to domestic violence in circumstances where there is no entitlement to take the leave under the terms of the NES.

[113] Section 136(1) of the Act provides for terms that may or must be included in a modern award, while s.136(2) prohibits the inclusion of certain terms in an award:

'136 What can be included in modern awards

Terms that may or must be included

- (1) A modern award must only include terms that are permitted or required by:
 - (a) Subdivision B (which deals with terms that may be included in modern awards); or
 - (b) Subdivision C (which deals with terms that must be included in modern awards); or
 - (c) section 55 (which deals with interaction between the National Employment Standards and a modern award or enterprise agreement); or
 - (d) Part 2-2 (which deals with the National Employment Standards).

Note 1: Subsection 55(4) permits inclusion of terms that are ancillary or incidental to, or that supplement, the National Employment Standards.

Note 2: Part 2-2 includes a number of provisions permitting inclusion of terms about particular matters.

Terms that must not be included

- (2) A modern award must not include terms that contravene:

- (a) Subdivision D (which deals with terms that must not be included in modern awards); or
- (b) section 55 (which deals with the interaction between the National Employment Standards and a modern award or enterprise agreement).

Note: The provisions referred to in subsection (2) limit the terms that can be included in modern awards under the provisions referred to in subsection (1).⁷

[114] Section 136(1) provides that a modern award must only include terms that are permitted or required under ss.136(1)(a)-(d). In relation to s.136(1)(a), s.139(1)(h) in Subdivision B of Division 3 of Part 2-3 of the Act, permits a modern award to include terms about 'leave, leave loadings and arrangements for taking leave'. As submitted by the ACTU,¹⁰⁷ s.139(1)(h) would encompass a term extending paid personal/carer's leave to incorporate family and domestic violence leave.

[115] Section 136(2) prohibits award terms that are proscribed by Subdivision D of Division 3 of Part 2-3 of the Act or that contravene s.55. Subdivision D does not include any relevant proscription. Consequently, a term extending paid personal/carer's leave to incorporate family and domestic violence leave could be included in a modern award if and only if the term would not contravene s.55.

[116] Section 55 of the Act provides:

'55 Interaction between the National Employment Standards and a modern award or enterprise agreement

National Employment Standards must not be excluded

- (1) A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.

Terms expressly permitted by Part 2-2 or regulations may be included

- (2) A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:
 - (a) by a provision of Part 2-2 (which deals with the National Employment Standards); or
 - (b) by regulations made for the purposes of section 127.

Note: In determining what is permitted to be included in a modern award or enterprise agreement by a provision referred to in paragraph (a), any regulations made for the purpose of section 127 that expressly prohibit certain terms must be taken into account.

- (3) The National Employment Standards have effect subject to terms included in a modern award or enterprise agreement as referred to in subsection (2).

Note: See also the note to section 63 (which deals with the effect of averaging arrangements).

Ancillary and supplementary terms may be included

- (4) A modern award or enterprise agreement may also include the following kinds of terms:
 - (a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;
 - (b) terms that supplement the National Employment Standards; but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

- Note 1: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:
- (a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or
 - (b) that specify when payment under section 90 for paid annual leave must be made.
- Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:
- (a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or
 - (b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).
- Note 3: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74.

Enterprise agreements may include terms that have the same effect as provisions of the National Employment Standards

- (5) An enterprise agreement may include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards, whether or not ancillary or supplementary terms are included as referred to in subsection (4).

Effect of terms that give an employee the same entitlement as under the National Employment Standards

- (6) To avoid doubt, if a modern award includes terms permitted by subsection (4), or an enterprise agreement includes terms permitted by subsection (4) or (5), then, to the extent that the terms give an employee an entitlement (the **award or agreement entitlement**) that is the same as an entitlement (the **NES entitlement**) of the employee under the National Employment Standards:
 - (a) those terms operate in parallel with the employee's NES entitlement, but not so as to give the employee a double benefit; and
 - (b) the provisions of the National Employment Standards relating to the NES entitlement apply, as a minimum standard, to the award or agreement entitlement.

Note: For example, if the award or agreement entitlement is to 6 weeks of paid annual leave per year, the provisions of the National Employment Standards relating to the accrual and taking of paid annual leave will apply, as a minimum standard, to 4 weeks of that leave.

Terms permitted by subsection (4) or (5) do not contravene subsection (1)

- (7) To the extent that a term of a modern award or enterprise agreement is permitted by subsection (4) or (5), the term does not contravene subsection (1).

Note: A term of a modern award has no effect to the extent that it contravenes this section (see section 56). An enterprise agreement that includes a term that contravenes this section must not be approved (see section 186) and a term of an enterprise agreement has no effect to the extent that it contravenes this section (see section 56).'

[117] Section 55(2)(a) permits a modern award to include terms 'expressly permitted' by Part 2-2 of the Act. In relation to personal/carer's leave, Part 2-2 only expressly permits a modern award to include terms providing for an employee to cash out paid personal/carer's leave (s.101) and terms relating to the kind of evidence that an employee must provide in order to be entitled to paid personal/carer's leave or unpaid carer's leave (s.107(5)).

[118] Section 55(2)(b) permits a modern award to include terms 'expressly permitted' by regulations made for the purposes of s.127. We will return to s.55(2)(b) later. It suffices for present purposes to note that, to date, no such regulations have been made.

[119] Consequently, an award term extending paid personal/carer's leave to incorporate family and domestic violence leave would not be permitted by s.55(2).

[120] Section 55(1) provides that a modern award must not 'exclude' the NES 'or any provision of' the NES. However, s.55(4) permits an award to include certain 'ancillary or incidental' terms and terms that 'supplement' the NES. Such terms do not contravene s.55(1) (s.55(7)).

[121] It follows that an award term extending paid personal/carer's leave to incorporate family and domestic violence leave will contravene s.55 if it excludes the NES or any provision of the NES within the meaning of s.55(1) and it is not a term permitted by s.55(4).

[122] The ACTU submits that a modern award term extending access to personal/carer's leave for purposes other than those provided for in the NES 'potentially excludes ... the minimum NES entitlement to 10 days personal or carer's leave'.¹⁰⁸ Ai Group submits that such an award term would exclude the minimum NES entitlement and contravene s.55(1).¹⁰⁹ NatRoad makes a similar submission.¹¹⁰

[123] The NES comprise Divisions 3 to 12 of Part 2-2 of the Act (s.61(3)). Paid personal/carer's leave is provided for in Division 7 of Part 2-2.

[124] The Act contains no express definition of 'paid personal/carer's leave'. Section 96 of the Act deals with the quantum and accrual of paid personal/carer's leave and s.97 deals with the taking of the leave:

'96 Entitlement to paid personal/carer's leave

Amount of leave

- (1) For each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave.

Accrual of leave

- (2) An employee's entitlement to paid personal/carer's leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.

97 Taking paid personal/carer's leave

An employee may take paid personal/carer's leave if the leave is taken:

- (a) because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee; or
- (b) to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of:
 - (i) a personal illness, or personal injury, affecting the member; or
 - (ii) an unexpected emergency affecting the member.

Note 1: The notice and evidence requirements of section 107 must be complied with.

Note 2: If a female employee has an entitlement to paid personal/carer's leave, she may take that leave instead of taking unpaid special maternity leave under section 80.'

[125] Section 99 provides for payment for paid personal/carer's leave:

'99 Payment for paid personal/carer's leave

If, in accordance with this Subdivision, an employee takes a period of paid personal/carer's leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.'

[126] Notice and evidence requirements for paid personal/carer's leave are set out in s.107:

'107 Notice and evidence requirements

Notice

- (1) An employee must give his or her employer notice of the taking of leave under this Division by the employee.
- (2) The notice:
 - (a) must be given to the employer as soon as practicable (which may be a time after the leave has started); and
 - (b) must advise the employer of the period, or expected period, of the leave.

Evidence

- (3) An employee who has given his or her employer notice of the taking of leave under this Division must, if required by the employer, give the employer evidence that would satisfy a reasonable person that:
 - (a) if it is paid personal/carer's leave—the leave is taken for a reason specified in section 97; or
 - (b) if it is unpaid carer's leave—the leave is taken for a permissible occasion in circumstances specified in subsection 103(1); or
 - (c) if it is compassionate leave—the leave is taken for a permissible occasion in circumstances specified in subsection 105(1).

Compliance

- (4) An employee is not entitled to take leave under this Division unless the employee complies with this section.

Modern awards and enterprise agreements may include evidence requirements

- (5) A modern award or enterprise agreement may include terms relating to the kind of evidence that an employee must provide in order to be entitled to paid personal/carer's leave, unpaid carer's leave or compassionate leave.

Note: Personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

[127] On its terms, s.97 permits an employee to take paid personal/carer's leave for the reasons specified in ss.97(a) and (b). On the assumption made earlier, any award term extending paid personal/carer's leave to incorporate family and domestic violence leave will entail an entitlement to take leave in circumstances not covered by ss.97(a) and (b). Section 97 does not clearly prohibit an employee taking paid personal/carer's leave in such circumstances.

[128] However, s.107(3)(a) provides that an employee who has given notice of taking paid personal/carer's leave as required by s.107(1), must, if required by his or her employer, provide the employer with evidence that would satisfy a reasonable person that the leave is taken for a reason specified in s.97. This requirement would appear to be inconsistent with an award term providing that paid personal/carer's leave may be taken in circumstances not covered by s.97.

[129] The Full Bench of the Commission in *4 Yearly Review – Alleged NES Inconsistencies*¹¹¹ found that certain award terms inconsistent with s.91(1) of the Act 'exclude[d] s 91(1) in the sense that in their operation they would negate the effect of the subsection.'¹¹²

[130] Ai Group submits that an award term of the type envisaged would 'partially negate the effect' of s.97 of the Act.¹¹³ Ai Group also submits that such an award term would 'partially negate the effect of' the entitlement to 10 days' paid personal/carer's leave for each year of service under s.96(1), because leave taken for reasons beyond those in s.97 'cannot be legitimately considered "paid personal/carer's leave".'¹¹⁴ NatRoad makes a similar submission.¹¹⁵

[131] The meaning of s.55(1) was considered by the Full Bench of the Commission in *Application by Canavan Building Pty Ltd*¹¹⁶ (*Canavan*):

'[36] Section 55(1) of the Act relevantly provides that an enterprise agreement "must not exclude" the NES or any provision thereof. It is not necessary that an exclusion for the purpose of s.55(1) must be constituted by a provision in the agreement ousting the operation of an NES provision in express terms. On the ordinary meaning of the language used in s.55(1), we consider that if the provisions of an agreement would in their operation result in an outcome whereby employees do not receive (in full or at all) a benefit provided for by the NES, that constitutes a prohibited exclusion of the NES. That was the approach taken by the Full Bench in *Hull-Moody*. The correctness of that approach is also confirmed by the Explanatory Memorandum for the *Fair Work Bill 2009* as follows:

"209. This prohibition extends both to statements that purport to exclude the operation of the NES or a part of it, and to provisions that purport to provide lesser entitlements than those provided by the NES. For example, a clause in an enterprise agreement that purported to provide three weeks' annual leave would be contrary to subclause 55(1). Such a clause would be inoperative (clause 56)."¹¹⁷

[Emphasis added and endnote omitted]

[132] In terms of the approach in *Canavan*, the submissions of the ACTU, Ai Group and NatRoad outlined above amount to saying that the relevant 'benefit provided for by the NES' is: paid leave, all of which will be available to an employee to take for the purposes in s.97. Axiomatically, that benefit is lost if the employee takes any of the leave for any other purpose.

[133] If the relevant benefit under the NES is conceived of in those terms, then an award term extending paid personal/carer's leave to incorporate family and domestic violence leave would, to paraphrase *Canavan*, in its operation result in an outcome whereby employees do not receive in full a benefit provided for by the NES and so would constitute a 'prohibited exclusion' of the NES.

[134] The operation of the award term could be said to have this result because an employee who utilised accrued paid personal/carer's leave for reasons related to family or domestic

violence and not in circumstances covered by s.97, would have remaining to them a lesser entitlement to take paid personal/carer's leave in accordance with the NES than that provided for by ss.96 and 97. The ACTU provides an example in its submission:

'assume that a full-time employee is subject to domestic violence. She accesses three days of her personal leave to move house and seek an intervention order against her former partner. Later that year, she has the flu and takes four days off; her children then get sick and she needs to stay at home with them for six days. Her minimum entitlement is to 10 days paid personal/carer's leave, but she is unable to receive the full benefit of the minimum entitlement because her leave balance has been depleted by circumstances which would not otherwise meet the criteria in s 97 of the FW Act.'¹¹⁸

[135] Section 55(4) permits a modern award to include terms that are 'ancillary or incidental to the operation of an entitlement of an employee under' the NES and terms that 'supplement' the NES, but 'only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to' the NES.

[136] The Act does not specify what it means for a term to be 'ancillary or incidental' or to 'supplement' the NES for the purposes of s.55(4).

[137] The ACTU submits that 'a term which expands the circumstances in which an employee can access personal/carer's leave does not sit comfortably with the ordinary meaning of "ancillary or incidental to the operation of" s 97' of the Act.¹¹⁹ The ACTU also submits that, while the contrary is arguable, such a term is not supplementary to the NES.¹²⁰ As we understand AMIC's submission, AMIC submits that such a term cannot be considered ancillary, incidental or supplementary within the meaning of s.55(4).¹²¹

[138] Commencing in March 2006, the Work Choices amendments¹²² to the then *Workplace Relations Act 1996* (Cth) (WR Act) introduced a set of statutory minimum employment conditions for all national system employees, in the form of the Australian Fair Pay and Conditions Standard (AFPCS).¹²³ This marked a shift to the standardisation of leave entitlements and to legislation rather than awards as the primary source of leave entitlements.

[139] Paid personal/carer's leave arrangements under the AFPCS were similar to those under the *Parental Leave Test Case 2005*,¹²⁴ with 'personal/carer's leave' being defined in s.244 of the WR Act as follows:

'244 For the purposes of this Division, *personal/carer's leave* is:

- (a) paid leave (*sick leave*) taken by an employee because of personal illness, or injury, of the employee; or
- (b) paid or unpaid leave (*carer's leave*) taken by an employee to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of:
 - (i) a personal illness, or injury, of the member; or
 - (ii) an unexpected emergency affecting the member.'

[140] The NES under the Act commenced in January 2010. Key provisions of the personal/carer's leave NES are reproduced earlier. Paid personal/carer's leave entitlements under the NES largely replicate those under the former AFPCS. In contrast to the AFPCS, the NES does not cap the use of paid personal/carer's leave for carer's leave purposes, and casual employees are entitled to unpaid compassionate leave.

[141] In its submission, Ai Group also notes the definition of personal/carer's leave from s.244 of the WR Act (above). Ai Group submits that:

'It cannot be legitimately concluded that the Legislature intended the concept of "personal/carer's leave" to have a wider meaning [in the Act than] ... it had under the WR Act, given the historical context ... and the absence of any indication of this in the Explanatory Memorandum or other Parliamentary materials relating to the *Fair Work Bill 2008*.'¹²⁵

[142] Ai Group further submits that:

'Even though s.97 of [the Act] ... is framed in terms of the circumstances when paid personal/carer's leave can be taken, in effect, the section sets out the meaning of paid personal/carer's leave in a similar manner to s.244 of the WR Act.'¹²⁶

[143] Ai Group concludes that an award term extending paid personal/carer's leave 'to include circumstances beyond those in s.97 ... would be inconsistent with the meaning of the term "paid personal/carer's leave" in the Act.'¹²⁷ Further, Ai Group considers it 'obvious' that such a term 'would represent a major change in the safety net and hence could not be legitimately considered ... an ancillary or incidental term'.¹²⁸ Ai Group submits that such a term cannot 'supplement' the NES, as it is detrimental to an employee for the purposes of s.55(4).¹²⁹

[144] While the Act contains no express definition of paid personal/carer's leave, the historical concept is reflected in the description of the circumstances in which the leave may be taken under s.97 of the Act. To extend paid personal/carer's leave to incorporate family and domestic violence leave might be considered such a significant change to the concept of personal/carer's leave, as to constitute the creation of a new form of leave. If so, it would follow that an award term extending paid personal/carer's leave to incorporate family and domestic violence leave, could not be considered 'ancillary or incidental to the operation of an entitlement of an employee under' the NES, or to 'supplement' the NES for the purposes of s.55(4) of the Act.

[145] A number of parties also contend that an award term extending paid personal/carer's leave to incorporate family and domestic violence leave would be 'detrimental to an employee in any respect, when compared to' the NES within the meaning of s.55(4).

[146] The ACTU submits that such a term would be detrimental to an employee for essentially the same reason as outlined at [134] above.¹³⁰ Ai Group makes a similar submission¹³¹ and ACCI's submission seems to be to the same effect.¹³²

[147] The ACTU submits that the assessment as to whether an award term has a detrimental effect is to be undertaken 'by applying the *Canavan* test' (see [131] above), and cites the Full Bench in *Australian Federation of Air Pilots v HNZ Australia Pty Ltd*¹³³ for that proposition.¹³⁴

[148] ACCI draws attention to the words 'detrimental to an employee *in any respect*, when compared to' the NES in s.55(4) of the Act (emphasis added), and submits:

‘69. Perhaps contrary to the notation in the section, these words should be read to provide an absolute protection of the NES not just as a whole or in concept but in relation to every individual element.

70. The words support the view that elements of the NES cannot be offset by an increased benefit in one area outweighing a detriment in another.’¹³⁵

[149] While ACCI’s second paragraph above accords with a literal reading of s.55(4), the submission does raise an issue with the text of s.55. As perhaps ACCI is acknowledging in its first paragraph, under such a reading it is not clear how the example of an ancillary or incidental term given in paragraph (a) of Note 1 under s.55(4), would be permitted by s.55(4). This example is of a term:

‘under which, instead of taking paid annual leave at the rate required by section 90, an employee may take twice as much leave at half the rate of pay’.

[150] The difficulty is that this term might be said to operate to the detriment of an employee in the respect of payment for annual leave, in comparison to s.90(1) of the NES (which requires, when an employee takes a period of paid annual leave, that the employer pay the employee at the employee’s base rate of pay).

[151] It is at least arguable that an award term extending paid personal/carer’s leave to incorporate family and domestic violence leave would be detrimental to an employee in a respect when compared to the NES. As submitted variously by the ACTU, Ai Group, ACCI and NatRoad, that respect would be that an employee who utilised accrued paid personal/carer’s leave for reasons related to domestic violence and not in circumstances covered by s.97, would have remaining to them a lesser entitlement to take paid personal/carer’s leave than that provided for by ss.96 and 97 of the Act.

[152] A contrary view might be put. It seems counterintuitive that lessening a restriction on the circumstances in which an employee can take paid personal/carer’s leave, could operate so as to deny the employee the full benefit of that leave. In the example at [134] above, the employee chooses to take three days’ paid leave in circumstances related to domestic violence, when, presumably, the only alternative would have been for the employee to seek unpaid leave. If the employee is subsequently unable to take three days’ paid personal/carer’s leave as a carer because her leave accrual has been exhausted, should that consequence be considered a detriment to the employee, when the employee has had the full benefit of 10 days’ paid leave?

[153] The ACTU submissions also raised the possibility that an award term extending paid personal/carer’s leave to incorporate family and domestic violence leave might require, or permit employers to require, employees to utilise paid personal/carer’s leave for reasons related to domestic violence in circumstances not covered by s.97.¹³⁶ We have made no assumption that such an award clause would operate in this manner. In any case, it does not seem to us that employee choice is critical to the view put in the previous paragraph.

Conclusion

[154] As we have sought to demonstrate in our review of the submissions, the issues raised are not without a degree of complexity.

[155] All of the submissions before us contend that the Commission does *not* have jurisdiction to provide for paid personal/carer's leave under the NES to be taken for reasons relating to family and domestic violence in circumstances not covered by s.97. Different reasons are advanced by the parties in support of that proposition.

[156] Given the unanimous position taken by the various parties we do not propose to act on the preliminary view expressed in the Majority Decision at this stage and it is not necessary to express any concluded views on the jurisdictional issue. However, we propose to revisit this issue in the review envisaged in Chapter 6.

[157] In concluding, we note that ACCI submits that '[a]ny change to the NES entitlement to expand conditions of access would require legislative change.'¹³⁷ That submission is, with respect, incorrect. Section 55(2)(b) of the Act permits a modern award or enterprise agreement to include any terms that the award or agreement is 'expressly permitted to include ... by regulations made for the purposes of section 127' of the Act. Section 127 in turn provides:

'127 Regulations about what modern awards and enterprise agreements can do

The regulations may:

- (a) permit modern awards or enterprise agreements or both to include terms that would or might otherwise be contrary to this Part or section 55 (which deals with the interaction between the National Employment Standards and a modern award or enterprise agreement); or
- (b) prohibit modern awards or enterprise agreements or both from including terms that would or might otherwise be permitted by a provision of this Part or section 55.'

[158] It follows that regulations could be made for the purposes of s.127 to expressly permit modern awards, and enterprise agreements, to include a term which extends paid personal/carer's leave to incorporate family and domestic violence leave.

5. Unpaid leave

5.1 The preliminary view

[159] As related earlier, the Majority Decision expressed the preliminary view that ‘all employees should have access to unpaid family and domestic violence leave’.¹³⁸

[160] In the subsequent proceedings a number of the Employer parties contended that we should *not* introduce an unpaid family and domestic violence leave entitlement into the modern award system. Ai Group advanced the following propositions in support of this position:¹³⁹

1. The provision of family and domestic violence leave is a matter appropriately dealt with at the enterprise level, not in the award safety net.
2. In considering what constitutes a fair and relevant minimum safety net, it is not appropriate for the Commission to prioritise some particular social concerns (such as family and domestic violence) over others:

‘Prioritising family and domestic violence within leave entitlements necessarily involves making a value judgment that the problem of family and domestic violence is more pressing and deserving than the myriad of other social problems in society. This is not the role of the Commission. The Commission is being asked to determine, for example, that a victim of family and domestic violence is more deserving of leave than a victim of a serious assault by a stranger. No probative evidence has been led in the proceedings that might facilitate the making of such an assessment.’¹⁴⁰

3. The creation of additional separate forms of leave is a matter for the NES, not the modern award system.
4. The Act provides various forms of leave that can be accessed by employees experiencing family and domestic violence, including annual leave and personal/carer’s leave.
5. The Act provides various forms of protection to employees who are absent from work due to family and domestic violence (including the unfair dismissal and general protections regimes).
6. The modern award system provides employees with access to different forms of flexibility in the event that they need to be absent from work due to family and domestic violence, including time off instead of overtime, make up time and the model flexibility clause.
7. The complexities associated with family and domestic violence render ‘the task of formulating an entitlement to leave for the purposes of a minimum safety net inherently difficult’.

[161] As to proposition 1, the Employer parties contend that the issue of family and domestic violence is a matter better addressed through enterprise bargaining or workplace level policies and procedures, rather than by ‘one size fits all’ modern award term.

[162] In the earlier proceedings, Ai Group adduced evidence that analysed the Workplace Agreements Database (WAD) in relation to terms dealing with family and domestic violence. The WAD is a census database maintained by the Commonwealth Department of Jobs and Small Business that provides information on developments in coverage, wage increases and conditions of employment included in federal collective agreements.

[163] Ms Jenni Mandel, a Workplace Relations Adviser at Ai Group, provided a report analysing enterprise agreements containing domestic/family violence provisions using the WAD (Mandel Report).¹⁴¹

[164] According to Ms Mandel's analysis, 1,149 current agreements (7.9 per cent) as at 30 June 2016 contained a provision dealing with domestic/family violence (not necessarily providing for leave), covering 819,905 employees (37.8 per cent).¹⁴² These agreements covered all 19 ANZSIC industries, with around one-third of the agreements in the 'Health care and social assistance' industry.¹⁴³ Almost three in 10 of the employees covered by these agreements were in the 'Education and training' industry.¹⁴⁴ Around four in five of these agreements were in the private sector, covering 480,941 employees (almost 60 per cent).¹⁴⁵ Over half of the agreements covered more than 100 employees.¹⁴⁶ Around six in seven of the agreements, covering 93.8 per cent of these employees, covered unions.¹⁴⁷

[165] The Mandel Report also showed that 323 enterprise agreements (15 per cent) approved in the first half of 2016 (up to 30 June) contained a provision dealing with domestic violence.¹⁴⁸

- 124 (around 38 per cent) contained paid domestic/family violence leave entitlements;¹⁴⁹
- 21 (6.5 per cent) contained unpaid domestic/family violence leave entitlements;¹⁵⁰ and
- 115 (around 36 per cent) contained provisions allowing access to other forms of leave for domestic/family violence purposes.¹⁵¹

[166] The 323 agreements covered all industries except Mining,¹⁵² with 90 of these agreements in the 'Health care and social assistance' industry and 279 (86.4 per cent) in the private sector.¹⁵³ Almost half covered more than 100 employees¹⁵⁴ and 253 (over three-quarters) covered unions.¹⁵⁵

[167] Ai Group observed that the evidence of Ms Mandel demonstrates that enterprise bargaining has resulted in a number of enterprise agreements including provisions dealing with family or domestic violence.¹⁵⁶ Ai Group also observed that many agreements deal with family and domestic violence differently, with some providing for more than the Amended Claim and others less.¹⁵⁷ Ai Group submitted that the evidence suggests that this matter is capable of being dealt with at the enterprise level.¹⁵⁸

[168] Ai Group submitted that the evidence of Ms Mandel showed that there has been an increasing prevalence of provisions dealing with family and domestic violence in enterprise agreements¹⁵⁹ and that there is a correlation between the inclusion of family and domestic violence provisions and business size.¹⁶⁰

[169] Ai Group argued that the ACTU has ‘advanced very little direct evidence’ that the absence of family and domestic violence leave provisions in enterprise agreements demonstrates ‘employer unwillingness’¹⁶¹ or a ‘widespread refusal to bargain’.¹⁶²

[170] ACCI performed a search on the Commission’s website of enterprise agreements containing the phrase ‘domestic violence’ and identified 1,222 enterprise agreements, of which it reviewed 800.¹⁶³ ACCI submitted from this review that the enterprise agreements address domestic/family violence in different ways, including through access to:

- employee assistance programs;
- existing leave entitlements (e.g. annual and personal/carer’s leave);
- cashing out of annual leave;
- flexible working arrangements or individual flexibility arrangements;
- leave at the employer’s discretion;
- paid leave;
- repatriation leave; and
- unpaid leave.¹⁶⁴

[171] ACCI submitted that this shows that ‘bargaining for these types of clauses is in its infancy’ and that ‘employees and businesses have bargained for [a] variety of enterprise specific entitlements tailored to the specific environment of those enterprises’.¹⁶⁵

[172] ACCI submitted that domestic/family violence leave can and is bargained for through enterprise bargaining,¹⁶⁶ and that many enterprise agreements include domestic/family violence leave entitlements in circumstances where such terms are not a feature of the relevant modern award.¹⁶⁷

[173] The ACTU adduced lay witness evidence from five union officials, who spoke of the difficulty in bargaining in respect of family and domestic violence provisions.¹⁶⁸

[174] The ACTU submitted that there are limitations on drawing conclusions from the WAD, and that no conclusions should be drawn from the analysis of the 1,149 agreements provided by Ms Mandel. The ACTU stated that a limitation of the WAD is its definition of a ‘current agreement’ as an agreement ‘that has not passed its nominal expiry date’. Accordingly, all of the agreements in Ms Mandel’s analysis had nominal expiry dates on or after 30 June 2016.¹⁶⁹ However, pursuant to ss. 54 and 58 of the Act, an agreement remains in operation until it is terminated or replaced by a new agreement.¹⁷⁰ The ACTU contended that there was no information to indicate that the agreements in Ms Mandel’s analysis were representative of all enterprise agreements in operation as at 30 June 2016. Accordingly, ‘no reliable conclusions can be drawn from Ms Mandel’s analysis of the 1,149 agreements at paragraphs 10-25 of her statement that would be applicable to all operational enterprise agreements’.¹⁷¹

[175] The ACTU also submitted that there is no basis on which it could be contended that Ms Mandel’s analysis of 323 enterprise agreements approved between 1 January and 30 June 2016 is representative of all enterprise agreements in operation in that period.¹⁷² The ACTU

submitted that during cross-examination, Ms Mandel could not confirm whether the two sets of enterprise agreements were representative of all enterprise agreements in operation.¹⁷³

[176] As to the prevalence of family and domestic violence provisions in enterprise agreements, we accept that there is some force in the ACTU's submissions as to whether the agreements analysed by Ms Mandel can be viewed as representative of all agreements in operation. The material before us does not establish that the types of clauses in current agreements are representative of clauses found across all agreements in operation in terms of their prevalence, content and context (i.e. industry, business size etc).

[177] It is clear that some employers and employees have successfully negotiated provisions which seek to address family and domestic violence, and that there is significant variation in these provisions. They include provision for:

- paid family and domestic violence leave;
- access to other leave entitlements (such as personal/carer's leave);
- unpaid leave;
- a right to request flexible working arrangements; and
- assistance for supporters and carers of people experiencing family and domestic violence.

[178] It is also clear from the Mandel Report that family and domestic violence provisions are found in agreements in most industries and involving employers of different size (particularly large employers).

[179] However, as the Full Bench observed in the June 2015 *4 yearly review of modern awards – Annual leave decision*:

‘we are conscious of the need to exercise care when assessing the provisions in enterprise agreements in the context of a review of modern awards. Enterprise agreements are negotiated by the parties and approved by the Commission against various statutory criteria. The legislative context relevant to the review of modern awards is quite different.’¹⁷⁴

[180] In our view, the evidence does not support the contention that the matter is better left to enterprise-level negotiation. Family and domestic violence is a serious social issue that impacts on employees and employers in the workplace.

[181] A relevant modern award term will provide a minimum safety net standard that will underpin bargaining. There is no persuasive evidence before us that would lead us to conclude that inserting a term providing unpaid family and domestic violence leave in modern awards would have an adverse impact on the incentive to bargain in relation to this matter.

[182] In its second proposition at [160], Ai Group contends that it is not appropriate for the Commission to prioritise family and domestic violence over other social issues. We disagree. The Majority Decision concluded:

‘While we also accept that there are other matters which might impact on employees in a significant way we are satisfied that the evidence established that the circumstances faced by employees who experience family and domestic violence require a special response.’¹⁷⁵
[Endnotes omitted]

[183] In its third proposition, Ai Group contends that the creation of additional forms of leave – such as unpaid family and domestic violence leave – is a matter for the NES, not the modern award system. We note that during the course of oral argument Ai Group clarified that the proposition put was simply a merit submission, rather than a jurisdictional argument.

[184] We reject that proposition. There is no sound basis for restricting the content of modern awards in the manner contended. The Act expressly provides that modern awards may include terms about ‘leave, leave loadings and arrangements for taking leave’ (s.139(1)(h)).

[185] In its fourth, fifth and sixth propositions, Ai Group contends that the current regulatory framework – in the Act and modern awards – provides a range of protections for employees, and in effect suggests that an award term providing unpaid family and domestic violence leave is not necessary.

[186] We disagree. The same argument, in substance, was considered and rejected in the Majority Decision.¹⁷⁶ It may be accepted that employees experiencing family and domestic violence will be able to access existing entitlements in *some* circumstances. But the existing regulatory framework is not sufficient to address the myriad of circumstances facing employees who experience family and domestic violence. For example, there is no existing safety net entitlement permitting an employee to be absent from work on short notice to address an urgent need to find accommodation so as to remove themselves from harm.

[187] We adopt the conclusion in the Majority Decision:

‘We are therefore, not satisfied that the existing entitlements meet the needs of employees who experience family and domestic violence.’¹⁷⁷

[188] The final proposition advanced by Ai Group – that it is inherently difficult to formulate an unpaid family and domestic violence leave term – does not provide a sound basis for not proceeding to give effect to the preliminary view. Indeed, as demonstrated by subsequent events, the task of formulating a model term may be difficult, but it is far from impossible.

[189] In conclusion, we confirm the preliminary view expressed in the Majority Decision that all employees should have access to unpaid family and domestic violence leave. We later address the modern awards objective and the matters we are required to take into account (ss.134(1)(a)-(h)), but note here that for the reasons which follow, we are satisfied that the variation of modern awards to include the model unpaid family and domestic violence leave term is necessary to achieve the modern awards objective. We note that we have exempted from this general finding the specific awards mentioned in [275], which will be the subject of later proceedings.

[190] We now turn to consider the content of an unpaid family and domestic violence leave model term.

5.2 The model term

[191] The conferences of interested parties held on 13, 18, 19 and 20 October 2017 occurred in the context of the preliminary views expressed in Majority Decision.

[192] In the event that we adhered to the view that there should be a model unpaid family and domestic violence leave term, the conference parties reached agreement on most elements of a model term, as set out below. All parties acknowledged that the proposed model term represents a significant compromise of their respective preferred positions.

[193] For our part, the elements of the proposed model term identified as agreed will be incorporated into the final model term, together with the two matters specified at [195] and [196]. Issues that remained unresolved at the conferences relating to the leave entitlement are discussed further at [197] onwards.

Family and Domestic Violence Leave Model Term

1 Definitions (Agreed)

1.1 In this [*model term*]:

family and domestic violence means violent, threatening or other abusive behaviour by a family member of an employee that seeks to coerce or control the employee and that causes them harm or to be fearful.

family member means:

- (a) a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or
- (b) a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee; or
- (c) a person related to the employee according to Aboriginal or Torres Strait Islander kinship rules.

1.2 A reference to a spouse or de facto partner in the definition of ***family member*** in clause 1.1 includes a former spouse or de facto partner.

2 Entitlement to unpaid family and domestic violence leave (Partial Agreement)

A number of matters concerning the extent of the entitlement remain in dispute:

- Is an employee entitled to unpaid leave for *each occasion* that satisfies clause 3 and, if so, is there a limit on the number of days of unpaid leave that can be taken on each occasion?
- Is the entitlement to be limited to a specified quantum of unpaid leave *per annum* and, if so, what is that quantum?
- In relation to any specified quantum of unpaid leave entitlement:
 - Does the entitlement accrue progressively during a year of service or is it simply an entitlement in each 12 month period?

- Does the entitlement accumulate from year to year?
 - How does the entitlement 'work' in relation to part-time employees?
 - Does the entitlement to take unpaid leave apply to casuals?
-
- Should an employee be required to exhaust other forms of leave (such as personal/carer's leave) before becoming entitled to unpaid family and domestic violence leave?

In the event that the entitlement to unpaid family and domestic violence leave is limited to a specified quantum of unpaid leave, then the following note is agreed:

Note: A period of family and domestic violence leave may be less than a day by agreement between the employee and the employer.

3 Taking Unpaid Leave (Agreed)

An employee experiencing family or domestic violence may take unpaid family and domestic violence leave if the employee needs to do something to deal with the impact of the family and domestic violence and it is impractical for the employee to do that thing outside their ordinary hours of work.

Note: The reasons for which an employee may take leave include making arrangements for their safety or the safety of a family member (including relocation), attending urgent court hearings, or accessing police services.

4 Notice and evidence requirements (Agreed)

Notice

4.1 An employee must give their employer notice of the taking of leave by the employee under this [*model term*].

4.2 The notice:
(a) must be given to the employer as soon as practicable (which may be a time after the leave has started); and
(b) must advise the employer of the period, or expected period, of the leave.

Evidence

4.3 An employee who has given their employer notice of the taking of leave under this [*model term*] must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for a purpose specified in clause 3.

Note: Depending on the circumstances such evidence may include a document issued by the police service, a court or a family violence support service, or a statutory declaration.

5 Confidentiality (Agreed)

5.1 Employers must take steps to ensure information concerning any notice given or evidence provided under clause 4 is treated confidentially, as far as it is

reasonably practicable to do so.

- 5.2 Nothing in this clause prevents an employer from disclosing information provided by an employee if the disclosure is required by an Australian law or is necessary to protect the life, health or safety of the employee or another person.

Note: Information concerning an employee's experience of family and domestic violence is sensitive and if mishandled can have adverse consequences for the employee. Employers should consult with such employees regarding the handling of this information.

6 Compliance (Agreed)

An employee is not entitled to take leave under this [*model term*] unless the employee complies with this [*model term*].

[194] Two further matters were agreed during the conferences on 19 and 20 October 2017.

[195] First, in the event that we determined it was appropriate to express the unpaid leave entitlement in terms of a specified number of days per annum (as opposed to the ACTU's position that unpaid leave be available on a per occasion basis) it was generally agreed that a note be inserted in the model term to the effect that an employer and employee may agree to an additional period of unpaid leave.¹⁷⁸

[196] Second, in relation to the effect of taking unpaid leave pursuant to the model term, it was generally agreed that s.22 of the Act would apply. In short; the period of unpaid leave taken by an employee would not count as service for the purpose of any other leave entitlements, but such unpaid leave would not break the employee's continuity of service.¹⁷⁹

[197] We now turn to the major issue in contention; the amount of the leave entitlement.

[198] The ACTU's primary submission is that unpaid family and domestic violence leave should be available on an uncapped, per occasion basis. Two main arguments are advanced in support of this submission.¹⁸⁰

[199] First, the requirement for such leave is varied and unpredictable. As counsel for the ACTU puts it:

'This position is justified by reference to the following matters. Family and domestic violence leave should be available to enable affected employees to take necessary steps to ensure their safety and wellbeing without putting their employment at risk. A person's need for leave in these circumstances can be unpredictable and varied and it is important that there is sufficient flexibility to enable the employee to take time off as they need.'¹⁸¹

[200] Second, there are comparable provisions in the Act that provide for unpaid leave on a per occasion basis, namely:

- unpaid special maternity leave (s.80);
- unpaid carer's leave (s.102);

- compassionate leave for casuals (s.104);
- community service leave (ss.108-110).¹⁸²

[201] The Employer parties are opposed to the ACTU proposal for reasons including:

- the difficulty of ‘localising the notion of “the occasion”, giving rise to the entitlement to unpaid leave’;¹⁸³ and
- that it fails to strike a reasonable balance between the interests of employees and employers. The Employer parties submit that the proposal effectively confers an unlimited entitlement on employees, and note that employee absences, particularly at short notice, can be disruptive, especially for small businesses. The Employer parties submit that the proposal would be contrary to the efficient and productive performance of work (s.134(1)(d)) and would have a detrimental impact on business (s.134(1)(f)).¹⁸⁴

[202] In our view, it is appropriate that we take a cautious approach to determining this issue, given that we are dealing with the parameters of a *new* entitlement to unpaid leave in circumstances where there is considerable uncertainty about the likely utilisation of the entitlement.

[203] The NES provides for unpaid leave on an uncapped per occasion basis in certain circumstances. But those circumstances are relatively confined. For example, casual employees are entitled to two days’ unpaid compassionate leave for each ‘permissible occasion’ - defined as being when a member of the employee’s immediate family or household:

- ‘(a) contracts or develops a personal illness that poses a serious threat to his or her life; or
- (b) sustains a personal injury that poses a serious threat to his or her life; or
- (c) dies.’¹⁸⁵

[204] In the present circumstances, we are not persuaded that the provision of an uncapped per occasion entitlement is appropriate. The model term should specify the maximum annual entitlement to unpaid leave. A specified annual entitlement will also give businesses greater certainty about the extent of their obligations.

[205] The next issue is the quantum of such an annual entitlement. In the event that we rejected its primary position, the ACTU submitted that it would be appropriate to determine an annual entitlement of 20 days’ unpaid leave, on the basis that this would meet the needs of employees experiencing particularly severe and life threatening family and domestic violence who require time away from work to make arrangements for their safety and the safety of their children.¹⁸⁶ The ACTU acknowledged that it was unlikely that the majority of affected employees would require 20 days’ leave per annum.¹⁸⁷

[206] Ai Group advocated a cautious approach and submitted that unpaid leave should be limited to two days per annum which, it submitted, aligned with other relevant entitlements such as unpaid carer’s leave and compassionate leave.¹⁸⁸ MEA submitted that a maximum of

two days' unpaid leave per occasion would be appropriate.¹⁸⁹ AMIC submitted that employees should only be granted one day of unpaid leave or alternatively, no more than two days' unpaid leave.¹⁹⁰

[207] ACCI submitted that two to three days per annum would be an appropriate quantum of unpaid leave.

[208] ACCI noted that the Commission could seek guidance from the unpaid leave entitlements in the NES¹⁹¹ including: unpaid carer's leave; unpaid parental leave; community service leave; jury service leave; unpaid special maternity leave; unpaid no safe job leave, and unpaid pre-adoption leave. ACCI submitted that statutory unpaid leave was overwhelmingly limited in quantum and the purpose for taking the leave was clearly defined and was triggered by a specific event or cause.¹⁹² ACCI noted that these leave types did not accrue, were event-driven and that leave was not available if some other form of leave was available and the employer directed that leave to be taken.¹⁹³ Australian Business Industrial and the New South Wales Business Chamber and the Pharmacy Guild of Australia adopted and supported ACCI's submissions.¹⁹⁴

[209] NatRoad's primary submission was that there should be no entitlement to unpaid family and domestic violence leave in either the *Road Transport and Distribution Award 2010* or the *Road Transport Long Distance Award 2010*,¹⁹⁵ but in the alternative, submitted that the quantum of leave should be at the 'lower end of the spectrum'.¹⁹⁶

[210] We accept ACCI's contention that reference to the NES can provide guidance in framing the content of the unpaid family and domestic violence leave model term. The 'notice and evidence' requirements in the model term draw heavily from the NES (see ss.80(2)-(5); 85(4)-(6); 107 and 110). But the quantum of the unpaid leave entitlements in the NES provide little assistance in determining the quantum in the model term. This is because the NES usually provides for unpaid leave on a 'per occasion' basis, as opposed to the annual limit to be prescribed in the model term.

[211] For example, s.102 provides an entitlement of '2 days of unpaid carer's leave for each occasion (a permissible occasion)' (as defined in s.102). Plainly there may be more than one 'permissible occasion' in a 12 month period; indeed there is no annual cap on the entitlement to unpaid carer's leave.

[212] Similarly, s.104 provides an entitlement to '2 days of compassionate leave for each occasion (a permissible occasion)'. Compassionate leave is provided as paid leave for employees other than casuals; casuals have an entitlement to unpaid compassionate leave.

[213] Some parts of the NES provide an entitlement to unpaid leave in defined circumstances, with no limit on the amount of unpaid leave that may be taken. For example, Division 8 of Part 2-2 of the Act provides for unpaid community service leave. Types of 'eligible community service activity' covered are: jury service; voluntary emergency management activity, and activities prescribed by the regulations¹⁹⁷ (s.109(1)).

[214] Section 108 provides that employees who engage in 'eligible community service activity' are entitled to be absent from their employment 'for a period' if, among other things:

- '(b) Unless the activity is jury service – the employee's absence is reasonable in all the circumstances.'

[215] Hence, the relevant limitation on the amount of unpaid leave for a community service activity (other than jury service) is that it be ‘reasonable in all the circumstances’. There is no limit on the extent of the absence if it relates to jury service.¹⁹⁸

[216] It follows that, contrary to some of the Employer parties’ submissions, the NES provisions relating to unpaid personal/carer’s and unpaid compassionate leave provide no support for the proposition that the model term should limit the entitlement to two days’ unpaid leave per annum.

[217] During the course of oral argument,¹⁹⁹ Ai Group referred to a report by Breckenridge et al titled *Implementation of domestic violence clauses – an employer’s perspective*²⁰⁰ (the ‘Breckenridge Report’) in support of its contention that the entitlement in the model term be limited to two days’ unpaid leave per annum. The Breckenridge Report was prepared by the Gendered Violence Research Network at the University of New South Wales; was cited in the submissions of the Australian Human Rights Commission and the ACTU in these proceedings,²⁰¹ and is one of the reports listed in the Research Reference List.

[218] The ACTU summarises the Breckenridge Report as follows:

‘In November 2014, the School of Social Sciences at the University of New South Wales, investigated the implementation of domestic violence clauses in select industrial instruments in order to analyse the effects. This included analysing the number of requests for family violence leave. The UNSW Report showed that 35.3 per cent of employers had received a request for family violence related leave in the past 12 months. In other words, 64.7 per cent of employers covered by agreements with domestic violence had *no* family violence related leave requests.

Of those that had requests, the average time off for paid leave in the past 12 months was 43 hours (ranging between 8 and 202 hours). The average time off for unpaid leave was in the past 12 months was 19 hours (ranging between one and 65 hours).²⁰² The UNSW Report also found that the most typical period of leave requested was two to three days (40 per cent), followed by 25.7 per cent of one day or less, 11.4 per cent of one week or more and 22.9 per cent indicated there was no pattern.

In summary, the UNSW Report showed that where employers have implemented family violence entitlements, the number of employees who access the leave, and the number of days those employees request as leave, is low. Further, none of the organisations that participated in the survey reported any significant financial cost associated with family violence leave.’²⁰³

[219] The ACTU accurately summarises the Breckenridge Report. Table 2 from the Breckenridge Report is included below as Table 2:

Table 2
Domestic Violence Clauses and Leave

Workplace DV clause in operation	%	n
More than 12 months	76.2	77
Less than 12 months	23.8	24
DV leave requested in past 12 months	%	n
Yes	35.3	36
No	64.7	66
Hours of leave requested in past 12 months	Mean	SD
Paid (n=31)	42.8	42.1
Unpaid (n=24)	19.3	30.6
Typical amount of leave taken	%	n
1 day or less	25.7	9
2 to 3 days	40.0	14
1 week or more	11.4	4
No pattern	22.9	8

[220] The survey which is the subject of the Breckenridge Report sought to collect qualitative and quantitative data from a potential sample of 450 workplaces that have family and domestic violence leave entitlements ‘in their workplace agreements, awards or directives.’²⁰⁴

[221] Table 2 above reports the responses to a question put to survey respondents about their perceptions of the amount of time off (paid and unpaid) that was provided to individuals who requested leave under the family and domestic violence clause applicable to their organisation. The Breckenridge Report summarises the responses as follows:

‘They reported that the average time off for paid leave in the past 12 months was 43 hours and ranged from 8 to 202 hours. In contrast, the average amount of unpaid leave reported in the past 12 months was 198 hours, and ranged from 1 to 912 hours. However, this large number was influenced by one extreme outlier where a respondent reported 912 hours of unpaid leave, and the removal of this extreme case lowered the average time for unpaid leave to 19 hours (ranging from 1 to 65 hours). In other words, the average time off for unpaid leave was just under half of the average time off for paid leave reported by the respondents.’²⁰⁵

[222] While it is not clear from Table 2, it appears that the data on the ‘typical amount of leave taken’ refers to the leave taken *per incident*, not the amount of leave taken *per annum*. This explains the discrepancy between the ‘hours of leave requested in the past 12 months’ and the fact that the typical amount of leave taken was one to three days (i.e. 65.7 per cent reported ‘1 day or less’, or ‘2 to 3 days’). So much is clear from the following statement in the Breckenridge Report, under the heading ‘Key Learnings and Future Directions’:

‘In terms of the typical amount of leave requested per incident, just under half of the respondents indicated that employees typically requested two-to-three days (40%; n=14).’²⁰⁶ [Emphasis added]

[223] Four observations may be made about the findings of the Breckenridge Report.

[224] First, the average number of hours of unpaid leave requested in the past 12 months was 19.3 hours (or over two days), with survey responses ranging from one to 65 hours.

[225] Second, the typical (i.e. 40 per cent of respondents) amount of leave taken *per incident* was two to three days.

[226] Third, the Breckenridge Report does not differentiate between survey responses on the basis of whether the workplace provides both paid and unpaid leave, or only unpaid leave. Hence, the responses on unpaid leave may under-report the extent of the total leave taken in circumstances where an enterprise provides both paid and unpaid leave. The Breckenridge Report states that the average number of *paid* hours requested over the past 12 months was 42.8 hours (over five days).

[227] Finally, the results may be affected by the characteristics of the industries in which the survey respondents operate (that is, if the relevant industries employ predominately female employees then the results may not be representative of the utilisation of such leave across the entire labour force). Unfortunately, the information provided in the Breckenridge Report does not enable us to reach any conclusions in that regard.²⁰⁷

[228] The above observations do not support Ai Group's contention that the entitlement in a model term should be limited to two days' unpaid leave per annum. This is because the Breckenridge Report concludes that the typical extent of leave taken *per incident* is two to three days. Further, based on the evidence before us some employees experiencing family and domestic violence will experience more than one such incident in a 12 month period.²⁰⁸

[229] We note that there is other evidence before us reflecting the experience of individual employers and employees. ACCI took us to some of that evidence during the course of closing oral argument,²⁰⁹ including Ms Eckersley's evidence regarding the experience of PwC.

[230] PwC's 'Family and Domestic Violence and Sexual Assault Support Policy' provides up to 10 days' paid leave per financial year 'to attend medical or support services, appointments, counselling, police appointments, legal proceedings, arrange to relocate and/or engage in other activities related to the effects of family and domestic violence or sexual assault'.²¹⁰

[231] In the course of oral argument, ACCI referred to the following extract from Ms Eckersley's cross-examination:

'Mr Arndt: Up to 10 days, and that's the guaranteed leave amount. There's some discretion in the PwC policy to go further but it's a 10 day entitlement?

Ms Eckersley: Yes we don't use language like "guaranteed" but it is up to 10 days if people - if we believe - yes, when someone discloses to us, then it's up to 10 days. Yes, I'm drawing that distinction because as I said of our current cases, if you like, there has been some leave but it hasn't been a full - it's not necessarily the full 10 days. So there has been people - there have been people take two days.'²¹¹

[232] ACCI submitted that the 'gist' of this part of Ms Eckersley's evidence was that PwC's actual experience of the amount of leave taken pursuant to their policy was two days.²¹² We disagree; that is *not* Ms Eckersley's evidence. Ms Eckersley was responding to the

proposition that the PwC Policy provided for an entitlement to 10 days' paid leave. She was not being asked about PwC's experience of employee's accessing the policy. In reply to the question put, Ms Eckersley simply observed that some employees have accessed the leave entitlement, though 'not necessarily the full 10 days' and that there have been employees who have taken two days. The answer to the next question put to Ms Eckersley supports the proposition that she was not saying the average utilisation was two days and employees had not accessed the full entitlement:

'Mr Arndt: So the full scope of the policy hasn't been necessary as yet?

Ms Eckersley: I'm going to decline to answer that on the basis of the confidentiality.'²¹³

[233] We also note that during the course of her examination in chief, Ms Eckersley said that PwC had received five requests to access a combination of leave and other support under the PwC Policy.²¹⁴ However, as noted by Ms Eckersley in her statement, there may be other factors which explain the low level of utilisation of the entitlement:

'I also suspect, but have no way of knowing, that some staff experiencing family and domestic violence or sexual assault may have made no mention of what they were experiencing, and instead found it easier to just take other forms of leave, like annual leave or personal carer's leave, or just resign than disclose the reason for absences or diminished performance.'²¹⁵

[234] It seems to us that evidence of the experience of individual employers and employees in utilising an entitlement to family and domestic violence leave needs to be treated with some caution. Their experience is no doubt reflective of the workplaces concerned, the extent of other leave entitlements and their personal circumstances. While useful, such evidence is indicative or anecdotal only and cannot be extrapolated to the labour force generally.

[235] Having regard to the evidence about the impact on employees of family and domestic violence; the indicative evidence of the utilisation of existing family and domestic violence leave entitlements, and the parties' submissions, we are of the view that five days' unpaid leave per annum represents a fair and relevant minimum safety net entitlement.

[236] Having determined the quantum issue, we now turn to consider some related issues:

- Does the entitlement accrue progressively during a year of service or is it simply an entitlement in each 12 month period?
- Does the entitlement accumulate from year to year?
- How does the entitlement apply to part-time employees?
- Does the entitlement apply to casual employees?

[237] It is convenient to deal with the last issue first. The preliminary view in the Majority Decision was that '*all employees* should have access to unpaid family and domestic violence leave'. Consistent with the preliminary view, the ACTU submitted that casuals should have an entitlement to unpaid family and domestic violence leave, arguing that there was no sound reason to deny them a right to be absent for the purposes of attending to matters associated with family and domestic violence.²¹⁶

[238] There were a range of views among the Employer parties.

[239] Ai Group's primary submission was that casual employees should not be entitled to unpaid family and domestic violence leave. Ai Group advanced the following argument in support of its primary position:

‘Such employees receive a casual loading to compensate for the fact that they are not entitled to most forms of leave that apply to full-time and part-time employees’.²¹⁷

[240] NatRoad similarly opposed casual employees having an entitlement to unpaid leave²¹⁸ and argued that casual employees generally had a right to refuse work and that the casual loading compensated for the lack of entitlement to most forms of leave.²¹⁹

[241] In the event that its primary submission was not accepted, Ai Group argued that access to unpaid leave should be restricted to ‘long term’ casuals (as it is in s.67). A long term casual employee is defined in s.12:

‘a national system employee of a national system employer is a *long term casual employee* at a particular time if, at that time:

- (a) the employee is a casual employee; and
- (b) the employee has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months.’

[242] During the course of closing oral argument, Ai Group advanced the following submission in support of its alternative position:

‘That proposal in one sense strikes a middle ground that we say is much more workable. Our primary position is that all casuals should be exempt, as I said it's a radical step to start introducing leave for casuals into the award but - and we say unwarranted but this would be a more modest compromised position.’²²⁰

[243] ACCI does not oppose unpaid family and domestic violence leave being available to casual employees, noting that such an outcome was consistent with access to unpaid leave in the NES.²²¹

[244] AMIC submitted that in-principle it opposed casual employees being entitled to any unpaid family and domestic violence leave,²²² but that if unpaid leave were to be granted, it should be limited to regular and systematic casual employees.²²³ MEA also submitted that casual employees who are engaged on a regular and systematic basis should be able to access unpaid family and domestic violence leave, consistent with a casual employee's entitlement to compassionate leave and unpaid carers' leave.²²⁴

[245] We have decided that the model term entitlement to five days' unpaid family and domestic violence leave will apply to *all* employees. We make two points in this regard.

[246] First, in the NES *unpaid* leave entitlements generally apply to ‘*all* employees’; whereas NES *paid* leave entitlements are restricted to ‘employees (other than casuals)’. As mentioned earlier, reference to the NES can assist in providing guidance in framing the content of the model term.

[247] Second, 51 per cent of award-reliant female employees are employed on a casual basis,²²⁵ hence to exclude casuals from the scope of the model term would mean that a significant proportion of the employees most likely to need the protection of a minimum safety net entitlement to family and domestic violence leave would not be entitled to access the entitlement.

[248] We also observe that the proposition advanced by Ai Group and others based on the casual loading is without merit. In no sense could the casual loading be said to compensate casual employees for the fact that they would not have an entitlement to five days' unpaid leave under the model term. So much is clear from an analysis of the decisions which have set the casual loading at 25 per cent.²²⁶

[249] We now turn to the remaining three questions relating to quantum set out at [236]. To some extent these issues are interrelated, and the positions of the respective parties were dependent on the quantum of unpaid leave that was determined.

[250] For example, Ai Group's position as to whether the entitlement should apply pro-rata to part-time employees depended on the quantum of the entitlement – if, for example, the standard was 10 days' unpaid leave then this should apply to part-time employees on a pro-rata basis, but if we accepted Ai Group's position of two days' unpaid leave there would be no need to pro-rata the entitlement.²²⁷

[251] ACCI advanced a similar submission as to whether the entitlement accrues progressively during the year or whether it is available, in full, upon commencement:

'My clients didn't get particularly hot under the collar about the process of accumulation. It seemed to follow that if it is something in the order of three days the grant being available upon the commencement of employment really doesn't cause a lot of problems.

It is also the case that some of the other grants of unpaid leave appear to be available at the commencement of employment, and again relying heavily on some of the NES propositions in our submissions we really didn't think that an elaborate accumulation process was necessary in the context of the three days we advanced.'²²⁸

[252] In considering whether to provide for accrual and pro-rata entitlements we are also concerned to ensure that the model term is simple and easy to understand. It is, as Ai Group put it, a 'balancing act'.²²⁹

[253] In seeking to strike an appropriate balance we have decided that the unpaid leave entitlement:

- will be available *in full* at the commencement of each 12 month period rather than accruing progressively during a year of service;
- will *not* accumulate from year to year; and
- will be available in full to part-time and casual employees (i.e. not pro-rated).

[254] This is consistent with our view that the purpose of the unpaid leave entitlement is to enable employees to be absent from work when they need to do something to deal with the

impact of family and domestic violence. It is not a reward for service (such as annual leave), but a needs-based entitlement (similar to unpaid carer's leave in s.102).

[255] We also note that this approach is broadly consistent with the treatment of unpaid leave entitlements in the NES.

[256] We now turn to the remaining contested issue: the interaction between the new entitlement to unpaid family and domestic violence leave and other forms of leave.

[257] The ACTU contended that there should be no requirement for employees to utilise any available paid leave entitlements before accessing unpaid family and domestic violence leave.²³⁰ In support of that contention, the ACTU submitted:

- the term sought is unnecessary as award-reliant workers are low paid and are unlikely to take unpaid leave if paid leave is available;
- any such request will reduce the employee's entitlement to annual and personal/carer's leave 'meaning that women in particular will have less access than their male counterparts to leave for illness and leisure';²³¹
- comparable unpaid leave provisions in the NES do not require employees to take paid leave even when it is available (see s.80, unpaid special maternity leave);
- requiring an employee to first access their paid leave entitlements is 'likely to cause confusion which of course tells against the need for a simple and easy to understand modern award system, and this is because the effect of family and domestic violence on an employee cannot easily be compartmentalised between personal injury or illness on one hand and non-personal injury matters on the other'.²³²

[258] The Employer parties generally contend that unpaid family and domestic violence leave should not be available if the employee is able to access paid personal/carer's leave. As ACCI puts it:

'The general guidance from the Act supports the view that an employee should not take unpaid leave when another form of paid leave is available; in this case personal/carer's leave which could be triggered in many circumstances involving domestic violence.'²³³

[259] Ai Group makes a similar point, noting that it is consistent with the approach in s.103(3) regarding access to unpaid carer's leave.²³⁴

[260] ACCI made an additional point during the course of closing oral argument:

'Our real problem though is this; if you're going to say that you can now take these, in our case three unpaid days, as what is in effect personal leave or carer's leave this case becomes a very different case. This all of a sudden is a case which says an employee should have more personal leave and carer's leave rather than the case about domestic violence per se. Domestic violence or an occasion of domestic violence obviously is the motivating factor, but you would actually be saying we have made a positive decision to supplement the National Employment Standard for personal carer's leave and allow people additional unpaid personal carers leave, but for a particular reason.'²³⁵

[261] As a practical matter, we think that award-reliant employees are likely to access any available paid leave entitlements before utilising an entitlement to unpaid family and domestic violence leave. But we are not persuaded that we should mandate such an approach.

[262] In our view, the Employer parties' reliance on the NES unpaid carer's leave entitlement is misplaced. We note that an employee is entitled to two days' unpaid carer's leave for each permissible occasion, subject to s.103(3):

'(3) An employee cannot take unpaid carer's leave during a particular period if the employee could instead take paid personal/carer's leave.'

[263] But two things should be noted about the NES entitlement to unpaid carer's leave.

[264] First, the NES provides an entitlement to *paid* carer's leave in the same circumstances in which there is an entitlement to *unpaid* carer's leave (compare ss.97(b) and 102). In contrast, the model term provides for unpaid leave in only a limited subset of circumstances in which paid personal/carer's leave would be available.

[265] Second, the NES unpaid carer's leave entitlement is two days 'for each occasion'. There is no annual cap on the NES entitlement to unpaid carer's leave (unlike the position under the model term).

[266] We accept that there is some force in ACCI's submission that not requiring employees to first access any paid personal/carer's leave entitlement will amount to supplementing the NES, by allowing employees to access additional unpaid personal/carer's leave, but for a particular reason. We have taken the submission into account, but we are not persuaded that a term requiring employees to access other paid leave entitlements before utilising an entitlement to unpaid family and domestic violence leave is necessary, given that in practice employees are likely to access paid leave entitlements first in any event.

[267] To require employees to access any paid personal/carer's leave entitlement before accessing unpaid family and domestic violence leave will also introduce an unwarranted degree of complexity into the award term.

[268] We also accept that such a provision is likely to have, as the ACTU submits, a detrimental impact on women.

[269] We have determined all of the contested issues in relation to the unpaid family and domestic violence leave model term. We will finalise the drafting of the model term in the coming weeks. The substantive content of the model term is known now, as the final version will be based on the agreed terms and the issues we have determined. We now turn to consider whether such a model term is a 'permitted term' and whether the inclusion of such a term in modern awards is necessary to achieve the modern awards objective.

5.3 Jurisdiction and the modern awards objective

[270] We are satisfied that the model term is a permitted term within the meaning of s.136(1)(a). Section 139(1)(h) provides:

‘Terms that may be included in modern awards—general

(1) A modern award may include terms about any of the following matters:

...

(h) leave, leave loadings and arrangements for taking leave.’

[271] Further, s.142(1) provides:

‘Incidental terms

(1) A modern award may include terms that are:

- (a) incidental to a term that is permitted or required to be in the modern award; and
- (b) essential for the purpose of making a particular term operate in a practical way.’

[272] Insofar as the model term provides an entitlement to five days’ unpaid family and domestic violence leave, it is a term ‘about ... leave’, within the meaning of s.139(1)(h). The other elements of the model term, such as the definitions, notice and evidence requirements and confidentiality, are incidental to the unpaid leave entitlement and are essential for the purpose of making that term operate in a practical way. No party before us took a contrary view.

[273] As noted at [19], the August 2017 Statement made clear that:

‘if a model term(s) is determined as part of these proceedings and we are satisfied that such a term is necessary to achieve the modern awards objective then it will be inserted into each modern award except those modern awards [for] which a party has indicated a preference for a different approach’.²³⁶

[274] The August 2017 Statement also confirmed that the *Australian Government Industry Award 2016* would be included in the current proceedings and that the inclusion of any model term arising from these proceedings in the remaining enterprise and State reference public sector modern awards will also be considered during the review of those awards. The review of those instruments will occur after the current technical and drafting processes for the Group 1 to 4 awards are substantially complete.²³⁷

[275] In response to the August 2017 Statement, the APSC²³⁸ and NatRoad²³⁹ both made submissions in relation to certain award and industry-specific matters. The APSC submits that it is not necessary to include specific clauses in respect of family and domestic violence leave in the *Australian Government Industry Award*. NatRoad does not support the inclusion of any model term in the *Road Transport and Distribution Award 2010* or the *Road Transport (Long Distance Operations) Award 2010*.²⁴⁰

[276] The three awards mentioned will be the subject of later proceedings to determine whether it is necessary to vary those awards to insert the model term. We now turn to the remaining 119 modern awards listed in **Attachment C**.

[277] As mentioned in Chapter 2, before varying a modern award the Commission must be satisfied that if the modern award is varied in the manner proposed then it would only include terms necessary to achieve the modern awards objective.

[278] The modern awards objective is to ‘ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account’ the particular considerations identified in s.134(1)(a) to (h). We now turn to the s.134 considerations.

[279] Section 134(1)(a) requires that we take into account ‘relative living standards and the needs of the low paid’. A threshold of two-thirds of median full-time wages provides a suitable benchmark for identifying the ‘low paid’ for the purpose of s.134(1)(a).²⁴¹

[280] The majority of low paid employees are award-reliant and some of these employees are likely to be affected by family and domestic violence. The provision of five days’ unpaid family and domestic violence leave is likely to assist the needs of the low paid. The model term will enable employees affected by family and domestic violence to take unpaid leave if they need to do something to deal with the impact of the violence – such as making arrangements for their safety or the safety of their children – without affecting their employment. This consideration is a factor in favour of varying modern awards to include the model term.

[281] Section 134(1)(b) requires that we take into account ‘the need to encourage enterprise bargaining’. As observed earlier, there is no persuasive evidence before us which would lead us to conclude that inserting a term providing for unpaid family and domestic violence leave would have an adverse impact on the incentive to bargain in respect of this matter. However, we would also observe that the evidence does not persuade us that such a term would necessarily *encourage* enterprise bargaining.

[282] Section 134(1)(c) requires that we take into account ‘the need to promote social inclusion through increased workforce participation’. The use of the conjunctive ‘through’ makes it clear that in the context of s.134(1)(c), social inclusion is a concept to be promoted exclusively ‘*through* increased workforce participation’. As the Expert Panel observed in the *2012-2013 Annual Wage Review decision*²⁴² *obtaining employment* is the focus of this consideration. But in our view social inclusion may also be promoted by assisting employees to *remain in employment*.

[283] As shown in the PSS, around 62 percent of women who have experienced family and domestic violence in the 12 months prior to the survey were in paid work. The provision of unpaid family and domestic violence leave is likely to assist employees to remain in employment while they deal with the impact of the violence. As related earlier, employment is an important pathway out of violent relationships. Sustained periods of employment can provide financial security, independence, social networks and increased self-esteem.

[284] The Majority Decision stated:

‘We accept the ACTU’s submission that the provision of paid family and domestic violence leave would promote social inclusion. We accept the evidence which was largely unchallenged about the impact of family and domestic violence on employees’ workforce participation and, in particular on women’s workforce participation.’²⁴³

[285] We note that the above finding relates to the provision of *paid* family and domestic violence leave. It is also apposite to the provision of *unpaid* family and domestic violence leave. We adopt the finding. The consideration in s.134(1)(c) supports the variation of modern awards to include the model term.

[286] It is convenient to deal with ss.134(1)(d) and (f) together.

[287] Section 134(1)(d) requires that we take into account ‘the need to promote flexible modern work practices and the efficient and productive performance of work’ and s.134(1)(f) requires that we take into account ‘the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden’.

[288] The word ‘productivity’ in s.134 has the conventional meaning it is given in economics of the number of units of output per unit of input. Productivity is a measure of the volumes or quantities of inputs and outputs, not the cost of purchasing those inputs or the value of outputs generated. The price of inputs, including the cost of labour, raises separate considerations relating to business competitiveness and employment costs.²⁴⁴

[289] We also note that s.134(1)(f) is expressed in very broad terms; it refers to the likely impact of any exercise of modern award powers ‘on business, *including*’ (but not confined to) the specific matters mentioned, that is, ‘productivity, employment costs and the regulatory burden’.

[290] The extent of the impact of the model term on business will depend upon the extent to which the entitlement is utilised in practice. As the extent of utilisation is unknown, it follows that it is difficult to predict the effect of the model term on business.

[291] However, we accept that, to the extent that it is accessed by employees, the new entitlement to unpaid leave will have some adverse impact on business. It will increase employment costs and may adversely impact on the efficient and productive performance of work. But we doubt that the taking of this unpaid leave entitlement would have any significant impact on productivity.

[292] The variation of modern awards to insert the model term will also give rise to some, albeit not significant, increase in the regulatory burden upon business in administering the leave entitlement.

[293] The considerations in ss.134(1)(d) and (f) tell *against* varying modern awards to include the model term.

[294] Section 134(1)(da) requires that we take into account the ‘need to provide additional remuneration’ for:

- ‘(i) employees working overtime; or

- (ii) employees working unsocial, irregular or unpredictable hours; or
- (iii) employees working on weekends or public holidays; or
- (iv) employees working shifts.’

[295] It is common ground that this consideration is not relevant in the present context.

[296] Section 134(1)(e) requires that we take into account ‘the principle of equal remuneration for work of equal or comparable value’. The expression ‘equal remuneration for work of equal or comparable value’ is defined in s.302(2) to mean ‘equal remuneration for men and women workers for work of equal or comparable value’.

[297] We accept that family and domestic violence is a gendered phenomenon, in that it predominately affects women. But s.134(1)(e) is concerned with the provision of equal *remuneration* in particular, not the impact of an award term on women generally. The consideration in s.134(1)(e) is not relevant in the present context.

[298] Section 134(1)(g) requires that we take into account ‘the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards’.

[299] We accept that the variation of modern awards to insert the model term will add a degree of complexity to modern awards insofar as it will give rise to an additional employee entitlement (and a corresponding employer obligation). However, the decisions we have made in relation to the content of the model term are intended to make the provision simple and easy to understand.

[300] Section 134(1)(h) requires that we take into account ‘the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy’. The matters mentioned in s.134(1)(h) focus on the aggregate (as opposed to sectorial) impact of an exercise of modern award powers.

[301] For the reasons given above the impact of the model term is difficult to predict. But it is an *unpaid* leave entitlement which is only accessible in particular circumstances. We note that the model term may also have some positive economic effects, in terms of allowing women affected by family and domestic violence to remain in employment.

[302] We doubt that the variation of modern awards to insert the model term will give rise to any significant adverse impact on the national economy.

[303] We have taken into account the considerations in ss.134(1)(a) to (h) and are satisfied that the variation of modern awards to include the model term is necessary to ensure that such awards achieve the modern awards objective. As we have mentioned, retaining employment is an important pathway out of violent relationships. Conversely, a lack of financial security has an adverse impact on the ability to recover from family and domestic violence. Absent an entitlement to unpaid family and domestic violence leave, employees will be reliant on the goodwill of their employer to obtain the leave necessary to deal with the various issues arising from family and domestic violence while remaining in employment. Our decision in this regard relates to the 119 modern awards listed at **Attachment C**.

6. Next Steps

[304] The drafting of the model term to give effect to our decision will be finalised in the coming weeks. Interested parties will be given an opportunity to comment on the final form of the model term. Such comments are to be directed to whether the model term accurately reflects the outcome of our decision; it is not an opportunity to re-litigate matters we have determined.

[305] Further proceedings in relation to the awards referred to at [275] will be the subject of a mention to be held in Sydney at **11:00am on Tuesday 1 May 2018**.

[306] As we have observed, family and domestic violence is ubiquitous. One in four women in Australia have experienced such violence (almost 2.2 million women). Such violence not only affects those who suffer it, but the children who are exposed to it, extended families, friends and work colleagues. It is an issue that impacts on workplaces and which requires specific action.

[307] This decision takes a cautious regulatory response to this issue. We have decided to provide five days' unpaid leave to employees experiencing family and domestic violence, if the employee needs to do something to deal with the impact of that violence and it is impractical for them to do it outside their ordinary hours of work. We have decided to defer our consideration of whether employees should be able to access paid personal/carer's leave for the purpose of taking family and domestic violence leave.

[308] The extent to which the new entitlement to unpaid leave will be utilised is unknown, as is the impact of the new entitlement on business.

[309] We propose to revisit this issue in June 2021, after the model term has been in operation for three years. At that time we will consider whether any changes are needed to the *unpaid* leave model term, and whether to allow access to personal/carer's leave. At that time we will also revisit the question of whether provisions should be made for *paid* family and domestic violence leave.

PRESIDENT

Appearances:

Sydney:

Ms S Ismail and Ms K Burke on behalf of the Australian Council of Trade Unions

Mr B Ferguson and Ms R Bhatt on behalf of the Australian Industry Group

Mr N Ward on behalf of the Australian Chamber of Commerce and Industry, Australian Business Industrial of the NSW Business Chamber and Pharmacy Guild of Australia

Mr G Johnston on behalf of the Australian Meat Industry Council

Melbourne:

Ms L McBride on behalf of the Community and Public Sector Union

Canberra:

Ms A Ballard on behalf of the National Road Transport Association

Hearing details:

Sydney.

2017.

19 and 20 October.

Final written submissions:

Australian Chamber of Commerce and Industry, 1 September 2017

Australian Council of Trade Unions, 1 September 2017

Australian Industry Group, 30 August 2017

Australian Meat Industry Council, 1 September 2017

Australian Public Service Commission, 31 August 2017

Dr P Harpur and others, 14 August 2017

National Road Transport Association, 1 September 2017

Final written submissions in reply:

Australian Council of Trade Unions, 2 October 2017

Australian Industry Group, 1 October 2017

Master Electricians Australia, 3 October 2017

Transport Workers' Union of Australia, 29 September 2017

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¹ [ACTU submissions](#), 28 October 2014.

² [\[2015\] FWCFB 5585](#) at [2].

³ [ACTU submission](#) 15 June 2015, Attachment A.

⁴ [\[2015\] FWCFB 5585](#).

⁵ *Ibid* at [21].

⁶ [\[2017\] FWCFB 1133](#) at [146].

⁷ *Ibid* at [140].

⁸ *Ibid* at [146].

⁹ [\[2017\] FWCFB 3494](#).

¹⁰ *Ibid* at [6].

¹¹ [\[2017\] FWCFB 3865](#).

¹² [\[2017\] FWCFB 4047](#).

¹³ *Ibid* at [17]–[19].

¹⁴ [\[2017\] FWC 5192](#).

¹⁵ *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [38].

¹⁶ *O’Sullivan v Farrer* (1989) 168 CLR 210 at p. 216 per Mason CJ, Brennan, Dawson and Gaudron JJ.

¹⁷ See *4 Yearly Review of Modern Awards - Preliminary Jurisdictional Issues* [\[2014\] FWCFB 1788](#) at [40]–[48].

¹⁸ *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [85]. Although the Court’s observations were directed at the expression ‘in its own right’ in Item 6(2A) of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) they are apposite to s.156(5).

¹⁹ *Ibid* at [86]. While the Full Federal Court was considering the meaning of the Item 6(2A) of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) the observations are also apposite to s.156(5) of the FW Act, which is in substantially the same terms.

²⁰ [2017] FCAFC 123.

²¹ *Ibid* at [28]–[29].

²² *4 Yearly Review of Modern Awards – Annual Leave* [\[2016\] FWCFB 3177](#) at [135]–[140].

²³ [\[2017\] FWCFB 1001](#).

²⁴ *Ibid* at [269].

²⁵ *Edwards v Giudice* (1999) 94 FCR 561 at para 5; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]–[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [56].

²⁶ *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [33].

²⁷ (2012) 205 FCR 227.

²⁸ *Ibid* at [35]–[37] and [46].

²⁹ See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227.

³⁰ *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123 at [37].

³¹ [2014] FWCFB 1788.

³² *Ibid* at [36].

³³ *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]–[106].

³⁴ *National Retail Association v Fair Work Commission* (2014) 225 FCR 154.

³⁵ *Ibid* at [109]–[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission’s task in the Review.

³⁶ [2017] FCAFC 123 at [23].

³⁷ *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35].

³⁸ [2017] FCAFC 161.

³⁹ *Ibid* at [48].

⁴⁰ [2017] FWCFB 1001 at [230]–[268]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [23].

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- ⁴¹ *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [34].
- ⁴² [2017] FWCFB 1001 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]–[44].
- ⁴³ [2017] FCAFC 161 at [49] and [65].
- ⁴⁴ *Ibid* at [53].
- ⁴⁵ [2017] FWCFB 1001 at [128].
- ⁴⁶ *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [18].
- ⁴⁷ See, for example, *The Australian Industry Group re Manufacturing and Associated Industries and Occupations Award 2012* [2012] FWA 2556.
- ⁴⁸ [Transcript](#), 14 November 2016 at [34]–[526].
- ⁴⁹ [Transcript](#), 14 November 2016 [537]–[679].
- ⁵⁰ [Transcript](#), 14 November 2016 at [686]–[802].
- ⁵¹ [Transcript](#), 15 November 2016 at [873]–[954] and [998]–[1135].
- ⁵² [Transcript](#), 15 November 2016 at [1140]–[1255].
- ⁵³ [Transcript](#), 15 November 2016 at [1267]–[1325].
- ⁵⁴ [Transcript](#), 15 November 2016 at [1327]–[1407].
- ⁵⁵ [Transcript](#), 16 November 2016 at [1432]–[1490].
- ⁵⁶ [Transcript](#), 16 November 2016 at [1515]–[1617].
- ⁵⁷ [Transcript](#), 16 November 2016 at [1655]–[1688].
- ⁵⁸ [Transcript](#), 17 November 2016 at [1942]–[2010].
- ⁵⁹ [Transcript](#), 17 November 2016 at [2013]–[2081].
- ⁶⁰ [Transcript](#), 17 November 2016 at [2082]–[2126].
- ⁶¹ [Transcript](#), 17 November 2016 at [2134]–[2220].
- ⁶² [Transcript](#), 18 November 2016 at [2234]–[2331].
- ⁶³ [Transcript](#), at 17 November 2016 at [1726]–[1930].
- ⁶⁴ [Transcript](#), 18 November 2016 at [2356]–[2518].
- ⁶⁵ [2017] FWCFB 3494 at [49].
- ⁶⁶ *Ibid*.
- ⁶⁷ *Ibid* at [56].
- ⁶⁸ *Ibid* at [54].
- ⁶⁹ *Ibid* at [60]–[61].
- ⁷⁰ *Ibid* at [51].
- ⁷¹ Department of Social Services (2011), National plan to reduce violence against women and their children 2010–2022, Australian Government, p. 1.
- ⁷² [ACTU final submission](#), 28 November 2016 at [42]; As the ACTU submits ‘[t]he centrality of control to an understanding of family and domestic violence is reflected in statutory definitions of family and domestic violence in s. 4AB of the *Family Law Act 1975* and s. 5 of the *Family Violence Protection Act 2008* (Vic)’.
- ⁷³ Exhibit B4, Expert Report of Dr Michael Flood at [2.6].
- ⁷⁴ Exhibit B4 at [3.20].
- ⁷⁵ Cussen T & Bryant W, *Domestic/family homicide in Australia*, Research in Practice, No.38 May 2015, Australian Institute of Criminology. at <http://www.aic.gov.au/publications/current%20series/rip/21-40/rip38.html>
- ⁷⁶ [Ibid](#) at p. 2.
- ⁷⁷ *Ibid* at p. 2.
- ⁷⁸ *Ibid*, p. 3.
- ⁷⁹ *Ibid*.
- ⁸⁰ Exhibit B1, Expert Report of Dr. Peta Cox at [7.2]–[7.5].
- ⁸¹ Source: Australian Bureau of Statistics, Personal Safety, Australia, 2005, Catalogue No. 4906.0.
- ⁸² Source: Australian Bureau of Statistics, *Personal Safety, Australia, 2012*, Catalogue No. 4906.0.
- ⁸³ Source: Australian Bureau of Statistics, *Personal Safety, Australia, 2012*, Catalogue No. 4906.0.

- ⁸⁴ Source: Australian Bureau of Statistics, *Personal Safety, Australia, 2012*, Catalogue No. 4906.0.
- ⁸⁵ VicHealth and Department of Human Services (2004), [The health costs of violence: measuring the burden of disease caused by intimate partner violence](#), Victorian Government.⁸⁵
- ⁸⁶ Victorian Health Promotion Foundation (VicHealth) and Department of Human Services (2004), *The health costs of violence: measuring the burden of disease caused by intimate partner violence*, Victorian Government, p. 10.
- ⁸⁷ Lum M et al, (2016), *Examination of the health outcomes of intimate partner violence against women: State of knowledge paper*, Australia's National Research Organisation for Women's Safety, March, p20..
- ⁸⁸ Exhibit ACTU B-6: Professor Cathy Humphreys, Expert report of Professor Cathy Humphreys at [6.2].
- ⁸⁹ McFerran, L (2011) 'Safe at Home, Safe at Work', National Domestic Violence and the Workplace Survey, Australian Domestic and Family Violence Clearinghouse, A Project of the Centre for Gender-Related Violence Studies and Micromex Research, University of New South Wales (**National Domestic Violence Workplace Survey 2011**), page 2.
- ⁹⁰ Cox P (2015) Violence Against women: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012 (**Cox ANROWS Report 2015**) at [4.3].
- ⁹¹ Exhibit B1 at [8.24]–[8.25], [8.27]–[8.30].
- ⁹² Exhibit B1 at [8.28], [8.30].
- ⁹³ Exhibit B23, Confidential Witness 1, at [23].
- ⁹⁴ Exhibit B24, Confidential Witness 2, at [10].
- ⁹⁵ Exhibit B11, Witness Statement of Emma Smallwood [38].
- ⁹⁶ Exhibit B11 at [40]–[41].
- ⁹⁷ Exhibit B5, Cortis N, [Women's economic security and domestic violence: the role of employment, employment support and employment protection](#) at [21].. taken from PSS 2012, ABS Table A17 'Women's experience of violence by intimate partner during last 12 months'.
- ⁹⁸ See for example Cortis Report, McFerran Report and Exhibit B17, Witness Statement of Jocelyn Bignold at 36. Also see S Patton, *Pathways: How Women Leave Violent Men*, Government of Tasmania, Hobart, 2003, p xviii; R Braaf and I Barrett Meyering, *Seeking Security: Women's Economic Wellbeing During and Following Domestic Violence*, Australian Domestic and Family Violence Clearinghouse, Sydney, 2011.
- ⁹⁹ PwC (2015), *A high price to pay: the economic case for preventing violence against women, a report prepared for OurWatch and VicHealth*, November 2015.
- ¹⁰⁰ [KPMG \(2009\), The cost of violence against women and their children, The National Council to Reduce Violence Against Women and Their Children, March 2009.](#)
- ¹⁰¹ Access Economics (2004), [The cost of domestic violence to the Australian economy](#), a report prepared for the Office of the Status of Women, Department of the Prime Minister and Cabinet.
- ¹⁰² Estimates were calculated by applying the respective prevalence rates in 2012 to the population of women aged 18 and over in 2014-15. ABS analysis of the Personal Safety Survey showed no statistically significant increase in the prevalence of violence between the 2005 and 2012 survey. Therefore it was assumed that there is no increase in the prevalence rate of violence between 2012 and the present.
- ¹⁰³ PwC (2015), *A high price to pay: the economic case for preventing violence against women*, a report prepared for Our Watch and VicHealth, November, p. 11.
- ¹⁰⁴ Neave M, Faulkner P & Nicholson T (2016), [Royal Commission into family violence: summary and recommendations](#), Victorian Government, Royal Commission into Family Violence, March, Volume VI at p. 222.
- ¹⁰⁵ [2017] FWCFB 3494 at [6].
- ¹⁰⁶ [2017] FWCFB 4047.
- ¹⁰⁷ [ACTU submissions](#), 1 September 2017 at [57].
- ¹⁰⁸ [ACTU submissions](#), 1 September 2017 at [54].
- ¹⁰⁹ [Ai Group submissions](#), 30 August 2017 at [63].
- ¹¹⁰ [NatRoad submissions](#), 1 September 2017 at [95]-[98].
- ¹¹¹ *4 Yearly Review of Modern Awards – Alleged NES Inconsistencies*, [\[2015\] FWCFB 3023](#), (2015) 249 IR 358.
- ¹¹² *Ibid* at [37].
- ¹¹³ [Ai Group submissions](#), 30 August 2017 at [61].
- ¹¹⁴ [Ai Group submissions](#), 30 August 2017 at [62]-[63].
- ¹¹⁵ [NatRoad submissions](#), 1 September 2017 at [98].

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- ¹¹⁶ *Re Canavan Building Pty Ltd* [2014] FWCFB 3202.
- ¹¹⁷ *Ibid* at [36].
- ¹¹⁸ [ACTU submissions](#), 1 September 2017 at [67].
- ¹¹⁹ [ACTU submissions](#), 1 September 2017 at [71].
- ¹²⁰ [ACTU submissions](#), 1 September 2017 at [72] and [54].
- ¹²¹ [AMIC submissions](#), 1 September 2017 at [112]-[115].
- ¹²² *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).
- ¹²³ In January 2004 the *Workplace Relations Amendment (Improved Protection for Victorian Workers) Act 2003* (Cth) had introduced into Schedule 1A of the WR Act a set of minimum employment conditions for Victorian employees. These were based on the *Fair Employment Bill 2000* (Vic) and included paid ‘personal leave’ and separate ‘bereavement leave’. Paid personal leave accrued at the rate of 8 days per year, and was available for absences ‘due to personal illness or injury’ (sick leave) and ‘for the purposes of caring for a member of the employee’s immediate family or a member of the employee’s household who is sick and requires care and support’ (carer’s leave). Use of paid personal leave for carer’s leave was capped at 5 days per year.
- ¹²⁴ (2005) 143 IR 245.
- ¹²⁵ [Ai Group submissions](#), 30 August 2017 at [40]-[44].
- ¹²⁶ [Ai Group submissions](#), 30 August 2017 at [41].
- ¹²⁷ [Ai Group submissions](#), 30 August 2017 at [46].
- ¹²⁸ [Ai Group submissions](#), 30 August 2017 at [52].
- ¹²⁹ [Ai Group submissions](#), 30 August 2017 at [54]-[55].
- ¹³⁰ [ACTU submissions](#), 1 September 2017 at [54] and [73]-[74].
- ¹³¹ [Ai Group submissions](#), 30 August 2017 at [54]-[55].
- ¹³² [ACCI submissions](#), 1 September 2017 at [73].
- ¹³³ *Australian Federation of Air Pilots v HNZ Australia Pty Ltd* [2015] FWCFB 3124.
- ¹³⁴ [ACTU submissions](#), 1 September 2017 at [73].
- ¹³⁵ [ACCI submissions](#), 1 September 2017 at [68]-[70].
- ¹³⁶ [ACTU submissions](#), 1 September 2017 at [76].
- ¹³⁷ [ACCI submissions](#), 1 September 2017 at [74].
- ¹³⁸ [2017] FWCFB 3494 at [6].
- ¹³⁹ [Ai Group submissions](#), 1 October 2017 at [29]-[56].
- ¹⁴⁰ [Ai Group submissions](#), 1 October 2017 at [50].
- ¹⁴¹ [Ai Group reply submission](#), Witness statement of Jenni Mandel, 19 September 2016.
- ¹⁴² Exhibit F4, Witness Statement of Jenni Mandel at [10]-[11].
- ¹⁴³ Exhibit F4 at. [12].
- ¹⁴⁴ Exhibit F4 at [14].
- ¹⁴⁵ Exhibit F4 at [16]-[17].
- ¹⁴⁶ Exhibit F4 at [20].
- ¹⁴⁷ Exhibit F4 at [22]-[23].
- ¹⁴⁸ Exhibit F4 at [26].
- ¹⁴⁹ Exhibit F4 at [27].
- ¹⁵⁰ Exhibit F4 at [28].
- ¹⁵¹ Exhibit F4 at [28].
- ¹⁵² Exhibit F4 at [30].
- ¹⁵³ Exhibit F4 at [32].
- ¹⁵⁴ Exhibit F4 at [34].
- ¹⁵⁵ Exhibit F4 at [35].
- ¹⁵⁶ [Ai Group reply submission](#), 19 September 2016 at [450].
- ¹⁵⁷ [Ai Group reply submission](#), 19 September 2016 at [451]; Ai Group final submission, 28 November 2016 at [623].

- ¹⁵⁸ [Ai Group reply submission](#), 19 September 2016 at [461].
- ¹⁵⁹ [Ai Group submission](#), 28 November 2016 at [619]–[620].
- ¹⁶⁰ [Ai Group submission](#), 28 November 2016 at [621].
- ¹⁶¹ [Ai Group reply submission](#), 19 September 2016 at [462].
- ¹⁶² [Ai Group reply submission](#), 19 September 2016 at [464].
- ¹⁶³ [ACCI submission](#), 16 September 2016 at [8.28]–[8.29]. ACCI stated that these may include superseded or expired agreements no longer in use.
- ¹⁶⁴ [ACCI submission](#), 16 September 2016 at [8.32].
- ¹⁶⁵ [ACCI submission](#), 16 September 2016 at [8.33].
- ¹⁶⁶ [ACCI final submission](#), 28 November 2016 at [6.1].
- ¹⁶⁷ [ACCI final submission](#), 28 November 2016 at [6.4].
- ¹⁶⁸ See Exhibits ACTU B-8, ACTU B-9, ACTU B-10, ACTU B-14 and ACTU B-15. The union officials are Gandy, O’Neil, Doleman, Kempfi and Jackson.
- ¹⁶⁹ [ACTU final submission](#), 28 November 2016 at [163].
- ¹⁷⁰ [ACTU final submission](#), 28 November 2016 at [163].
- ¹⁷¹ [ACTU final submission](#), 28 November 2016 at [164].
- ¹⁷² [ACTU final submission](#), 28 November 2016 at [165].
- ¹⁷³ [ACTU final submission](#), 28 November 2016 at [166]; Transcript, Friday 18 November 2016, [2438]–[2444]; [2470]–[2473]; [2486]–[2488].
- ¹⁷⁴ [2015] FWCFB 3406 at [252]
- ¹⁷⁵ [2017] FWCFB 3494 at [51].
- ¹⁷⁶ *Ibid* at [39]–[46].
- ¹⁷⁷ *Ibid* at [46].
- ¹⁷⁸ [Transcript](#), 20 October 2017 at [557]–[601].
- ¹⁷⁹ [Transcript](#), 19 October 2017 at [27]–[30] and [556].
- ¹⁸⁰ See generally ACTU Submission 1 September 2017 at [9]–[13].
- ¹⁸¹ Transcript 19 October 2017 at [47].
- ¹⁸² Transcript 19 October 2017 at [50].
- ¹⁸³ For example, ACCI Submission 29 September 2017 at [36]–[38].
- ¹⁸⁴ [Ai Group submission](#), 29 September 2017 at [61].
- ¹⁸⁵ s.104, *Fair Work Act 2009* (Cth).
- ¹⁸⁶ Transcript, 19 October 2017 at [58].
- ¹⁸⁷ Transcript, 19 October 2017 at [58].
- ¹⁸⁸ [Ai Group submission](#), 30 August 2017 at [10]–[11].
- ¹⁸⁹ [MEA submission](#), 3 October 2017 at p.3
- ¹⁹⁰ [AMIC submission](#), 1 September 2017 at [47].
- ¹⁹¹ [ACCI submission](#), 1 September 2017 at [20].
- ¹⁹² [ACCI submissions](#), 1 September 2017 at [34].
- ¹⁹³ [ACCI submissions](#), 1 September 2017 at [33].
- ¹⁹⁴ Transcript, 20 October 2017 at [476].
- ¹⁹⁵ [NatRoad submission](#), 1 September 2017 at [53].
- ¹⁹⁶ Transcript, 20 October 2017 at [555].
- ¹⁹⁷ No relevant regulations have been made.
- ¹⁹⁸ Section 111(5) provides that for employees (other than casuals) paid leave for jury service is capped at 10 days. Casuals have no entitlement to paid leave. Unpaid jury service leave is uncapped.
- ¹⁹⁹ Transcript, 20 October 2017 at [341]–[374]; Also see Ai Group’s submission 30 August 2017 at [12]–[16].
- ²⁰⁰ Breckenridge J, Cale J, Hameed S, McCaskie L & Tzoumakis S (2015), [Implementation of domestic violence clauses—an employer’s perspective](#), Gendered Violence Research Network, University of New South Wales.
- ²⁰¹ [ACTU Submission](#) 1 June 2016 at [7.29]–[7.31].
- ²⁰² We note that this is the calculation after the adjustment and removal of an extreme outlier where a respondent noted 912 hours, refer to p.7 of the Report.

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- ²⁰³ [ACTU Submission](#) 1 June 2016 at [7.29]-[7.31].
- ²⁰⁴ Breckenridge J, Cale J, Hameed S, McCaskie L & Tzoumakis S (2015), *Implementation of domestic violence clauses—an employer’s perspective*, Gendered Violence Research Network, University of New South Wales, p.3
- ²⁰⁵ Ibid at p.7
- ²⁰⁶ Ibid at p. 12.
- ²⁰⁷ Ibid at Table 1. Table 1 does not tell us how many employees are employed in each sector, it simply provides a ‘description of the workplaces’.
- ²⁰⁸ Source: Australian Bureau of Statistics, *Personal Safety, Australia, 2012*, Catalogue No. 4906.0.
- ²⁰⁹ Transcript, 20 October 2017 at [491]-[512].
- ²¹⁰ Exhibit S1 at [19](a).
- ²¹¹ Transcript, 17 November 2016 at [1887].
- ²¹² Transcript, 20 October 2017 at [493].
- ²¹³ Transcript, 17 November 2016 at [1888].
- ²¹⁴ Transcript, 17 November 2016 at [1751]-[1754].
- ²¹⁵ Exhibit S1 at [35].
- ²¹⁶ [ACTU Submission, 1 September 2017](#) at [40]; [Transcript](#), 19 October 2017 at [66].
- ²¹⁷ Ai Group submission 30 August 2017 at [26].
- ²¹⁸ [NatRoad submission](#), 1 August 2017 at [89].
- ²¹⁹ [NatRoad submission](#), 1 August 2017 at [89].
- ²²⁰ Transcript, 20 October 2017 at [447].
- ²²¹ Transcript, 20 October 2017 at [521]-[530].
- ²²² [AMIC submission – Preliminary views, 1 September 2017](#) at [96].
- ²²³ [AMIC submission – Preliminary views, 1 September 2017](#) at [101].
- ²²⁴ [MEA Submission – Preliminary views](#), 3 October 2017 at p.2.
- ²²⁵ [ACTU Final Submissions](#), 28 November 2016 at [6].
- ²²⁶ *Re Metal, Engineering and Associated Industries Award 1998- Part 1* (2001) 105 IR 27; *Re Request from the Minister for Employment and Workplace Relations – 28 March 2008 Award Modernisation* (AM2008/1-12 (2008) 177 IR 364 at [47]-[50].
- ²²⁷ Transcript, 20 October 2017 at [389]-[401].
- ²²⁸ Transcript 20 October 2017 at [515]-[516].
- ²²⁹ Transcript, 20 October 2017 at [401].
- ²³⁰ Transcript, 19 October 2017 at [72].
- ²³¹ Transcript, 19 October 2017 at [80]-[82].
- ²³² Transcript, 19 October 2017 at [86].
- ²³³ [ACCI submission](#) 1 September 2017 at [6.1].
- ²³⁴ Ai Group [submission](#), 30 August 2017 at [31].
- ²³⁵ Transcript, 20 October 2017 at [518].
- ²³⁶ [2017] FWCFB 4047 at [18]-[19].
- ²³⁷ see [\[2014\] FWCFB 5537](#) at [16]-[18].
- ²³⁸ APSC [submission](#) 28 July 2017.
- ²³⁹ NatRoad [submission](#) 28 July 2017.
- ²⁴⁰ NatRoad [submission](#) 1 September 2017 at [6].
- ²⁴¹ See *4 yearly review of modern awards – Penalty Rates – Hospitality and Retail sectors* [2017] FWCFB 1001 at [166]-[168].
- ²⁴² [2012] FWCFB 4000 at [100]-[102].
- ²⁴³ [2017] FWCFB 3494 at [82].
- ²⁴⁴ [2017] FWCFB 1001 at [220]-[225].

Attachment A – List of Statements issued

Document	Date
<u>Statement – [2017] FWC 5445</u>	20 October 2017
<u>Statement – [2017] FWCFB 5426</u>	19 October 2017
<u>Statement – [2017] FWC 5417</u>	19 October 2017
<u>Statement – [2017] FWC 5192</u>	6 October 2017
<u>Statement – [2017] FWC 4729</u>	15 September 2017
<u>Statement and Directions – [2017] FWCFB 4047</u>	3 August 2017
<u>Statement – [2017] FWCFB 3865</u>	24 July 2017
<u>Statement – [2017] FWC 3696</u>	14 July 2017
<u>Statement - [2017] FWC 3389</u>	23 June 2017
<u>Statement - [2017] FWC 3316</u>	20 June 2017
<u>Statement - [2017] FWC 2928</u>	29 May 2017
<u>Statement - [2017] FWC 2347</u>	28 April 2017
<u>Statement - [2017] FWC 2189</u>	18 April 2017
<u>Statement - [2017] FWC 1733</u>	27 March 2017
<u>Statement - [2014] FWC 8583</u>	1 December 2014

Attachment B – List of submissions filed

Item no.	Document title	Organisation	Document date
1	Submission in reply – preliminary views	MEA	3/10/2017
2	Submission in reply – preliminary views – background paper – Attachment A	ACTU	2/10/2017
3	Submission in reply – preliminary views	Ai Group	1/10/2017
4	Submission in reply – preliminary views	TWU	29/09/2017
5	Submission in reply – preliminary views - background paper	AMIC	29/09/2017
6	Submission in reply – background paper	ACCI	29/09/2017
7	Submission – preliminary views - amended	ACTU	1/09/2017
8	Submission – preliminary views	ACTU	1/09/2017
9	Submission – preliminary views	ACCI	1/09/2017
10	Submission – preliminary views	AMIC	1/09/2017
11	Submission – preliminary views	NatRoad	1/09/2017
12	Submission – preliminary views	APSC	31/08/2017
13	Submission – preliminary views	Ai Group	30/08/2017
14	Submission	Dr P Harpur and others	14/08/2017
15	Submission – future conduct	ACCI	28/07/2017
16	Submission – future conduct	Ai Group	28/07/2017
17	Submission – future conduct	ACTU	28/07/2017
18	Submission – inclusion of the Australian Government Industry Award	APSC	28/07/2017
19	Submission – future conduct	AMIC	28/07/2017
20	Submission – future conduct	NatRoad	27/07/2017
21	Submission – inclusion of enterprise awards	CPSU	19/07/2017
22	Submission	National Road Transport Association	05/04/2017
23	Submission – response to questions	ACTU	04/04/2017
24	Submission – response to questions	Ai Group	03/04/2017
25	Submission – response to questions	ACCI	03/04/2017
26	Submission - further information	Victorian Government Solicitor's Office	06/12/2016
27	Submission	Brisbane Catholic Education	01/12/2016
28	Submission	ACTU	28/11/2016
29	Submission	ACCI	28/11/2016
30	Submission	Ai Group	28/11/2016
31	Submission - tender list	ACTU	25/11/2016
32	Submission	ACT Government	23/11/2016
33	Submission	Surf Coast Shire Council	16/09/2016
34	Submission	Council of Greater Dandenong	15/11/2016

35	Submission	Queensland Government	14/11/2016
36	Submission - objection to evidence - ACTU	Ai Group	13/11/2016
37	Witness statements and expert evidence - updated	ACTU	11/11/2016
38	Witness statement - J. Stott - revised - redacted	ACTU	11/11/2016
39	Submission	NRA	02/11/2016
40	Submission in reply - witness statement and expert report	ACTU	17/10/2016
41	Submission - amended witness statement	ACTU	14/10/2016
42	Submission in reply	AHRC	14/10/2016
43	Submission - source documents	ACCI	12/10/2016
44	Submission in reply	ACTU	05/10/2016
45	Submission	National Foundation for Australian Women	05/10/2016
46	Reply submission and witness statements	Ai Group	19/09/2016
47	Submission	PGA	19/09/2016
48	Submission	AFEI	19/09/2016
49	Submission	AMIC	16/09/2016
50	Submission	ACCI	16/09/2016
51	Submission	NFF	15/09/2016
52	Submission	Aged Care Services Australia Group	15/09/2016
53	Submission and witness statement	Pricewaterhouse Coopers	20/06/2016
54	Submission and witness statements	ACTU	01/06/2016
55	Submission - confidentiality matters	ACTU	26/05/2016
56	Submission	Victorian Government	16/05/2016
57	Submissions	AHRC	12/05/2016
58	Outline of Expert Evidence	ACTU	05/05/2016
59	Further submission	Ai Group	21/08/2015
60	Further submission	ACCI and others	21/08/2015
61	Further submission	ACTU	18/08/2015
62	Further submission and list of authorities	Ai Group	11/08/2015
63	Correspondence and submissions	ACTU	15/06/2015
64	Submission on preliminary issues	NFF	20/04/2015
65	Submission - Jurisdictional objection	Ai Group	20/04/2015
66	Submission	HIA	20/04/2015
67	Outline of submissions	ACCI	20/04/2015
68	Draft determinations	ACTU	02/03/2015
69	Submission - draft clauses	ACTU	13/02/2015
70	Submissions	ACTU	11/11/2014
71	Submissions	ACCI	11/11/2014

72	Submission	Accommodation Association of Australia	11/11/2014
73	Submission	Australian Hotels Association	11/11/2014
74	Submission	Private Hospital Industry Employers' Associations	11/11/2014
75	Submission	Australian Federation of Employers and Industries	11/11/2014
76	Submission	Ai Group	11/11/2014
77	Submission	Housing Industry Association	11/11/2014
78	Outline of Submissions	NFF	11/11/2014
79	Submission	Restaurant and Catering Industrial	11/11/2014
80	Addendum to 10 November 2014 submission	Australian Entertainment Industry Association	11/11/2014
81	Outline of submissions	Australian Entertainment Industry Association	10/11/2014
82	Outline of Claim	United Firefighters Union of Australia	28/10/2014
83	Outline of Claim	ACTU	28/10/2014

Attachment C – List of modern awards to be varied

Aboriginal Community Controlled Health Services Award 2010
Aged Care Award 2010
Air Pilots Award 2010
Aircraft Cabin Crew Award 2010
Airline Operations – Ground Staff Award 2010
Airport Employees Award 2010
Alpine Resorts Award 2010
Aluminium Industry Award 2010
Ambulance and Patient Transport Industry Award 2010
Amusement, Events and Recreation Award 2010
Animal Care and Veterinary Services Award 2010
Aquaculture Industry Award 2010
Architects Award 2010
Asphalt Industry Award 2010
Banking, Finance and Insurance Award 2010
Black Coal Mining Industry Award 2010
Book Industry Award 2010
Broadcasting and Recorded Entertainment Award 2010
Building and Construction General On-site Award 2010
Business Equipment Award 2010
Car Parking Award 2010
Cement and Lime Award 2010
Cemetery Industry Award 2010
Children’s Services Award 2010
Cleaning Services Award 2010
Clerks – Private Sector Award 2010
Coal Export Terminals Award 2010
Commercial Sales Award 2010
Concrete Products Award 2010
Contract Call Centres Award 2010
Corrections and Detention (Private Sector) Award 2010
Cotton Ginning Award 2010
Dredging Industry Award 2010
Dry Cleaning and Laundry Industry Award 2010
Educational Services (Post-Secondary Education) Award 2010
Educational Services (Schools) General Staff Award 2010
Educational Services (Teachers) Award 2010
Electrical Power Industry Award 2010
Electrical, Electronic and Communications Contracting Award 2010
Fast Food Industry Award 2010
Fire Fighting Industry Award 2010
Fitness Industry Award 2010
Food, Beverage and Tobacco Manufacturing Award 2010
Funeral Industry Award 2010
Gardening and Landscaping Services Award 2010
Gas Industry Award 2010
General Retail Industry Award 2010
Graphic Arts, Printing and Publishing Award 2010
Hair and Beauty Industry Award 2010
Health Professionals and Support Services Award 2010
Higher Education Industry – Academic Staff – Award 2010

Higher Education Industry – General Staff – Award 2010
Horse and Greyhound Training Award 2010
Horticulture Award 2010
Hospitality Industry (General) Award 2010
Hydrocarbons Field Geologists Award 2010
Hydrocarbons Industry (Upstream) Award 2010
Joinery and Building Trades Award 2010
Journalists Published Media Award 2010
Labour Market Assistance Industry Award 2010
Legal Services Award 2010
Live Performance Award 2010
Local Government Industry Award 2010
Mannequins and Models Award 2010
Manufacturing and Associated Industries and Occupations Award 2010
Marine Tourism and Charter Vessels Award 2010
Marine Towing Award 2010
Maritime Offshore Oil and Gas Award 2010
Market and Social Research Award 2010
Meat Industry Award 2010
Medical Practitioners Award 2010
Mining Industry Award 2010
Miscellaneous Award 2010
Mobile Crane Hiring Award 2010
Nursery Award 2010
Nurses Award 2010
Oil Refining and Manufacturing Award 2010
Passenger Vehicle Transportation Award 2010
Pastoral Award 2010
Pest Control Industry Award 2010
Pharmaceutical Industry Award 2010
Pharmacy Industry Award 2010
Plumbing and Fire Sprinklers Award 2010
Port Authorities Award 2010
Ports, Harbours and Enclosed Water Vessels Award 2010
Poultry Processing Award 2010
Premixed Concrete Award 2010
Professional Diving Industry (Industrial) Award 2010
Professional Diving Industry (Recreational) Award 2010
Professional Employees Award 2010
Quarrying Award 2010
Racing Clubs Events Award 2010
Racing Industry Ground Maintenance Award 2010
Rail Industry Award 2010
Real Estate Industry Award 2010
Registered and Licensed Clubs Award 2010
Restaurant Industry Award 2010
Salt Industry Award 2010
Seafood Processing Award 2010
Seagoing Industry Award 2010
Security Services Industry Award 2010

Silviculture Award 2010
Social, Community, Home Care and Disability Services Industry Award 2010
Sporting Organisations Award 2010
State Government Agencies Administration Award 2010
Stevedoring Industry Award 2010
Storage Services and Wholesale Award 2010
Sugar Industry Award 2010
Supported Employment Services Award 2010
Surveying Award 2010
Telecommunications Services Award 2010
Textile, Clothing, Footwear and Associated Industries Award 2010
Timber Industry Award 2010
Transport (Cash in Transit) Award 2010
Travelling Shows Award 2010
Vehicle Manufacturing, Repair, Services and Retail Award 2010
Waste Management Award 2010
Water Industry Award 2010
Wine Industry Award 2010
Wool Storage, Sampling and Testing Award 2010

Attachment D – List of cases

4 Yearly Review of Modern Awards – Annual Leave [2016] FWCFB 3177

4 yearly review of Modern Awards – Penalty Rates – Hospitality and Retail sectors [2017] FWCFB 1001

Application by Canavan Building Pty Ltd [2014] FWCFB 3202

Australian Competition and Consumer Commission v Leelee Pty Ltd [1999] FCA 1121

Australian Federation of Air Pilots v HNZ Australia Pty Ltd [2015] FWCFB 3124

Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd [2017] FCAFC 123

Edwards v Giudice (1999) 94 FCR 561

Fire Fighting Industry Award decision [2016] FWCFB 8025

National Retail Association v Fair Work Commission (2014) 225 FCR 154

O’Sullivan v Farrer (1989) 168 CLR 210

Parental Leave Test Case 2005 (2005) 143 IR 245

Preliminary Jurisdictional Issues decision [2014] FWCFB 1788

Re 4 Yearly Review – Alleged NES Inconsistencies (2015) 249 IR 358

Schweppes Australia Pty Ltd v United Voice – Victoria Branch [2017] FWCFB 4047

Shop, Distributive and Allied Employees Association v The Australian Industry Group [2017] FCAFC 161

Shop, Distributive and Allied Employees Association v National Retail Association (No.2) (2012) 205 FCR 227

The Australian Industry Group re Manufacturing and Associated Industries and Occupations Award 2012 [2012] FWA 2556