

FAIR WORK COMMISSION

**4 YEARLY REVIEW OF MODERN AWARDS
(S.156 of the Fair Work Act)**

**FAMILY & DOMESTIC VIOLENCE LEAVE
(AM2015/1)**

**RESPONSE BY
AUSTRALIAN MEAT INDUSTRY COUNCIL
TO FULL BENCHLIST LIST OF ISSUES**

1 September 2017

Summary

1. The Australian Meat Industry Council (AMIC) provides this submission in response to the Full Bench Statement of 3 August 2017 in the family/domestic violence common issue matter. We do not intend to file further evidence.
2. The Full Bench Statement of 3 August 2017 attached a List of Issues for consideration and invited submissions from interested parties.
3. In paragraphs [4] to [39] we provide various comments under specific headings. In paragraphs [40] to [120] we deal with the List of Issues.

Initial comments

4. The claim for paid family/domestic violence leave was heard, evidence led and submissions made by interested parties. The joint decision of two members of the Full Bench (*the majority*) was eventually handed down 3 July 2017 rejecting the claim for ten days paid leave, but reaching provisional views on certain other matters relating to unpaid leave.
5. The reconstituted Full Bench is now considering the merit, quantum and other matters for unpaid family and domestic leave.
6. One assumes that the provisional views of the majority become the starting point in any discussion. Both the majority and minority decision of the then Vice President (albeit for slightly different reasons) firmly rejected paid family and domestic violence leave. Generally, it was rejected as not being necessary for inclusion into modern awards.
7. AMIC's focus in this submission, therefore, is with the issue of unpaid leave for family and domestic violence.
8. The comments that follow relate to some important fundamental matters in the context of the present stage of the Full Bench proceedings. We do so under convenient headings.

Why the ACTU claim was rejected by the Full Bench

9. Very simply:
 - (i) The majority was not satisfied that it was necessary to provide 10 day's paid leave for family and domestic violence¹;
 - (ii) The definition in the ACTU amended claim clause for family/domestic violence leave was too broad and gave rise to uncertainty²;
 - (iii) The scope of the ACTU amended claim clause (being for attending activities related to the violence experience etc.) was too broad³.

¹ [2017] FWCFB 3494 at para [6] and [59]

² Ibid at para [111] and [112]

³ Ibid at para [59] and [109 – 114]

Note: we should add that the comments of VP Watson at para [143] and [144] of the 27 February minority decision merely adds force to the majority view.

10. One assumes, no matter what quantum of paid leave was inserted into the ACTU amended claim clause, the coverage and scope matters as pointed out in 9(ii) and (iii) above would fail to meet the principles associated with the 4 yearly modern award review.

The provisional views of the majority

11. The majority was not content to simply reject the claim. As has been stated on many occasions during the 4 yearly modern award review a Full Bench in deciding an issue is not limited to the claim. The majority turned its attention to unpaid leave.
12. The provisional views of the majority can be summarised as follows:
 - (i) It is necessary that there should be some provision for unpaid family and domestic violence leave⁴;
 - (ii) Such unpaid leave should be available for all employees⁵;
 - (iii) The provision for family and domestic violence unpaid leave should be limited to dealing with the immediate impact of violence such as finding alternative accommodation or attending urgent court hearings⁶;
 - (iv) Employees should also be able to access personal/carer's leave for the purpose of taking family and domestic violence leave⁷.
13. In outlining provisional views, the majority:
 - (i) Did not fully develop a definition of 'family and domestic violence';
 - (ii) Nor fully develop coverage though it made pertinent comments, by way of examples, of causes for concern;
 - (iii) Nor did the majority fully consider the extent of exposure to family or domestic violence for the purpose of any unpaid leave;
 - (iv) Nor did the majority fully consider evidentiary matters;
 - (v) Nor did the majority fully address the complex related issue of interaction with personal/carer's leave.
14. The majority did not fully develop these matters simply noting that the parties had no opportunity to consider matters in the context of the provisional views⁸.

⁴ Ibid at para [6] and [119]

⁵ Ibid at para [6] and [119]

⁶ Ibid at para [114]

⁷ Ibid at para [6], [116] and [119]

⁸ Ibid at para [6]

Definitional issues

15. Leaving aside for the moment merit or quantum matters, definitional issues are, obviously, of fundamental concern. After all, the Full Bench is considering an expansion of leave entitlements through the modern award system.
16. The Full Bench is considering a (new) form of leave for all employees covered by modern awards including casuals, over and above the NES entitlements. It is a form of leave never before contemplated for awards in over 100 years of federal industrial laws. This is a novel matter irrespective of FWC appearing to have the power to introduce such leave⁹.

The legislative framework of family and domestic violence relief

17. All this is made more difficult because of the framework for domestic violence procedure. The procedural process for court intervention is contained in a myriad of state and territory legislation. That legislation provides for the making of court orders, interim or final, to protect victims from future incidents of family violence.
18. The legislation is subsumed within state jurisdiction because the Commonwealth has no power under s.51 of the Australian Constitution to legislate fully on the subject and hence the coverage of the Family Law Act¹⁰. The Commonwealth cannot legislate for defacto relationships where domestic violence incidents occur.
19. Across state and territory acts there appears to be no consistent definitions of family and/or domestic violence. Each state act uses different terminology and meanings.

Is the state legislation a relevant matter?

20. A brief overview of the state and territory legislation was considered in AMIC's September 2016 submissions though, we did not in that submission, attempt to provide other than an overview.
21. Some knowledge of various state and territory acts is necessary, though not determinative, for any definition for 'family and domestic violence' in modern awards should unpaid leave be granted.
22. One cannot consider 'family and domestic violence' issues in a vacuum, even if dealing with a matter under FW Act jurisdiction. True, the issue before the Full Bench is for leave entitlements from the workplace. But any resultant unpaid leave coverage, if granted, may be wider or narrower than exposure coverage in the various state acts.

⁹ Section 139(1) of the FW Act

¹⁰ The power of the Commonwealth in s.51(xxi) is limited to making laws about "marriage" and in section 51(xxii) about laws for "divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants".

23. One may then ask what difference does it make if the coverage in any modern award terms is wider or narrower than the state and territory acts? An incident is an incident. However, courts acting under different legislation for incidents may have different powers and this may affect procedure and outcomes and hence, the circumstances where unpaid leave should be granted. Courts may or may not grant interim or final orders sought by the applicant. The standard of proof is different in some jurisdictions. This is the legal environment in which the Full Bench is being asked to mandate unpaid leave.
24. This is all in contradistinction, with some other NES leave entitlements which provide certainty – personal leave for illness or injury, carer’s leave for caring, compassionate leave because of a death or life threatening illness, community service leave for specific service duty.
25. What if the case for interim or final relief of an alleged victim in a state or territory jurisdiction fails on the evidence? It is simply unpaid leave. Fortunately, it is not that simple. The employee is away from the workplace and the job may have to be performed by some other employee. There may be other cost factors. There are detrimental consequences for the employer who, on the rejected ACTU amended claim clause we submit, had no right to reject family and domestic violence leave. Surely some of the elements of s.134 of the Fair Work Act [FW Act] cater for employer interests. The decision of VP Watson referred to these matters when considering the 134(f) limb¹¹. The majority concluded that conclusions were difficult when considering s.134 (f) and that a cautious approach was needed¹².
26. The ACTU in final written submissions before the Full Bench appeared to dismiss the relevance of the court process by simply stating the matter was whether leave should be granted and not about any the specific legal remedies¹³. For the reasons in AMIC’s September 2016 submissions we did not agree.
27. The majority briefly dealt with the question of the rights of the employer after referring to the ACTU submissions and concluded, on that basis, that the claim clause was too broad and uncertain¹⁴. The Vice President was more severe on this issue¹⁵:
28. These form part of the reasons why AMIC submitted during the hearing that the matter is best left to Federal Parliament to consider coverage, consistency and related issues.

¹¹ See para [126] to [135]

¹² See para [97] to [98] of majority.

¹³ See para [44] of ACTU submissions in reply dated 28 November 2016

¹⁴ Majority decision at [110] and [111]

¹⁵ Vice President Watson decision at para [136] and [143]

Some specific issues arising from state and territory legislation

Coverage – the definition and extent of the family and domestic violence

29. There is no consistent definition of 'family and domestic violence' under the state and territory legislation. The legislation, taken together, is complex.
30. By way of examples:
- The purpose of the *Domestic and Family Violence Protection Act 2012* (Qld) is to protect against domestic violence. S.8 defines domestic violence as meaning behaviour by a person towards another person with whom the first person is in a relevant relationship. S.8 and other sections outline the exposure to domestic violence. S.13 defines relevant relationship as being an intimate, family or informal care relationship as defined.
 - The *Family Violence Protection Act 2008* (Vic) in S.5 defines family violence as being behaviour towards a family member of that person and lists various exposure matters. S.8 extensively defines a family member, domestic partner or relative. S.9 refers to domestic partner within the meaning of the *Relationships Act 2008* (Vic).
 - The *Intervention Orders (Protection of Abuse) Act 2009* (SA) is an act to assist in preventing domestic and non-domestic abuse. S.8 sets out the meaning of abuse, both domestic and non-domestic and refers to married partner, domestic partner, intimate personal relationship partner, child, stepchild or grandchild, brothers/sisters, related by blood/marriage.
 - The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) Act does not define domestic or personal violence and simply refers to a personal violence offence by reference to the Crimes Act. S.6 does define domestic relationship and includes 'living or has lived in the same household. S.6 defines relative.
 - The *Restraining Orders Act 1997* (WA) defines family and domestic relationship in S.4. It refers to married couples, de-facto couples, being related to each other, and 'other personal relationship of a domestic nature' where the lives are interrelated.
31. Some of the state and territory acts extend coverage to members of households and some do not¹⁶. The NSW legislation does not define 'family and domestic violence' and simply defines a 'domestic violence offence' by referring to personal violence offences under the Crimes Act 1900 [NSW]. The SA legislation, under s.11A, limits coverage for 'domestic partner' to living in a relationship for a minimum of 3 years.

¹⁶ For an example where 'member of the household' appears not to be covered; see ss.8, 9 and 13-18 of the Domestic and Family Violence Protection Act 2012 (Qld).

32. While AMIC does acknowledge that the state and territory acts have wide coverage it is AMIC's view, outlined later in these submissions, that any coverage for unpaid leave, if granted, should be much narrower.

Exposure issues

33. This was not dealt with in detail in the majority decision. The ACTU amended clause claim referred to '*violent, threatening or abusive behaviour*'.
34. Some of the exposure matters in state and territory acts where persons may attempt to seek relief include:
- Physical and sexual abuse;
 - Emotional and psychological abuse;
 - Intimidating, offensive or emotionally abusive behaviour;
 - Pursuing the person or a third person with intent to intimidate;
 - Reasonable apprehension of injury;
 - Economic abuse;
 - Threatening or coercive behaviour that seeks to control;
 - Social or personal autonomy deprivation;
 - Damage to property;
 - Stalking.
35. In many cases, for certainty, the state and territory acts provide definitions and limitations. However, as we noted earlier, the state and territory acts contain different terminology, even if covering the same subject matter.
36. Obviously, the state and territory acts are in place for persons to pursue matters through the courts for relief. One assumes state and territory coverage has to be somewhat extensive so prospective applicants are not confronted with lack of jurisdiction arguments in given situations. On the other hand, any unpaid leave if granted, needs to be clearly understood to satisfy the limbs of s.134 of the FW Act.

The need for leave and urgent matters

37. The majority suggested certain immediate impact/urgent matters be considered for the taking of any unpaid leave. Most of the state and territory acts provide for certain prescribed persons to issue documents following incidents. The reason is obvious. The acts describe the issued documents in various ways – police protection notices, family violence safety notice, interim order, interim apprehended violence order, police order. These various issued documents may deal with accommodation matters (in some circumstances even though the perpetrator has a legal interest in the property). In most circumstances when documents are issued, the police or issuing officer is usually taken to be the applicant for the court proceedings.
38. In some circumstances where a document has been issued, it is likely that the issuing of the documents referred to in [37] would be dealt with outside rostered work hours for any affected employee though it may, we admit

depending upon the jurisdiction, require a 'soon thereafter' court mention to confirm interim matters.

39. It is a fact that the state and territory acts provide for other pathways available to affected victims for incidents other than the police or justices issuing notices/interim orders. The most obvious is where the alleged victim is the applicant on the originating court document filed at the court. This pathway, AMIC submits, may in circumstances require or not require an urgent mention hearing.

Full Bench List of Issues for consideration

40. We will not repeat, unnecessarily, the comments above when considering the List of Issues.

Unpaid Domestic Violence Leave–

2.1 Should there be an entitlement to access unpaid domestic violence leave in Modern Awards?

Primary answer

41. Our primary submission is to answer the question posed in the 'negative'. We believe our submissions during the hearing of the matter are just as relevant for unpaid as for paid leave.
42. Though we understand and respect the majority's provisional views, AMIC and other employer parties strongly opposed, during the hearing of the matter, the granting of paid leave for family and domestic violence into the modern awards.
43. AMIC submitted it was a matter best left for consideration to Parliament. This appeared to be the view of the Vice President and should attract some weight. Some other employer parties, during the hearing, expressed a view that assistance to employees affected by domestic violence is best dealt at the enterprise level. AMIC does not disagree with this approach.
44. The employer parties ultimately did not submit FWC lacked the power to insert leave the subject of the ACTU amended clause claim into modern awards. However, the fact that the processes for intervention to deal with family/domestic violence issues are dealt with in state and territory acts adds weight to AMIC's submission along with an array of NES entitlements available for leave and flexible working arrangement requests and specifically s.65A of the FW Act that refers to family and domestic violence.
45. The issue, for consideration, has ramifications beyond modern award coverage.

Alternative position

46. If the Full Bench is of the view that intervention is warranted then, obviously, the remaining matters in the List of Issues need to be addressed.

2.2 If there is to be an entitlement to unpaid domestic violence leave in Modern Awards, what is the extent of the entitlement to unpaid domestic violence leave (i.e. quantum)?

Quantum

47. Having regard to our comments earlier in this submission and the brief comments below and with some guidance from the FW Act, the Full Bench should only agree to one day's unpaid leave. If the Full Bench decides to go beyond a day the maximum should be no more than two day's unpaid leave for each year of employment.

Brief reasons

48. The FW Act provides some guidance for this issue. The NES provides unpaid leave in certain circumstances i.e. unpaid carer's leave (s.102), unpaid compassionate leave for casuals (ss.104, 106). The entitlement is two day's leave for each occasion.
49. The majority decision provided implicit guidance on the issue without nominating any quantum. The majority did this by narrowing the circumstances. AMIC agrees with the majority that unpaid leave, if granted, should only be to attend 'immediate impact' matters. If this is the case then it narrows the quantum of leave required.
50. Attending appointments with lawyers or financial professionals are not matters, in AMIC's view, that merit unpaid leave. While these appointments and consultations may be required in a family/domestic violence situation it is possible to mount a clear and fair argument that consultation can occur outside rostered hours, given the abundance of communication technology available in the modern era.
51. Attending medical facilities or seeking professional counselling should not be considered for unpaid leave as, in all probability, they would come within personal/carer's leave and/or (perhaps) flexible work entitlements. Annual leave and long service leave may possibly be accessed.
52. AMIC believes that any unpaid leave for family/domestic violence should be solely for a limited number of urgent purposes, where personal/carer's leave may not be able to be accessed.
53. It is difficult to imagine urgent interlocutory matters lasting a day in court, depending on the size of the court list. It is reasonable also to assume that alternative accommodation issues could be set in motion in less than a day.

54. The circumstances alluded to in [53] may take longer than we have surmised but, with respect, modern award entitlements, together with the NES, are to provide a fair and relevant minimum safety net, no more.

Not for each occasion

55. AMIC is firmly of the view that, because of the limited urgent circumstances warranted for accessing unpaid leave, it should not be 'for each occasion' as is associated with compassionate leave under the FW Act. In other words, it should not be unpaid leave on an ongoing basis for each occasion.
56. It is somewhat difficult to imagine that urgent court hearings would or could occur on an ongoing basis during a single year. There may be other court hearings but, because we have adopted the majority view on the limited circumstances, the issue is whether they are urgent. In any event, our proposal is that any unpaid leave (one or a maximum two days) be available for each year of employment.
57. We agree there may well be other court hearings during a given year to hear and/or finalise court orders but these would come within the usual programmed daily court lists. There may be other re-location moves during the year. However, the Full Bench is dealing with minimum award terms that are necessary.

Period options

58. If unpaid leave is granted for employees then the options outlined in s.105(2) should be considered. If one day's unpaid leave is granted by the Full Bench the conditions need to be modified.

2.3 The circumstances in which the leave entitlement arises, including: (a) the definition of 'family and domestic violence' for the purposes of the clause;

AMIC's view on coverage

59. The ACTU in submissions filed in support of the case stated that the definition in the amended claim clause was '*a simplified version derived from 4AB of the Family Law Act*¹⁷ (FL Act). The majority dealt with the substantial defects in this 'simplified version'.
60. Drafting a definition for family and domestic leave is an extremely complex issue. To cover everything in the state and territory acts would mean either listing the legislation or cutting and pasting and these approaches may run counter to parts of s.134 of the FW Act.
61. A suggestion is to adopt the FL Act definition in an amended form. This is outlined in [71] below.

¹⁷ Para 2.12 of 1 June 2016 submissions.

The FL Act

62. The definition in 4AB the FL Act is as follows:

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

63. The definition does not cover "domestic violence" because, for the reasons given earlier in (18), the Commonwealth has no power to legislate.

64. The ACTU justified not using 'control' or 'coercion' (or equivalent terminology) matters in the claim clause because, it submitted, the claim was concerned with paid leave not the court process.

65. It appears completely unsatisfactory to simply use the words '*...member of the person's family or household (current or former)*'¹⁸. The amended claim clause is uncertain and open to ambiguous interpretation. It leaves the interpretation of 'person's family' unclear.

66. In the ACTU amended claim clause, there were no boundaries associated with 'member's household'.

67. If any coverage is extended to households then, as AMIC submits below, it must be severely limited and qualified. Loose, ambiguous terminology gives rise to uncertainty. Tenuous connections to the household need to be eliminated.

68. Contrary to the earlier ACTU submission, AMIC thinks any definition should cover:

- What (coverage);
- How (the acts/circumstances);
- Who (the persons that may be affected).

69. The 'bullying' definition in the FW Act provides an example similar to what AMIC is suggesting in form. The definition in the Act can be summarised as follows:

*'Bullying' occurs: while a person is at work an individual or a group of individuals repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member, and that behaviour creates a risk to health and safety*¹⁹.

70. This definition is an aid for employers and employees alike providing sufficient detail and irrespective of whether a dispute may find its way to FWC. This definition covers the ambit of what we suggested in [68].

71. One suggestion is to take the FL Act definition and amend it as follows:

¹⁸ ACTU amended clause claim

¹⁹ see s.789FD of FW Act

- a) *'Family and domestic violence' means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family or household or causes that family member or member of the household to be fearful.*
- b) *'Person's family' in (a) means members of the person's 'immediate family' as defined in s.12 of the Fair Work Act 2009.*
- c) *Member of the household in (a) means a person who is residing in the household.'*

72. The FW Act already references the FL Act, albeit in a different context²⁰.

73. We acknowledge that the suggested definition is narrower than the combined coverage of the state and territory acts. This is for at least two reasons as follows:

- a) the majority commented on the ACTU amended claim clause that *'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'*²¹;
- b) the majority concluded that there should be a cautious approach to the introduction of family and domestic violence leave²².

74. It is also important that the word 'household' be limited. The words 'member of the household' from the ACTU amended claim clause do not appear at all satisfactory for modern award purposes. If coverage extends to 'households' it is better expressed as coverage for a person who 'is residing in the household.'

75. Another glaring problem, unless something akin to our suggestion is adopted, is a time limit. We made reference earlier to the SA legislation and the definition of 'domestic partner' and the three (3) year limit. Unless (b) and (c) in [71] are qualified by defining the family as 'immediate family', and limiting household' to a person 'residing', time goes on 'infinitem'.

(b) The circumstances in which leave may be accessed (e.g. attending an appointment related to the violence);

Circumstances

76. For the reasons contained earlier in this submission (and those below) if unpaid leave is granted by the Full Bench it should only be for the matters listed in the majority decision and no others.

²⁰ See s.17 of the FW Act.

²¹ para [112] of majority

²² para [99]

Brief Reasons

77. The majority view seemed emphatic when it stated that '*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*'²³.
78. The ACTU claim clause listed purposes that substantially crossed far beyond the urgency barrier – attending legal proceedings at large, appointment with legal practitioner, possible financial appointments, and other experiences associated with the experience of family and domestic violence.
79. The ACTU claim listed other purposes for the taking of leave – appointments with a medical practitioner, counselling. AMIC submits these come within the ambit of personal/carer's leave and should not be considered a circumstance in the granting of any unpaid leave.
80. For all the various reasons provided herein, the majority view must be accepted.

(c) Who may access the entitlement?

81. The majority' view was that all employees should have access to any unpaid leave granted.
82. For full-time and part-time employees, obviously, unpaid leave is not relevant for days an employee is not rostered to work. If the employee is not rostered to work when an urgent court hearing is scheduled the employee is away from work in any event.
83. For part-time employees any unpaid leave entitlement would be a pro-rata basis.
84. Coverage of casuals is dealt with under the numbered heading 2.5 below.

2.3 Accrual issues, in particular whether the leave entitlement is available in full at the start of the year or accrues.

85. We receive some guidance from the NES leave entitlements under the FW Act.
86. Personal/carer's leave accrues during any year of employment and any untaken leave accrues to the next year - s.96. Other leave, such as compassionate leave, is two days for each occasion and there is no accrual from year to year as it is dependant upon an occasion occurring – s.104.

²³ para [114]

Accrual matters

87. To be consistent and fair, it seems that any unpaid leave for family and domestic violence should be available at the start of the employee's year. This comment is obviously based on the suggestions we have made under the List of Issues namely, limited unpaid leave for limited circumstances.

Unused unpaid leave in any given year

88. Any unused unpaid leave for any year of employment would not accrue to the subsequent years of employment but (the one or maximum two days unpaid leave we suggest) would be available for each year of employment.

2.4 How would an employee access the entitlement (notice and evidentiary requirements)?

89. We only need provide brief comments on this subject. During the hearing of the matter both the ACTU and employer parties provided submissions. The submissions of the employer parties remain relevant.
90. The ACTU amended claim clause in X3.2, (annexed to the majority decision), stated that if an employer required evidence then such evidence may include issued documents by relevant named persons or a statutory declaration. The words 'may include' are too open-ended and raise uncertainty as to the type of evidence. The reference to 'statutory declaration', if considered by the Full Bench, should be clear by stating it is a document declared by the employee.
91. If, as AMIC has suggested, the circumstances for unpaid leave be limited to the matters contained in the majority decision then this severely limits – and rightly so – the type of persons who may issue a document as proof of evidence. It would not be a doctor or a nurse under the limited circumstances as it is difficult to imagine how these persons would have direct knowledge of the circumstances.
92. S.107 of the FW Act is obviously a guide for resolving this issue. This provision deals with the notice and evidentiary requirements for personal/carer's and compassionate leave.
93. If adopted, we stress the relevance of s.107(4) which states that an employee is not entitled to leave unless the employee complies with obligations outlined in s.107.
94. We also note that VP Watson in the minority decision made comments concerning evidentiary and notice matters concerning the ACTU amended claim clause. The majority, and we understand why, provided little comment concerning notice and evidentiary matters in the amended claim clause²⁴.

²⁴ The majority concentrated (generally) upon the issue of paid leave and the coverage for the amended claim clause, rejecting both.

2.5 The availability of leave for part-time and casual employees.

95. We dealt with part-time employees above. We did not deal with casual employees under that heading.
96. We understand some other employer parties oppose casual employees being entitled to any unpaid domestic violence leave. In principle, AMIC agrees.
97. However, should the Full Bench grant any unpaid leave to all employees covered by modern awards, access for casual employees and any limitations needs to be carefully considered and analysed.
98. Many modern awards define casuals as persons who are engaged and paid as such. Some modern awards state that the employment of a casual terminates at the end of each day.
99. A casual may work some hours one week, the same or a lesser or greater number of hours the next, none the next. How can this employee be considered for coverage concerning unpaid leave when any leave is unpaid and when rostered hours are inconsistent?
100. On the other hand, under the award, a casual may work a full week every week for a period until informed they are not required.
101. The FW Act provides some sort of answer when it refers to the rights of casuals, in various sections, as being employed on a regular and systematic basis. An employee, as a regular and systematic employee, may be able, in our submission if leave is granted, to access unpaid leave should they be rostered to work.

2.6 The confidentiality of information provided by employees concerning their experience of family and domestic violence.

102. The Australian Industry Group (Ai Group) filed submissions dated 19 September 2016, in response to the ACTU submissions. The Ai Group submissions dealt in some detail with matters arising concerning confidentiality. Even though the Ai Group submissions related to the ACTU amended claim clause, the submissions remain relevant. AMIC is content to adopt and support those Ai Group submissions for the present stage of the proceedings.
103. We also simply note there is a simple reference at the end of s.107(5) of the FW Act to the Privacy Act and the giving of personal information to the employer.

2.7 Whether taking unpaid family and domestic violence leave counts towards continuity of service.

104. The FW Act provides clear guidance on this issue. AMIC is firmly of the view that s.22 should be strictly followed. There exist no valid reasons for

doing otherwise. If the Full Bench granted unpaid leave then there should be no break in the continuous service but the unpaid leave does not count towards the length of the employee's continuous service.

2.8 Relationship/interaction with other forms of leave.

B. Extension of the NES entitlement to personal/carers leave to domestic violence leave

1. Does the Full Bench have jurisdiction to extend the NES entitlement to personal/carers leave to incorporate domestic violence leave?

105. The question under the head uses the word 'extend'. The question posed simply asks whether the Full Bench has jurisdiction to extend the NES entitlement concerning personal/carer's leave so that one may take domestic violence leave as part of the personal/carer's leave entitlement.
106. The starting point is s.97 of the FW Act. The Full Bench is familiar with this section of the NES so we do not set it out. Personal/carer's leave may be taken if very specific reasons exist. There are pre-conditions for the taking of this leave. If the pre-conditions are not met, one is not entitled to use personal/carer's leave. One is not entitled to take personal/carer's leave for subject matter outside the boundaries of s.97.
107. Most modern awards for personal carer's leave and compassionate leave simply state that these subjects are provided for in the NES. The employer or employee who, are covered by the awards, are directed to the FW Act. If the leave requested is not covered by s.97 or s.104 of the FW Act then leave, under these NES entitlements, is not relevant.
108. Division 3 of Pt 2-1 of the FW Act deals with the interaction between the NES, modern awards and enterprise agreement. In the Jurisdictional Issues decision, the Full Bench noted that:

‘Division 3 of Part 2-1 of the FW Act deals with, among other things, the interaction between the NES and modern awards. These provisions will be relevant to any Review application which seeks to alter the relationship between a modern award and the NES. In particular s.55(4) provides that a modern award may include the following kinds of terms:

“(a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;

(b) terms that supplement the National Employment Standards;

but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when

compared to the National Employment Standards.²⁵
(AMIC's emphasis).

109. There are some relevant notes attached to s.55(4). They are as follows:

Note 1: Ancillary or incidental terms permitted by [paragraph](#) (a) include (for example) terms:

- (a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or
- (b) that specify when payment under section 90 for paid annual leave must be made.

Note 2: Supplementary terms permitted by [paragraph](#) (b) include (for example) terms:

- (a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or
- (b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

Note 3: Terms that would not be permitted by [paragraph](#) (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74.(our emphasis).

110. Concerning s.55(4) – and we produce simply for convenience - the Fair Work Bill 2008 Explanatory Memorandum provided as follows:

‘213 A modern award or enterprise agreement can also include:

- *terms that are incidental or ancillary to the operation of NES entitlements; and*
- *terms that supplement NES entitlements, provided that the effect of those terms is not detrimental to an employee in any respect compared to the NES (subclause 55(4)).*

214. This provision allows modern awards and enterprise agreements to deal with machinery issues (such as when payment for leave must be made). It also allows awards to provide more beneficial entitlements than the minimum standards provided by the NES. For example, an award or agreement could provide for more beneficial payment arrangements for periods of leave, or provide redundancy

²⁵ [214] FWCFB 1788 at [47]

entitlements to employees of small business employers. Similarly, an agreement could provide a right to flexible working arrangements. The term about a dispute settlement procedure would also apply to that right. (our emphasis).

111. The question posed under this List of Issues concerns the power to extend personal/carer's leave to domestic violence leave.
112. We do not understand how the Full Bench has the jurisdiction to extend personal/carer's leave to family and domestic violence leave if the reason for the family and domestic violence leave does not come within the s.97 criteria. If the Full Bench extended personal/carer's leave beyond s.97 leave to domestic violence leave (at large) it would be beyond jurisdiction. The given power is to 'supplement' 'not extend' to some foreign circumstances.
113. We do not understand how the Full Bench has jurisdiction to supplement personal/carer's leave to domestic violence if the domestic violence leave does not come within the personal/carer's leave s.97 criteria.
114. The limits of the power in s.55(4) of the FW Act mean the question posed must be answered in the negative.
115. There appear to be a number of fundamental principles under this head, summarised as follows:
 - (i) FWC has power to supplement personal/carer's leave under NES but only for personal/carer's leave matters as defined in s.97 of FW Act.
 - (ii) FWC cannot add non-personal/carer's leave matters to personal/carer's leave entitlements under the NES i.e. in the case of domestic violence this would be urgent court hearings, re-location matters, meetings with lawyers of financial accountants.
 - (iii) FWC cannot dictate to an employee with 10 days personal/carer's leave under the NES. This would be detrimental.
 - (iv) FWC is permitted to confirm that the domestic violence leave can be accessed under s.97 as long as the leave is permitted under s.97 of the FW Act.
 - (v) FWC is permitted to create new forms of leave under modern awards – s.139 of the FW Act.

2. If so, should the NES entitlement to personal/carers leave be extended to incorporate domestic violence leave?

116. Our answer to this question is dictated by our submissions for 2.8(B)(1) above.

117. The Full Bench has no power to incorporate or extend personal/carer's leave to cover domestic violence leave (at large).

3. If the NES entitlement to personal/carers leave is to be extended to incorporate domestic violence leave, then:

3.1 The circumstances in which the NES entitlement to personal/carers leave can be accessed for the purposes of domestic violence leave? This issue requires a consideration of definitional issues regarding domestic violence for the purposes of the clause, the purposes for which the leave could be accessed and who can access the entitlement.

118. Our answer for 2.8(B)(1) above answers part of this Issue. Concerning 3.1 we think, having regard to our submissions, that it is totally undesirable or necessary for the Full Bench to answer this Issue. The NES dictates the leave parameters – access, circumstances.

3.2 Should there be a cap on the amount of personal/carer's leave that can be taken for family and domestic violence leave purposes?

119. Having regard to our submissions above, the Full Bench has no power to cap personal/carer's leave for domestic violence leave. If it did, it would be beyond jurisdiction.

3.3 The issues set out at 2.3 to 2.8 above.

120. For the reasons given these issues are not necessary to answer.

Australian Meat Industry Council

1 September 2017