

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

**Reply Submissions Regarding the
Preliminary Views Expressed by
Deputy President Gooley and
Commissioner Spencer**

Family and Domestic Violence Clause
(AM2015/1)

1 October 2017

Ai
GROUP

4 YEARLY REVIEW OF MODERN AWARDS

AM2015/1 FAMILY AND DOMESTIC VIOLENCE CLAUSE

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1. INTRODUCTION

1. In 2016, the Australian Council of Trade Unions (**ACTU**) pursued the introduction of a new clause in virtually all modern awards that would have afforded employees experiencing family and domestic violence leave an entitlement to paid and unpaid leave. That claim was rejected by the Full Bench as it was then constituted.
2. Notwithstanding the decision of Deputy President Gooley and Commissioner Spencer (**Majority Decision**) that the ACTU claim should be dismissed, it expressed the *provisional* view that:
 - “all employees should have access to unpaid family and domestic violence leave”¹; and
 - “employees should be able to access personal/carer’s leave for the purpose of taking family and domestic violence leave”².
3. On 30 August 2017, in accordance with the Fair Work Commission’s (**Commission**) directions of 3 August 2017, the Australian Industry Group (**Ai Group**) filed submissions in response to the preliminary views expressed in the majority decision. Those submissions state Ai Group’s position that:
 - The Commission should not introduce an unpaid family and domestic violence leave entitlement in the modern awards system; and
 - As a matter of jurisdiction, the Commission cannot introduce award clauses that permit access to paid personal/carer’s leave for the purposes of taking family and domestic violence leave.
4. This submission should be read in conjunction with the aforementioned submission. It is filed in response to material filed by other interested parties

¹ 4 yearly review of modern awards – Family and Domestic Violence Leave Clause [2017] FWCFB 3494 at [6].

² 4 yearly review of modern awards – Family and Domestic Violence Leave Clause [2017] FWCFB 3494 at [6].

including the ACTU. It also deals with the Background Paper published by the Commission on 15 September 2017 and the three model clauses there proposed (subsequently referred to as the **First Model Clause**, **Second Model Clause** and **Third Model Clause**).

5. We note also that on 15 September 2017 the Commission published a Research Reference List, which identifies materials and data sources previously referred to by interested parties as well as additional publications identified by the Commission. Interested parties were advised that if they wish to comment on any of those publications, they should do so in their reply submissions.³ In the time available to us, we have not had an opportunity to review any of the publications there identified and, by extension, to comment on them. Should the Commission or any interested party subsequently seek to rely on any of those publications (or parts thereof), Ai Group may seek an opportunity to respond.

³ *Family and Domestic Violence Leave Clause and Family Friendly Work Arrangements* [2017] FWCFB 4729 at [4].

2. THE STATUTORY FRAMEWORK

6. The current proceedings are being conducted in the context of the 4 yearly review of modern awards (**Review**), which being is conducted by the Commission pursuant to s.156 of the *Fair Work Act 2009* (**FW Act** or **Act**).
7. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).
8. The modern awards objective is set out at s.134(1) of the FW Act. It requires the Commission to ensure that modern awards, together with the National Employment Standards (**NES**), provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at s.134(1)(a) – (h).
9. The modern awards objective applies to any exercise of the Commission's powers under Part 2-3 of the FW Act, which includes s.156.

3. THE COMMISSION'S GENERAL APPROACH TO THE REVIEW

10. At the commencement of the Review, a Full Bench dealt with various preliminary issues. The Commission's Preliminary Jurisdictional Issues Decision⁴ provides the framework within which the Review is to proceed.

11. The Full Bench emphasised the need for a party to mount a merit based case in support of a change sought, accompanied by probative evidence (emphasis added):

[23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.⁵

12. The Commission indicated that the Review will proceed on the basis that the relevant modern award achieved the modern awards objective at the time that it was made (emphasis added):

[24] In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.⁶

⁴ 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788.

⁵ 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 at [23].

⁶ 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 at [24].

13. The decision confirms that the Commission should generally follow previous Full Bench decisions that are relevant to a contested issue unless there are cogent reasons for not doing so: (emphasis added)

[25] Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in *Nguyen v Nguyen*:

“When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see *Queensland v The Commonwealth* (1977) 139 CLR 585 per Aickin J at 620 et seq.”

[26] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in *Cetin v Ripon Pty Ltd (T/as Parkview Hotel)* (*Cetin*):

“Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so.”

[27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.⁷

14. In addressing the modern awards objective, the Commission recognised that each of the matters identified at s.134(1)(a) – (h) are to be treated “as a matter of significance”⁸ and that “no particular primacy is attached to any of the s.134 considerations”⁹. The Commission identified its task as needing to “balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net”¹⁰: (emphasis added)

[36] ... Relevantly, s.138 provides that such terms only be included in a modern award ‘to the extent necessary to achieve the modern awards objective’. To comply with s.138

⁷ 4 *Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24] – [27].

⁸ 4 *Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [31].

⁹ 4 *Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [32].

¹⁰ 4 *Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [33].

the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms 'necessary to achieve the modern awards objective'. What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. 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.¹¹

15. The frequently cited passage from Justice Tracey's decision in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* was adopted by the Full Bench. It was thus accepted 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.¹²

16. Accordingly, the Preliminary Jurisdictional Issues Decision establishes the following key threshold principles:

- A proposal to significantly vary a modern award must be accompanied by submissions addressing the relevant statutory requirements and probative evidence demonstrating any factual propositions advanced in support of the claim;
- The Commission will proceed on the basis that a modern award achieved the modern awards objective at the time that it was made;
- An award must only include terms to the extent necessary to achieve the modern awards objective. A variation sought must not be one that is merely desirable; and
- Each of the matters identified under s.134(1) are to be treated as a matter of significance and no particular primacy is attached to any of the considerations arising from it.

¹¹ 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 at [36].

¹² *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [46].

17. In a subsequent decision considering multiple claims made to vary the *Security Services Industry Award 2010*, the Commission made the following comments, which we respectfully commend to the Full Bench (emphasis added):

[8] While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.¹³

18. In a recent decision issued by a Full Court of the Federal Court of Australia, the following observations were made about the statutory task that is here being undertaken by the Commission:

28 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.

29 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 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.¹⁴

19. Regardless of whether the Commission is considering varying an award of its own motion or in response to a specific claim proposed by a moving party, the

¹³ *Re Security Services Industry Award 2010* [2015] FWCFB 620 at [8].

¹⁴ *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123 at [28] – [29].

decisions we have here cited are pertinent to the approach that should be adopted by it in deciding whether the variation should indeed be made.

20. That is, whilst it might be argued that the proceedings now before the Commission are being conducted by reference to, and as a result of, the provisional view expressed in the Majority Decision (as opposed to a specific claim mounted by an interested party), it remains the case that:

- Any variation proposed by the Commission or an interested party must be supported by submissions addressing the relevant statutory requirements and probative evidence demonstrating any factual propositions advanced in support of it; and
- The Commission must be satisfied that any proposed term is necessary to ensure that the award achieves the modern awards objective.

4. ISSUES CONCERNING PROCEDURAL FAIRNESS

21. As we understand it, the process currently at play relates to the following issues:
- Whether a clause providing unpaid family and domestic violence leave is necessary to ensure that the relevant awards achieve the modern awards objective. This necessarily involves a consideration of the precise terms of any such clause.
 - Whether a modern award can, as a matter of jurisdiction, contain a clause that grants an employee access to paid personal/carer's leave under the NES for the purposes of family and domestic violence leave.
 - If so, whether such a clause is necessary to ensure that the relevant awards achieve the modern awards objective.
22. These are the issues that are brought to bear by virtue of the Majority Decision and in relation to which interested parties have been directed to file material.
23. We accordingly proceed on the basis that the proceedings now relate only to the three issues identified above, rather than a broader investigation into the issue of family and domestic violence and whether there is a need for awards to provide something other than unpaid leave and/or access to paid personal/carer's leave under the NES.
24. This is particularly important in the context of this matter and the circumstances in which it has evolved. These proceedings have their genesis in a claim made by the ACTU for a paid leave entitlement for those experiencing family and domestic violence. Evidence was called and tested, detailed submissions were made and careful consideration was given by the Commission to the ACTU's proposal as well as the concept of creating a separate form of paid leave for employees experiencing family and domestic violence.
25. We are of course mindful of the nature of the Review and the Commission's repeated observation that it is not bound by the terms of a proponent's claim. Indeed that is the very basis upon which we are now required to give

consideration to the provision of unpaid leave and/or access to paid personal/carer's leave under the NES.¹⁵ It is relevant to note, however, that a respondent party at this stage of the proceedings can deal only with that which has been put before us. It is not incumbent upon us to provide a response (or a hypothetical response) to every potential outcome. Such an approach would render the task here before us virtually impossible to undertake, particularly within the timeframes imposed upon us by the Commission and the resource constraints we face due to the conduct of the Review generally.

26. Should the Commission, the ACTU or any other interested party now propose that modern awards be varied in a way that deviates from the provisional views expressed in the Majority Decision, notions of fairness dictate that respondent parties such as Ai Group be afforded an opportunity to address the Full Bench in relation to whether such a course of action should be permitted or taken in the context of these proceedings. It would be inherently unfair and inconsistent with the manner in which the Commission is required to perform its functions¹⁶ for respondent parties to be required to repeatedly respond to proposals that in essence seek the introduction of the same entitlement in each instance, albeit in different terms.

¹⁵ *4 yearly review of modern awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 at [118].

¹⁶ See in particular s.577(a) of the FW Act.

5. UNPAID DOMESTIC VIOLENCE LEAVE

27. In the submissions that follow, we respond to submissions made in relation to the Commission's preliminary view that modern awards should provide an unpaid family and domestic violence leave entitlement and the Commission's Background Paper.
28. It should be noted that these submissions are made on the basis that they do not prejudice our primary position that an unpaid leave entitlement should not be granted. All submissions made in relation to the terms of any unpaid leave clause are put on the basis that they should be read if the Commission decides that the introduction of an unpaid leave clause is necessary for the purposes of s.138 of the Act.

ISSUE A.1 – SHOULD THERE BE AN ENTITLEMENT TO ACCESS UNPAID DOMESTIC VIOLENCE LEAVE IN MODERN AWARDS?

29. Ai Group opposes the introduction of an unpaid domestic violence leave entitlement in modern awards.
30. It is important to note that in their decision, Deputy President Gooley and Commissioner Spencer did not express a final view that an unpaid domestic violence leave clause is necessary for the purposes of s.138 of the Act. Rather, the Majority Decision states: (emphasis added)

[5] The task before the Full Bench is to determine if it is necessary for the purpose of ensuring that modern awards, together with the NES, provide a fair and relevant minimum safety net to include in all modern awards, an entitlement for employees to take family and domestic violence leave.

[6] 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, we 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.

...

[119] Based on the largely uncontested evidence before us we have formed the preliminary view that it is necessary to meet the modern awards objective for provisions to be inserted in modern awards which would allow for a period of unpaid family and domestic violence leave ...¹⁷

31. In essence, Deputy President Gooley and Commissioner Spencer only formed a *preliminary view* that it is necessary to make provision for unpaid family and domestic violence leave. They did not reach a final conclusion that unpaid family and domestic violence leave *is necessary* to ensure that awards achieve the modern awards objective.
32. As a result, in the context of the current proceedings, the Full Bench's jurisdiction to vary modern awards to introduce an unpaid leave clause will be enlivened only if it finds that such a clause is *necessary* in the sense contemplated by s.138 of the Act. Such a finding has not yet been made by the Commission and, in our view, there remains insufficient material before the Full Bench as presently constituted in order to enable it to reach such a conclusion.
33. In support of our position, we continue to rely on Ai Group's submission of 28 November 2016 (**November 2016 Submission**). Specifically, we there advanced the following propositions, which remain apposite.
34. **Firstly**, family and domestic violence leave (in any form, whether paid or unpaid), is not a matter that can suitably or appropriately be dealt with by way of a one-size-fits-all award clause. It is an issue that should instead be left to the enterprise. This is in part because different employers have varying capacities to accommodate their employees' absence from work and to bear the associated expenses.
35. It is Ai Group's experience that employers typically take a compassionate and flexible approach when their employees require leave from work due to family and domestic violence. Much of the evidence lead by the ACTU was consistent with this. Further, the material before the Commission establishes that many

¹⁷ 4 yearly review of modern awards – Family and Domestic Violence Leave Clause [2017] FWCFB 3494 at [5] – [6] at [119].

employers have implemented policies specific to family and domestic violence leave, introduced separate leave entitlements in their enterprise agreements and/or adopted other innovative ways of providing support and flexibility to their employees. For instance:

	Witness/Report	Relevance
1	Ludo McFerran; Domestic Violence at Work Research Affiliate (expert witness called by the ACTU)	Ms McFerran testified that “small businesses can be both flexible and innovative when responding to domestic violence affecting staff and owners”. ¹⁸
2	Marilyn Beaumont; Chairperson of the Australian Women Health Networks National Board (lay witness called by the ACTU)	<p>Ms Beaumont provided an example of initiatives adopted by employers that are designed to provide support and assistance to employees suffering from family and domestic violence, which do not necessarily include the provision of a separate leave entitlement. Specifically, Ms Beaumont was involved in a project with Linfox, which she describes as follows:</p> <p><i>In the first year of the pilot titled Harm in the Home, we worked with a Linfox Victorian worksite to develop and test a process to strengthen organisational capacity of a male dominated workplace to promote gender equality and non-violent norms.</i></p> <p>...</p> <p><i>In 2008, Women’s Health Victoria secured further funding from VicHealth to ‘scale up’ the project over three years, expanding the pilot to other Linfox worksites in Victoria. Phase II aimed to further embed in Linfox the prevention of violence against women through activities such as training, workplace policy and the dissemination of key prevention messages. It included the development and modelling of a workplace program that could be implemented in other activities.</i></p> <p>...</p> <p><i>... Evaluation demonstrated that training tools for workplace training helps both prevent violence before it occurs and to support staff who may be experiencing domestic violence. Employees are more likely to challenge violence supportive attitudes and behaviours after completing workplace training thus contributing to primary prevention of violence.</i>¹⁹</p> <p><i>The workplace program, now entitled ‘Take a Stand against Domestic Violence: It’s Everyone’s Business’ appears to now be widely available to employers.</i>²⁰</p>
3	Jocelyn Bignold; Chief Executive Officer of McCauley Community Services for	Ms Bignold gave evidence regarding the ‘Engage to Change’ education program administered by McCauley works. It “aims to educate employers and staff about family violence, its impact on business and what can be done to support women experiencing violence”. ²¹ Specifically, Ms Bignold states:

¹⁸ Statement of Ludo McFerran dated 31 May 2016 at Annexure LM-3, paragraph 10.1.

¹⁹ Witness statement of Marilyn Beaumont at paragraphs 31 – 34.

²⁰ Witness statement of Marilyn Beaumont at paragraph 35.

²¹ Witness statement of Jocelyn Bignold at paragraph 47.

	<p>Women (lay witness called by the ACTU)</p>	<p><i>The program covers how to recognise family violence, identify risks to staff, respond effectively and know where and how to refer women for help. The program includes face-to-face interactive training sessions tailored to the company's needs and a 20-minute e-learning package about the impacts of family violence on the workplace and what can be done to prevent it.</i></p> <p><i>Since the program commenced in its current form, we have delivered the program to 45 employers in industries including health, banking, superannuation, insurance, local government and retail.²²</i></p>
<p>4</p>	<p>Sandra Dann; Director of the Working Women's Centre SA Inc (lay witness called by the ACTU)</p>	<p>Ms Dann's statement provides useful examples of initiatives taken by employers to provide support to their employees in the event that they are victims of domestic violence, and the specialised training and assistance available to such employers:</p> <p><i>On 16 October, 2014 the Premier of South Australia, Jay Weatherill, directed that all government departments and agencies undertake accreditation with the White Ribbon Workplace Accreditation program. ... I am delivering this training, predominantly to Managers and White Ribbon Workplace Advocates, but in some instances to whole agencies. Some of this training is delivered along with specialist workers from DV services.</i></p> <p><i>In addition to this training, each WWC in South Australia, Queensland and the Northern Territory is delivering tailored awareness and training sessions on domestic and family violence and work to corporate, public sector and community based organisations. The Centres also provide specialised advice to organisations about the implementation of DV clauses in Enterprise Agreements, DV policies, DV safety planning relevant to the workplace and information about appropriate referral services. WWC's also refer organisations and individuals to appropriate unions.²³</i></p>
<p>5</p>	<p>Karen Willis; Executive Officer of Rape and Domestic Violence Services Australia (lay witness called by the ACTU)</p>	<p>Ms Willis told of the positive steps that are being taken by employers to support victims of domestic violence, which includes the insertion of family and domestic violence leave provisions in their enterprise agreements and the implementation of workplace policies:</p> <p><i>For the past two years R&DVSA has been working with employers who want to include domestic violence leave provisions in their agreements with employees. ... A number of workplaces to whom we had provided assistance when employees had experienced domestic violence approached us to assist with their policies. R&DVSA provides assistance with policy development and training for the first responders in the organisation. Some employers have also engaged in ethical leadership training to ensure their organisational culture is one which establishes an environment where violence against women is not tolerated and that those who may be experiencing such violence feel they will be supported in accessing the organisations policies.²⁴</i></p> <p>Additional examples of specific instances in which employers provided support to their employees can be found at paragraphs 16, 18 and 20 of her statement. The types of assistance provided included changes to bank account details, changes to the workplace to ensure the safety of the victim and her colleagues, personal assistance by the employer to</p>

²² Witness statement of Jocelyn Bignold at paragraphs 55 – 56.

²³ Witness statement of Sandra Dann at paragraphs 14 – 15.

²⁴ Witness statement of Karen Willis OAM at paragraph 1.

		<p>enable the victim to relocate and flexible working arrangements. Ms Willis ultimately concluded:</p> <p><i>... In my experience, employers are increasingly supportive of their employees.</i></p> <p>...</p> <p><i>There are employers who help the person move, offer loans to be paid back 'when they get on their feet' and the finding of 'bits and pieces' they may need. The result is a safe women (sic) and an employee who is loyal to that organisation.²⁵</i></p>
6	Mick Doleman; Executive Officer of the Maritime International Federation (lay witness called by the ACTU)	<p>During cross examination Mr Doleman confirmed that the MUA had approximately 17 enterprise agreement with a domestic violence leave clause in it and that it will continue to pursue its inclusion in other enterprise agreements as they expire.²⁶</p> <p>Mr Doleman also gives evidence regarding the White Ribbon movement and, specifically, the accreditation process it has implemented for workplaces. He speaks of the success of the program, stating that "in some ways [it has been] too successful as the resources required to extend the program are in short supply".²⁷</p>
7	Brad Gandy; Assistant Branch Secretary for the WA Branch of the AWU (lay witness called by the ACTU)	<p>Attached to Mr Gandy's statement was Spotless' Domestic Violence Leave Policy, which applies nationally to all its employees. Whilst the policy does not include a separate paid leave entitlement, it provides for the following:</p> <ul style="list-style-type: none"> • A victim of domestic violence may seek support from an EEO Contact Officer, who will advise the employee of available avenues under the policy. • A victim of domestic violence should be offered confidential counselling services through the Spotless Employee Assistance Program. • A victim of domestic violence should be provided information regarding government agencies and services that provide support to victims of domestic violence. • A victim of domestic violence may be advised of available legal protection. • A victim of domestic violence, or an employee who needs to provide care or support to a member of their immediate family or household because they are experiencing family violence, may request flexible working arrangements. • If a request is made, managers must seriously consider what changes can be made in the workplace to support the victim. The

²⁵ Witness statement of Karen Willis OAM at paragraph 45 and 47.

²⁶ Transcript of proceedings on 16 November 2016 at PN1475 – PN1480.

²⁷ Witness statement of Mick Doleman at paragraph 8.

		<p>request is to be considered in light of operational requirements and the safety of the victim.</p> <ul style="list-style-type: none"> • Discussion with the employee is required to ensure the proposition is fully understood and alternatives are exhausted if the original request cannot be accommodated.
8	<p>Jenni Mandel; Adviser – Workplace Relations Policy at Ai Group (lay witness called by Ai Group)</p>	<p>It has not been contentious in these proceedings that enterprise bargaining has resulted in a number of enterprise agreements including provisions dealing with matters associated with family and domestic violence. Moreover, there appears to be an increasing prevalence of these provisions in agreements.</p> <p>These propositions were supported by the evidence of Jenni Mandel, which was derived entirely from the Department of Employment's Workplace Agreement Database:</p> <ul style="list-style-type: none"> • 15% of all enterprise agreements approved in 2016 (up to 30 June 2016) contain a provision dealing with family and domestic violence leave.²⁸ These agreements cover 56.5% of all employees covered by the enterprise agreements approved in 2016 (up to 30 June 2016).²⁹ • This is to be compared to 7.9% of all enterprise agreements current as at 30 June 2016 which contained a provision dealing with family and domestic violence.³⁰ These agreements cover 37.8% of all employees covered by the enterprise agreements current as at 30 June 2016.³¹ <p>The evidence of Ms Mandel suggested that the inclusion of family and domestic provisions correlates with business size.</p> <ul style="list-style-type: none"> • 57.3% of all enterprise agreements approved in 2016 (up to 30 June 2016) that contain a paid domestic violence leave entitlement cover more than 100 employees.³² • Only 11.3% enterprise agreements approved in 2016 (up to 30 June 2016) that contain a paid domestic violence leave entitlement 15 or less employees.³³ <p>This was also demonstrated by questions asked of Ms Mandel by the Commission:</p> <p><i>Well, let me give you a more graphic example. If you go down to accommodation and food services?---Yes.</i></p>

²⁸ Witness statement of Jenni Mandel at paragraph 26.

²⁹ Witness statement of Jenni Mandel at Attachment B.

³⁰ Witness statement of Jenni Mandel at paragraph 10.

³¹ Witness statement of Jenni Mandel at paragraph 11.

³² Witness statement of Jenni Mandel at paragraph 44.

³³ Witness statement of Jenni Mandel at paragraph 44.

		<i>There was said to be 24 agreements and 103,000-odd employees covered by those agreements. That's said to represent 5.6 per cent of agreements in that sector, but it's said to represent 71 per cent of employees in that sector. That could only be the case if the particular agreements that have the clause apply to a large number of employees?---Yes, that would be right.³⁴</i>																																																												
9	Workplace Gender Equality Agency	<p>The Workplace Gender Equality Agency has published the following data in relation to 4 025 304 employees within 4697 organisations. As can be seen, the vast majority of employers have some measure in place to support employees who are experiencing family or domestic violence and just under 50% afford their employees unpaid leave.</p> <table border="1"> <thead> <tr> <th>Policies and strategies</th> <th>2015</th> <th>2016</th> </tr> </thead> <tbody> <tr> <td>Has a formal policy or formal strategy to support employees who are experiencing family or domestic violence</td> <td>34.9%</td> <td>39.3%</td> </tr> <tr> <td>Has some measure in place to support employees who are experiencing family or domestic violence</td> <td>76.1%</td> <td>74.8%</td> </tr> <tr> <th>Measures offered</th> <th>2015</th> <th>2016</th> </tr> <tr> <td>Employee assistance program</td> <td>64.7%</td> <td>66.4%</td> </tr> <tr> <td>HR or other staff training</td> <td>13.5%</td> <td>11.0%</td> </tr> <tr> <td>Referral to support services</td> <td>26.0%</td> <td>26.9%</td> </tr> <tr> <td>Access to any leave (overall measure)</td> <td>52.4%</td> <td>52.6%</td> </tr> <tr> <td>Paid domestic violence leave</td> <td>N/A</td> <td>12.1%</td> </tr> <tr> <td>Unpaid domestic violence leave</td> <td>N/A</td> <td>3.8%</td> </tr> <tr> <td>Unpaid leave</td> <td>N/A</td> <td>49.3%</td> </tr> <tr> <td>Domestic violence clause in an enterprise or workplace agreement</td> <td>N/A</td> <td>6.9%</td> </tr> <tr> <td>Workplace safety planning</td> <td>N/A</td> <td>8.3%</td> </tr> <tr> <td>Confidentiality of disclosure</td> <td>N/A</td> <td>41.2%</td> </tr> <tr> <td>Protection from adverse action or discrimination</td> <td>N/A</td> <td>21.3%</td> </tr> <tr> <td>Flexible working arrangements</td> <td>N/A</td> <td>48.6%</td> </tr> <tr> <td>Financial support</td> <td>N/A</td> <td>11.2%</td> </tr> <tr> <td>Change of office location</td> <td>N/A</td> <td>13.7%</td> </tr> <tr> <td>Emergency accommodation assistance</td> <td>N/A</td> <td>4.0%</td> </tr> <tr> <td>Medical services</td> <td>N/A</td> <td>10.0%</td> </tr> </tbody> </table>	Policies and strategies	2015	2016	Has a formal policy or formal strategy to support employees who are experiencing family or domestic violence	34.9%	39.3%	Has some measure in place to support employees who are experiencing family or domestic violence	76.1%	74.8%	Measures offered	2015	2016	Employee assistance program	64.7%	66.4%	HR or other staff training	13.5%	11.0%	Referral to support services	26.0%	26.9%	Access to any leave (overall measure)	52.4%	52.6%	Paid domestic violence leave	N/A	12.1%	Unpaid domestic violence leave	N/A	3.8%	Unpaid leave	N/A	49.3%	Domestic violence clause in an enterprise or workplace agreement	N/A	6.9%	Workplace safety planning	N/A	8.3%	Confidentiality of disclosure	N/A	41.2%	Protection from adverse action or discrimination	N/A	21.3%	Flexible working arrangements	N/A	48.6%	Financial support	N/A	11.2%	Change of office location	N/A	13.7%	Emergency accommodation assistance	N/A	4.0%	Medical services	N/A	10.0%
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45. In our submission, the implementation of an unpaid leave entitlement in the minimum safety net may have the effect of deterring employers from developing, implementing and/or offering such firm-specific measures which are tailored to the needs of their employees and the employer's capacity.

³⁴ Transcript of proceedings on 18 November 2016 at PN2511 – PN2522.

46. In addition, we refer to pages 145 – 152 of our November 2016 Submission.
47. **Secondly**, whilst family and domestic violence is an important social issue, it is regrettably one of many that can impact upon members of our society, including award covered employees. We deal with this issue at pages 19 – 34 of our November 2016 Submission.
48. Relevantly, the grant of an unpaid leave entitlement would have the effect of creating a new entitlement for employees who face a particular type of problem in our society, in the context of many other important and challenging issues that can also have a bearing on an employee’s personal and professional life. Our concern in this respect is twofold. Firstly, with respect, we do not consider that it is the Commission’s role to prioritise specific social issues for the purposes of creating new minimum safety net standards. Secondly, it is our concern that if the claim were successful, it may result in further calls from the union movement for additional forms of leave or otherwise in respect of various other prevailing social issues, resulting in continual claims to expand the minimum safety net in a manner that would be contrary to the need to ensure a stable and sustainable modern awards system (s.134(1)(g)).
49. It is not appropriate for the Commission, in considering what constitutes a ‘fair and relevant minimum safety net’, to prioritise particular social concerns over others. The objective would not be furthered by treating those employees affected by particular social problems more generously than those affected by others. The legislature has already struck an appropriate balance by determining the circumstances in which employees generally should be entitled to paid and unpaid leave. It has elected not to establish specific family and domestic leave entitlements. It has maintained this approach notwithstanding its understanding of the significance of the issue, as demonstrated by the amendment to s.65(1) of the FW Act to expressly deal with such subject matter. The Commission should not supplant the intent of the legislature by developing a further general leave entitlement that would be applicable to all award covered employees.
50. 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.

51. **Thirdly**, the creation of additional separate forms of leave is a matter for the NES, not the awards system. We deal with this issue at pages 153 – 164 of our November 2016 Submission.
52. **Fourthly**, the FW 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. We refer the Commission to pages 135 – 138 of the November 2016 Submission.
53. **Fifthly**, the FW Act provides various forms of protection to employees who are absent from work due to family and domestic violence. This includes the unfair dismissal and general protections regimes. We refer to pages 139 – 140 of our November 2016 Submission.
54. **Sixthly**, the modern awards 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. We dealt with this issue at pages 142 – 144 of our November 2016 Submission.
55. **Seventhly**, as has been submitted by Ai Group throughout the course of these proceedings, the complexities associated with family and domestic violence renders the task of formulating an entitlement to leave for the purposes of a minimum safety net inherently difficult. Indeed to date the ACTU has not proposed a form of words resulting in a workable clause that is clear and unambiguous in its application and operation; and appropriately defines “family and domestic violence” for the purposes of the clause. As will become apparent

from the submissions that follow, the model clauses proposed by the Commission are, in some respects, similarly problematic.

56. This fundamental difficulty and the many deficiencies that arise from the proposals filed to date and those that are put in response to the Majority Decision, weighs against the grant of an unpaid leave entitlement in modern awards for the purposes of family and domestic violence.

ISSUE A.2.1 – IF THERE IS TO BE AN ENTITLEMENT TO UNPAID DOMESTIC VIOLENCE LEAVE, WHAT QUANTUM OF LEAVE IS APPROPRIATE?

57. The various interested parties and the Background Paper have adopted different approaches to this issue.
58. The ACTU have proposed that the entitlement to unpaid leave be uncapped. In support of this position they erroneously contend that employers bear no liability if leave is not accessed in a year, and that the costs to employers where leave is accessed relate only to the need to source replacement staff members.³⁵ They argue that the quantum of the leave entitlement should consequently be based upon an employee's need.
59. The ACTU submissions fail to recognise that staff absences, particularly absences that may occur at short notice, can be very disruptive and damaging to an employer's operations. It is trite to observe that they can have an adverse impact upon productivity and performance of an organisation and to other adverse consequences, such as increased pressure on remaining staff. The submission also naively assumes that replacement staff can be found in all circumstances.
60. In terms of specific considerations arising under s.134(1), the proposed approach would be contrary to the efficient and productive performance of work (s.134(1)(d)) and would have a detrimental impact upon business including productivity, employment costs and the regulatory burden (s.134(1)(f)). It is likely

³⁵ ACTU submission dated 1 September 2017 at paragraph 12.

to have a particularly damaging impact on small employers who may have limited capacity to cover for employee absences. In this regard, the claim is at odds with that element of the objects of the FW Act that speaks to the need to acknowledge the "...special needs of small to medium-sized businesses."³⁶

61. At a broader level, the ACTU position fails to strike any form of reasonable balance between the interests of employers and employees. The perspective of both such parties must be considered by the Full Bench when determining what represents a necessary term for the purposes of ensuring a fair and relevant minimum safety net.
62. Ai Group has proposed that, should a leave entitlement be granted, it be limited to 2 days of leave per annum, with a pro-rata entitlement for part-time employees. Other employer parties have advanced similar proposals. AMIC's primary position is that the leave should not exceed 1 day, while ACCI's submissions suggested 2 to 3 days (although the clause they have proposed provides for up to 3 days per annum).
63. Ai Group's position has the benefit of being broadly aligned with the treatment under the NES of other instances where unpaid leave entitlements are afforded. This includes unpaid personal carer's leave (s.102) and unpaid compassionate leave (s.104).
64. We do not here contend that there may not be circumstances where an employee may either need or desire additional leave beyond the quantum we have proposed, for relevant purposes associated with their experience of domestic violence. Similarly, there may be circumstances where an employee needs additional leave beyond that provided by s.102 and s.104. Nonetheless, the awards system does not generally supplement the legislative entitlement afforded by the NES in this regard. It would consequently be somewhat incongruous for the Full Bench to find that a significantly different and

³⁶ See s.3(g) of the Act.

disproportionate approach should be taken in relation to family and domestic violence leave.

65. Moreover, it would not be “fair” to employers, or consistent with the modern awards objective, to simplistically align the quantum of any entitlement to the needs of employees in all circumstances. Instead, the setting of such a quantum must be based upon an assessment of what is necessary to deliver a fair and relevant minimum safety net, as contemplated in the context of the modern awards objective. As rightly observed in the Background Paper, “The quantum determined must be only what is necessary to achieve the modern awards objective.” The objective requires a balancing of a range of considerations beyond the needs or interests of employees.
66. Where employees seek extended periods of unpaid leave, it is appropriate that employers have some say as to whether they accommodate such requests, having regard to the circumstances at hand. This would include the impact upon the employer’s operations and their ability to accommodate the leave. There is no evidence to suggest that employers are not currently reasonable and compassionate in their approach to such matters. Moreover, such employees will be protected by the unfair dismissal regime, to the extent determined to be appropriate by Parliament. This system not only enables employees who have been unfairly dismissed due to the necessity for them to be absent because of the experience of family and domestic violence to obtain a remedy (including reinstatement and compensation), but also creates a powerful incentive for employers to be fair and reasonable in relation to such matters. Importantly, it enables consideration of such matters to be based upon the relevant circumstances of the parties. Such flexibilities should be retained in preference to the adoption of a heavy handed ‘one size fits all approach’ of establishing a uniform entitlement to a significant period of leave.
67. Regardless, there is insufficient material before the Full Bench to enable it to assess, in any robust way, the extent to which employees could be expected to take unpaid domestic violence leave. Indeed, the proposition that employees should be able to access unlimited unpaid leave was not the focus of the case

originally advanced by the ACTU and accordingly, was not addressed in the evidentiary cases presented by the parties. Consequently, the true impact of the claim upon employers of an unlimited, or even significant, unpaid leave entitlement cannot now be assessed.

68. As we have previously argued, the limited evidence that has been received in the proceedings suggests that an entitlement to a short period of leave would be sufficient to cater to the needs of most affected employees. Given the circumstances, the Full Bench should adopt a cautious and restrained approach to the granting of any new entitlement to unpaid leave.

The Commission's Model Clauses

69. The First Model Clause and Second Model Clause provide for an ability to take up to 2 days of unpaid leave on the occurrence of a "permissible occasion." That is, leave is available on each occasion that the employee needs to take the leave as a result of family and domestic violence, but in each instance the entitlement is limited to a maximum of 2 days. However, there is no limit on the number of times such leave may be required.
70. A major deficiency with the approach adopted within these clauses is that it does not set any firm upper limit on the quantum of leave that an employer would potentially need to provide in a given year. In circumstances where there are multiple "permissible occasions" an employee would potentially be able to access extended periods of leave. This has the potential to impose a very cumbersome burden upon an employer.
71. A further difficulty arises from the trigger for the entitlement being each occasion when "the employee needs to take the leave as a result of the family violence." The drafting appears to contemplate that every time an employee needs leave this constitutes a separate permissible occasion. This, in effect, gives rise to an unlimited entitlement. On one view, while or whenever there is a need, an entitlement arises. In advancing this submission we presume that the "permissible occasion" is not the experience of family and domestic violence, but the occurrence of the need to take leave.

72. In contrast to the approach adopted in the first two model clauses, the Third Model Clause does not appear to provide for an entitlement to unpaid leave for permanent employees, except by agreement with their employer. It does however provide differential entitlements for “short term” and “long term casual employees” that incorporate limitations on the number of days of leave that must be afforded.
73. The approach of setting a limit on the number of days per year of unpaid leave that can be taken would be preferable to the approach of providing for an entitlement every time there is a “permissible occasion”. However, our view in this regard will of course depend upon the number of days per year that might ultimately be selected. We do not agree that the 10 days included in the Third Model Clause is warranted and we cannot identify any proper basis for such a suggestion in the evidence.
74. In relation to the question of quantum, we note that the Full Bench should not be overly moved by the approach that might be taken by some employers in relation to the granting of paid or unpaid leave (either through policies or enterprise agreements). Regardless, the approach that is adopted by parties in relation to such matters varies. We also observe that the granting of a modest quantum is also consistent with the conclusion in the Majority Decision that such leave should only be available for the purposes of attending to immediate needs.
75. Alternatively, if the approach of providing an entitlement per occasion were to be adopted, there would need to be much greater clarity and rigour around what precisely constitutes the “occasion” giving rise to the entitlement.

ISSUE A.2.2 – IF THERE IS TO BE AN ENTITLEMENT TO UNPAID DOMESTIC VIOLENCE LEAVE, IN WHAT CIRCUMSTANCES SHOULD THE ENTITLEMENT TO LEAVE ARISE?

76. It is critical to note that whilst the Majority Decision expressed the preliminary view that an entitlement to unpaid should be introduced in modern awards, it also made various observations that are here apposite to the Commission’s determination of the scope of any unpaid leave entitlement.

77. The following extract of the Majority Decision is relevant: (emphasis added)

The scope of the clause

[109] The ACTU clause is directed at violence by a person against a current or former partner or member of the person's family or household. Leave is available for the purpose of "*attending activities related to the experience of being subjected to family and domestic violence.*"

[110] The ACTU rejected the submission its definition is too broad and does not require the behaviour to have an impact or an effect on employees. It submitted that this is not relevant because the employer is not required to "*inquire into the circumstances of the violence the employee is being subjected, rather the purpose for which the leave is requested.*" It is submitted that all the employer is required to do is enquire of the purpose for which they need to be absent from work. The ACTU further rejected the submission that there was no requirement that the leave be necessary, i.e. an employee may be able to arrange the activities for a time he or she was not rostered to be at work. It submitted that there was nothing in its proposal that would prevent an employer negotiating with an employee about this.

[111] We accept the submission that the current clause is too broad and uncertain in its operation.

[112] For example, there is no requirement that the family member who is the perpetrator of the violence reside with the employee who is applying for the leave or that the employee is at risk of repeated violence. So for example, an employee who was assaulted by his or her brother would be entitled to family and domestic violence leave even if the future contact with the brother was unlikely. Further the definition would capture violence committed by a member of the person's household towards her or him even if no relationship existed between the household member and the employee other than they shared a house. We accept the submission that this is too broad a scope.

[113] Further, we consider that the leave must be necessary to deal with the family and domestic violence. We accept the submission that the expression "attending activities related to the experience of being subjected to family and domestic violence" is too uncertain.

[114] Employees' experiences of domestic violence can have long term effects both physically and psychologically. An employee whilst fit for work may need on-going counselling or a child may need on-going counselling. We accept the submission that while employers have a role in supporting employees who have experienced family and domestic violence, the provision of leave for family and domestic violence should be limited to dealing with the immediate impact of such violence such as finding alternative accommodation or attending urgent court hearings.

[115] We accept that these difficulties could be overcome by a narrower and more certain clause but given our conclusion about the provision of paid leave it is not necessary for us to include in this decision a re-drafted clause. However, given our

preliminary view about the provision of unpaid leave we propose to provide the parties with a proposed clause for their consideration in the next stage of the review.³⁷

78. We do not consider that the observations made in the above excerpt of the Majority Decision are limited or, with respect, were intended to be limited to the proposed provision of paid leave. Nor do they represent “provisional views” of the Commission. Indeed paragraph [115] rather suggests that Deputy President Gooley and Commissioner Spencer regarded the issues there raised as being relevant to any proposed unpaid leave clause that the Commission might release for the consideration of interested parties as well as to any award clause that ultimately gives effect to its preliminary view. Accordingly, the Full Bench should, at this juncture, bear in mind the important conclusions reached by Deputy President Gooley and Commissioner Spencer in the Majority Decision regarding the scope of any family and domestic violence leave clause.

79. The Majority Decision accepts many of the very detailed submissions filed by Ai Group in response to the ACTU’s claim³⁸. In particular, it was accepted that:

- A clause that does not require that the alleged perpetrator of the violence resides with the employee seeking leave from work is too broad³⁹;
- A clause that does not require that the employee seeking leave from work is at risk of repeated violence is too broad⁴⁰;
- A clause that applies where violence was allegedly committed by a member of the employee’s household towards him or her even if no relationship existed between the household member and the employee other than a shared house is too broad⁴¹;

³⁷ *4 yearly review of modern awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 at [109] – [115].

³⁸ See in particular Ai Group Reply Submission dated 19 September 2016 at pages 113 – 146 and Ai Group Final Submission dated 28 November 2016 at pages 166 – 209.

³⁹ *4 yearly review of modern awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 at [112].

⁴⁰ *4 yearly review of modern awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 at [112].

⁴¹ *4 yearly review of modern awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 at [112].

- Any entitlement to leave should arise only where such leave is *necessary* to deal with the alleged violence⁴²;
 - The expression “attending activities related to the experience of being subjected to family and domestic violence” is too uncertain⁴³; and
 - Any entitlement to leave should be limited to dealing with the immediate impact of the alleged violence (such as finding alternative accommodation or attending urgent court hearings)⁴⁴.
80. The above conclusions were reached in the Majority Decision having regard to the detailed submissions filed by Ai Group and other interested parties, the evidence called by the ACTU and the cross-examination of those witnesses.
81. It is our understanding that in reaching its conclusion in relation to the preliminary views expressed in the Majority Decision, the Full Bench will have regard to all submissions made and evidence called in the proceedings to date.⁴⁵ Accordingly, we here respond to the submissions made by the ACTU and others regarding the scope of any unpaid leave clause with reference to the Majority Decision and the submissions and evidence heard in these proceedings thus far.

ISSUE A.2.2(A) – THE DEFINITION OF ‘FAMILY AND DOMESTIC VIOLENCE’

82. One of the most controversial but fundamental issues canvassed in the proceedings to date has been the terms in which “family and domestic violence” for the purposes of any award clause should be defined.
83. Whilst definitions of family and domestic violence (however described) contained in various statutory regimes may provide some guidance, we do not consider that

⁴² *4 yearly review of modern awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 at [113].

⁴³ *4 yearly review of modern awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 at [113].

⁴⁴ *4 yearly review of modern awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 at [114].

⁴⁵ *4 yearly review of modern awards—Family & Domestic Violence Leave and Family Friendly Work Arrangements clauses* [2017] FWCFB 3865 at [7].

their adoption in the modern awards system is necessarily appropriate.⁴⁶ Such definitions are generally interpreted and applied by various Courts of competent jurisdiction, who have the benefit of evidence called by the relevant parties in order to make the necessary findings of fact; evidence that an employer would not have access to for the purposes of determining whether an employee's circumstances meet the definition contained in an award clause. There may also be decisions that have been made by the Courts that go to the proper interpretation of those definitions, which readers of the award would, in all likelihood, be unaware of and further, there would be a question as to their relevance to the interpretation of the definition in the context of a modern award.

84. Furthermore, statutory definitions may have been crafted to achieve a specific end that is, for instance, consistent with the objects of that legislation or in light of a particular policy position of the relevant Government. This too has a bearing on the extent to which such a definition is necessarily appropriate for the purposes of the modern awards system, given that the Commission's task is to ensure that any award terms are *necessary* to ensure that modern awards achieve the modern awards objective; a factor that would not have coloured the crafting of an appropriate definition in the relevant legislation.
85. Similarly, definitions adopted in domestic violence leave policies implanted by certain employers or enterprise agreement clauses currently ⁴⁷ cannot necessarily be taken to be appropriate for the purposes of a minimum safety net. The Commission is here tasked with considering whether awards provide a fair and relevant *minimum safety net*. A consideration of outcomes bargained between employers and employees, or of policies that large employers have elected to put in place, does not assist the Commission in determining an appropriate form of words for the purposes of an award clause that, by virtue of its very nature, must be sufficiently rigorous.
86. Some evidence was led in these proceedings regarding the nature and concept of family and domestic violence. What has emerged from that evidence is that

⁴⁶ ACTU submission dated 1 September 2017 at paragraph 17.

⁴⁷ ACTU Submission dated 1 September 2017 at paragraph 25.

the experience of such violence may fall anywhere within a broad range of form, degree, consequence and impact. It may include grievous physical assault, accompanied by psychological and emotional trauma. It may also include an isolated incident of one partner shouting at another, which does not in fact result in any adverse or negative consequence for the person on the receiving end of that behaviour. It can include forms of abuse that are notoriously difficult to assess and identify, even for those who are trained and qualified to work in the family and domestic violence sector.

87. In making this submission, we do not of course suggest that any behaviour that is violent, threatening or abusive in nature should be condoned. However, we consider it uncontroversial that there are degrees of such behaviour. The question here before the Commission is whether it is necessary for the purposes of ensuring a fair and relevant minimum safety net to include an unpaid leave entitlement in circumstances where it could apply to employees who experience behaviour at both ends of the spectrum.
88. Many of the witnesses made reference to the notion that, as they conceive of it, family and domestic violence occurs in the context of a relationship where power and control is at play. They testified that understanding that context is a necessary part of an assessment as to whether the relevant behaviour constitutes family and domestic violence. Their evidence suggests that in that context, the occurrence of a single instance of certain behaviour does not always constitute family and domestic violence. Furthermore, they highlighted the inherently subjective nature of that assessment.
89. For instance, Dr Michael Flood (an expert witness called by the ACTU) gave the following evidence under cross examination by Ai Group: (emphasis added)

At paragraph 2.6 you talk about the need to understand domestic violence as involving a systematic pattern of power and control, and I'll read that paragraph to you. You say:

Thus, intimate partner violence or domestic violence between adults can be best understood as involving a systematic pattern of power and control exerted by one person against another, involving a variety of physical and nonphysical tactics of abuse and cohesion, in the context of a current or former intimate relationship. While the presence of an aggressive behaviour between partners or former

partners in a sense can be described as domestic violence, this pattern of power and control is domestic violence in the strong or proper sense.

Now in your statement am I correct in understanding that the term domestic violence or intimate partner violence as you term it is often broadly used to describe a range of behaviours or types of behaviour that a perpetrator might engage in?---Is often used, did you say?

Yes?---Yes, yes.

What do you mean when you say that domestic violence involving a pattern of power and control is domestic violence in the strong and proper sense?---I suppose I'm seeking to distinguish between a definition of domestic violence that focuses on the presence of any physical aggression between intimate partners or ex-partners on the one hand, and a definition of domestic violence which focuses on a - yes, a systematic pattern of coercive and controlling behaviour by one partner against the other.

...

Why do you say it's important to understand and put it differently?---Okay. Because I think otherwise we miss the likely character and context and in particular the impact of those behaviours, and in particular the ways in which one person may be subjected to what some scholars call intimate terrorism. That is, you know, a pattern of power and abuse which typically is - you know, produces fear, produces control, produces significant limits on their autonomy and so on.⁴⁸

90. Professor Humphreys, another expert witness called by the ACTU, also gave evidence about the relevance of context and the inherently subjective nature of any assessment as to whether a person is experiencing “violent, threatening, or other abusive behaviour”, that being the form of words that was there proposed by the ACTU. She was asked by Ai Group whether a series of actions or types of behaviour would, in her opinion, constitute family and domestic violence for the purposes of the ACTU’s proposed clause: (emphasis added)

What about if someone uses harsh words against their partner?---It depends on the context. So that you can't just say that any harsh words equals domestic violence. There's a context in which there's a regime of control that's established, and harsh words by someone in an equal relationship where you're having a conflict is different from harsh words where it's a context in which there's been physical or sexual or emotional abuse.

...

Would shouting at someone be domestic violence?---Not always.

⁴⁸ Transcript of proceedings on 14 November 2016 at PN709 - PN715.

Covered by that - sorry, would it be covered by that clause?---Not always. You know, it needs to be violent, threatening, or abusive behaviour by a person. So shouting can be a form of domestic violence, but the context is important. I don't think that - yes.

VICE PRESIDENT WATSON: Calling names?---Well, it depends what sort of names. You know, swearing at a person in ways that are derogatory and humiliating, that sort of name calling can be experienced as extremely abusive. But not all name calling would necessarily constitute domestic violence.

Where's your other abusive behaviour? So do we look at what the dictionary says about what abuse is?---We could, yes. I mean, to a certain extent abuse, and what's experienced of abuse, has a subjective quality about it that can't be necessarily pinned down exactly. Context does count. People do shout at each other, or call each other names, and it's not necessarily something that would necessarily fit immediately in to the context of domestic violence. Because I think that we don't want to become - you know, most couples when they separate there's a lot of strong words that happen, and it's not always domestic violence.

MR FERGUSON: Just, again, to clarify, I'm just asking for your view about what behaviours fall within that definition as contained in the document that you've been provided. Circumstances where one partner criticises the way in which another partner undertakes some sort of domestic chore. Could that be caught by this definition?---It could, but it's not always. Partners do criticise each other in the way in which they divide up their domestic duties. Women have a lot to say about men, and men have a lot to say about women in this area. I don't think that we necessarily call all of that domestic violence.

In general terms, in order to determine whether it is behaviour that falls within this definition, do you need to understand how it makes the other partner feel?---We don't always have access to that.

I agree, but do you need to understand that in order to - - -?---It's helpful to understand it, but there's some circumstances in which it will be patently obvious and you don't need to have the subjective opinion of the other person. But there will be circumstances where you do?---Particularly when it comes to emotional abuse, I think you need to understand the context.⁴⁹

91. The evidence before the Commission consistently points towards the need to have regard to the context in which the particular behaviour is exhibited for the purposes of understanding whether it constitutes family and domestic violence. An award clause that affords an employee an entitlement in circumstances that fall beyond the scope of behaviour that is conceived by the expert witnesses as family and domestic violence is not supported by the case mounted by the ACTU.
92. Several witnesses also gave evidence accepting the variable impact that the experience of family and domestic violence may have. Indeed, there was an

⁴⁹ Transcript of proceedings on 15 November 2016 at PN1188 – PN1194.

acceptance by some that such experiences will not always manifest in negative consequences.

93. This was confirmed by Dr Flood, who testified that the impact of family and domestic violence will vary depending upon the nature and degree of the violence and indeed in some circumstances, there will be no impact: (emphasis added)

Well, coming back to your characterisation of domestic violence in the strong and proper sense, would you agree that in broad terms the impact of intimate partner violence is most pronounced where the victim is subject to the domestic violence in the strong and proper sense, as you describe it?---Yes.

So by extension, the impact of intimate partner violence will often be less pronounced where the victim is subject to domestic violence which appears, you know, at the other end of the spectrum?---Yes.

Yes. Of a one-off sort of nature?---Yes.

...

There would be instances where a person is exposed in a one-off incident to - - - ?---Of what?

Of intimate partner violence?---Okay.

Such as psychological abuse?---Okay. Yes.

That they don't suffer any injury?---Correct.

Or significant negative consequence?---Correct.⁵⁰

94. Dr Flood also gave evidence regarding 'situational couple violence': (emphasis added)

Some heterosexual relationships suffer from occasional outbursts of violence by either husbands or wives during conflicts, what Johnson (2000) calls 'situational couple violence'. Here, the violence is relatively minor, both partners practise it, it is expressive in meaning, it tends not to escalate over time, and injuries are rare.⁵¹

95. We can see little justification for an award term that delivers a leave entitlement to individuals that experience it in the event that they do not in fact suffer any

⁵⁰ Transcript of proceedings on 15 November 2016 at PN724 – PN734.

⁵¹ Flood, Michael (2006) Violence Against Women and Men in Australia: What the Personal Safety Survey Can and Can't Tell Us About Domestic Violence, *Domestic Violence and Incest Resource Centre Newsletter*, Summer: 9. (Exhibit F1)

negative consequences as a result. Any definition of family and domestic violence should therefore require that the relevant behaviour has some impact or bearing on the employee in order for an entitlement to the leave to arise.

96. We note that the definition contained in Model Clause 1, which is based on the *Family Law Act 1975* (Cth), is more rigorous than any other definition proposed in these proceedings to date to the extent that it requires that the relevant behaviour must have a bearing or effect on the victim. That is, the behaviour must have the effect of coercing or controlling the family member or cause the family member to be fearful.

97. A similar approach can be found in provisions contained in the FW Act. For instance, the anti-bullying provisions in the Act require that, in addition to the alleged conduct of another worker, that behaviour “creates a risk to health and safety”.⁵² The circumstances in which a person is considered to have taken adverse action against another person under s.342(1) is also expressed by reference to the impact that that action has. For example, adverse action is taken by an employer against an employee if the employer:

- dismisses the employee;
- injures the employee in her or her employment;
- alters the position of the employee to the employee’s prejudice; or
- discriminates between the employee and other employees of the employer.

98. We consider that any entitlement to unpaid leave that does not require that the alleged behaviour had an impact or bearing on the employee would be unjustifiably broad in scope. For instance, it could apply to an employee who experiences the use of harsh words via a text message sent to their mobile phone

⁵² Section 789FD(1)(b).

(because, for instance, it is considered “emotionally abusive”), irrespective of whether that behaviour adversely affects the employee.

99. The evidence also highlights the subjectivity involved in ascertaining whether an employee is experiencing family and domestic violence; matters that undoubtedly render the task of drafting an award clause particularly difficult.

100. Notwithstanding those difficulties, we strongly submit that it would be entirely inappropriate for a new entitlement to leave to be introduced in the modern awards system that does not purport to define the relevant term (i.e. ‘family and domestic violence’ or however else it is described). The absence of a definition would render any clause extremely difficult to apply in practice. Without a definition, the provision may be interpreted very broadly and applied in circumstances that fall well beyond the scope of the Majority Decision. It would result in considerable uncertainty as to an employee’s eligibility to the leave and further, would render the Commission’s task of assessing the potential impact of any proposed clause on employers virtually impossible.

101. In our view, the definition of family and domestic violence leave included in any clause is one of three criteria that must be satisfied for an entitlement to unpaid leave to arise. That is, the employee:

- Must in fact be a victim of family and domestic violence (as defined) and be adversely affected by it;
- Must be undertaking an activity that falls within the scope of the relevant clause as a consequence of that violence; and
- Must be taking the leave for the purposes of undertaking that activity.

102. As a result, an employer must be able to assess whether an employee has been subject to family and domestic violence for the purposes of ascertaining whether, at law, an employee is eligible for leave under the relevant clause.

103. In formulating a definition, the Commission should be careful not to place employers in the impossible position of having to undertake a subjective,

multifaceted and inherently difficult task of ascertaining whether an employee is in fact the victim of family and domestic violence as defined. The difficulties associated with identifying whether an employee has been subject to family and domestic violence were brought into sharp focus in the evidence of Professor Humphreys (extracted above), Dr Cortis and Ms Kun, which we later turn to. They were also acknowledged by counsel for the ACTU in the context of a series of questions put to Dr Cortis in this regard:

... the ACTU's application doesn't require an employer to decide whether a person who seeks leave is being abused per se. We accept that that is a high burden.⁵³

104. Businesses are not necessarily equipped with the personnel or the knowledge and experience necessary to make such an evaluation. In the absence of an understanding of the complexities associated with family and domestic violence (which cannot reasonably be expected or assumed), an employer is not in a position to undertake the fact-finding exercise necessary to ascertain whether in fact an employee is experiencing such violence. These difficulties are particularly pronounced for small businesses. For instance, how is an employer to ascertain whether specific behaviour has occurred within a system of power and control and has, as a matter of fact, caused the employee to be fearful or coerced?
105. The difficulties associated with the potential need to make this assessment would be compounded if the provision itself does not require an employee to provide substantive evidence of the fact that they are experiencing family and domestic violence; a matter that was the subject of contention between the parties earlier in these proceedings. That is to say, the problems would be compounded if any employee who simply claims to be a 'victim' of family and domestic violence would be eligible to access leave under the proposed clause.
106. The issues we have here raised are intended to highlight the inherent complexities associated with the ACTU's claim and the difficulties that it poses for an employer of an employee who seeks to access the leave entitlement

⁵³ Transcript of proceedings on 15 November 2016 at PN955.

proposed. Such complexities would leave employers in circumstances whereby they are unable to effectively monitor compliance with the provision.

107. We consider it likely that in practice, an employer would find themselves relying purely on an employee's assertion that they are experiencing family and domestic violence, without any real ability to verify this. This is a startlingly inappropriate basis for the operation of an element of the safety net.

108. Accordingly, any definition of family and domestic violence should be simple and easy to understand. It should enable an employer and employee to readily identify whether the employee is eligible for the leave by reference to the definition.

109. Finally, any definition of family and domestic violence should not go beyond the scope of that which was determined in the Majority Decision. That is:

- A clause that does not require that the alleged perpetrator of the violence resides with the employee is too broad⁵⁴;
- A clause that does not require that the employee is at risk of repeated violence is too broad⁵⁵; and
- A clause that applies where violence was allegedly committed by a member of the employee's household towards him or her even if no relationship existed between the household member and the employee other than a shared house is too broad⁵⁶.

110. The ACTU boldly submits that, notwithstanding the Majority Decision, the scope of any unpaid leave clause should not be limited consistent with Deputy President Gooley and Commissioner Spencer's decision.⁵⁷ It has not provided

⁵⁴ *4 yearly review of modern awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 at [112].

⁵⁵ *4 yearly review of modern awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 at [112].

⁵⁶ *4 yearly review of modern awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 at [112].

⁵⁷ ACTU submission dated 1 September 2017 at paragraph 20.

any rationale for its submission or called any additional evidence that might lend support to its submission. For the reasons previously articulated, we understand the observations made in the Majority Decision to be equally apposite to the introduction of any leave entitlement and, in addition, represent conclusions reached by the Commission (as opposed to provisional views). Further, and in any event, we do not consider that the ACTU should now be granted an opportunity to re-litigate matters already determined by the Commission. Accordingly, any unpaid leave clause should properly reflect the Majority Decision in this regard.

111. Should the Commission ultimately conclude that the formulation of a workable, simple and easy to understand definition for the purposes of the modern awards system is impracticable, in our view that, in and of itself, should lead it to decide against the introduction of a new leave entitlement across the modern awards system.
112. In the submissions that follow, we address the definitions proposed in the model clauses, and subsequently the submissions made by the ACTU in response to the Commission's provisional views.

The First Model Clause

113. The First Model Clause contains the following definition of family violence:
(emphasis added)

family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful.

Note: Examples of behaviour that may constitute family violence include (but are not limited to) the following:

- (a) an assault;
- (b) a sexual assault or other sexually abusive behaviour;
- (c) stalking;
- (d) repeated derogatory taunts;
- (e) intentionally damaging or destroying property;

(f) intentionally causing death or injury to an animal;

(g) unreasonably denying the family member the financial autonomy that they would otherwise have had;

(h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or the family member's child, at a time when the family member is entirely or predominantly dependent on the person for financial support;

(i) preventing the family member from making or keeping connections with their family, friends or culture;

(j) unlawfully depriving the family member, or any member of the family member's family, of their liberty.

114. We raise the following concerns in relation to the First Model Clause.

115. **Firstly**, the terms "violent" and "threatening" are not defined by the clause, and the "other behaviour[s]" are also not defined or described. This, in and of itself, renders the provision inconsistent with s.134(1)(g), which refers to the need to ensure a simple and easy modern awards system.

116. Having regard to the plain and ordinary meaning of these words, as well as the context of in which these proceedings have been conducted (including the evidence that has been adduced), it would appear to us, that the proposed definition might encapsulate:

- any exertion of physical force, including acts of a sexual nature, whether causing injury or otherwise;
- any threat of physical force, including acts of a sexual nature;
- any emotional abuse;
- any threat of emotional abuse;
- any psychological abuse;
- any threat of psychological abuse;
- any economic abuse;
- any threat of economic abuse;

- any use of harsh or derogatory words, whether face-to-face or through some other medium;
- any coercive behaviour;
- any threat of coercive behaviour;
- stalking;
- any threat of stalking;
- any other form of ill treatment so perceived; and
- any threat of any other form of ill treatment.

117. This is consistent with our cross examination of Professor Humphreys.⁵⁸

118. As can be seen the definition would capture a very broad range of behaviours; a matter that goes to the scope and potential impact of an unpaid leave entitlement.

119. **Secondly**, we acknowledge that the difficulties that might otherwise flow from a clause of such broad import may be less pronounced as a result of the subsequent element of the definition, which requires that the behaviour “coerces or controls a member of the person’s family” or “causes [them] to be fearful”. However, as we have previously discussed, that element requires an understanding of the context in which the alleged perpetrator engaged in the behaviour and how it makes the employee feel; matters that render the application of a leave entitlement in the minimum safety net inherently problematic.

120. **Thirdly**, the proposed clause does not reflect the Majority Decision. It does not require that the employee seeking leave from work is at risk of repeated violence.⁵⁹

⁵⁸ Transcript of proceedings on 14 November 2016 at PN171 – PN1187.

⁵⁹ *4 yearly review of modern awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 at [112].

121. **Fourthly**, the proposed clause would apply if the alleged perpetrator was a “member of the person’s family”, which would appear to include any individual whom the person is related to by blood,⁶⁰ whether living together or otherwise, as well as adopted children and step-children.⁶¹ This includes parents, grandparents, children, siblings, uncles, aunts, cousins and so on. Relevantly, it is inconsistent with the Majority Decision to the extent that it does not require that the alleged perpetrator of the violence resides with the employee seeking leave from work⁶².
122. **Fifthly**, we are concerned that the list of examples may lead readers of the relevant award into error. This is because it may cause employers and/or employees to conclude that wherever any of the behaviours there listed are exhibited, the definition of family violence is met. However this may not always be the case. For instance, there may be circumstances in which “repeated derogatory taunts” do not have the effect of “[coercing] or [controlling]” the employee or causing the employee to be “fearful”. Whilst we understand that the intention underpinning the proposed inclusion of the example may be to assist a reader of the award to interpret the relevant definition, we consider that it may ultimately have a contrary effect.

The Second Model Clause

123. The Second Model Clause contains the following definition of family violence:

Family violence is:

- (a) behaviour by a person towards a family member of that person if that behaviour –
- i. is physically or sexually abusive; or
 - ii. is emotionally or psychologically abusive; or
 - iii. is economically abusive; or

⁶⁰ Macquarie Dictionary, fifth edition.

⁶¹ See s.17 – Meaning of *child* of a person, of the FW Act.

⁶² *4 yearly review of modern awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 at [112].

iv. is threatening; or

v. is coercive; or

vi. in any other way controls or dominates the family member and causes that family member to feel fear for the safety and wellbeing of that family member or another person.

(b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).

124. 'Family member' is defined as follows:

Family member means:

(a) a person who is, or has been, the relevant person's spouse or domestic partner; or

(b) a person who has, or has had, an intimate personal relationship with the relevant person; or

(c) a person who is, or has been, a relative of the relevant person; or

(d) a child who resides with the relevant person or has previously resided with the relevant person on a normal or regular basis; or

(e) a child of a person who has, or has had, an intimate personal relationship with the relevant person.

125. In relation to the Second Model Clause, we raise the following concerns.

126. **Firstly**, the clause would appear to apply in the very broad range of circumstances listed above and gives rise to the same concerns about the context, subjectivity and complexity of the definition.

127. **Secondly**, in relation to the express reference to economic abuse, we refer the Commission to the evidence of Dr Cortis and Ms Kun; witnesses called by the ACTU, which revealed the particular complexities and potential difficulties associated with determining or identifying the extent to which behaviour constitutes 'economic abuse'.

128. Dr Cortis gave the following evidence under cross-examination: (emphasis added)

I want to commence by asking you about the matters addressed in part 3 of your first report, if you could turn to that?---Part 3, is that titled, "Estimating the prevalence of economic abuse"?

It is. In that chapter you explain the difficulties of measuring the prevalence of economic abuse in Australia, don't you?---Yes.

I want to take you to paragraph 14. You say there at the start of that paragraph: The estimates of the prevalence of financial abuse in Australia should be interpreted with a degree of caution.

?---Yes.

You say that one reason is that:

The wide range of behaviours which may be involved makes this kind of abuse difficult to define and capture in surveys and administrative data sets.

Am I right to assume that it's not possible to decisively identify all of the specific behaviours that constitute economic abuse?---They are poorly recognised in my opinion in comparison to physical - to tactics of physical and emotional abuse.

...

I understand from your evidence that limiting a partner's access to financial resources could be economic abuse?---That's right.

Would all instances where a partner limits another partner's access to funds or financial resources be abuse - be economic abuse?---If it is - where it is in the context of exerting control and generating costs for women, yes, it would be considered economic abuse.

Can you explain what you mean by exerting control?---Exerting control would be generating costs for women, it could - it would involve a very wide range of tactics around interfering with women's acquisition and use of resources, denying them financial autonomy, denying them access to resources that people require to have choice and control over their own lives.

...

So would contesting child support payments or a property settlement in the course of litigation in divorce proceedings constitute economic abuse?---It could. For example deliberately prolonging the time taken for property settlement is a common form of economic abuse. The child support system may also be used as a site for economic abuse, for example, misreporting one's income.

Coming back to the first point, am I right to say that contesting child support payments or property settlement wouldn't always be economic abuse?---It depends.

Does it depend on the motivations?---It depends on the motivations and the tactics and the faith, whether the party has entered into the proceedings in good faith.

So in order to understand whether someone is subject to economic abuse, in that context, you'd need to understand the underlying motivations behind a partner's position in litigation?---You'd also need to understand the experience of the woman affected. If they felt that they were subject to - I suppose I'm saying there's a subjective experience of women that would need to be taken into account and if they - yes. If they - if they felt that the - court proceedings for example were being unduly prolonged as a way to - so

that, for example, the man could spend money in the interim then it would be, yes. It would be considered economic abuse.

So it's abuse, so to work out whether or not it's abuse you have to know the motivations of the partner - - -?---And the experience.

- - - and the feelings of the potential victim?---Yes, yes.⁶³

129. The evidence of Ms Kun reveals the practical impossibility in some circumstances for an employer, or even a third party such as community service worker, to identify with certainty whether a person is subject to economic abuse: (emphasis added)

I'll just take you to paragraph 34?---Yes.

You there say starting in the second paragraph:

Financial abuse is often hidden or unrecognised even by the women who experience it. There is poor public awareness or understanding of the issues by professionals, service providers and legal or financial support service industries.

Who are the professionals you're referring to there?---The professionals could be financial counsellors. There's a banking industry, there's a whole lot of professionals that come into contact with women that are experiencing financial abuse and it can also be community sector professionals.

What do you mean by community sector professionals?---Social workers, youth workers, welfare workers.

And they generally have a poor understanding of these sorts of issues, or sometimes have a poor understanding?---Sometimes, yes.

...

Who are you referring to when you say service providers?---The service providers would also be the family - it can be the family violence sector, workers within that. It's a big sector, yes.

...

And just for the purpose of clarity, when you refer to financial support services industry what do you mean?---Yes, financial planners, banking industry, finance.

I'll just take you to paragraph 40. You there say that WIRE provides training about financial abuse in the context of family violence and that's designed for amongst other community - workers in the community sector?---Mm-hm.

⁶³ Transcript of proceedings on 15 November 2016 at PN907 – PN954.

Am I right to assume that part of the purpose in providing that training is to combat this lack of understanding amongst some of those workers?---Definitely.

Are you aware of any sort of mandatory legal requirement that such workers undertake this training?---No, but out of the Royal Commission there will be financial counsellors and other community services sector will be receiving training on financial abuse. Whether it's mandated, I don't know.

...

So are you talking about workers in Victoria?---Yes.

...

And I just want to talk to you about the nature of financial abuse if I may?---Mm-hm.

It can take many forms can't it?---Correct.

I just take you to paragraph 37 and paragraph 37A specifically. From reading that I understand, and you'd agree with me, that that can include limiting access to shared moneys?---Yes.

Is limiting your partner's access to shared moneys always financial abuse?---No.

Is it - when do you say it's financial abuse?---When power and control is involved as with all family violence. It's when it's not equal and not respectful.

So is it if one partner is in some way trying to control another partner's behaviour through limiting access, that that would be financial abuse?---Correct. So if a - one person was saying "I won't give you access to the money unless you have sex with me" that's financial abuse.

Yes, but what about if one partner volunteers to allow the other partner to manage the couple's resources; could that be financial abuse?---If they volunteer freely. That what we say at WIRE is if that person who volunteers knows that any time if they say "I want to have a look at the accounts" or "I now want to be involved" they could and they don't fear the repercussions of that statement.

So in order to work out whether it's financial abuse you need to know whether that partner feels that way?---Yes it's about power and control. Yes.

And I understand - well, would you agree with me that financial abuse could include the situation where somebody tries to limit their partners' access to paid work?---Yes.

And that could include behaviours such as sabotaging someone's employment?---Correct.

And could include for example hiding a set of keys?---Correct.

And it could include restricting access to training or education?---Yes.

I think I've read somewhere that it could include incurring a parking fine in another partner's name?---Usually incurring several and on purpose and hiding them.

How many?---It's impossible to say whether it's one or whether it's 10. Again we go back to family violence is about power and control. It's about them not disclosing and so that person is left with the increasing fines that come with not paying a parking fine.

So in order to identify whether or not someone is suffering financial abuse do you need to have a broad understanding of the nature of their relationship?---At WIRE before we would make that determination about whether a person is experiencing about financial abuse, we would talk about the context of the relationship and have that conversation with the person.

And then you just make that decision based on what the woman tells you or the person tells you?---We would base it upon our expertise and what the woman tells us.

I take it you wouldn't necessarily speak to the partner?---No.⁶⁴

130. The evidence of Ms Kun also establishes the lack of understanding of economic abuse amongst not only the women who experience it but also by the professions assisting women experiencing it. This is said to include community sector professions (including social workers, youth workers and welfare workers) as well as providers of legal or financial services. This creates significant difficulties for a clause that operates on the assumption that such persons can provide evidence that a person is undertaking an activity associated with the experience of this form of abuse.
131. The difficulties associated with identifying economic abuse by professionals, persons working with family and domestic violence support services, employers and employees weigh against the inclusion of an award clause in the minimum safety net that creates a leave entitlement in relation to it.
132. **Thirdly**, it is not clear whether the definition requires that the behaviours listed have some impact on the employee. Subclause (a)(vi) of the definition of family violence appears to proceed on the assumption the behaviours listed preceding it will have the effect of controlling or dominating the relevant person or causing them to fear for their safety or that of another person. The drafting of the definition does not, however, expressly require that to be the case. To that extent, we refer to the submissions we have earlier made about the need to ensure that any

⁶⁴ Transcript of proceedings on 17 November 2017 at PN1961 – PN2004.

unpaid leave clause applies only where an employee is in fact impacted by the alleged behaviour.

133. **Fourthly**, the definition of “family violence” at subclause (b) appears to have the effect of extending an entitlement to a child where that child hears or witnesses, or is otherwise exposed to the effects of behaviour by a person referred to in paragraph (a).
134. We make the obvious point that the term “child” is not defined for the purposes of the clause and as a result, its meaning is ambiguous. Further, the issue of whether children who witness or are otherwise exposed to violent behaviour between by a person towards their family member was not properly ventilated in the proceedings conducted in relation to the ACTU’s claim. There was very little if any material presented that goes to the prevalence of children being exposed to such violence and consequently needing to take leave from work. As such the case presented to date does not establish that the introduction of such a leave entitlement is necessary in the relevant sense.
135. **Fifthly**, the proposed clause does not reflect the Majority Decision. It does not require that the employee seeking leave from work is at risk of repeated violence.⁶⁵
136. **Sixthly**, the proposed clause is inconsistent with the Majority Decision to the extent that it does not require that the alleged perpetrator of the violence resides with the employee seeking leave from work⁶⁶. For example, the definition of “family member” includes a former spouse, a former domestic partner, a person with whom they had an intimate personal relationship regardless of whether they were cohabiting partners and a relative regardless of whether they were cohabiting.

⁶⁵ *4 yearly review of modern awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 at [112].

⁶⁶ *4 yearly review of modern awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 at [112].

The Third Model Clause

137. The Third Model Clause contains the following relevant definitions:

Domestic and family violence means behaviour by a person (the *first person*) towards another person (the *second person*) with whom the first person is in a relevant relationship that –

(a) is physically or sexually abusive; or

(b) is emotionally or psychologically abusive; or

(c) is economically abusive; or

(d) is threatening; or

(e) is coercive; or

(f) in any other way controls or dominates the second person and causes the second person to fear for the second person's safety or wellbeing or that of someone else.

Relevant relationship means –

(a) an intimate personal relationship; or

(b) a family relationship; or

(c) an informal care relationship.

138. **Firstly**, the clause would appear to apply in the very broad range of circumstances listed above and gives rise to the same concerns about the context, subjectivity and complexity of the definition.

139. **Secondly**, we refer to the submissions we have earlier made in relation to economic abuse, which is expressly identified at subclause (c) of the proposed definition of domestic and family violence.

140. **Thirdly**, it is not clear whether the definition requires that the behaviours listed have some impact on the employee. Subclause (f) of the definition of domestic and family violence appears to proceed on the assumption that the behaviours listed preceding it will have the effect of controlling or dominating the relevant person or causing them to fear for their safety or wellbeing, or that of another person. The drafting of the definition does not, however, expressly require that to be the case. To that extent, we refer to the submissions we have earlier made

about the need to ensure that any unpaid leave clause applies only where an employee is in fact impacted by the alleged behaviour.

141. **Fourthly**, the proposed clause does not reflect the Majority Decision. It does not require that the employee seeking leave from work is at risk of repeated violence.⁶⁷

142. **Fifthly**, the proposed clause is inconsistent with the Majority Decision to the extent that it does not require that the alleged perpetrator of the violence resides with the employee seeking leave from work⁶⁸. For example, “relevant relationship” means:

- An intimate personal relationship, which could include a person with whom the relevant employee is not living.
- A family member, which could include parents, grandparents, cousins, nieces, nephews, aunts, uncles and so on, regardless of whether they lived with the person.

143. **Sixthly**, the definition of “relevant relationship” includes an informal care relationship. To our knowledge, no evidence has been led in these proceedings about violence perpetrated by such persons. There is no material to suggest that such violence does in fact occur and if so, its prevalence. There is no material before the Commission that might aid it in understanding the nature of any such violence, its impact, the extent to which victims of it are award covered employees or the purposes for which they may seek to be absent from work. Further, the definition is not limited to carers who reside with the employee and to that extent, it extends beyond the scope of the Majority Decision.⁶⁹

⁶⁷ *4 yearly review of modern awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 at [112].

⁶⁸ *4 yearly review of modern awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 at [112].

⁶⁹ *4 yearly review of modern awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 at [112].

The ACTU's Originating Proposal

144. The definition proposed by the ACTU for the purposes of its claim was as follows:

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

145. It is trite to observe that the ACTU's proposal was drafted in very broad terms and, as submitted by the ACTU, was intended to be so interpreted.⁷⁰

146. Ai Group has previously dealt, at length, with the ACTU's proposed definition in light of the evidence heard by the Commission, and identified numerous reasons why we considered that its adoption would be extremely problematic.⁷¹ Whilst it is not clear from the ACTU's submissions of 1 September 2017 that it continues to pursue the inclusion of that definition, to the extent that the Commission proceeds to consider it, or an alternate clause that shares certain elements with it or gives rise to similar issues, Ai Group continues to rely on those submissions.

ISSUE A.2.2(B) – THE CIRCUMSTANCES IN WHICH THE LEAVE MAY BE ACCESSED

147. We here articulate the following basic propositions that we advance in relation to the circumstances in which any unpaid leave entitlement may be accessed and then subsequently comment on the model clauses and the ACTU proposal in this regard.

148. **Firstly**, in response to question three posed in the Background Paper; any unpaid leave clause should list the circumstances in which the leave may be accessed. It is not appropriate that the leave be permitted to be taken in any number of undefined circumstances. Such uncertainty is innately undesirable and may give rise to disputation at the enterprise level. It would shift the burden of ascertaining whether the purpose for which an employee seeks to take leave is properly connected with and, as a result of, the employee suffering from family and domestic violence to an employer; an outcome that is particularly

⁷⁰ ACTU Outline of Submissions dated 1 June 2016 at paragraph 2.12.

⁷¹ Ai Group Final Submission dated 28 November 2016 at paragraphs 460 – 478.

undesirable given the complex nature of family and domestic violence. Further, it would be inconsistent with the need to ensure that modern awards are simple and easy to understand (s.134(1)(g)).

149. These proceedings are of course not being conducted in a vacuum. The ACTU mounted an evidentiary case and the Commission has access to the many materials listed in the Research Reference List it recently published. Accordingly, having regard to that which is before the Full Bench, the Commission should formulate a list of circumstances in which an employee may access any unpaid leave entitlement.
150. **Secondly**, any list of circumstances in which the leave may be accessed should be exhaustive. It should not contain a “catch all” provision, such as that proposed by the ACTU, which we shortly come to. The inclusion of such a provision, which effectively grants an entitlement to unpaid leave for any additional purpose to those expressly identified, would have the same effect as a clause that allows unpaid leave for any purpose for which the employee seeks it, which we have dealt with above.
151. **Thirdly**, the purposes for which any unpaid leave can be accessed must be limited to the immediate impact of the alleged violence, consistent with the Majority Decision.⁷² A clause that enables employees to take unpaid leave absent any temporal connection with the occurrence of the alleged family and domestic violence is unjustifiably broad and at odds with the conclusion reached by Deputy President Gooley and Commissioner Spencer. For the reasons we articulate shortly, neither the ACTU proposal nor the Commission’s model clauses reflect their decision.

⁷² *4 yearly review of modern awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 at [114].

152. **Fourthly**, any entitlement to leave should arise only where such leave is *necessary* to deal with the alleged violence, as stated in the Majority Decision⁷³. In our view, this is relevant to:

- Whether the taking of unpaid leave itself is necessary; and
- Whether it is necessary to take it on the day and time proposed.

153. An assessment as to whether the leave is necessary, in relation to each of the aforementioned aspects, should be an objective one; not one that is based on an employee's subjective determination as to whether the leave is necessary, as such an approach would be inconsistent with the obligation imposed on the Commission to ensure that modern awards provide a *fair* safety net to employers and employees.

154. In so submitting, we note that the ACTU's proposals and the Commission's model clauses do not contemplate any employer discretion as to whether the unpaid leave is taken and if so, when it is taken. The provision effectively provides an absolute right to take leave.

155. Personal/carer's leave under the NES is also non-discretionary, in the sense that an employee who meets the circumstances described at s.97 and the notice and evidentiary requirements at s.107 may take personal/carer's leave. So long as the relevant statutory criteria are met, the legislation does not grant an employer the discretion to refuse access to the leave entitlement. Compassionate leave operates similarly.⁷⁴

⁷³ 4 yearly review of modern awards – Family and Domestic Violence Leave Clause [2017] FWCFB 3494 at [113].

⁷⁴ Sections 104 and 105 of the FW Act.

156. Relevantly, however, by virtue of the manner in which the Act casts the provisions associated with taking the leave, the ability to do so arises only in circumstances where it is necessary. That is, s.97 allows an employee to take personal/carer's leave if it is taken:

- because the employee is not fit for work; or
- to provide care or support to a member of the employee's immediate family or household.

157. In describing the circumstances in which an employee can take personal/carer's leave by reference to specific situations that arise at a particular point in time and which, by their very nature, render the employee's absence from work necessary, the legislation effectively creates a limitation on the purposes for which the leave can be taken and *when* that leave is taken. Section 105 prescribes the circumstances in which compassionate leave may be taken in a similar vein.

158. The issues we here raise go to the potential breadth of any unpaid leave clause which are relevant to:

- The need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)); and
- The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f)).

159. **Fifthly**, and by extension, any entitlement to unpaid leave should be granted only where it is impracticable for the employee to attend to the relevant activity outside of working hours. The material before the Commission does not, as a matter of merit, justify the introduction to an absolute right to leave in circumstances where the relevant activity could otherwise be undertaken outside of working hours.

160. **Sixthly**, any entitlement to unpaid leave should arise only where it is necessary *as a result of* the alleged family and domestic violence. That is, the taking of the leave must be sufficiently connected to and be as a result of the alleged violence.

The ACTU's proposal in particular does not make this clear; a matter that we shortly turn to.

The ACTU's Proposal

161. The ACTU submits that unpaid family and domestic violence leave should be available to employees as follows: (emphasis added)

An employee experiencing family and domestic violence is entitled to leave without pay when required for the purposes of:

- (a) Attending legal proceedings;
- (b) Attending appointments with counsellors or medical, financial or legal professionals;
- (c) Making relocation or other safety arrangements; or
- (d) Any other activities related to the effects of family and domestic violence.⁷⁵

162. In proposing the above clause, the ACTU submits that:

- It has been drafted to “ensure that family and domestic violence leave is available in circumstances where it is necessary for the affected employee to deal with the “immediate impact” of such violence”, consistent with the Majority Decision⁷⁶ (emphasis added);
- It accepts that an employee must *require* leave during working hours to attend to an activity sufficiently connected with the effects of the alleged violence in order for an entitlement to the leave to arise;⁷⁷
- The draft clause it has proposed provides “sufficient certainty, and there is no need to expressly limit access to the entitlement to the “immediate impact” of the violence only”⁷⁸;

⁷⁵ ACTU submission dated 1 September 2017 at paragraph 22.

⁷⁶ ACTU submission dated 1 September 2017 at paragraph 23.

⁷⁷ ACTU submission dated 1 September 2017 at paragraph 28.

⁷⁸ ACTU submission dated 1 September 2017 at paragraph 28.

- The draft clause it has proposed “clarifies the need for a direct connection between the requirement for leave and the effect of family and domestic violence on an employee”;⁷⁹ and
- The use of the words “related to” in subclause (d) is intended to require the existence of a causal connection between the experience of the alleged violence and the purpose for which the leave is taken.⁸⁰

163. We here explain the various issues that we have identified as arising from the ACTU’s proposal and respond to the above contentions.

A Temporal Connection

164. The ACTU submits that its proposal has been drafted “with regard to the comments made by the majority Full Bench that the original wording proposed by the ACTU should be narrowed to ensure that family and domestic violence leave is available in circumstances where it is necessary for the affected employee to deal with the “immediate impact” of such violence”⁸¹. It submits that its proposed clause provides “sufficient certainty, and there is no need to expressly limit access to the entitlement to the “immediate impact” of the violence only”⁸².

165. The form of words proposed by the ACTU appears to grant an employee access to leave where the employee is “experiencing” family and domestic violence. The use of the present tense suggests that an employee would be entitled to leave at a point in time at which that employee is experiencing family and domestic violence. If the employee experienced family and domestic violence some years ago, but is no longer experiencing such violence, an entitlement to leave would not arise.

⁷⁹ ACTU submission dated 1 September 2017 at paragraph 28.

⁸⁰ ACTU submission dated 1 September 2017 at paragraphs 24 – 25.

⁸¹ ACTU submission dated 1 September 2017 at paragraph 23.

⁸² ACTU submission dated 1 September 2017 at paragraph 28.

166. Nevertheless, as has been accepted by the ACTU, the Majority Decision found that any entitlement to leave should be limited to dealing with the immediate impact of the alleged violence.⁸³ In the interests of ensuring that the provision is simple and easy to understand (s.134(1)(g)), we submit that any clause ultimately determined by the Commission should make clear that the entitlement arises only in the circumstances contemplated in the Majority Decision.

A Connection with the Family and Domestic Violence

167. Notwithstanding the ACTU's submissions, the drafting it has proposed in its submission⁸⁴ does not connect the experience of family and domestic violence with the purposes for which the leave may be taken.

168. For example, under its proposed wording, "an employee experiencing family and domestic violence [would be] entitled to leave without pay when required for the purposes of ... attending legal proceedings". The clause does not specify that the attendance at legal proceedings must be necessitated by the experience of family and domestic violence. An employee experiencing family and domestic violence could, on a plain reading of the words, access the entitlement to unpaid leave for the purposes of attending legal proceedings associated with a traffic infringement that is no way connected to the experience of the alleged violence. Similarly, the leave could be accessed by an employee "experiencing family and domestic violence without pay when required for the purposes of ... attending appointments with ... medical ... professionals". However, this could include a medical appointment in relation to an illness that is not in any sense associated with the alleged violence.

169. Such outcomes are quite clearly unjustifiable and out-of-step with the intention underpinning the Majority Decision as well as what which we understood to be the intention of the ACTU.

⁸³ *4 yearly review of modern awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 at [114].

⁸⁴ ACTU submission dated 1 September 2017 at paragraph 28.

The Potential Breadth of Activities

170. The proposed subclause (d) is effectively a “catch all” provision. It would enable an employee to access family and domestic violence leave for the purposes of any “activities related to the effects of family and domestic violence”. It completely disregards the observation made in the Majority Decision that the expression “attending activities related to the experience of being subject to family and domestic violence” is too uncertain⁸⁵.

171. In a previous submission, the ACTU provided the following examples of circumstances in which an employee might seek to access an entitlement to leave:

... This could include attending appointments with children who have been affected by domestic violence, or attending a child’s school or other sporting or extracurricular activities to notify those responsible for the child’s care of relevant information. ...⁸⁶

172. In its submissions of 1 September 2017 (or any of its earlier submissions) the ACTU has not sought to identify all of the circumstances that justify accessing the proposed leave entitlement.

173. The clause would allow an employee to access leave for any purpose that is merely “related” to their experience of family and domestic violence, even if the connection between their experience and the activity is tenuous. The proposed provision would potentially extend to circumstances such as attending financial institutions and visiting Centrelink or some other government agency.

174. The ACTU has previously submitted that “because of the complexities associated with the experience of family and domestic violence, it is appropriate that the list of activities for which leave can be taken is inclusive, not exclusive”⁸⁷. As previously stated, the difficulty with that approach is that whilst it relieves the drafter of the difficult task of identifying the various relevant activities for which the leave may or may not be taken, it transfers the need to grapple with those

⁸⁵ *4 yearly review of modern awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 at [114].

⁸⁶ ACTU Outline of Submissions dated 1 June 2016 at paragraph 2.16.

⁸⁷ ACTU Outline of Reply Submission dated 6 October 2016 at paragraph 132.

complexities to the reader of the award. Such an approach is contrary to the need to ensure that awards are simple and easy to understand (s.134(1)(g)).

175. To point to domestic violence leave policies or enterprise agreement clauses currently in force that use the terminology here adopted by the ACTU⁸⁸ misses the point. The Commission is here tasked with considering whether awards provide a fair and relevant *minimum safety net*. A consideration of outcomes bargained between employers and employees, or of policies that large employers have elected to put in place, does not assist the Commission in determining an appropriate form of words for the purposes of an award clause that, by virtue of its very nature, must be sufficiently rigorous.

176. We have earlier submitted that the provision proposed by the ACTU would appear to apply to those who “experience” family and domestic violence by way of having witnessed it. We consider that subclause (d) would enable such an employee to access leave under the proposed clause, not only to seek assistance for themselves but also to accompany the victim or the perpetrator to, for example, medical or legal appointments or proceedings. We consider that accordingly, the ACTU’s proposed clause is of unjustifiably broad import.

The Necessity for Taking the Leave and the Absence of Employer Discretion

177. The Majority Decision concluded that any entitlement to leave should arise only where such leave is *necessary* to deal with the alleged violence⁸⁹.

178. The ACTU appears to acknowledge this element of the decision, as it accepts that an employee must *require* leave during working hours to attend to an activity sufficiently connected with the effects of the alleged violence in order for an entitlement to the leave to arise.⁹⁰

179. Despite this, the clause proposed does not confine an entitlement to leave to circumstances in which it is in fact necessary for the employee to be absent from

⁸⁸ ACTU Submission dated 1 September 2017 at paragraph 25.

⁸⁹ *4 yearly review of modern awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 at [113].

⁹⁰ ACTU submission dated 1 September 2017 at paragraph 28. See also paragraph 23.

work and further, that it is necessary for that leave to be taken at the proposed time. The proposed provision appears to permit an employee to take the leave for any one of the purposes identified in the clause, without regard for whether the leave is warranted and if so, whether the employee requires the leave at the time that they take it.

180. In so submitting, we note that the provision does not contemplate any employer discretion as to whether the leave is taken and if so, when it is taken. The provision effectively provides an absolute right to take leave. So long as the employee is accessing leave for the purpose of attending to activities related to the experience of family and domestic violence, the leave can be taken “when required” (that is, whenever required by the employee). The leave can be accessed even if the relevant activity for which the leave was taken could have been completed outside of the employee’s hours of work.
181. As a consequence, the leave could be taken by an employee who has experienced family and domestic violence as and when the employee so desires. The terms in which the entitlement is expressed do not, by their very nature, limit the entitlement to circumstances where it is necessary to do so. The provision does not require an employee to establish that the purpose for which they seek to take the leave necessitates their absence, nor does it grant an employer the discretion to make that assessment.
182. For instance, an employee may need to attend a financial institution. The need to do so may be premised on the fact that they have “experienced” certain violence perpetrated by their partner and as a result, they seek to alter their financial arrangements because they intend to separate from their partner. It should not be assumed, however, that this is synonymous with a need to be absent from work. Notwithstanding, even in the absence of any urgency to make these arrangements or any reason why the employee cannot do so at a time that the employee is not required to attend work, the proposed clause would permit an employee to take leave and as a consequence, potentially impose additional costs and operational difficulties on an employer.

183. By way of further examples, a part-time employee who works three days per week, could choose to visit a financial institution or make non-urgent relocation arrangements on the three working days, rather than on their four non-working days. Also, an afternoon shift worker who usually works from 2pm to 10pm could choose to visit a bank at 4pm, rather than at noon.
184. As can be seen from the above illustration, the provision proposed places the implications of an additional leave entitlement squarely upon an employer, without any restriction upon the circumstances in which the leave can be taken by an employee. The provision does not give any consideration to the prospect of an employee taking steps to minimise the implications that such leave might have for their employer.
185. If an employee experiencing family and domestic violence decides to be absent for a specific purpose and that purpose is one that is specified at subclauses (a) – (d), nothing more is required.

The First Model Clause

186. The First Model Clause prescribes the entitlement to the unpaid leave and then the circumstances in which it may be taken as follows: (emphasis added)

X.5 An employee, including a casual employee, who is experiencing family violence is entitled to 2 days of unpaid leave for each occasion (a ***permissible occasion***) when the employee needs to take the leave as a result of the family violence.

X.6 An employee may take unpaid leave for a particular occasion if the employee needs to take the leave as a result of the family violence.

X.7 An employee may take unpaid leave for a particular permissible occasion as:

- (a) a single continuous period of up to 2 days; and
- (b) any separate periods to which the employee and employer agree.

187. We raise the following concerns with the proposed clauses, with reference to the principles listed above:

- The clauses do not list the circumstances in which the leave may be taken. It simply allows an employee to take leave wherever it is “needed”,

absent any employer discretion. We refer to the first proposition raised above and our submissions in relation to the ACTU's proposal

- The clauses do not limit the circumstances in which the leave may be taken to deal with the immediate impact of the alleged violence. We refer with the third proposition raised above and our submissions in relation to the ACTU's proposal.
- The clauses do not make clear that an employee can take leave only where the leave is *necessary* (that is, both the taking of leave itself and the day/time at which it is proposed to be taken). Clause X.6 enables an employee to take the leave "if the employee needs to take the leave". We are concerned that this may be read to suggest that the right to take unpaid leave arises where the employee considers that they need to take leave; rather than an objective assessment as to whether the leave is *necessary*. We refer to the fourth proposition above and our submissions in relation to the ACTU's proposal.
- The clause does not limit the entitlement to the leave where it is impracticable for the employee to attend to the relevant activity outside of working hours. We refer to the fifth proposition above.

188. In light of this, the clause confers upon an employee an entitlement to take unpaid leave which is unjustifiably broad and, importantly, goes well beyond the scope contemplated by the Majority Decision.

The Second Model Clause

189. Clause X.5 of the Second Model Clause is relevant:

- X.5 An employee, including a casual employee, who is a victim of family violence is entitled to 2 days of unpaid family violence leave for each occasion (a ***permissible occasion***) when the employee needs to take the leave as a result of the family violence (***unpaid family violence***).
- X.6 An employee cannot take unpaid family violence leave during a particular period if the employee could instead take paid personal/carer's leave.

190. The Second Model Clause raises the same concerns as the First Model Clause. We need not repeat those submissions.

191. It is relevant to note that the clause would give rise to an entitlement to take leave in circumstances such as the following (in addition to the examples referred to above in relation to the ACTU's proposal):

- A part-time employee who was subjected to violence by her husband 15 years ago decides to divorce her husband 15 years later, for various reasons that include the violence to which she was subjected at that time. The employee makes appointments to see her lawyer for advice in relation to property settlement with her husband, which could otherwise be made at an alternate time outside of her working hours.
- An employee decides to contact a telephone counselling service to seek its assistance in circumstances where the service is available 24 hours a day, seven days a week, and the nature of the assistance sought is not such that it carries any urgency. The availability of such services outside of ordinary working hours is a fact in evidence in these proceedings.⁹¹
- An employee may decide to visit their child's school to speak to the relevant personnel in order to inform them of certain circumstances associated with the alleged violence, even if this could be done at an alternate time outside of working hours.

192. We again observe that, having regard to the examples above, the clause confers upon an employee an entitlement to take unpaid leave which is unjustifiably broad and goes well beyond the scope contemplated by the Majority Decision.

⁹¹ Transcript of proceedings on 17 November 2016 at PN1968 – PN1972.

The Third Model Clause

193. Clause X.2 grants an entitlement to unpaid leave only to casual employees, in the following terms: (emphasis added)

(b) A long term casual employee is entitled to 10 days of unpaid domestic and family violence leave in a year if –

- (i) the employee is exposed to domestic violence; and
- (ii) the employee needs to take leave as a result of the domestic violence.

(c) A short term casual employee is entitled to 2 days of unpaid domestic and family violence a year if –

- (i) the employee is exposed to domestic violence; and
- (ii) the employee needs to take leave as a result of the domestic violence.

(d) Without limiting clause X.2(a), X.2(b) or X.2(c), the employee may need to take domestic and family violence leave if the employee has to do any of the following:

- (i) recovering from an injury caused by the domestic violence; or
- (ii) attend an appointment relating to the domestic violence including an appointment for counselling, medical treatment or obtaining legal advice; or
- (iii) attend an interview with police relating to the domestic violence; or
- (iv) prepare for a court appearance relating to the domestic violence; or
- (v) attend court for a proceeding relating to the domestic violence; or
- (vii) organise child care or the education of a child that is necessary because of the domestic violence.

194. We raise the following concerns with the proposed clauses, with reference to the propositions listed earlier:

- Subclause (d) is a “catch all” provision of the nature contemplated in the second proposition above, which has the effect of simply allowing an employee to take leave wherever it is “needed”, absent any employer discretion. We refer to our submissions in relation to the ACTU’s proposal in this regard.
- The clauses do not limit the circumstances in which the leave may be taken to deal with the immediate impact of the alleged violence. Indeed

the clause appears to require only a tenuous link in order for an entitlement to the leave to arise. We refer with the third proposition raised above. For example:

- An “appointment relating to domestic violence” (clause (d)(ii)) could include appointments with counsellors or psychologists many years after the alleged violence occurred. The effect of such a clause is beyond the scope of that which has been determined by the Majority Decision.
- A “court appearance relating to the domestic violence” (clause (d)(iv)) could include divorce proceedings that are, in some way, related to domestic violence that occurred many years ago.
- An employee may decide to “find housing that is necessary because of the domestic violence” (clause (d)(vi)) in circumstances where, as a result of ongoing family and domestic violence an employee decided to move into a separate property several months ago, which the employee was renting. The employee’s lease has since come to an end and is now required to relocate. It might be argued that the circumstances facing the employee, which require them to “find housing”, arose only “because of the domestic violence”.
- The clauses do not make clear that an employee can take leave only where it is necessary (that is, both the taking of leave itself and the day/time at which it is proposed to be taken). Clause X.6 enables an employee to take the leave “if the employee needs to take the leave”. We are concerned that this may be read to suggest that the right to take unpaid leave arises where the employee considers that they need to take leave; rather than an objective assessment as to whether the leave is *necessary*. We refer to the fourth proposition above.

- The clause does not limit the entitlement to the leave where it is impracticable for the employee to attend to the relevant activity outside of working hours. We refer to the fifth proposition above.

ISSUE A.2.2(c) – WHO MAY ACCESS THE ENTITLEMENT

195. Ai Group considers that any entitlement to unpaid leave should arise only for victims of the alleged family and domestic violence. That is, persons towards whom the alleged violence was directed. An entitlement broader in scope falls beyond the ambit of these proceedings in the sense that it has not been the subject of any probative evidence or detailed consideration.

The Provision of the Entitlement to Other Individuals

196. The ACTU had, at an earlier stage in the proceedings, proposed a clause that would have granted an entitlement to leave to an employee “experiencing” family and domestic violence. The same phraseology is used in the clause it has proposed in response to the Commission’s preliminary views and the First Model Clause. Further we note that the Background Paper observes that family members who witness such violence or those who provide care or support to a person towards whom the violence is directed “may want to access such leave”.

197. The third edition of the Macquarie Dictionary defines “experience” as follows: (emphasis added)

1. a particular instance of personally encountering or undergoing something ...
2. the process or fact of personally observing, encountering, or undergoing something ...
3. the observing, encountering, or undergoing of things generally as they occur in the course of time ...
4. knowledge observed, encountered, or undergone ...
5. to have experience of; meet with; undergo; feel ...

198. If, for instance, an employee has witnessed or observed family and domestic violence (however defined), the ACTU’s proposed clause and the First Model Clause would arguably entitle them to leave. This is also true in the context of

the Third Model Clause, which refers to employees who are “exposed” to family and domestic violence.

199. The ACTU has previously submitted that it is appropriate that “some flexibility is built into the clause due to the complexities associated with the experience of family and domestic violence”⁹². It had pointed to several examples of activities associated with a domestic homicide of a child/other relative and appeared to suggest that in those circumstances, the parent and/or other relative who undertook activities associated with the homicide should be entitled to leave pursuant to its proposed clause. It appears that the ACTU holds the view that an entitlement to leave should apply in the circumstances earlier described.
200. We are concerned that a clause that applies to an employee who has witnessed family and domestic violence would extend the entitlement to an unjustifiably broad group of employees. There has been no serious evidentiary case advanced by the ACTU in support of the proposition that all employees who *observe* family and domestic violence should be entitled to some form of leave.
201. Further, the observations made in the Majority Decision about the scope of any award clause does not accord with the concept of providing a leave entitlement to employees who are not themselves subject to family and domestic violence.
202. On the material before it, the Commission cannot be satisfied that a clause that entitles an employee who *observes* family and domestic violence access to unpaid leave is necessary in the manner contemplated by s.138.
203. We make similar submissions in relation to clause X.8 of the Second Model Clause, which provides for unpaid carer’s leave. The original proceedings were not directed towards a claim for such an entitlement and the evidence that was received did not deal with the merit or otherwise of such a proposal. Nor was it a matter addressed in the Majority Decision. We accordingly suggest that consideration of a new entitlement of this nature should be regarded by the Full Bench as outside the scope of these proceedings.

⁹² ACTU Outline of Reply Submissions in Reply dated 5 October 2015 at paragraph 110.

The Provision of the Entitlement to Perpetrators

204. The ACTU accepts that perpetrators of family violence should not receive family and domestic violence leave:

Providing perpetrators with access to a workplace entitlement where that person may have engaged in criminal conduct would, in our submission, create unforeseeable complications for employees and employers alike, and is opposed more broadly on policy grounds by the ACTU.⁹³

205. Ai Group similarly considers that the provision of an award derived entitlement to unpaid leave for perpetrators of family and domestic violence as inappropriate.

206. We nonetheless observe that none of the clauses proposed to date include an exemption for employees who are perpetrators of family and domestic violence from the operation of the clause. Consequently and having regard to the manner in which they have been crafted as well as the evidence in the proceedings concerning the nature of domestic violence, we contend that they may operate to provide an entitlement to some employees who engage in the relevant behaviour described by the clause. Put simply, we contend that a person who perpetrates domestic violence could be said to have “experienced” or been “exposed” to domestic violence and as such, would have an entitlement to leave under some of the proposed clauses. Moreover, all of the proposed clauses could operate to afford perpetrators of domestic violence with an entitlement to leave in circumstances where they have been subject to violence or abuse as a consequence of their own abusive actions. This includes, for example, situations where a perpetrator’s partner may engage in some form of retaliatory action of self-defence.

⁹³ ACTU Outline of Submissions dated 1 June 2016 at paragraph 2.13; ACTU Outline of Reply Submissions dated 5 October 2016 at paragraphs 107 – 108 and ACTU submission dated 1 September 2017 at paragraph 31.

207. Dr Michael Flood, one of the expert witnesses called by the ACTU, gives evidence regarding the incidence of female perpetration of intimate partner violence and the intention or motivation underpinning such acts: (emphasis added)

There are contrasts in the intentions, motivations, and nature of men's and women's uses of intimate partner violence. In particular, women's perpetration of intimate partner violence is more likely than men's to be motivated by self-defence and to take place in the context of their partners' violence.⁹⁴

208. Adopting momentarily the ACTU's gendered approach to this case, a male employee who has been violent towards his female partner, and whose female partner subsequently allegedly engages in violent or threatening behaviour towards him as an act of self-defence, would be entitled to leave under the proposed clauses. Alternatively, a male employee who is physically violent towards his female partner and subsequently receives text messages that are, for instance, "emotionally abusive", would also be entitled to leave. It strikes us that this outcome is potentially at odds with the supposed intent underpinning the ACTU's claim and the model clauses proposed by the Commission, as stated in the Background Paper.

209. The ACTU elected to mount its case by reference to gender. It presented evidence that overwhelmingly dealt with women's experiences of family and domestic violence that is committed by male perpetrators. In passing, it also acknowledged that men might fall victim to acts of family and domestic violence by female perpetrators. There was virtually no recognition however of the incidence of violence between partners that is committed by both parties to the relationship. The existence of "situational couple violence"⁹⁵, as it is often called, appeared not to have been considered by it, however Dr Flood gave the following relevant evidence under cross examination:

Can I take you back to page 9 of that article⁹⁶. You, there in the first column towards the top, refer to situational couple violence. Now, you say:

⁹⁴ Statement of Dr Michael Flood at Annexure MF-3, paragraph 3.33. See also paragraph 3.35.

⁹⁵ Family Court of Australia, *Family Violence Best Practice Principles* (December 2015). See also transcript of proceedings on 14 November 2016 at PN759 – PN763.

⁹⁶ Exhibit F1.

Some heterosexual relationships suffer from occasional outbursts of violence by either husbands or wives during conflicts. What Johnston calls situational couple violence. Here, the violence is relatively minor. Both partners practice it. It is expressive in meaning and it tends not to escalate over time and injuries are rare.

Would you say that situational couple violence is another example of circumstances in which both the female and male in a heterosexual relationship may be subject to intimate partner violence?---Situational couple violence does describe a pattern where both partners in a relationship are using physical aggression.

Yes. So they're being violent, physically violent?---Correct.

And the violence could be directed towards both partners?---Yes.⁹⁷

210. There is of course also the occurrence of violence between other family members that does not accord with the female victim/male perpetrator dichotomy presented by the ACTU.
211. One of the difficulties to arise from the gendered approach adopted by the ACTU in mounting its claim is that it overlooks certain complexities associated with the incidence of family and domestic violence. The material before the Commission does not grapple with the prospect that an employee might be a “victim” of family and domestic violence as well as a “perpetrator”. That is to say, whilst an employee may be subject to violent, threatening or abusive behaviour, the employee may also have engaged in the very same behaviour.
212. The purposes for which the leave can be taken in the proposed clauses are not confined to circumstances that arise from the employee’s experience as a victim. Accordingly, a male perpetrator of family and domestic violence may need to attend court proceedings to defend an application for an apprehended domestic violence order and related criminal charges. If that employee was “experiencing” or “exposed to” or the “victim of” family and domestic violence (by virtue of alleged violent, threatening or abusive behaviour directed towards him by his female partner in response to his actions), he would be entitled to a separate unpaid leave to attend those legal proceedings.

⁹⁷ Transcript of proceedings on 14 November 2017 at PN759 – PN763.

213. Ultimately, the question to be answered by the Commission is whether the insertion of a provision that potentially provides an employee with an entitlement to unpaid leave where that employee has engaged in violent, threatening or abusive behaviour is necessary to ensure a *fair* and relevant minimum safety net. When considered in this context, any such provision is obviously out of step with community expectations. Indeed, this is reflected in the policy position of the ACTU as set out in its submissions.⁹⁸ None of the proposed clauses advanced to date avoid such difficulties.

ISSUE A.2.3 – IF THERE IS TO BE AN ENTITLEMENT TO UNPAID DOMESTIC VIOLENCE LEAVE, SHOULD THE LEAVE ENTITLEMENT BE AVAILABLE IN FULL AT THE START OF EACH YEAR, OR ACCRUE?

214. Ai Group has already addressed this issue in the context of our previous submissions.

215. We nonetheless acknowledge the following observation made in the background paper:

[38] the quantum of leave may affect the way unpaid family violence leave accrues. If, for example, it is determined that the model term provide that one or two days of such leave there may be no utility in the leave entitlement accruing progressively during a year of employment.

216. There is of course force to this proposition. However, if the Full Bench formed the view that an entitlement to more than one or two days of leave per annum was warranted, it may be necessary to give consideration to the manner in which the entitlement should accrue. Employers should not be required to grant extended periods of leave to newly engaged employees or to individuals who may only be employed to perform work on a short-term basis. It was such considerations that, in part, drove our suggestion that any full leave entitlement should not apply for an employee with less than 12 months service.⁹⁹ In support of this suggestion we note that, traditionally, awards often provided greater entitlements to sick leave in second and subsequent years of employment than

⁹⁸ ACTU Outline of Submissions dated 1 June 2016 at paragraph 2.13.

⁹⁹ Ai Group submission of 30 August 2017 at paragraph 23.

in an individual's first year of employment. We do not propose to elaborate on these submissions at this point, as no party has proposed that employees be afforded an annual entitlement to more than three days of leave (except for the ACTU which has proposed an uncapped entitlement be applied).

217. We reiterate our view that leave should not accumulate from year to year.

ISSUE A.2.4 – IF THERE IS TO BE AN ENTITLEMENT TO UNPAID DOMESTIC VIOLENCE LEAVE, WHAT NOTICE AND EVIDENTIARY REQUIREMENTS SHOULD APPLY?

218. If the Commission determines that there should be an entitlement to unpaid family and domestic violence leave, it is important that it be subject to robust notice and evidentiary requirements. We nonetheless agree with the observation in the Background Paper that:

[45] The purposes for which the leave may be taken may inform the types of evidence an employee may be required to provide. If leave could only be taken in a limited range of circumstances, the types of evidence an employee could provide would correspondingly be limited.

219. The circumstances in which an entitlement to unpaid leave will arise will colour the approach that should be taken to the development of the notice and evidence requirements. Given this context, it is difficult to provide a definitive view as to the best approach to adopt in relation to the treatment of such matters until the criteria for eligibility for an entitlement to leave is settled. Of course, such matters will in part depend upon the content of any definition of domestic violence adopted within an award clause dealing with such subject matter.

220. Nonetheless, Ai Group has previously submitted that the appropriateness of the notice and evidence requirements in s.107 of the FW Act should be considered once the scope of the clause is determined, and we remain of this view. It is an appropriate starting point. However, it would be overly simplistic to assume that notice and evidence requirements that simply mirror such provisions would be sufficient. The circumstances of family and domestic violence will commonly not be as readily verifiable as a situation where an employee or a family or household

member is ill or injured or where an employee may be eligible for compassionate leave.

221. Before dealing with the relative merits of the various suggested clauses, we here reiterate that we maintain the view that the very nature of family and domestic violence gives rise to a number of very significant difficulties associated with identifying when an employee has been the subject of such abuse and when they may require leave to undertake associated activities. We have canvassed such difficulties, and examples of where such concerns have been borne out in the evidence, earlier in this submission. We do not repeat such detail here, but instead emphasise that the evidence clearly demonstrated that an assessment of whether a person is experiencing domestic violence will often require a consideration of a raft of contextual considerations that may not be easily observed or verified, as well as a degree of subjectivity. Clearly such matters will have a bearing on the kind of evidentiary requirements that should underpin any entitlement.
222. The abovementioned inherent difficulties, and the failure of the ACTU to identify a solution to such problems through the clause they proposed, underpinned central arguments that Ai Group advanced against the granting of the union claim. They are powerful considerations that weigh very strongly against the granting of any form of paid leave, even if it were limited to a proposal to enable employees to access paid personal/carer's leave. However, they should similarly not be overlooked in the granting of any entitlement to unpaid leave.
223. The challenge of establishing that an employee has experienced family and domestic violence, and consequently requires leave, should not mean that there is any less need for such matters to be properly established before an employee is able to access a legally enforceable right to leave. It would be naïve to fail to recognise and account for the fact that, unfortunately, some employees seek to access leave entitlements inappropriately. This reality has been recognised by unions in the context of other award review proceedings.¹⁰⁰ It may be put by

¹⁰⁰ See for example paragraphs 80 to 81 of the AMWU written submissions of 20 December 2016 in the context of the Public Holidays Common Issues proceedings (AM2014/301).

some that such matters take on less importance in the context of an unpaid leave entitlement when compared to paid leave, given there is less financial incentive for an employee to access such leave and there are fewer associated costs for employers. However, given the adverse consequences visited upon employers by staff absences, there is still a necessity for a fair safety net to establish a proper evidentiary regime capable of ensuring that the leave is only taken when an employee is genuinely entitled to the leave.

The Specific Proposals Advanced

224. Notwithstanding our primary contention that an entitlement to unpaid leave should not be granted, we here identify various matters that any proposed clause should reflect.

225. **Firstly**, it is important that an employee be required by a clause to provide evidence to demonstrate that:

- a. they are a victim of family and domestic violence (as defined) and not a perpetrator; and
- b. they *need* to access the leave for a relevant purpose associated with such an experience. (What constitutes a relevant purpose will depend upon the clause's regulation of the purposes for which an employee will be eligible for leave).

226. **Secondly**, the clause should provide a basis for determining the nature or quality of the evidence that should be regarded as sufficient to warrant the granting of the claim. In this regard, we suggest that any clause should require the employee to provide evidence that 'would satisfy a reasonable person' that they are eligible for the leave.

227. **Thirdly**, we are not convinced that it is *necessary* to include examples of the types of evidence that may satisfy the requirement of the clause. This approach is not adopted in s.107 of the FW Act. However, if such examples are to be included in a clause, the provision should be drafted so as to make it abundantly clear that they merely represent examples of evidence that *might* be sufficient to

satisfy a reasonable person of the relevant criteria. That is, the clause should not be drafted in such a manner as to suggest that the production of a certain category of document (such as a statutory declaration) will in all cases be sufficient to discharge an employee's requirements under the clause.

228. **Fourthly**, there should be a connection between compliance with the notice and evidence requirements in the clause and eligibility to take the leave. That is, any proposed clause should not merely require an employee to provide notice and evidence. It should provide that an employee is only eligible to access such leave if they comply with such requirements.

229. In the sections that follow, we identify the various proposed clauses dealing with notice and evidence requirements that have been advanced, and then provide relevant observations in relation to the alternate approaches.

The ACTU's Proposal

230. The ACTU has proposed that following provision to deal with notice and evidence 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 the clause.

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

231. We make the following three observations in relation to the ACTU's proposed clause.

232. **Firstly**, a fundamental difficulty with this clause is that it fails to require that the employee provide evidence that they are experiencing family and domestic violence. If the fundamental justification for the granting of leave is the experience of family and domestic violence, it is essential that the employee be able to establish that they have in fact suffered such abuse.

233. **Secondly**, although the approach proposed by the ACTU requires the employee to comply with notice and evidence requirements, it does not actually make an entitlement to the leave dependent upon such compliance.
234. **Thirdly**, we are concerned that the wording of clause X.3.2 could be read to suggest that if an employee provides evidence that constitutes a document issued by one of the parties specified in the clause, it will always be sufficient to discharge their obligations under the clause. Such an approach would be untenable given the evidence in these proceedings concerning the limitations the ability of various such parties to actually verify that a person is experiencing domestic violence.
235. It may be that this is not the ACTU's intention. In this regard we acknowledge that the second sentence of clause X.3.2 could be read to be merely an indicative list of documents that *might* satisfy the overarching requirement of the first sentence of the provision.
236. Nonetheless, any clause ultimately adopted should require the provision of such evidence as would "satisfy a reasonable person" of the relevant reason for the leave. In some circumstances it may well be that an employer is justified in questioning the sufficiency of documentation specified in the clause. This could include, for example, circumstances where an employer might justifiably refuse to accept a statutory declaration or document produced by an individual's lawyer or a family violence support worker, where a more robust form of documentation could reasonably be provided by the employee.
237. At paragraph 38 of the ACTU's submissions of 1 September 2017, it asserts that an employer would be "entitled to refuse to accept a statutory declaration if they were not reasonably satisfied that that it demonstrates that the leave is for a purpose covered by the clause". However, it is unclear whether the ACTU contends that the matter in dispute would be the employee's entitlement to access the leave or merely whether the employee had met the relevant evidentiary requirements. This tension demonstrates the importance of making the actual entitlement to leave dependent upon compliance with the relevant notice and evidentiary requirements.

The ACCI proposal

238. ACCI has suggested the following approach:

1.3 Notice

(a) An employee must give their employer notice of the taking of leave under this clause by the employee.

(b) The notice must:

(i) be given to the employer as soon as practicable (which may be a time after the leave has started); and

(ii) advise the employer of the period, or expected period of the leave.

1.4 Evidence

(a) An employee who has given their employer notice of the taking of leave under this clause must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for a reason specified in this clause and it was impracticable to attend outside work time.

(b) To avoid any doubt, a statutory declaration is sufficient for the purposes of clause 1.4(a).

239. In relation to the requirements of clause 1.4, we are supportive of an approach that requires an employee to give the employer evidence that would 'satisfy a reasonable person' that the leave is taken for a reason specified in the clause. There is also merit in the inclusion of clause 1.3(ii) as a measure to mitigate the disruptive impact of any new entitlement.

240. Clause 11.4(a) appears intended to also introduce a requirement that the employee establish that the activity they are undertaking whilst on leave could not practically be undertaken outside of work time. There is merit to this approach. It could not reasonably be argued that the safety net should afford an employee an absolute right to time off work to undertake an activity that could be undertaken outside of work hours.

241. In relation to the drafting of the proposed clause 11.4(a), we suggest that the term "attend" may not be appropriate if the leave is taken for purposes not associated with actually *attending* some form of appointment.

242. The proposed clause 11.4(b) is problematic. A statutory declaration should not be sufficient in all circumstances.

The First Model Clause

243. The First Model Clause is relevantly in the following terms:

X.9 An employee is not entitled to take unpaid leave under clause X.5 unless the employee gives the employer:

(a) notice of the taking of leave by the employee; and

(b) if required by the employer, evidence that would satisfy a reasonable person that the leave is taken because the employee is experiencing family violence and needs to take the leave as a result of the family violence.

Note: Examples of evidence an employee could provide to comply with clause X.9(b) include (but are not limited to) any of the following:

(a) a statutory declaration;

(b) a document issued by a medical practitioner;

(c) evidence of a legal proceeding;

(d) a police report.

X.10 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

244. Ai Group does not support the inclusion of the proposed note. We are concerned that its inclusion might suggest that provision of any of the types of evidence specified will be sufficient to meet the requirements of the clause, in all circumstances.

The Second Model Clause

245. Ai Group's does not hold major concerns regarding the structure of the Second Model Clause.

The Third Model Clause

246. The Third Model Clause is relevantly in the following terms:

X.3 Requirement for employee to give notice

(a) An employee's entitlement to domestic and family violence leave is conditional on the employee giving the employer notice of -

(i) the employee's absence from work; and

(ii) if it is possible to notify the employer before the leave is taken – the approximate period the employee will be absent.

(b) The employee must give the employer notice under clause X.3(a) -

(i) before or on the day the employee is to take leave; or

(ii) if it is not possible to notify the employer before the leave is taken – during the leave or as soon as possible after the leave ends.

X.4 Employer may request evidence

(a) An employer may ask an employee to give the employer evidence that the employee is exposed to domestic violence and needs to take leave as a result.

(b) The employee must comply with the request.

(c) Without limiting clause X.3(b), the employee may comply with the request by giving the employer –

(i) evidence from the police; or

(ii) evidence of a legal proceeding or a court report; or

(iii) evidence from a doctor or other health practitioner; or

(iv) a report from a counsellor; or

(v) written advice or a statutory declaration from the employee.

247. The Third Model Clause fails to make the entitlement to take leave dependent upon the provision of the relevant evidence.

248. Although clause X.4 identifies evidence that must be provided, upon request, it does not provide any qualitative criteria for determining the nature of the evidence that should be sufficient. That is, it does not adopt the approach generally taken in other proposals for requiring that the evidence must be that which would "satisfy a reasonable person". Instead, the clause appears to

operate on the basis that an employee can provide any evidence whatsoever that "...the employee is exposed to domestic violence and needs to take leave as a result."

249. The clause expressly provides that the evidentiary requirements may be met by providing any of the types of evidence identified in clause X.4(c), regardless of the content of such evidence. For example, it appears that an employee could simply provide "written advice" to their employer and that would be sufficient. Such an approach would be patently inadequate.

ISSUE A.2.5 – IF THERE IS TO BE AN ENTITLEMENT TO UNPAID DOMESTIC VIOLENCE LEAVE, SHOULD LEAVE BE AVAILABLE TO PART-TIME AND CASUAL EMPLOYEES?

250. Ai Group has dealt with this issue at paragraphs 25 – 26 of our 30 August 2017 submission.

ISSUE A.2.6 – IF THERE IS TO BE AN ENTITLEMENT TO UNPAID DOMESTIC VIOLENCE LEAVE, WHAT CONFIDENTIALITY PROVISIONS SHOULD APPLY?

251. It is important that any confidentiality provision operates in a clear and practical manner.

252. Ai Group's November 2016 Submission deals with various practical difficulties associated with the operation of the clause confidentiality clause ultimately proposed by the ACTU in previous proceedings. We continue to rely on such submissions.

253. Before dealing with each of the specific model clauses proposed in the Background Paper, we note that many of the observations set out in our previous written submissions would apply with equal force to the First Model Clause and Third Model Clause. We raise here, in particular, a query as to whether the proposed clauses seek to regulate which employees of an employer can have access to the relevant information. For example, does clause (d) of the Third

Model clause prohibit disclosure within the organisation or is it only directed at preventing disclose to external parties?

254. It is undoubtedly important that employers treat information concerning an employee's experience of family domestic violence in a sensitive manner and we do not doubt that this is the approach typically taken by employers currently. However, depending upon the circumstances, there may be sound reasons why various personnel may justifiably need access to information concerning the reasons why a person seeks to take family and domestic violence leave. This could include, for example, relevant managers, supervisors and human resources personnel, or other staff involved in the administration of leave arrangements. The manner and extent to which both the First Model Clause and Third Model Clause deal with such issues appears uncertain.
255. In the sections that follow we deal with specific concerns regarding each of the model clauses proposed in the Background Paper.

The First Model Clause

256. The First Model Clause deals with the issue of confidentiality in the following way:

X.11 An employer must take all reasonable steps to keep confidential any information provided by an employee to the employer concerning family violence.

257. One difficulty with this provision is that it creates a discrete obligation relating to all information concerning family violence. That is, it is not only information that an employer receives as a product of the employee accessing leave that the employer must keep confidential pursuant to this clause. Indeed, the obligation would appear to apply even in circumstances where no leave is sought.
258. It is appropriate that a clause relating to an entitlement to family and domestic leave only regulate the treatment of information that is provided for the purpose of an employee accessing such leave. The manner in which an employer must treat other personal or sensitive information is best dealt with through legislation such as the *Privacy Act 1988*, rather than through instruments that are designed to establish a set of minimum terms and conditions of employment. Accordingly, the drafting of clause X.11 would create an unnecessarily broad obligation.

The Second Model Clause

259. The Second Model Clause merely includes a note alerting the reader to potentially applicable obligations under relevant legislation:

Note: Personal information given to an employer under this section may be regulated under the Privacy Act 1988 or state or territory legislation.

260. This approach is broadly consistent with that adopted under s.107 of the FW Act, save that the proposed clause also references state and territory legislation.

The Third Model Clause

261. The Third Model Clause contains the following provision:

(d) An employer who receives evidence under this clause must not disclose the evidence to someone else unless the disclosure is required by law.

262. If the Full Bench determines that it is necessary to include a confidentiality provision in any award clause dealing with family and domestic violence leave, there is merit in that aspect of the Third Model Clause which limits the prohibition on disclosure of material to evidence that has been received under the clause. By adopting this approach, the clause does not impose a blanket obligation on an employer to keep confidential any information that they may receive about an employee's experience of family and domestic violence. Rather, it only purports to regulate material that is relevant to the operation of the remainder of the clause. A clause that does more than this cannot be considered necessary to meet the modern awards objective.

263. However, the clause is still potentially problematic because of the uncertainty surrounding the meaning of the terms "the employer" and "someone else". If the term "the employer" is intended to include authorised staff such as managers and HR personnel, and the term "someone else" is intended to refer to external parties, then the clause would be less problematic.

ISSUE A.2.7 – IF THERE IS TO BE AN ENTITLEMENT TO UNPAID DOMESTIC VIOLENCE LEAVE, SHOULD UNPAID FAMILY AND DOMESTIC VIOLENCE LEAVE COUNT TOWARDS CONTINUITY OF SERVICE?

264. Ai Group has dealt with this issue at paragraphs 29 – 30 of our 30 August 2017 submission.

ISSUE A.2.8 – IF THERE IS TO BE AN ENTITLEMENT TO UNPAID DOMESTIC VIOLENCE LEAVE, WHAT IS THE RELATIONSHIP / INTERACTION WITH OTHER FORMS OF LEAVE?

265. Ai Group has dealt with this issue at paragraph 31 of our 30 August 2017 submission.

6. EXTENSION OF THE NES ENTITLEMENT TO PERSONAL/CARERS LEAVE TO DOMESTIC VIOLENCE LEAVE

266. As explained in our earlier submission, we do not consider that, as a matter of jurisdiction, a modern award can include a term that grants an employee an entitlement to personal/carer's leave under the NES for the purposes of family and domestic violence leave. We note that the ACTU has taken a similar position in its submission of 1 September 2017. Accordingly, we do not here propose to put anything further in relation to this issue.
267. If the Commission, despite our submissions, decides to introduce award clauses that purport to implement the relevant aspect of the preliminary view expressed in the Majority Decision, Ai Group may seek an opportunity to be heard in relation to the terms of such a clause.