



DECISION

Fair Work Act 2009

s.156—4 yearly review of modern awards

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

Family and domestic violence leave review 2021

(AM2021/55)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER SPENCER

MELBOURNE, 16 MAY 2022

Family and domestic violence leave review 2021 – 4 yearly review of modern awards – application to vary modern awards – paid family and domestic violence leave – provisional views.

INDEX

Chapter	Paragraph
1. Introduction	[1]
1.1 The timing of the FDVL Review	[24]
2. Overview of the Decision	[57]
3. The ACTU Claim	[91]
4. The Legislative Framework and Legal Issues	[96]
4.1 General observations	[96]
4.2 The ‘scope’ of the proceedings	[113]
4.3 The ‘approach’ to the proceedings	[122]
4.4 An award-by-award approach?	[149]
4.5 The NES point	[171]
5. The Submissions	[205]

	5.1	General	[205]
	5.2	The ACTU	[212]
	5.3	ACCI and Ai Group	[233]
		5.3.1 Ai Group	[234]
		5.3.2 ACCI	[237]
	5.4	MGA	[239]
6.		The Evidence	[245]
	6.1	Overview	[245]
	6.2	The Absence of Evidence Adduced by the Opposing parties	[268]
	6.3	The Commission’s Research Program	[284]
		6.3.1 The Monash Report	[286]
		6.3.2 The Employer Survey	[322]
		6.3.3 The WAD Analysis	[347]
		6.3.4 The SWIRLS Report	[371]
		6.3.5 Research Reference List	[389]
	6.4	The Personal Safety Survey	[392]
	6.5	WGEA – Employer Census	[411]
	6.6	Findings	[414]
		6.6.1 FDV	[419]
		(i) Prevalence	[419]
		(ii) Impact	[423]
		(iii) Employment	[436]
		6.6.2 FDV Leave	[444]
		(i) The prevalence of paid FDV leave arrangements	[444]
		(ii) The utility of paid FDV leave	[487]
7.		Cost of the ACTU Claim	[511]

7.1	Background	[511]
7.2	The utilisation of paid FDV leave	[518]
	7.2.1 Employer Survey	[519]
	7.2.2 Monash Report	[526]
	7.2.3 Bank of Queensland	[531]
	7.2.4 Western Australian Government	[535]
	7.2.5 Victorian Government	[538]
	7.2.6 Research Reference List	[545]
	7.2.7 House Committee Report	[547]
	7.2.8 The Expert Evidence	[548]
7.3	Submissions	[549]
7.4	The Expert Evidence	[551]
	7.4.1 Dr Stanford	[551]
	7.4.2 Professor Duncan	[586]
7.5	Conclusion	[609]
8.	Consideration	[628]
8.1	The Decision Tree	[628]
8.2	The Broad Lines of Argument	[631]
	8.2.1 The existing award and statutory entitlements provide a fair and relevant minimum safety net	[650]
	8.2.2 A matter for government action	[679]
	8.2.3 Other social issues are not the subject of specific award provisions	[741]
	8.2.4 FDV leave is a matter for the enterprise	[753]
	8.2.5 Not fair to employers	[770]
	8.2.6 Conclusion on the Broad Lines of Argument	[782]
8.3	Elements of the Further Amended Claim	[785]

	8.3.1 10 days' paid FDV leave?	[785]
	8.3.2 The extension of paid FDV leave to casual employees	[797]
	8.3.3 Expanding the definition of FDV	[821]
	8.3.4 The accrual and accumulation of paid FDV leave	[833]
	8.3.5 The proposed rate of pay for paid FDV leave	[846]
	8.3.6 The additional unpaid FDV leave	[865]
	8.4 Our <i>Provisional</i> View on a Model Paid FDV Leave Term	[874]
9.	The Modern Awards Objective	[877]
	9.1 General Observations	[877]
	9.2 The Section 134 Considerations	[888]
	9.3 Our <i>Provisional</i> View	[977]
10.	Conclusion	[979]
11.	Next steps	[1001]
Attachments		Page
Attachment A: NES entitlements to unpaid FDV leave		239
Attachment B: ACTU proposed variation – Further Amended Claim		241
Attachment C: Research Reference List		246
Attachment D: Summary of State and Territory FDV Leave entitlements from SWIRLS Report		262
Attachment E: Principal Findings		265

ABBREVIATIONS

4 Yearly Review	4 yearly review of modern awards
4 Yearly Review Amending Act	<i>Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018 (Cth)</i>
10 Days Paid FDV Leave Amendment Bill	<i>Fair Work Amendment (Ten Days Paid Domestic and Family Violence Leave) Bill 2020 [No 2]</i>
ABS	Australian Bureau of Statistics
ACCI	Australian Chamber of Commerce and Industry, Australian Business Industrial and New South Wales Business Chamber Ltd
ACTU	Australian Council of Trade Unions
ADFVC	Australian Domestic and Family Violence Clearinghouse
Ai Group	Australian Industry Group
ACTU claim	ACTU claim for 10 days' paid family and domestic violence leave, initially made on 30 July 2021 and then subsequently varied
Amended Claim	ACTU claim for family and domestic violence leave updated as at 22 February 2022
ANROWS	Australia's National Research Organisation for Women's Safety Limited
<i>April 2021 Statement</i>	[2021] FWCFB 2047
<i>April 2022 Statement</i>	[2022] FWCFB 50
Background Document 1	Background document to the Family and Domestic Violence Leave Review dated 11 March 2022
Background Document 2	Background document No. 2 to the Family and Domestic Violence Leave Review dated 5 April 2022
BOQ	Bank of Queensland
Budget 2022-23	Australian Government (2022), Budget 2022-23
<i>Canavan</i>	[2014] FWCFB 3202
Commission	Fair Work Commission
COSBOA	Council of Small Business Organisations Australia
Duncan Report	Bankwest Curtin Economics Centre, <i>Family and Domestic Violence Leave Review: Report prepared by Bankwest Curtin Economics Centre for the Australian Council of Trade Unions (30 July 2021)</i>
Duncan Supplementary Report	Bankwest Curtin Economics Centre, <i>Family and Domestic Violence Leave Review: Supplementary Report prepared by the Bankwest Curtin Economics Centre for the Australian Council of Trade Unions (21 December 2021)</i>

Employer Survey	Employer survey for the <i>Family and domestic violence leave review 2021</i> (December 2021)
Employer Survey Report	Fair Work Commission, <i>Survey analysis for the Family and domestic violence leave review 2021</i> (December 2021)
EVP	Escaping Violence Payment
EVP trial	Escaping Violence Payment Trial
<i>Family Friendly Work Arrangements Case</i>	(2018) 276 IR 249; [2018] FWCFB 1692
FDV Leave Amendment Act	<i>Fair Work Amendment (Family and Domestic Violence Leave) Act 2018</i> (Cth)
FDV Leave Amendment Bill	<i>Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018</i> (Cth)
FDV	Family and domestic violence
FDV leave	Family and domestic violence leave
FDVL Review	The Family and Domestic Violence Leave Review which commenced on 21 April 2021
Further Amended Claim	ACTU claim for family and domestic violence leave updated as at 28 March 2022 and reproduced at Attachment B of this decision
FW Act	<i>Fair Work Act 2009</i> (Cth)
HILDA	Household Income and Labour Dynamics in Australia
House Committee	House of Representatives Standing Committee on Social Policy and Legal Affairs
House Committee Report	House of Representative Standing Committee on Social Policy and Legal Affairs - Inquiry into family, domestic and sexual violence (March 2021), published on 1 April 2021
GVRN	Gendered Violence Research Network (University of New South Wales)
ILO	International Labour Organization
<i>July 2017 Majority Decision</i>	[2017] FWCFB 3494
Local Government Associations	Local Government Association of the Northern Territory, Municipal Association of Victoria, and WA Local Government Association
LSL	Long service leave
<i>March 2018 FDVL Decision</i>	[2018] FWCFB 1691
MGA	Master Grocers Australia Ltd
Monash Report	Fitz-Gibbon et al, <i>Safe, Thriving and Secure: Family Violence Leave and Workplace Supports in Australia</i> (2021), Monash University, December

National Plan	Department of Social Services (2011), <i>National plan to reduce violence against women and their children 2010–2022</i> , Australian Government
NES	National Employment Standards
opposing parties	ACCI, Ai Group and MGA
<i>Penalty Rates Decision</i>	[2017] FWCFB 1001
<i>Penalty Rates Review</i>	<i>Shop, Distributive and Allied Employees Association v The Australian Industry Group</i> [2017] FCAFC 161
PSS	Australian Bureau of Statistics, Personal Safety Survey
PwC	Price Waterhouse Coopers
Stanford Report	Dr Stanford, <i>Expert Report of Dr. James Stanford</i> (July 2021)
Stanford Supplementary Report	Dr Stanford, <i>Re Family & Domestic Violence Leave Review</i> (21 December 2021)
SWIRLS	Social Work Innovation Research Living Space, Flinders University
SWIRLS Report	Seymour et al, <i>Family and Domestic Violence Leave Entitlement in Australia: A Systemic Review</i> (2021), Social Work Innovation Research Living Space, Flinders University, November
VicHealth Report	VicHealth and Department of Human Services (2004), <i>The health costs of violence: measuring the burden of disease caused by intimate partner violence</i> , Victorian Government
WA	Western Australia
WAD	Workplace Agreements Database
WAD Analysis	Seymour et al, <i>Analysis of the Workplace Agreements Database for the Family and Domestic Violence Leave Review</i> (2021), Social Work Innovation Living Space, Flinders University, November
WGEA	Workplace Gender Equality Agency
WGEA Employer Census	WGEA, <i>Australia's gender equality scorecard: Key results from the Workplace Gender Equality Agency's 2020-21 employer census</i> (February 2022)
WR Act	<i>Workplace Relations Act 1996</i> (Cth)

The Fair Work Commission would like to thank everyone who was involved in these proceedings. This includes the industrial parties, witnesses and researchers, the employers who took the time to complete the Employer Survey and the victim-survivors who gave their time to inform the Monash Report. We note that this decision includes descriptions of domestic violence drawn from the submissions and reports that we have considered in these proceedings and we acknowledge that this material may be distressing.

1. Introduction

[1] This decision is about whether modern awards should be varied to provide for paid family and domestic violence (FDV) leave (FDV leave) and additional unpaid FDV leave.

[2] The present proceedings arose out of the 4 yearly review of modern awards (the 4 Yearly Review) and were foreshadowed in a decision issued by a Full Bench of the Commission¹ on 26 March 2018 (the *March 2018 FDVL Decision*).² During the course of the proceedings the Australian Council of Trade Unions (ACTU) filed a claim which, in essence, seeks to vary all modern awards to insert an entitlement to 10 days' paid FDV leave in a 12-month period and up to 5 days' unpaid FDV leave on a per occasion basis (the ACTU claim). The ACTU claim was originally lodged on 30 July 2021. The ACTU filed an [amended proposed variation](#) on 22 February 2022 (the Amended Claim) and a [further amended proposed variation](#) to modern awards was filed on 28 March 2022 (the Further Amended Claim). The ACTU claim (as reflected in the Further Amended Claim) is discussed in Chapter 3 of this decision. It is convenient to refer to the ACTU's claim generally as 'the ACTU claim' unless we are referring specifically to drafting or terms in the Amended Claim or the Further Amended Claim.

[3] The relevant background may be shortly stated.

[4] In 2014, as part of the 4 Yearly Review, the ACTU sought to vary all modern awards to include an entitlement to 10 days of paid FDV leave per year. That claim was rejected in 2017,³ but the majority of the FDV leave Full Bench which dealt with the claim expressed the preliminary view that all employees should have access to unpaid FDV leave and, further, that employees should be able to access personal/carer's leave for the purpose of taking FDV leave⁴ (the *July 2017 Majority Decision*).

[5] The FDV leave Full Bench was then reconstituted after the retirement of one of its Members⁵ and the Full Bench issued the *March 2018 FDVL Decision* confirming the preliminary view in respect of access to unpaid FDV leave.⁶

[6] A model term for unpaid leave to deal with FDV was finalised in a decision published by the Full Bench as currently constituted⁷ on 6 July 2018.⁸ The model term provided an entitlement to 5 days' unpaid leave for employees dealing with FDV and:

- applied to all employees (including casuals)
- was available in full at the commencement of each 12-month period, rather than accruing progressively during a year of service

¹ Justice Ross, President, Deputy President Gooley and Commissioner Spencer.

² [2018] FWCFB 1691.

³ [2017] FWCFB 1133 and [2017] FWCFB 3494.

⁴ *Re 4 Yearly Review of Modern Awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 (*July 2017 Majority Decision*).

⁵ Vice President Watson.

⁶ [2018] FWCFB 1691.

⁷ The Full Bench was reconstituted again following the retirement of Deputy President Gooley.

⁸ [2018] FWCFB 3936.

- did not accumulate from year to year, and
- was available in full to part-time and casual employees (i.e. was not pro-rated).

[7] It was also decided not to require employees to access any available paid leave entitlement before accessing unpaid FDV leave.

[8] The *March 2018 FDVL Decision* concluded as follows:

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

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

[309] We propose to revisit this issue in June 2021, after the model term has been in operation for three years. At that time we will consider whether any changes are needed to the unpaid leave model term, and whether to allow access to personal/carer’s leave. At that time we will also revisit the question of whether provisions should be made for paid family and domestic violence leave.’⁹

[9] Some 123 modern awards were subsequently varied to include the unpaid leave entitlement.¹⁰ The new modern award entitlement came into operation on 1 August 2018.

[10] The *Fair Work Amendment (Family and Domestic Violence Leave) Act 2018* (Cth) (the FDV Leave Amendment Act) amended the *Fair Work Act 2009* (Cth) (the FW Act) to include an entitlement to unpaid FDV leave as part of the National Employment Standards (NES). The NES entitlement (**Attachment A**) was in substantially the same terms as the model term.¹¹ The FDV Leave Amendment Act commenced on 12 December 2018.

[11] The Explanatory Memorandum to the *Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018* says:

‘Family and domestic violence is a significant community issue, which has a real and tangible impact on employees and employers in the workplace. It disrupts employment and precludes workforce participation because some employees who need time off work to deal with the impact of the family and domestic violence may see resignation as their only option. The effects of family and domestic violence are far reaching and extend beyond the individual directly affected to their families and the general community. The inclusion of unpaid family and domestic leave

⁹ [2018] FWCFB 1691 [307]–[309].

¹⁰ This number included the then 122 modern awards and the *Australian Government Industry Award 2016*. The 34 State reference public sector modern awards and enterprise modern awards were not included in the 4 Yearly Review. Following the amalgamation of the *Cement & Lime Award 2010* and the *Quarrying Award 2010*, there are now 121 modern awards of general application.

¹¹ FW Act ss.106A–E, 107.

in the NES would provide invaluable support to employees who are experiencing family and domestic violence.

A new entitlement to unpaid family and domestic violence leave in the NES would also ensure, as far as possible, consistency in entitlements for employees in the national system. From 1 August 2018, as a result of the *26 March 2018 FDVL Decision* the Fair Work Commission (the Commission) made as part of the 4 Yearly Review of Modern Awards, a new clause providing five days of unpaid family and domestic violence leave took effect in 123 modern industry and occupation awards. The new clauses inserted by the Commission only affect employees whose terms and conditions are set by those awards. Many Australian employers have also already implemented policies and entitlements to provide such support to their employees. However, there are still millions of Australian employees in the national system who do not have access to family and domestic violence leave.

The entitlement in the Bill to unpaid family and domestic violence leave is consistent with the new modern award entitlement that the Commission inserted into all modern industry and occupation awards. After broad consultation, the Commission finalised the wording of the Model Clause to be inserted into the modern awards on 6 July 2018.¹²

[12] As a result of the amendments to the FW Act, an employee is entitled to 5 days of unpaid FDV leave in a 12-month period.¹³ The employee can take unpaid FDV leave if they are experiencing FDV; they need to do something to deal with the impact of the FDV, and it is impractical for them to do that thing outside their ordinary hours of work.¹⁴

[13] ‘Family and domestic violence’ is defined in the FW Act as violent, threatening or other abusive behaviour by a close relative of an employee that seeks to coerce or control the employee and causes the employee harm or to be fearful.¹⁵

[14] A ‘close relative’ of an employee is defined as a person who is a member of the employee’s immediate family or is related to the employee according to Aboriginal or Torres Strait Islander kinship rules.¹⁶ ‘Immediate family’ means a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee, or a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee.¹⁷

[15] The entitlement to unpaid FDV leave is available in full at the start of each 12-month period of an employee’s employment; does not accumulate from year to year, and is available in full to part-time and casual employees.¹⁸ If an employee is casual or employed for a specified period of time, or for a specified task or season, the employment period is taken to be the start of the employee’s first employment with that employer.¹⁹

¹² Explanatory Memorandum to the *Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018*, available at https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6181_ems_2b2ee1ae-6c4e-4880-b0ff-95490d6fb2d8/upload_pdf/684509.pdf;fileType=application%2Fpdf.

¹³ FW Act s.106A(1).

¹⁴ Ibid s.106B(1).

¹⁵ Ibid s.106B(2).

¹⁶ Ibid s.106B(3).

¹⁷ Ibid s.12 – definition of *immediate family*. Note ‘child’ is defined in s.17.

¹⁸ Ibid s.106A(2).

¹⁹ Ibid s.106A(3).

[16] Unpaid FDV leave can be taken as a continuous period of 5 days, or in separate periods, including part days.²⁰

[17] An employer and employee can agree to the employee taking more than 5 days' unpaid FDV leave.²¹

[18] An employee must give notice to their employer of the taking of unpaid FDV leave as soon as practicable (which may be a time after the leave has started), and must advise the employer of the period or expected period of the leave.²² The employee must, if required by their employer, give the employer evidence that would satisfy a reasonable person that the employee is experiencing FDV; the leave is taken because they need to do something to deal with the impacts of FDV, and it is impractical for them to do the thing outside their ordinary hours of work.²³ The employer must take steps to ensure as far as reasonably practicable that any notice or evidence is treated confidentially,²⁴ but can disclose information if required by an Australian law or it is necessary to protect the life, health or safety of the employee or another person.²⁵

[19] After the commencement of the NES entitlement to unpaid FDV leave, the Commission decided to remove the modern award terms and replace them with a note referring to the NES entitlement as part of the finalisation of the technical drafting issues in modern awards during the 4 Yearly Review.²⁶ At that time, we noted that:

‘Our decision to delete the model term and replace it with a reference to the NES as set out at [13] does not obviate the requirement for a review of the scope of the term and of the issues set out above. We intend to proceed with our consideration of the above issues and interested parties will be invited to participate in the review ...’²⁷

[20] On 12 April 2021, the ACTU wrote to the Commission requesting that the review of the FDV leave provisions ‘commence urgently’,²⁸ noting that ‘the increased incidence of family and domestic violence during COVID-19 has clearly demonstrated that this remains a pressing problem confronting employees and employers and the wider community’.

[21] In a statement issued on 15 April 2021²⁹ (the *April 2021 Statement*), we announced the commencement of the FDVL Review and stated that the following issues would be considered during the course of the FDVL Review:

²⁰ FW Act s.106A(4).

²¹ Ibid s.106A(5).

²² Ibid ss.107(1) and (2).

²³ Ibid s.107(3)(d).

²⁴ Ibid s.106C(1).

²⁵ Ibid s.106C(2).

²⁶ [2019] FWCFB 5144.

²⁷ Ibid [46]. Note that the issues referred to are those set out at [309] of the *March 2018 FDVL Decision* (quoted at [8] above).

²⁸ ACTU correspondence dated 12 April 2021.

²⁹ [2021] FWCFB 2047.

1. whether employees should be able to access paid personal/carer's leave for the purpose of taking FDV leave;
2. the adequacy of the unpaid FDV leave entitlement; and
3. whether provisions should be made for paid FDV leave.

[22] In the *April 2021 Statement* we also said that the Commission would conduct a research program to assist in the FDVL Review including:

- a literature and data review
- an analysis of the Workplace Agreements Database (WAD)
- a qualitative assessment of the experience of FDV leave
- a survey of employers seeking information on the use and operation of the unpaid FDV leave entitlement, and
- an update of the Research Reference List first published in September 2017.

[23] It is convenient to deal at the outset with ACCI's submission that it is not possible in the current circumstances to properly conduct the FDVL Review at this time.

1.1 The timing of the FDVL Review

[24] In its 4 February 2022 submissions, ACCI submits that it is impossible to undertake any form of meaningful 'review' of the current operation of the unpaid FDV leave entitlement in the present 'dynamic context' and in the absence of any relevant evidence.³⁰ The 'dynamic context' to which ACCI refers includes the circumstances of the COVID-19 pandemic. ACCI submits 'the Full Bench may wish to identify a further review date - by which time the effects of the pandemic will be better known, and the conditions of the Australian workplace will be more stable'.³¹

[25] Similarly, Ai Group submits there is limited evidence available to assist in the conduct of the FDVL Review:

'Evidence of how over-award arrangements or enterprise agreement provisions relating FDV leave operate is of limited value and does not rectify this void. Nor is it any answer to criticise employer parties for not calling related evidence on the erroneous assumption that we are able to (an assumption that ignores the fact that we cannot compel our members to give evidence and there are limitations on the resources that we can devote to the current proceedings). Ultimately, if factual considerations are not able to be taken into account by the Full Bench, it should decline to disturb the current safety net. This is consistent with the maintenance of a stable modern awards system.'³²

³⁰ ACCI submissions in reply dated 4 February 2022 [6.19].

³¹ Ibid [6.24].

³² Ai Group final submissions dated 28 March 2022 [156].

[26] The ACTU makes 3 points in response to ACCI:

1. It is not productive to raise in early 2022 that pandemic conditions are not optimum for the conduct of the FDVL Review and to suggest the FDVL Review be deferred on that basis. The FDVL Review was foreshadowed, and then commenced, in April 2021. The disruptive nature of the COVID-19 pandemic was then well-known. ACCI did not object to the conduct of the FDVL Review at that time nor did it suggest that the Review be deferred.³³
2. Data collection in this area is challenging. This was the case before the COVID-19 pandemic. The absence of a perfect data set is not a valid reason to defer the FDVL Review. The Commission, along with many other courts and tribunals, frequently considers applications for orders which proceed on imperfect or incomplete data, but in which there is nonetheless sufficient evidence on which to make a determination. The relevant question for the Full Bench is whether the evidence before it, which includes the Commission Research, is sufficient to satisfy the Full Bench that it is necessary to vary modern awards.³⁴
3. The employers have not adduced any evidence as to the economic status of their members or of employers more generally as a result of the COVID-19 pandemic, nor sought to demonstrate in any measurable way the differences between award-covered employers' pre-pandemic economic position with the current, and projected, economic performance of those employers. General assertions to this effect are not equivalent to probative evidence, and the issue is sufficiently complex that the Full Bench cannot take 'judicial notice' that all award-covered businesses have suffered economic harm during the pandemic.³⁵

[27] We deal with the ACTU's second and third points about the available evidence in Chapters 6 and 7 of this decision; suffice to say here that we are satisfied that there is sufficient evidence to support the findings we have made and the position we have reached in respect of the ACTU claim.

[28] We agree with the first point raised by the ACTU. The FDVL Review was foreshadowed in the *March 2018 FDVL Decision* and we confirmed that the proposed review would proceed in our July 2019 decision. The foreshadowed review commenced with a statement and a conference in April 2021. The World Health Organisation declared COVID-19 a global pandemic on 11 March 2020,³⁶ and the Australian Government initiated the first guidelines for social distancing in order to stop or slow the spread of the coronavirus disease on 15 March 2020.³⁷ The impacts of the COVID-19 pandemic have been known for some time and, to the extent that the ACCI submission is advanced as a threshold issue, it had the opportunity to raise this early in the process.

³³ ACTU submissions in reply dated 21 February 2022 [90].

³⁴ Ibid [91].

³⁵ Ibid [92].

³⁶ Australian Government, Department of Health, *About the COVID-19 Pandemic*, <https://www.health.gov.au/health-alerts/covid-19/about>, accessed on 13 April 2022.

³⁷ Fair Work Commission [Information note – Government responses to COVID-19 pandemic](#), 31 March 2022.

[29] We also note that the Commission has conducted a number of other review proceedings during the COVID-19 pandemic in which Ai Group and ACCI have participated. These matters include:

1. AM2018/26 – The substantive issues in the review of the *Social, Community, Home Care and Disability Services Industry Award 2010*. Ai Group filed a supplementary submission and witness statement on 5 August 2021
2. AM2020/20 – Application to vary the *Fast Food Industry Award 2010* – joint application by Ai Group, the ACTU and the SDA. Ai Group filed a witness statement in this matter
3. AM2020/102 – Application by the Motor Trades Association and Ai Group to vary the *Vehicle Repair, Services and Retail Award 2020* (ACCI also made submissions)
4. AM2020/10 – Application to vary the *Clerks–Private Sector Award* – Ai Group and ACCI application to insert a COVID-19 schedule
5. AM2020/104 – Application to vary the *Horticulture Award 2020*. Ai Group made submissions
6. AM2021/72 – Proposed On Demand Delivery Services Award. ACCI made submissions, and
7. AM2017/51 – Overtime for casuals common issue proceedings – Ai Group made submissions.

[30] Although Ai Group sought extensions of time to file submissions in some of the above matters due to the demands of the COVID-19 pandemic, neither ACCI nor Ai Group submitted that the matters should be delayed; nor did they contend that they were unable to file evidence in those proceedings due to the ‘dynamic context’.

[31] Finally, in response to the ACCI submission that the Full Bench may want to defer the FDVL Review, we note that in the *March 2018 FDVL Decision* we found that:

‘Family and domestic violence is ubiquitous. One in four women in Australia have experienced such violence (or almost 2.2 million women). Family and domestic violence affects not only those who suffer it, but the children who are exposed to it, extended families, friends and work colleagues ...’³⁸

[32] We make a similar finding later in this decision. We also note the ACTU submission ‘that there is a growing body of Australian and international literature showing that the frequency and severity of family and domestic violence has risen during the pandemic’³⁹. This submission is supported by the Social Work Innovation Research Living Space, Flinders

³⁸ *March 2018 FDVL Decision* [80].

³⁹ See ACTU supplementary submissions dated 22 December 2021 [31].

University (SWIRLS) report, *Family and Domestic Violence Leave Entitlement in Australia: A Systemic Review* (the SWIRLS Report).⁴⁰

[33] In these circumstances, we reject the ACCI submission that the FDVL Review should be delayed.

[34] Following the *April 2021 Statement*, directions were issued for the filing of submissions and evidence.

[35] The following parties made submissions:

- ACTU [30 July 2021](#), [22 December 2021](#) and [21 February 2022](#) and an [amended proposed variation](#) dated 22 February 2022
- [ACCI dated 4 February 2022](#)
- [Ai Group dated 4 February 2022](#)
- [Bank of Queensland dated 30 July 2021](#)
- [Council of Small Business Organisations Australia dated 25 November 2021](#)
- [JobWatch dated 22 December 2021](#)
- [Local Government Associations dated 23 February 2022](#)
- [Master Grocers Australia \(MGA\) dated 4 February 2022](#)
- [McAuley Community Services for Women dated 30 July 2021](#)
- [Queensland Government dated 21 December 2021](#)
- [Victorian Government dated 28 July 2021](#), and
- [Western Australian Government dated 23 December 2021](#).

[36] The Australian Government did not file a submission in the FDVL Review.

[37] The hearing of the evidence took place on 1 March 2022. A [transcript](#) of that hearing was published on 2 March 2022.

[38] A [Statement](#) issued on 8 March 2022 varied the directions to require that the parties file and exchange written submissions addressing only the conclusions to be drawn from the

⁴⁰ Seymour et al, Social Work Innovation Research Living Space, Flinders University *Family and Domestic Violence Leave Entitlement in Australia: A Systemic Review* (3 November 2021), [2.1.1].

evidence and closing submissions by 28 March 2022, and listing the matter for final oral submissions on Friday 8 April 2022.⁴¹

[39] In a [Statement](#) issued on 11 March 2022, we published the following documents:

- a background document ([Background Document 1](#))
- [Information Note](#) – *ACTU Supplementary Submission to the Family and Domestic Violence Leave Review*, and
- [Information Note](#) – *Paid Family and Domestic Violence Leave by Business Size*.

[40] Background Document 1 set out, amongst other things, a summary of the submissions of the main parties and posed a number of questions for the parties. Parties were asked to include answers to the questions in their submissions to be filed by 28 March 2022.

[41] The following submissions were filed in response to the amended directions:

- [ACCI](#) – final submissions dated 28 March 2022
- ACTU – [Final submissions on evidence](#); [Final submissions](#) and [Submissions in response to Background Document all dated 28 March 2022](#)
- [Ai Group](#) – final submission dated 28 March 2022, and
- [Victorian Government](#) – final submission dated 28 March 2022.

[42] In a [Statement](#) issued on 5 April 2022⁴² (the *April 2022 Statement*), we published the following documents:

- a second background document ([Background Document 2](#)), and
- [Information note](#) – *Initiatives to reduce family and domestic violence in Budget 2022-23*.

[43] Background Document 2 set out, among other things, the parties' written closing submissions and the answers provided to the questions posed in Background Document 1. Background Document 2 also posed some additional questions which the parties were directed to answer by no later than 3pm on Thursday 7 April 2022. The following submissions were received:

- [ACCI](#) submissions in response to Background Document 2 dated 7 April 2022
- [ACTU](#) submissions in response to Background Document 2 dated 7 April 2022
- [Ai Group](#) submissions in response to Background Document 2 dated 7 April 2022

⁴¹ [2022] FWCFB 24.

⁴² [\[2022\] FWCFB 50](#).

[44] The *April 2022 Statement* also noted that the Commission's Research Reference List had been updated to include the following:

- Australian Government (2022), *Budget Paper No. 2: Budget Measures*, 29 March 2022
- Australian Government (2022), *Women's Budget Statement 2022–23*, 29 March 2022
- Australian Domestic and Family Violence Death Review Network & Australia's National Research Organisation for Women's Safety (ANROWS) (2022), *Australian Domestic and Family Violence Death Review Network Data Report: Intimate partner violence homicides 2010–2018*, Second Edition, Research report 03/2022, ANROWS, and
- Morgan A and Boxall H (2022), *Economic insecurity and intimate partner violence in Australia during the COVID-19 pandemic*, Research report, Issue 2, ANROWS, January 2022.

[45] Parties were invited to make submissions about these additions to the Research Reference List and about the Information Note on the Australian Government Budget 2022-23 (Budget 2022-23) at the hearing on 8 April 2022.

[46] The hearing of final oral submissions took place on 8 April 2022. A [transcript](#) of that hearing was published on 14 April 2022.

[47] It is convenient to note here that the central issue in the proceedings is whether all modern awards should be varied to provide for *paid* FDV leave and for supplementary *unpaid* FDV leave. For the reasons which follow, we do not propose to give any further consideration to the first 2 FDVL Review issues as set out at [21] above.

[48] As to the first FDVL Review issue, it is uncontentious that employees who require leave because of a personal illness or injury relating to FDV, and who are entitled to paid leave, may access personal/carer's leave for that purpose.

[49] It is also common ground, at least as between the ACTU, ACCI and Ai Group,⁴³ that it is not open to the Commission to extend the NES entitlement to paid personal/carer's leave for purposes other than those prescribed by s.97 of the FW Act, as such a term would contravene s.55 of the FW Act. This is said to be so because such a term would exclude the operation of the NES by depriving employees of the full entitlement to 10 days' paid personal/carer's leave; and would be detrimental to employees for that reason.

[50] The MGA initially took a different position. In its submission dated 4 February 2022, the MGA contended that a modern award term which permits employees to access personal/carer's leave for FDV purposes is a term that supplements, and does not exclude, the

⁴³ ACTU submissions dated 30 July 2021 [7]–[28]; Ai Group submissions in reply dated 4 February 2022 [37]–[62]; ACCI submissions in reply dated 4 February 2022 [5.1]–[5.4].

NES,⁴⁴ because employees dealing with the consequences of FDV may be ‘not fit for work’ as a result and so fall within the scope of s.97 of the FW Act.⁴⁵

[51] Section 97 of the FW Act provides that an employee may take leave if they are not fit for work *because of a personal illness, or personal injury* and, in the case of carer’s leave, because of *an unexpected emergency affecting the [family] member*. The MGA submission did not address the causal relationship between the concept of ‘fitness for work’ and the limiting phrase ‘because of a personal injury or illness’ in respect of the personal leave aspect of s.97(a) of the FW Act. The MGA contended that the benefit of personal/carer’s leave is not ‘lost’ if employees are permitted to take this leave for a purpose other than as prescribed by the FW Act but did not otherwise address the arguments made against its position by the other parties in the proceeding.

[52] In Background Document 1, the MGA was asked whether it pressed its submission that a modern award term which permits access to paid personal/carer’s leave for FDV purposes does not contravene s.55 of the FW Act. If the submission was pressed, the MGA was invited to respond to those who put a contrary view. The MGA advised that it did not intend to file a response to Background Document 1.

[53] In Background Document 2, the following question was put to the MGA:

Q2 For MGA: *Does the MGA press its submission that a modern award term which permits access to paid personal/carer’s leave for FDV purposes does not contravene s.55 of the FW Act? If the MGA does not respond to the question, it will be assumed that the submission is not pressed.*

[54] The MGA advised that it did not press its submission that a modern award term which permits access to paid personal/carer’s leave for FDV purposes does not contravene s.55 of the FW Act.

[55] In circumstances where no party proposed that modern awards be varied to enable employees to access paid personal/carer’s leave for the purpose of taking FDV leave, we do not consider it necessary to express a concluded view in respect of the first FDVL Review issue.

[56] As to the second FDVL Review issue, it is common ground that it is not necessary to review the model term as finalised in the *March 2018 FDVL Decision* because the model term was removed from modern awards following the commencement of the NES entitlement. The adequacy of the NES entitlement to unpaid FDV leave will necessarily form part of our consideration of that part of the ACTU claim that seeks to provide an award entitlement to *paid* FDV leave and additional *unpaid* FDV leave.

⁴⁴ MGA submissions in reply dated 4 February 2022 [16]–[23], esp [21].

⁴⁵ Ibid [22].

2. Overview of the Decision

[57] In this chapter we provide an overview of our decision, findings and conclusions.

[58] These proceedings arose out of the 4 Yearly Review of modern awards conducted under s.156 of the FW Act.

[59] The essence of the ACTU claim is that modern awards be varied to provide all employees with 10 days' paid FDV leave in a 12-month period and up to 5 days' unpaid FDV leave on a per occasion basis. The overarching premise of the ACTU's claim is that FDV is a workplace issue that requires a workplace response and that 'paid leave provides a critical mechanism for employees to maintain their employment and financial security, while dealing with the effects of FDV'.⁴⁶

[60] Under Part 2-3 of the FW Act, the Commission has the power to make, vary or revoke modern awards either on the Commission's own motion or in response to an application. Modern awards set minimum terms and conditions for national system employees in particular industries or occupations.⁴⁷

[61] The ACTU claim is made under s.157 of the FW Act. Under s.157(1), the Commission may only make the variations sought by the ACTU if it is satisfied that the variations are 'necessary to achieve the modern awards objective'.

[62] The modern awards objective requires the Commission to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account the matters at ss.134(1)(a)-(h). The FW Act also prescribes what may, must and must not be included in modern awards. Chapter 4 sets out some general observations about the Commission's modern awards powers.

[63] In short, our task is to assess the evidence and submissions against the statutory tests, principally whether a modern award provides a fair and relevant safety net of terms and conditions and whether a proposed variation is necessary in order for the award to achieve the modern awards objective.

[64] We accept that variations to modern awards must be justified on their merits. The introduction of a paid FDV leave entitlement into modern awards would be a significant change and we accept that if we were to arrive at such a decision, we would clearly state our reasons for doing so. Those reasons would include a consideration of the *March 2018 FDVL Decision* and the facts and circumstances which have occurred since the implementation of that decision.

[65] We accept that these proceedings relate to the FDVL Review and the ACTU claim. We are, of course, not confined to the terms of the ACTU claim and, subject to according interested

⁴⁶ ACTU supplementary submission dated 22 December 2021 [28].

⁴⁷ There are currently 121 modern awards that cover employers and their employees in particular industries and occupations. There are also 34 additional modern awards that are either modern enterprise awards or state reference public sector modern awards. Modern enterprise awards are expressed to relate to a single enterprise or group of enterprises (see s.168A). State reference public sector modern awards relate to state reference public sector employers and their employees (see s.168E).

parties procedural fairness, we may determine the matter other than in the terms sought by the ACTU (s.599 of the FW Act).

[66] Ai Group contends that the ACTU claim is not permitted by s.55 of the FW Act and hence, if granted, would be of no effect (s.136(1)(c)). We deal with that submission in Chapter 4.5 (The NES point).

[67] We conclude that the grant of paid FDV leave in a modern award does not of itself exclude *the capacity* of employees to access the statutory entitlement to unpaid FDV leave and cannot properly be characterised as depriving employees of receiving, in full, the NES benefit because they have elected to access the enhanced benefit. Accordingly, it cannot be said to exclude the employees' entitlement to unpaid FDV leave under the NES.

[68] Chapter 5 provides a brief summary of the main merit and legal arguments advanced by the ACTU, ACCI and Ai Group. Background Document 1 provides a more detailed summary of the parties' submissions.

[69] The evidence is dealt with in Chapters 6, 7 and 8.

[70] The ACTU filed 2 expert witness statements: [Dr Stanford](#) dated 30 July 2021 and [Professor Duncan](#) dated 28 July 2021. [Supplementary reports](#) from Dr Stanford and Professor Duncan were filed on 22 December 2021. Professor Duncan and Dr Stanford were cross-examined during the hearing on 1 March 2022 and a [transcript](#) of that hearing was published on 2 March 2022. The ACTU also adduced evidence from 10 lay witnesses.

[71] The following reports were published as part of the Commission's research program:

- Fitz-Gibbon K, Pfitzner N, McNicol E and Rupanagudi H (2021), '[Safe, thriving and secure: Family violence leave and workplace supports in Australia](#)', Monash University, December (the Monash Report)
- [Survey analysis for the Family and domestic violence leave review 2021](#), December 2021 (the Employer Survey)
- Seymour K, Hirsch R, Wendt S and Natalier K (2021), '[Analysis of the Workplace Agreements Database for the Family and Domestic Violence Leave Review](#)', Social Work Innovation Research Living Space, Flinders University, November (the WAD Analysis)
- Seymour K, Hirsch R, Wendt S and Natalier K (2021), '[Family and Domestic Violence Leave Entitlement in Australia: A Systemic Review](#)', Social Work Innovation Research Living Space, Flinders University, November (the SWIRLS Report)

[72] The Commission also published a [Research Reference List](#) (see **Attachment C**) and the following Information Notes:

- [Initiatives to reduce family and domestic violence in Budget 2022–23](#) (5 April 2022)

- [Paid Family and Domestic Violence Leave by business size](#) (11 March 2022)
- [ACTU supplementary submission to the Family and Domestic Violence Leave Review](#) (11 March 2022)

[73] The opposing parties elected *not* to call any evidence in the proceedings. We deal with the consequences of the opposing parties' election in Chapter 6.2 noting that a party asserting a particular fact or consequence can be said to bear the evidentiary burden of adducing or pointing to evidence which supports that assertion.⁴⁸

[74] The balance of Chapter 6 deals with the reports published as part of the Commission's research program and the parties' comments on that research. We then deal with some data on the prevalence and impacts of FDV and the results of the Workplace Gender Equality Agency's (WGEA) 2020-21 employer census. The evidence in respect of the cost of the ACTU claim is addressed in Chapter 7.

[75] Our findings on the evidence are set out in Chapter 6.6, Chapter 7.5 and the principal findings are set out in Attachment E. In brief summary, we find that FDV is ubiquitous, disproportionately affects women, has increased during the COVID-19 pandemic, and has a significant adverse effect on those who experience it as well as their families and the general community. We also find that FDV has a real and tangible impact in the workplace, and that women who experience FDV have a more disrupted work history, lower personal incomes, more frequent changes of jobs, and are more likely to be employed in casual and part-time work than women with no experience of violence. We find that FDV is both a cause and consequence of gender inequality, and we affirm the finding made in the *March 2018 FDVL Decision* that employees who experience FDV often face financial difficulties as a result, such as relocation costs, or becoming a sole parent, and may suffer economic harm as a result of disruption to workplace participation.

[76] In relation to the provision of paid FDV entitlements in enterprise agreements, and over award arrangements we find that there has been a sharp rise in the availability of paid FDV leave in the past 5 years. A substantial proportion of the Australian workforce now has access to paid FDV leave. We find that the provision of 10 days paid FDV leave is an emerging industrial standard in bargaining and over-award arrangements. We find that such an entitlement, where provided, provides significant assistance to those experiencing FDV in that it helps individuals to maintain their economic security, to access relevant services and to safely exit to a life free from violence. We also find that the introduction of paid FDV leave is likely to be of some, albeit difficult to quantify, benefit to employers through reducing absenteeism and lost productivity caused by FDV.

[77] In Chapter 7.4, we assess the expert evidence adduced by the ACTU concerning the cost of its claim and conclude that the evidence supports a finding varying modern awards in accordance with the *provisional* model term for paid FDV leave which we identify in Chapter

⁴⁸ *Village Cinemas Australia Pty Ltd v Carter* [2007] AIRCFB 35 [27]; *Roy Morgan Research Ltd v Baker* [2013] FWCFB 8936 [23]; *TAFE NSW v Pykett* [2014] FWCFB 714 [36]–[37]; *Advanced Health Invest Pty Ltd T/A Mastery Dental Clinic v Mei Chan* [2019] FWCFB 5104 [43] cited with approval in *Adaszko v Mitford Investments Pty Ltd ATF The JJG Trust t/as Integro Private Wealth* [2021] FWCFB 719 [28]; and *Steve Newton v Toll Transport Pty Ltd* [2021] FWCFB 3457 [81].

8.4 would have no significant adverse impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy. At the enterprise level, we find that although the cost impact on employers will vary, it is unlikely to be substantial given the evidence concerning the low employee utilisation rate of access to the entitlement and the existence of at least some offsetting benefits to employers.

[78] We address the general case advanced by the ACTU for a paid FDV leave entitlement, and the cases mounted in response by the opposing parties in Chapter 8.2 and conclude that the merits strongly favour a paid FDV leave entitlement. We find that:

- FDV is a workplace issue that requires a workplace response;
- paid FDV leave is a critical mechanism for employees to maintain their employment and financial security while dealing with the effects of the FDV;
- the financial circumstances of employees who have experienced FDV may make it impracticable for them to access the existing *unpaid* entitlement, with the consequences that they make not be able to relocate, attend court proceedings, and obtain medical treatment and other forms of support, and this may inhibit such employees from leaving violent relationships;
- the current minimum safety net is, accordingly, not fair or relevant;
- paid FDV leave is not simply ‘a matter for government’, and the Commission’s jurisdiction to establish additional leave entitlements in modern awards has been properly invoked by the ACTU claim;
- that other social issues are not currently dealt with in modern awards is not a reason not to provide for paid FDV leave if the merits otherwise justify it; and
- we are not persuaded that the issue of FDV should be left to the enterprise level and left unregulated by modern awards.

[79] In Chapter 8.3, we deal with the various elements of the ACTU’s claim: the quantum of the leave entitlement; whether the entitlement should extend to casual employees; whether the definition of FDV should be expanded as proposed by the ACTU or remain consistent with s.106B(2) and (3) of the FW Act; the accrual and accumulation of FDV; the rate of pay for FDV leave when it is taken, and the ACTU’s claim for an additional 5 day’s unpaid FDV leave per occasion once paid leave is exhausted.

[80] In Chapter 8.4 we set out our *provisional* view that a model FDV leave term should have the following characteristics:

1. Full time employees and, on a pro-rata basis part-time employees, should be entitled to 10 days paid FDV leave per year.
2. The entitlement to 10 days paid FDV leave per year should accrue progressively across the year in the same way as for personal/carer’s leave accrues under the NES, with accrual occurring accordingly to the methodology articulated by the High Court

in *Mondelez Australia Pty Ltd v AMWU & Ors*⁴⁹. The entitlement should accumulate from year to year, but subject to a ‘cap’ whereby the total accrual does not exceed 10 days at any given time.

3. The FDV leave entitlement should be accessible in advance of an entitlement to such leave accruing, by agreement between an employer and employee.
4. The FDV leave entitlement should operate on the basis that it is paid at the employee’s ‘base rate of pay’ as defined in s.16 of the FW Act.
5. The definition of ‘family and domestic violence’ should be in the same terms as the definition in s.106B(2) of the FW Act (and not extend to FDV perpetrated by a member of the employee’s household who is not related to the employee).
6. In all other relevant respects the model FDV leave term should reflect the terms of s.106B.

[81] We reject the element of the ACTU claim which seeks an additional period of 5 days’ unpaid FDV leave on a per occasion basis and have formed the *provisional* view that paid FDV leave *not* apply to casuals.

[82] In Chapter 9 we make our *provisional* assessment on the modern awards objective, at a ‘global’ level. We accept that we must consider any specific circumstances raised in respect of each modern award and be satisfied that any proposed variation to an award is necessary to ensure that that award achieves the modern awards objective. The award-by-award process will commence once we have finalised the content of the proposed model term. The modern awards objective is to ‘ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions’, taking into account the particular considerations identified in ss.134(1)(a)-(h). At a global level of assessment, it is our *provisional* view that the insertion of the *provisional* model term for 10 days paid FDV leave is necessary to achieve the modern awards objective.

[83] In Chapter 10 we set out our conclusion, noting that in Chapter 4.3 we accepted that our reasons would include a consideration of the *March 2018 FDVL Decision* and the facts and circumstances which have occurred since the implementation of that decision.

[84] Our consideration of the *March 2018 FDVL Decision* is set out in Chapters 4, 5 and 8. In various parts of our decision we reference the facts and circumstances which have occurred since the implementation of the *March 2018 FDVL Decision*; including:

- (i) The introduction of an NES entitlement to 5 days unpaid FDV leave;
- (ii) The COVID-19 pandemic;
- (iii) The sharp rise in the availability of paid FDV leave in the past 5 years. A substantial proportion of the Australian workforce now has access to paid FDV

⁴⁹ [2020] HCA 29.

leave and the provision of 10 days' paid FDV leave is an emerging industrial standard in bargaining and over-award arrangements.

- (iv) Various Government initiatives to address FDV and its consequences;
- (v) The House Committee Report;
- (vi) The papers published as part of the Commission's research program and the evidence they contain;
- (vii) The expert evidence on the cost of the ACTU claim.

[85] As to matter (vii), the material before us addresses the lacuna in the evidence regarding the costs of paid FDV leave identified in the *July 2017 Majority Decision*.

[86] ACCI and Ai Group did not contest the proposition that paid FDV leave is desirable or at the very least is beneficial for some employees.

[87] The contested issue is *not* about whether paid FDV leave is desirable or beneficial to employees – it is about whether it is *necessary* to vary modern awards to achieve the modern awards objective by providing for paid FDV leave.

[88] We then refer to our conclusion in Chapter 8.2.6, that the ACTU has made good its 'overarching premise' advanced that FDV is a workplace issue that requires a workplace response and that paid FDV leave is a critical mechanism for employees to maintain their employment and financial security, while dealing with the consequences of FDV. We also refer to our conclusion that the merits strongly favour the provision of an additional FDV leave entitlement in the terms of the *provisional* model FDV leave term (see Chapter 8.4). And, to our *provisional* view that the insertion into modern awards of the *provisional* model FDV leave term is necessary to achieve the modern awards objective.

[89] Finally, in Chapter 11, we set out the next steps to be taken in the proceedings:

1. The parties are to formulate a draft model FDV leave term based on our *provisional* views in Chapter 8.4. The formulation of such a draft term will be without prejudice to a parties' ability to challenge any of our *provisional* views. The proposed draft model terms are to be filed by **4:00pm Friday 17 June 2022**;
2. The parties are to confer and submit draft directions in respect of the finalisation of these proceedings. Such directions are to:
 - (i) provide an opportunity for the parties to express a view on the draft model FDV leave terms proposed by other parties and the *provisional* views we express in Chapter 8.4 about the content of that term; and
 - (ii) provide the Commonwealth Government an opportunity to clarify its intentions regarding any amendment to the NES, should it choose to do so.

[2022] FWCFB 2001

[90] The draft directions are to be filed by no later than **4:00pm Friday 1 July 2022.**

3. The ACTU claim

[91] The form of the ACTU's claim has been amended during the course of these proceedings.

[92] As noted at [2], the ACTU filed a [submission and proposed variation to modern awards on 30 July 2021](#). The Amended Claim and Further Amended Claim were filed on 22 February 2022 and 28 March 2022 respectively. The Amended Claim and the Further Amended Claim sought to clarify drafting and other issues that arose during the course of the proceedings and did not alter the substance of the ACTU claim.

[93] The essence of the ACTU claim is that modern awards be varied to provide all employees with 10 days' paid FDV leave in a 12-month period and up to 5 days' unpaid FDV leave on a per occasion basis.

[94] The Further Amended Claim is modelled on the current NES entitlement, with the following differences (clause references are as set out in the Further Amended Claim):

(a) it provides for 10 days' paid FDV leave: (cl.A(1)) which is available in full at the start of each 12-month period of the employee's employment; does not accumulate from year to year, and is available in full to part-time and casual employees (cl.A(2)). The clause also provides that the employer and employee may agree that the employee may take more than 10 days of paid FDV leave (1AA).

(b) for a full-time employee, leave is payable at the rate of pay the employee would otherwise have earned (including any applicable incentive-based payments and bonuses; monetary allowances; shift loadings, penalty rates, rostered overtime, allowances and other entitlements) had the employee not taken paid family and domestic violence leave (cl.C(1))

(c) for a part-time employee, leave is payable at the greater of: (i) the rate of pay the employee would otherwise have earned (including any applicable incentive-based payments and bonuses; monetary allowances; shift loadings, penalty rates, rostered overtime, allowances and other entitlements) had the employee not taken paid family and domestic violence leave; or (ii) a daily rate calculated based on the average weekly pay received by the employee in the previous 6 weeks, or where the employee has been employed for less than 6 weeks, for the duration of their employment. The daily rate is calculated by dividing the employee's average weekly pay by 5 (cl.C(2))

(d) for a casual employee with rostered or agreed hours, leave is payable at the rate of pay that the employee would otherwise have earned (including any applicable incentive-based payments and bonuses; monetary allowances; shift loadings, penalty rates, rostered overtime, allowances and other entitlements) had the employee not taken paid family and domestic violence leave (cl.C(3))

(e) for all other casual employees, leave is payable at a daily rate calculated based on the average weekly pay received by the employee in the previous 6 weeks, or where the employee has been employed for less than 6 weeks, for the duration of their employment. The daily rate is calculated by dividing the employee's average weekly pay by 5 (cl.C(4))

(f) upon exhaustion of the paid leave entitlement, employees are entitled to up to 5 days' unpaid FDV leave on each occasion for the purposes set out in cl.B(1): (cl.D(1)). The clause also provides that the employer and employee may agree that the employee may take more than 5 days of unpaid FDV leave to deal with the impact of FDV (cl.D(2))

(g) employees may take FDV leave if they are experiencing FDV; they need to do something to deal with the impact of the FDV, and it is impractical for them to do that thing outside their hours of work (cl.B(1)). However, the word 'ordinary' (in s.106B(1)(c) of the FW Act) is removed from the clause, to clarify that FDV leave is not limited to matters that are impractical to deal with outside employees' 'ordinary' hours of work.⁵⁰ The ACTU also proposes an addition to Note 1 to cl.B(1) (which is based on Note 1 to s.106B(1)) to clarify that attending appointments with medical, financial or legal professionals are examples of actions that may be covered by the provision and to replace the word 'are' with 'include' in the following sentence in the Note: 'Examples of actions, by an employee who is experiencing family and domestic violence, that could be covered by paragraph (b) ~~are~~ include ...', and

(h) the definition of 'family and domestic violence' is expanded to include violent, threatening or other abusive behaviour by a member of an employee's household, in addition to a close relative of an employee (cl.B(2)).

[95] The Further Amended Claim is set out at **Attachment B**.

⁵⁰ ACTU final submissions dated 28 March 2022 [23].

4. The Legislative Framework and Legal Issues

4.1 General observations

[96] Under Part 2-3 of the FW Act, the Commission has the power to make, vary or revoke modern awards either on the Commission’s own motion or in response to an application. Modern awards set minimum terms and conditions for national system employees in particular industries or occupations. The FW Act sets out the modern awards objective which requires the Commission to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account certain social and economic factors. The FW Act also prescribes what may, must and must not be included in modern awards. This chapter of the decision sets out some general observations about the Commission’s modern awards powers.

[97] The general provisions relating to the performance of the Commission’s functions also apply to these proceedings.⁵¹ Section 578(a) provides that in performing functions and exercising powers under a part of the FW Act the Commission must take into account the object of the FW Act and any particular objects of the relevant part. The objects of Part 2-3 is expressed in s.134, the modern awards objective. The objective of the FW Act is set out in s.3, in particular s.3(g) provides:

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

...

(g) acknowledging the special circumstances of small and medium-sized businesses.’

[98] These proceedings arose out of the 4 yearly review of modern awards conducted under s.156 of the FW Act (the 4 Yearly Review).

[99] On 12 December 2018, s.156 was repealed by the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* (the 4 Yearly Review Amending Act) with effect from 1 January 2018. Under the application and transitional provisions of the 4 Yearly Review Amending Act, a review of an award that commenced but was not completed before 1 January 2018 can continue under the terms of the repealed provisions.⁵² The FDVL Review is proceeding pursuant to these transitional provisions.

[100] In the *March 2018 FDVL Decision* the Full Bench made the following observations about the operation of s.156:

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

⁵¹ See ss.577 and 578 of the FW Act.

⁵² We note that for the reasons referred to in our Statement of 28 February 2019 ([2019] FWCFB 1044), modern enterprise awards and State reference public sector awards could not be varied under the transitional provisions of the 4 Yearly Review Amendment Act.

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

If a power to decide is conferred by a statute and the context (including the subject-matter to be decided) provides no positive indication of the considerations by reference to which a decision is to be made, a general discretion confined only by the scope and purposes of the legislation will ordinarily be implied. However, a number of provisions of the Act which are relevant to the Review operate to constrain the breadth of the discretion in s.156(2)(b)(i). In particular, the Review function is in Part 2-3 of the Act and hence involves the performance or exercise of the Commission's 'modern award powers' (see s.134(2)(a)). It follows that the 'modern awards objective' in s.134 applies to the Review. Section 138 (achieving the modern awards objective) also applies.⁵³ [footnotes omitted]

[101] These observations are relevant to the present proceedings.

[102] In addition, the ACTU claim is made under s.157 of the FW Act. Under s.157(1), the Commission may only make the variations sought by the ACTU if it is satisfied that the variations are 'necessary to achieve the modern awards objective'.

[103] The 'modern awards objective' is defined in s.134(1) as requiring the Commission 'to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account ...' the matters at ss.134(1)(a) to (h) (the s.134 considerations).

[104] Section 138 of the FW Act emphasises the importance of the modern awards objective in the context of both the 4 Yearly Review and in considering applications under s.157; it states:

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

[105] There is a distinction between what is 'necessary' and what is merely 'desirable'. Necessary means that which 'must be done'; 'that which is desirable does not carry the same imperative for action'.⁵⁴

[106] What is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances of the particular modern award, the terms of any proposed variation and the submissions and evidence.⁵⁵ Reasonable minds may

⁵³ *March 2018 FDVL decision* [30]–[32].

⁵⁴ *Shop, Distributive and Allied Employees Association v National Retail Association (No. 2)* (2012) 205 FCR 227 [46].

⁵⁵ See generally: *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161.

differ as to whether a proposed variation is necessary (within the meaning of s.138), as opposed to merely desirable.⁵⁶

[107] The ‘modern awards objective’ and the parties’ submissions in respect of the relevant s.134 considerations are dealt with in Chapter 9 of this decision.

[108] While the considerations in ss.134(a)-(h) inform the evaluation of what might constitute a ‘fair and relevant minimum safety net of terms and conditions’, they do not necessarily exhaust the matters which the Commission might consider to be relevant to the determination of a fair and relevant minimum safety net. The range of relevant matters ‘must be determined by implication from the subject matter, scope and purpose of the’ FW Act.⁵⁷

[109] In the *4 Yearly Review of Modern Awards – Penalty Rates*⁵⁸ (*Penalty Rates Decision*) the Full Bench summarised the general propositions applying to the Commission’s task in the 4 Yearly Review, as follows:

- ‘1. The Commission’s task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are ‘necessary to achieve the modern awards objective’ (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission’s consideration is upon the terms of the modern award, as varied.
2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.
3. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. For example, the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made. The particular context in which those decisions were made will also need to be considered.
4. The particular context may be a cogent reason for not following a previous Full Bench decision, for example:
 - the legislative context which pertained at that time may be materially different from the *Fair Work Act 2009* (Cth);
 - the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision; or

⁵⁶ *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001, [136], citing *Shop, Distributive and Allied Employees Association v National Retail Association (No. 2)* (2012) 205 FCR 227 [46].

⁵⁷ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39–40. Also see *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 [48].

⁵⁸ *Penalty Rates Decision* [2017] FWCFB 1001, [269].

- the extent of the previous Full Bench’s consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.’⁵⁹

[110] The Commission’s task was described by the Full Court of the Federal Court as follows:

‘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. ...

... 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.’⁶⁰

[111] In the same decision, the Court also said: ‘... the task was not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation met the objective.’⁶¹

[112] The observations set out above have been made in a number of Commission decisions throughout the 4 Yearly Review and are uncontentious. These observations are also apposite to the FDVL Review and our consideration of the ACTU claim in these proceedings.⁶²

4.2 The ‘scope’ of the proceedings

[113] In its submission of 4 February 2022, Ai Group submits that the current proceedings should be limited to:

‘... the ACTU Claim, the Review (as particularised above) and the material advanced by interested parties in relation to the same. These proceedings are not a general inquiry into the issue of FDV, its impact on employees or the implementation of measures other than FDVL and access to paid personal / carer’s leave. Accordingly, they should not be conducted as such.’⁶³

[114] Background Document 1 sought clarification as to the import of Ai Group’s submission and posed a number of questions to Ai Group.⁶⁴

[115] In response, Ai Group submits that:

⁵⁹ Ibid.

⁶⁰ See *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123 [28]–[29].

⁶¹ Ibid [46].

⁶² The material set out at [62]–[112] above was included in Background Document 1 and no party contested any of these propositions.

⁶³ Ai Group submissions in reply dated 4 February 2022 [14].

⁶⁴ Questions 4–7 Background Document 1.

(a) These proceedings relate to the FDVL Review and the ACTU Claim.

(b) The scope of the FDVL Review has been articulated by the Commission by reference to three questions, all of which relate to the provision of leave.

(c) The ACTU Claim is for paid FDV leave and unpaid FDV leave, in addition to the unpaid FDVL entitlement prescribed by the NES.

(d) The scope of these proceedings should be confined to the above matters. That is, the matters considered and the possible outcomes that may flow from these proceedings should be limited to the potential provision of paid FDVL and further unpaid FDV leave. It should not involve a consideration of whether awards should, in some other way, deal with the issue of FDV.’⁶⁵

[116] Ai Group submits that the answer to Background Document 1 Q4 – ‘Is Ai Group contending that the broad context – including the impact of FDV on employees and on their employment – is *not* relevant in the present proceedings?’ is: ‘[n]o, to the extent that that context is relevant to the matters outlined at paragraph (d) above.’⁶⁶

[117] In relation to Background Document 1 Q5 – ‘Is Ai Group contending that the Full Bench may only have regard to “material advanced by interested parties”?’’, Ai Group contends that the Full Bench may only have regard to ‘material advanced by interested parties’ as well as the material cited on the Commission’s Research Reference List, subject to its submissions in relation to Background Document 1 Q6.⁶⁷

[118] In relation to Background Document 1 Q6– ‘Is it contended that the Full Bench cannot have regard to the reports published as part of the Commission’s research program relating to these proceedings or the material referred to as the Commission’s Research Reference List? ... Further, if that is Ai Group’s submission, what is the legislative/legal basis for the submissions put?’’, Ai Group submits that if the Commission intends to rely on specific parts of the Research Reference List to make findings or draw conclusions that have not been sought by the parties, it should first be afforded an opportunity to be heard in relation to those proposed findings/conclusions; and subject to paragraph (d) above.⁶⁸

[119] In relation to Background Document 1 Q7 – ‘Ai Group’s submissions refer extensively to a range of measures and initiatives taken with respect to FDV by various governments as a reason not to award paid FDV leave ... How does this align with the submission that the proceedings are not ‘a general inquiry into ... the implementation of measures other than FDVL ...?’’, Ai Group refers to the explanation of its submission cited at [49] of Background Document 1 and paragraph (d) above. Paragraph [49] sets out Ai Group’s submission that the scope of the current proceedings is ‘limited’, in particular that it should be limited to:

⁶⁵ Ai Group final submissions dated 28 March 2022 [161].

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

‘... the ACTU Claim, the Review (as particularised above) and the material advanced by interested parties in relation to the same. These proceedings are not a general inquiry into the issue of FDV, its impact on employees or the implementation of measures other than FDVL and access to paid personal / carer’s leave. Accordingly, they should not be conducted as such.’⁶⁹

[120] Ai Group submits that the element of its submission cited in Background Document 1 Q7 should read as follows: a general inquiry into ... the implementation of measures other than FDV leave in modern awards.⁷⁰

[121] We accept that these proceedings relate to the FDVL Review and the ACTU claim. We are, of course, not confined to the terms of the ACTU claim and, subject to according interested parties procedural fairness, we may determine the matter other than in the terms sought by the ACTU (s.599 of the FW Act). We also accept that to the extent we propose to make evidentiary findings that have not been sought by the parties, procedural fairness would require that interested parties be afforded an opportunity to be heard in respect of any such proposed findings.

4.3 The ‘approach’ to the proceedings

[122] ACCI also raises an issue about our approach to the proceedings, submitting that in assessing the ACTU claim, the Full Bench “*will be required to assess the ACTU claim as if it were a review of the current FDV leave framework*”⁷¹ [Emphasis added]:

‘This is so because, even if the Unlimited Unpaid/10 Day Paid Claim is assessed ‘independently’ from the process of the Review, the Unlimited Unpaid/10 Day Paid Claim has been made in a context where an entitlement to 5 days unpaid leave was introduced less than four years ago. As at mid-2018, the Full Bench considered that it was not necessary to fulfil the modern awards objective to introduce paid domestic violence leave at all, let alone 10 days paid leave.

Either considered in the context of a review or considered as a claim remade less than four years after it was declined, in assessing the Unlimited Unpaid/10 Day Paid Claim, the Full Bench must consider whether anything has changed since 2018 that would require a reassessment of its finding in 2018 i.e. that 10 days paid leave was not required to fulfil the modern awards objective.’⁷²

[123] The submission advanced by ACCI appears to suggest that the Commission must be satisfied that there has been a material change in circumstances since the implementation of the *March 2018 FDVL Decision* as a condition precedent to making any decision to grant paid FDV leave.

[124] This issue was canvassed in Background Document 1 where the parties were invited to comment on the following propositions:

‘1. In circumstances where s.156 applies, that section imposes an obligation on the Commission to review *all* modern awards and each modern award must be reviewed in its own right. The

⁶⁹ Ai Group submissions in reply dated 4 February 2022 [14].

⁷⁰ Ai Group final submissions dated 28 March 2022 [161].

⁷¹ ACCI submissions in reply dated 4 February 2022 [6.7]. [Emphasis added]

⁷² ACCI submissions in reply dated 4 February 2022 [6.8]–[6.9].

- 4 Yearly review is conducted on the Commission's own motion and is not dependent upon an application of a specified party. In that sense the 4 Yearly review may be contrasted with other powers and functions conferred on the Commission by the FW Act, which can only be exercised or performed on the application of a specified party (e.g. see the approval and variation of enterprise agreements: ss.186(1) and 211(3); majority support determinations: s.243(1); and equal remuneration orders: s.302(3)).⁷³
2. In conducting the 4 yearly review the Commission is able to exercise its usual procedural powers, contained in Division 3 of Part 5-1 of the FW Act. Importantly, the Commission is not bound by the rules of evidence and procedure (s.591) and may inform itself in relation to any matter before it in such manner as it considers appropriate (s.590(1)).⁷⁴
 3. The Commission is not constrained by the terms of a particular application.⁷⁵ The Commission is not required to make a decision in the terms applied for (s.599) and, in a 4 yearly review, may vary a modern award in whatever terms it considers appropriate, subject to its obligation to accord interested parties procedural fairness and the application of relevant statutory provisions, such as ss.134, 138 and 578.⁷⁶
 4. In the present proceedings the facts and circumstances which have occurred since the implementation of the *March 2018 Decision* are relevant to the FDVL Review and to the Commission's consideration of the ACTU's claim; but they are not determinative.
 5. A decision to vary a modern award may be warranted if it has been established that there has been a material change in circumstances since the issue which is the subject of the variation was last considered by the Commission but the Commission's power to do so is not conditioned on it being satisfied that there has been such a change in circumstances.'

[125] The ACTU did not contest any of the above propositions and submits 'it is erroneous to suggest that the Commission must not vary the terms of an award unless it is satisfied that there has been a material change in circumstances.' In support of this submission the ACTU relies on the Full Bench's reasoning in the *Penalty Rates Decision* as upheld by the Full Federal Court in *SDA v the Australian Industry Group*.⁷⁷

[126] Similarly, Ai Group did not contest any of the propositions set out above.⁷⁸

[127] ACCI subsequently sought to clarify the substance of its earlier submission and submits that it was not the intent of its submission to suggest that the Commission must be satisfied that there has been a 'material change in circumstances' since the implementation of the *March 2018 FDVL Decision* as a condition precedent to making any decision to grant paid FDV leave.⁷⁹

⁷³ [2016] FWCFB 3177 [136].

⁷⁴ [2017] FWCFB 1001 [109].

⁷⁵ *4 Yearly Review of Modern Awards – Annual Leave* [2016] FWCFB 3177 [135]–[140].

⁷⁶ [2017] FWCFB 1001 [110].

⁷⁷ ACTU submissions in response to Background Document 1 dated 28 March 2022 [4].

⁷⁸ Ai Group final submissions dated 28 March 2022 [162].

⁷⁹ ACCI final submissions dated 28 March 2022 [7.7].

[128] ACCI submits that it did not seek to advance a submission that the lack of change in circumstances presents a *jurisdictional* impediment to the granting of the claim.⁸⁰ ACCI submits that in 2016 to 2018, a Full Bench of the Commission considered ‘a very large and comprehensive case’ brought by the ACTU, seeking, in broad terms, the same entitlement that is sought now. It submits that at that time, the Full Bench considered evidence and arguments advanced by the parties and arrived at a decision that the introduction of 10 days’ paid FDV leave was not necessary to satisfy the modern awards objective.⁸¹

[129] ACCI clarified that its submissions that the Full Bench must consider ‘whether anything has changed since 2018’ merely amounts to the proposition that there should be some justification or rationale for a different decision by the Full Bench in 2022 than the one arrived at in 2018.⁸²

[130] ACCI argues that the fact that a proponent of a variation does not need to establish a ‘material change in circumstance’, does not mean it does not have to bring a compelling and persuasive case.⁸³ While ‘reasonable minds may differ’ whether a proposed variation is *necessary* within the meaning of s.138, ACCI submits that this principle would not extend to allowing an arbitrary ‘change of mind’ by the Full Bench, such that 4 years later it arrives at a different answer to the same question posed in 2018 without a coherent basis for doing so.⁸⁴

[131] ACCI submits that something of relevance would need to have changed between 2018 and 2022 in order to justify a different answer in 2022. As to what that change could be, ACCI submits that there are likely to be 3 possibilities:

(i) In circumstances where the relevant ‘circumstances’ have not changed between 2018 and 2022, the Full Bench *could* well determine that it made an incorrect decision in 2018. ACCI submits this is unlikely and notes that although the Commission is not bound by principles of *stare decisis* it has generally followed previous Full Bench decisions.⁸⁵

(ii) In circumstances where the relevant ‘circumstances’ have not changed between 2018 and 2022, the Full Bench could nonetheless determine that the evidence brought in support of the ACTU claim in 2022 justifies a different result to that reached in 2018 i.e. while the evidentiary case of the ACTU was insufficient in 2018, the evidentiary case in 2022 establishes that a different result is justified. For the reasons already advanced in these and other submissions, ACCI thinks that this is also unlikely based on the material filed.⁸⁶

⁸⁰ Ibid [7.4].

⁸¹ Ibid [7.10]–[7.11].

⁸² Ibid [7.14].

⁸³ Ibid [7.15].

⁸⁴ Ibid [7.16].

⁸⁵ Ibid [7.19].

⁸⁶ Ibid [7.20].

(iii) The relevant ‘circumstances’ for assessment could have changed such that a different outcome is warranted in 2022 from that arrived at in 2018.⁸⁷

[132] ACCI contends that in each of the 3 scenarios set out above, the Full Bench would need to justify both the quantum of the entitlement sought and the fundamental shift in the entitlement from an unpaid entitlement to a paid (and unlimited unpaid) one.⁸⁸ This would be in addition to justifying the other distinctive aspects of the entitlement including the change of the definition of ‘family and domestic violence’, the unusual pay rate, ‘upfront’ paid leave accrual method and the fact it would entail the almost unprecedented provision of paid leave to casuals.⁸⁹

[133] ACCI submits that, given the extent of the change proposed, there would need to be a compelling reason to vary an entitlement that was considered sufficient to satisfy the modern awards objective only 4 years ago.⁹⁰ It submits that there is no evidence to so move the Full Bench; noting this is a submission going to how the Full Bench might undertake its reasoning process rather than a jurisdictional question.⁹¹

[134] In reply, the ACTU submits that ACCI’s revised formulation remains problematic ‘because it simply dresses up the material change in circumstances test in different clothing, converting it from a jurisdictional threshold to a merit threshold, whereas ... the Commission’s exercise of its power in this review is not so constrained’.⁹² The ACTU also contends that ACCI’s submission mischaracterises the *March 2018 FDVL Decision*. We return to that point shortly.

[135] The ACTU acknowledges that ‘the events between the implementation of the 2018 Decision and the current date are clearly *relevant* to the FWC’s inquiry but ... the terms on which the Commission may exercise its power to vary a modern award repose solely in the terms of s.157: the variation must be necessary to achieve the modern awards objective.’⁹³ Contrary to ACCI’s submission that the Full Bench ‘*must consider whether anything has changed since 2018*’, the ACTU submits that ‘there is no additional constraint on the exercise of the Commission’s modern award powers to the effect that a moving party must demonstrate there has been a material change in circumstances (or any other expression of that concept) since the 2018 Decision in order to justify the proposed variation’.⁹⁴

[136] This matter was the subject of further debate during the course of closing oral argument which gave rise to some measure of agreement between ACCI and the ACTU.⁹⁵

⁸⁷ Ibid [7.21].

⁸⁸ Ibid [7.22].

⁸⁹ Ibid.

⁹⁰ Ibid [7.23].

⁹¹ Ibid [7.24]–[7.26].

⁹² Transcript, 8 April 2022, PN11.

⁹³ ACTU submissions in reply dated 21 February 2022 [15].

⁹⁴ Ibid.

⁹⁵ See Transcript, 8 April 2022, PN6–PN29.

[137] For our part, we accept the propositions set out earlier, at [124]. In short, our task is to assess the evidence and submissions against the statutory tests, principally whether a modern award provides a fair and relevant safety net of terms and conditions and whether a proposed variation is necessary in order for the award to achieve the modern awards objective.

[138] In its closing oral submission, ACCI advanced what it characterised as a ‘fundamental proposition’, that is:

‘decisions of the Full Bench should generally be followed in the absence of cogent reasons for departing from them ... if the Full Bench is to come to a different decision now, it should provide reasons for doing so’.⁹⁶

[139] The modern awards objective requires that the Commission ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account the s.134 considerations. One of the s.134 considerations is the need to ensure a ‘stable’ modern award system (s.134(1)(g)). This consideration was the subject of some debate in the proceedings which led to the *Preliminary Jurisdictional Issues decision* in which the Full Bench said:

‘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 ... 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.’⁹⁷

[140] In conducting the FDVL Review, the Commission has proceeded on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time that it was made and has had regard to the relevant historical context. The adoption of this *prima facie* position is an element of the general proposition that previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.

[141] Although the Commission is not bound by principles of *stare decisis* it has generally followed previous Full Bench decisions. In another context, 3 members of the High Court observed in *Nguyen v Nguyen*:

‘Where 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 occasions 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 per Aickin J at 620*.’⁹⁸

[142] While the Commission is not a court, the public interest considerations underlying these observations have applied with similar, if not equal, force to appeal proceedings in the

⁹⁶ Transcript, 8 April 2022, PN22–PN23.

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

⁹⁸ *Nguyen v Nguyen* (1990) 169 CLR 245 at p.269; also see *R v Moore; ex parte Australian Telephone and Phonogram Officers’ Association* (1982) 148 CLR 600.

Commission.⁹⁹ As a Full Bench of the Australian Industrial Relations Commission observed in *Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin)*¹⁰⁰:

‘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.’

[143] These policy considerations support the approach the Commission has taken in the FDVL Review; that is, it has taken into account previous decisions relevant to any contested issue. However, the particular context in which those decisions were made may provide a cogent reason for *not* following a previous Full Bench decision. That proposition is apposite in the present proceedings.

[144] We consider that the earlier FDV leave decisions are more nuanced than suggested by ACCI in its submissions, in particular the rejection of the ACTU’s claim for 10 days’ paid FDV leave in the earlier proceedings was somewhat qualified.

[145] While the *July 2017 Majority Decision* concluded that varying modern awards to include the ACTU’s clause was not necessary to ensure that awards achieved the modern awards objective, it went on to say:¹⁰¹

‘This is not to say we reject the ACTU’s submissions and the evidence called to support those submissions that family and domestic violence is a workplace issue which requires a workplace response ...

We accept the evidence that the provision of paid leave would assist employees who experience family and domestic violence. It would obviously reduce the financial impact of the consequences of the violence. We accept the evidence that employees who experience family and domestic violence face financial difficulties as a result of the family and domestic violence such as relocation costs or becoming a sole parent. Having to lose pay at the same time because of the need to attend to the consequences of family and domestic violence would add to the financial burden faced by these employees. We therefore, would have no difficulty in concluding that the provision of paid leave would be a desirable outcome.’ [Emphasis added]

[146] Further, as is apparent from the conclusion to the *March 2018 FDVL Decision* (see [8] above), it is patently clear that in introducing 5 days’ *unpaid* FDV leave the Full Bench was taking ‘a cautious regulatory response’ to the issue of FDV and it proposed to revisit this issue in June 2021 including ‘the question of whether provision should be made for *paid* family and domestic violence leave’. In short, the *ratio* of the *March 2018 FDVL Decision* did not involve any rejection of the merits of paid FDV leave.

[147] The *March 2018 FDVL Decision* therefore does not provide a datum point for our consideration in these proceedings and nor does it provide some sort of merits hurdle.

⁹⁹ *Re Furnishing Industry Association of Australia (Queensland) Limited Union of Employers*, Print Q9115, 27 November 1998 per Giudice J, Watson SDP, Hall DP, Bacon C and Edwards C.

¹⁰⁰ (2003) 127 IR 205 [48].

¹⁰¹ [2017] FWCFB 3494 [48], [60].

[148] As we have already stated, we accept that variations to modern awards must be justified on their merits. The introduction of a paid FDV leave entitlement into modern awards would be a significant change and we accept that if we were to arrive at such a decision, we would clearly state our reasons for doing so. Those reasons would include a consideration of the *March 2018 FDVL Decision* and the facts and circumstances which have occurred since the implementation of that decision.

4.4 An award-by-award approach?

[149] The ACTU contends that there is nothing in the terms of s.157 of the FW Act, or in the Commission's modern award powers which apply to the conduct of the FDVL Review, that would preclude the Commission from taking an incremental approach to considering an application to vary all modern awards: first at a 'global' level, and later, any necessary award-by-award analysis.¹⁰²

[150] ACCI and the Ai Group submit that s.138 of the FW Act requires that each modern award be analysed separately to ascertain that it meets the statutory requirements.¹⁰³

[151] As noted above, the FDVL Review is continuing under the terms of repealed s.156 pursuant to the transitional arrangements in the 4 Yearly Review Amending Act, as well as pursuant to s.157 of the FW Act. Both ss.156 and 157 involve the performance or exercise of the Commission's 'modern award powers' (see s.134(2)(a)) and the 'modern awards objective' in ss.134 and 138 applies to the provisions.

[152] Section 156 imposed an obligation on the Commission to review *all* modern awards and s.156(5) required each modern award to be reviewed in its own right. This was intended to ensure that the 4 Yearly Review was conducted 'by reference to the particular terms and the particular operation of each particular award rather than by a global assessment based upon generally applicable considerations'.¹⁰⁴

[153] However, s.156(5) did not prevent the Commission from reviewing 2 or more modern awards at the same time, nor did it confine the review of a modern award to a *single* holistic assessment of all of its terms.¹⁰⁵

[154] Consistent with the approach taken by the Commission in various 'common issue' proceedings during the course of the 4 Yearly Review, Background Document 1 raised the following option regarding the process to be followed in these proceedings:

1. The Full Bench will consider the substantive merits of the ACTU's Claim and whether modern awards should make any further provision for FDV leave. If the merits weigh in favour of the ACTU's Claim, in whole or part, then the Full Bench will express a

¹⁰² ACTU submissions in reply dated 21 February 2022, [24] citing *March 2018 FDVL Decision* [40]–[41].

¹⁰³ ACCI submissions in reply dated 4 February 2022 [7.4]; Ai Group submissions in reply dated 4 February 2022 [438].

¹⁰⁴ [2018] FWCFB 1692 [47], citing *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 [85] and noting that 'Although the Court's observations were directed at the expression 'in its own right' in Item 6(2A) of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) they are apposite to s.156(5)'.

¹⁰⁵ [2018] FWCFB 1692 [47]–[48].

provisional view as to the terms of any entitlement to *paid* FDV leave/additional *unpaid* FDV leave. The Full Bench will also express a *provisional* view about whether it is appropriate to include such a provision in modern awards, on the basis that it is necessary to achieve the modern awards objective. If the Claim fails on the merits and the Full Bench decides that no variation to modern awards is necessary, that will be the end of the proceeding.

2. If a *provisional* view is expressed in accordance with step 1 above then the Full Bench will formulate a draft model term. Interested parties will have an opportunity to comment on the draft model term.
3. The content of any model term will then be finalised.
4. After the content of any model term has been finalised parties will be given an opportunity to make submissions on the *provisional* view that a variation to modern awards to insert the model term is necessary to achieve the modern awards objective in the context of each particular award.
5. Parties will have the opportunity to make submissions on any draft variation determinations before they are finalised in respect of relevant awards.’

[155] The ACTU submits that the approach set out above is appropriate and that ‘it is consistent with the statutory framework, is efficient, and affords procedural fairness to interested parties.’¹⁰⁶

[156] Ai Group’s primary position is that the material before the Commission does not establish that the introduction of paid FDV leave and/or the ACTU claim is necessary to achieve the modern awards objective, that the Commission should find as such and the proceedings brought to an end on that basis. However, Ai Group does not otherwise oppose the process set out above.¹⁰⁷

[157] ACCI opposes a process whereby the Commission determines that a particular model term should be inserted into all modern awards and then seeks submissions from parties to ‘rebut’ that *provisional* view in individual awards, in the absence of which the model term would be inserted.¹⁰⁸ ACCI submits that to undertake such an approach may fail to properly assess whether a variation is necessary within the meaning of s.157 in respect of each individual award.¹⁰⁹ ACCI submits that s.157 requires the Commission to make an assessment at an award-specific level¹¹⁰ and that while the Commission could determine the framework for a model clause prior to making an assessment as to whether the insertion of that model term was necessary in any particular award, the ‘assessment of necessity’ within the meaning of s.138 needs to be undertaken on an award-by-award basis, having regard to the characteristics of the particular award and the employers and employees that it covers.¹¹¹

¹⁰⁶ ACTU submissions in response to Background Document 1 dated 28 March 2022 [5].

¹⁰⁷ Ai Group final submissions dated 28 March 2022 [164].

¹⁰⁸ ACCI final submissions dated 28 March 2022 at [7.32].

¹⁰⁹ ACCI final submissions dated 28 March 2022 [7.33].

¹¹⁰ *Ibid* [7.31].

¹¹¹ *Ibid*.

[158] ACCI contends that the Commission should be ‘extremely cautious’ not to adopt an approach whereby it forms a *provisional* view that a particular determination should be adopted into all modern awards, *prior* to being satisfied that making the determination is necessary to achieve the modern awards objective in relation to each particular modern award.¹¹² It contends that the expression of such a ‘provisional’ view would create a reverse onus in relation to the assessment as to whether the determination was necessary in a particular modern award to satisfy the modern awards objective.¹¹³

[159] ACCI further submits that the Full Bench should *not* undertake a process whereby it determines that a particular model term should be inserted into all modern awards and then seeks submissions from parties to rebut that *provisional* view in individual awards, in the absence of which, the model term would be inserted.¹¹⁴

[160] The ACTU addressed this issue further at the hearing on 8 April 2022, making 3 points:

- There is nothing in s.157 that requires the Full Bench to make an assessment at an award-specific level, but, in any event, that is precisely what the Commission is proposing to do with its approach.
- Given the FDVL Review is continuing under s.156, s.156(5) applies which provides that the requirement to review each modern award in its own right does not prevent the Commission from reviewing 2 or more awards at the same time.
- Referring to its February 2022 submissions at [23]-[24], the ACTU’s position is that the process proposed by the Commission does not contravene s.156 or s.157.¹¹⁵

[161] Consistent with the Commission’s approach throughout the 4 Yearly Review, we do not consider that the Commission is constrained from dealing with multiple awards together, in dealing with the FDVL Review and the ACTU claim. The Commission’s usual procedural powers apply to the exercise of powers under s.157 of the FW Act. The Commission has broad powers as to the manner in which it may inform itself in relation to any matter before it.

[162] As was noted in the Revised Explanatory Memorandum to the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017* in relation to the repeal of s.156 of the FW Act:

‘After the repeal of the requirement to conduct 4 yearly reviews, the framework that remains for making, varying and revoking modern awards under Division 5 of Part 2-3 of the Act will continue to require that the FWC is satisfied that making a determination is necessary to achieve the modern awards objective. This allows the FWC to make a determination where emerging social and economic matters demonstrate that change is necessary. For example, in exercising its functions under Part 2-3, the FWC is required to take into account a range of criteria, such as the need to promote social inclusion through increased workforce participation. This requires the FWC to consider the changing labour market and the manner in which work is evolving. It

¹¹² ACCI final submissions dated 28 March 2022 [7.29].

¹¹³ Ibid [7.30].

¹¹⁴ Ibid [7.32].

¹¹⁵ Transcript, 8 April 2022, PN7–8.

must also promote flexible modern work practices and the efficient and productive performance of work, which again requires the FWC to look beyond the way work has been performed historically and to make sure the safety net of terms and conditions continues to meet community expectations.¹¹⁶ [Emphasis added]

[163] As we have mentioned, s.156(5) required each modern award to be reviewed in the 4 Yearly Review in its own right; but s.156(5) did not prevent the Commission from reviewing 2 or more modern awards at the same time, nor did it confine the review of a modern award to a *single* holistic assessment.

[164] We reject ACCI’s submission that the proposed approach may fail to properly assess whether a variation of a modern award is necessary within the meaning of s.157. The process we have outlined clearly provides interested parties with an opportunity to make submissions in respect of our *provisional view* ‘in the context of each particular award’.

[165] In the Full Federal Court decision of *Association for Employees with a Disability v Commonwealth of Australia*,¹¹⁷ the Court dismissed the judicial review application on the grounds that it was premature—the applicant sought to challenge the Commission’s provisional views in relation to the variation of an award, which were expressed as part of an iterative and ongoing process that has not yet reached its conclusion.¹¹⁸ In their joint judgment, Mortimer and Abraham JJ observed:

‘In the present case, the applicant asks the Court to deal with circumstances that have not occurred (the making of a determination under s 156(2) in the terms of Attachment A to the December decision), and which on the evidence before the Court, might never happen. That is because the Commission has, first, indicated its views are provisional, second, proposes to conduct a trial to see how its “preferred approach” works in practice before reaching any concluded views and third, has demonstrated a capacity to be persuaded and change its mind.’¹¹⁹

[166] The Commission’s process here involves, as a first step, a consideration of the substantive merits of the ACTU claim and whether modern awards should make further provision for FDV leave. We will then express a *provisional view* as to the terms of any such entitlement and whether it is necessary to vary modern awards to include such a term. These are steps in an ‘iterative, consultative, and reflective’¹²⁰ process, outlined at [154], in which interested parties will be further consulted and have the opportunity to make submissions prior to any exercise of power pursuant to s.156 and/or s.157 of the FW Act. In that process will not reach any concluded views in respect of whether the variation of particular modern awards is necessary to ensure that those awards achieve the modern awards objective. A modern award will only be varied if we are so satisfied.

¹¹⁶ *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017 Revised Explanatory Memorandum*, Statement of Compatibility with Human Rights at pp.vii-viii.

¹¹⁷ *Association for Employees with a Disability v Commonwealth of Australia* [2021] FCAFC 36, 283 FCR 561; 305 IR 203.

¹¹⁸ *Ibid* [87].

¹¹⁹ *Ibid* [140].

¹²⁰ See *Ibid* [117].

[167] In the *Penalty Rates Decision*,¹²¹ the Full Bench expressed some *provisional* views¹²² as to the form of the transitional arrangements in respect of the Sunday penalty rate reductions that had been determined. The Full Bench sought submissions in respect of those *provisional* views and ACCI advanced the following submission:

‘The burden of proof ... should lie with any party wishing to depart from the Commission’s provisional views ... Unions and those supporting them must bear the burden of convincing the Commission that it should depart from its provisional views on implementation.’¹²³

[168] The *Penalty Rates – Transitional Arrangements decision*¹²⁴ rejected ACCI’s submissions characterising the proposition advanced as ‘misconceived’, for 2 reasons:

1. The *provisional* views were provided to assist those parties who wished to make submissions as to the form of the transitional arrangements; they ‘were not provided with the intention of creating an additional hurdle for those who wished to express a contrary view’.¹²⁵
2. It is doubtful whether the common law concept of onus of proof is relevant in Commission proceedings, particularly 4 yearly review proceedings. Ultimately, the Commission must be satisfied that a modern award is not achieving the modern awards objective and requires variation.

[169] For the same reasons we reject ACCI’s contention in the present proceedings that the expression of a *provisional* view that a FDV leave term be inserted into modern awards may not satisfy s.157 of the FW Act and would ‘in effect create a ‘reverse-onus’ in relation to the assessment as to whether the determination was necessary in a particular modern award to satisfy the modern awards objective.’¹²⁶

[170] We propose to adopt the process outlined in Background Paper 1 and set out at [154].

4.5 The NES Point

[171] In Chapter 7.2 of its submission of 4 February 2022, Ai Group contends that the ACTU claim is not permitted by s.55 of the FW Act and hence, if granted, would be of no effect (s.136(1)(c)).

[172] Any variation of a modern award must comply with the requirements of the FW Act relating to the content of modern awards. Division 3 of Part 2-3 deals with the terms of modern awards, in particular terms that may or must be included in modern awards, and terms that must not be included in modern awards. This Division also prohibits award terms that contravene s.55 (which deals with the interaction between the NES and modern awards).

¹²¹ [2017] FWCFB 1001.

¹²² Ibid [2021].

¹²³ ACCI submissions dated 21 April 2017 [6]–[7].

¹²⁴ [2017] FWCFB 3001 [46]–[53].

¹²⁵ Ibid [48].

¹²⁶ ACCI final submissions dated 28 March 2022 [7.30].

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

‘136 What can be included in modern awards

Terms that may or must be included

(1) A modern award must only include terms that are permitted or required by:

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

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

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

Terms that must not be included

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

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

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

[174] Section 136(1) provides that a modern award must only include terms that are permitted or required under ss.136(1)(a)-(d). In relation to s.136(1)(a), s.139(1)(h) in Subdivision B of Division 3 of Part 2-3 of the FW Act permits a modern award to include terms about ‘leave, leave loadings and arrangements for taking leave’. This satisfies s.136(1) of the FW Act.

[175] Section 136(2) prohibits award terms that are proscribed by Subdivision D of Division 3 of Part 2-3 of the FW Act or that contravene s.55. Subdivision D does not include any relevant proscription. Consequently, a term providing for paid FDV leave could be included in a modern award if and only if the term would not contravene s.55.

[176] Section 55 of the FW Act provides:

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

National Employment Standards must not be excluded

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

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

(2) A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:

(a) by a provision of Part 2-2 (which deals with the National Employment Standards);
or

(b) by regulations made for the purposes of section 127.

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

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

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

Ancillary and supplementary terms may be included

(4) A modern award or enterprise agreement may also include the following kinds of terms:

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

(b) terms that supplement the National Employment Standards;

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

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

(a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or

(b) that specify when payment under section 90 for paid annual leave must be made.

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

(a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or

(b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

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

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

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

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

(6) To avoid doubt, if a modern award includes terms permitted by subsection (4), or an enterprise agreement includes terms permitted by subsection (4) or (5), then, to the extent that the terms give an employee an entitlement (the *award or agreement entitlement*) that is the same as an entitlement (the *NES entitlement*) of the employee under the National Employment Standards:

(a) those terms operate in parallel with the employee's NES entitlement, but not so as to give the employee a double benefit; and

(b) the provisions of the National Employment Standards relating to the NES entitlement apply, as a minimum standard, to the award or agreement entitlement.

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

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

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

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

[177] Section 55(1) provides that a modern award must not 'exclude' the NES 'or any provision of' the NES.

[178] Sections 55(2)-55(4) set out terms that may be included in modern awards. An award term providing for paid FDV leave would not be a term permitted by s.55(2) and hence s.55(3) is not relevant. Section 55(4) permits an award to include certain 'ancillary or incidental' terms and terms that 'supplement' the NES. Such terms do not contravene s.55(1) (s.55(7)). It follows

that an award term providing for paid FDV leave will contravene s.55 if it excludes the NES or any provision of the NES within the meaning of s.55(1), and it is not a term permitted by s.55(4).

[179] In the *Family Friendly Work Arrangements Case*,¹²⁷ the Full Bench describes the statutory context to s.55 as follows:

‘The EM [Explanatory Memorandum] states the purpose of s.55:

‘206. Clause 55 sets out the relationship between the NES on the one hand and modern awards and enterprise agreements on the other.’

The nature of the NES is central to the context in which s.55 is to be read. Section 61 introduces the NES. Subsection 61(1) provides:

‘61 The National Employment Standards are minimum standards applying to employment of employees

(1) This Part sets minimum standards that apply to the employment of employees which cannot be displaced, even if an enterprise agreement includes terms of the kind referred to in subsection 55(5).

Note: Subsection 55(5) allows enterprise agreements to include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards.’

Importantly, the ‘minimum standards’ in the NES comprise minimum employment entitlements *of employees*. Any obligations of an employee or ‘rights’ of an employer under the terms of the NES constitute qualifications to the employee receiving a benefit, not substantive employer benefits or rights. Accordingly, the NES only binds employers:

‘44 Contravening the National Employment Standards

(1) An employer must not contravene a provision of the National Employment Standards.

Note: This subsection is a civil remedy provision (see Part 4-1).’

In contrast, modern awards and enterprise agreements bind employers, employees and other persons to whom they apply (ss.45 and 50) ...

Section 55(1) provides:

‘National Employment Standards must not be excluded

(1) A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.’
[Emphasis added]

The EM states in relation to s.55(1):

¹²⁷ (2018) 276 IR 249; [2018] FWCFB 1692.

‘208. The intent of the NES is that it provides enforceable minimum entitlements for all eligible employees. This is reflected in subclause 55(1), which provides that a modern award or enterprise agreement may not exclude the NES, or any part of it.

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

[Emphasis added]

The term ‘exclude’ is used elsewhere in the Act in specifying how the Act, and modern awards and enterprise agreements, interact with State and Territory laws (see ss.26-28).

Section 56 provides for severance:

‘56 Terms of a modern award or enterprise agreement contravening section 55 have no effect

A term of a modern award or enterprise agreement has no effect to the extent that it contravenes section 55.’

It follows that if an award or agreement term can operate so as to exclude the NES or a provision of the NES, this must be permitted by other provisions of s.55 or of the Act more broadly.’¹²⁸

[180] In *Application by Canavan Building Pty Ltd*¹²⁹ (*Canavan*), the Full Bench of the Commission stated:

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

“209. This prohibition extends both to statements that purport to exclude the operation of the NES or a part of it, and to provisions that purport to provide lesser entitlements than those provided by the NES. For example, a clause in an enterprise agreement that purported to provide three weeks’ annual leave would be contrary to subclause 55(1). Such a clause would be inoperative (clause 56).”¹³⁰

[Emphasis added and endnote omitted]

¹²⁸ Ibid [136]–[139] and [146]–[150].

¹²⁹ [2014] FWCFB 3202.

¹³⁰ Ibid [36].

[181] Ai Group submits that the ACTU claim is not consistent with and excludes the NES.¹³¹ Ai Group does ‘not contend that the Commission lacks power to provide employees with new entitlements in respect of leave for purposes related to FDV or to implement in awards terms that might be properly supplementary to NES provisions relating to unpaid FDV leave; save that any such award term would need to conform with s.55 and any other legislative restrictions on the content of award terms.’¹³² However, Ai Group submits that ‘the specific proposal advanced by the ACTU ... would not however be permissible.’¹³³ The issues raised by Ai Group concerning the proposed paid FDV leave entitlement in the ACTU claim (as reflected in the Further Amended Claim) are considered further below.

[182] In brief, Ai Group submits as follows:

- The ACTU proposal would contravene s.55(1) because it would exclude the provisions of the NES dealing with unpaid FDV leave as it would mean, in practice, that award-covered employees would not access unpaid leave under the NES because they would access the alternate and substantively different scheme of paid or unpaid leave under the applicable award. This would mean that employees do not receive a benefit under the NES and it would also negate the effect of the NES provisions that provide for a scheme of unpaid FDV leave in specific circumstances.¹³⁴
- Section 55 carefully and comprehensively regulates when award terms may exclude the NES and there is no provision in s.55 that generally permits award terms to exclude the NES, provided they are not detrimental to an employee or if they deliver an entitlement that might be considered more beneficial to an employee. Parties are not able to simply displace or exclude the NES or provisions of the NES in favour of alternate schemes or entitlements that might be considered more beneficial or favourable (on whatever basis that might be assessed).¹³⁵
- The ACTU has proposed an independent, ‘standalone’ award-derived entitlement to paid and unpaid FDV leave that is separate and distinct to the NES entitlement. Although dealing with a similar subject matter to relevant aspects of the NES, it does not operate as an adjunct to the NES or extend an entitlement under the NES, but effectively delivers a different leave scheme to the NES entitlement.¹³⁶

¹³¹ See, for example, Ai Group submissions in reply dated 4 February 2022 [35]–[71], Ai Group final submissions dated 28 March 2022 [54]–[91] and Transcript, 8 April 2022, at PN328–PN346.

¹³² Ai Group final submissions dated 28 March 2022 [90]. Ai Group’s submission was in response to the ACTU’s submissions in reply dated 21 February 2022 [32] that ‘[t]he opposing parties contend that paid FDV leave is a matter for Parliament, and that government should have primary carriage of responding to FDV more generally. These submissions ignore that the Commission is empowered to vary modern awards to provide for paid FDV leave, and that in a recent inquiry, Parliament expressly deferred consideration of paid FDV leave to this Review.’ See also Transcript, 8 April 2022, PN345.

¹³³ Ibid.

¹³⁴ Ai Group final submissions dated 28 March 2022 [67]–[67], citing *Canavan and 4 Yearly Review – Alleged NES Inconsistencies* [2015] FWCFB 3023, (2015) 249 IR 358 [37]. See also Ai Group submissions in reply dated 4 February 2022 [68] and Transcript, 8 April 2022, PN331, PN337 and PN341–PN342.

¹³⁵ Ai Group final submissions dated 28 March 2022, [69] and [71]. See also Transcript, 8 April 2022, PN329.

¹³⁶ Ai Group final submissions dated 28 March 2022 [55]. See also Ai Group reply submissions in reply dated 4 February 2022 [70] and Transcript, 8 April 2022, PN332.

- The proposed clause would not be a term permitted by s.55(4)(b) as it does not supplement the NES. Ai Group concurs with the Full Bench's view in the *Family Friendly Work Arrangements Case* that a supplementary term would be a term that supplements or adds to the substantive provision. The broad interpretation of the word 'supplement' urged by the ACTU should not be adopted. Ai Group opposes the ACTU's apparent contention that the proposed term is a supplementary term to the NES on the basis that 'both terms concern taking leave for the purposes of dealing with FDV'. That is not sufficient to bring it within the scope of s.55(4); there needs to be a connection between the term and the substantive legislative provision (here, ss.106A–106B). A supplementary term would not encompass terms that deliver a separate benefit to the NES (even if they relate to similar subject matter). This view is consistent with the nature of the examples of supplementary terms contained within Note 2 of s.55(4) which extend or increase the entitlement delivered by the NES. The proposed clause is not analogous to these examples.¹³⁷

[183] For reasons which will become apparent, we have not found it necessary to deal with those aspects of Ai Group's s.55 submissions which deal with the *unpaid* FDV leave element of the ACTU claim.

[184] For its part, ACCI does not contest that the Commission 'assuming satisfaction of the relevant jurisdictional thresholds (i.e. ss.134, 138 etc) could grant a claim modifying a NES entitlement in a modern award, by way of relevant example, by converting an unpaid NES leave entitlement to a paid form of leave'.¹³⁸ Further, ACCI does not suggest that the entitlements under the ACTU claim (if granted) are inconsistent in any relevant technical sense with the NES (by way of example, with respect to s.55 of the FW Act).¹³⁹

[185] The ACTU opposes Ai Group's submissions and contends that its proposed variation is permitted by s.139(1)(h) of the FW Act and does not exclude the NES entitlement. If necessary, the ACTU also relies on s.55(4) on the grounds that the term, including an entitlement to paid FDV leave, is supplementary to the NES entitlement.¹⁴⁰

[186] It is not contested that the Commission has clear statutory power to include terms in modern awards about leave, leave loadings and arrangements for taking leave (s.139(1)(h)). Accordingly, the inclusion of an entitlement to paid FDV leave in modern awards is permitted by s.139(1)(h), which is contained in Subdivision B of Division 3 of Part 2-3 of the FW Act.

[187] Further, it is not necessary for an award term to operate in conjunction with or as an adjunct to a NES entitlement in order for it to be a permitted term.¹⁴¹ Section 136 relevantly provides that 'a modern award must only include terms that are permitted or required' by Subdivision B of Division 3 of Part 2-3 of the FW Act and must not include terms that contravene s.55 of the FW Act (ss.136(1)(a) and 136(2)(b)). Any such term is a permitted term.

¹³⁷ Ai Group final submissions dated 28 March 2022 [73]–[77].

¹³⁸ ACCI submissions in reply dated 4 February 2022 [7.3].

¹³⁹ ACCI submissions in response to Background Document 2 dated 7 April 2022 [9]–[10] (in response to question 11).

¹⁴⁰ See, for example, ACTU submissions in reply dated 21 February 2022 [16]–[22] and Transcript, 8 April 2022, PN30–PN53.

¹⁴¹ ACTU submissions in reply dated 21 February 2022 [21].

[188] The issue to be determined is whether the inclusion of an entitlement to paid FDV leave in modern awards would ‘exclude’ the NES for the purposes of s.55(1) and therefore not be a permitted term pursuant to s.136(2)(b) of the FW Act.

[189] In order to determine whether a proposed award term would contravene the NES or s.55(1) of the FW Act, the nature of the benefits under the proposed award term must be identified and compared to the NES entitlement.

[190] The ‘minimum standards’ in the NES comprise minimum employment entitlements of *employees*. The EM to the *Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018* (FDVL Bill) includes in its outline of the FDVL Bill:

‘The inclusion of unpaid family and domestic leave in the NES would provide invaluable support to employees who are experiencing family and domestic violence.

...

The provision of this leave in the NES would recognise that employees experiencing family and domestic violence may need to undertake activities during working hours to deal with the impact of family and domestic violence, and would allow them time to do so as a minimum workplace entitlement ...’¹⁴²

[191] The FDVL Bill’s Statement of Compatibility also explains:

‘The object of the *Fair Work Act 2009* (the Act) is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians. The National Employment Standards (NES) in the Act further this object by providing a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions for employees covered by the Act.

This Bill would amend the Act to introduce an entitlement to five days of unpaid family and domestic violence leave into the NES. The new entitlement is consistent with the entitlement in the Model Clause developed by the Fair Work Commission (the Commission), as part of the 4 Yearly Review of Modern Awards (4 Yearly Review) ...

...

The amendments in the Bill would assist employees affected by family and domestic violence to remain in continuous employment, which in turn would provide financial security, independence, social networks and increased self-esteem.’¹⁴³

...

‘The introduction of the new entitlement in the Bill promotes the right to just and favourable working conditions. An employee may be able to access existing leave entitlements in the Act

¹⁴² Explanatory Memorandum to the *Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018*, Outline pp.iii-iv.

¹⁴³ Explanatory Memorandum to the *Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018*, Statement of Compatibility with Human Rights, Overview of the Bill p.vi.

in some circumstances where they are experiencing family and domestic violence (e.g. personal/carer's leave in certain situations). However, there are a number of purposes for which an employee would not be able to access existing leave entitlements in the Act, for example, where an employee needs to urgently find accommodation for themselves or attend an appointment with a lawyer. The new entitlement would grant employees in the national system a guaranteed minimum entitlement enabling them to take time off work where they might not otherwise have any leave available.¹⁴⁴

[192] Ai Group submits that the practical effect of the ACTU claim is that it would exclude or negate the NES entitlement – a scheme for unpaid leave – because award-covered employees would elect to utilise the paid leave entitlement in favour of the unpaid NES entitlement.¹⁴⁵

[193] Contrary to Ai Group's submission, it does not follow that an NES provision is excluded simply because a more favourable term is included in a modern award and as a consequence, employees are more likely to use the award term than the relevant provision of the NES. As the Full Bench observed in the *Family Friendly Work Arrangements Case*:

'It has been suggested that a modern award or enterprise agreement term might be considered to 'practically exclude' a provision of the NES, if it would result in employees utilising the award or agreement term rather than the provision of the NES. We note that any entitlement under an award or agreement that is more beneficial to employees than a minimum standard under the NES is likely to have that result. Examples would include where a term provides a higher rate of pay for periods of annual leave or personal/carer's leave than the base rate provided for under the NES, and where a term provides for additional paid personal/carer's leave which may be taken instead of unpaid carer's leave provided for under the NES.'¹⁴⁶ [Emphasis added]

[194] The central question is whether the provisions of an award term would in their operation impact an employee's capacity to receive (in full or at all) a benefit provided for by the NES. Even if it is assumed, as contended by Ai Group, that employees will not receive a benefit under the NES – an entitlement to unpaid FDV leave – because they have chosen to access a more beneficial award entitlement to paid FDV leave, that outcome is based on the personal preference of the individual employees. It is not a limitation on the operation of the NES entitlement itself.

[195] In sum, the grant of paid FDV leave in an award does not of itself exclude *the capacity* of employees to access the statutory entitlement to unpaid FDV leave and cannot properly be characterised as depriving employees of receiving, in full, the NES benefit because they have elected to access the enhanced benefit. Accordingly, it cannot be said to exclude the employees' entitlement to unpaid FDV leave under the NES.

[196] Ai Group also submits that the ACTU claim is not supplementary to the operation of the NES entitlement in Subdivision CA of Division 7 of Part 2-2 of the FW Act, but instead 'would operate as an entirely separate and distinct scheme, that does not appear to have any touch point

¹⁴⁴ Explanatory Memorandum to the *Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018*, Statement of Compatibility with Human Rights, Human rights implications, p.vii.

¹⁴⁵ Ai Group submissions in reply dated 4 February 2022 [45b] and [68], and Transcript, 8 April 2022, PN331.

¹⁴⁶ *Family Friendly Work Arrangements Case* [155].

or source of commonality with the unpaid leave entitlement contained in the NES'.¹⁴⁷ In closing oral argument, Ai Group further submits that the ACTU has:

'... proposed a separate award scheme which is something entirely different to the NES. It operates differently. It deals with broadly similar subject matter, but it is different. It's a different regime and it doesn't interconnect in any way. It doesn't extend the NES entitlement in some way that might be considered supplementary, drawing analogies to the examples of the supplementary terms. It just operates separately and on its own.'¹⁴⁸

[197] However, Ai Group also made clear that it was 'not saying that you couldn't reframe an entitlement to paid leave, if they're calling for it of course, in a manner that more squarely supplemented the NES. And we accept in that context ... that the Awards do permit the Commission to regulate the matters related to leave - matters about leave'.¹⁴⁹

[198] In view of our conclusion above that the grant of the ACTU's claim would not 'exclude' the unpaid FDV leave provisions of the NES and thus would not contravene s 55(1), it is unnecessary for us to separately decide whether an entitlement to paid FDV leave in modern awards could also be characterised as supplementing the NES provisions. This is because, as s.136(1) makes clear, s.55(4) does not operate as a limitation on the scope of the matters prescribed by s.139(1) which may be the subject of modern award terms but is rather an additional source of power. Because, on any view, the ACTU's claim would be encompassed by the subject matters of 'leave' in s.139(1)(h), it does not matter whether the claim would supplement the NES or not. However, in deference to the parties' submissions, we will express a view on the issue.

[199] Section 55(4)(b) permits a modern award or agreement to include terms that supplement the NES, but 'only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to' the NES. Section 55(7) provides that to the extent that a term of a modern award is permitted by s.55(4), the term does not contravene s.55(1).¹⁵⁰

[200] On its ordinary meaning, a supplementary term is one that provides a supplement or something additional to the substantive provision¹⁵¹ – here the entitlement to unpaid FDV leave in Division CA of Division 7 of Part 2-2 of the FW Act.

[201] We do not consider that including an entitlement to paid FDV leave in modern awards could be said to be replacing the NES FDV leave standard 'with something else entirely' – it is not of a fundamentally different character and does not provide for something outside the contemplation of the FW Act. It simply provides for a different form of leave entitlement to that contained in the NES, that is directed to the same objectives.

[202] The NES entitlement is directed to providing 'invaluable support to employees who are experiencing family and domestic violence', 'allow[ing] them time to ... [undertake activities

¹⁴⁷ Ai Group submissions in reply dated 4 February 2022 [70].

¹⁴⁸ Transcript, 8 April 2022, PN332.

¹⁴⁹ Transcript, 8 April 2022, PN345.

¹⁵⁰ The ACTU has not contended that the ACTU claim can be characterised as ancillary or incidental to the operation of the NES FDV entitlement for the purposes of s.55(4)(a). We agree with this position.

¹⁵¹ *Family Friendly Work Arrangements Case* [156].

during working hours to deal with the impact of family and domestic violence] as a minimum workplace entitlement ...’ An award entitlement to paid FDV leave sits conformably with the matters to which the NES entitlement is directed and ‘would assist employees affected by family and domestic violence to remain in continuous employment, which in turn would provide financial security, independence, social networks and increased self-esteem’.¹⁵²

[203] In our view, the inclusion of a paid FDV leave entitlement in modern awards (or enterprise agreements) would ‘supplement’ or ‘add to’ the substantive NES provision. Indeed, a number of existing enterprise agreements approved by the Commission provide an entitlement to paid FDV leave for employees covered by the agreement.

[204] In the circumstances, we are satisfied that an entitlement to paid FDV leave in modern awards could be said to supplement the NES entitlement and would not be detrimental to an employee in any respect.

¹⁵² See Explanatory Memorandum to the *Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018*, pp.iii-iv and vi.

5. The Submissions

5.1 General

[205] The ACTU filed:

- [Submission and proposed variation](#) on 30 July 2021
- [Supplementary submission](#) dated 22 December 2021
- [Submissions in reply](#) dated 21 February 2022
- An [amended proposed variation](#) dated 22 February 2022
- A [response to Background Document 1](#) dated 28 March 2022
- [Final submissions](#) dated 28 March 2022 including the Further Amended Claim [Final submissions on the evidence](#) dated 28 March 2022, and
- A submission in [response to Background Document 2](#) dated 7 April 2022.

[206] [JobWatch](#) made a submission in support of the ACTU claim and the following parties made submissions which broadly support an entitlement to paid FDV leave but do not specifically support the ACTU claim:

- [BOQ](#)
- [McAuley Community Services for Women](#)
- [Victorian Government](#), and
- [WA Government](#)

[207] Correspondence was also received from the [Queensland Government](#) setting out a position generally supportive of an entitlement to paid FDV leave.

[208] Various [Local Government Associations](#) filed a joint submission in relation to the *Local Government Industry Award 2020* submitting that that Award should be varied to provide 5 days' paid FDV leave to full-time and part-time employees. The Associations also supported the ACTU's proposed variation to the Note in s.106B(1) of the FW Act (see Note 1 to cl.B(1) of the Further Amended Claim) and the ACTU's proposed expansion of the definition of 'family and domestic violence' (see cl.B(2) of the Further Amended Claim); but opposed the other aspects of the ACTU claim. The Local Government Associations' submission also records the results of a short survey administered by the WA Local Government Association.¹⁵³

¹⁵³ Local Government Associations submissions in reply dated 23 February 2022 [6]–[8].

[209] The following parties made submissions opposing the ACTU claim:

- ACCI – [submissions in reply](#) dated 4 February 2022; [final submissions](#) dated 28 March 2022 and [submissions in response to Background Document 2](#) dated 7 April 2022
- Ai Group – [submissions in reply](#) dated 4 February 2022; [final submissions](#) dated 28 March 2022 and [submissions in response to Background Document 2](#) dated 7 April 2022, and
- MGA [submissions in reply](#) dated 4 February 2022 and [submissions in response to Background Document 2](#) dated 6 April 2022.

(Collectively, the opposing parties)

[210] The [Council of Small Business Organisations Australia](#) (COSBOA) filed a submission generally opposing an entitlement to paid FDV leave, but it did not respond specifically to the ACTU claim and nor did it address the specific issues to be considered in the FDVL Review.

[211] This chapter provides a brief summary of the main merit and legal arguments advanced by the ACTU, ACCI, Ai Group and the MGA. Background Document 1 provides a more detailed summary of the parties' submissions. The chapter does not canvas the parties' submissions on the evidence; those submissions are addressed in Chapters 6, 7 and 8. The submissions in respect of the modern awards objective are addressed in Chapter 9.

5.2 The ACTU

[212] The ACTU contends that provision should be made for 10 days' paid FDV leave in all modern awards and that upon exhausting that paid leave entitlement, employees experiencing FDV should be entitled to up to 5 days' unpaid leave on each occasion they are required to attend to activities related to their experience of being subjected to FDV.

[213] Paid FDV leave is said to be necessary to ensure that employees are provided with a fair and relevant safety net of minimum terms and conditions of employment.

[214] The ACTU contends that the current safety net of terms and conditions is not 'fair', in the sense required by s.134(1) of the FW Act, because:

'the absence of paid FDV leave requires those employees who have paid leave entitlements to use those entitlements, intended for leisure or illness, to attend to activities directed to escape and recovery from family and domestic violence. Further, a significant proportion of employees, who have no access to any paid leave entitlements at all, are required to take unpaid leave, compounding the economic disadvantage suffered by persons affected by family and domestic violence.'¹⁵⁴

[215] The ACTU's overarching proposition in support of its application is that the existing entitlements provided by the current regulatory framework do not meet the needs of employees who experience FDV. The ACTU submits that the creation of an entitlement to 5 days' unpaid

¹⁵⁴ ACTU submissions dated 30 July 2021 [118].

leave was an important first step in ensuring that employees who need to take time off work to deal with the effects of FDV are able to do so without immediate threat to their security of employment. However, it submits that the safety net remains inadequate to meet the needs of those employees.

[216] The ACTU sets out 8 propositions and findings that it contends should be drawn from the evidence.

1. *Family and domestic violence is ubiquitous in Australia*

[217] The ACTU continues to rely on the evidence filed and the findings made by the Full Bench in the *March 2018 FDVL Decision*. These findings include that one in 4 women in Australia have experienced some form of FDV since the age of 15.¹⁵⁵

[218] The ACTU also notes that in March 2021, the Report of the House of Representatives Standing Committee Inquiry into Family, Domestic and Sexual Violence Against Women (the House Committee Report) found that rates of family, domestic and sexual violence in Australia ‘do not appear to be declining’ and that family, domestic and sexual violence against women ‘remains a matter of serious concern across the nation.’¹⁵⁶

[219] The ACTU further submits that there is a growing body of Australian and international literature showing that the frequency and severity of FDV has risen during the COVID-19 pandemic.¹⁵⁷

2. *Family and domestic violence is a workplace issue*

[220] The ACTU submits that with the introduction of the unpaid leave term in all modern awards and the subsequent inclusion of unpaid leave in the NES (the first new national employment standard since the FW Act commenced), the proposition that FDV is a workplace issue is now unquestionably correct.¹⁵⁸

3. *The cost of family and domestic violence*

[221] The ACTU relies on the finding of the majority in the *July 2017 Majority Decision* that FDV has a real and tangible impact on employees and employers in the workplace,¹⁵⁹ and submits that the employment and financial consequences of FDV affect the national economy, as well as individual employers and employees. For individuals, the employment and financial impact of FDV can be severe, and many affected people are unable to leave violent situations without being at risk of unemployment, financial stress, homelessness and poverty. Conversely, financial security offers a clear pathway out of violent situations, with collateral benefits for employers, and the national economy.

¹⁵⁵ *March 2018 FDVL Decision* [80], cited in the ACTU submissions dated 30 July 2021 [50].

¹⁵⁶ House Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into Family, Domestic and Sexual Violence Against Women* (2021) [2.27]–[2.46], cited in the ACTU submissions dated 30 July 2021 [51].

¹⁵⁷ ACTU submissions dated 30 July 2021 [53]–[54].

¹⁵⁸ *Ibid* [57].

¹⁵⁹ [2017] FWCFB 3494 [54].

[222] The ACTU submits that the costs of FDV include the following:

- A cost to the national economy which, in the *March 2018 FDVL Decision*, was estimated to be between \$8.1 billion (in 2002/03 and including male victims) and \$21.6 billion (in 2014/15, excluding male victims).¹⁶⁰
- A cost to employers including lost productivity due to absenteeism, recruitment and retraining costs.¹⁶¹
- A cost to the award-covered workforce. The ACTU submits that women comprise 61 per cent of all award-reliant employees and that 51 per cent of all award-reliant women are casuals. It further submits that award-covered workers are low paid, with female employees earning less than male employees. Finally, the ACTU submits that FDV disproportionately affects women.¹⁶²
- A financial impact on employees, including the impact on employment and personal finances. The ACTU submits that employees affected by FDV will incur out-of-pocket costs arising from, for example, lawyers' and court fees, the cost of medical treatment and relocation costs, and that these costs can be particularly acute at the time of leaving, or contemplating leaving, a violent relationship or situation.¹⁶³

4. *The necessity of paid FDV leave*

[223] The ACTU submits that the evidence given by the ACTU lay witnesses is consistent with the observations of the Full Bench in the *March 2018 FDVL Decision*, that employment is an important pathway out of violent relationships, and that sustained periods of employment can provide, among other things, financial security.¹⁶⁴

5. *The cost of providing paid FDV leave*

[224] The ACTU relies on the evidence of Dr Stanford and Professor Duncan and submits that the actual cost of providing paid FDV leave to award-covered employees would be low. It further submits that an investment in employees' safety in the form of 10 days' paid FDV leave has benefits not only for workers, but for employers including a reduction in the costs of absenteeism and lost productivity and indirect benefits in terms of improved corporate image.¹⁶⁵

6. *Ten days of leave is necessary to provide a minimum safety net*

¹⁶⁰ ACTU submissions dated 30 July 2021 [60], citing *March 2018 FDVL Decision* [106].

¹⁶¹ *Ibid* [62]–[64].

¹⁶² *Ibid* [65]–[68].

¹⁶³ *Ibid* [69]–[72].

¹⁶⁴ *Ibid* [73].

¹⁶⁵ *Ibid* [78]–[85].

[225] The ACTU submits that 5 days of FDV leave is an insufficient amount of time to protect employees experiencing FDV. It submits that:

- A ‘common standard’ of 10 days’ paid FDV leave has developed over a number of years and has spread through Australian workplaces in enterprise bargaining agreements.¹⁶⁶
- Not all employees dealing with FDV will need to access the full 10 days of leave per annum. The evidence of Dr Stanford is that the average quantum of leave is just over 7 days.¹⁶⁷ However, some employees will require access to more than 10 days.¹⁶⁸
- FDV impacts many aspects of a person’s life, including in the areas of health, children, access to legal and financial resources, and accommodation. Dealing with FDV is both time consuming and costly. There are many urgent tasks that must be attended to in order to recover from violence and/or to leave a violent relationship. Aside from the obvious trauma associated with violence and abuse, the sheer logistical challenge of dealing with the effects of FDV can be extreme.¹⁶⁹ Access to a sufficient amount of time off work is crucial to ensure that people can access necessary support services, particularly at the point of leaving a violent relationship.¹⁷⁰
- The provision by employers of a wide range of supports to employees should be encouraged and supported including access to great amounts of paid time off work where required. However, 10 days’ paid FDV leave is the *minimum* number of days to which all employees should have access.¹⁷¹
- A whole of community response to FDV cannot be fully effective unless employers provide employees with – as a minimum – sufficient time off work to access necessary support services. The evidence demonstrates that 5 days of unpaid leave per annum does not provide sufficient time to enable adequate access to such support.¹⁷²
- Governments and organisations around the country are undertaking a coordinated national effort to reduce violence against women and children, including by increasing access to services for victims of domestic and family violence and sexual assault. These support services operate during working hours and workers must have access to sufficient time off work to attend them, otherwise the goal of increasing access to services will be gravely undermined. The ACTU submits that its lay witness

¹⁶⁶ Ibid [86]–[88].

¹⁶⁷ Ibid [89].

¹⁶⁸ Ibid [91].

¹⁶⁹ Ibid [90].

¹⁷⁰ Ibid [96].

¹⁷¹ Ibid [95].

¹⁷² Ibid.

evidence demonstrates that not having access to sufficient and paid time off work is a key barrier to accessing support.¹⁷³

7. *FDV leave must be paid in order to provide a minimum safety net*

[226] The ACTU submits that economic security is the primary factor determining whether a person subjected to FDV remains in, escapes from or returns to a dangerous relationship and that without economic resources, leaving a violent relationship is extremely difficult.¹⁷⁴ It is submitted that these findings are borne out by the ACTU's lay witness evidence, which demonstrates that financial security is an absolutely critical factor in whether or not a person accesses support services.¹⁷⁵

[227] The ACTU submits that the evidence presents a clear and consistent picture of the central importance of financial security to recovery and escape from FDV, and that conversely; lack of financial security can have a profoundly negative impact on a person's ability to recover from or escape violent situations.¹⁷⁶

[228] The ACTU submits that the absence of paid FDV leave has a particularly adverse impact on women and that:

- While men can and do experience domestic violence, the evidence shows that women are more likely to be subjected to violence and to experience the impact of such violence more severely.¹⁷⁷
- Women are also over-represented among the award-reliant, casual and low paid workforce and remain disproportionately responsible for caring for children and others, which means women are already more likely to have to use their leave entitlements to attend to caring responsibilities and are less likely to have access to them.¹⁷⁸
- For women who do have paid leave entitlements, the requirement that they use their annual and personal leave to, for example, attend multiple court hearings or move into emergency housing, means they will have less access to leave for illness and leisure than their male counterparts.¹⁷⁹
- Women employed as casuals with no paid leave entitlements have no option but to make the unacceptable choice between their employment and their safety.¹⁸⁰

¹⁷³ Ibid [96].

¹⁷⁴ Ibid [97]–[98], citing the State of Victoria, Royal Commission into Family Violence: Report and Recommendations, Volume IV, Parl Paper No 132 (2014-2016), Chapter 21 'Financial Security' at [93].

¹⁷⁵ Ibid [99].

¹⁷⁶ Ibid [100].

¹⁷⁷ Ibid [101].

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

8. *Supplementary unpaid FDV leave of 5 days per occasion is necessary*

[229] The ACTU also submits that it is necessary to reframe the existing NES entitlement to 5 days' unpaid FDV leave as a supplementary entitlement which is available on a per occasion basis once the paid leave entitlement is exhausted. It submits that this provision may be rarely utilised, but that for those who need to access the unpaid leave entitlement, it will be crucial. The ACTU further submits that there is precedent for 'per occasion' unpaid leave provisions in the FW Act including special maternity leave, carer's leave, compassionate leave for casuals and community service leave.¹⁸¹

[230] In relation to the Commission's research program, the ACTU submits that the research program provides further evidence in support of the ACTU's application for 10 days' paid FDV leave for all award-covered employees. The ACTU submits that the following key propositions and findings can be drawn from the research program:

- The evidence presented in the SWIRLS Report and the Monash Report,¹⁸² reiterates the fact that FDV is ubiquitous in Australia.¹⁸³
- The frequency and severity of FDV has risen during the COVID-19 pandemic.¹⁸⁴
- FDV is a gendered phenomenon and a workplace issue.¹⁸⁵
- There are serious and measurable employment and financial consequences of FDV, affecting the national economy, employers and employees.¹⁸⁶
- The SWIRLS Report found that FDV has a high economic cost, with the estimated cost to the Australian economy of women and children experiencing partner violence ranging between \$12.6 and \$22 billion per year.¹⁸⁷
- The SWIRLS Report reported that the impact of FDV is estimated to cost employers up to \$2 billion a year.¹⁸⁸
- Both the SWIRLS Report and the Monash Report present evidence in support of the conclusion expressed in the *July 2017 Majority Decision* and the *March 2018 FDVL Decision* that FDV has a significant adverse impact on those who experience such violence, and on their families and community.¹⁸⁹

¹⁸¹ Ibid [102].

¹⁸² Fitz-Gibbon et al, Monash University, *Safe, Thriving and Secure: Family Violence Leave and Workplace Supports in Australia* (December 2021).

¹⁸³ ACTU supplementary submissions dated 22 December 2021 [30].

¹⁸⁴ Ibid [31].

¹⁸⁵ Ibid [32]–[33] citing the SWIRLS Report and the Monash Report.

¹⁸⁶ Ibid, [34].

¹⁸⁷ Ibid [36].

¹⁸⁸ Ibid [37].

¹⁸⁹ Ibid [38].

- Employment is an important pathway out of violent relationships, and sustained periods of employment can provide financial security (among other things).¹⁹⁰
- The cost to employers of providing paid FDV leave is not substantial and is likely to be offset by reductions in the costs associated with FDV for employers.¹⁹¹
- The evidence presented in the Commission’s research program suggests that the industrial norm for the provision of paid FDV leave is between 10 and 14 days, which supports the notion that 10 days’ paid leave is an appropriate minimum standard.¹⁹²

[231] As part of the research program, a survey of employers was designed by Commission staff with the involvement of the parties and was then distributed by employer organisations to their members (the Employer Survey). The Employer Survey sought information on the use and operation of the unpaid FDV leave entitlement; how employers support employees who have experienced FDV, and whether employees have access to either paid or unpaid FDV leave. The ACTU submits that the results from the Employer Survey Report¹⁹³ should be treated with a degree of caution because the composition of the employer parties’ membership, and representativeness of respondents to the survey of the membership, and of award-covered employers, is unknown.¹⁹⁴

[232] The ACTU’s reply submissions are canvassed below in the context of the ACCI and Ai Group submissions.

5.3 ACCI and Ai Group

[233] ACCI and Ai Group submit that FDV is a serious and pervasive social issue; it is unacceptable and must be strongly condemned.¹⁹⁵ However, they oppose the ACTU claim and contend that no variation to modern awards is necessary in the sense contemplated by s.138 of the FW Act. The paragraphs below summarise the legal and merit arguments advanced by the employer parties and the ACTU’s reply to those submissions.

5.3.1 Ai Group

[234] Ai Group contends that it is not ‘appropriate or necessary’ for the minimum safety net to further prescribe entitlements that apply to employees who experience FDV, beyond the unpaid FDV leave entitlement contained in the NES. Ai Group submits that the provision of any additional support to employees who experience FDV should be left to the enterprise level and submits that:

‘Employers typically take a flexible and compassionate approach to supporting employees experiencing FDV, having regard to the needs of each employee, their circumstances and the

¹⁹⁰ Ibid [40].

¹⁹¹ Ibid [41].

¹⁹² Ibid [57].

¹⁹³ Fair Work Commission, *Survey analysis for the Family and domestic violence leave review 2021* (December 2021).

¹⁹⁴ ACTU supplementary submission dated 22 December 2021 [26].

¹⁹⁵ ACCI submissions in reply dated 4 February 2022 [2.2], Ai Group submissions in reply dated 4 February 2022 [3].

employer's capacity. Employers should be encouraged to continue doing so, where practicable.¹⁹⁶

[235] Ai Group advances 4 broad points:

1. A significant number of initiatives in relation to FDV have been and are being pursued by governments at all levels. These are detailed in Chapter 8 of Ai Group's submission of 4 February 2022. The extent of government activity in respect of this issue has significantly increased since the earlier proceedings:

'It is clear that the issue of FDV is at the forefront of the various Governments' agendas and it is considered a social issue that requires urgent attention ... In light of the significantly increased activity by policy-makers in this area ... it is not necessary, as required by s.138 of the FW Act, to create an entitlement to FDVL in the awards system and, by extension, to impose the resulting costs and other impacts on individual employers ... it is, in our view, more appropriate that steps are taken through the implementation of the various schemes and programmes designed by Governments to tackle the issue of FDV, rather than through the grant of FDVL'.¹⁹⁷

2. The safety net provides employees with various other entitlements and flexibilities which can be accessed by employees experiencing FDV including unpaid FDV leave, personal/carer's leave, compassionate leave and the right to request flexible working arrangements. The existing legislative entitlements and protections are detailed in Chapter 9 of Ai Group's submission of 4 February 2022.

3. The cost of providing a paid FDV leave entitlement cannot be properly quantified and therefore the Commission should take a cautious approach and decide against granting such an entitlement.

4. The introduction of further leave entitlements would be unfair to employers; it would increase employment costs and the regulatory burden at a time when many businesses 'have suffered profound financial and operational challenges as a result of the COVID-19 pandemic'.

[236] Ai Group submits that it would *not* be appropriate to vary modern awards to introduce paid FDV leave for the following reasons:

- FDV is a 'complex, multi-faceted, whole of society issue'¹⁹⁸ that affects different employees in different ways and therefore requires a nuanced and flexible approach.¹⁹⁹
- Employers are typically supportive of employees experiencing FDV and adopt a compassionate and flexible approach to supporting them. The introduction of paid

¹⁹⁶ Ai Group submissions in reply dated 4 February 2022 [17(d)].

¹⁹⁷ Ibid [73]–[75].

¹⁹⁸ Ibid [243].

¹⁹⁹ Ibid [232(a)].

FDV leave is not likely to facilitate the continuation of such an approach and may in fact undermine the progress made to date in this sphere.²⁰⁰

- Many employees already have access to paid FDV leave and/or other associated entitlements by virtue of enterprise agreements that apply to them. The introduction of paid FDV leave to the safety net may stifle employer, employee and union efforts to develop innovative, enterprise-specific schemes that are tailored to the circumstances of the relevant workplace and workforce.²⁰¹
- The introduction of paid FDV leave would impose new and additional employment costs on employers. The material before the Commission does not enable it to properly assess the extent of that cost and the Commission should adopt a cautious approach in the FDVL Review.²⁰²
- It is not fair that employers bear the cost of paid FDV leave.²⁰³
- No workable clause that gives effect to a paid FDV leave entitlement has been advanced before the Commission.²⁰⁴
- The introduction of paid FDV leave is not ‘necessary’, in the sense required by s.138 of the FW Act.²⁰⁵

5.3.2 ACCI

[237] Similarly to Ai Group, ACCI submits that the introduction of paid FDV leave is not ‘necessary’ to satisfy the modern awards objective. ACCI agrees with the 4 broad points advanced by Ai Group and puts the following additional arguments:

1. The issue of FDV, and any subsequent leave entitlement, is more appropriately addressed by Parliament. Any introduction of paid FDV leave into modern awards would overlap with social policy initiatives which have been explicitly designed to operate alongside unpaid leave entitlements, such as the Government’s escaping violence payment.²⁰⁶ It is clear that Parliament explicitly rejected a decision to introduce a paid leave entitlement into the NES.²⁰⁷ The ‘pervasive’ and ‘highly complex’ issue of FDV requires a response that is ‘exponentially broader’ than a modern award entitlement.²⁰⁸ Consequently:

²⁰⁰ Ibid [232(b)].

²⁰¹ Ibid [232(c)].

²⁰² Ibid [232(d)].

²⁰³ Ibid [232(e)].

²⁰⁴ Ibid [232(f)].

²⁰⁵ Ibid [232(g)].

²⁰⁶ ACCI submissions in reply dated 4 February 2022 [7.27], [7.20].

²⁰⁷ Ibid [7.19].

²⁰⁸ Ibid [7.30].

‘The idea that the Full Bench of the Fair Work Commission, independent from and in contrast to, the Federal Parliament, should pursue its own course of seeking to address FDV through its introduction of paid leave to employees who happen to be award covered, seems to be inconsistent with this approach.’²⁰⁹

2. The existing framework of entitlements in the NES, including personal/carer’s leave, annual leave, unpaid FDV leave and the right to request flexible working arrangements, is appropriate and satisfies the modern awards objective.²¹⁰ The existing entitlements and protections are detailed in Chapter 4 of ACCI’s submission of 4 February 2022.
3. There is not sufficient data or analysis on the cost of providing paid FDV leave, particularly the cost to small and medium businesses.²¹¹ The data before the Commission does not cover the period of time which the proceedings are designed to review and, in any event, that time period is a time of ‘extraordinary upheaval and displacement in the Australian labour force, economy and society.’²¹² The Full Bench should take a cautious approach and reject the ACTU claim.²¹³
4. The introduction of paid FDV leave will increase costs for employers, particularly small and medium businesses, ‘at an acutely difficult and uncertain time for many employers’ due to the COVID-19 pandemic.²¹⁴

[238] In addition to the above, ACCI further submits:

1. The Commission does not have sufficient evidence to make a meaningful determination about the functioning of the current safety net.²¹⁵ It is not contested that paid FDV leave will benefit employees experiencing FDV.²¹⁶ However, modern awards are not intended to represent ‘best practice’ but should give rise to ‘minimum and necessary conditions.’²¹⁷ There is not sufficient evidence before the Commission to demonstrate that the current safety net is not providing the minimum necessary conditions for those experiencing FDV.²¹⁸
2. The singular reference to ‘modern award’ in s.157 of the FW Act means that the Commission’s role in assessing the ACTU claim is to determine whether the jurisdictional requirements are met for each and every modern award subject to the claim.²¹⁹ No attempt has been made to provide evidence as to the specific

²⁰⁹ Ibid [7.31].

²¹⁰ Ibid Chapter 4 – Existing Entitlements.

²¹¹ Ibid [10.26]–[10.28]; [11.5].

²¹² Ibid [11.5].

²¹³ Ibid [11.7].

²¹⁴ Ibid [10.27].

²¹⁵ Ibid [8.14]–[8.15].

²¹⁶ Ibid [8.51].

²¹⁷ Ibid [8.33].

²¹⁸ Ibid [8.51].

²¹⁹ Ibid [7.4].

circumstances of any individual modern award, and the relevant factors for the assessment of the ACTU claim will differ between awards on the basis of pay rates, gender make-ups, entitlements, locations and working conditions.²²⁰

3. There has been no attempt to establish why award-covered employees should have access to paid FDV leave when award-free employees should not.²²¹ The resulting ‘global’ claim is ‘in effect a claim for a ‘proxy’ NES entitlement reserved only for award-covered employees’.²²²
4. While paid FDV leave may well be a ‘commonly achieved aspect of enterprise bargaining’²²³ this does not reflect a minimum standard and the Commission should not ‘transplant trends in bargaining into the minimum safety net.’²²⁴ In considering what is necessary to go into modern awards, the Commission must consider the *minimum* required, not the requirement of ‘industrial norms’.²²⁵
5. Current utilisation of unpaid FDV leave is not an appropriate metric to justify the introduction of paid FDV leave. ACCI submits that there are many circumstances in which employees must take paid leave and the ‘fact that an employee is required or has taken unpaid leave to deal with FDV does not, in itself, support a proposition that such leave should be paid leave’.²²⁶ ACCI argues there is an important distinction between an employee needing to be absent from work to address FDV-related issues and a requirement that an employer pay the employee during that absence, particularly where there are other pre-existing entitlements and assistance available.²²⁷

5.4 MGA

[239] As noted earlier in this decision, MGA did not press its initial submissions in relation to employees accessing paid personal/carer’s leave for FDV purposes.²²⁸

[240] MGA submits that the current entitlement to *unpaid* FDV leave is ‘adequate and sufficient as a safety net’ and ‘provides an important tool in safeguarding women’s ongoing participation in the workforce.’²²⁹ MGA argues that while ensuring women’s workforce participation is ‘crucial’ there are other options available to protect women’s participation, such as the return to work guarantee in s.84 of the FW Act relating to parental leave.²³⁰ Additionally, the existing framework is adequate as there are other forms of paid leave available to

²²⁰ Ibid [7.9].

²²¹ Ibid [7.11].

²²² Ibid [7.12].

²²³ Ibid [8.20(b)].

²²⁴ Ibid [8.20(c)].

²²⁵ Ibid.

²²⁶ Ibid [9.11]–[9.12].

²²⁷ Ibid [9.17].

²²⁸ See [50]–[54] of this decision.

²²⁹ MGA submissions in reply dated 4 February 2022 [24].

²³⁰ Ibid [25].

employees, including personal leave and annual leave.²³¹ MGA argues that following the introduction of *unpaid* FDV leave:

‘[E]mployers have demonstrated varying capacities to accommodate family and domestic violence related absences and to bear associated expenses, as demonstrated in the variety of different additional workplace supports and additional paid leave provided by individual workplaces. Similarly to employers in other industries, MGA TMA members typically take a compassionate and flexible approach when their employees require leave from work due to family and domestic violence.’²³² [references omitted]

[241] MGA submits that the introduction of *paid* FDV leave will have a disproportionate effect on small and medium businesses, particularly through increased employment costs. MGA submits that the increased employment costs ‘coupled with the increased regulatory burden and costs associated with COVID-19, will have a detrimental impact on employment growth and the performance and competitiveness of the Australian economy.’²³³ MGA conducted a survey of its membership on 28 September 2021, which received 42 responses. 95 per cent of members disagreed with permanent and casual employees being provided with paid FDV leave.²³⁴ MGA argues:

‘MGA TMA’s small and medium sized members are not well placed to absorb the increased costs of providing the proposed ten paid FDVL days. Small and medium sized independent businesses, such as those in grocery, supermarket and timber and hardware retail, already face razor-thin margins. Should employment costs increase for small and medium businesses through the introduction of paid FDVL, this will result in decreasing profit margins for independent businesses. This may result in unintended indirect consequences for small business, such as having little option but to terminate staff that they can no longer afford, and reduction of employee hours or business owners working longer hours themselves as profit margins decrease. Increased employment costs can also pose indirect harm on small and medium sized business owners through impact on their family lives as they work longer hours, on their superannuation nest egg through the devaluation of their business and ensuing health problems.’²³⁵

[242] MGA submits that ‘the impact of introducing paid FDVL will be nullified if family and domestic violence awareness and trauma-informed understanding among employers is not improved’ and therefore that ‘FDV awareness and trauma-informed understanding among employers must be improved prior to the introduction of paid FDVL’.²³⁶ MGA argues that ‘an award term providing ten days’ paid FDV leave will have little impact on award-covered employees experiencing such violence if workplace culture is not aligned with the objectives of introduc[ing] such leave.’²³⁷ MGA suggests the following be introduced to develop FDV awareness and trauma-informed understanding:

²³¹ Ibid [26].

²³² Ibid [28].

²³³ Ibid [64].

²³⁴ Ibid [36].

²³⁵ Ibid [32].

²³⁶ Ibid [58]–[59].

²³⁷ Ibid [58].

- fact or information sheets, best practice guides and videos that provide information about the prevalence and impact of FDV and provide practical support and guidance to employers, especially small and medium business
- provision of support services to small and medium sized businesses, such as an employer support helpline and an employee referral system
- specific engagement and consultation with industry and trade associations in respect of FDV, and
- a model or template FDV leave policy that supplements other resources, that empowers employers to provide entitlements to FDV leave in excess of any award entitlement, including a paid FDV leave entitlement.

[243] MGA argues there is ‘little data or research’ since the introduction of the unpaid FDV leave entitlement in 2018 and that the decision to introduce a *paid* entitlement ‘should be informed by data and research that demonstrates its necessity.’²³⁸

[244] MGA submits that addressing FDV requires a ‘whole-of-community response’ and as a result it requires federal or state-level support to bear the costs. MGA says it ‘supports introduction of paid FDV leave entitlements if a framework is introduced where the Australian or state Government makes payment to the employer who then pays the employee’ otherwise:

‘It is inequitable that employers not only bear the cost of family and domestic violence through absenteeism and lost productivity, but additionally through paid FDVL.’²³⁹

²³⁸ Ibid [60].

²³⁹ Ibid [61].

6. The Evidence

6.1 Overview

[245] The ACTU filed 2 expert witness statements: [Dr Stanford](#) dated 30 July 2021 and [Professor Duncan](#) dated 28 July 2021. [Supplementary reports](#) from Dr Stanford and Professor Duncan were filed on 22 December 2021. Professor Duncan and Dr Stanford were cross-examined during the hearing on 1 March 2022 and a [transcript](#) of that hearing was published on 2 March 2022.

[246] The ACTU adduced evidence from 10 lay witnesses:

- [Gabrielle Craig](#), Assistant Principal Solicitor, Women’s Legal Service NSW in Lidcombe, New South Wales (NSW)
- [Marianne Crowe](#), a Registered Nurse at St Vincent’s Hospital in Melbourne, Victoria
- [Stacey Davies](#), an Organiser at the United Workers’ Union working in the early childhood education and care team in Melbourne, Victoria
- [Carla Jones](#), Principal Industrial and Women’s Officer of the Rail, Tram and Bus Union, Queensland Branch
- [Dr Victoria Jones](#), Head of the Medical Unit at the Women’s Health Service at the Women’s and Children’s Hospital, South Australia
- [Terese Kingston](#), a Service Support Worker at the Domestic Violence Resource Service, Mackay, Queensland
- [Tess Oxley](#), a paramedic with the Ambulance Service of New South Wales in Sydney, NSW
- [Samantha Parker](#), Assistant Manager at the Nepean Blue Mountains Women’s Domestic Violence Court Advocacy Service, in Penrith, NSW
- [Penny Spalding](#), Assistant Secretary of the Queensland Teachers’ Union, and
- [Karyn Walsh](#), CEO of Micah Projects in Brisbane, Queensland.

[247] A [confidentiality order](#) was issued on 12 August 2021 which applies to some of the lay witness evidence.

[248] The lay witnesses are professionals who work in the areas of medicine, law, industrial relations and family and domestic violence support services and assist people who have experienced (or are experiencing) FDV.

[249] No direct evidence was given by employees who have experienced, or are experiencing, FDV. The ACTU said that it had made a deliberate decision *not* to call employees who have

experienced FDV as witnesses because asking those persons to give evidence and potentially be cross-examined had the potential to be traumatising for those persons.²⁴⁰

[250] As noted by Ai Group in its submissions, the *Family Law Act 1975* (Cth) was amended in 2018 to protect people experiencing FDV from being cross-examined in family law matters involving family violence, in certain circumstances.²⁴¹ The ban on direct cross-examination in certain circumstances aims to prevent the re-traumatisation of people who have experienced FDV.²⁴² The amendment to the *Family Law Act 1975* gives statutory effect to the understanding that there are inherent challenges involved in cross-examining a person who has experienced FDV, without re-traumatising them in the process.

[251] For our part, we acknowledge that the ACTU's decision to provide witness evidence from front line workers instead of from employees who have experienced FDV is understandable in the present case. Asking a person who has experienced, or is experiencing, FDV to speak about their experience can be re-traumatising. The Monash Report (discussed below) acknowledges the importance of protecting the wellbeing and safety of persons who have experienced FDV when asking them to speak about their experience.²⁴³

[252] Ai Group and ACCI filed objections to the lay evidence: [Ai Group](#) dated 24 February 2022 and [ACCI](#) dated 24 February 2022. The [ACTU](#) filed submissions in reply in relation to the objections.²⁴⁴

[253] Ai Group's objections were on the grounds that the source of the hearsay evidence was not identified or is anonymised and that, as a result, the evidence cannot be properly tested by the respondent parties who are unable to take steps to ascertain the veracity of the evidence.²⁴⁵

[254] Similarly, ACCI objected to the lay witness evidence on the grounds that it was indirect and involved conclusions which could not be meaningfully tested.²⁴⁶

[255] A hearing on 28 February 2022 dealt with the objections to the evidence and a [transcript](#) of those proceedings was published on 1 March 2022. We issued our [rulings on the objections to evidence](#) on 28 February 2022.

[256] The ACTU conceded that some of the lay witness evidence was hearsay evidence, but referred to s.60 of the *Evidence Act 1995* and submitted that the evidence was not sought to be

²⁴⁰ Transcript, 30 April 2021, PN13; Transcript, 1 March 2022, PN672.

²⁴¹ Ai Group submissions in reply dated 4 February 2022 [91].

²⁴² Ibid [93]. The ban on cross-examination applies where a party to proceedings intends to cross-examine the other party directly; there is an allegation of family violence against the examining party, and there has been a conviction or charge of violence, a FVO, an injunction, or the court otherwise makes an order. In these circumstances, the examining party *must not* cross-examine the witness party personally and cross-examination *must* be conducted by a legal practitioner: *Family Law Act 1975* (Cth) s.102NA.

²⁴³ Monash Report p.16.

²⁴⁴ ACTU submissions in reply to objections to the evidence dated 25 February 2022.

²⁴⁵ Ai Group submissions on objections to evidence dated 24 February 2022 [1]; Ai Group submissions in reply dated 4 February 2022 [241].

²⁴⁶ ACCI submissions in reply dated 4 February 2022 [8.47].

tendered to prove the truth of the asserted fact but only to prove the fact of the representation.²⁴⁷ We admitted the hearsay evidence on the limited basis identified by the ACTU. Our consideration of the lay witness evidence has been in accordance with the ruling we published on 28 February 2022.²⁴⁸

[257] None of the lay witnesses were required for cross-examination by the employer parties.

[258] ACCI submits that the lay witness evidence takes the Full Bench no further than its conclusions in the earlier proceedings. It submits that these proceedings are about leave and that the lay material filed in this case is ‘not from persons who are the subject of FDV and is accordingly of limited utility when seeking to assess the specific circumstances of those experiencing FDV in relation to their specific employment scenarios’.²⁴⁹

[259] ACCI submits that the lay evidence filed in these proceedings does not establish *why* leave should be paid, or in the quantum sought by the ACTU claim. It submits that the lay witnesses were not cross-examined by the employer parties because they could not provide direct evidence for the necessity for paid leave (the issue that this case is about). ACCI submits that beyond the findings already made in 2018, it does not believe that any new conclusions could be made on this evidence.²⁵⁰

[260] In relation to the lay witness evidence, Ai Group submits:

- ‘Large tracks of the evidence has been admitted on the basis that it is hearsay evidence and it is relied upon only to establish what the witness was told, rather than the truth of the asserted fact. Such evidence should not be attributed any weight. At its highest, it is evidence that a person was told something, which may or may not be true, by an unnamed person. Further, if the evidence is not relied upon to establish the truth of the asserted fact, the probative value, relevance and reliability of the evidence is dramatically diminished’.²⁵¹
- ‘Significant portions of the evidence relied upon by the ACTU concern unnamed persons. This evidence should not be given any weight.’²⁵²

[261] Ai Group also makes submissions in respect of particular lay witnesses and the limitations in that evidence.²⁵³

[262] We note here that despite generally contending that we should accord the lay witness evidence no or little weight, the employer parties also sought to rely on various aspects of the lay witness evidence in their submissions, for instance:²⁵⁴

²⁴⁷ ACTU submissions reply to objections to evidence dated 25 February 2022; Transcript, 28 February 2022, PN225–PN226.

²⁴⁸ Objections to Evidence – Full Bench Rulings, 28 February 2022.

²⁴⁹ ACCI final submissions dated 28 March 2022 [5.1]–[5.4].

²⁵⁰ ACCI final submissions dated 28 March 2022 [5.7]–[5.16].

²⁵¹ Ai Group final submissions dated 28 March 2022 [35].

²⁵² Ibid [37].

²⁵³ Ibid [44]–[53]

²⁵⁴ See Ai Group submissions in reply dated 4 February 2022 [234]–[235]; ACCI submissions in reply dated 4 February 2022 [8.50].

Ai Group relies on:

- Carla Jones at [9], [11] and [14]²⁵⁵
- Marianne Crowe at [18]-[19] and [21]²⁵⁶
- Terese Kingston at [12]²⁵⁷
- Penny Spalding at [8]-[9] and [14]-[15]²⁵⁸
- Karyn Walsh at [13] And [15], and²⁵⁹
- Tess Oxley at [7].²⁶⁰

ACCI relies on:

- Carla Jones at [12]-[13]²⁶¹
- Tess Oxley at [10]-[12]²⁶²
- Stacey Davies at [18], and²⁶³
- Samantha Parker at [33].²⁶⁴

[263] We accept that the lay witness evidence is necessarily limited to the professional experience of the particular witness and cannot be extrapolated to encompass all persons who experience FDV, or the support offered by each and every employer.

[264] The lay witness evidence presents an impression of the cost and time involved in managing or leaving a violent relationship and the significant financial and social barriers to accessing support, and that the ramifications of FDV can have a significant impact on employees in their workplace.

[265] The following broad themes may be said to emerge from the lay witness evidence:

²⁵⁵ Ai Group submissions in reply dated 4 February 2022 [235](a) and [244](b).

²⁵⁶ Ibid [235](b).

²⁵⁷ Ibid [235](c).

²⁵⁸ Ibid [235](d).

²⁵⁹ Ibid [235](e).

²⁶⁰ Ibid [244](c).

²⁶¹ ACCI submissions in reply dated 4 February 2022 [8.50](a).

²⁶² Ibid [8.50](c) and (d).

²⁶³ Ibid [8.50](g).

²⁶⁴ Ibid [8.50](f).

- An employee's financial circumstances are a barrier to accessing support, health services and maintaining court proceedings.
- Dealing with FDV involves substantial time.
- FDV impacts negatively on work performance.
- There are benefits to paid FDV leave for employees who are experiencing FDV.
- Even where paid FDV leave exists, employees face barriers in accessing it.
- COVID-19 has resulted in an increase in the incidence and impacts of FDV.

[266] These themes are consistent with other evidence in the proceedings.

[267] The opposing parties elected *not* to call any evidence in the proceedings. It is convenient to deal now with the consequences of the opposing parties' election.

6.2 The Absence of Evidence Adduced by the Opposing Parties

[268] Ai Group submits that the absence of any employer evidence is 'neither here nor there' and that 'no adverse inference' should be drawn from the absence of any such evidence.²⁶⁵ Ai Group contends that the employer parties 'do not bear any onus to demonstrate that FDV leave will result in unfavourable consequences for employers';²⁶⁶ it is for the proponent of a variation (in this case the ACTU) to establish that the variation proposed is necessary within the meaning of s.138 and to call evidence in respect of the relevant s.134 considerations.²⁶⁷

[269] As mentioned earlier, variations to modern awards must be justified on their merits. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.²⁶⁸ The proponent of an award variation should present a persuasive evidentiary case and the failure to do so may lead to a claim being rejected.²⁶⁹ But these observations are not intended to import the common law notion of onus or burden of proof. Ultimately, the Commission must be satisfied that a modern award is not achieving the modern awards objective and requires variation.²⁷⁰

[270] Indeed, the question of whether legal concepts of onus play a role in statutory tribunals not bound by the rules of evidence, such as the Commission, is a vexed one.²⁷¹ As a Full Bench of the Australian Industrial Relations Commission observed in *Coal and Allied Operations Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*:

²⁶⁵ Ai Group final submissions dated 28 March 2022 [105].

²⁶⁶ Ai Group submissions in reply dated 4 February 2022 [439].

²⁶⁷ Ibid [440].

²⁶⁸ *Penalty Rates Decision* [2017] FWCFB 1001 [269] and see *Re Shop, Distributive and Allied Employees Association* [2011] FWAFFB 6251; (2011) 211 IR 462 [24] per Lawler VP, Watson SDP, Hampton C.

²⁶⁹ See *Penalty Rates Decision* [2017] FWCFB 1001 [257]–[260].

²⁷⁰ *Penalty Rates – Transitional Arrangements Decision* [2017] FWCFB 3001 [52].

²⁷¹ See generally *Teterin and ors v Resource Pacific Pty Limited t/as Ravensworth Underground Mine* [2014] FWCFB 4125.

‘It is doubtful how far the notion of onus of proof is relevant at all to Commission proceedings. There is a respectable basis for the view that, where there is a statutory requirement for the Commission to be "satisfied" about exercising a discretion, the notion of onus of proof imports legal doctrines that should have no part in the Commission's procedural or decisional process. This is especially so where a discretion, as in the case of section 127, is exercisable on the Commission's own motion. In short, the Commission is either satisfied that it should exercise the discretion, or it is not. It matters little how the Commission arrives at that state of mind.’²⁷²

[271] A legal onus may be distinguished from an evidentiary onus. A legal onus, or burden of persuasion, ‘is the obligation of a party to meet the requirement of a rule of law that a fact in issue be proved’ to the requisite standard of proof, with such a party bearing the risk of non-persuasion as to the fact in issue.²⁷³ The evidentiary onus was described by the High Court in *Sidhu v Van Dyke*²⁷⁴ ‘in its strict legal connotation’ as being ‘the burden of adducing or pointing to sufficient evidence to raise an issue for determination by the court’.²⁷⁵

[272] In seeking to explain the absence of any employer-led evidence, Ai Group observed that:

- employer organisations cannot compel their members to give evidence, and
- there are limitations on the resources that Ai Group can devote to the current proceedings.²⁷⁶

[273] This explanation is unpersuasive. As to the first point, there is no evidence that Ai Group even *attempted* to procure evidence from its members in support of the assertions it advances. And, as to the second point, the employer organisations have been on notice since March 2018 that the issue of paid FDV leave would be revisited in June 2021 and the commencement of the FDVL Review was announced in the April 2021 Statement.

[274] Further, while the allocation of an organisation’s resources are a matter for that organisation, we note that Ai Group has been involved in other matters during the course of the FDVL Review, including review proceedings in respect of individual modern awards. For instance, in the review of the *Social, Community, Home Care and Disability Services Industry Award 2010 (SCHADS Award)* Ai Group filed submissions on 5 August 2021 and a witness statement. The witness statement filed was directed at, among other things, the need to reconfigure payroll systems in the event that broken shift allowances were introduced into the SCHADS Award. We fail to see why similar evidence could not have been filed in these proceedings in support of the asserted increase in regulatory burden (including changes in payroll administration) as a consequence of the introduction of paid FDV leave. After all, the ACTU claim in these proceedings is not merely directed at one award but seeks to introduce a new paid leave entitlement into *all* modern awards.

²⁷² (1997) 73 IR 311 p.317.

²⁷³ ‘Cross on Evidence’, Australian Edition, Service 167 - May 2014 at [7010].

²⁷⁴ [2014] HCA 19.

²⁷⁵ Ibid [63] per French CJ, Kiefel, Bell and Keane JJ.

²⁷⁶ Ai Group final submissions dated 28 March 2022 [156].

[275] Ai Group contends that ‘no adverse inference’ should be drawn from the failure of the opposing parties to adduce any evidence. We apprehend that this submission is directed, at least in part, at the drawing of a *Jones v Dunkel*²⁷⁷ inference.

[276] The rule in *Jones v Dunkel* has been aptly described as ‘a rule of common sense and fairness in relation to the fact finding process’.²⁷⁸ It applies in circumstances where a party fails to call a witness, where it would be natural for them to do so, or where the party might be reasonably expected to call the witness. A breach of the ‘rule’ may lead to the drawing of an adverse inference; namely that the uncalled evidence would not have helped the party's case; not an inference that the uncalled evidence would have been positively unfavourable to the party's case or positively favourable to the opposing party's case. Whether such an adverse inference is drawn is a matter of discretion.²⁷⁹

[277] The rule in *Jones v Dunkel* is more apt in *inter partes* proceedings, than Review proceedings, such as the present matter.²⁸⁰ Our attention was not drawn to any Review decision which applied the rule to draw an adverse inference. In any event, the ACTU did not invite us to draw a *Jones v Dunkel* inference in this case and we do not propose to do so. However, that does not mean that the opposing parties’ failure to adduce any evidence is without consequence.

[278] The ACTU contended that it is open to the Commission to assume that the employer parties had access to members who could have given evidence about matters relevant to the issues in contention.²⁸¹ We agree with that contention and have made that assumption. Further, the ACTU characterises various assertions advanced by the opposing parties as speculative and unsupported by any evidence, including:

- The proposed variation ‘*may cause significant disruption to an employer’s operations*’ because the provision (like the current NES entitlement) affords employees the right to be absent from work with little notice and without the employer’s agreement.²⁸²
- The definition of whether an employee has experienced FDV ‘will result in foreseeable difficulties such as confusion or uncertainty as to whether what has occurred is FDV for the purposes of the entitlement, disputation and employers feeling compelled ... to adopt an approach of granting such leave when it may not strictly arise’.²⁸³

²⁷⁷ (1959) 101 CLR 298.

²⁷⁸ *Xiu Zhen Huang v Rheem Australia Pty Ltd* Print 954993, 9 February 2005 per Lawler VP, Leary DP and Deegan C at [33]; cited in *CFMMEU v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal* [2021] FWCFB 6059 at [165].

²⁷⁹ See generally *Tamayo v AlSCO Linen Services Pty Ltd*, Print P1859, 25 February 1999; *Mr Richard Hyde v Serco Australia Pty Limited T/A Serco Australia Pty Limited* [2018] FWCFB 3989; and *CFMMEU v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal* [2021] FWCFB 6059.

²⁸⁰ See *Penalty Rates – Transitional Arrangements* [2017] FWCFB 1001 [836] – [837].

²⁸¹ ACTU submissions in reply dated 21 February 2022 [54].

²⁸² Ai Group submissions in reply dated 4 February 2022 [464]–[466] and ACCI submissions in reply 4 February 2022 [10.22].

²⁸³ Ai Group submissions in reply dated 4 February 2022 [305].

- The introduction of paid FDV leave would increase the regulatory burden on employers to, as Ai Group put it: ‘administer a new and additional form of leave, which will generally require them to make certain amendments to their payroll services’.²⁸⁴

[279] A party asserting a particular fact or consequence can be said to bear the evidentiary burden of adducing or pointing to evidence which supports that assertion.²⁸⁵

[280] We note that in the SCHADS Award Review proceedings the Full Bench rejected several propositions advanced by Ai Group for which no evidence was adduced, namely:

‘We note here that no evidence is referred to by Ai Group in support of the proposition for the requirement that an agreement be reached on each occasion will impose a substantial regulatory burden on employers.

...

Further to the proposed finding 3, Ai Group asserts that the extent to which the 2 hour minimum payment deters employers from providing training to employees ‘could adversely affect the extent to which employees are afforded an opportunity to develop new skills and refine existing skills’ and ‘may also ultimately affect the quality of the care provided to the employers’ clients’.

No evidence is referred to in support of these assertions and they amount to little more than speculation.

....

Ai Group submits that ‘any notion that the adverse impact of the new minimum payment provisions may... be mitigated by an employer’s ability to ‘build’ a shift of such duration will often not be applicable to work undertaken remotely.’ No evidence is referred to in support of this assertion.’²⁸⁶

[281] We propose to take a similar approach in these proceedings. Contested assertions which are unsupported by evidence will only be accepted if the assertion made is logically persuasive.

[282] We now turn to the reports published as part of the Commission’s research program and the parties’ comments on that research. We will then deal with some data on the prevalence and impacts of FDV and the results of the Workplace Gender Equality Agency (WGEA) Employer Census, before turning to our findings.

[283] We deal with the evidence regarding the cost of the ACTU claim in Chapter 7.

²⁸⁴ Ai Group submissions in reply dated 4 February 2022 [477].

²⁸⁵ *Village Cinemas Australia Pty Ltd v Carter* [2007] AIRCFB 35 [27]; *Roy Morgan Research Ltd v Baker* [2013] FWCFB 8936 [23]; *TAFE NSW v Pykett* [2014] FWCFB 714 [36]–[37]; *Advanced Health Invest Pty Ltd T/A Mastery Dental Clinic v Mei Chan* [2019] FWCFB 5104 [43] cited with approval in *Adaszko v Mitford Investments Pty Ltd ATF The JGG Trust t/as Integro Private Wealth* [2021] FWCFB 719 [28]; and *Steve Newton v Toll Transport Pty Ltd* [2021] FWCFB 3457 [81].

²⁸⁶ [2021] FWCFB 5244 [35], [85]–[86] and [132].

6.3 The Commission's Research Program

[284] The following reports were published as part of the Commission's research program:

- Fitz-Gibbon K, Pfitzner N, McNicol E and Rupanagudi H (2021), '[Safe, thriving and secure: Family violence leave and workplace supports in Australia](#)', Monash University, December (the Monash Report)
- [Survey analysis for the Family and domestic violence leave review 2021](#), December 2021 (the Employer Survey)
- Seymour K, Hirsch R, Wendt S and Natalier K (2021), '[Analysis of the Workplace Agreements Database for the Family and Domestic Violence Leave Review](#)', Social Work Innovation Research Living Space, Flinders University, November (the WAD Analysis)
- Seymour K, Hirsch R, Wendt S and Natalier K (2021), '[Family and Domestic Violence Leave Entitlement in Australia: A Systemic Review](#)', Social Work Innovation Research Living Space, Flinders University, November (the SWIRLS Report)

[285] The Commission also published a [Research Reference List](#) (see **Attachment C**) and the following Information Notes:

- [Initiatives to reduce family and domestic violence in Budget 2022–23](#) (5 April 2022)
- [Paid Family and Domestic Violence Leave by business size](#) (11 March 2022)
- [ACTU supplementary submission to the Family and Domestic Violence Leave Review](#) (11 March 2022)

6.3.1 The Monash Report

[286] The Monash Report was commissioned to examine employees' experiences of FDV. The Report draws on the accounts of 302 victim-survivors of FDV who participated in a national survey and 42 victim-survivors who also shared further insights into their experiences through an interview.²⁸⁷ All data collection was conducted in November and December 2021.²⁸⁸

[287] The Monash Report notes that FDV is a gendered phenomenon, with women nearly 3 times more likely than men to experience intimate partner violence;²⁸⁹ consequently the majority of survey respondents (92.5 per cent) and interview participants (95 per cent) were female.²⁹⁰ The report also found that both survey and interview participants were more likely

²⁸⁷ Monash Report p 9. We note that the Monash Report uses the acronym 'DFV' to refer to family and domestic violence.

²⁸⁸ Ibid p.11.

²⁸⁹ Ibid p.7.

²⁹⁰ Ibid p.13, 16.

to be aged between 41 and 50 years and, based on those that responded to the survey, the majority were employed in full-time ongoing work (56.5 per cent).²⁹¹

[288] The key findings are presented in the Monash Report under 5 themes:

(i) *The impact of FDV on employees at work*

[289] The Monash Report finds that experiencing FDV significantly impacts employees' ability to attend and meaningfully engage in work; to fulfil the expectations of their role at work; to participate in the workplace environment, and impacts on career progression. For the majority of survey respondents, engagement in work presented numerous challenges.²⁹²

[290] A number of survey respondents noted that in many instances the impacts of violence and/or injuries sustained from an assault meant that they were unable to attend work, often at short notice and typically without proper explanation.²⁹³ The Monash Report notes that:

'The significant impacts that the experiences of DFV have on employees at work highlights the need to ensure that meaningful and effective supports are put in place to negate, where possible, the impacts of experiences of DFV and to support individuals to remain safe and engaged in work.'²⁹⁴

(ii) *FDV leave*

[291] The Monash Report finds that access to and experiences of using FDV leave (both paid and unpaid) 'were extremely varied' across the survey and interview samples.²⁹⁵ Just over half of survey respondents (53 per cent) reported that they did *not* have access to FDV leave.²⁹⁶

[292] The Monash Report goes on to make the following observations:

'For these victim-survivors the lack of paid family violence leave was closely associated with their experiences of economic insecurity and financial dependence during and following their experience of DFV. Research has consistently evidenced the immediate and long-term financial impacts of intimate partner violence on the economic security of victim-survivors, particularly women (Cortis and Bullen, 2015).'²⁹⁷

[293] Other participants drew comparisons between the existence of FDV leave policies and their own sense of safety, with one participant noting that had FDV leave been available, '[m]y daughter would feel safe. I would feel safe'.²⁹⁸

²⁹¹ Ibid pp.12, 14, 16.

²⁹² Ibid p.19.

²⁹³ Ibid p.20.

²⁹⁴ Ibid p.19.

²⁹⁵ Ibid p.27

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ Ibid.

[294] Of the 203 survey respondents who responded to a question asking if they had accessed FDV leave, 20.2 per cent had accessed family violence leave (paid or unpaid) while 28.1 per cent had accessed another form of leave.²⁹⁹ All survey respondents who had accessed FDV leave were employed in either a full-time or part-time ongoing role.³⁰⁰ No casuals or contractors who responded to the survey reported having accessed FDV leave.³⁰¹

[295] Survey respondents were invited to list what documentation they provided to their employees in order to access FDV leave.³⁰² The range of documentation provided included:

- copy of an intervention order
- letter from courts/court documents.
- medical/doctor's certificate
- letter from legal counsel
- statutory declaration
- Police report, and
- letter from psychologist/psychiatrist.³⁰³

[296] In many instances, it was unclear from the survey response received whether this was the required documentation or whether this was the specific documentation volunteered by the individual.³⁰⁴ In several circumstances, survey respondents listed numerous documents provided.³⁰⁵ However, it was not clear whether they submitted all these documents voluntarily to support their leave requests and/or whether these documents were considered sufficient evidence on the part of their employers.³⁰⁶

[297] The average number of paid FDV leave days that survey respondents could access was 14 days, ranging from one day and up to 3 months.³⁰⁷ Some respondents accessed 90 days of paid FDV leave and around one-third exhausted all FDV leave provisions.³⁰⁸ Over half responded that the period of leave offered was sufficient (60 per cent), while a number of those who felt the period of leave was insufficient instead suggested between 2 weeks and one month.³⁰⁹ The Report notes that 'this viewpoint aligns with emerging best practice

²⁹⁹ Ibid p.28.

³⁰⁰ Ibid.

³⁰¹ Ibid.

³⁰² Ibid 31.

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ Ibid.

³⁰⁶ Ibid.

³⁰⁷ Ibid p.30.

³⁰⁸ Ibid.

³⁰⁹ Ibid.

recommendations which propose a minimum of 10 to 14 days paid leave, and ideally the introduction of unlimited [FDV] leave'.³¹⁰

(iii) *The impact of workplace culture*

[298] Findings from the survey and interview data analysis show that access to and the use of any FDV leave (paid or unpaid) is inhibited by social stigma and shame. These feelings are exacerbated in unsupportive and unsafe workplaces. Many survey respondents and interview participants talked about their reluctance to disclose their experiences of FDV at work, often due to shame or embarrassment. As one survey respondent explained:

'I think I'd always struggle with bringing my personal situation into the light at work. Work was my salvation, my safe place, where I was sure of myself and respected (in stark contrast to home where I was screamed at and belittled and made to feel so useless) so I wouldn't have found it easy bringing DV issues up at work. When my home situation escalated and my former husband took a firearm and started shooting our children's pets (hard to write that without emotion) the kids and I put our surviving pets in the car and left. We just had the clothes we were wearing and fortunately [we had] family to go to. I called into work sick the next day, and at that point I reached out to my closest friend at work [and] told her what had happened, and she covered me for weeks. I was at work but barely functioning and she did whatever she had to make sure my workload covered. I should have taken more leave but that was on me, the organisation I worked for would have willingly given me leave without needing to know the details. (Survey respondent, female, information media and telecommunication).'³¹¹

[299] Some survey respondents did not access leave because they were unwilling to disclose their circumstances.³¹² The Monash Report states that access to, and use of, FDV leave is 'inhibited by social stigma and shame' and that the clear message which emerged from victim-survivors was: 'if workplaces do not have safe and supportive cultures, then the introduction and operation of any [FDV] policies are null'.³¹³

(iv) *Additional workplace supports*

[300] Beyond the provision of paid or unpaid FDV leave, there were a number of supports provided by employers that survey respondents and interview participants referred to as having played a critical role in ensuring their safety and participation in the workforce while experiencing FDV.³¹⁴ Supports listed through the survey and interviews as provided by employers could be broadly categorised under 3 key areas:

- flexible working arrangements
- safety planning and protocols, and
- workplace -based services and supports.³¹⁵

³¹⁰ Ibid.

³¹¹ Ibid p.34.

³¹² Ibid p.29.

³¹³ Ibid p.34.

³¹⁴ Ibid p.38.

³¹⁵ Ibid.

[301] In addition to the importance of paid FDV leave, the Monash Report finds that numerous survey respondents and interview participants identified flexible working arrangements as a critical support that can be provided by workplaces to increase the likelihood that a victim-survivor will be able to maintain employment during and after their experience of violence.³¹⁶ Flexible working arrangements can include changes to hours of work, amendments to work patterns or work location, and a shift in the duties required in a role.³¹⁷

(v) *Supports accessed by employees outside of their workplace*

[302] Survey respondents and interview participants listed a number of support services that were accessible outside of their workplace during their experience of FDV.³¹⁸ These include:

- legal services including women’s legal services
- domestic, family and sexual violence specialist services
- counselling services
- psychiatrists and psychologists
- court support
- child and family services
- mental health supports
- religious institutions – including pastors
- emergency housing and crisis accommodation
- health services including general practitioners (GPs) and emergency nurses
- Police, and
- victims’ services.³¹⁹

[303] The Monash Report concludes that:

‘When set alongside emerging best practice recommendations in Australia and internationally, the expertise and experience of victim-survivors identifies the need for workplaces to provide at minimum 14 days paid family violence leave, and ideally access to unlimited leave. The latter

³¹⁶ Ibid.

³¹⁷ Ibid.

³¹⁸ Ibid 42.

³¹⁹ Ibid.

recognising the long-term impacts of DFV on victim-survivors, the critical importance of their economic security, and the significant journey which accompanies the recovery phase.’³²⁰

[304] The Monash Report also notes that its findings support a recommendation made by the Australian Law Reform Commission in 2011 that:

‘There should be a core of basic requirements with respect to family violence leave, including that it should be paid, flexible and easily accessible where necessary, while containing sufficient safeguards to maintain the confidentiality of personal information and the integrity of the leave system.’³²¹

[305] The employer parties’ submissions address the relevance and reliability of the qualitative evidence in the Monash Report.

[306] ACCI argues ‘there is no reference in the study to the size of employers for whom participants worked nor the financial impact that many of the report’s recommendations would have (such as the need for paid FDV leave) on SMEs’.³²² ACCI also states that ‘it would have been helpful if the actual questions asked by those interviewing the participants could be provided, given that the form of a question can necessarily shape an answer that it is provided in response’.³²³

[307] Taking the last point first, it was open to ACCI to summons the authors of the Monash Report to give evidence and to call for the questions put to the interview participants; but it chose not to do so. Indeed, the validity of any of the findings or conclusions expressed in the Monash Report could have been challenged by calling for the records of the interviews and cross-examining the authors of the Report; as was done in the *Penalty Rates Decision* in respect of one of the qualitative studies.³²⁴ However, the employer parties in these proceedings chose not to do so. We therefore find no proper basis to conclude that the reliability of the Monash Report data and its conclusions were affected by the form of the questions asked. As to ACCI’s first point, the lack of reference to the size of the employers for whom participants worked would be of greater significance if the Monash Report was to be treated as quantitative evidence, but no party sought to rely upon it in this way. As to the issue of the financial impact of paid FDV leave, that is dealt with extensively in other evidence and, in any event, this is not relevant to the value of the Monash Report insofar as it recommends paid FDV leave based on qualitative research as to the impact of FDV on employees.

[308] Qualitative research often attempts to identify themes emerging from focus group discussions or interviews with individuals. Such research cannot usually be said to be representative of the views or experiences of *all* persons in the cohort from which the participants are drawn; but it can provide more detail and context, which assists in gaining a

³²⁰ Ibid p.44.

³²¹ Ibid.

³²² ACCI submissions in reply dated 4 February 2022 [8.25].

³²³ Ibid [8.26].

³²⁴ [2017] FWCFB 1001 [595]–[609].

deeper understanding about a particular issue. As a number of recent Full Bench decisions have observed, the validity of qualitative research is widely accepted.³²⁵

[309] In our view, it is important to listen to and take into account the evidence presented by victim-survivors of FDV. Qualitative research can provide a more detailed understanding of the circumstances of those experiencing FDV—its findings are not meant to be representative of all those who are experiencing or have experienced FDV.

[310] The opposing parties also highlight the Monash Report finding that survey respondents were often unwilling to disclose to their employer that they were experiencing FDV and therefore did not access FDV leave. ACCI states that ‘the provision of 10 days paid FDV leave would not be a solution for this issue’.³²⁶ Ai Group submits that the introduction of paid FDV leave ‘will not ... directly address many of the needs or concerns identified’.³²⁷ MGA submits that the research found that paid FDV leave did not ensure victim-survivors’ engagement in work³²⁸ and that the introduction of paid FDV leave will have ‘little impact’ if awareness and understanding among employers is not improved.³²⁹

[311] We accept that the introduction of paid FDV leave is not a panacea for the devastating effects of FDV. But the fact that some employees may be unwilling to disclose to their employer that they are experiencing FDV (and hence would not access paid FDV leave) is not a persuasive argument for not introducing such an entitlement. It simply means that not *all* employees experiencing FDV will choose to access such an entitlement.

[312] ACCI notes that some participants may have been referring to experiences prior to the introduction of 5 days’ unpaid FDV leave and that ‘this may alter and render parts of the Monash Report obsolete and unusable’.³³⁰ ACCI also argues that the Monash Report does not provide ‘real and tangible evidence’ as to why 14 days’ paid leave is necessary³³¹ and that ‘it is difficult to ascertain’ how it could be used to suggest that unlimited unpaid or 10 days’ of paid leave ‘represents an appropriate industrial minimum’.³³²

[313] As to the first proposition, the Monash Report states:

‘We note from the interview data that some victim-survivors were reflecting on experiences that predate the 2018 decision to include an employee entitlement to five days unpaid family and domestic violence leave.’³³³

³²⁵ *4 yearly review of modern awards – Social, Community, Home Care and Disability Services Industry Award 2010 – Substantive Claims* [2021] FWCFB 2383 [168]; *Horticulture Award 2020* [2021] FWCFB 5554 [123]–[126] and [179]–[183]. Also see *Penalty Rates Decision* [2017] FWCFB 1001 [1617].

³²⁶ ACCI submissions in reply dated 4 February 2022 [8.29].

³²⁷ Ai Group submissions in reply dated 4 February 2022 [244].

³²⁸ MGA submissions in reply dated 4 February 2022 [43].

³²⁹ *Ibid* [58].

³³⁰ ACCI submissions in reply dated 4 February 2022 [8.28].

³³¹ *Ibid* [8.30].

³³² *Ibid* [8.33].

³³³ Monash Report p.27.

[314] ACCI's submission that the fact that some participants referred to their experiences prior to the introduction of the 5 days' unpaid leave entitlement may have altered or rendered obsolete and unusable parts of the Monash Report is entirely speculative, was not the subject of any elaboration and was never put to the authors of the Report. For these reasons it is rejected.

[315] We also reject the second proposition. Contrary to ACCI's submission, the Monash Report does provide 'real and tangible evidence' as to the value of paid FDV leave and the quantum of leave required.

[316] Both Ai Group and ACCI highlight that flexible working arrangements are identified in the Monash Report as being a key part of an employer's ability to assist employees experiencing FDV. ACCI therefore submits that the needs of employees experiencing FDV will be different in every situation and that 'this position supports the current system which includes the baseline of the NES but allows employees and employers to come to situation specific accommodations'.³³⁴ Ai Group also notes that the Monash Report states that in some instances the employee may require various forms of flexibility and support such as leave from work, changes to working hours and/or changes to other working arrangements to ensure their personal safety.³³⁵

[317] We accept, as the Monash Report found, that flexible working arrangements play a critical role in ensuring the safety and workforce participation of employees experiencing FDV. But that proposition says nothing about the necessity of providing access to paid FDV leave; indeed the Monash Report concludes that there is a need for workplaces to provide at least 14 days' paid FDV leave.

[318] The qualitative evidence presented in the Monash Report details the impacts of FDV on the workplace and performance at work of victim-survivors. It provides an important perspective on the significant assistance that paid FDV leave can provide to improve the welfare of victim-survivors and that such leave helps individuals remain safe and engaged in work. As one survey respondent put it:

'If I didn't have access to [family violence] leave, I would have lost my job, I would have lost everything ... I don't know if I would have survived ... [paid family violence leave] was my lifeline. (Soraya, interview participant)'³³⁶

[319] It is convenient to note here that Professor Duncan discusses the Monash Report in Bankwest Curtin Economics Centre, *Family and Domestic Violence Leave Review: Supplementary Report prepared by the Bankwest Curtin Economics Centre for the Australian Council of Trade Unions* (21 December 2021) (Duncan Supplementary Report)³³⁷ and notes the finding that approximately 20 per cent of the respondents had accessed paid or unpaid FDV leave and 92.5 per cent of the respondents identified as female. Professor Duncan states that

³³⁴ ACCI submissions in reply dated 4 February 2022 [8.35].

³³⁵ Ai Group submissions in reply dated 4 February 2022 [243].

³³⁶ Monash Report p. 28.

³³⁷ Duncan Supplementary Report [34]–[42].

this finding was consistent with the assumption in the Duncan Report of a 20.1 per cent FDV leave utilisation rate amongst women.³³⁸

[320] Professor Duncan also notes that the Monash Report supports his conclusions as to the benefits of paid FDV leave in terms of reducing employer costs from absenteeism and lost productivity.³³⁹

[321] Professor Duncan was not cross-examined on the contents of his Supplementary Report and we accept this aspect of his evidence.

6.3.2 The Employer Survey

[322] The Commission conducted the Employer Survey to seek information on how employers support employees who have experienced or are experiencing FDV and, in particular, whether employees have access to either paid or unpaid FDV leave.

[323] The Employer Survey was designed by Commission staff and interested parties were able to provide comments on the draft survey instrument.³⁴⁰

[324] A final version of the Employer Survey was published with a [Statement](#) on 25 October 2021.³⁴¹

[325] The Employer Survey was distributed by ACCI, Ai Group and COSBOA to their members and was conducted between October and December 2021. Some 1340 responses were received.³⁴²

[326] The results of the [Employer Survey](#) were published on 10 December 2021 (the Employer Survey Report). The Survey results did not provide information on the number of members contacted by each employer organisation, or the response rate to the Survey.

[327] Among the Employer Survey respondents:

- almost half were from employers with 20 or fewer employees, while around one in 5 had more than 100 employees³⁴³
- the majority (87.4 per cent) had employees covered by a modern award, with around half responding that all employees in the organisation were covered by a modern award. Around one-quarter had some or all of their employees covered by an enterprise agreement³⁴⁴

³³⁸ Ibid [41].

³³⁹ Ibid [42].

³⁴⁰ [2021] FWCFB 2047 [15].

³⁴¹ [2021] FWCFB 6034.

³⁴² Employer Survey p.3.

³⁴³ Employer Survey p.4.

³⁴⁴ Ibid 5, 7.

- the most common modern award used was the Clerks – Private Sector Award 2020 (22.3 per cent) followed by the Manufacturing and Associated Industries and Occupations Award 2020 (13.4 per cent),³⁴⁵ and
- the most commonly reported industries by Survey respondents were Manufacturing (17.7 per cent), Construction (10.8 per cent) and Retail trade (10.1 per cent).³⁴⁶

[328] Around 7 per cent of respondent employers had employees who had taken unpaid FDV leave in the last 12 months.³⁴⁷ The majority (around two-thirds of respondents) had only 1 employee who had taken unpaid FDV leave in the last 12 months; that is, only around 0.05 per cent of all employees of the Survey respondents had taken unpaid FDV leave in the last 12 months.³⁴⁸

[329] About 20 per cent of Survey respondents provided paid FDV leave.³⁴⁹ The most common responses were that employees could take 5 days or 10 days of paid FDV leave each year.³⁵⁰ Almost all of those Survey respondents answered that paid FDV leave was available to full-time employees, while most responded that it was available to part-time employees in full or on a pro-rata basis.³⁵¹ Around half of those Survey respondents answered that paid FDV leave was available to casual employees.³⁵² Fewer than one-third of Survey respondents answered that their organisation is covered by an enterprise agreement that contains paid FDV leave entitlements.³⁵³

[330] While the Employer Survey found that one in 5 organisations provided employees with paid FDV leave,³⁵⁴ this varied by business size. Organisations that employed more than 100 employees comprised the highest proportion of those that provided employees with paid FDV leave (35.5 per cent), followed by organisations that employed one to 5 employees (20.7 per cent) (Chart 1).³⁵⁵

³⁴⁵ Ibid p.6.

³⁴⁶ Ibid p.9.

³⁴⁷ Ibid p.11.

³⁴⁸ Ibid p.12.

³⁴⁹ Ibid 18.

³⁵⁰ Ibid 19.

³⁵¹ Ibid 20.

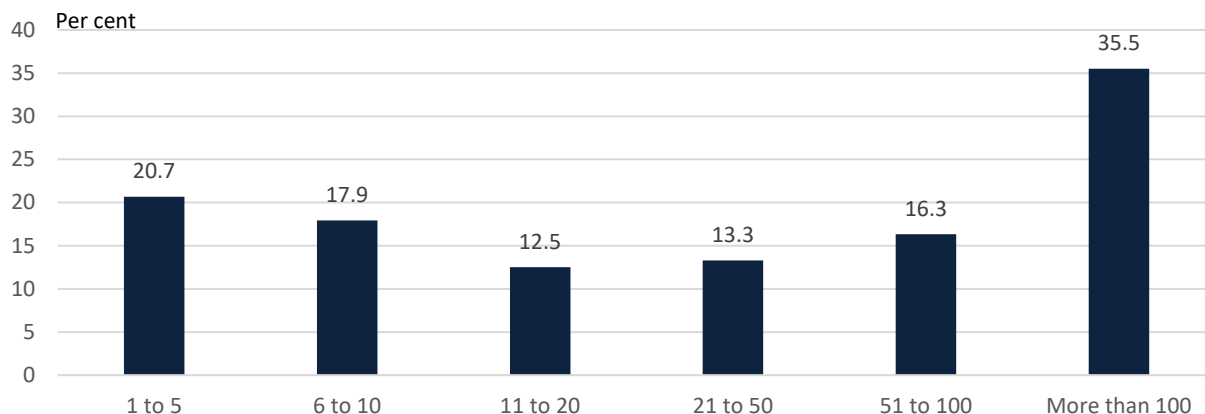
³⁵² Ibid.

³⁵³ Ibid 23.

³⁵⁴ Employer Survey p.18.

³⁵⁵ Fair Work Commission (2022) *Information Note – Paid Family and Domestic Violence Leave by business size*, 11 March.

Chart 1: Does your organisation provide employees with paid FDV leave?³⁵⁶



Note: Based on 859 responses. Excludes organisations that had no employees.

[331] Over one-quarter of Survey respondents required employees accessing paid FDV leave to provide evidence of their need to take leave; a further 30 per cent of respondents required evidence some of the time.³⁵⁷ The most common reasons that employees accessed paid FDV leave were to attend medical appointments, make arrangements for their safety, attend support services, attend court hearings and access legal or police services.³⁵⁸

[332] The most common types of support provided by Survey respondents were access to annual leave, personal/carer’s leave or long service leave (LSL); flexible working arrangements (such as changes to duties or work location); unpaid FDV leave entitlements in addition to those contained in the NES, and employee assistance programs or other support services.³⁵⁹

[333] We note that Chart 11 in the Employer Survey Report shows that 91.3 per cent of respondents who had received requests for more than 5 days’ unpaid FDV leave, granted all requests.³⁶⁰ The remaining respondents (8.7 per cent) granted *some* of the requests.³⁶¹ Among respondents who did not grant all of the requests, the reasons given were that the employee was eligible to take a form of paid leave and that the employee did not provide the evidence required.³⁶²

[334] Further, the overwhelming majority of respondents to the Employer Survey provided employees with additional leave or support to that required by the FW Act, or by an applicable enterprise agreement or modern award. Some 71.9 per cent of respondents provided such additional leave or support *in all instances* and a further 15.8 per cent provided additional leave or support *in some instances*.³⁶³

³⁵⁶ Ibid.

³⁵⁷ Employer Survey p.22.

³⁵⁸ Ibid p.21.

³⁵⁹ Ibid p.25.

³⁶⁰ Ibid p.14.

³⁶¹ Ibid.

³⁶² Ibid.

³⁶³ Ibid p.27.

[335] The ACTU contends that the Employer Survey results provide evidence that the ‘industrial norm for the provision of paid FDV leave is between 10 and 14 days’.³⁶⁴ Based on the results of the Employer Survey, the ACTU calculates that ‘the quantum of [paid FDV] leave entitlements is close to evenly split between employers who provide 10 *or more* days of paid FDV leave (49.7 per cent) and employers who provide 9 or less days (50.3 per cent)’, although it notes that the demographic characteristics of the employers and the number of employees covered is not known.³⁶⁵

[336] The ACTU also submits that the Employer Survey ‘does not indicate that employers are experiencing operational difficulties with the implementation of paid or unpaid FDV leave provisions’.³⁶⁶ This submission was based on the proportion of Survey respondents that required employees to provide evidence of their need to take unpaid FDV leave, which according to the ACTU, was consistent with the survey conducted as part of the Monash Report.³⁶⁷

[337] The ACTU also submits that, as around half of Survey respondents provided paid FDV leave to casual employees, ‘this suggests that there is no inherent or structural barrier to award-covered employers providing paid leave to casual employees’.³⁶⁸ However, Ai Group argues that the Employer Survey ‘does not suggest that a paid leave entitlement for casual employees is workable in the context of all casuals and across the awards system’.³⁶⁹

[338] ACCI submits that the Employer Survey demonstrates that employers voluntarily provide paid FDV leave in certain circumstances, and that when leave is sought it is granted.³⁷⁰ Ai Group also notes that no employer rejected a request for more than 5 days of unpaid FDV leave in a 12 month period.³⁷¹ MGA submits that the results of the Employer Survey demonstrate that prescribing paid FDV leave is not necessary, as the Survey shows that many employers have implemented specific FDV leave policies, introduced FDV leave entitlements in enterprise agreements, and provide other means of support and flexibility to employees.³⁷²

[339] As to the reliability of the Employer Survey, the ACTU contends that the Survey results should be ‘treated with a degree of caution’, as the composition of employer parties’ membership and the representativeness of Survey respondents to award-reliant employers is unknown.³⁷³ ACCI states that the ‘representativeness or otherwise of the employer survey can be discerned in part from the answers to the questions asked’, but accepts that the results of the Employer Survey must be ‘assessed subject to its own limitations’.³⁷⁴

³⁶⁴ ACTU supplementary submissions dated 22 December 2021 [57].

³⁶⁵ Ibid [60].

³⁶⁶ ACTU submissions in reply dated 21 February 2022 [80].

³⁶⁷ Ibid.

³⁶⁸ ACTU supplementary submissions dated 22 December 2021 [68].

³⁶⁹ Ai Group submissions in reply dated 4 February 2022 [338].

³⁷⁰ ACCI submissions in reply dated 4 February 2022 [8.9](a), [8.9](d).

³⁷¹ Ai Group submissions in reply dated 4 February 2022 [235](g).

³⁷² MGA submissions in reply dated 4 February 2022 [29].

³⁷³ ACTU supplementary submissions dated 22 December 2021 [26].

³⁷⁴ ACCI submissions in reply dated 4 February 2022 [8.4]-[8.5].

[340] In reference to the ACTU’s argument that the Employer Survey should be treated with caution, Ai Group submits:

‘It does not appear to be asserted that the value of the survey has been materially undermined by any unrepresentativeness of the cohort who responded to it; nor is the survey relied upon by Ai Group as being representative of industry generally. We nonetheless note that some 1340 employers responded to the survey. The employers range in their size and the industry in which they operate. The survey therefore provides instructive and contemporary insights into the experiences of employers.’³⁷⁵

[341] A number of Full Bench decisions have commented on the task of assessing the probative value of survey evidence.³⁷⁶

[342] As observed by the Expert Panel in the *2012-13 Annual Wage Review* decision:

‘There are well-understood rules about the conduct of surveys that need to be followed if the results of a survey of a sample of a particular population are to accurately represent the picture that you would get if you obtained the same information from that entire population. These rules include that the sample size or proportion sampled must be large enough. Most important, the sample for the survey must be selected on a random basis. If a membership list is used as the basis for a survey, then it is essential that those that respond are properly representative of the entire membership base (e.g. by firm size, form of ownership, industry sector, geographic location). Where this is not the case, then the responses become more like case studies or anecdotes—accounts of the situation of those who did respond, but not to be taken as representative of the survey population (e.g. the membership) as a whole. Even where the survey is representative of the membership, it needs additional evidence to show that it is representative of, for example, employers more broadly.

...

In evaluating the extent to which we can rely on survey evidence that is submitted to us, we would look for an account of the nature of the survey population, the method of collecting responses, the response rate and total number, evidence that the respondents are a true random sample (or close enough) of the survey population, and testing of findings against comparable aggregates produced by the ABS or other known reliable sources. It would also assist to provide a record of the questions asked.’³⁷⁷

[343] We adopt these observations; subject to the qualification that evidence, and in particular survey evidence, is rarely perfect. Part of our task is to determine the probative value of the survey evidence here. As observed by the Full Bench in the *Penalty Rates Decision*:

‘The assessment of survey evidence is not a binary task – that is, such evidence is not simply accepted or rejected. Most survey evidence has methodological limitations – be it sample related the nature of the questions put or the response rate. The central issue is the extent to which the

³⁷⁵ Ai Group submissions in reply dated 4 February 2022 [237].

³⁷⁶ See *Penalty Rates Decision* [1063]–[1098] and [1190]–[1264]; *Annual Wage Review 2012-13* [2013] FWCFB 4000 [442]–[446]; and Application to vary the *Horticulture Award 2020* [2021] FWCFB 5554 [110]–[122].

³⁷⁷ [2013] FWCFB 4000 [441]–[442].

various limitations impact on the reliability of the results and the weight to be attributed to the survey data.³⁷⁸

[344] No party suggests that the Employer Survey was a random stratified sample of the relevant population. Nor is it suggested that the results can be extrapolated to employers generally.

[345] In the *Penalty Rates Decision*, the Full Bench observed that ‘the methodological problems associated with some survey evidence may mean that rather than dismiss the evidence the results are accepted as indicative or anecdotal, rather than definitive’.³⁷⁹ That observation is apposite in the present context. We propose to treat the results of the Employer Survey as indicative or anecdotal rather than definitive. That said, the results do represent the views of 1340 employers and they provide useful information on how employers support employees who have experienced or are experiencing FDV, and whether employees have access to either paid or unpaid FDV leave.

[346] The results of the Employer Survey also inform the debate on the likely utilisation rate of an award entitlement to 10 days’ paid FDV leave and we discuss this in Chapter 7 of our decision.

6.3.3 The WAD Analysis

[347] The Social Work Innovation Research Living Space (SWIRLS) of Flinders University was contracted to undertake analysis of the Attorney-General’s Department’s Workplace Agreements Database (the WAD Analysis).

[348] The WAD Analysis provides an overview of FDV clauses or provisions in current enterprise agreements as at 30 June 2021 and enterprise agreements approved between 7 July 2018 to 30 June 2021.³⁸⁰ The latter captures the period after the 2018 decision that finalised a model term for unpaid FDV leave.³⁸¹ As outlined in the research program published in April 2021, the scope of the WAD Analysis was to update evidence filed by Ai Group in the earlier FDV leave proceedings.³⁸²

[349] The WAD Analysis contains data on both current and approved enterprise agreements. Current enterprise agreements analysed in the WAD Analysis are those agreements that have been approved and that have commenced but have not been terminated, have not nominally expired and have not been replaced,³⁸³ as at 30 June 2021. Approved enterprise agreements in the Analysis are those agreements that were approved by the Commission between 7 July 2018 and 30 June 2021. Given the characteristics of the 2 datasets, we have assumed that there is

³⁷⁸ [2017] FWCFB 1001 [1097].

³⁷⁹ *Ibid* [1069].

³⁸⁰ WAD Analysis p.1.

³⁸¹ *Ibid*.

³⁸² [2021] FWCFB 2047 [15].

³⁸³ Australian Government Attorney-General’s Department (2021), *Trends in Federal Enterprise Bargaining Report*, September quarter 2021 p. 48.

likely to be a significant overlap in the agreements analysed in the current agreement and approved agreement datasets.

[350] The WAD Analysis found that there were 6,172 current enterprise agreements as at 30 June 2021 with some type of FDV clause or provision,³⁸⁴ which accounted for 60.6 per cent of all current enterprise agreements.³⁸⁵ A total of 1,550,344 employees were covered by these agreements, or 87.0 per cent of all employees covered by current enterprise agreements as at 30 June 2021. There has been an increase in the proportion of employees covered by current enterprise agreements with some type of FDV clause, of about 49.24 percentage points between 30 June 2016 and 30 June 2021.³⁸⁶

[351] Of the 6,172 current enterprise agreements with some type of FDV clause or provision, 43.5 per cent had paid FDV leave provisions and 55.2 per cent had unpaid FDV leave provisions.³⁸⁷

[352] Construction accounted for the highest proportion of current enterprise agreements with some type of FDV clause or provision (36.0 per cent), while Education and training accounted for the highest proportion of employees covered by current enterprise agreements with some type of FDV clause or provision (20.7 per cent).³⁸⁸

[353] Around one-third (34.7 per cent) of current enterprise agreements with some type of FDV clause or provision cover 1 to 15 employees, and around one-quarter (26.3 per cent) cover 16 to 50 employees.³⁸⁹ A further one-quarter of current agreements cover more than 100 employees.³⁹⁰

[354] The WAD Analysis found that there were 7,879 enterprise agreements approved from 7 July 2018 to 30 June 2021 with some type of FDV clause or provision, accounting for 64.4 per cent of enterprise agreements approved in the period.³⁹¹ This proportion was 27.8 percentage points higher compared with the period analysed in the Ai Group evidence for the *March 2018 FDVL Decision* (6 July 2016 to 6 July 2018).³⁹²

[355] A total of 1,684,047 employees were covered by approved enterprise agreements with some type of FDV clause or provision, accounting for 87.03 per cent of all employees covered by enterprise agreements approved from 7 July 2018 to 30 June 2021.³⁹³ The number of

³⁸⁴ Examples include: additional entitlements for employees experiencing FDV, flexible working arrangements, or access to both paid or unpaid leave.

³⁸⁵ While the WAD Analysis stated that only 6.28 per cent of current agreements had some type of FDV clause or provision, SWIRLS has noted that this was a typographical error and the correct proportion is 60.6 per cent. For more information, see Fair Work Commission (2022), *Information note—ACTU supplementary submission to the Family and Domestic Violence Leave Review*, 11 March.

³⁸⁶ WAD Analysis p.3.

³⁸⁷ Ibid.

³⁸⁸ Ibid pp.4–5.

³⁸⁹ Ibid p.7.

³⁹⁰ Ibid p.8.

³⁹¹ Ibid p.10.

³⁹² Ibid.

³⁹³ Ibid 16.

employees covered by the agreements was around 22.7 per cent higher compared with the period analysed for the *March 2018 FDVL Decision*.³⁹⁴

[356] Around one-third of all enterprise agreements approved from 7 July 2018 to 30 June 2021 (32.8 per cent) have paid FDV leave provisions and almost the same proportion (31.8 per cent) have unpaid FDV leave provisions.³⁹⁵ These enterprise agreements cover 61.7 per cent and 42.6 per cent of employees, respectively.³⁹⁶

[357] Around one in 8 enterprise agreements approved from 7 July 2018 to 30 June 2021 contained FDV provisions with access to other/existing leave and/or non-leave entitlements/support, while around one in 10 enterprise agreements approved have provisions for carers/supporters of FDV victims.³⁹⁷

[358] Around 2 in 5 enterprise agreements (39.5 per cent) approved in the period with some type of FDV clause or provision cover one to 15 employees and around one-quarter of approved enterprise agreements (25.2 per cent) cover 16 to 50 employees.³⁹⁸ Less than one-quarter of such approved enterprise agreements (22.5 per cent) covered more than 100 employees.³⁹⁹

[359] The parties commented on the relevance of the WAD Analysis in their submissions.

[360] The ACTU states that the number of enterprise agreements currently in operation is not reflected by either the approved or current enterprise agreements datasets, but, subject to this caveat, the analysis of approved enterprise agreements is ‘reasonably likely to reflect the number of enterprise agreements currently in operation’.⁴⁰⁰ This is in part because current enterprise agreements exclude agreements that have passed their nominal expiry date but have not been terminated or replaced,⁴⁰¹ so that the dataset of approved enterprise agreements ‘is likely to more accurately reflect current trends in enterprise agreement content’.⁴⁰²

[361] Issues regarding the current agreement analysis of the WAD Analysis raised by the ACTU and Dr Stanford were addressed in an information note published by the Commission on 11 March 2022.⁴⁰³ Commission staff contacted the Attorney-General’s Department to obtain data on the number of employees covered by the 2685 current enterprise agreements with a paid FDV leave policy as at 30 June 2021. According to the Attorney-General’s Department, there were around 1.13 million employees on current enterprise agreements (or 63.5 per cent of all employees on current enterprise agreements) that contained paid FDV leave.⁴⁰⁴

³⁹⁴ Ibid p.17.

³⁹⁵ Ibid p.10.

³⁹⁶ Ibid p.17.

³⁹⁷ Ibid p.10.

³⁹⁸ Ibid p.35.

³⁹⁹ Ibid.

⁴⁰⁰ ACTU supplementary submissions dated 22 December 2021 [10](d).

⁴⁰¹ Ibid.

⁴⁰² Ibid [14].

⁴⁰³ Fair Work Commission (2022), *Information note—ACTU supplementary submission to the Family and Domestic Violence Leave Review*, 11 March.

⁴⁰⁴ Ibid.

[362] ACCI submits that while the WAD Analysis ‘may be of some interest’ it is unable to account for the ability of businesses operating under awards to offer paid FDV leave in the same way as businesses using enterprise agreements; and the content of an enterprise agreement is ‘not reflective of an appropriate minimum standard but rather a bargained outcome above the minimum’.⁴⁰⁵

[363] ACCI disagrees with Dr Stanford’s comment that the provision of paid FDV leave entitlements has become ‘a common feature of employment policy’, noting that only 32.8 per cent of approved enterprise agreements that contain some form of FDV provision have paid FDV leave.⁴⁰⁶ ACCI further notes, that just over half of enterprise agreements approved in the period of analysis with paid FDV leave were in Construction, demonstrating that this is not an ‘economy-wide practice’ and not reflected in other industries.⁴⁰⁷ ACCI highlights that Manufacturing accounts for a higher proportion of enterprise agreements with unpaid FDV leave (14.7 per cent) than paid FDV leave (4.7 per cent), indicating ‘a far greater willingness and inclination to provide unpaid FDV leave than paid FDV leave’.⁴⁰⁸ ACCI adds that the ‘overwhelming majority’ of enterprise agreements with paid FDV leave are in Victoria and cover unions⁴⁰⁹ and ‘therefore cannot be said to be reflective of other Australian workplaces’.⁴¹⁰ ACCI submits that the conclusion from this analysis suggests that, following the introduction of unpaid leave in modern awards and the NES, ‘paid FDV leave is a commonly achieved aspect of enterprise bargaining’, but it is far from ubiquitous and does not reflect a minimum standard even in enterprise bargaining.⁴¹¹

[364] In referring to these data, the ACTU notes that Construction ‘has low rates of female participation’ and that industries with the highest proportion of female employees, such as Health care and social assistance and Education and training, represent just 20 per cent of enterprise agreements approved in the period of analysis with paid FDV leave.⁴¹² According to the ACTU, that the ‘substantial majority’ of enterprise agreements with some form of FDV leave cover unions suggests workers in industries without strong union representation are less likely to be protected by FDV provisions and argues that the data ‘do not necessarily translate into improved access to paid FDV leave entitlements for employees who need them the most’.⁴¹³

[365] The ACTU highlights that the WAD Analysis showed nearly two-thirds of enterprise agreements approved in the period from 7 July 2018 to 30 June 2021 provide for 10 days of paid FDV leave (62.6 per cent) and just 18.3 per cent provide less than 10 days (the correct proportion is 20.3 per cent); and that over half of employees covered by these agreements have

⁴⁰⁵ ACCI submissions in reply dated 4 February 2022 [8.18].

⁴⁰⁶ Ibid [8.20](e)(i).

⁴⁰⁷ Ibid [8.20](a).

⁴⁰⁸ Ibid [8.20](b).

⁴⁰⁹ Ibid.

⁴¹⁰ Ibid [8.20](c).

⁴¹¹ Ibid [8.20](b).

⁴¹² ACTU supplementary submissions dated 22 December 2021 [77].

⁴¹³ Ibid.

access to 10 days or more of paid FDV leave (55.5 per cent).⁴¹⁴ ACCI agrees that while most agreements that provide paid FDV leave specify 10 days, this accounts for only 27.6 per cent of employees.⁴¹⁵

[366] Ai Group submits that the increase in the proportion of enterprise agreements that contain some type of clause dealing with FDV since 2016 ‘suggests that the absence of such an entitlement [to paid FDV leave] from the safety net may encourage collective bargaining’.⁴¹⁶ The ACTU suggests that this ‘causal relationship’ was not explained by Ai Group and that it is ‘equally possible that the introduction of unpaid FDV leave to modern awards and later to the NES, has encouraged collective bargaining on workplace responses to FDV more broadly ... and that the introduction of a paid FDV leave entitlement will further encourage bargaining on this issue’.⁴¹⁷ MGA submits that these data show FDV ‘is currently adequately dealt with at the enterprise level’⁴¹⁸ while ACCI submits that as employees already have access to paid leave, this means that introducing paid FDV leave is not necessary ‘within the meaning of the Act’.⁴¹⁹

[367] In our view, it is more appropriate to focus on approved enterprise agreements in the WAD Analysis as this is reasonably likely to reflect the current trends in enterprise agreement content. The data in respect of approved enterprise agreements is set out above.

[368] The WAD Analysis shows that just over 64 per cent of enterprise agreements approved between 7 July 2018 and 30 June 2021 have some type of FDV clause or provision, accounting for the majority of employees covered by these enterprise agreements. Around one-third of all enterprise agreements approved from 7 July 2018 to 30 June 2021 (32.8 per cent) have *paid* FDV leave provisions.

[369] The most common number of paid FDV leave days provided was 10 days, accounting for 62.6 per cent of enterprise agreements with paid FDV leave provisions approved in the period and covering 27.6 per cent of employees.⁴²⁰ A further 9.9 per cent of approved enterprise agreements provided for more than 10 days of paid FDV leave, covering 27.9 per cent of employees.⁴²¹ For approved enterprise agreements with unpaid FDV leave provisions, 85.2 per cent provided for 5 to 9 days, accounting for 61.9 per cent of employees.⁴²²

[370] As for the debate about the relationship between the introduction of unpaid FDV leave and bargaining, no evidence is advanced in support of Ai Group’s thesis that the absence of a paid safety net entitlement may have encouraged collective bargaining. Further, as we observe later, in a number of Annual Wage Reviews the Expert Panel has pointed to the ‘complexity of factors which may contribute to decision making about whether or not to bargain’, and that

⁴¹⁴ Ibid [58].

⁴¹⁵ ACCI submissions in reply dated 4 February 2022 [8.20](e)(ii).

⁴¹⁶ Ai Group submissions in reply dated 4 February 2022 [458].

⁴¹⁷ ACTU submissions in reply dated 21 February 2022 [40].

⁴¹⁸ MGA submissions in reply dated 4 February 2022 [27].

⁴¹⁹ ACCI submissions in reply dated 4 February 2022 [8.20(e)(iii)].

⁴²⁰ WAD Analysis pp.44-45.

⁴²¹ Ibid.

⁴²² Ibid.

complexity has led the Expert Panel to conclude that it is ‘unable to predict the precise impact [of its decisions] on collective bargaining with any confidence’.⁴²³

6.3.4 The SWIRLS Report

[371] The SWIRLS Report presents data and literature analysis about the nature, prevalence and workplace responses to FDV and addresses the following questions:

- What is the nature and prevalence of FDV in Australia?
- What are the direct economic costs of FDV on individuals?
- What approaches have been taken across Australia to address FDV leave, including paid or unpaid leave and/or other flexibilities?
- What is the impact of FDV leave on workplaces, and the Australian economy?⁴²⁴

[372] The SWIRLS Report begins with an overview of data concerning the nature and prevalence of FDV in Australia, followed by the presentation of findings from a ‘Systematic Literature Review’. The Systematic Literature Review summarises evidence and findings regarding the nature, prevalence and workplace responses to FDV from academic papers, government and consultancy reports. It also covers data on the economic impacts and approaches to FDV leave across Australia.⁴²⁵

[373] Based on the literature review, the SWIRLS Report observes that FDV is a widespread problem with significant consequences that occur across all ages and socioeconomic and demographic groups, but mainly impacts on women and children who suffer emotional, mental and physical issues including the erosion, over time, of employment stability.⁴²⁶

[374] Data presented on key FDV prevalence patterns in the SWIRLS Report include that:

- women were nearly 3 times more likely to experience partner violence than men⁴²⁷
- approximately one in 6 women have experienced physical violence by a current or previous partner since the age of 15⁴²⁸
- women were 8 times more likely than men to experience sexual violence by a partner⁴²⁹

⁴²³ [2016] FWCFB 3500 [540].

⁴²⁴ SWIRLS Report p.1.

⁴²⁵ Ibid.

⁴²⁶ Ibid p.4.

⁴²⁷ Ibid p.2.

⁴²⁸ Ibid.

⁴²⁹ Ibid p.3.

- almost one in 4 women report experiencing emotional abuse by a current and/or previous partner since the age of 15⁴³⁰
- women who report violence by a current or previous partner often report multiple incidences of violence⁴³¹
- most women who have experienced current partner violence have never contacted police⁴³²
- most women who have experienced physical and/or sexual violence report they do not want to leave that relationship, and⁴³³
- for women in vulnerable populations:
 - those with disability or a long-term health condition were twice as likely as women without disability to experience physical and/or sexual violence by a cohabiting partner, and women with intellectual/psychological disability were nearly three times more likely again⁴³⁴
 - lesbian and bisexual women experience more physical, sexual and emotional abuse than exclusively heterosexual women⁴³⁵
 - those living outside major cities (23 per cent) were more likely to have experienced violence from a current or previous partner since the age of 15 years than women living in major cities (15 per cent),⁴³⁶ and
 - indigenous women were more likely to be hospitalised for FDV than non-indigenous women (32 times as likely).⁴³⁷

[375] The SWIRLS Report notes that FDV is also a leading contributing factor in preventable disease, contributing more to the burden of disease for women aged 18–44 years old than any other risk factor.⁴³⁸ It also notes that for those women living in rural and remote areas who have experienced violence from a current or previous partner, difficulties in accessing both formal and informal support also make it more difficult for victims to leave violent relationships.⁴³⁹

[376] The SWIRLS Report comments that FDV contributes to economic harm, particularly through its impact on the paid employment of women, contributing to broader gender inequalities. Research set out in the Report estimates that 62 per cent of women who have experienced FDV are employed, with other research finding that they earn relatively lower

⁴³⁰ Ibid.

⁴³¹ Ibid.

⁴³² Ibid.

⁴³³ Ibid pp.2–3.

⁴³⁴ Ibid p.4

⁴³⁵ Ibid.

⁴³⁶ Ibid.

⁴³⁷ Ibid.

⁴³⁸ Ibid p.2.

⁴³⁹ Ibid p.4.

incomes, which was linked to a move to part-time or casual work and/or full-time caring roles following FDV.⁴⁴⁰ The SWIRLS Report also highlights that higher participation of women in part-time and casual employment is significant for FDV leave,⁴⁴¹ and that FDV ‘erodes women’s position in the workforce’.⁴⁴²

[377] Additional data referred to in the SWIRLS Report includes that:

- 55–70 per cent of victims are employed full time
- victims of FDV earn 35 per cent less than non-victims
- the majority (60 per cent) of victims reported changes to their work hours, location and job classification, and
- 67 per cent of employed victims changed employers, and of those who did change, safety concerns (30 per cent), difficulty performing at work (27 per cent) and/or embarrassment about the situation (30 per cent) were cited as reasons.⁴⁴³

[378] Impacts at the workplace are also identified in the SWIRLS Report, with research supporting a finding that experiences of FDV left women feeling distracted, tired, unwell or afraid at work, leading to absences and leave which often resulted in reduced income or disrupted work histories.⁴⁴⁴ One report found that one in 11 women had taken time off work due to FDV from a current partner compared with one in 25 men.⁴⁴⁵ The proportion is higher (one in 5 women) in relation to FDV from a previous partner. Expenses incurred by victims of FDV include medical treatment, police support, legal advice, counselling and judicial support, with the average cost of leaving FDV estimated at \$18,000 per person.⁴⁴⁶

[379] The SWIRLS Report observes that there is ‘a lack of comparative research’ which systematically identifies the different impacts of paid and unpaid FDV leave; but it did discuss research on potential or likely outcomes of FDV leave on the workplace.⁴⁴⁷ Such impacts include reduced staff turnover; a more positive work environment; stronger employee morale, and reduced social isolation. One report suggests that any costs to employers from providing FDV leave would be significantly offset by the benefits.⁴⁴⁸

⁴⁴⁰ Ibid p.5.

⁴⁴¹ Ibid p.1.

⁴⁴² Ibid p.5.

⁴⁴³ Ibid.

⁴⁴⁴ Ibid.

⁴⁴⁵ Ibid.

⁴⁴⁶ Ibid.

⁴⁴⁷ Ibid.

⁴⁴⁸ Ibid p.6.

[380] The SWIRLS Report observes that FDV is widely acknowledged as a barrier to achieving gender equality both in the workplace⁴⁴⁹ and more generally⁴⁵⁰ and goes on to state:

‘... Given the recognition that FDV “erodes working women’s access to safe and full-time work”, FDV leave entitlements can be considered a key element in efforts to secure greater gender equality. FDV leave, for example, is an important means for “maintaining the economic security necessary to potentially leave and recover from a violent relationship”. FDV leave plays a role in mitigating the barriers for women in accessing the resources they need to rebuild their lives. As a strategy for supporting women’s continued employment – and hence, women’s economic independence – FDV leave entitlements can contribute to reducing the damaging impacts of FDV for, not only, individual women but also the broader economy ...

... without access to FDV leave, women face an increased risk of financial instability and homelessness that impacts on their ability to leave abusive relationships. Recent publications also emphasise that employment is a crucial pathway for women escaping violent relationships.’⁴⁵¹ [Research references omitted]

[381] The ACTU contends that the SWIRLS Report supports conclusions that FDV has a ‘significant adverse impact’ on victims, their families and the community; that employment can provide a pathway out of FDV and a ‘critical source of economic and physical safety’, and that the economic costs cited supports its submissions.⁴⁵² The ACTU submits that the SWIRLS Report found that FDV disproportionately affects women; that the majority of women who have experienced FDV are employed; that the negative effects are felt both in the immediate and long-term,⁴⁵³ and that the disproportionate number of women in casual and part-time work is ‘especially significant’.⁴⁵⁴

[382] Submissions by MGA, ACCI and Ai Group comment on the lack of recent data and studies, as well as the reliability of data referred to in the SWIRLS Report.

[383] MGA argues that decisions on paid FDV leave should be postponed due to there being little new material for analysis, and that significant gaps in the data that is currently available make them unreliable.⁴⁵⁵ For the reasons given in Chapter 1 we do not propose to postpone the FDVL Review.

[384] ACCI refers to a disclaimer in the SWIRLS Report that notes there had been little new data or research since the *March 2018 FDVL Decision* and that ‘the existing literature presents little new material for analysis’.⁴⁵⁶ ACCI submits that this ‘demonstrates that the Full Bench

⁴⁴⁹ Ibid p.7 citing Weatherall R, Gavin M and Thorburn N (2021), ‘Safeguarding women at work? Lessons from Aotearoa New Zealand on effectively implementing domestic violence policies’, *Journal of Industrial Relations*, Vol. 63, No. 4, pp. 568–590.

⁴⁵⁰ Ibid citing ANROWS. (2019). *Paid domestic and family violence (DFV) leave: Summary of the evidence*. Sydney, NSW, Australia’s National Research Organisation for Women’s Safety (ANROWS). <https://www.anrows.org.au/resource/summary-of-the-evidence-paid-domestic-and-family-violence-dfv-leave/>.

⁴⁵¹ Ibid p.7.

⁴⁵² ACTU supplementary submissions dated 22 December 2021 [38]–[40].

⁴⁵³ Ibid [32]–[33].

⁴⁵⁴ Ibid [69].

⁴⁵⁵ MGA submissions in reply dated 4 February 2022 [60].

⁴⁵⁶ ACCI submissions in reply dated 4 February 2022 [8.12].

simply has not been put in a position which it can make a meaningful determination'.⁴⁵⁷ Further, ACCI submits that the SWIRLS Report is unable to provide evidence on the amount of unpaid FDV leave being taken and/or how many days of paid FDV leave are required.⁴⁵⁸ Similarly, Ai Group submits that there is 'little if any analysis' on the uptake of unpaid FDV leave⁴⁵⁹ and argues that data from WGEA cited in the SWIRLS Report demonstrates that employers support employees experiencing FDV.⁴⁶⁰

[385] In our view, the SWIRLS Report provides a collation of relevant data on the demographics of FDV victims; its impacts on their incomes, experiences at the workplace and with their employers, and costs to the individual and broader economy. In particular, it highlights the disproportionate effect on women workers and the significant impact on their economic security. This information will assist our evaluation of whether the introduction of paid FDV leave into modern awards is necessary, in the sense contemplated by s.138 of the FW Act.

[386] The studies and data cited in the SWIRLS Report support a finding that FDV 'erodes working women's access to safe and full-time work'.⁴⁶¹

[387] The narrative and data in the SWIRLS Report supports a finding that FDV leave can assist employees experiencing FDV by maintaining their economic security and mitigating the barriers to accessing resources needed to deal with FDV.

[388] The research cited in the SWIRLS Report also suggests that continuity of employment is linked to both long-term financial security for those experiencing FDV and also lower hiring and training costs for employers.

6.3.5 Research Reference List

[389] The Commission's [Research Reference List](#) has been updated throughout the FDVL Review and was most recently published on 6 April 2022. The introduction to the Research Reference List notes that:

'the Full Bench proposes to have regard to the materials set out in the Research reference list. Parties may address any issues regarding the Research reference list in their submissions in accordance with the current timetable set out at [20] of the Statement issued on 19 October 2021 ([2021] FWCFB 6028).'⁴⁶²

[390] The Research Reference List contains 162 documents consisting of: 61 published research articles and books; 53 working papers and reports; 26 Government reports; and 22 data sources. We refer to some of these documents later in our decision.

⁴⁵⁷ Ibid [8.15].

⁴⁵⁸ Ibid [8.11].

⁴⁵⁹ Ai Group submissions in reply dated 4 February 2022 [267].

⁴⁶⁰ Ibid [234]-[235](f).

⁴⁶¹ SWIRLS Report p.7.

⁴⁶² Research Reference List p.1.

[391] We now turn to deal with some data which is drawn from the submissions of the parties, the Commission's research program and the Research Reference List.

6.4 The Personal Safety Survey

[392] The Personal Safety Survey (PSS),⁴⁶³ conducted by the Australian Bureau of Statistics (ABS), collects information from men and women aged 18 years and over about the nature and extent of violence experienced by them since the age of 15.⁴⁶⁴ The PSS also collects information about men and women's experience of current and previous partner violence and emotional abuse, experiences of stalking, sexual and physical abuse, witnessing of violence between a parent and their partner, lifetime experiences of sexual harassment and general feelings of safety.⁴⁶⁵ The PSS has been conducted on 3 occasions (2005, 2012 and 2016), and is based on the design of the Women's Safety Survey conducted in 1996.⁴⁶⁶ In 2016, 21,242 persons completed the survey nationally, comprising 5,653 fully responding males and 15,589 fully responding females.⁴⁶⁷

Partner violence

[393] The PSS collected information about men and women's experience of partner violence since the age of 15.⁴⁶⁸

[394] The ABS defines 'violence' as 'any incident involving the occurrence, attempt or threat of either physical or sexual assault experienced by a person since the age of 15'. 'Partner' is defined as 'any person the respondent currently lives with, or has lived with at some point, in a married or de facto relationship.' A 'current partner' is defined as a person who, at the time of the survey, was living with the respondent in a marriage or de facto relationship. A 'previous partner' is defined as a person who lived with the respondent at some point, but was no longer living with the respondent at the time of the survey, including a partner the respondent was living with at the time of experiencing violence or a partner the respondent was no longer living with at the time of experiencing violence. The definition of 'partner' does not include a boyfriend/girlfriend or date, but these categories were included as part of the definition of 'intimate partner'.⁴⁶⁹

[395] According to the 2016 PSS, women are almost 3 times more likely than men to have experienced partner violence, with approximately one in 6 women (17 per cent) and one in 16 men (6.1 per cent) experiencing partner violence since the age of 15.⁴⁷⁰ In the previous 12 months, 1.7 per cent of women and 0.8 per cent of men experienced violence from a current or

⁴⁶³ ABS, *Personal Safety, Australia: Statistics for Family, Domestic, Sexual Violence, Physical Assault, Partner Emotional Abuse, Child Abuse, Sexual Harassment, Stalking and Safety* (Report, 8 November 2017) Research Reference List No.102 <[Personal Safety, Australia, 2016 | Australian Bureau of Statistics \(abs.gov.au\)](#)>.

⁴⁶⁴ ABS, 'Personal Safety, Australia Methodology' (Report, 8 November 2017) <[Personal Safety, Australia methodology, 2016 | Australian Bureau of Statistics \(abs.gov.au\)](#)>.

⁴⁶⁵ Ibid.

⁴⁶⁶ Ibid.

⁴⁶⁷ Ibid.

⁴⁶⁸ ABS (2017).

⁴⁶⁹ Ibid.

⁴⁷⁰ Ibid.

former partner. Women were 8 times more likely than men to experience sexual violence by a partner (5.1 per cent for women compared with 0.6 per cent for men). Women were more likely to experience violence by a previous partner than a current partner, with 2.9 per cent of women experiencing violence by a current partner and 14.6 per cent of women experiencing violence by a previous partner.⁴⁷¹

[396] Rates of partner violence against women have remained stable over time, with 1.5 per cent of women in 2005 compared with 1.7 per cent of women in 2016 reporting experiencing partner violence in the previous 12 months.⁴⁷²

[397] Of those who experienced partner violence, most experienced more than one incident of violence. 54 per cent of women and 65 per cent of men who experienced violence by a current partner experienced more than one incident of violence by that partner.⁴⁷³ 6.4 per cent (17,600) of women reported they experienced violence by a current partner all or most of the time.⁴⁷⁴ Men and women who experienced previous partner violence were more likely to experience multiple incidents of violence, with 68 per cent of women and 61 per cent of men who experienced violence by a previous partner experiencing more than one incident by that partner.⁴⁷⁵ Of those women who experienced violence by a previous partner, 19.5 per cent (267,500) said they experienced violence all or most of the time.⁴⁷⁶

⁴⁷¹ Ibid.

⁴⁷² Ibid.

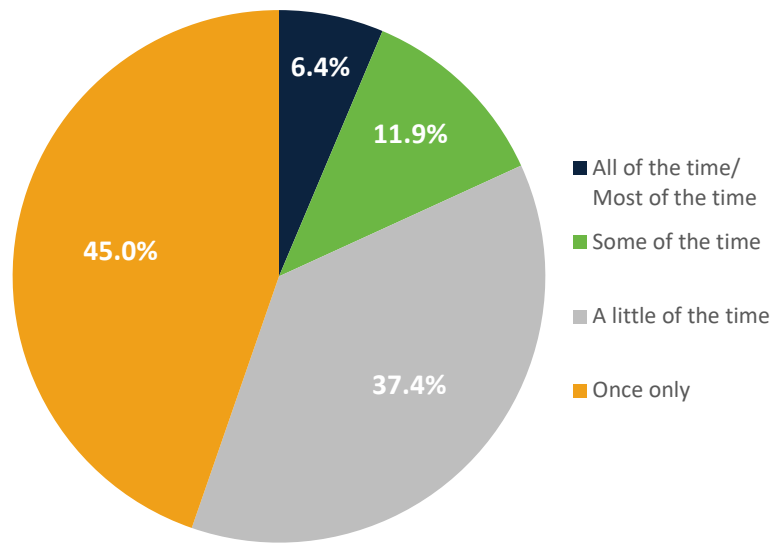
⁴⁷³ ABS, Personal Safety, Australia 2016, Table 17.3 Experience of Current Partner Violence Since Age 15, By Sex of Respondent, Proportion of Persons (Note: Proportion for male respondents has a margin of error >10 percentage points or proportion ± margin of error <0% or >100%, which should be considered when using this information).

⁴⁷⁴ ABS, Personal Safety, Australia 2016, Table 17.1 Experience of Current Partner Violence Since Age 15, By Sex of Respondent, Estimate (Note: estimate has a relative standard error of 25% to 50% and should be used with caution).

⁴⁷⁵ ABS, Personal Safety, Australia 2016, Table 18.3 Experience of Previous Partner Violence Since Age 15, By Sex of Respondent, Proportion of Persons.

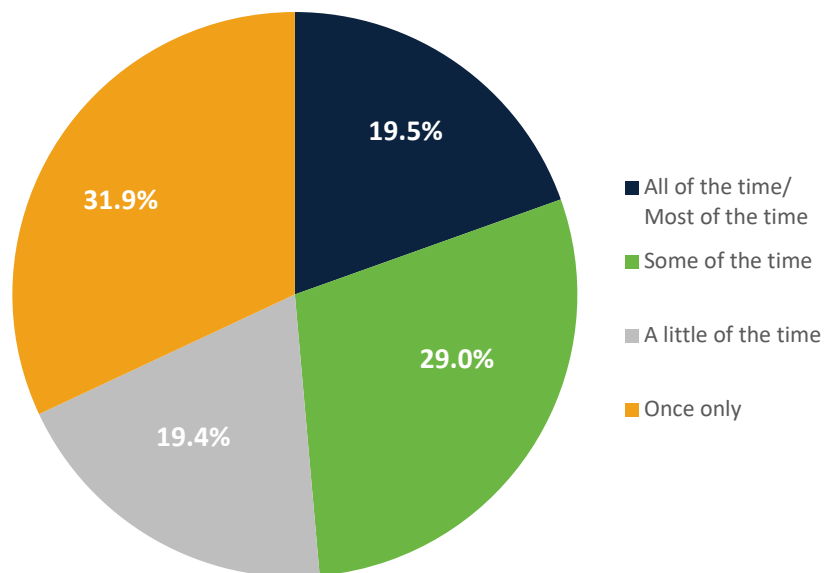
⁴⁷⁶ ABS, Personal Safety, Australia 2016, Table 18.1 Experience of Previous Partner Violence Since Age 15, By Sex of Respondent, Estimate.

Chart 2: Experience of violence by *current partner* since age 15, women, by frequency of violence



Source: ABS, Personal Safety, Australia 2016, Table 17.3.

Chart 3: Experience of violence by *previous partner* since age of 15, women, by frequency of violence



Source: ABS, Personal Safety, Australia 2016, Table 18.3.

[398] Men were more likely than women to be the perpetrator of partner violence. Three in 4 (75 per cent) of people who experienced partner violence reported the perpetrator was male compared with 25 per cent who reported the perpetrator was female.⁴⁷⁷ Partner violence perpetrated against women was almost always perpetrated by a man: 96 per cent of women who experienced partner violence reported the perpetrator was male.⁴⁷⁸

[399] Women who were pregnant were at a greater risk of partner violence: two-thirds (68 per cent) of women who experienced violence from a current partner were pregnant at some stage during the relationship and of those, one in 6 experienced violence during the pregnancy.⁴⁷⁹ For those women who experienced violence from a *previous* partner, this rate was even higher: of those women, 47 per cent experienced violence during their pregnancy with 24 per cent experiencing violence for the first time during their pregnancy.⁴⁸⁰

Emotional Abuse

[400] The PSS collected information about men's and women's experiences of emotional abuse. 'Emotional abuse' is defined as 'when a person is subjected to certain behaviours or actions that are aimed at preventing or controlling their behaviour, causing them emotional harm or fear. These behaviours are characterised in nature by their intent to manipulate, control, isolate or intimidate the person they are aimed at. They are generally repeated behaviours and include psychological, social, economic and verbal abuse.'⁴⁸¹

[401] One in 4 women (23 per cent) and one in 6 men (16 per cent) experienced emotional abuse by a current or previous partner. 38 per cent of women and 22 per cent of men experienced a previous partner controlling them knowing about, having access to or making decisions about household money. 22 per cent of women and 11 per cent of men experienced a previous partner controlling or trying to control them from working or earning money. 27 per cent of women and 22 per cent of men said their previous partner controlled or tried to control their income or assets.⁴⁸²

[402] FDV affects not only those who experience it, but their children, family and friends, and work. Some of impacts of family and domestic violence on work, children and health are canvassed below.

Impact on work

[403] The 2016 PSS collected information about the impact of partner violence on work.

⁴⁷⁷ Australian Institute of Health and Welfare, 'Family, domestic and sexual violence in Australia 2018' (2018) Australian Government, Catalogue No FDV 2 p.31, Research Reference List No.105.

⁴⁷⁸ Ibid.

⁴⁷⁹ Ibid p.36.

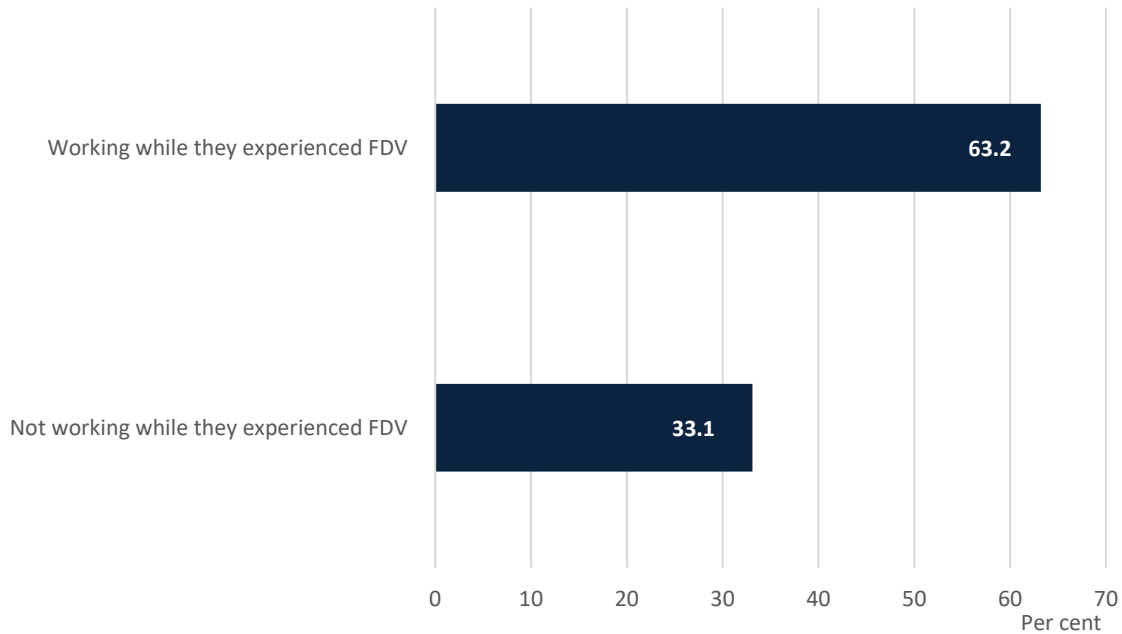
⁴⁸⁰ Ibid.

⁴⁸¹ ABS (2017).

⁴⁸² Ibid.

[404] Of women who experienced violence by a *current* partner, 63.2 per cent were working at the time, while 33.1 per cent were not working.⁴⁸³ Of women who experienced violence by a *previous* partner, 67.4 per cent were working at the time, while 31.5 per cent were not working.⁴⁸⁴

Chart 4: Current partner violence – women’s employment status

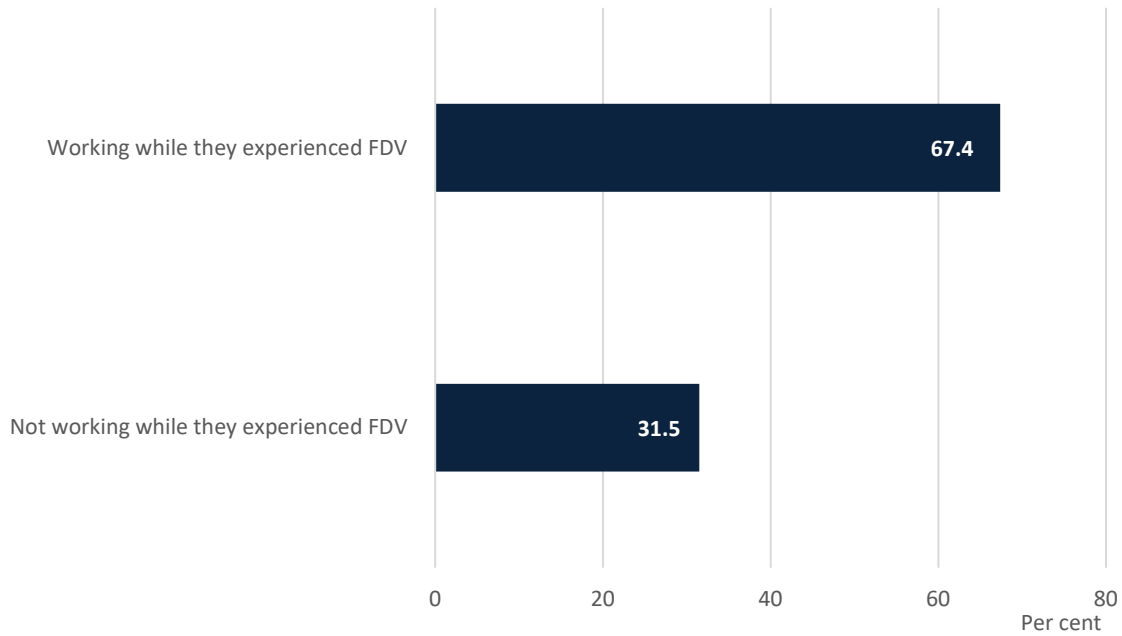


Source: ABS, Personal Safety, Australia 2016, Table 17.3 Experience of Current Partner Violence Since Age 15 By Sex of Respondent, Proportion of Persons.

⁴⁸³ ABS, Personal Safety, Australia 2016, Table 17.3 Experience of Current Partner Violence Since Age 15 By Sex of Respondent, Proportion of Persons.

⁴⁸⁴ Ibid.

Chart 5: Previous partner violence – women’s employment status

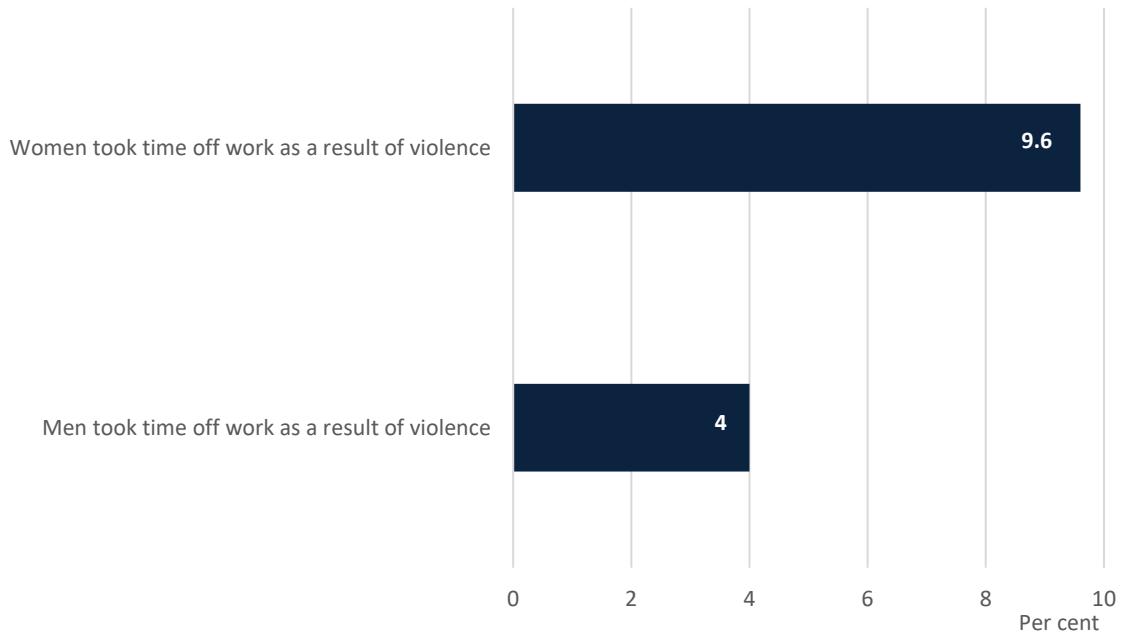


Source: ABS, Personal Safety, Australia 2016, Table 18.3 Experience of Previous Partner Violence Since Age 15 By Sex of Respondent, Proportion of Persons.

[405] One in 11 (9.6 per cent or 26,500) women and one in 25 (4 per cent or 6,000) men took time off work as a result of violence from a *current* partner. One in 5 (20 per cent or 270,000) women and one in 6 (17 per cent or 66,200) men took time off as a result of violence from a *previous* partner.⁴⁸⁵

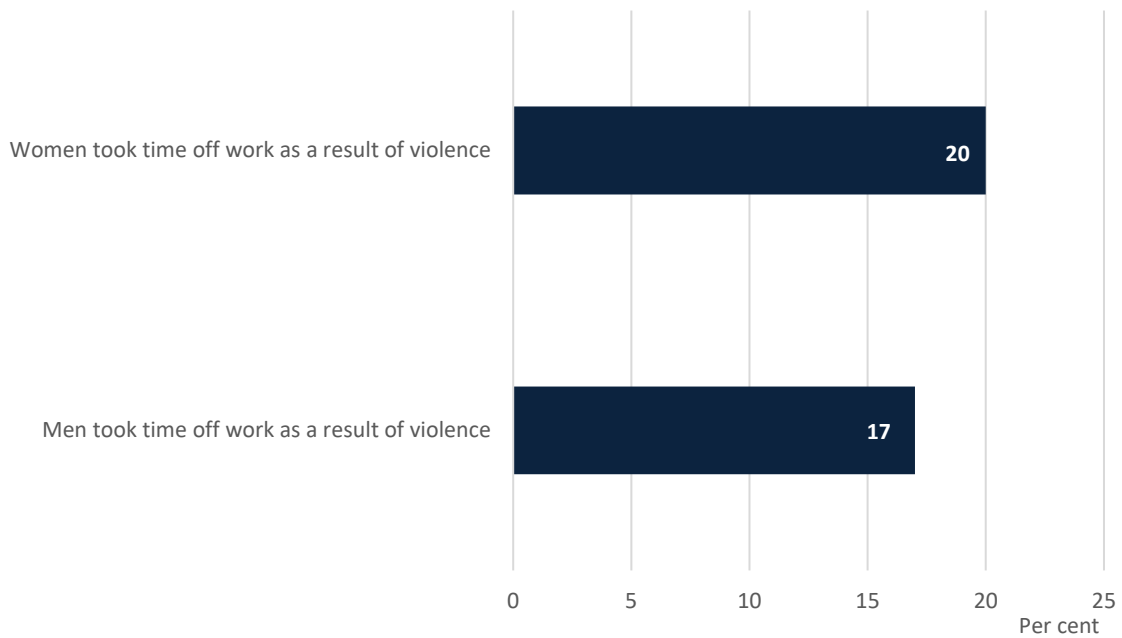
⁴⁸⁵ ABS (2017).

Chart 6: Current partner violence – time taken off work



Source: ABS, Personal Safety, Australia 2016, Table 17.3 Experience of Current Partner Violence Since Age 15 By Sex of Respondent, Proportion of Persons.

Chart 7: Previous partner violence – time taken off work



Source: ABS, Personal Safety, Australia 2016, Table 18.3 Experience of Previous Partner Violence Since Age 15 By Sex of Respondent, Proportion of Persons.

Impact on children

[406] The 2016 PSS asked respondents if they ever heard or saw violence being directed at a parent before the age of 15. One in 10 men (10 per cent) and one in 8 women (13 per cent) witnessed violence towards their mother by a partner.⁴⁸⁶ One in 25 men (4 per cent) and one in 20 women (4.7 per cent) witnessed violence towards their father by a partner.⁴⁸⁷ Of those who experienced violence by a previous partner, 68 per cent of women and 60 per cent of men who had children in their care when they experienced violence reported that the violence was seen or heard by children.⁴⁸⁸

[407] The PSS also collected information and men's and women's experiences of physical and/or sexual abuse before the age of 15 by any adult. One in 6 women (6 per cent) and one in 10 men (11 per cent) had experienced abuse before the age of 15. Those who were physically or sexually abused before the age of 15 were approximately 3 times more likely to have experienced partner violence than those who had not been abused before 15: 36 per cent of women and 15 per cent of men who had been abused before the age of 15 had also experienced violence by a partner since the age of 15.⁴⁸⁹

Impact on health and routine

[408] The 2016 PSS collected information on experiences of fear or anxiety due to partner violence. 46 per cent of all women who experienced current partner violence experienced anxiety or fear due to the violence, while 65 per cent of women who experienced previous partner violence felt anxiety or fear due to the violence. Half of those respondents reported feeling anxiety or fear most or all of the time.⁴⁹⁰

[409] Respondents were asked if they had made changes to routine in the last 12 months due to experiencing anxiety or fear due to partner violence. 2.3 per cent of women experiencing violence from a *current* partner and 18.7 per cent of women who experienced violence from a *previous* partner said they had made changes to work due to experiencing anxiety and fear.⁴⁹¹ Partner violence also impacted on health: 7.6 per cent of women experiencing current partner violence and 22.5 per cent of women who experienced previous partner violence reported changes to eating habits in the previous 12 months, while 26.5 per cent and 37.6 per cent respectively reported changes to sleeping habits.⁴⁹² 40.5 per cent of women who had experienced violence from a previous partner reported changes to social/leisure activities in the previous 12 months due to anxiety or fear.⁴⁹³

⁴⁸⁶ ABS (2017).

⁴⁸⁷ Ibid.

⁴⁸⁸ Ibid.

⁴⁸⁹ Australian Institute of Health and Welfare, 'Family and Domestic Violence in Australia 2018' (2018) Australian Government, Catalogue No FDV 2 p.38, Research Reference List No.105.

⁴⁹⁰ ABS (2017).

⁴⁹¹ ABS, Personal Safety, Australia 2016, Table 20.3 Female Anxiety or Fear Experienced Due to Partner Violence, By Partner Type, Proportion of Females (NOTE: 2.3% proportion has a margin of error >10 percentage points or proportion ± margin of error <0% or >100%, which should be considered when using this information).

⁴⁹² Ibid (NOTE: 26.5% proportion has a margin of error >10 percentage points or proportion ± margin of error <0% or >100%, which should be considered when using this information).

⁴⁹³ Ibid.

Impact following separation from a violent partner

[410] 59.7 per cent (756,800) of women who left a violent partner moved out of the home.⁴⁹⁴ 24,400 slept rough—that is on the street, in a car, in a tent or squatted in an abandoned building—and 65,100 stayed in a refuge or shelter.⁴⁹⁵ Of all the women who left a violent relationship, 38 per cent left property or assets behind when the relationship ended.⁴⁹⁶

6.5 WGEA – Employer Census

[411] The results of the WGEA 2020-21 Employer Census noted a ‘sharp rise in the availability of paid FDV leave’ in the past 5 years.⁴⁹⁷ The WGEA dataset covers almost 4.2 million employees (nearly 40 per cent of Australia’s total labour force), employed in 4,474 organisations with 100 or more employees.

[412] Chart 35 from the WGEA 2020-21 Employer Census (reproduced below) shows that over 70 per cent of employers have a formal policy and/or strategy to support employees experiencing FDV and there has been a ‘substantial jump’ in employers offering paid FDV leave (12.1 per cent in 2015-16 to 50.7 per cent in 2020-21).⁴⁹⁸

⁴⁹⁴ ABS, Personal Safety, Australia 2016, Table 24.1 Final Separation from Violent Previous Partner, By Sex of Respondent, Estimate; ABS, Personal Safety, Australia 2016, Table 24.3 Final Separation from Violent Previous Partner, By Sex of Respondent, Proportion.

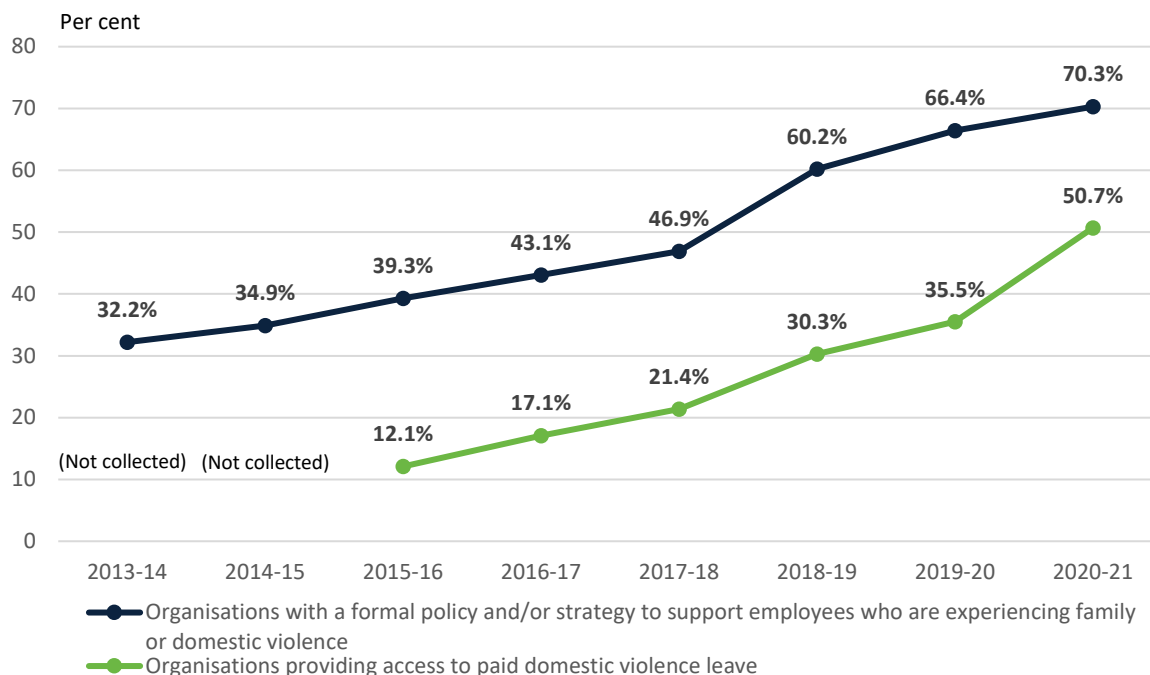
⁴⁹⁵ Ibid.

⁴⁹⁶ Ibid.

⁴⁹⁷ Workplace Gender Equality Agency, *Australia’s Gender Equality Scorecard: Key Results from the Workplace Gender Equality Agency’s 2020-21 Employer Census*, (Report, February 2022) p.31.

⁴⁹⁸ Ibid p.31.

Chart 8: Percentage of organisations with a formal policy and/or strategy to support employees who are experiencing family or domestic violence



Source: Workplace Gender Equality Agency (2022) ‘Australia’s gender equality scorecard: Key results from the Workplace Gender Equality Agency’s 2020-21 employer census’, February at p.31.

[413] We now turn to our findings.

6.6 Findings

[414] Most of the evidentiary findings we propose to make are uncontentious.

[415] On 8 March 2022, we issued a Statement⁴⁹⁹ in which we directed the parties to address the following question in the written submissions that were due to be filed on 28 March 2022:

‘Are any of the findings at [65]-[66]; [91]-[95] and [102]-[106] of the March 2018 Decision [2018] FWCFB 1691 challenged in the present proceedings? Is there any opposition to the Full Bench adopting those findings in the present proceeding?’

[416] In response to the question posed, the ACTU did not challenge any of the identified findings and supports their adoption in these proceedings.⁵⁰⁰ Similarly, ACCI responded that it was not going to challenge any of the identified findings and did not oppose their adoption in the present proceedings.⁵⁰¹ Subject to 2 exceptions, Ai Group also did not oppose the adoption of the identified findings;⁵⁰² we return to those 2 exceptions later.

⁴⁹⁹ [2022] FWCFB 24.

⁵⁰⁰ ACTU final submissions dated 28 March 2022 [3].

⁵⁰¹ ACCI final submissions dated 28 March 2022 [2.2].

⁵⁰² Ai Group submissions in response to Background Document 2 dated 7 April 2022 [3].

[417] We have divided our findings into 2 broad areas:

- FDV: prevalence, general impacts and in particular employment; and
- FDV leave: availability and utility.

[418] Our principal findings are set out at Attachment E.

6.6.1 FDV

(i) *Prevalence*

[419] FDV is ubiquitous. While men can, and do, experience FDV, such violence disproportionately affects women. Since the age of 15, approximately one in 4 women (23 per cent or 2.2 million) compared to one in 13 men (7.8 per cent or 703,700) has experienced at least one incident of violence by an intimate partner. It is a gendered phenomenon.⁵⁰³

[420] On average, one woman every 10 days in Australia is killed by an intimate partner.⁵⁰⁴ In the 10 years from mid-2002 to mid-2012:

- 488 women in Australia were killed by an intimate partner, and
- 75 per cent (488) of total victims (654) killed by an intimate partner were women.⁵⁰⁵

[421] In the year from 1 July 2019 to 30 June 2020, 36 women in Australia were killed by an intimate partner. Approximately 4 in 5 (80 per cent or 36) of total victims (45) killed by an intimate partner were women.⁵⁰⁶

[422] It is not seriously contested that the COVID-19 pandemic has seen an increase in the prevalence of FDV. In a Federal Election Policy Statement released in February 2022, Ai Group states that '[T]he pandemic has contributed to an increase in family and domestic violence in the community'.⁵⁰⁷ The evidence supports Ai Group's statement.⁵⁰⁸

⁵⁰³ ABS (2017).

⁵⁰⁴ Australian Institute of Criminology (2015) 'Domestic/family homicide in Australia', National Homicide Monitoring Program (Cussen & Bryant).

⁵⁰⁵ Ibid p.3.

⁵⁰⁶ Australian Institute of Criminology (2022) 'Homicide in Australia 2019-20', National Homicide Monitoring Program (Serpell, Sullivan, Doherty) p.4.

⁵⁰⁷ Ai Group (2022) 'Federal Election Policy Statements: Workplace Relations Policy – Gender Equality and Increased Workforce Participation', February p.2.

⁵⁰⁸ Hayley Boxall, Anthony Morgan and Rick Brown, *The Prevalence of Domestic Violence Among Women During the COVID-19 Pandemic* (Statistical Bulletin 28, Australian Institute of Criminology, July 2020), Research Reference List No.151; Kerry Carrington et al, *The Impact of COVID-19 Pandemic on Domestic and Family Violence Services and Clients, Australia* (Briefing Paper No.12, Centre of Justice, Queensland University of Technology, May 2021), Research Reference List No.37.

(ii) Impact

[423] It is uncontentioned that FDV has a significant adverse impact on those who experience such violence. The effects of FDV are far reaching and extend beyond the individual directly affected to their families and the general community. Family violence can also exacerbate existing mental health problems and increase the risk of subsequent depression.⁵⁰⁹

[424] A number of Australian studies have sought to assess the aggregate cost of violence against women, particularly domestic violence. These include the report by Price Waterhouse Coopers (PwC), *A High Price to Pay – the Economic Case for Preventing Violence Against Women* (PwC Report).⁵¹⁰ A KPMG report titled ‘the Cost of Violence Against Women and their Children’⁵¹¹ and ‘The Cost of Domestic Violence to the Australian Economy’ prepared by Access Economics and commissioned by the Office of the Status of Women in 2004 (Access Economics Report).⁵¹²

[425] The Victorian Government, Royal Commission into Family Violence Report summarised the findings of the 3 reports referred to above, as follows:⁵¹³

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

⁵⁰⁹ Miriam Lum et al, *Examination of the Health Outcomes of Intimate Partner Violence Against Women*. (State of Knowledge Paper, ANROWS – Landscapes Vol.3, March 2016) p.20.

⁵¹⁰ PwC, *A High Price to Pay: The Economic Case for Preventing Violence Against Women: a Report Prepared for OurWatch and VicHealth* (Report, November 2015).

⁵¹¹ KPMG, *The Cost of Violence Against Women and their Children* (Report, The National Council to Reduce Violence Against Women and Their Children, March 2009).

⁵¹² Access Economics, *The Cost of Domestic Violence to the Australian Economy* (Report, Office of the Status of Women, 2004).

⁵¹³ *Royal Commission into Family Violence: Report and Recommendations* (Final Report Summary and Recommendations, March 2016) Volume VI p.222.

[426] Relying on an ANROWS 2019 publication, the SWIRLS Report estimates that the impact of FDV costs employers up to \$2 billion a year.⁵¹⁴

[427] The SWIRLS Report also observes that the long-term economic harm of FDV for individuals is under-researched, but notes:

‘It is widely agreed...that FDV contributes to economic harm in a range of ways, most notably in its impacts on women’s employment.’⁵¹⁵

[428] One of the findings from the *March 2018 FDVL Decision* challenged by Ai Group is the fifth finding at [65] of that Decision which states:

‘Employees who experience family and domestic violence often face financial difficulties as a result, such as relocation costs or become a sole parent; and may suffer economic harm as a result of disruption to workplace participation.’

[429] In respect of this finding, Ai Group submits:

‘Whilst the evidence may be said to establish that *some* employees who experience FDV face financial difficulties, it does not establish its prevalence or incidence. That is, it cannot be concluded that such employees ‘often’ face financial difficulties as a result of FDV.’⁵¹⁶

[430] Ai Group provided no further elaboration or support for its position. In particular, it provided no analysis of the relevant evidence. In our view the evidence supports a finding in the terms set out at [65] of the *March 2018 FDVL Decision*.

[431] As the ACTU submits, the SWIRLS Report concludes that ‘FDV has a significant impact on women’s paid employment’,⁵¹⁷ citing research which found that:

- (a) The employment conditions, patterns of participation and work trajectories of women who experience FDV changes significantly after experiencing FDV (Franzway et al., 2019).⁵¹⁸
- (b) Women experiencing FDV earn 35 per cent less than those who do not (Aeberhard-Hodges and McFerran, 2018).⁵¹⁹
- (c) FDV causes women to feel distracted, tired, unwell, or afraid at work, leading to absences and leave, often resulting in reduced income and disrupted work histories. (Aeberhard-Hodges & McFerran, 2018; Franzway et al., 2019).⁵²⁰

⁵¹⁴ SWIRLS Report p.5, citing ANROWS, *Paid Domestic and Family Violence (DVF) Leave: Summary of the Evidence* (Report, March 2019).

⁵¹⁵ Ibid.

⁵¹⁶ Ai Group submissions in response to Background Document 2 dated 7 April 2022 [5].

⁵¹⁷ Ibid.

⁵¹⁸ Suzanne Franzway, Nicole Moulding, Sarah Wendt, Carole Zufferey and & Donna Chung, *The Sexual Politics of Gendered Violence and Women’s Citizenship* (Policy Press, 2019).

⁵¹⁹ Jane Aeberhard-Hodges and Ludo McFerran, (2018) 60(2) ‘An International Labour Organisation instrument on violence against women and men at work: The Australian influence’ *University of Industrial Relations* 246.

⁵²⁰ Ibid; Franzway et al (2019).

[432] The SWIRLS Report summarises the research in the following terms:

‘FDV has a significant impact on women’s paid employment, thereby contributing to broader gender inequalities. Australian research estimates that 62 per cent of women who have experienced FDV are employed (ANROWS, 2019); 55 per cent to 70 per cent of these women are employed on a full-time basis (Franzway et al., 2019). In their national survey study, Franzway et al. (2019) noted that women who had experienced FDV earned relatively lower incomes which they linked to a shift, post-FDV, to part-time or casual paid work and/or full-time caring roles; in their sample of 658 women, 34 per cent of whom had a Bachelor degree or higher, 40 per cent earned under \$30 000pa, 14 per cent earned \$30 000–39 000pa, and 10 per cent earned \$40 000–49 000pa. While most participants did not change their occupation after experiencing FDV, their employment conditions, patterns of participation and work trajectories changed significantly. The majority (60 per cent) reported changes to their work hours, location and job classification. Sixty-seven percent of women had moved to a different employer for reasons including safety (30 per cent), difficulty performing at work (27 per cent), and/or embarrassment about their situation (30 per cent). The demands of caring for others, usually children, also had implications for the employment of some participants (20 per cent). Franzway et al. (2019) concluded that women’s labour market vulnerability is not just an immediate consequence of FDV but one that stretches into the future. Thus, FDV erodes women’s position in the workforce. Franzway et al.’s (2019) conclusions are supported by Aeberhard-Hodges & McFerran (2018) who report that women experiencing FDV earn 35 per cent less than those who do not.’⁵²¹

[433] The Monash Report also supports the contested finding. The Monash Report explored the impact of FDV on employment in detail, including the impact on employees’ ability to attend work, meaningfully engage in work and fulfil work expectations, and participate in the workplace environment. The Report concluded that ‘*experiences of DFV impact significantly on an individual’s ability to attend work, to participate meaningfully in work, to fulfil their role expectations, and to progress their career ambitions*’.⁵²²

[434] Finally, the lay witness evidence also provides support for the contested findings.⁵²³

[435] For the reasons given we adopt the fifth finding at [65] in the *March 2018 FDVL Decision*.

(iii) Employment

[436] It is uncontested that FDV has a real and tangible impact on employees and employers in the workplace. Women who are experiencing or have experienced FDV have a more disrupted work history; are on lower personal incomes; have had to change jobs frequently; and

⁵²¹ SWIRLS Report p.5.

⁵²² Monash Report p.5.

⁵²³ See Witness Statement of Dr Victoria Jones dated 30 July 2021 [20]–[21]; Witness Statement of Samantha Parker dated 30 July 2021 [32]; Witness Statement of Stacey Davies dated 30 July 2021 [18]–[19]; Witness Statement of Karyn Walsh dated 30 July 2021 [21]; Witness Statement of Gabrielle Craig dated 30 July 2021 [15]–[16] and Witness Statement of Carla Jones dated 30 July 2021 [8], [13].

are more likely to be employed in casual and part-time work, than women with no experience of violence.⁵²⁴ FDV is both a cause and consequence of gender inequality.

[437] It is also uncontentious that sustained periods of employment can provide financial security, independence, social networks and increased self-esteem.

[438] The second finding from the *March 2018 FDVL Decision* which is challenged by Ai Group is the finding in the first sentence of [102] that Decision which says:

‘Employment is an important pathway out of violent relationships.’

[439] In respect of this finding, Ai Group submits:

‘Whilst we do not oppose the proposition that employment *may* assist employees with leaving violent relationships, the evidence in these proceedings does not establish that employment always, or generally, facilitates or provides a ‘*pathway*’ out of violent relationships.’⁵²⁵

[440] In our view, the evidence clearly supports the challenged finding. The 2019 ANROWS report titled ‘Paid domestic and family violence (DFV) leave: Summary of the evidence’, states:

‘Employment is a crucial pathway for women escaping violent relationships. Sustained periods of employment can provide financial security, independence, social networks and increased self-esteem. Paid domestic and family violence leave is important for minimising disruption to incomes while women end violent relationships and for reducing the adverse financial impact of violence on women.’⁵²⁶

[441] Cortis and Bullen (2015) conclude:

‘Participation in employment, education and training offer women opportunities to improve their economic security following violence ...

In the industrial sphere, domestic violence protections in industrial instruments, including access to domestic violence leave, provide strategies for reducing the impact of violence on women’s workforce participation, job tenure and economic security ...

Economic and financial security is central to the wellbeing of women and children during and following experiences of domestic violence ...

...

Importantly, economic security affects a woman’s abilities to leave abusive relationships. Women require financial resources to transition from violent relationships, and as abusers may control finances and render women reliant on the abuser, financial insecurity is a key reason that women remain in or return to abusive relationships.

⁵²⁴ Ludo McFerran, *Safe at Home, Safe at Work: National Domestic Violence and the Workplace Survey* (Report, Centre for Gender Related Violence Studies, October 2011) p.2, Research Reference List No.48.

⁵²⁵ Ai Group submissions in response to Background Document 2 dated 7 April 2022 [7].

⁵²⁶ ANROWS, *Paid Domestic and Family Violence (DFV) Leave: Summary of the Evidence* (Report, 2019) p.1, Research Reference List No.1.

Economic disadvantage constitutes both a major obstacle for women seeking to leave abusive relationships, and a barrier to achieving safety, security, independence and wellbeing following violence.’⁵²⁷

[442] Finally, Eftekhar (2019) notes:

‘Ensuring that women who are victims of domestic violence have steady employment is important for several reasons. Firstly, employment is important for reducing isolation, developing self-esteem, confidence, and self-worth in victims. As well, women with disrupted work history are more likely to go on income assistance, and women on income assistance are more likely to experience domestic violence and stay in an abusive relationship. Therefore, preventing this cycle will not only help women but also help reduce public costs. In addition, financial independence is key for women attempting to leave an abusive relationship as financial control and dependence are two of the main reasons women fall back to the hands of their abusers and become trapped in a cycle of violence.’⁵²⁸[references omitted]

[443] For the reasons given we adopt the finding in the first sentence of [102] of the *March 2018 FDVL Decision*.

6.6.2 FDV Leave

(i) *The prevalence of paid FDV leave arrangements*

[444] The ACTU contends that the evidence demonstrates that a standard of 10 days’ paid FDV leave has developed over time ‘as a consequence of the input of experts in the field and negotiations at the workplace level between employers and employees’⁵²⁹ and that the ‘industrial norm for the provision of paid FDV leave is between 10 and 14 days’.⁵³⁰ The ACTU relies on the following evidence in this regard:

- Evidence from Debra Eckersley of PwC from the 2016 proceedings, that PwC’s decision to provide 10 days’ paid FDV leave was informed by research that had revealed 10 days as a ‘common standard’ as well as the advice of experts in the FDV field.⁵³¹
- Dr Stanford’s analysis of the WAD which found that most agreements which provide FDV leave specify 10 days, which he suggests demonstrates ‘a growing consistency in leave entitlements around that level of benefit’.⁵³²

⁵²⁷ Dr Natasha Cortis and Dr Jane Bullen, *Building Effective Policies and Services to Promote Women’s Economic Security Following Domestic Violence* (State of Knowledge Paper, ANROWS – Landscape Vol.7, March 2015) pp.2-4, 8, Research Reference List No.38.

⁵²⁸ Sarah Eftekhar, *Breaking the Cycle of Domestic Violence: A Case for Paid Domestic Leave Policies and Legislation in British Columbia* (LEVEL: Vancouver Foundation, Youth Policy Program, Report, 2019) p.9 (referred to in SWIRLS Report p.6).

⁵²⁹ ACTU submissions dated 30 July 2021 [87].

⁵³⁰ ACTU supplementary submissions dated 22 December 2021 [57].

⁵³¹ ACTU submissions dated 30 July 2021 [87] referring to Transcript, 17 November 2016, PN1890 and PN1893.

⁵³² *Ibid* [88], referring to Stanford Report [38] and [41]–[42].

- Evidence from the WAD that of the 4,011 enterprise agreements approved between 7 July 2018 to 30 June 2021, 62.55 per cent provide for 10 days' paid leave, while only 18.32 per cent provide for less than 10 days.⁵³³ A further 9.90 per cent of agreements provide for more than 10 days' leave covering 27.93 per cent of all employees covered by agreements, meaning that over half (55.52 per cent) of all employees covered by agreements have access to 10 days or more of paid FDV leave.⁵³⁴
- Public sector employees in every state and territory have access to paid FDV leave of between 10 and 20 days per year.⁵³⁵
- In relation to the Employer Survey, there was an almost even split between respondents who provide 10 or more days of paid FDV leave (49.7 per cent) and those who provide 9 days or less (50.3 per cent).⁵³⁶
- Respondents to the survey undertaken by Monash, reported an average of 14 days' paid FDV leave available, with the Monash Report citing emerging best practice recommendations of a minimum of 10 to 14 days' paid FDV leave.⁵³⁷

[445] The opposing parties dispute the proposition that the provision of 10 to 14 days' paid FDV leave is 'the industrial norm'.

[446] In relation to the ACTU's reliance on the WAD Analysis, ACCI notes that of the agreements approved from 7 July 2018 to 30 June 2021 which provide paid FDV leave:

- a majority are from the construction sector
- the 'overwhelming majority' are from Victoria, and
- the agreements 'almost exclusively cover unions and union-covered employees'.⁵³⁸

[447] Based on this analysis, ACCI submits that the proposition that 'the Commission should assess enterprise bargaining outcomes and then transplant trends in bargaining into the minimum safety net should be rejected',⁵³⁹ and that:

'it is difficult to understand how one state and union-covered employees can be representative of the broader Australian workforce and that their particular practice of providing for paid FDV leave can be held out to be an industrial norm.'⁵⁴⁰

⁵³³ ACTU supplementary submissions dated 22 December 2021 [58], referring to the WAD Analysis p.44.

⁵³⁴ Ibid, referring to the WAD Analysis pp.44-45.

⁵³⁵ Ibid [59], referring to the SWIRLS Report.

⁵³⁶ Ibid [60], referring to Employer Survey p.19.

⁵³⁷ Ibid [61], referring to Monash Report p.30.

⁵³⁸ See ACCI submissions in reply 4 February 2022 [8.19]–[8.20].

⁵³⁹ Ibid [8.20(c)].

⁵⁴⁰ Ibid [8.20(b)].

[448] ACCI also rejects the proposition that enterprise bargaining outcomes should be transplanted into the minimum safety net:

‘The Full Bench’s consideration of what is required to go into modern awards should be a consideration of the minimum required. This is not a reflection of so called ‘industrial norms’ and certainly not reflected in outcomes achieved through union-led enterprise bargaining where employers have *offered* certain industrial terms for their employees to vote on.

There is no ‘upper limit’ in enterprise bargaining in contrast to modern awards which *cannot* rise above an absolute minimum standard of the modern awards objective.’⁵⁴¹

[449] ACCI also submits that the existence of current paid leave entitlements and identification of trends or ‘best practice’ models should not be persuasive.⁵⁴² In this context, ACCI points out that the Monash Report identifies 10 to 14 days as ‘best practice’ and submits that ‘modern awards are not intended to represent “best practice”, ideal or desirable conditions, they are meant to give rise to minimum and necessary conditions’.⁵⁴³

[450] Ai Group submits that the Commission’s task is to consider what is necessary to achieve the modern awards objective and that:

‘It is not simply to codify commonly provided benefits within the award system. The prevalence or otherwise of a particular above-award condition could not be seen as a compelling justification for a variation to the safety net.’⁵⁴⁴

[451] Ai Group makes 5 points in this regard:

1. Parties subject to enterprise agreements are not subject to award terms. Consequently, without information about all of the provisions of the relevant enterprise agreements, the fact that such agreements provided for FDV leave provides ‘little guidance’ as to how they would be applied in practice, or what award terms may have been ‘traded away’ in return for such provisions.⁵⁴⁵
2. Growth in bargaining over FDV leave may be the product of industrial pressure applied to employers, and it cannot be assumed that the adoption of 10 days’ paid FDV leave in enterprise agreements reflects a ‘broad acceptance by employers of the appropriateness of such a quantum of leave.’⁵⁴⁶
3. The prevalence of a particular quantum of FDV leave in enterprise agreements does not say anything about the actual need for such leave.⁵⁴⁷

⁵⁴¹ Ibid [8.20](c).

⁵⁴² Ibid [8.32].

⁵⁴³ Ibid [8.33].

⁵⁴⁴ Ai Group submissions in reply dated 4 February 2022 [371].

⁵⁴⁵ Ibid [373].

⁵⁴⁶ Ibid [374].

⁵⁴⁷ Ibid [375].

4. The FW Act reflects an assumption that parties will engage in enterprise bargaining for terms and conditions that leave employees better off overall than the award system. As a result, it would be ‘counter-intuitive for the Commission to lift award conditions to reflect the outcome of such bargaining’.⁵⁴⁸
5. Evidence about the prevalence of FDV leave terms in enterprise agreements without any analysis of whether the terms align with other aspects of the ACTU claim, including eligibility and accrual, ‘should not satisfy the Commission that there is any ‘*industrial norm*’ in relation to a particular quantum of leave’.⁵⁴⁹

[452] We note that no evidence is advanced in support of Ai Group’s hypothesis that the growth in bargaining over FDV leave has been the product of industrial pressure applied to employers. However, we accept that it may reasonably be inferred from the concentration of FDV leave entitlements in enterprise agreements which cover unions and apply in more unionised sectors of the workforce that the growth in such entitlements must at least in part be attributed to union claims and union ‘pressure’ in bargaining. We emphasise however that this can only be stated at a high level of generality and there is no material before us about the extent to which such union ‘pressure’ may have included protected industrial action, or even threatened or prospective protected industrial action.

[453] In reply, the ACTU submits that the evidence demonstrates that 10 days’ paid FDV leave ‘has developed over a number of years from negotiations at the workplace level ... based on the real and practical needs of employees who have experienced FDV, as well as the input of experts’.⁵⁵⁰

[454] The ACTU says it is not asking the Commission to ‘codify’ 10 days’ paid FDV leave within the award system merely because it is increasingly prevalent in enterprise bargaining, but rather submits:

‘the emergence of an industrial norm of 10 days paid FDV leave is evidence of the need of many employees for more than five days of FDV leave, and that there is a growing consensus among employers and employees that this need is met (for most employees, but not all) by the provision of 10 days paid leave.’⁵⁵¹

[455] The modern awards objective provides that the Commission ‘must ensure that modern awards, together with the [NES], provide a fair and relevant minimum safety net of terms and conditions’.⁵⁵² In giving effect to this duty, the Commission must take into account the matters in ss.134(1)(a)-(h).⁵⁵³

⁵⁴⁸ Ibid [376].

⁵⁴⁹ Ibid [377].

⁵⁵⁰ ACTU submissions in reply dated 21 February 2022 [65].

⁵⁵¹ Ibid.

⁵⁵² FW Act s.134(1).

⁵⁵³ *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 [43].

[456] As the Full Federal Court observed in the *Penalty Rates Review*:

‘The statutory criteria of “fair and relevant” qualify the nature of the safety net which is the subject of the duty. They inform the taking into account of the matters in s 134(1)(a)-(h) but are not confined by those matters. They are confined only by implication from the subject matter, scope and purpose of the Fair Work Act.

...

It is also the case that the “fair and relevant” safety net criteria which dictate the quality of any modern award embrace the concept of “fair and relevant” having regard to contemporary circumstances, that conception being within the subject matter, scope and purpose of the Fair Work Act.

...

it cannot be doubted that the perspectives of employers and employees and the contemporary circumstances in which an award operates are circumstances within a permissible conception of a “fair and relevant” safety net taking into account the s 134(1)(a)-(h) matters.’⁵⁵⁴

[457] Hence, we can have regard to contemporary circumstances in assessing whether a modern award achieves the modern awards objective. It seems to us that this includes a consideration of the prevalence and impact of FDV on employment and how employers are responding to these issues.

[458] We readily accept, as Ai Group contends, that it is not our task ‘simply to codify commonly provided benefits within the award system’.⁵⁵⁵ But acceptance of that proposition does not mean that benefits provided outside the modern awards system are irrelevant to our consideration of the ACTU claim. As the Full Federal Court has observed, we are entitled to have regard to the contemporary circumstances in which an award operates.

[459] Further, we are required to take into account ‘relative living standards and the needs of the low paid’ (s.134(1)(a)) in assessing whether an award provides a fair and relevant safety net.

[460] The Annual Wage Review Expert Panel has concluded on several occasions that an assessment of ‘relative living standards’ requires a comparison of the living standards of award-reliant workers with other relevant groups and the extent to which low-paid workers are able to achieve a decent standard of living and engage in community life in the context of contemporary norms.

[461] In the *2018-19 Annual Wage Review decision* the Panel said:

‘The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and modern award minimum wages with those of other groups, in particular other workers, especially non-managerial workers

⁵⁵⁴ Ibid [50]–[51] and [53].

⁵⁵⁵ Ai Group submissions in reply dated 4 February 2022 [371].

...

The living standards of employees on the NMW and award-reliant employees are affected by their wage rate, the hours they work, tax-transfer payments and the circumstances of the households in which they live.’⁵⁵⁶

[462] It seems to us that an assessment of relative living standards encompasses a comparison between the FDV leave entitlements of award-reliant workers with employees who are not award-reliant, such as those covered by enterprise agreements or over-award arrangements.

[463] We are, of course, conscious of the need for caution when considering the terms of enterprise bargaining and over-award arrangements in the context of a review of modern awards and when considering proposed variations to modern awards.

[464] Enterprise agreements are negotiated by the parties and approved by the Commission against various statutory criteria. The legislative context relevant to the review of modern awards and to our consideration of applications to vary modern awards is quite different. As the Full Bench in the *Modern Awards Review 2012—Penalty Rates* decision observed:

‘... in approving agreements the Commission is not making an assessment as to whether the instrument meets the modern awards objective or would be appropriate in circumstances other than those applying at the enterprise concerned.’⁵⁵⁷

[465] In summary, it seems to us that the prevalence of paid FDV leave arrangements is relevant to our consideration of the ACTU claim. The prevalence of paid FDV leave in enterprise agreements and the provision of such leave by a significant proportion of employers more generally suggests that there is a demand for such leave and that such employers see some utility in providing it.

[466] We also wish to comment on ACCI’s contention that ‘modern awards ... *cannot* rise above an absolute minimum standard of the modern awards objective’.⁵⁵⁸

[467] The proposition that modern awards ‘*cannot* rise above an absolute minimum standard’ is a mischaracterisation of our statutory task. A similar proposition was considered, and rejected, in the *Penalty Rates Decision*.⁵⁵⁹ In that case, ACCI (and other employer bodies; referred to as the Joint Employers) submitted that the reference to a ‘minimum safety net’ in s.134(1) means the ‘least ... possible’ to create a ‘minimum floor’, as follows:

‘The notion of a “safety” “net” is effectively the creation of a floor ensuring employees are “caught” preventing them from being exposed to “hurt, injury, danger or risk”.

The addition of the term “minimum” reinforces the level that this floor is calibrated to: namely, “... the least quantity or amount possible ...”

⁵⁵⁶ [2019] FWCFB 3500 at [197]–[198].

⁵⁵⁷ [2013] FWCFB 1635 [229].

⁵⁵⁸ ACCI submissions in reply dated 4 February 2022 [8.20(c)].

⁵⁵⁹ [2017] FWCFB 1001.

The creation of the minimum safety net by sections 134 and 284 of the FW Act illuminates what the phrase “only to the extent necessary” in s 138 relates to.

That is, section 138 is dictating that the Commission may only include terms in a modern award to the extent necessary to create a minimum floor. Once this minimum floor is created, section 138 restrains the Commission from going any further irrespective of what historically would be called the “general industrial merits of the case”.⁵⁶⁰

[468] The Full Bench rejected the proposition advanced by the Joint Employers, as follows:

‘The proposition advanced relies on dictionary definitions of *some* individual words within s.134(1). But the argument advanced pays scant regard to the fact the modern awards objective is a composite expression which requires that modern awards, together with the NES, provide “a fair and relevant minimum safety net of terms and conditions”. The joint employer reply submission gives insufficient weight to the statutory directive that the minimum safety net be “fair and relevant”. Further, in giving effect to the modern awards objective the Commission is required to take into account the s.134 considerations, one of which is “relative living standards and the needs of the low paid” (s.134(1)(a)). The matters identified tell against the proposition advanced in the joint employer reply submission.’⁵⁶¹

[469] The modern awards objective does not dictate that a ‘fair and relevant safety net’ cannot rise above an ‘*absolute* minimum standard’. The submission advanced is a gloss on the words of the FW Act. We propose to apply the words of the statute, as interpreted by the Federal Court.

[470] We now turn to the evidence regarding the prevalence of paid FDV leave. At the outset, we note that it is uncontentious that many employers are supportive of their employees and will act in a compassionate and collaborative manner in relation to employees experiencing FDV.⁵⁶²

[471] As ACCI acknowledges, paid FDV leave is becoming increasingly common in enterprise agreements, although far from ubiquitous.⁵⁶³ Similarly, Ai Group acknowledges that the WAD Analysis shows a ‘significant increase’ in employers providing terms and conditions above the minimum requirement for employees experiencing FDV.⁵⁶⁴

[472] The WAD Analysis provides an overview of FDV clauses or provisions in current agreements as at 30 June 2021 and enterprise agreements approved between 7 July 2018 and 30 June 2021. As mentioned earlier in Chapter 6.3.3, it is more appropriate to focus on approved enterprise agreements as such a focus is reasonably likely to reflect current trends in enterprise agreement content.

⁵⁶⁰ ACCI, NSWBC and ABI joint reply submission – 1 April 2016 [5.6]–[5.9].

⁵⁶¹ [2017] FWCFB 1001 [128].

⁵⁶² Transcript, 8 April 2022, PN294.

⁵⁶³ ACCI submissions in reply dated 4 February 2022 [8.20(b)].

⁵⁶⁴ Ai Group submissions in reply dated 4 February 2022 [246].

[473] The prevalence of FDV provisions and paid FDV leave in enterprise agreements has increased over time. The WAD Analysis found that:

- 7,879 agreements (64.39 per cent) approved from 7 July 2018 - 30 June 2021 contain some form of FDV clause or provision, accounting for the majority of employees covered by those agreements. This amounts to an increase of about 27.79 per cent compared with agreements approved from 6 July 2016 - 6 July 2018,⁵⁶⁵ and
- Some 1,684,047 employees (87.03 per cent) were covered by agreements approved from 7 July 2018 - 30 June 2021 that contained some form of FDV clause or provision.⁵⁶⁶ This amounts to an increase of about 22.68 per cent of employees when compared to those employees covered by agreements approved from 6 July 2016 - 6 July 2018.⁵⁶⁷

[474] Around one-third of all enterprise agreements approved from 7 July 2018 to 30 June 2021 (32.8 per cent) have *paid* FDV leave provisions.⁵⁶⁸ The most common number of paid FDV leave days provided was 10 days, accounting for 62.6 per cent of those approved enterprise agreements with paid FDV leave provisions, covering 27.6 per cent of employees covered by those agreements.⁵⁶⁹ A further 9.9 per cent of approved enterprise agreements provided for more than 10 days of paid FDV leave, covering 27.9 per cent of employees.⁵⁷⁰

[475] We broadly agree with ACCI's analysis of the agreements approved from 7 July 2018 to 30 June 2021 which contain some type of FDV clause or provision, such agreements are concentrated in particular industry sectors.

[476] Construction accounted for the highest proportion of enterprise agreements approved in the period from 7 July 2018 to 30 June 2021 with some type of FDV clause or provision (42.6 per cent).⁵⁷¹ However, Education and training (18.7 per cent) and Health care and social assistance (15.0 per cent) had the highest proportion of employees covered by enterprise agreements approved with some type of FDV clause or provision.⁵⁷²

[477] Construction also accounted for the highest proportion of enterprise agreements approved in the period with paid FDV leave (52.8 per cent) and unpaid FDV leave (36.2 per cent).⁵⁷³ Again, however, Education and training accounted for the highest proportion of employees covered by approved enterprise agreements with paid FDV leave (23.8 per cent), while Retail trade had the highest proportion of employees covered by approved enterprise agreements with unpaid FDV leave (29.9 per cent).⁵⁷⁴

⁵⁶⁵ WAD Analysis p.10.

⁵⁶⁶ Ibid p.16-17.

⁵⁶⁷ Ibid p.17.

⁵⁶⁸ Ibid p.44.

⁵⁶⁹ Ibid.

⁵⁷⁰ Ibid.

⁵⁷¹ Ibid p.11.

⁵⁷² Ibid p.18.

⁵⁷³ Ibid pp.12-13.

⁵⁷⁴ Ibid pp.19-20.

[478] The Employer Survey Report also provides information about employees with access to paid or unpaid FDV leave. The results of the Employer Survey are set out in Chapter 6.3.2. Those results show that about 20 per cent (1 in 5) of respondents provide paid FDV leave and that the provision of paid FDV leave varied by business size.

[479] Based on the Employer Survey Report, the ACTU calculates that ‘the quantum of [paid FDV] leave entitlements is close to evenly split between employers who provide 10 *or more* days of paid FDV leave (49.7 per cent) and employers who provide 9 or less days (50.3 per cent)’, although it notes that the demographic characteristics of the employers and the number of employees covered is not known.⁵⁷⁵ The ACTU calculations were not challenged by the opposing parties.

[480] As we concluded in Chapter 6.3.2, the Employer Survey has its limitations and the results cannot be extrapolated to employers generally. However, the results do represent the views of 1,340 employers and provide useful information on whether employees have access to FDV leave.

[481] The significant increase in enterprise agreements containing a paid FDV leave term is consistent with the results of the WGEA 2020-21 Employer Census, documented in Chapter 6.5. The WGEA dataset covers almost 4.2 million employees (nearly 40 per cent of Australia’s total workforce), employed in 4,474 organisations with 100 or more employees. The Census notes a ‘sharp rise in the availability of paid FDV leave in the past 5 years’ (12.1 per cent in 2015-16 to 50.7 per cent in 2020-21).⁵⁷⁶

[482] Finally, the data from the SWIRLS Report, set out in Attachment D, shows that most State and Territory public sector employees have access to between 10 and 20 days’ paid FDV leave.

[483] We now turn to the ACTU’s contention that the ‘industrial norm’ is for employees to be provided with paid FDV leave of between 10 and 14 days.

[484] The ACTU’s unchallenged analysis of the Employer Survey Report suggests that about half of respondent employers who provide paid FDV leave provide 10 or more days’ paid leave. As we have set out above, the WAD Analysis shows that around one-third of all enterprise agreements approved from 7 July 2018 to 30 June 2021 provide paid FDV leave and the most common number of paid FDV leave days provided was 10 days (in 62.6 per cent of agreements with paid FDV leave provisions).⁵⁷⁷ A further 9.9 per cent of approved enterprise agreements provided for *more than* 10 days of paid FDV leave.⁵⁷⁸

[485] Access to paid FDV leave varies by business size. The Employer Survey Report shows that of respondent businesses, 20.7 per cent of those employing one to 5 employees and 17.9

⁵⁷⁵ ACTU supplementary submissions dated 22 December 2021 [60].

⁵⁷⁶ Workplace Gender Equality Agency, *Australia’s Gender Equality Scorecard: Key Results from the Workplace Gender Equality Agency’s 2020-21 Employer Census*, (Report, February 2022) p.3.

⁵⁷⁷ WAD Analysis p.44.

⁵⁷⁸ *Ibid.*

per cent of those employing 6 to 10 employees provide paid FDV leave.⁵⁷⁹ The WGEA Employer Census shows that 50.7 per cent of organisations employing more than 100 employees provide paid FDV leave.⁵⁸⁰

[486] Contrary to the ACTU’s submission, it is not accurate to describe these developments as establishing an ‘industrial norm’ of 10 to 14 days’ paid FDV leave. However, we accept that the evidence establishes that there has been a sharp rise in the availability of paid FDV leave in the past 5 years. A substantial proportion of the Australian workforce now has access to paid FDV leave. The available evidence suggests that where employees are able to access paid FDV leave, it is relatively common for 10 days’ paid leave to be provided. In summary, the evidence supports a finding that the provision of 10 days’ paid FDV leave is an emerging industrial standard in bargaining and over-award arrangements.

(ii) The utility of paid FDV leave

[487] The qualitative evidence presented in the Monash Report details the impacts of FDV on the workplace and performance at work of victim-survivors. It provides an important perspective on the significant assistance that paid FDV leave can provide to assist the welfare of victim-survivors and that such leave helps individuals remain safe and engaged in work.⁵⁸¹

[488] The Monash Report also notes that when asked whether in hindsight access to FDV leave would have been helpful:

‘Numerous interview participants described workplaces where the culture was not conducive to safe disclosure, regardless of the leave provisions available ... victim-survivors spoke about the value of having supported time away from work to plan for their safety and support their recovery.’⁵⁸²

[489] The viewpoint is said to be captured in the comments of an interview participant, who explained:

‘I just needed some time to get myself together, my headspace, get some treatments, just to see where I am today. I just couldn’t believe what was happening to me, because it was a number of assaults. It was just awful. (Bianca, interview participant)’⁵⁸³

[490] The Monash Report concludes that:

‘Workplace policies and support practices are essential to ensure victim-survivors are supported to maintain paid employment during their experience of DFV, and to continue to engage with work throughout their recovery. The economic benefits of paid employment are significant in the context of women’s economic security and their ability to safely exit and maintain a life free from violence.

⁵⁷⁹ Fair Work Commission (2022) *Information Note – Paid Family and Domestic Violence Leave by business size*, 11 March.

⁵⁸⁰ Workplace Gender Equality Agency, *Australia’s Gender Equality Scorecard: Key Results from the Workplace Gender Equality Agency’s 2020-21 Employer Census*, (Report, February 2022) p.31.

⁵⁸¹ Monash Report, see for example p.28

⁵⁸² *Ibid* p.27.

⁵⁸³ *Ibid*.

Within this context, family violence leave provisions have a symbolic and a functional role to play.

....

When set alongside emerging best practice recommendations in Australia and internationally, the expertise and experience of victim-survivors identifies the need for workplaces to provide at minimum 14 days paid family violence leave, and ideally access to unlimited leave. The latter recognising the long-term impacts of DFV on victim-survivors, the critical importance of their economic security, and the significant journey which accompanies the recovery phase.⁵⁸⁴

[491] Similarly, the SWIRLS Report observes:

‘FDV is widely acknowledged as a barrier to achieving gender equality both in the workplace (Weatherall, Gavin & Thorburn, 2021) and more generally (ANROWS, 2019; AIHW, 2019). Given the recognition that FDV “erodes working women’s access to safe and full-time work” (Aeberhard-Hodges & McFerran, 2018, p. 260), FDV leave entitlements can be considered a key element in efforts to secure greater gender equality. FDV leave, for example, is an important means for “maintaining the economic security necessary to potentially leave and recover from a violent relationship” (Weatherall, Gavin & Thorburn, 2021, p 571). FDV leave plays a role in mitigating the barriers for women in accessing the resources they need to rebuild their lives. As a strategy for supporting women’s continued employment – and hence, women’s economic independence – FDV leave entitlements can contribute to reducing the damaging impacts of FDV for, not only, individual women but also the broader economy.’⁵⁸⁵

[492] Various articles in the Research Reference List emphasise the importance of access to paid FDV leave to enable victim-survivors ‘to begin the process of surviving and then escaping from a domestic violence situation ... [and] is also an important tool in enabling victims of domestic violence to stay in the work force.’⁵⁸⁶

[493] The House Committee Report also makes a number of observations relevant to our assessment of the utility of paid FDV leave. In particular, the Report notes that many services supporting victim-survivors are only open, or are primarily open, during business hours, and then makes the following observation:

‘Leave is an important tool to allow victim-survivors to access services. Without an ability to take leave, those experiencing [family, domestic and sexual violence] may be faced with a choice between accessing services and maintaining employment.

The Committee believes that wherever possible victim-survivors should be supported to continue their employment if they wish.’⁵⁸⁷

⁵⁸⁴ Ibid p.44.

⁵⁸⁵ SWIRLS Report p.7.

⁵⁸⁶ Alice de Jonge, ‘Corporate Social Responsibility Through a Feminist Lens: Domestic Violence and the Workplace in the 21st Century’ (2018) 148(3) *Journal of Business Ethics* 471, 479, Research Reference List No.17. Also see Natasha Cortis and Jane Bullen, *Building Effective Policies and Services to Promote Women’s Economic Security Following Domestic Violence* (State of Knowledge Paper, ANROWS, August 2015), Research Reference List No.38.

⁵⁸⁷ House of Representative Standing Committee on Social Policy and Legal Affairs, *Inquiry into Family, Domestic and Sexual Violence* (Final Report, March 2021) [8.218]–[8.219].

[494] The evidence supports a finding that paid FDV leave provides significant assistance to those experiencing FDV. Such leave helps individuals to maintain their economic security; to access relevant services, and to safely exit to a life free from violence.

[495] The evidence also supports a finding that the provision of paid FDV leave is likely to be of benefit to employers. In its ‘Summary of evidence’ report on paid FDV leave, ANROWS concludes that:

- The cost to employers of having to provide paid FDV leave will be significantly offset by the benefits of providing paid FDV leave.
- Benefits include: a demonstration that organisations are committed to their staff; raising awareness of FDV as a workplace and social issue; and enhancing the overall reputation and state of organisations.

[496] de Jonge (2018) goes further, arguing that the benefits of providing paid FDV leave outweighs the cost of doing so:

‘the consequent costs of recruiting and training new employees to replace workers lost due to domestic violence, are greater than the costs of providing leave and other entitlements necessary to support and retain affected employees. In short, the costs of assisting workers to deal with the impacts of domestic violence are far less than the costs involved in not doing so. ... Investing in systems and procedures to help affected workers offset the costs of domestic violence also makes economic sense for another important reason. When workers feel that an employer cares enough to provide support through difficult times, employee morale improves, with consequent beneficial impacts on productivity. This generates a virtuous circle, where the additional resources generated by improved productivity can be re-invested in improved training and support services within the workplace.’⁵⁸⁸

[497] In respect of the costs and benefits to employers of the introduction of an entitlement to 10 days paid FDV leave the thrust of the ACTU’s contention is that:

‘the costs to employers of providing FDV leave are likely to be small, and will largely be offset by productivity gains and other benefits associated with helping employees affected by family and domestic violence to escape and recover from harmful and dangerous situations which impact negatively on their lives and on their work.’⁵⁸⁹

[498] In support of its contention the ACTU relies principally on the expert evidence of Professor Duncan and Dr Stanford, and the SWIRLS Report. We return to that evidence shortly.

[499] ACCI submits that ‘[n]o real evidence has been filed at all which is persuasive that, at an individual (particularly small) business level costs of the claim will be off-set by benefits.’⁵⁹⁰ ACCI also contests the conclusions in the expert evidence that the costs of a paid FDV leave

⁵⁸⁸ de Jonge (2018) p.473.

⁵⁸⁹ ACTU submissions dated 30 July 2021 [142].

⁵⁹⁰ ACCI submissions in reply dated 4 February 2022 [8.41].

entitlement are likely to be largely offset by the benefits and submits that that evidence ‘fails to provide any real or tangible evidence of how [Professor Duncan] arrived at this conclusion.’⁵⁹¹

[500] Ai Group submits that a ‘small number of conclusions’ can be drawn from the evidence including:

1. That the introduction of additional FDV leave entitlements would increase employment costs.⁵⁹²
2. The evidence does not enable a reliable assessment of the quantum of FDV leave that would be taken by employees and, by extension, the evidence does not enable a reliable assessment of the microeconomic or macroeconomic costs of FDV leave.⁵⁹³
3. The evidence does not establish that employers will experience benefits as a *result* of the grant of FDV leave which will in turn offset some or all of the costs associated with FDV leave. Any such assertions in the evidence are ‘at best, speculative.’⁵⁹⁴

[501] We deal with Ai Group’s contention that the evidence does not enable a reliable assessment of the cost of the ACTU claim, in the next chapter. We note that ACCI advances a similar argument.

[502] The assessment of whether the introduction of paid FDV leave will reduce the incidence of FDV in the community generally, is somewhat problematic. As Dr Stanford notes:

‘[e]stimating the extent to which the provision of paid leave to employees experiencing FDV would reduce the incidence of FDV (both to themselves, and to other workers) is a complex exercise, given the many factors contributing to the incidence of FDV, and the gradual way those factors evolve over long periods of time. Approaches to scientifically estimating these impacts could include comparing the experience of those who were supported with paid leave in addressing their situations, to the experience of those with no such employment or income protections, and then quantifying resulting differences in the rate of recurrence of violence. Other approaches could involve exploiting cross-industry or cross-jurisdictional variation in the coverage of paid FDV leave measures, to see if any correlation exists with reductions in violence.’⁵⁹⁵

[503] But, the introduction of paid FDV leave is likely to be of some benefit to employers.

[504] The SWIRLS Report observes that FDV can have negative impact on employers and the workplace:

‘[o]ther research confirming the impacts of FDV on employment discusses women’s experiences of feeling distracted, tired, unwell, or afraid at work, leading to absences and leave (Aeberhard-

⁵⁹¹ Ibid.

⁵⁹² Ai Group final submissions dated 28 March 2022 [6].

⁵⁹³ Ibid [7]-[8].

⁵⁹⁴ Ibid [9].

⁵⁹⁵ Stanford Report [16].

Hodges & McFerran, 2018; Franzway et al., 2019), and often resulting in reduced income and disrupted work histories. The AIHW (2018), for example, reports that 1 in 11 (9.6 per cent, or 26 500) women, as compared to 1 in 25 (4 per cent or 6,000) men, have taken time off work due to FDV from a current partner. This figure rises to 1 in 5 (20 per cent, or 270,000) women in relation to FDV from a previous partner. Aeberhard-Hodges & McFerran (2018) further describe out-of-pocket expenses of FDV, including accessing medical treatment, police support, legal advice, counselling and judicial support. Bluett-Boyd (2018) has estimated the average cost of leaving FDV as more than \$18,000 per person.⁵⁹⁶

[505] The SWIRLS Report also finds that:

‘By facilitating the capacity of employees to maintain ongoing employment, FDV leave is likely to contribute to reduced staff turnover and, hence, less disruption for the workplace while also avoiding the costs associated with recruiting and training new employees (Aeberhard-Hodges & McFerran, 2018; de Jonge, 2018; ANROWS, 2019). FDV leave entitlements may also contribute to a more positive work environment characterised by increased awareness of FDV and reduced stigma for those experiencing it (Aeberhard-Hodges & McFerran, 2018; Eftekhar, 2019; Guthrie & Babic, 2021). This may lead, in itself, to stronger employee morale linked to reduced social isolation and increased self-worth (Eftekhar, 2019; Wilcox et al., 2021).’⁵⁹⁷

[506] Dr Stanford deals with the benefits of paid FDV leave, to employers, in these terms:

‘there is clear evidence that access to paid leave to support employees trying to resolve or escape FDV helps to reduce the recurrence of violence... We cannot say with precision how much those costs would be reduced by the economy-wide provision of FDV leave programs (presumably in concert with other education and support measures to prevent FDV). But they will certainly help to reduce those costs, which are very large, and the potential economic savings resulting from reduced FDV offer a significant incentive (secondary, of course, to the goal of preventing violence and harm experienced by the victims of FDV) for all measures aimed at preventing the occurrence or reoccurrence of FDV.’⁵⁹⁸

[507] It is Dr Stanford’s evidence that:

‘There would be no observable negative impact on productivity from the extension of this entitlement to all workers. Indeed, if there were any impact on productivity at all it would likely be positive (as a result of the causal relationships discussed in Part I of this report between FDV and worker attendance, attention, retention, and productivity). Any measures which serve to reduce the incidence of FDV, and assist victims of FDV in escaping from or resolving those situations more quickly and effectively, will have positive implications for realised productivity.

The impact on business or organisational performance of extending this measure will be positive. The extension would have no significant negative impact on labour cost. Employee attitudes and loyalty to the employer will be strengthened by the knowledge that the employer will offer support to them in the event of the very negative circumstances of FDV. The business or workplace’s public brand may also be enhanced by showing its commitment to this ethical and responsible treatment of its workforce.⁵⁹⁹

⁵⁹⁶ SWIRLS Report p.5.

⁵⁹⁷ Ibid p.6.

⁵⁹⁸ Stanford Report [17].

⁵⁹⁹ Ibid [90]-[91].

[508] Professor Duncan's evidence is in similar terms:

‘the direct benefits to employers from providing paid FDV leave include the reduction in costs from absenteeism and lost productivity due to financial constraints. The indirect benefits to employers include the mitigation of the negative effects of family and domestic violence on workplace productivity.’⁶⁰⁰

[509] As mentioned earlier, the ACTU contends that the cost of providing paid FDV leave as an award entitlement ‘will be largely offset by productivity gains and other benefits associated with helping employees affected by FDV.’⁶⁰¹

[510] We accept that the introduction of paid FDV leave will be of some benefit to employers. But the evidence before us is insufficient to quantify that benefit with any level of confidence or to conclude that the benefits would ‘largely offset’ the cost.

⁶⁰⁰ Duncan Report [54].

⁶⁰¹ ACTU submissions dated 30 July 2021 [142].

7. Cost of the ACTU Claim

7.1 Background

[511] As we have mentioned, the *July 2017 Majority Decision* accepted the evidence that the provision of paid FDV leave would assist employees experiencing FDV and reduce the financial impact of the consequences of the violence.⁶⁰² The Majority had ‘no difficulty in concluding that the provision of paid leave would be a desirable outcome’.⁶⁰³

[512] However, the *July 2017 Majority Decision* ultimately concluded that the variation sought by the ACTU was not *necessary* to achieve the modern awards objective⁶⁰⁴ for reasons which included the following observations:

‘[W]e are not satisfied that the ACTU has made out a case for ten days paid leave to all employees. We have also formed the view that the ACTU’s proposed definition is too broad in scope and would be difficult to apply. Those conclusions however do not negate the need for a protective unpaid provision.

...

The ACTU has not provided a satisfactory explanation as to how it arrived at ten days and the evidence does not support a finding that ten days paid leave is necessary.

Given that paid leave for this purpose has only been made available in recent times, it is not surprising that there is little evidence about the amount of leave that has been taken by employees in reliance on such provisions.

Further, given the lack of availability of leave for this purpose there is little evidence about how much actual unpaid leave is being taken by employees which would, if the clause was in operation, now be paid leave.

Therefore, we are not satisfied that the ACTU has made out a case that ten days paid leave for all award covered employees is necessary to meet the modern award objective.’⁶⁰⁵

[513] It is also apparent from the *July 2017 Majority Decision’s* consideration of the modern awards objective, and s.134(1)(g) in particular, that the absence of evidence as to the cost of the proposed variation was a matter of some significance. The *July 2017 Majority Decision* deals with the issue as follows:

‘We accept that we are unable to assess the impact of the clause on employment costs. It is unfortunate that none of the studies to date have uncovered the extent to which employers informally or formally provide such leave or the extent to which employees access existing entitlements for family and domestic violence leave.

We accept that providing paid leave to employees who experience family and domestic violence may assist employees to leave violent relationships and hence reduce the disruption to the

⁶⁰² [2017] FWCFB 3494 [60].

⁶⁰³ *Ibid* [60].

⁶⁰⁴ *Ibid* [47].

⁶⁰⁵ *Ibid* [59] and [65] – [68].

workplace and increase the productivity of those who experience family and domestic violence. The provision of such paid leave would send a message to employees that family and domestic violence is an important workplace issue and encourage those who experience family and domestic violence to take preventative action earlier and thereby reduce the disruption to the workplace and hence improve the productivity of those employees.

However, we accept that it is difficult to measure these impacts in circumstances where such leave has only recently been introduced and the informal provision of such leave has not been measured.

We accept that the provision of paid leave will increase costs to employers and that given the lack of data, the impact on employers of that increase in costs is difficult to assess.

This supports our conclusion that we should take a cautious approach to the introduction of family and domestic violence leave, particularly paid family and domestic violence leave.⁶⁰⁶

[514] In short, the Majority relied on 4 points in rejecting the ACTU's claim for 10 days paid FDV leave:

1. The ACTU did not provide a satisfactory explanation as to how it arrived at the figure of 10 days' paid leave and the evidence did not support a finding that 10 days' paid FDV leave is necessary.
2. None of the studies to that point of time had uncovered the extent to which employers informally or formally provided paid FDV leave.
3. There was 'little evidence' about the amount of leave employees experiencing FDV actually take, in circumstances where their employer provides FDV leave.
4. The Majority accepted that the provision of paid FDV leave would increase employment costs but was unable to assess the extent of the increase because of the lack of data referred to in points 2 and 3 above.

[515] As to the first point, we deal with whether 10 days' paid FDV leave is necessary in Chapter 8.3.1.

[516] The evidentiary deficiency identified in the second point has been addressed in these proceedings. As we found in Chapter 6.6.2, the evidence establishes that there has been a sharp rise in the availability of paid FDV leave in the past 5 years and that the provision of 10 days' paid FDV leave is an emerging industrial standard in bargaining and over-award arrangements.

[517] The third point relied on by the Majority concerned the paucity of evidence about the utilisation of paid FDV leave, in circumstances where it was available. The utilisation issue is central to estimating the cost of the ACTU's claim. We propose to turn to that issue first before turning to the parties' submissions as to the cost of the ACTU claim and the evidence of Professor Duncan and Dr Stanford.

⁶⁰⁶ Ibid [95] – [99].

7.2 The Utilisation of Paid FDV Leave

[518] Various aspects of the evidence inform our consideration of the likely level of utilisation of an entitlement to 10 days' paid FDV leave, should such an entitlement be introduced. These aspects of the evidence are set out below.

7.2.1 Employer Survey

[519] The Commission conducted a survey to understand how employers support employees who have experienced or are experiencing FDV and, in particular, whether employees have access to either paid or unpaid FDV leave. A more detailed consideration of the Employer Survey results is set out in Chapter 6.3.2.

[520] The Employer Survey results provide the following data on the utilisation of *unpaid* leave:

- 7.3 per cent of respondents reported that they had employees who had taken unpaid FDV leave in the last 12 months.⁶⁰⁷
- Most of the respondents (63.3 per cent) who answered that they had employees who had taken unpaid FDV leave in the past 12 months had only one employee who had taken unpaid FDV leave and about one in 5 (21.7 per cent) said they had 2 employees who had taken unpaid FDV leave.⁶⁰⁸
- Around 0.05 per cent of the total number of employees across all survey participants had taken unpaid FDV leave in the past 12 months.⁶⁰⁹

[521] Professor Duncan and Dr Stanford refer to the Employer Survey results in their supplementary statements and comment on the utilisation rate.⁶¹⁰

[522] Professor Duncan notes that the survey results do not make clear the proportion of employees experiencing FDV that are specifically provided with access to paid FDV leave.⁶¹¹ He goes on to derive an estimate of the utilisation of paid FDV leave among employees of the respondents to the Employer Survey, as follows:

‘Given that 13.4 per cent organisations in the Employer Survey received a request for leave or other forms of support from employees experiencing FDV in the past two years, and 31 per cent of those organisations provide paid FDV leave among the range of supports on offer, this suggests that **up to 4.2 per cent of organisations (13.4% x 31%) in the Employer Survey provided paid FDV leave to at least one employee in the past two years.** This assumes that all employees experiencing FDV would request paid FDV [leave] if available, and that all requests for paid FDV leave would be granted by their employers.

⁶⁰⁷ Employer Survey Report, Chart 8 p.11.

⁶⁰⁸ Ibid Chart 9 p.12.

⁶⁰⁹ Ibid p.12.

⁶¹⁰ Stanford Supplementary Report [11]-[16] and Duncan Supplementary Report [2]-[33].

⁶¹¹ Duncan Supplementary Report [21].

...

The Employer Survey does not allow for a calculation of how many of those employees were granted *paid* FDV leave. However, if 4.2 per cent of organisations have granted paid FDV leave to at least one employee in the past two years, the share of employees who requested and were provided with paid FDV leave will be a far smaller percentage, due to the number of workers employed by responding organisations in the Employer Survey.’⁶¹²

[523] Professor Duncan concludes that the evidence from the Employer Survey ‘suggests the assumed incidence of paid FDV leave used in [the Duncan Report] are reasonable, and does not give cause to revisit the analysis of costings in’ that Report.⁶¹³

[524] Similarly, Dr Stanford states that the utilisation rate of 0.05 per cent for unpaid FDV leave ‘is at the lower end of the range of estimated utilisation rates for paid FDV leave provisions’ that were reported in the Stanford Report - but that ‘the results of the FWC’s survey are consistent with [his] general conclusion in [Dr Stanford’s current report] that the use of FDV leave is a rare occurrence among employees’.⁶¹⁴

[525] Professor Duncan and Dr Stanford were not cross-examined on the contents of their supplementary reports and we accept this aspect of their evidence.

7.2.2 Monash Report

[526] An online survey was conducted of Australians over the age of 18 who had experienced FDV. A total of 302 respondents completed the online survey. Of the 203 respondents who responded to the question about accessing FDV leave, 20.2 per cent had accessed either paid or unpaid FDV leave, while 28.1 per cent accessed another form of leave while experiencing FDV.⁶¹⁵ The Monash survey is not a representative sample survey and we have treated the survey results as indicative only and as qualitative in nature.

[527] 21.7 per cent of respondents said they did not access FDV leave. Of those respondents who accessed FDV leave, only one took *unpaid* FDV leave. The remaining respondents accessed paid FDV leave.⁶¹⁶

[528] Over a quarter of the respondents who did not access FDV leave were casual employees or on a contract and either did not have access to FDV leave or did not think they could access it.⁶¹⁷

[529] Of those respondents whose workplaces offered paid FDV leave, the number of days available ranged from one day to up to 3 months, with an average of 14 days’ paid FDV leave.⁶¹⁸

⁶¹² Ibid [26], [28]. A typographical error in the Report is corrected by the text in square brackets.

⁶¹³ Duncan Supplementary Report [33].

⁶¹⁴ Stanford Supplementary Report [15].

⁶¹⁵ Monash Report p.28.

⁶¹⁶ Ibid p.29.

⁶¹⁷ Ibid.

⁶¹⁸ Ibid p.30.

[530] Approximately one third of respondents reported they had fully exhausted their FDV leave entitlement.⁶¹⁹

7.2.3 Bank of Queensland

[531] The BOQ advised that in 2014 it incorporated a clause within its Enterprise Agreement providing for 5 days' paid and 5 days' unpaid FDV leave. In 2017, the clause was updated to expand the entitlement to 10 days' paid and 10 days' unpaid FDV leave, with an additional 3 days' leave for an employee required to provide support for a family or household member impacted by FDV.⁶²⁰

[532] Clause 25.4 of the BOQ 2018 Enterprise Agreement deals with 'Domestic or family violence leave' and states:

'(a) Subject to compliance with Clauses 25.4(b) and 25.4(c), if you are experiencing domestic and family violence you will be allowed:

(i) 10 days per year (non-cumulative) of paid leave;

for medical appointments, legal proceedings and other activities related to domestic and family violence. This leave will be in addition to existing leave entitlements and may be taken as consecutive or single days or as a fraction of a day and can be taken without prior approval.

(b) You must give BOQ notice, in accordance with BOQ's policies, of the taking of leave under this clause. The notice must:

(i) be given to either your manager or People and Culture as soon as practicable once the need for the leave is realised (which may be a time after the leave has started); and

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

(c) If you have given notice of the taking of leave under this clause, you must, if required by BOQ, give BOQ evidence that would satisfy a reasonable person of the need for the leave.'

[533] The F17 Employer's Statutory declaration filed in support of the approval of the BOQ 2018 Enterprise Agreement states that the agreement covers 856 employees.

[534] BOQ submits that between 2018 – 2021 it has provided specific FDV support to 21 employees. BOQ advises that the adoption of paid FDV leave averages 3 days per impacted employee and, of those employees who accessed paid leave, only one accessed the full 10 days.⁶²¹

⁶¹⁹ Ibid.

⁶²⁰ BOQ submissions dated 30 July 2021 p. 1.

⁶²¹ Ibid p.2.

7.2.4 WA Government

[535] The WA Government filed a submission on 23 December 2021 noting that it introduced 10 days paid FDV leave for all WA public sector employees in 2017.⁶²² An employee who uses all their paid FDV leave entitlement can access up to 2 days unpaid FDV leave on each further occasion. As at September 2021, there were over 155,000 employees in the WA public sector. The table below sets out the number of days of paid FDV leave accessed by WA public sector employees (excluding 52,500 public health system employees) since 2017 by gender:⁶²³

Reporting period	Whole days (whole and part days combined)		
	Male	Female	Not specified
August 17 – February 2018	10.33	131.8	2
February 2018 – August 2018	6.47	247.4	0
August 2018 – February 2019	17	460.9	0
February 2019 – August 2019	49.07	441.2	0
August 2019 – February 2020	5.17	433.8	2.4
February 2020 – August 2020	42	398.99	0
August 2020 – February 2021	18	395.95	0
February 2021 – August 2021	10.73	444.01	0

[536] The WA Government submission does not contain information on the number of employees who took paid FDV leave, nor the average number of days of leave taken.

[537] The ACTU notes that the data is incomplete but submits it is instructive that the WA Government provides 10 days paid FDV leave to all WA public sector employees. As at September 2021, over 155,000 employees were entitled to a collective total of 1.55 million days of paid FDV leave per year. In the 12 months between August 2020 and August 2021, a total of 869 days of paid FDV leave were taken,⁶²⁴ representing 0.05 per cent utilisation of the total number of days of paid FDV leave available to WA public sector employees.⁶²⁵

⁶²² WA Government submissions dated 23 December 2021 p.1.

⁶²³ Ibid pp.1-2.

⁶²⁴ The number of days leave taken, in the middle two columns of the table, are added together: $18+395.95+10.73+444.01 = 868.69$ days.

⁶²⁵ ACTU submissions in response to Background Document 2 dated 7 April 2022 [51].

7.2.5 Victorian Government

[538] The Victorian Government filed a [further submission](#) on 28 March 2022 which provides updated information in relation to its family violence leave model clauses. The Victorian Government submits that:

- paid family violence leave is now in the approximately 150 public sector enterprise agreements that cover 9 government departments and approximately 280 public sector agencies, and⁶²⁶
- approximately 322,605 Victorian public sector employees have access to 20 days' paid family violence leave or unpaid family violence leave for casual employees.⁶²⁷

[539] The Victorian Government's further submission provides data on the utilisation of the paid leave entitlement in 3 of its largest departments - the Department of Health (which employs approximately 4,335 employees), the Department of Families, Fairness and Housing (which employs approximately 6,300 employees), and the Department of Justice and Community Safety (which employs approximately 10,855 employees)⁶²⁸ For these Departments:

- an average of 0.3 per cent of employees accessed paid family violence leave in the past year, and
- an average of 8.56 days of a 20 day per annum entitlement were taken.⁶²⁹

[540] The Victorian Government's further submissions also states:

'Whilst casuals in the Victorian public sector do not have a paid entitlement to family violence leave, on 14 March 2022 the Victorian Government initiated a two-year pilot - Australian first - Victorian Sick Pay Guarantee scheme where casual employees in eligible occupations can be paid an allowance to enable them to attend to mental and physical ill health and issues, covering five days paid per year of sick and carers pay at the national minimum wage.'⁶³⁰

[541] The ACTU submits that the data in the Victorian Government's further submission shows an average of 0.3 per cent of eligible employees accessed paid FDV leave in the last year. The ACTU contends that this level of utilisation 'is consistent with, and reinforces, evidence before the Commission that utilisation rates are likely to be low'.

[542] In response to the Victorian Government data, Ai Group contends that it only covers a small proportion of Victorian public sector employees and that the Commission cannot be satisfied that it is a representative sample of that employee cohort.⁶³¹ ACCI notes that the utilisation of a leave entitlement that does not extend to casuals is likely to be lower than the

⁶²⁶ Victorian Government further submissions dated 28 March 2022 [10].

⁶²⁷ Ibid.

⁶²⁸ Ibid [11].

⁶²⁹ Ibid.

⁶³⁰ Ibid [13].

⁶³¹ Ai Group submissions in response to Background Document 2 dated 7 April 2022 [41].

utilisation of the ACTU claim, if granted. This is said to be so because permanent employees have access to other forms of paid leave which may be used in relevant circumstances.⁶³²

[543] We accept Ai Group’s criticism of the data; we cannot be satisfied that it is a representative sample of the relevant employee cohort. That said, the data still represents the experience of over 20,000 employees with access to paid FDV leave.

[544] We also accept the logic of the proposition advanced by ACCI; but, as will become apparent, the point advanced is not relevant as it is our *provisional* view that paid FDV leave *not* apply to casuals.

7.2.6 Research Reference List

[545] In 2019, the *Domestic Violence – Victims Protection Act 2018* (NZ) took effect, which introduced 10 days’ paid FDV leave for all employees in New Zealand. Holly Carrington, DVFREE⁶³³ & Policy Advisor from the domestic violence organisation Shine, reported that an informal survey of 6 employers (with a combined total of 18,800 employees) found that less than 0.5 per cent of employees had asked for paid FDV leave from April 2019 to March 2021.⁶³⁴ Of those employees who accessed the leave, the average utilisation was less than 5 days per year.⁶³⁵

[546] Breckenridge et al conducted an online survey of Australian workplaces between February 2015 and March 2015 which received 102 responses.⁶³⁶ 35.3 per cent of respondents reported receiving a request for FDV leave in the previous 12 months.⁶³⁷ The average time off for paid leave was 43 hours, and time off ranged from 8 hours to 202 hours.⁶³⁸ 40 per cent of those respondents reported the typical amount of leave requested per incident was 2 to 3 days, with 25.7 per cent reporting one day or less and 11.4 per cent reporting a request for one week or more.⁶³⁹

7.2.7 House Committee Report

[547] The House Committee Report records the following information provided by the National Retail Association about the impact of the introduction of 5 days’ unpaid FDV leave in 2018:

‘Ms Lindsay Carrol from the National Retail Association (NRA), told the Committee:

⁶³² ACCI submissions in response to Background Document 2 dated 7 April 2022 [18]-[19].

⁶³³ ‘DVFREE’ is a program created by Shine to improve the workplace response to domestic violence.

⁶³⁴ DVFREE, ‘Domestic Violence Victims Protection Act: Two Years On’ (30 March 2021) Research Reference List dated 6 April 2022 No.127.

⁶³⁵ Ibid.

⁶³⁶ Breckenridge J, Cale J, Hameed S, McCaskie L, Tzoumakis S, ‘Implementation of Domestic Violence Clauses: An Employer’s Perspective’ (2015) *Gendered Violence Research Network*, University of New South Wales, Research Reference List dated 6 April 2022 No.36, p.4.

⁶³⁷ Ibid, p.7.

⁶³⁸ Ibid, p.12.

⁶³⁹ Ibid, p.7.

When the full bench of the Fair Work Commission determined to vary 120 modern awards to include the entitlement to five days of unpaid family and domestic violence leave, we fully supported this measure. Since that entitlement came into effect in August 2018, we've actively sought feedback from our members about the take-up of that leave. That feedback has led us to conclude that the impact of that entitlement on our members was negligible. One of our larger members, with over 2,000 employees, had budgeted for an increased cost of a minuscule 0.05 per cent.

However, Ms Carrol advised that the NRA had not canvassed its members' views on the proposal for paid family violence leave and did not have a formal position on the proposal.⁶⁴⁰ [footnotes omitted]

7.2.8 The Expert Evidence

[548] Professor Duncan and Dr Stanford provide evidence in respect of utilisation, in addition to their evidence referred to above about the Employer Survey data on utilisation. We deal with their evidence in more detail later, but note here that they both expect the utilisation of a modern award paid FDV leave entitlement to be low.

7.3 Submissions

[549] The ACTU relies on the evidence of Dr Stanford and Professor Duncan and submits that the actual cost of providing paid FDV leave to award-covered employees would be low. It is further submitted that an investment in employees' safety in the form of 10 days' paid FDV leave has benefits not only for workers, but for employers, including a reduction in the costs of absenteeism and lost productivity. It also contends that there are indirect benefits in terms of improved corporate image.⁶⁴¹

[550] The employer parties submit that there is insufficient material before the Commission to assess the cost of introducing paid FDV leave; but that it is clear that the introduction of paid FDV leave will introduce additional costs for employers. ACCI and Ai Group identify various limitations in the expert evidence.⁶⁴² These submissions are summarised in Background Document 1.

7.4 The Expert Evidence

7.4.1 Dr Stanford

[551] Dr James Stanford is an Economist and Director of the Centre for Future Work. Dr Stanford prepared two expert reports: the [Stanford Report](#) and the [Stanford Supplementary Report](#). The Stanford Supplementary Report has been considered in the sections regarding the Monash Report and the Employer Survey above.

⁶⁴⁰ House Committee Report [8.155]–[8.156].

⁶⁴¹ ACTU submissions dated 30 July 2021 [78]–[85].

⁶⁴² Ai Group submissions in reply dated 4 February 2022 [259], [262], [265], [268]–[278]; Ai Group final submissions dated 28 March 2022 [12]–[32], [103], [108]–[109]; ACCI submissions in reply dated 4 February 2022 [8.20]–[8.45]; ACCI final submissions dated 28 March 2022 [3.1]–[4.10]; Transcript, 8 April 2022, PN230, PN232, PN235, PN298–PN300, PN323–PN326.

[552] The Stanford Report was prepared in response to the ACTU's request that Dr Stanford provide an expert report addressing the following questions:

1. What is your estimate of the likely utilisation (if any) of an entitlement in all modern awards for 10 days paid family and domestic violence leave?
2. What is your estimate of the likely aggregate impact (if any) of the provision of 10 days paid family and domestic violence leave in modern awards on businesses employing award-covered workers, including small and medium sized businesses, in term of:
 - (a) Employment costs (including providing paid leave);
 - (b) Productivity;
 - (c) Performance; and
 - (d) Regulatory burden?
3. What is your estimate of the likely impact (if any) of an entitlement in all modern awards for 10 days paid family and domestic violence leave on:
 - (a) Employment growth;
 - (b) Inflation;
 - (c) The sustainability, performance and competitiveness of the national economy; and
 - (c) Workforce participation?⁶⁴³

[553] Background Document 2 contained a summary of the methodology of the Stanford Report. In its response to Background Document 2, the ACTU proposed a number of corrections to that summary.⁶⁴⁴ ACCI and Ai Group did not take exception with the ACTU's corrections.⁶⁴⁵ The ACTU's corrections have been incorporated into the methodology set out below.

[554] A key finding in the Stanford report is that a 10-day paid FDV leave provision would be utilised by between 0.23 per cent and 0.46 per cent of all employees each year, with an average of 7-8 days leave taken by an employee over the course of a year.⁶⁴⁶ Dr Stanford estimates this will cost less than \$200 million per year across the whole economy.⁶⁴⁷

[555] The Stanford Report calculates utilisation rates as the number of days claimed for paid FDV leave as a proportion of total days worked by employees, and provides a range of estimates of the utilisation of 10 days paid FDV leave to award covered employees:

⁶⁴³ Witness Statement of Dr Stanford dated 30 July 2021, attachment JS-2 (letter of instructions)

⁶⁴⁴ ACTU submissions in response to Background Document 2 dated 7 April 2022 [11].

⁶⁴⁵ Transcript, 8 April 2022, PN236-237, PN246.

⁶⁴⁶ Stanford Report [84]–[85].

⁶⁴⁷ Ibid [81].

1. Applying data from existing research, the utilisation rates of a paid FDV leave entitlement would be between 0.001 per cent and 0.013 per cent with employees taking an average of 7-8 days of leave.⁶⁴⁸
2. Utilising data from an informal survey of 3 employers, the utilisation rates of a paid FDV leave entitlement would be between 0.0027 per cent and 0.0078 per cent.⁶⁴⁹
3. Relying on data from existing research and the informal survey, the provision of paid FDV leave would increase aggregate labour costs by 0.4 cents per hour work, amounting to a total cost to the workforce of less than \$100 million per year (low end estimate).⁶⁵⁰
4. Utilising data from the PSS, 0.23 per cent to 0.46 per cent of all employees will utilise paid FDV leave each year. Assuming that the average claim is 10 days, workplaces will lose 0.021 per cent of total working time in a year, with estimated costs less than \$200 million per year (high end estimate).⁶⁵¹
5. Based on an analysis of the Workplace Agreements Database, close to 30 per cent of all approved EAs since 2018 include a paid FDV leave provision.⁶⁵²
6. Relying on prior research and the Workplace Agreements Database, Dr Stanford estimates that between 30 per cent and 50 per cent of Australian employees already have access to paid FDV leave entitlements.⁶⁵³

[556] The methodology in the Stanford report can be summarised as follows:

Step 1

[557] Dr Stanford estimates the utilisation rate of a paid FDV leave entitlement by using results from previous research.

[558] Table 2 in the Stanford Report shows the utilisation rates of paid FDV leave entitlements from 5 previous studies of FDV leave provisions. Dr Stanford estimates the utilisation rates in the various studies as between 0.001 per cent and 0.013 per cent, with employees on average utilising between 7-8 days of paid FDV leave over the course of a year.⁶⁵⁴

⁶⁴⁸ Ibid [51], [85].

⁶⁴⁹ Ibid [62].

⁶⁵⁰ Ibid [66], [68].

⁶⁵¹ Ibid [81], [84].

⁶⁵² Ibid [36].

⁶⁵³ Ibid [43], [45].

⁶⁵⁴ Stanford Report Table 2 p. 20. [85].

Step 2

[559] The Stanford Report relies on an informal survey conducted by Dr Stanford in 2021 of 46 Australian employers from which 3 responses were received. The 3 employers have had *paid* FDV leave programs which provide 10 days or more of leave in place for 2 to 6 years (see table 3 in the Stanford Report).⁶⁵⁵

Step 3

[560] Dr Stanford uses data from the ABS National Accounts and Labour Force (2019) to calculate the cost of providing paid FDV leave.

[561] Using the National Accounts and Labour Force data, Dr Stanford finds that the all-in cost of labour compensation for Australian workers averaged \$44 per hour worked in 2019.⁶⁵⁶

[562] Relying on the existing research and the informal survey, Dr Stanford concludes that the cumulative total of paid FDV leave accounted for between 0.001 to 0.013 per cent of total working time. Taking the high end of these estimates (rounded to 0.01) and multiplying it with the average labour compensation in 2019, Dr Stanford estimates that provision of paid FDV leave would increase aggregate labour costs by 0.4 cents per hour worked.⁶⁵⁷ Using this figure, Dr Stanford estimates that the cost across the entire workforce of providing paid FDV leave would be less than \$100 million per year (low end estimate).⁶⁵⁸

Step 4

[563] Dr Stanford generates a ‘high end estimate’ of the costs of providing paid FDV leave by utilising the PSS data on whole of population experience of intimate partner violence in the previous 12 months.

[564] Table 4 of the Stanford Report shows the estimated prevalence rate of intimate partner violence for the previous 12 months. It is estimated that 1.76 per cent of the population experiences intimate partner violence in a given year.⁶⁵⁹

Table 4. Incidence of Sexual or Physical Violence from Intimate Partner, Last 12 Months

Table 4. Incidence of Sexual or Physical Violence from Intimate Partner, Last 12 Months			
	Assault	Threat	Total
Women			

⁶⁵⁵ Ibid [59]-[60]; ACTU submissions in response to Background Document 2 dated 7 April 2022 [11].

⁶⁵⁶ Ibid [65].

⁶⁵⁷ Ibid [66].

⁶⁵⁸ Ibid [68].

⁶⁵⁹ Ibid [76].

Number (000)	187.0	50.4	211.7
% All Adults	1.99%	0.54%	2.26%
Proportion of Victims of Violence ¹ Missing Work in Next 12 Months			15.49%
Men			
Number (000)	96.6	19.2	113.9
% All Adults	1.07%	0.21%	1.26%
Proportion of Victims of Violence ¹ Missing Work in Next 12 Months			10.77%
Total			
Number (000)	283.5	72.1	323.1
% All Adults	1.54%	0.39%	1.76%
Proportion of Victims of Violence ¹ Missing Work in the Next 12 Months			13.00%

Source: Author's calculations from ABS, "Personal Safety, Australia," 2016, Tables 5.1, 10.1, and 11.1. Totals do not add due to overlapping categories.

¹ Including victims of any form of violence

[565] Dr Stanford uses PSS data on time taken off work for targets of violence by any perpetrator (not just partner violence). It is estimated that 13 per cent of targets of violence by any perpetrator took time off work in the preceding 12 months.⁶⁶⁰

[566] Dr Stanford relies on research by Cox that estimates that 62 per cent of women who experienced FDV were employed. Relying on ABS Labour Force data (2020), Dr Stanford estimates this is approximately equal to the proportion of adult women who participate in the labour market. He therefore assumes that the incidence of FDV experienced by working women is equivalent to the overall incidence experienced by all women.⁶⁶¹

[567] To estimate the proportion of employees who take time off work as a result of FDV, Dr Stanford estimates that if 1.76 per cent of the population experiences intimate partner violence and 13 per cent will miss work as a result, this amounts to 0.23 per cent of all workers who will experience an absence from work due to FDV in any given year.⁶⁶²

[568] Dr Stanford assumes that the broader provision of a paid FDV leave entitlement and growing social awareness and acceptance of its use, may lead to more frequent claims. He assumes that the number of people who take FDV leave will *double*.⁶⁶³ Consequently, the overall claim rate of a paid FDV leave entitlement is reached by estimating that if 1.76 per cent of the population experienced FDV in a given year, and 26 per cent of those will miss work as

⁶⁶⁰ Stanford Report [74].

⁶⁶¹ Ibid [75].

⁶⁶² Ibid [76].

⁶⁶³ Ibid [77].

a result, there will be an overall claim rate of 0.46 per cent per year, that is 0.46 per cent of all employees will take paid FDV leave each year.⁶⁶⁴

Step 5

[569] Assuming that the average claim of paid FDV leave is 10 days of leave, Dr Stanford estimates that workplaces will lose 0.021 per cent of total working time in a year. This is an upper-boundary estimate reflecting the high-cost assumptions made at each stage of the calculation. The Stanford Report calculates that at that rate of utilisation, a workplace with 1000 full-time workers could expect to incur approximately 45 additional days of paid leave per year, or 20 minutes of extra paid leave per worker per year.⁶⁶⁵

[570] Using the same method of estimating employment costs for the entire economy as at Step 3 above, the Stanford Report estimates that the cost of the utilisation rate of 0.021 per cent of working time would equal less than \$200 million per year, or less than 0.01 of the national GDP.⁶⁶⁶

[571] Dr Stanford acknowledges that this calculated estimate does not account for the proportion of the workforce who already has access to paid FDV leave.⁶⁶⁷

[572] The Stanford Report cites prior research by Family and Community Services NSW and the WAD to determine the existing coverage of FDV leave entitlements.

[573] A qualitative survey of 123 workplaces from which 33 responses were received by Family and Community Services NSW found that 18 workplaces had policies providing paid FDV leave and 21 had policies providing unpaid FDV leave.⁶⁶⁸ The survey found that larger workplaces were more likely to provide paid FDV leave: one-third of workplaces with between 1000 and 5000 employees and over half of workplaces with between 5,000 and 10,000 employees offered paid FDV leave.⁶⁶⁹ 80 per cent of workplaces with over 10,000 employees provided paid FDV leave.⁶⁷⁰

[574] Dr Stanford concludes that this data reveals that ‘the proportion of Australian workers with access to paid FDV entitlements will be substantially larger than the proportion of workplaces which offer it.’⁶⁷¹

[575] Relying on previous studies that estimate the cost to the Australian economy of FDV, the Stanford Report concludes that the economic costs of FDV are approximately one per cent

⁶⁶⁴ Ibid.

⁶⁶⁵ Ibid [79]–[80].

⁶⁶⁶ Ibid [81].

⁶⁶⁷ Ibid.

⁶⁶⁸ Ibid [26].

⁶⁶⁹ Ibid [28].

⁶⁷⁰ Ibid.

⁶⁷¹ Ibid.

of national GDP, which, in present day terms corresponds to costs of over \$20 billion per year.⁶⁷²

[576] Citing evidence that the incidence of FDV has increased as a result of the COVID-19 pandemic, Dr Stanford assumes that the estimate of the costs of FDV to the economy is ‘likely to understate the current incidence and costs’ of FDV in light of the pandemic.⁶⁷³

[577] Dr Stanford concludes that while the costs of paid FDV leave cannot be weighed directly against the overall costs of FDV, they can be reasonably compared to one another.⁶⁷⁴

[578] ACCI and Ai Group submit, for various reasons, that we should give little if any weight to Dr Stanford’s evidence.

[579] ACCI submits that considerable caution should be exercised in applying Dr Stanford’s conclusions relating to the operation of an entitlement of paid FDV leave provided under enterprise agreements (that have been the subject of bargaining), to how they will function under an entitlement to be included in modern awards. ACCI submits that during cross examination, Dr Stanford made a number of concessions and acknowledged a range of issues with his Report.⁶⁷⁵

[580] Ai Group challenges Dr Stanford’s evidence on a number of bases.⁶⁷⁶

[581] In relation to the Stanford Report’s ‘high end estimate’, Ai Group submits that the ABS data on the impact of violence on victims utilised by Dr Stanford ‘does not distinguish between different types of violence’.⁶⁷⁷ It says:

‘There is however no basis for assuming that the proportion of persons who experience FDV and take time off work during the following 12 month period is the same as those who experience violence generally.’⁶⁷⁸

[582] Ai Group submits that, as a result, the estimates provided do ‘not permit a sufficiently clear or accurate assessment regarding the prevalence of FDV’.⁶⁷⁹

[583] Ai Group also submits that Dr Stanford’s evidence from the informal surveys with employers (2016 and 2021) should be ‘afforded little if any weight’.⁶⁸⁰ It says:

‘Dr Stanford’s research in 2016 related to five employers and in preparation for these proceedings, information was collected from three employers. Self-evidently, the results of this research are

⁶⁷² Ibid [12].

⁶⁷³ Ibid [14].

⁶⁷⁴ Ibid [17].

⁶⁷⁵ ACCI final submissions dated 28 March 2022 [4.4].

⁶⁷⁶ Ai Group final submissions dated 28 March 2022 [13]–[25].

⁶⁷⁷ Ai Group submissions in reply dated 4 February 2022 [262].

⁶⁷⁸ Ibid.

⁶⁷⁹ Ibid [263].

⁶⁸⁰ Ibid [269].

not representative of employers generally and they should not be extrapolated to draw any general conclusions or findings.’⁶⁸¹

[584] In reply, the ACTU submits that ‘there is no suggestion in the material that...Dr Stanford’s analysis of utilisation rates, [is] incorrect’⁶⁸² and that:

‘In circumstances where there is no single data source that can positively answer the question as to the likely utilisation rate of a paid FDV leave entitlement – and nor could it rationally be expected that such a source exist – the ACTU submits that the proper approach is to consider the evidence as a whole. Dr Stanford’s reports perform that task. The overwhelming preponderance of the evidence is that utilisation rates are likely to be low, and correspondingly, so will be the costs of providing paid leave.’⁶⁸³

[585] In our view, Ai Group overstates the deficiencies in the Stanford Report. Some of Ai Group’s criticisms were not ultimately pressed⁶⁸⁴ or were unfair, in the sense that the criticism advanced in the submission had not been put to Dr Stanford in cross-examination.⁶⁸⁵ While Ai Group’s critique of Dr Stanford’s evidence is somewhat overstated, it is evident to us that the methodology in the Stanford Report is not as robust as that in the Duncan Report, a point to which we return shortly.

7.4.2 Professor Duncan

[586] Professor Duncan is the Director of the Bankwest Curtin Economics Centre and Bankwest Professor of Economic Policy at Curtin University. Professor Duncan prepared 2 expert reports: the [Duncan Report](#) and the [Duncan Supplementary Report](#). This section outlines the methodology of the Duncan Report.

[587] The Duncan Report was prepared in response to the ACTU’s request that Professor Duncan provide an expert report addressing the following questions:

1. What is the likely cost (if any) to employers of award-covered employees, including small and medium sized businesses, of providing 10 days paid family and domestic violence leave?
2. Is there a cost to employers of award-covered employees, including small and medium sized businesses, of not providing an entitlement of 10 days paid family and domestic violence leave? If the answer to this question is yes, please provide an estimate of the likely cost.

⁶⁸¹ Ibid [270].

⁶⁸² ACTU submissions in reply dated 21 February 2022 [42].

⁶⁸³ Ibid [51].

⁶⁸⁴ Transcript, 8 April 2022, PN305-PN306.

⁶⁸⁵ See the discussion during oral argument, Transcript, 8 April 2022, PN309-PN321; *Browne v Dunn* (1893) 6 R 67; *MWJ v The Queen* [2005] HCA 74; *CFMMEU & another v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal* [2021] FWCFB 6059.

3. What are the likely benefits (if any) for award-covered employers and employees, including small and medium sized businesses, of the provision of an entitlement of 10 days paid family and domestic violence leave?⁶⁸⁶

[588] A key finding in the Duncan Report is that the total annual cost to employers of providing an entitlement of 10 days paid FDV leave to award-covered employees is between \$13.1 million and \$34.3 million per annum.⁶⁸⁷ The ACTU relies on the Duncan Report as evidence of the estimated cost of providing paid FDV leave.⁶⁸⁸

[589] The Duncan Report uses data on the prevalence of FDV among workers to estimate the cost of providing 10 days' paid FDV leave to award-covered employees and uses the following data:

- The number of likely employed victims/survivors of family and domestic violence in 2019, calculated by reference to data in the PSS regarding prevalence rates, by age and sex;⁶⁸⁹
- The average weekly wage of award-covered employees, by sex, using data from Wave 19 of the Household Income and Labour Dynamics in Australia (HILDA) survey, and;⁶⁹⁰
- The estimated proportion of employed victims/survivors of FDV who took time off work in the 12 months following the reported incidence of violence.⁶⁹¹

[590] The Duncan Report provides a range of estimates of the costs of providing 10 days paid FDV leave to award covered employees:⁶⁹²

1. Applying the assumptions from Dr Stanford's 2016 report that women would access an average of 7.8 days of leave, and men 5.9 days, the estimated total cost to employers of providing 10 days of paid FDV leave would be \$13.1 million.
2. The above estimate is adjusted to take into account the 2.5 per cent increase in wages as per the most recent Annual Wage Review resulting in an estimated total cost of \$13.4 million.
3. Applying utilisation rates drawn from PSS data, and assuming employees use the full 10 days of paid leave, the estimated total cost of providing 10 days of paid FDV leave to award-covered workers is \$17.1 million.

⁶⁸⁶ Witness statement of Professor Duncan, 281 July 2021, Annexure AD-2

⁶⁸⁷ Duncan Report, p4, [39], [41] and Table 4.

⁶⁸⁸ ACTU submissions in reply dated 21 February 2022 [41].

⁶⁸⁹ Duncan Report, Table 1

⁶⁹⁰ Ibid [28].

⁶⁹¹ Ibid, Table 2.

⁶⁹² Ibid, Table 4.

4. Applying assumptions from Dr Stanford's 2016 report that uptake rates of FDV leave may double, the estimate increases to approximately \$34.3 million.

[591] The methodology in the Duncan Report can be reduced to 4 steps.

Step 1

[592] Professor Duncan estimates the probability of experiencing FDV by age and sex using the 2016 PSS data and assumes that prevalence has remained stable in the period to 2021. The probability of experiencing FDV is then applied to the population estimates of award wage holders by age and sex categories.⁶⁹³

[593] Table 1 in the Duncan Report (extracted below) shows the estimated prevalence rate of FDV for wage and salary earners in Australia as at June 2021, by age and sex. It is estimated that 186,400 employed women and 142,400 employed men in Australia experienced FDV in the last 12 months.⁶⁹⁴ Prevalence rates of FDV among employed people decrease consistently with age for both women and men, with rates typically higher for women (3.0 per cent) compared to men (2.1 per cent).⁶⁹⁵

Table 1. Number and share of employed persons experiencing family and domestic violence (FDV) in the last 12 months: by age and gender

	Aged 18-24		Aged 25-34		Aged 35-44		Aged 45-54		Aged 55-64		Age 65 years +		All ages		Persons
	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	
Employed persons, June 2021 ('000s)	963	956	1,439	1,603	1,385	1,546	1,291	1,359	940	1,047	247	392	6,265	6,903	13,168
Estimated number of employed people experiencing FDV, June 2021	60.3	33.8	48.2	45.1	37.7	29.4	25.0	17.3	13.2	12.4	2.0	4.4	186.4	142.4	328.8
Probability of experiencing FDV	6.3%	3.5%	3.3%	2.8%	2.7%	1.9%	1.9%	1.3%	1.4%	1.2%	0.8%	1.1%	3.0%	2.1%	2.5%

Notes: Estimates of the number of people experiencing family and domestic violence in the last 12 months include those subjected to violence from current or previous partners or family members. Prevalence rates are calculated as the ratio of FDV incidence to the number of employed people, by age and gender. Counts are uprated to June 2021 using ABS counts of employed persons by age and gender.

Source: BANKWEST CURTIN ECONOMICS CENTRE | Authors' calculations based on ABS Personal Safety Survey (2016) and ABS Cat. 6291.0.55 Table 1 (Labour force status by Age, Social marital status, and Sex)

Step 2

[594] The Duncan Report uses data on time taken off work by employees experiencing FDV from the 2016 PSS utilising the family relationship to the perpetrator as a filter in the PSS TableBuilder.⁶⁹⁶

[595] Table 2 in the Duncan Report (extracted below) shows the estimated proportion of male and female employees who took time off work in 2016 as a result of experiencing family related violence of different forms. These include the incidence of family violence (from partners,

⁶⁹³ Ibid [27].

⁶⁹⁴ Ibid.

⁶⁹⁵ Ibid.

⁶⁹⁶ Ibid [26].

parents, siblings or relatives), intimate partner violence, current partner violence, or current and/or previous partner violence.⁶⁹⁷

Table 2. Share of employed taking time off work due to experiencing FDV in last 12 months

Nature of most recent experience of family related violence						
		Violence from family member	Intimate partner violence	Current partner violence	Current and/or previous partner violence	Highest share
Share of employees taking time off work as a result of FDV	Men	1.3%	2.3%	0.0%	2.7%	2.7%
	Women	16.0%	15.9%	17.2%	20.1%	20.1%

Source: BANKWEST CURTIN ECONOMICS CENTRE | Authors' calculations from ABS Personal Safety Survey, 2016.

[596] The data shows that a significantly higher proportion of women take time off as a result of FDV compared with men.⁶⁹⁸ Between 15.9 per cent and 20.1 per cent of women who have experienced FDV took leave due to FDV (with these proportions varying depending on the nature of the FDV experienced), while these proportions were much lower for males, ranging from 0.0 per cent to 2.7 per cent.⁶⁹⁹ The Duncan Report uses the highest values in the table (20.1 per cent for women and 2.7 per cent for males) for the purpose of estimating the cost of an entitlement to paid FDV leave (see row 4 in Table 3).⁷⁰⁰

Step 3

[597] To estimate the cost of providing 10 days of paid FDV leave for award-covered employees, the Duncan Report uses weekly wage data for workers on award wages from Wave 19 of the HILDA survey, uprated to June 2021 dollars using CPI data from the ABS.

[598] Total leave payments to employees affected by FDV are estimated by multiplying the number of employed people that took time off work in the last 12 months following the incidence of FDV by the 10 days average wage for the respective sex and age group. The results are shown in Table 3 in the Duncan Report (extracted below).

⁶⁹⁷ Ibid [31].

⁶⁹⁸ Ibid [32].

⁶⁹⁹ Ibid Table 2.

⁷⁰⁰ Ibid [36].

Table 3. Estimated cost of 10 days paid FDV leave, award-covered employees

	Age 18-24		Age 25-34		Age 35-44		Age 45-54		Age 55-64		Age 65 years +		Total		
	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Persons
Estimated number of employed people experiencing FDV, June 2021 ('000s)	60.3	33.8	48.2	45.1	37.7	29.4	25.0	17.3	13.2	12.4	2.0	4.4	186.4	142.4	328.8
Estimated share of award wage holders among employed workforce, June 2021 ('000s)	41.3%	35.4%	24.4%	18.0%	22.4%	8.8%	21.9%	10.2%	24.1%	13.3%	19.3%	13.2%	26.3%	16.1%	
Estimated number of award wage holders experiencing FDV, June 2021 ('000)	24.9	12.0	11.7	8.1	8.5	2.6	5.5	1.8	3.2	1.7	0.4	0.6	54.1	26.6	80.8
Projected share of those experiencing FDV who take time off work (ABS estimates)	20.1%	2.7%	20.1%	2.7%	20.1%	2.7%	20.1%	2.7%	20.1%	2.7%	20.1%	2.7%			
Average weekly modern award wage (HILDA) (uprated to June 2021) (\$)	481	572	921	1,008	978	1,352	946	1,258	954	1,199	681	715			
Total cost of 10 day paid FDV leave among award wage holders (\$m)	4.8	0.4	4.3	0.4	3.3	0.2	2.1	0.1	1.2	0.1	0.1	0.0	15.9	1.2	17.1
Projected number of leave days taken (Stanford 2016)	7.8	5.9	7.8	5.9	7.8	5.9	7.8	5.9	7.8	5.9	7.8	5.9	7.8	5.9	
Total cost of paid FDV leave, using projected number of leave days taken (\$m)	3.7	0.2	3.4	0.3	2.6	0.1	1.6	0.1	0.9	0.1	0.1	0.0	12.4	0.7	13.1

Notes: Estimates of the number of people experiencing family and domestic violence in the last 12 months include those subjected to violence from current or previous partners or family members. Prevalence rates are calculated as the ratio of FDV incidence to the number of employed people, by age and gender. Counts are uprated to June 2021 using ABS counts of employed persons by age and gender. The proportion of employees on award wages by age and gender are calculated using data on pay setting arrangements from the HILDA survey, Wave 19.

Source: BANKWEST CURTIN ECONOMICS CENTRE | Authors' calculations using HILDA (2019) ABS Personal Safety Survey, 2016.

[599] Using data on the proportion of male and female workers in different age bands who are on modern award wages, the Duncan Report estimates the number of award-covered employees who have experienced FDV in the last 12 months (the third row of Table 3).⁷⁰¹ Overall, it is estimated that 54,100 female and 26,600 male award-wage holders have experienced FDV during the previous year (80,800 in total), the majority of whom are aged 34 years and under.⁷⁰²

[600] The Duncan Report starts with the assumption that award-wage workers who have experienced FDV during the past 12 months will access paid FDV leave entitlements at the same rates as under current arrangements (using the maximum rates shown in Table 2). The cost of 10 days of paid FDV leave is estimated as the number of award-covered employees who have experienced FDV in the last 12 months (Table 3 row 3), multiplied by the share of those workers who access paid FDV leave (Table 3 row 4), times 10 days of average pay for modern award wage holders (Table 3 row 5).⁷⁰³

[601] Assuming that the share of employees that took time off work remains constant and employees use the full 10 days of paid leave, the estimated total cost of providing 10 days of paid FDV leave to award-covered workers is \$17.1 million (Table 3 row 6).⁷⁰⁴

Step 4

[602] A number of the assumptions underpinning the analysis in Table 3 are then tested to provide some sensitivity analysis of the estimated costs of an entitlement to 10 days' paid FDV leave.

⁷⁰¹ Ibid [35].

⁷⁰² Ibid.

⁷⁰³ Ibid [36].

⁷⁰⁴ Ibid [37].

[603] The Duncan Report generated costings based on different assumptions. Using Stanford's (2016) assumptions that women would access an average of 7.8 days of leave and men would access 5.9 days, it is estimated that the total cost of providing 10 days of paid FDV leave to award-reliant employees would be \$13.1 million (representing the lower bound of his estimates), of which \$12.4 million is for female employees and \$0.7 million for male employees.⁷⁰⁵ Adjusting this for the 2.5 per cent increase in award wages from the Annual Wage Review 2020-21, the total cost estimate increased to \$13.4 million.⁷⁰⁶

[604] The Duncan Report then assumed that the introduction of paid FDV leave might increase utilisation of leave by employees. Using Stanford's (2016) assumption that the *proportion* of employees that take time off will *double* under a paid FDV leave provision, it is estimated that the total cost of 10 days FDV leave is approximately \$34.3 million, which represents the upper bound to the cost estimates in the Duncan Report.⁷⁰⁷

[605] The results of the sensitivity analysis are set out in Table 4 of the Duncan Report reproduced below.

Table 4. Estimated costs of 10 days of paid FDV leave for award-covered employees: alternative scenarios

	Female	Male	Persons
	\$m	\$m	\$m
Paid FDV leave accessed at the same rates as under current arrangements; average number of leave days per year as per Stanford (7.8 days for women, 5.9 days for men)	12.4	0.7	13.1
Same modelling assumptions as above, adding 2.5% Annual Wage Review increase	12.7	0.8	13.4
Paid FDV leave accessed at the same rates as under current arrangements; 100% utilisation of paid FDV leave days (10 days per year)	15.9	1.2	17.1
Paid FDV leave accessed at double the rates compared to current arrangements; 100% utilisation of paid FDV leave days (10 days per year)	31.8	2.5	34.3

Source: BANKWEST CURTIN ECONOMICS CENTRE – Authors' calculations based on HILDA (2019), ABS Personal Safety Survey (2016) and Annual Wage Review 2020-21.

[606] ACCI submits that Professor Duncan's evidence should be treated with caution and that an appropriate conclusion to arrive at when considering Professor Duncan's Report is that it is based on a series of arbitrary assumptions and should be afforded little weight when coming to an estimate of the likely cost of the ACTU claim.⁷⁰⁸

⁷⁰⁵ Ibid [39]-[40].

⁷⁰⁶ Ibid [40].

⁷⁰⁷ Ibid [41].

⁷⁰⁸ ACCI final submissions dated 28 March 2022 [3.5], [3.7].

[607] In essence, ACCI submits that Professor Duncan's Reports provide no evidentiary basis to depart from the Full Bench's conclusion in the earlier proceedings.⁷⁰⁹

[608] Similarly, Ai Group submits:

‘First, to the extent that Professor Duncan relies on the 2016 Breckenridge report and the Stanford 2016 report, we refer to and rely on [18] and [20] of the submissions above. The deficiencies and shortcomings in those reports wholly undermine the reliability of the analysis undertaken by the Professor regarding the cost of [FDV leave].

Second, the Professor's cost analysis is based on PSS data, which has various limitations. This also undermines the reliability of the analysis.

Third, in relation to [47] of the Professor's report; employers who currently provide [FDV leave] are most likely to be large employers. The cost burden that will face small and medium businesses will therefore, typically, not be offset by existing [FDV leave] entitlements.

Fourth, although the Professor says that employers can partly reduce the costs of lost production from time lost from work due to employees' financial stress by providing [FDV leave], he does not quantify or describe the extent of any such reduction that might be realised. Any reduction may in fact be marginal.

Finally, at its highest, the Professor says that:

- Employment and financial independence can play an important role in preventing FDV.
- It is possible that [FDV leave] may affect the violence norms and prevalence beyond the case of an individual employee.
- The research suggests that providing support to employees affected by FDV could have a positive effect on productivity.
- [FDV leave] could reduce turnover, hiring and training costs.
- Time cost from paid work could be more severe if employees face financial constraints for adjustments they need to make following FDV.⁷¹⁰

7.5 Conclusion

[609] ACCI and Ai Group submit, in essence, that the material before us does not provide a sound evidentiary basis to depart from the conclusion in the *July 2017 Majority Decision*. In other words, there is insufficient evidence to enable us to assess the extent of any increase in employment costs if modern awards were varied to include an entitlement to paid FDV leave.

[610] We proceed our analysis of the expert evidence by noting that it is inherently difficult to demonstrate, by direct evidence, the cost of a proposed award variation.⁷¹¹ Further,

⁷⁰⁹ Ibid [3.15].

⁷¹⁰ Ai Group final submissions dated 28 March 2022 [27]–[32].

⁷¹¹ *Shop, Distributive and Allied Employees Association* [2011] FWAFB 6251 [24].

estimating the economy-wide or per-employee cost of the establishment of a paid FDV entitlement in all modern awards is an inherently problematic task. The entitlement is necessarily contingent in nature, and the task involved in estimating cost requires the making of assumptions as to the extent of the usage of such an entitlement (both as to the proportion of employees who will ever use it and the number of days of leave required if it is accessed) based on very limited data that is difficult to extrapolate to the entire modern award-covered workforce. Professor Duncan and Dr Stanford both properly acknowledge and try to account for the limitations in the data.

[611] As observed in the House Committee Report, although data collection in this area has improved, there is more to do to ensure that governments and the community have a clear picture of FDV.⁷¹² ACCI accepted the thrust of the ACTU's submission that there is no single data source which exists that can perfectly predict likely utilisation rates and as such the likely cost of its claim, it submits that we are still required to come to an informed and reasoned position in relation to these matters. We agree with the latter proposition and we have done so.

[612] While it is unrealistic to expect that a cost estimate can be arrived at with any degree of mathematical precision, we consider that the expert reports have identified upper range cost estimates that are of sufficient utility to permit us to conclude that the introduction of paid FDV leave will not result in significant cost being imposed on employers generally or the national economy.

[613] Professor Duncan and Dr Stanford rely on different data sets to determine the prevalence of FDV. Professor Duncan utilises data sets relating to the prevalence of current and former partner violence as well as family violence. Professor Duncan estimated the probability of experiencing FDV by age and sex, and then applied this to the population estimates of 'award wage holders' by age and sex categories. By so doing, Professor Duncan is able to get a better picture of the prevalence of FDV in 'award-covered' employees.

[614] As to utilisation, Professor Duncan relies on data from the PSS which shows the proportion of employees who experienced FDV (including violence from a family member, intimate partner violence, current partner violence and current and/or former partner violence) and took time off work in the previous 12 months.

[615] We consider that Professor Duncan's methodology is robust and transparent. There is however one significant flaw we can identify in the methodology (albeit it was not identified by ACCI or Ai Group). The Duncan Report makes the mistake of equating 'award wage holders' – that is, 'award reliant' employees who derive their actual wage rate from a modern award – with 'award-covered' employees, which we assume means persons who are covered by a modern award and would obtain the benefit of an award entitlement to paid FDV leave. If we award paid FDV leave, it will immediately become an entitlement to any national system employee to whom a modern award 'applies' in accordance with s.47 of the FW Act. This will not include employees to whom an enterprise agreement applies (see s.57) or employees who have guaranteed annual earnings above the high income threshold (see s.47(2) and s.329), but will include all other employees covered by the award including those who receive above-award earnings through individual contracts or informal individual or collective arrangements – i.e.

⁷¹² House Committee Report [2.212].

employees who are *not* ‘award wage holders’ or award reliant. Employees who are ‘award reliant’ are a subset of a larger cohort of employees to whom modern awards apply. The estimates in row 3 of Table 3 of the Duncan Report, which we have earlier set out, of the numbers of award employees experiencing FDV are calculated based on the number of ‘award reliant’ employees employed in the workforce. These numbers would be higher if they were calculated based on the number of employees to whom modern awards *apply*, and who will enjoy the entitlement if awarded.

[616] The same flaw has led the Duncan Report (in the fifth row of Table 3) to use HILDA data for award-reliant workers to calculate the estimated total wage cost, when in fact many employees who would become entitled to a paid FDV leave entitlement in modern awards will be in receipt of over-award wages.

[617] However, this would not cause us to conclude that the Duncan Report calculations are without value as an estimate because those calculations proceed on a number of assumptions that clearly overstate the likely cost of FDV leave. *First*, it assumes that the ACTU claim will be granted in full, so casual employees are included in the number of affected employees. However, as we address in Chapter 8.3.2, we do not propose to grant the claim in respect of casual employees. Casual employment has constituted approximately 25 percent of the Australian employee workforce over the last 2 decades (although this has recently fallen significantly because of the effect of the COVID-19 pandemic).⁷¹³ *Second*, the assumption that usage of FDV leave, if awarded, will double both as to the proportion of employees accessing leave and the number of days taken when accessed, compared to current usage rates where an entitlement exists is clearly an overestimate (and was intended by Professor Duncan to be such in order to establish an absolute upper range estimate). If appropriate adjustments are made to take into account all the countervailing matters we have identified, it is unlikely that this will produce a different result of any significant order.

[618] In respect of the Stanford Report, as noted above, we consider that Ai Group’s submissions overstate the deficiencies in the Stanford Report. Some of Ai Group’s criticisms were not ultimately pressed⁷¹⁴ or were unfair, in the sense that the criticism advanced in the submission had not been put to Dr Stanford in cross-examination.⁷¹⁵ However, having said that, there are obvious limitations in Dr Stanford’s methodology which make it less robust than that of Professor Duncan:

- Dr Stanford’s ‘informal survey’ relies on findings from 3 employers in 2021 and 5 employers in 2016 and cannot be said to be representative of wider employer behaviour.
- Dr Stanford’s treatment of the PSS data is inconsistent with Professor Duncan’s. The data gathered by Professor Duncan utilising the TableBuilder function provides a far more detailed and accurate assessment of rates of FDV and utilisation of leave. In contrast, Dr Stanford relied on data from ‘intimate partner violence’, which does not include violence from family members.

⁷¹³ ABS, *Characteristics of Employment*, Australia, 2021; ABS, *Australian Labour Market Statistics*, July 2014.

⁷¹⁴ Transcript, 8 April 2022, PN305-PN306.

⁷¹⁵ See the discussion during oral argument, Transcript 8 April 2022, PN309-PN321.

- Dr Stanford does not disaggregate data by age or sex, and applies the global figure to *all* employees, not simply award-covered employees, to determine prevalence rates.
- Dr Stanford relies on data on the number of employees who took time off work due to violence from *any perpetrator*, not limited to those who took time off as a result of FDV.
- While Dr Stanford relies on *prevalence* rates from the previous 12 months, he relies on *utilisation* of leave rates based on the most recent incident experienced in the last 10 years. This means the incident may not have occurred within the previous 12 months and as a result, the claim rate is calculated on 2 components with different time periods.

[619] Dr Stanford also calculated the cost of providing paid FDV leave based on the average labour compensation for all Australian workers. As Professor Duncan pointed out, this approach has limitations as it does not allow a consideration of differences in wage based on age, sex and method of wage setting (i.e. modern award, enterprise agreement and individual agreements).⁷¹⁶ This may be accepted, although Dr Stanford's approach does have the advantage of taking some account of the application of paid FDV leave to award-covered employees who are paid above-award rates of pay.

[620] We also note that Dr Stanford, in our view correctly, makes a deduction from his cost estimates to account for employees who already have an entitlement to paid FDV leave.

[621] The attack on the expert evidence is essentially directed at the assumptions made in making the relevant calculations and there is no suggestion that the calculations in the Reports are mathematically incorrect. It was not specifically put to either Professor Duncan or Dr Stanford that their estimates of the likely cost of 10 days' paid FDV leave were unreliable or unsafe. No contradictory economic evidence was called by the opposing parties. Ai Group contends that 'it would be feasible to present material that more reliably estimates utilisation rates than that which is here before the Commission',⁷¹⁷ but adduced no such evidence itself. ACCI acknowledges that it has 'no evidence' that the provision of 10 days' paid FDV leave will result in extraordinary costs for all employers.⁷¹⁸

[622] The weight of the evidence supports a finding that the utilisation rate of a 10 day paid FDV leave entitlement is likely to be low. Such a finding is consistent with the assumptions which underpin the expert evidence.

[623] Taking account of the upper estimates in the expert evidence we find that varying modern awards in accordance with the *provisional* model paid FDV leave term expressed in Chapter 8.4 would have no significant adverse impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

⁷¹⁶ Duncan Report, [25].

⁷¹⁷ Ai Group final submissions dated 28 March 2022 [109].

⁷¹⁸ ACCI submissions in reply dated 4 February 2022 [10.27].

[624] The Duncan Report notes that the data suggests that ‘small and medium sized businesses will bear a greater costs burden’ in the provision of paid FDV leave; but concludes that these costs are likely to be largely offset by improved productivity and reduced absenteeism.⁷¹⁹ In Chapter 6.6.2(ii) we deal with the benefits for employers of introducing a paid FDV leave entitlement. In that chapter, we accepted that the introduction of paid FDV leave will be of benefit to some employers, but we rejected the ACTU’s contention that the benefit accruing to employers would ‘largely offset’ the cost.

[625] As noted in Chapter 6.3.2 the Employer Survey found that one in 5 organisations provided employees with paid FDV leave. This varied by business size. Notably, 20.7 per cent of organisations with one to 5 employees provided paid FDV leave, compared to 35.5 per cent of organisations employing more than 100 employees.⁷²⁰

[626] We accept that such a variation to modern awards is likely to give rise to greater variability in terms of employment cost at the enterprise level. For some employers, particularly those who do not currently provide paid FDV leave, the employment costs may be significant depending on the number of employees who access the entitlement and the number of days of paid leave they take. The evidence before us in respect of utilisation rates suggests that such costs are unlikely to be substantial.

[627] Contrary to the submissions advanced by the opposing parties the material before us *does* address the lacuna in the evidence regarding the costs of paid FDV leave identified in the *July 2017 Majority Decision*.

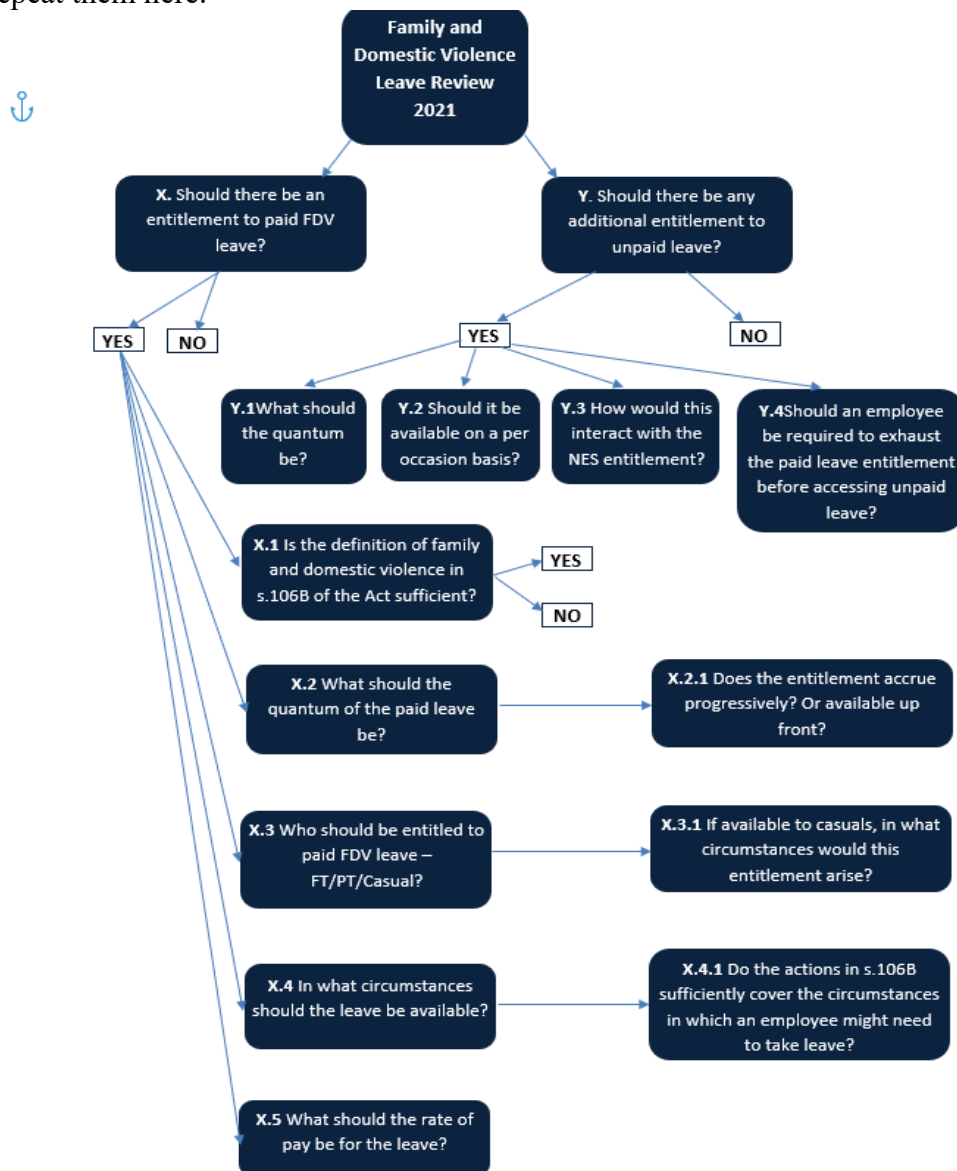
⁷¹⁹ Duncan Report, [44].

⁷²⁰ Information Note—Paid Family and Domestic Violence Leave by business size, published on 11 March 2022, chart 1.

8. Consideration

8.1 Decision Tree

[628] The ACTU claim raises a number of decision points which are set out in the decision tree below. In Background Document 1 the parties were asked to identify their proposed answers to each of the numbered questions in the decision tree by reference to their submissions and the evidence; the parties answers are set out in Background Document 2 and we need not repeat them here.



[629] The employer parties oppose the ACTU claim generally and in particular:

- the provision of 10 days' paid FDV leave;

- the extension of paid FDV leave to casual employees;
- the change in the definition of ‘family and domestic violence’ to include behaviour of an unrelated member of the employee’s household;
- the rate of pay for paid FDV leave; and
- the additional unpaid leave.

[630] This chapter deals with the merits of each element of the ACTU claim; we begin by considering the broad lines of argument advanced by the parties.

8.2 The Broad Lines of Argument

[631] The essence of the ACTU claim is that modern awards be varied to provide all employees with 10 days’ paid FDV leave in a 12 month period and up to 5 days’ unpaid FDV leave on a per occasion basis.

[632] The overarching premise of the ACTU’s claim is that FDV is a workplace issue that requires a workplace response and that ‘paid FDV leave provides a critical mechanism for employees to maintain their employment and financial security, while dealing with the effects of FDV’.⁷²¹

[633] The ACTU identifies 8 propositions, findings and considerations which it contends should be drawn from the evidence:

1. FDV is ubiquitous in Australia
2. FDV is a workplace issue
3. The cost of FDV
4. The necessity of paid FDV leave
5. The cost of providing paid FDV leave
6. 10 days of FDV leave is necessary to provide a minimum safety net
7. FDV leave must be paid in order to provide a minimum safety net
8. Supplementary unpaid FDV leave of 5 days per occasion is necessary.

[634] The opposing parties contend that modern awards should *not* be varied to provide for paid FDV leave. It is argued that any such variation is not *necessary*, in the sense contemplated by s.138, and would not be ‘fair’ to employers, in the sense contemplated by the modern awards objective.

⁷²¹ ACTU supplementary submissions dated 22 December 2021 [28].

[635] Despite the obvious points of contention between those supporting the ACTU claim and the opposing parties it is also apparent that there is some common ground.

[636] In closing oral argument counsel for the ACTU said:

‘I am sure, I will be corrected if I am wrong about this, but both ACCI and Ai Group acknowledge that paid Family and Domestic Violence Leave is desirable, or at the very least is beneficial for some employees.’⁷²²

[637] ACCI and Ai Group raised no objection to counsel’s observation.

[638] In February 2022, Ai Group publicly released a number of ‘Federal Election Policy Statements’ including: ‘[Workplace Relations Policy – Gender Equality and Increased Workforce Participation](#)’ (Ai Group Federal Election Policy Statement). This particular policy statement proposes the adoption of a number of initiatives to ‘improve gender equality ... workforce diversity and inclusion [and the enhancement] of female workforce participation and women’s economic well-being’.

[639] Among the initiatives proposed in the Ai Group Federal Election Policy Statement is a publicly funded FDV leave payment linked to the existing unpaid FDV leave entitlement in the FW Act. In support of the proposed payment the policy statement says:

‘Family and domestic violence is a community issue and more needs to be done to both prevent and respond to its occurrence. Family and domestic violence does not just impact employees, but the self-employed and business owners who may be unable to work because of the impact of the violence they are experiencing. The pandemic has contributed to an increase in family and domestic violence in the community and further Government support, in addition to the range of measures already adopted by Governments and employers, is required.

Ai Group calls for the creation of a publicly-funded Family and Domestic Violence Leave Payment (FDVLP) to apply to persons who are unable to work because they are experiencing family or domestic violence.

Ai Group acknowledges that some larger organisations provide their own paid family and domestic violence leave to employees, either in line with the structure of the *Fair Work Act 2009* (Cth) (FW Act) unpaid leave entitlement of up to five days, or through other forms of paid leave. This should not prevent such employees accessing the publicly funded entitlement, consistent with the way in which the existing publicly funded Paid Parental Leave scheme operates.

The quantum of the FDVLP should be aligned with the unpaid family and domestic violence leave entitlement of 5 days per year contained in the National Employment Standards (NES) in the FW Act, calculated at the adult minimum wage.

The FDVLP should also extend to eligible independent contractors and the self-employed who are unable to work due to family and domestic violence.

⁷²² Transcript, 8 April 2022, PN54.

Given the well-documented instances of financial abuse and financial vulnerabilities of persons experiencing family violence (particularly where the costs of caring for children are involved), it is not appropriate that this payment be means-tested.

We also consider that this proposal for a publicly-funded FDVLP is consistent with the two pillars of response and recovery in the Australian Government's Draft National Plan to End Violence Against Women and Children 2022-2032.⁷²³

[640] Background Document 1 asked Ai Group to elaborate on its proposal and whether there had been any response from the Australian Government to its proposed initiative.

[641] In response, Ai Group said that the proposal was for the development of a publicly-funded FDV leave payment that would operate in a similar manner to the current Australian Government paid parental leave scheme.⁷²⁴ Ai Group envisages such a scheme would be broadly aligned with the current NES entitlement, in the basic sense that it would provide for up to 5 days of paid leave per year (based on the NES entitlement to 5 days unpaid leave) at the adult minimum wage.⁷²⁵ The precise manner in which such a scheme would be constructed and administered would be the subject of consultation with Government, but Ai Group envisaged that it would be taxpayer funded, apply to all employees (including casual employees) as well as some independent contractors, and not means tested.⁷²⁶

[642] Background Document 2 posed the following question to Ai Group: Is it implicit in Ai Group's proposal that they acknowledge the need to provide a paid leave entitlement?

[643] In response, Ai Group submits the proposed measure 'should not be construed as reflecting a view that FDV leave is necessary' and that it should not prejudice its position in these proceedings.⁷²⁷ Ai Group says:

'FDV is a serious and pervasive social issue. It is an entirely unacceptable scourge that, in our view, warrants both continued community efforts to eradicate it and community support for those that suffer from it. We also recognise that some individuals may benefit from the provision of financial support in circumstances where they have experienced FDV and that it would be desirable, from a broad social policy perspective, that such support be provided.'⁷²⁸

[644] Ai Group submits it 'does not agree that it is necessary' to provide paid FDV leave in modern awards in the sense contemplated by s.138 and says:

'These proceedings are not, and should not be, directed at identifying what may be a best practice, ideal or even beneficial level of support for persons experiencing FDV. These are not irrelevant considerations, but the task before the Commission is different and more confined.'⁷²⁹

⁷²³ Ai Group, 'Federal Election Policy Statements' '[Workplace Relations Policy – Gender Equality and Increased Workforce Participation](#)' at pp.2-3

⁷²⁴ Ai Group final submissions dated 28 March 2022 [166].

⁷²⁵ Ibid [167].

⁷²⁶ Ibid.

⁷²⁷ Ai Group submissions in response to Background Document 2 dated 7 April 2022 [8].

⁷²⁸ Ibid [9].

⁷²⁹ Ibid [14].

[645] The ACTU responded to Ai Group’s submission during closing oral argument submitting ‘it must be implicit in the Ai Group’s proposal that they accept there is a need for such a scheme’ or at the very least that Ai Group considers paid FDV leave is ‘meritorious’.⁷³⁰ The ACTU argues that Ai Group’s submission that the Commission should not infer from its proposal that paid FDV leave is necessary ‘begs the question as to why Ai Group would propose a scheme that isn’t necessary’.⁷³¹

[646] There is considerable force in the ACTU’s argument.

[647] We accept that Ai Group’s advocacy for a publicly funded paid FDV leave scheme is not to be construed as reflecting a view that it is *necessary* to vary modern awards to provide paid FDV leave, in the sense contemplated by s.138. That said, it is apparent from Ai Group’s policy proposal that it accepts there is a need to provide the scheme it proposes. We return to this issue shortly.

[648] It is apparent that the contested issue is *not* about whether paid FDV leave is desirable or beneficial to employees – the contest between the parties is whether it is *necessary* to vary modern awards to achieve the modern awards objective by providing for paid FDV leave and additional unpaid FDV leave.

[649] In advancing their central contention that it is not appropriate to vary modern awards to introduce paid FDV leave, the opposing parties advance 5 broad merit arguments:

- (i) The existing award and statutory entitlements provide a fair and relevant minimum safety net.
- (ii) Paid FDV leave is a matter for Parliament/Government action.
- (iii) Other social issues are not the subject of specific award provisions.
- (iv) FDV leave is a matter for the enterprise.
- (v) It is not fair or appropriate that employers bear the cost of such an entitlement.

8.2.1 The existing award and statutory entitlements provide a fair and relevant minimum safety net.

[650] Both ACCI and Ai Group⁷³² submit that when viewed in the context of the existing entitlements, it is not necessary to vary awards to provide for paid FDV leave.

⁷³⁰ Transcript, 8 April 2022, PN60.

⁷³¹ Ibid PN61.

⁷³² Ai Group submissions in reply dated 4 February 2022 [179]-[192].

[651] ACCI submits that the existing framework of leave entitlements is appropriate and satisfies the modern awards objective:

‘...it is not apparent that a substantial variation to the existing safety net is *necessary* to fulfil the modern awards objective ...

If there was any doubt that further leave is necessary to satisfy the modern awards objective for either permanent or casual employees, the introduction of 5 days of unpaid FDV leave in the NES for all employees should remove that doubt.’⁷³³

[652] Ai Group sets out a range of existing statutory and award entitlements that are said to be relevant to the Commission’s consideration of whether awards should be varied to provide for paid FDV leave, as follows:

Existing statutory protections and entitlements:

1. Unpaid FDV leave
2. Paid leave entitlements – personal/carer’s leave
3. Paid leave entitlements – annual leave
4. Paid leave entitlements – long service leave
5. Flexible working arrangements
6. Protection against unfair dismissal
7. General protections
8. Conversion from casual to permanent employment
9. Work health and safety legislation.⁷³⁴

Existing award entitlements:

10. Individual flexibility arrangements
11. Time off instead of overtime
12. Make-up time
13. Annual leave in advance; and
14. Facilitative provisions.⁷³⁵

⁷³³ ACCI submissions in reply dated 4 February 2022 [4.11] and [4.21].

⁷³⁴ Ai Group submissions in reply dated 4 February 2022 [138]-[178].

⁷³⁵ Ibid [179]-[192].

[653] Ai Group advanced a similar argument in the earlier proceedings, which was rejected by the Full Bench in the *July 2017 Majority Decision* in the following terms:

‘We accept the AIG submission that the right to request flexible work arrangements would be applicable to deal with some circumstances faced by employees who experience family and domestic violence. However, we are not satisfied that that it is sufficient to meet all the circumstances faced by employees who experience family and domestic violence.

Employees who experience family and domestic violence often need to respond to incidents on short notice. Section 65 of the Act requires the request for flexible working arrangements to be in writing and the employer has 21 days to respond to the request. Further, that request may be refused on reasonable business grounds. An employee needing to attend court for the purpose of obtaining interim family court orders or interim apprehended violence orders or who needs to find alternative accommodation cannot afford to wait 21 days to see if her or his request for flexible working arrangements has been approved.

We also accept that employees, other than casual employees, who experience family and domestic violence, may be able to use personal/carer’s leave, annual leave or long service leave to enable them to deal with the consequences of the violence. An employee who is unfit for work because of either a physical or psychological injury can take personal leave. However, an employee cannot take such leave to attend court or to find alternative accommodation. Employees can use their annual leave for any purpose. However, an employee can only take annual leave at a time agreed by the employer and, while an employer may not unreasonably refuse to agree to such a request, we do not consider that there is sufficient flexibility around the taking of annual leave for it to be of sufficient assistance for employees facing the need for urgent leave. For the same reason we do not consider that being able to take long service leave will necessarily meet the employee’s needs.

While we accept that employees who experience family and domestic violence will have some protection from unfair dismissal, unlawful dismissal and adverse action we do not consider this to be sufficient. If employees have a right to family and domestic violence leave then that would be a workplace right. Employees would gain an additional protection against dismissal because an employee took family and domestic violence leave or proposed to take family and domestic violence leave ... Currently unless the employee has such an entitlement under an enterprise agreement, the employee has no such right unless their circumstances fit the current protections. For example, there is no workplace right to be absent from work to attend court proceedings or to find alternative accommodation.

We are therefore, not satisfied that the existing entitlements meet the needs of employees who experience family and domestic violence.’⁷³⁶

[654] In the *March 2018 FDVL Decision* the Full Bench adopted the conclusion in the *July 2017 Majority Decision* and said:

‘Ai Group contends that the current regulatory framework – in the Act and modern awards – provides a range of protections for employees, and in effect suggests that an award term providing unpaid family and domestic violence leave is not necessary.

⁷³⁶ [2017] FWCFB 3494 [42]–[46].

We disagree. The same argument, in substance, was considered and rejected in the Majority Decision.⁷³⁷ It may be accepted that employees experiencing family and domestic violence will be able to access existing entitlements in *some* circumstances. But the existing regulatory framework is not sufficient to address the myriad of circumstances facing employees who experience family and domestic violence. For example, there is no existing safety net entitlement permitting an employee to be absent from work on short notice to address an urgent need to find accommodation so as to remove themselves from harm.

We adopt the conclusion in the Majority Decision ...⁷³⁸

[655] Ai Group has identified 2 differences between the protections and entitlements that exist now and those in existence at the time of the earlier proceedings (the *March 2018 FDVL Decision* and the *July 2017 Majority Decision*):

- the unpaid FDV leave entitlement in the NES, and
- the statutory provisions concerning casual conversion.

[656] Ai Group contends that the introduction of the unpaid FDV leave entitlement in the NES is a ‘key factor distinguishing the surrounding circumstances during the earlier proceedings and the extant proceedings’.⁷³⁹ Ai Group relies on what it describes as ‘the combination and cumulative effect’ of the unpaid FDV leave entitlement and with other relevant statutory entitlements.⁷⁴⁰

[657] As to the observations in the *March 2018 FDVL Decision* that the safety net was ‘not sufficient to address the myriad of circumstances facing employees who experience family and domestic violence’, Ai Group submits that due to the introduction of unpaid FDV leave into the NES ‘the safety net is no longer deficient in the relevant sense’.⁷⁴¹

[658] In reply, the ACTU submits:

‘There is little or no analysis of how those provisions meet the needs of employees (permanent or casual) who need to take authorised leave from work and maintain continuity of income to deal with FDV. To the extent those provisions form part of the broad network of employers’ legislative obligations which are designed to protect employees’ interests, they are too remote from the present problem to be relevant.’⁷⁴²

[659] In relation to the question of whether the unpaid FDV leave provision has ameliorated the need for paid leave, the ACTU submits that income is critical to the concept of a safety net and that in order to truly comprise a safety net of minimum terms and conditions of employment, FDV leave must be paid leave.⁷⁴³

⁷³⁷ Ibid [39]-[46].

⁷³⁸ [2018] FWCFB 1691 [185]-[187].

⁷³⁹ Ai Group final submissions dated 28 March 2022 [84].

⁷⁴⁰ Ibid

⁷⁴¹ Ibid [85].

⁷⁴² ACTU submissions in reply dated 21 February 2022 [30].

⁷⁴³ Ibid [31].

[660] We accept that the NES entitlement to unpaid FDV leave provides an enhanced degree of protection to employees experiencing FDV. Absent that protection, those employees may have been unfairly dismissed or have faced other disciplinary action had they been absent from work in circumstances where no other form of leave was available. However, the NES entitlement is to *unpaid* FDV leave and hence does not address the fundamental issue of the financial capacity of employees to take FDV leave when they have a need to do so.

[661] The importance of *paid* FDV leave is canvassed in chapter 6.6.2(ii). Access to paid FDV leave provides significant assistance to employees experiencing FDV — it helps individuals to maintain their economic security; to access relevant services and to safely exit to a life free from FDV. Paid FDV leave is a critical mechanism for employees to maintain their employment and financial security, while dealing with the consequences of FDV.

[662] We reject the proposition that, when viewed in the context of existing statutory and award entitlements, it is not necessary to vary awards to provide for paid FDV leave.

[663] Findings made in the *July 2017 Majority Decision* and the *March 2018 FDVL Decision* emphasised the financial difficulties which employees who have experienced FDV may typically face. In the former decision, the majority found at [60]:

‘We accept the evidence that employees who experience family and domestic violence face financial difficulties as a result of the family and domestic violence such as relocation costs or becoming a sole parent. Having to lose pay at the same time because of the need to attend to the consequences of family and domestic violence would add to the financial burden faced by these employees.’

[664] The majority also found (at [61]) that ‘employees who experience family and domestic violence suffer economic harm as a result of disruption to workforce participation.’ As we said earlier, we affirm these findings in this decision.

[665] In the latter decision, the Full Bench also adopted the above findings, and went on to refer to evidence concerning the financial hardship facing women following separation from a violent partner, the financial impact of violence on victims including costs associated with legal proceedings, and the importance of employment, including the financial security it provides, as constituting an important pathway out of violent relationships.⁷⁴⁴

[666] These findings are not addressed by the provision of *unpaid* FDV leave.

[667] In the *July 2017 Majority Decision*, the majority (at [62]-[67]) referred to evidence concerning the recent introduction of paid FDV leave through enterprise bargaining and policy, and in the government sector. The Majority said the recency of this meant that there was little evidence about the amount of leave being taken by employees in reliance on such provisions or about how much actual unpaid leave was being taken by employees which would, if the (ACTU) clause was in operation, be paid leave. However, there is significant evidence before us which addresses the issue of employees’ reliance on paid as distinct from unpaid FDV leave. As we have previously set out, the Monash Report described the link between economic security and the lack of *paid* FDV leave as follows:

⁷⁴⁴ *March 2018 FDVL Decision* [97]-[102].

‘When asked whether in hindsight access to family violence leave would have been helpful, numerous interview participants spoke at length about how the security of having paid leave would have made a difference to them. In particular, victim-survivors spoke about the value of having supported time away from work to plan for their safety and support their recovery. This viewpoint is captured in the comments of an interview participant, who explained:

I just needed some time to get myself together, my headspace, get some treatments, just to see where I am today. I just couldn’t believe what was happening to me, because it was a number of assaults. It was just awful.
(Bianca, interview participant)

Other participants drew comparisons between the existence of family violence leave policies and their own sense of safety, with one participant noting that had DFV leave been available, ‘My daughter would feel safe. I would feel safe’. For these victim-survivors the lack of paid family violence leave was closely associated with their experiences of economic insecurity and financial dependence during and following their experience of DFV. Research has consistently evidenced the immediate and long-term financial impacts of intimate partner violence on the economic security of victim-survivors, particularly women (Cotis and Bullen, 2015).’

[668] Significantly, the Monash Report states that only one survey respondent took *unpaid* FDV leave, with all other survey respondents reporting that they either did not access leave at all or accessed *paid* leave. The inference being that for financial reasons taking unpaid FDV leave may not have been a practicable option for respondents who had experienced FDV. The Monash Report concludes that the provision of paid FDV leave is necessary in the context of ensuring that victim-survivors of FDV maintain paid employment and continue to engage with work throughout their recovery.

[669] The Employer Survey showed employee usage of the unpaid FDV leave entitlement but also, in respect of that minority of employers that provided a paid FDV leave entitlement, reported that the most common reasons for accessing paid leave were to attend medical appointments, make arrangements for the employee’s safety, attend support services, attend court hearings and access legal or police services.

[670] The ACTU’s lay witnesses also gave evidence about the straightened financial circumstances of FDV victims and the benefit of paid FDV leave in that context. For example, Dr Victoria Jones, the Head of the Medical Unit of the Women’s Health Service in the SA Women’s and Children’s Hospital, stated in her experience the majority of FDV patients in employment were low-paid women,⁷⁴⁵ and said:

‘Many women we see have left home without anything, and often with small children to care for. They sometimes don’t have access to bank accounts; they have had their income withheld by the abusive partner as part of the DV; they have no documents and nowhere to live. The vast majority of women we see are in serious financial difficulty. They often have a large number of conflicting appointments with various services at the point of leaving a violent partner.’⁷⁴⁶

⁷⁴⁵ Witness statement of Dr Vicki Jones dated 30 July 2021, [19]

⁷⁴⁶ *Ibid*, [17]

[671] Dr Jones also said that women who have experienced FDV who cannot access time off work often do not turn up for appointments and explain that they need to prioritise their work, which may put their medical treatment at risk.⁷⁴⁷ She also said that in her experience, one of the biggest barriers to successfully leaving a violent relationship is a lack of financial resources.

[672] Marianne Crowe, a registered nurse at St Vincent's Hospital in Melbourne who is employed in the hospital's Social Work Department as Project Lead – Safe Communities and Equitable Health, Strengthening Hospitals' Response to Family Violence, similarly gave evidence that in her experience low income is a key barrier to FDV patients accessing support because 'low paid patients who do not have the time or money to access support and are terrified of losing the little income they have if they lose their job because they are not allowed to be absent or cannot afford to take time off without pay'.⁷⁴⁸

[673] Gabrielle Craig, Assistant Principal Solicitor at the NSW Women's Legal Service, who has a caseload providing legal assistance to women who have experienced FDV, gave evidence that such women often reported that the time required to take off work to attend court hearings is a major issue confronting them,⁷⁴⁹ and said:

'Working women report they are fearful it may lead to loss of income if they are not entitled to paid domestic violence leave or, in some circumstances, termination of their employment. This is often at times when they are already suffering financial hardship due to significant expenses related to escaping domestic violence, such as expenses related to moving or finding alternative housing.'⁷⁵⁰

[674] Ms Craig said that she had many clients tell her they are not willing to commence or continue with legal processes or proceedings because they are concerned about the loss of income and/or about termination of their employment:⁷⁵¹

'I have spoken with many clients over the years who have not commenced or continued with legal processes because of the financial difficulties in having to take unpaid time off work and their fear of losing their job because of the time required off work to attend to Court and other events associated with legal processes.'⁷⁵²

[675] Ms Craig said, by contrast, that those clients she spoke to who had access to paid FDV leave had often told her that this had greatly assisted them to more effectively and safely participate in the legal process.⁷⁵³

[676] Terese Kingston, a Service Support Worker at the Domestic Violence Resource Service in Mackay, Queensland, gave evidence to similar effect as to the capacity of victims of FDV to participate in legal proceedings:

⁷⁴⁷ Ibid, [25]

⁷⁴⁸ Witness statement of Marianne Crowe dated 30 July 2021 [19].

⁷⁴⁹ Witness statement of Gabrielle Craig dated 30 July 2021 [8].

⁷⁵⁰ Ibid [9].

⁷⁵¹ Ibid [17]-[19].

⁷⁵² Ibid [22].

⁷⁵³ Ibid [21].

‘During my time at DVRS, I have seen more and more employers providing access to paid family and domestic violence leave and have witnessed the huge difference this makes for private applicants who have access to it. For example, Queensland Health now provides 10 days paid family and domestic violence leave, and the local council provides 20 days paid family and domestic violence leave. For people who have access to paid leave, they do not have to worry about the financial implications of applying for a protection order and can take the time to obtain the order they need. Generally, workplaces that provide domestic violence leave have often provided ‘domestic violence in the workplace’ training to staff, which provides information about recognising and responding to signs a work colleague is experiencing domestic violence. This training and associated policies means workplaces are often able to provide or refer staff for other forms of support.

In my experience, people who do not have access to paid leave often have to drop out of the process simply because they cannot afford to take the time off work required. I would describe access to paid family and domestic violence leave as a game changer for people in these crisis situations. I have observed particular challenges for people who are casually employed and have no leave of any kind to access.’⁷⁵⁴

[677] As a final example, Karyn Walsh, the CEO of Micah Projects, who has had extensive experience (particularised in her witness statement) of working with women and children experiencing FDV, said:

‘I have observed through my work that financial resources at the time of acting on decisions to leave a violent relationship are essential because people are often suddenly transitioning from a double income situation to being a sole provider for themselves and their children. There are all sorts of costs involved at this point of time, including paying for new rentals (including bonds), taking on more of a mortgage if a perpetrator has left home or been arrested, costs associated with changing schools including new uniforms, counselling for traumatised children, medication costs etc.

...

In my experience in providing support to clients in crisis, people seeking to leave violent relationships are most concerned about minimising the impact on their children and on their income and employment – these are the two most important considerations for people in crisis. They are related concerns, because disruptions to income and employment directly impact on a person’s ability to provide essential care to children, both in the immediate and longer term.

In my experience, money is a key obstacle to women leaving violent relationships. If there is concern that income or employment may be disrupted, women become very hesitant to make the decision to escape, particularly if there are children to provide for.’⁷⁵⁵

[678] In summary, the evidence demonstrates that employees experiencing FDV face acute financial circumstances at the time they seek to leave violent relationships or otherwise deal with the consequences of FDV. Income security is necessary for employees experiencing FDV to bear the cost of relocating and to spend time seeking legal advice and attending court proceedings and accessing medical treatment and other forms of support. The absence of such income security may mean employees experiencing FDV do not leave violent relationships. On

⁷⁵⁴ Witness statement of Terese Kingston dated 30 July 2021 [12]-[13].

⁷⁵⁵ Witness statement of Karyn Walsh dated 30 July 2021 [16] and [19]-[20].

the basis of this evidence, we are satisfied that the current NES and award minimum safety net is not fair and relevant from the perspective of employees experiencing FDV, particularly those who are low-paid, because it does not address this necessity for income security.

8.2.2 A matter for government action

[679] The opposing parties contend that *paid* FDV leave is a matter for Parliament, and that government should have primary carriage of responding to FDV more generally. For the reasons that follow we find this argument unpersuasive.

[680] The opposing parties submit it is appropriate for the Commission to take into account various government measures designed to assist persons experiencing FDV,⁷⁵⁶ and have identified a range of measures that they contend demonstrate that paid FDV leave is not necessary within the meaning of s.138 of the FW Act.⁷⁵⁷

[681] ACCI submits that Parliament has ‘displayed a clear intention’ to establish a system where:

- employees can access unpaid FDV as part of the industrial safety net
- employees can access financial support directly from the government to assist them to deal with the financial impacts of FDV
- employees can bargain or negotiate with their employers to secure further FDV support including paid leave in enterprise agreements, and
- employers can provide further FDV support as required in their own circumstances.⁷⁵⁸

[682] ACCI submits Parliament has ‘explicitly rejected a decision to introduce a paid leave entitlement into the NES.’⁷⁵⁹ This is said to be evident from the debates relating to proposed amendments to the *Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018* (Cth) (*FDV Leave Amendment Bill 2018*) which gave rise to the current NES entitlement to unpaid FDV leave and through the non-enactment of other bills seeking to achieve the same outcome. In relation to the latter, ACCI cites as an example the *Fair Work Amendment (Ten Days Paid Domestic and Family Violence Leave) Bill 2020* [No 2]⁷⁶⁰ (the 10 Days Paid FDV Leave Bill).

[683] The short point advanced by ACCI is that if the NES entitlement to unpaid FDV leave is to be varied in any way, it should be done by statutory amendment not by the variation of modern awards. It submits the Parliament could coordinate a holistic response to the complex

⁷⁵⁶ Ai Group submissions in reply dated 4 February 2022 [4].

⁷⁵⁷ ACCI submissions in reply dated 4 February 2022 [7.18], [7.21]–[7.26]; Ai Group submissions in reply dated 4 February 2022 [75]; and see generally from [72].

⁷⁵⁸ ACCI submissions in reply dated 4 February 2022 [7.15].

⁷⁵⁹ *Ibid* [7.19].

⁷⁶⁰ *Ibid*.

problem of FDV, a problem that, according to ACCI, is exponentially broader than a simple entitlement in modern awards.⁷⁶¹

[684] While Ai Group describes the existing NES entitlement as ‘a comprehensive scheme’,⁷⁶² it does *not* contend that the Commission lacks power to introduce new FDV leave provisions into modern awards to supplement the NES; rather, it submits:

‘as a matter of merit, it would be preferable for the Commonwealth Government to continue to take steps to address issues related to FDV and take responsibility for the financial support to persons unable to work due to FDV.’⁷⁶³

[685] In reply, the ACTU submits the Commission is empowered by the FW Act to vary modern awards and there is no indication that is constrained by Parliament’s ability to legislate on workers’ rights. The ACTU also submits that ‘no one body has exclusive responsibility for dealing with the impact of FDV’ and it ‘does *not* contend that paid FDV leave will “solve” the problem of family and domestic violence in Australia and the proposed variation should not be assessed by that standard’.⁷⁶⁴

[686] As mentioned in Chapter 4 of our decision, the Commission has clear statutory power to include terms in modern awards about ‘leave...and arrangements for taking leave’ (s.139(1)(h)) and hence has power to include a paid FDV leave term in modern awards. Section 139(1)(h) is contained in Subdivision B of Division 3 of Part 2-3 of the FW Act. Section 136 relevantly provides that ‘a modern award must only include terms that are permitted or required’ by Subdivision B of Division 3 of Part 2-3 of the FW Act and must not include terms that contravene s.55 of the FW Act (ss.136(1)(a) and 136(2)(b)). Any such term is a permitted term.

[687] The modern awards objective is central to our consideration in these proceedings. We deal with this matter in detail in Chapter 9 of our decision but note here that it requires the Commission ‘must ensure that modern awards, *together with the [NES]*, provide a fair and relevant minimum safety net of terms and conditions’ [emphasis added], taking into account the considerations in ss.134(1)(a)-(h).

[688] The interaction between the NES and, relevantly, modern awards is governed by s.55, set out earlier in Chapter 4 of our decision.

[689] Section 55(1) provides that a modern award must not ‘exclude’ the NES or any provision of the NES. Section 55(4) permits an award to include certain ‘ancillary or incidental’ terms and terms that ‘supplement’ the NES. Such terms do not contravene s.55(1) (s.55(7)). For the reasons given in Chapter 4.5 we are satisfied that the inclusion of an entitlement to *paid* FDV leave in modern awards would not contravene s.55(1) of the FW Act.

[690] The important point here is that by the enactment of the FW Act, Parliament has expressly empowered the Commission to include terms in modern awards about ‘leave ... and arrangements for taking leave’ and terms that are ancillary or supplementary to such terms,

⁷⁶¹ Ibid [7.29]-[7.30].

⁷⁶² Ai Group final submissions dated 28 March 2022 [92].

⁷⁶³ Ibid [94].

⁷⁶⁴ See ACTU submissions in reply 21 February 2022 [34].

provided that the effect of such terms is not detrimental to an employee in any respect when compared to the NES.

[691] Note 2 to s.55(4) is of interest in the present context. It states:

‘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).’

[692] The example given in Note 2(a) is instructive. It makes clear that despite the fact the NES prescribes an entitlement to 4 weeks’ paid annual leave (and 5 weeks for shiftworkers see s.87(1)), the statutory scheme contemplates the Commission may vary a modern award to *increase* the amount of an employee’s entitlement to paid annual leave beyond the amount prescribed in s.87(1).

[693] It is clear that the FW Act does *not* evidence any intention by Parliament to reserve for itself the decision of whether employees are entitled to paid FDV leave. The FW Act clearly delineates what the Commission can and cannot include in modern awards. Had Parliament intended to deny the Commission the power to include paid FDV leave (or additional unpaid FDV leave) in modern awards, the FW Act would expressly say so. Accordingly, it would constitute an abrogation of our jurisdiction to reject the paid FDV leave claim simply on the basis that it is a ‘matter for government’.

[694] We now turn to some of the particular points advanced in argument. It is convenient to begin with ACCI’s submission that Parliament has ‘explicitly rejected’ the introduction of paid FDV leave into the NES. Parliament’s rejection of paid FDV leave is said to be evident from the debates relating to the FDV Leave Amendment Bill.

[695] We reject this submission, it is simply wrong. The debates relating to the FDV Leave Amendment Bill – particularly the remarks of the then Minister for Industrial Relations, the Hon. Kelly O’Dwyer MP – make it clear that the Bill was substantially influenced by the Commission’s *March 2018 FDVL Decision*.⁷⁶⁵ The Minister said:

‘The bill will extend the decision of the Fair Work Commission to all employees covered by the Fair Work Act. It is the right step to take right now. The commission's decision applied to award-reliant employees. This bill will provide a universal safety net entitlement for all workers under the Fair Work Act, regardless of the basis of their employment or the size of their employer. Many workers covered by the Fair Work Act currently have no entitlement to family and domestic violence leave, as they are not award reliant. This new safety net entitlement will not

⁷⁶⁵ See House of Representatives Hansard 4 December 2018 12410 – 12411.

prevent employers from providing other support to employees experiencing family and domestic violence.’⁷⁶⁶

[696] Amendments to the FDV Leave Amendment Bill were proposed by the Member for Melbourne (Mr Adam Bandt MP), seeking to increase the quantum of unpaid FDV leave to 10 days and to amend the circumstances in which an employee could access the unpaid leave and the confidentiality provisions.⁷⁶⁷ In rejecting the proposed amendments the Minister said:

‘The government respects the integrity of the fair and balanced process by the Fair Work Commission in undertaking its decision, and this, of course, was also highlighted in the Senate Education and Employment Legislation Committee in its report on the bill, which acknowledged the considerable issues that were looked into by the Fair Work Commission and noted:

The committee did not receive evidence which would challenge the basis of the FWC's decision.

The bill will provide for five days unpaid leave, and it is the right step to take now. This bill will help protect women's job security when they need to take time off to deal with matters that can sometimes only be done in business hours—things like accessing police and related services or relocating to a safe residence.

I just want to touch on the other elements that the member spoke about. The entitlement in the bill matches the entitlement determined to be appropriate by the commission, which is for the leave to be available for an employee who is experiencing family and domestic violence themselves, rather than a close relative of the employee as has been proposed in the amendment. We believe it's important that the decision of the Fair Work Commission be respected. I also just want to note for the record that nothing in this bill prevents an employee from accessing other types of leave, such as carers leave, when the employee needs to provide care for a close relative.

I also want to touch on the confidentiality provisions that were just discussed by the member. The confidentiality provisions in the bill mirror those that are in the Fair Work Commission's model clause. These were the result of significant debate and comprehensive submissions by the parties to the Fair Work Commission and represent the accepted final position. If we were to accept any such amendments, they would ultimately undermine that.’⁷⁶⁸

[697] It is clear from a review of the Parliamentary debate that the intent of the FDV Leave Amendment Bill was to extend the operation of the Commission’s *March 2018 FDVL Decision* to all workers, not just the award reliant. The introduction of the Bill was a direct response to the *March 2018 FDVL Decision* and the terms of the Bill closely followed the model term determined by the Commission.

[698] Further, and contrary to ACCI’s contention, Parliament did not ‘explicitly reject’ the introduction of paid FDV leave into the NES, it simply extended the operation of the *March 2018 FDVL Decision* so that it applied to all employees. Indeed, the subject of paid FDV leave was not debated. The then shadow Minister for Industrial Relations, Mr Brendan O’Connor MP sought to move amendments to the FDV Leave Amendment Bill that would have provided

⁷⁶⁶ Ibid 12411.

⁷⁶⁷ Ibid 12461 – 12464.

⁷⁶⁸ Ibid 12465.

10 days paid FDV leave to full-time and part-time employees.⁷⁶⁹ The Deputy Speaker ruled those proposed amendments were ‘not within the subject of the bill or the title of the bill and, therefore, are out of order’.⁷⁷⁰

[699] There was a debate about the Deputy Speaker’s ruling. The Speaker then returned to the House and confirmed the earlier ruling.⁷⁷¹ The short point is that the *paid* FDV leave amendments were never debated by Parliament, far less voted on. The FDV Leave Amendment Bill then passed the House and proceeded to the Senate. No amendments were proposed in the Senate and the Bill was passed with the support of the Opposition.⁷⁷²

[700] ACCI also relies on non-enactment of the 10 Days Paid FDV Leave Amendment Bill to make good its contention that Parliament has ‘explicitly rejected’ the introduction of paid FDV leave into the NES. ACCI’s submission significantly overstates the position.

[701] The 10 Days Paid FDV Leave Amendment Bill was introduced as a private members Bill to the Senate on 9 December 2020. Following the Second Reading, consideration of the Bill was adjourned. Hansard records no debate or consideration of the 10 Days Paid FDV Leave Amendment Bill, far less an ‘explicit rejection’ of paid FDV leave. Importantly, Parliament has not rejected the Bill.

[702] Addressing FDV is a complex issue that requires a broad community response. It is not the purview of any one body. As noted in the House Committee Report ‘governments cannot eliminate [family, domestic and sexual violence] on their own ... there is an important role for business, community groups, and other non-government bodies in preventing and responding to [family, domestic and sexual violence] in our community. A whole-of-society approach is vital.’⁷⁷³

[703] Indeed, Ai Group accepts that a ‘whole of society approach is required’ and that employers have a role to play in this regard – it is the extent of that role which is in contention. Ai Group submits:

‘The NES already directly imposes obligations upon employers to potentially accommodate flexible work arrangements and unpaid leave for employees experiencing FDV. This reflects an appropriate mandatory role for employers (beyond the provision of other available NES leave entitlements) as it ensures that they accommodate an employee’s need for absences.’⁷⁷⁴

[704] In its submission of 4 February 2022, Ai Group makes reference to the House Committee Report noting that:

⁷⁶⁹ Ibid 12466-12468.

⁷⁷⁰ Ibid 12469.

⁷⁷¹ Ibid 12469–12471.

⁷⁷² Senate Hansard 6 December 2018 9632–9644.

⁷⁷³ House Committee Report [2.185].

⁷⁷⁴ Ai Group final submissions dated 28 March 2022 [93].

‘Specific consideration was given by the Committee to a proposal for the introduction of FDVL ... Whilst the Committee said that business has a role to play, amongst various other parts of society, in addressing the issue of FDV, it did not recommend the introduction of FDVL.’⁷⁷⁵

[705] Ai Group’s submission is factually accurate; but is apt to mislead, because it only presents a partial picture of the House Committee Report.

[706] As Ai Group correctly observes, the House Committee made no recommendation in respect of paid FDV leave; but, as the House Committee Report notes ‘*the scope of amendments to leave entitlements is a broad and complex issue that goes beyond the scope of this inquiry.*’⁷⁷⁶ [Emphasis added]

[707] The House Committee Report did make a number of observations that are relevant to our consideration of this issue. In particular, as we mentioned in Chapter 6.6.2(ii), the Report notes that many services supporting victim-survivors are only open, or are primarily open, during business hours.

[708] The House Committee Report also refers to Ai Group’s submission that the Commission was scheduled to review FDV leave provisions and that ‘a proper approach is not to do anything further in this space until we’ve at least read the Commission’s review.’⁷⁷⁷

[709] The House Committee evidently accepted the proposition advanced by Ai Group as its Report concludes in the following terms:

‘The Committee believes that the upcoming Fair Work Commission review of family violence leave will provide a useful opportunity for evidence gathering and an evaluation of family violence leave ... *the Committee defers to the pending Fair Work Commission review with regards to paid family violence leave.*’⁷⁷⁸ [Emphasis added]

[710] As the ACTU points out, there is a certain circularity to Ai Group’s submissions. In these proceedings Ai Group contends that we should not vary modern awards to provide for paid FDV leave because, among other things, it is properly a matter for Parliament. Yet before the House Committee Ai Group argued that the Committee should not make any recommendations in respect of paid FDV leave until the completion of the Commission proceedings. The end result places the issue of paid FDV leave in some sort of virtual *cul-de-sac*, the result of which is that nobody does anything.

[711] Importantly, the House Committee did not *reject* the introduction of paid FDV leave. Rather, the Committee determined that amendments to leave entitlements were beyond the scope of its inquiry, and expressly deferred to the Commission’s consideration of the issue in this Review.

[712] ACCI and Ai Group also identify various Government policy initiatives in support of their contention that it is not necessary to insert paid FDV leave terms into modern awards.

⁷⁷⁵ Ai Group submissions in reply dated 4 February 2022 [78].

⁷⁷⁶ House Committee Report [8.223].

⁷⁷⁷ Ibid [8.157].

⁷⁷⁸ Ibid [8.222]-[8.223].

[713] Ai Group details various Government responses to FDV in Chapter 8 of its 4 February 2022 submissions and submits:

‘In light of the significantly increased activity by policy-makers in this area, it is our submission that it is not *necessary*, as required by s.138 of the FW Act, to create an entitlement to FDVL in the awards system and, by extension, to impose the resulting costs and other impacts on individual employers. It is critical that FDV remains a key focus of the relevant Governments’ agendas and it is, in our view, more appropriate that steps are taken through the implementation of the various schemes and programmes designed by Governments to tackle the issue of FDV, rather than through the grant of FDVL.’⁷⁷⁹

[714] In contending that ‘FDV is a serious social issue that should be a focus for Governments’,⁷⁸⁰ Ai Group makes reference to the Escaping Violence Payment (EVP) Trial (the EVP trial). We return to the EVP trial and Ai Group’s reliance on it shortly.

[715] As to the various measures identified by the opposing parties the ACTU submits that they are simply not relevant to these proceedings, noting that:

‘(a) Regarding various government measures that have been proposed or foreshadowed, but have not yet been enacted, these cannot be said to be meeting the need that paid FDV leave is designed to meet, and should not be considered by the Commission as relevant matters in the Review.

(b) Many of the government measures are either irrelevant to the question of the necessity of paid FDV leave (eg, the Family Violence and Cross-Examination of Parties Scheme or the Office of the eSafety Commissioner’s steps to make cyberspace safe for women), or are described in general (eg, the NSW Blueprint) or aspirational (eg, the WA strategy) terms.

(c) ... None of the existing (or proposed) measures meet the specific need that paid FDV leave is designed to meet ...’⁷⁸¹ [Footnotes omitted]

[716] In particular, the ACTU submits that the EVP trial is not relevant to these proceedings as it does not ‘meet the specific need that paid FDV leave is designed to meet’ and, further, the EVP can take weeks to be approved and ... is only available to persons who are not living with the violent partner or have a plan to leave.’⁷⁸²

[717] The EVP trial was announced in October 2021 with a budget allocation of \$144.8 million. The EVP trial is for 2 years and provides an EVP to eligible individuals. The EVP provides a package of up to \$5,000 per individual, consisting of \$1,500 in cash and other goods, services and support.

⁷⁷⁹ Ai Group submissions in reply dated 4 February 2022 [75].

⁷⁸⁰ Ibid [445].

⁷⁸¹ ACTU submissions in reply dated 21 February 2022 [26].

⁷⁸² Ibid [26](c).

[718] The EVP is available if a person meets the following eligibility requirements:

- they are an Australian citizen or permanent resident aged over 18, living in Australia
- their living arrangements have changed within the last 12 weeks due to violence by their partner (they have left, or their partner has left their home), or they have a safe plan in place to leave soon (including from a refuge or temporary accommodation)
- they are experiencing financial stress which is impacting their ability to maintain financial commitments and independence through these changed living circumstances, and
- they have not accessed the EVP in the last 12 months.⁷⁸³

[719] As mentioned earlier, Ai Group relies on the EVP trial to support its contention that it is not necessary to insert FDV leave in modern awards. In particular, it submits:

‘The scheme appears to provide a substantial level of financial support. Employees eligible to take unpaid FDV leave pursuant to the NES or who would be eligible to take FDVL pursuant to the ACTU’s proposed clause may also be eligible for this payment.’⁷⁸⁴

[720] In a later submission, Ai Group submits:

‘We contend that, as a matter of merit, it would be preferable for the Commonwealth Government to continue to take steps to address issues related to FDV and take responsibility for financial support to persons who are unable to work due to FDV. In this respect we acknowledge the utility of the ‘Escaping Violence Payment’ which is currently operating under a two-year trial and may continue beyond this period. This is potentially more advantageous to employees than the ACTU Claim. Further, on 6 March 2022, the Federal Government announced an additional \$189 million over five years to strengthen prevention and early intervention efforts in family, domestic and sexual violence. We also here note that we have proposed the development of a publicly-funded FDV leave payment, which we will return to.’⁷⁸⁵ [Footnotes omitted, emphasis added]

[721] It seems to us that there is a degree of tension between Ai Group’s Federal Election Policy Statement in support of a publicly funded FDV leave payment and the submissions set out above.

[722] It is clear from Ai Group’s policy statement that it accepts the following propositions:

- More needs to be done to prevent and respond to the occurrence of FDV.
- The financial vulnerability of persons experiencing FDV is ‘well documented’.
- The pandemic has contributed to an increase in FDV in the community.

⁷⁸³ Uniting Care (2022), ‘[Escaping Violence Payment Trial Fact Sheet: Information for Applicants](#)’, March.

⁷⁸⁴ Ai Group submissions in reply dated 4 February 2022 [85].

⁷⁸⁵ Ai Group final submissions dated 28 March 2022 [94].

- Further Government support is required in addition to the range of measures already adopted by Governments and employers.

[723] The last point is particularly relevant given Ai Group's position in these proceedings. As mentioned above, Ai Group submits that in light of the 'significantly increased activity' by Governments in respect of FDV it is not *necessary* to create an entitlement to FDV leave in modern awards. As we mentioned in Chapter 4 of our decision, we accept that there is a distinction between that which is necessary (in the s.138 sense) and that which is desirable. It is clear from its own policy proposal that Ai Group regards paid FDV leave as desirable.

[724] Further, it is evident from its own policy statement that Ai Group accepts that more needs to be done to respond to FDV and that persons experiencing FDV require further support. Indeed, it is implicit in Ai Group's policy statement that it considered the range of existing Government support measures to be inadequate (or at least those support measures in place as at 20 February 2022 when the policy statement was released). So much is apparent from the following extract from Ai Group's Federal Election Policy Statement:

'further Government support, in addition to the range of measures already adopted by Government and employers, is required.' (Emphasis added)

[725] This assessment as to the inadequacy of existing support measures must necessarily include a reference to the EVP trial, as it commenced in October 2021. Ai Group also states that a publicly funded scheme of the type it proposed would deliver some of the benefits of the ACTU's claim.

[726] The real issue in contention is not about whether there is a need to provide paid FDV leave; it is about who pays for it. As Ai Group itself submits:

'A Government-funded scheme would deliver some of the benefits of the ACTU's proposal but would have the added advantage of not creating new employment costs or an administrative burden upon employers. It would also apply to all employees (not just those who are award covered).'⁷⁸⁶

[727] How are we to reconcile the tension between Ai Group's stated positions?

[728] Ai Group says that its call for further government support was not based on a 'precise forensic assessment of the extent to which other forms of government support or other entitlements under the safety net might already address or partly address the needs of employees covered by modern awards'.⁷⁸⁷

[729] Yet, in its submissions in these proceedings Ai Group contended first that the EVP trial is 'potentially more advantageous than the ACTU claim' and second that in light of the 'significantly increased activity' by Government in respect of FDV, it is not necessary to vary modern awards to provide for paid FDV leave.

⁷⁸⁶ Ai Group final submissions dated 28 March 2022 [168].

⁷⁸⁷ Ai Group final submissions dated 7 April 2022 [19].

[730] The first contention was not the subject of any elaboration or evidence, and we reject it. Eligibility for the EVP depends on the relationship having ended⁷⁸⁸ and the individual having, within the previous 12 weeks:

- left the home due to intimate partner violence; or
- remained in the home but the perpetrator has left the home; or
- a safe plan in place to move soon (including from a refuge or other temporary accommodation).⁷⁸⁹

[731] Data presented in the SWIRLS Report on key FDV prevalence patterns included the finding that most women who have experienced physical and/or sexual violence report they do not want to leave that relationship.⁷⁹⁰ It follows from this most women experiencing FDV may not be eligible for the EVP. Of course, that is not to say that there is no relationship between the EVP and paid FDV leave. As we observe in Chapter 6.6.2 the research emphasises the importance of access to paid FDV leave ‘to begin the process of surviving and then escaping from a domestic violence situation.’⁷⁹¹ Hence to the extent that paid FDV leave assists an employee experiencing FDV to leave the home in which they are experiencing violence or in developing a safe plan to move; they may become eligible for the EVP.

[732] As to the second contention, this submission was made on 4 February 2022, before Ai Group released its policy statement in support of a publicly funded paid FDV leave scheme and before it said more needed to be done to respond to FDV because the existing support measures (including the EVP) were inadequate.

[733] There is a chameleon-like quality to Ai Group’s position in respect of these issues; it changes depending on the context. The evident tensions in Ai Group’s position significantly diminish the force of this aspect of its submission in these proceedings.

[734] Ai Group also contends that in undertaking an assessment of the ‘need’ for paid FDV leave and any additional unpaid leave, the Full Bench ‘should also carefully consider the interaction between the availability of government support for persons experiencing FDV and any proposed new FDVL entitlement’.⁷⁹² Ai Group submits that such a task should entail a consideration of:

- (a) The extent to which persons who may be eligible to access any proposed FDV leave under an award may also be able to access other government support; and

⁷⁸⁸ Uniting, ‘Escaping Violence Payment – Who can access the service?’ < [Escaping Violence Payment | Uniting Vic.Tas \(unitingvictas.org.au\)](https://unitingvictas.org.au)>.

⁷⁸⁹ Ibid.

⁷⁹⁰ SWIRLS Report pp.2-3.

⁷⁹¹ de Jonge A (2018) ‘Corporate sound responsibility through a feminine lens: Domestic violence and the workplace in the 21st century’, *Journal of Business Ethics*, Vol 148, No 3 at pp 471 – 487. Research reference lead document 17, Also see Cortis N & Bullen J (2015), ‘Building effective policies and services to promote women’s economic security following domestic violence: state of knowledge paper’, *Landscapes*, Issue 07/15, Australia’s National Research Organisation for Women’s Safety, August. .

⁷⁹² Ai Group final submissions dated 7 April 2022 [21].

(b) The impact that any proposed FDV leave entitlement under an award would have on the eligibility of the employee for government provided support.⁷⁹³

[735] There is no material before the Commission which suggests that the introduction of paid FDV leave in modern awards would affect an employee's eligibility for any government provided support. However, Ai Group submits that:

‘Any deficiency of information about such matters in the material before the Commission should weigh against the granting of FDVL at this time.

Similarly, any risk that the grant of a new entitlement would result in a transfer of costs from government to employers by disentiing employees to such government supports should weigh against the grant of the claim, as it would not be fair to employers, having regard in particular to s.134(1)(f) of the Act.’⁷⁹⁴

[736] Absent any evidence that there is, in fact, any deficiency of information or impact upon transfer costs, we do not propose to accept Ai Group's submission.

[737] Ai Group also notes that at the time it advanced its proposal ‘the Commonwealth Government had not yet announced the significant additional commitment for measures to address FDV and support that it has provided for in the budget’.⁷⁹⁵

[738] The Commission's research staff have prepared an Information Note canvassing measures in the Budget 2022-23 to address FDV.⁷⁹⁶ The measures in the Budget 2022-23 do *not* include a proposal for publicly funded FDV leave. As to the other measures it is not clear which of these measures have been implemented or legislated. The opposing parties provided no information in this regard. As is apparent from various Annual Wage Review decisions, the Commission does not take into account Budget announcements about proposed changes to support arrangements until they have been legislated or otherwise implemented.⁷⁹⁷ We adopt the same approach in the present proceedings. As it is unclear which, if any, of the Budget 2022-23 measures have been implemented we are unable to take them into account.

[739] Finally, it is worth noting here the following comment in the House Committee Report:

‘The Committee acknowledges the evidence that the rate of FDSV has not decreased of the life of the National Plan, and the rate of sexual violence is in fact increasing. In that respect – despite its success in bringing Australia's governments together – the National Plan does not appear to have met its stated objective of a significant and sustained reduction in violence against women and their children.

The Committee also acknowledges the findings of the Auditor-General's report into the coordination and targeting of domestic violence funding, which in the Committee's view raises concerns about the Department of Social Services' implementation of the National Plan.

⁷⁹³ Ibid.

⁷⁹⁴ Ai Group submissions in response to Background Document 2 dated 7 April 2022 [22] – [23].

⁷⁹⁵ Ai Group submissions in response to Background Document 2 dated 7 April 2022 [20].

⁷⁹⁶ Information Note—Initiatives to reduce family and domestic violence in Budget 2022-23, 5 April 2022.

⁷⁹⁷ See [2019] FWCFB 3500 [223] and [2021] FWCFB 3500 [62]–[63].

The stark reality is that all Australian governments have much more work to do in preventing FDSV.’⁷⁹⁸

[740] We agree that much more needs to be done to prevent FDV and, further, more needs to be done to address the consequences of such violence.

8.2.3 Other social issues are not the subject of specific award provisions.

[741] Ai Group contends that FDV is ‘one of many serious and pervasive issues affecting members of our society’. In Chapter 11 of its 4 February 2022 submission Ai Group canvasses some of the ‘other issues’ facing employees, namely:

1. *The COVID-19 pandemic and the impact of the various public health orders put in place in response to the pandemic.*

‘Clearly, the COVID-19 pandemic and the restrictions associated with efforts to contain its spread, have had deep and long-lasting effects on the Australian community. It is likely that individuals and businesses will take many years to recover from the secondary and tertiary effects of the pandemic.

The pandemic has placed various demands on employees. In addition to those who have been unable to work because they contracted the virus, others have required time off work for a range of reasons including caring for others who are unwell or vulnerable and home schooling their children. This has no doubt placed many employees in the invidious position of having to choose between working and taking time off work or indeed in some cases, having to leave their employment.

Despite this, the Commission has not found it ‘*necessary*’ to vary awards generally to introduce a paid leave entitlement for employees who are unable to attend work. Indeed, it has rejected multiple union claims for such leave entitlements, except in one instance where it granted a time-limited paid leave entitlement for employees in the residential aged care sector.’⁷⁹⁹
[Footnotes omitted]

2. *A significant proportion of the population are victims of crime and the majority are also employees.*

‘The prevalence of crime in the community and the proportion of victims of crime who are employed is greater than the same parameters measured in respect of FDV. Further, victims of crimes may be impacted in ways that are similar to those who experience FDV to the extent that they suffer physical injuries, emotional and psychological consequences. They may also be involved in legal proceedings where the alleged perpetrator is prosecuted.’⁸⁰⁰

⁷⁹⁸ House Committee Report [2.182]–[2.184].

⁷⁹⁹ Ai Group submissions in reply 4 February 2022 [208] – [210].

⁸⁰⁰ Ibid [214].

3. *Other social issues.*

[742] Ai Group submits that a number of other issues affect employees in a way that requires them to take leave, in particular:

- Divorce and relationship breakdowns: ‘family law proceedings can be protracted and can involve court appearances as well as alternative dispute resolution meetings. These proceedings can therefore be disruptive to an employee’s work’.⁸⁰¹
- Drug and alcohol dependence: ‘In situations where employees become drug and alcohol dependent, a significant amount of time can be required to rehabilitate and this may require employees to take time off work’.⁸⁰²
- Death and bereavement: ‘Parliament recognises the difficulties associated with bereavement and has consequently included an entitlement of two days paid compassionate leave if a member of the employee’s immediate family or household dies. Casual employees receive an entitlements of two days unpaid leave’.⁸⁰³ [Footnotes omitted]

[743] ACCI takes a slightly different approach, it submits:

‘there are many circumstances where employees must take unpaid leave (eg. in cases of serious illness), circumstances where some employees are more likely to exhaust their personal/carers leave (eg. parents or carers) and also circumstances where employees must use their annual eave to deal with matters which are not rest or recreation (eg. when involved in divorce proceedings, when undertaking some forms of quarantine or when undertaking travel for family business).

The fact that an employee is required or has taken unpaid leave to deal with FDV does not, in itself, support a proposition that such leave should be paid leave, or that all award covered employees should be provided with paid leave such that they are “covered” in the event that they might be otherwise required to take unpaid leave’.⁸⁰⁴

[744] As to the opposing parties observation that employees may require or seek to take leave in response to a number of other social issues, the ACTU submits in reply:

‘These observations are not relied on in support of any argument for or against the ACTU’s claim and can be accordingly disregarded.’⁸⁰⁵

[745] There is some force in the ACTU’s reply submission. The significance of the other social problems referred to above to the particular issue before us in these proceedings is not entirely clear to us. It may be accepted that a range of issues affect employees and employers in a range of ways; but that does not lead us to conclude that we should do nothing in respect of FDV leave.

⁸⁰¹ Ibid [219].

⁸⁰² Ibid [228].

⁸⁰³ Ibid [231].

⁸⁰⁴ ACCI submissions in reply 4 February 2022 [9.11] – [9.12].

⁸⁰⁵ ACTU submissions in reply dated 21 February 2022 [94].

[746] ACCI and Ai Group generally accept the seriousness of FDV as a societal problem. As we have mentioned, ACCI accepts that there is ‘no contest’ that FDV is a ‘particularly offensive form of violence’ and that the ‘Australian system can improve its “systems” for both preventing FDV and for supporting those who are affected by it’⁸⁰⁶ and that it is ‘unlikely to be contested that paid FDV leave will benefit employees experiencing FDV.’⁸⁰⁷

[747] Ai Group submits that FDV is a ‘serious and pervasive social issue’ and acknowledges that ‘employers have a role to play’ in addressing FDV and that ‘[i]t can readily be accepted that in some cases’ provision of additional support for employees experiencing FDV is ‘beneficial or desirable.’⁸⁰⁸

[748] As we said in Chapter 6.6, FDV is an ubiquitous gendered phenomenon. It is uncontentional that FDV has a significant adverse impact on those who experience it. Employees who experience FDV often face financial difficulties as a result and may suffer economic harm as a result of disruption to workplace participation.

[749] FDV is both a cause and consequence of gender inequality and has a real and tangible impact on employees and employers in the workplace. FDV has a substantial adverse impact on the economy more broadly. In comparison to women with no experience of FDV, women who are experiencing or have experienced FDV have a more disrupted work history; are on lower personal incomes; have had to change jobs frequently; and are more likely to be employed in casual and part-time work.⁸⁰⁹

[750] It is also uncontentional that sustained periods of employment can provide financial security, independence, social networks and increased self-esteem and we have found that employment is an important pathway out of violent relationships.

[751] We note that in the earlier proceedings Ai Group contended that it was not appropriate for the Commission to prioritise FDV over other social issues. The *July 2017 Majority Decision* rejected this submission concluding that:

‘While we accept that there are other matters which might impact on employees in a significant way we are satisfied that the evidence established that the circumstances faced by employees who experience family and domestic violence require a special response.’⁸¹⁰ [Endnotes omitted]

[752] The *March 2018 FDVL Decision* endorsed this conclusion. We have come to the same view.

8.2.4 FDV Leave is a Matter for the Enterprise

⁸⁰⁶ ACCI submissions in reply dated 4 February 2022 [2.2]-[2.4].

⁸⁰⁷ *Ibid* [8.51].

⁸⁰⁸ Ai Group final submissions dated 28 March 2022 [93]; [97].

⁸⁰⁹ McFerran L (2011) ‘Safe at Home, Safe at Work’, National Domestic Violence and the Workplace Survey, Australian Domestic and Family Violence Clearinghouse, A Project of the Centre for Gender-Related Violence Studies and Micromex Research, University of New South Wales p.2.

⁸¹⁰ [2017] FWCFB 3494 [51].

[753] ACCI and Ai Group submit that the introduction of paid FDV leave may undermine progress or stifle efforts by employers, employees, and unions to negotiate and provide workplace-specific responses to employees affected by FDV, including via enterprise bargaining.⁸¹¹ Ai Group contends that FDV requires a nuanced and flexible approach and that employers are typically supportive of employees experiencing FDV and adopt a compassionate and flexible approach to support them.

[754] Ai Group contends that if 10 days' paid FDV leave is introduced into the safety net then:

'the imposition of the associated costs and regulatory burden will likely cause employers to abandon any efforts that they have made or intended to make in relation to this issue; and to instead simply provide that which is required of them by the safety net.'⁸¹²

[755] Ai Group also submits that the evidence does not show that employers are routinely refusing access to leave or other entitlements to employees experiencing FDV.⁸¹³ They further submit that the introduction of FDV leave would not address outlying attitudes and suggest that training and education of managers and supervisors are likely to be more effective.⁸¹⁴

[756] In reply, the ACTU notes that these submissions are not supported by any evidence:

'No research or publication is identified in support of that hypothesis. Not a single employer has been called to give evidence to substantiate 'concerns' that provision of a minimum award-based entitlement will cause otherwise supportive employers to discard their efforts in this regard.'⁸¹⁵

[757] Regarding enterprise bargaining, Ai Group submits that the increase in FDV-related clauses in enterprise agreements since 2016 suggests that the *absence* of paid FDV leave may have encouraged collective bargaining on this issue.⁸¹⁶ In reply, the ACTU submits that the posited causal relationship is not explained and that:

'It is equally possible that the introduction of unpaid FDV leave to modern awards and later the NES, has encouraged collective bargaining on workplace responses to FDV more broadly, as acknowledged by ACCI, and that the introduction of a paid FDV leave entitlement will further encourage bargaining on this issue.'⁸¹⁷ [Footnotes omitted]

[758] Taking the last issue first, we agree with the ACTU's reply submission. There is more than one plausible explanation for the increase in bargaining activity over FDV in recent years.

[759] As to the opposing parties' hypothesis that the introduction of an award entitlement to paid FDV leave may have a chilling effect on bargaining, we agree with the ACTU's reply submission. No evidence is advanced in support of the opposing parties' thesis and as we

⁸¹¹ ACCI submissions in reply dated 4 February 2022 [8.20(d)]; Ai Group submissions in reply dated 4 February 2022 [232(b)-(c)]; [245]–[248]; [249]–[251].

⁸¹² Ai Group submissions in reply dated 4 February 2022 [248].

⁸¹³ Ibid [239].

⁸¹⁴ Ibid [242].

⁸¹⁵ ACTU submissions in reply dated 21 February 2022 [39].

⁸¹⁶ Ai Group submissions in reply dated 4 February 2022 [456]–[459].

⁸¹⁷ ACTU submissions in reply dated 21 February 2022 [40].

observe in Chapter 9.2 of our decision the complexity of factors which may contribute to bargaining decisions means we are unable to predict with any confidence the precise impact of a particular decision – such as the introduction of an award entitlement to paid FDV leave – on bargaining.

[760] Ai Group advances 2 discrete points:

1. The additional cost and regulatory burden of paid FDV leave will likely cause employers to abandon any efforts that they have made or intended to make in relation to FDV.
2. Introducing paid FDV leave would not address underlying attitudes and training of managers would be more effective.

[761] As to the first point, no evidence is advanced in support of Ai Group’s submission and the submission put is contrary to aspects of the evidence before us.

[762] The SWIRLS Report found that ‘[p]erceived employer support is likely to be important for employee morale (de Jonge, 2018) and, relatedly, to workplace commitment and loyalty. The entitlement to FDV leave, whether paid or unpaid, is also likely to enhance the ‘overall reputation and status’ of organisations (ANROWS, 2019, p. 2; Aeberhard-Hodges & McFerran, 2018, p. 258).’⁸¹⁸

[763] Further, it is Professor Duncan’s evidence that, in his experience, while voluntary changes can produce incremental progress, regulatory action can be a useful mechanism to effect movement in a particular direction, by breaking down cultural or institutional inertia, or enabling employers to get greater clarity about particular issues, and how they can respond.⁸¹⁹ As Professor Duncan put it ‘there is a benefit in breaking an inertia that might otherwise exist, a natural inertia, amongst organisations.’⁸²⁰

[764] No evidentiary basis is advanced in support of Ai Group’s second point.

[765] We accept that cultural barriers can inhibit access to FDV leave entitlements. As noted in the Monash Report:

‘Findings from the survey and interview data analysis show that access to and the use of any family violence leave (paid or unpaid) is inhibited by social stigma and shame. These feelings are exacerbated in unsupportive and unsafe workplaces.’⁸²¹

[766] But the Monash Report also goes on to conclude:

‘family violence leave provisions have a symbolic and a functional role to play. At the symbolic level the introduction and existence of paid family violence leave sends a clear message that the workplace recognises the need for victim-survivors to be supported financially during and after

⁸¹⁸ SWIRLS Report, 4.1.

⁸¹⁹ Transcript, 1 March 2022, PN788, PN797.

⁸²⁰ Transcript, 1 March 2022, PN797.

⁸²¹ Monash Report p.34.

their experience of violence. Sending a clear message at the policy level is important for guiding much needed changes in workplace culture whereby DFV has traditionally been seen as a private experience, within which disclosure carries shame, stigma and embarrassment for individual employees.’⁸²²

[767] In short, introducing paid FDV leave is likely to bring about positive cultural change.

[768] We are not persuaded that the issue of FDV should be left to the enterprise level, unregulated by modern awards.

[769] It is uncontentional that many employers are supportive of their employees and adopt a compassionate approach to assisting employees deal with the consequences of FDV.⁸²³ But it does not follow that it is *not* necessary to introduce an entitlement to paid FDV leave. Plainly, not all employees who experience FDV have access to paid FDV leave. And, in any event, access to paid FDV leave should be a workplace right rather than being dependent on employer benevolence.

8.2.5 Not Fair to Employers

[770] Ai Group contends that it is not fair that employers bear the cost of paid FDV leave:

‘Whilst employers should be encouraged to adopt a compassionate approach to supporting employees experiencing FDV, they should not be *required* to afford employees a separate paid leave entitlement.’⁸²⁴

[771] In support of its contention Ai Group refers to Chapter 13 of its submissions in reply of 4 February 2022, which deals with s.138 and the modern awards objective. In that chapter, Ai Group submits that fairness in the context of the modern awards objective is to be assessed from the perspective of employees and employers. Ai Group submits that the variation of modern awards to introduce FDV leave would not be fair to employers, for these reasons:

1. It would not be fair to impose the additional costs and burden associated with such a provision. Nor would it be fair to impose the administration of a separate form of leave on employers. The cost of the claim on individual employers must also be considered: ‘[e]mployers will necessarily have varying capacities to provide employees with paid and further unpaid leave. The safety net should not be varied to require the provision of FDVL by all employers’⁸²⁵
2. FDV is a serious social issue that should be a focus for Governments. Governments ‘should, in our view, continue to play a key role in developing initiatives, programmes and schemes that are directed towards preventing FDV, educating society about FDV and supporting those who experience FDV.’⁸²⁶

⁸²² Monash Report p.44.

⁸²³ Transcript, 8 April 2022, PN294.

⁸²⁴ Ai Group submissions in reply dated 4 February 2022 [232].

⁸²⁵ Ibid [446].

⁸²⁶ Ibid [445].

3. The safety net already requires that employers provide employees with various forms of leave and other types of flexibilities: '[i]t would not be fair to further increase an employer's leave liability by requiring them to provide a separate form of leave in the circumstances.'⁸²⁷
4. The provision proposed by the ACTU 'is unworkable' and it would be unfair to require employers to comply with it.⁸²⁸
5. The ACTU claim and FDV leave more generally 'are not appropriate or necessary features of a *minimum* safety net'⁸²⁹

[772] We have considered and rejected the matters at points 2 and 3 (in Chapters 8.2.2 and 8.2.1 respectively). We deal with point 4 when dealing with the various elements of the ACTU claim in Chapter 8.3 and we deal with issues of cost and regulatory burden in the Chapter 9.2.

[773] In relation to point 5, Ai Group refers to Chapter 12 of its submissions in reply of 4 February 2022, titled 'The Appropriateness of Introducing FDVL'. In that chapter, Ai Group contends that it would not be appropriate to vary modern awards to introduce FDV leave because:

- FDV requires a nuanced and flexible approach.
- Employers are typically supportive of employees experiencing FDV and adopt a compassionate and flexible approach to support them. The introduction of FDV leave 'is not likely to facilitate the continuation of such an approach and may in fact undermine the progress made to date in this sphere.'⁸³⁰
- The introduction of FDV leave 'may stifle employer, employee and union efforts to develop enterprise-specific schemes that are tailored to the circumstances of the relevant workplace and workforce.'⁸³¹
- The introduction of FDV leave would impose new and additional employment costs on employers.

[774] Each of these arguments have been addressed elsewhere in our decision and we need not repeat that discussion here.

[775] ACCI advances a separate point, observing that 'we currently live in highly uncertain times'⁸³² and submits:

⁸²⁷ Ibid [447].

⁸²⁸ Ibid [448].

⁸²⁹ Ibid [451].

⁸³⁰ Ibid [232](b).

⁸³¹ Ibid [232](c).

⁸³² ACCI submissions in reply dated 4 February 2022 [6.15].

‘This uncertainty is particularly concerning in the context of a global pandemic and the effect that the pandemic has had on productivity, wage growth and the performance of the economy generally.’⁸³³

[776] ACCI further submits:

‘The Australian Chamber does not promote a case that the Unlimited Unpaid/10 Day Paid Claim will result in extraordinary costs for all employers. It has no evidence of that. What is clear is that the Unlimited Unpaid/10 Day Paid Claim will increase [costs] for employers at an acutely difficult and uncertain time for many employers, notably small and medium employers.’⁸³⁴

[777] As the ACTU observes in its reply submissions of 21 February 2022, the opposing parties’ submissions about the financial impact of the pandemic on small businesses are only advanced in general terms, and it submits:

‘they have not put any evidence before the Commission on if, and how, employers’ capacity to meet their statutory obligations to provide paid leave has been affected by pandemic-related restrictions, which might be considered a useful proxy for the analysis of the potential impact of paid FDV leave on small business.’⁸³⁵

[778] While it may be accepted, as a general proposition, that we live in uncertain times, the absence of any evidence as to the financial circumstances of small and medium businesses significantly constrains the force of ACCI’s submission. The submission put is also inconsistent with the generally optimistic assessment in the 2022-23 Budget.

[779] The 2022-23 Budget noted that the ‘Australian economy has proved remarkably resilient to the ongoing impacts of the pandemic, consistently outperforming expectations and all major advanced economies’.⁸³⁶ Economic growth as measured by gross domestic product (GDP) was 3.4 per cent in the December quarter 2021, the equal highest quarterly increase in 46 years, and this strong outcome does not appear to have been derailed by the Omicron outbreak in early 2022.⁸³⁷

[780] Household consumption exceeded pre-pandemic levels for the first time in the December quarter 2021.⁸³⁸ The 2022-23 Budget also stated that a record proportion of Australians are in work⁸³⁹ and this strong demand for labour is expected to continue.⁸⁴⁰ Higher consumer spending and employment than previously expected has led to improved growth forecasts.⁸⁴¹ Business confidence returned quickly after the Omicron wave and business

⁸³³ Ibid [10.26].

⁸³⁴ Ibid [10.27].

⁸³⁵ ACTU submissions in reply dated 21 February 2022 [55].

⁸³⁶ Australian Government (2022), *Budget 2022–23, Budget Paper No. 1*, 29 March, p. 31.

⁸³⁷ Ibid p.31, 45.

⁸³⁸ Ibid p.49.

⁸³⁹ Ibid p.39.

⁸⁴⁰ Ibid p.45.

⁸⁴¹ Ibid p.31.

investment is expected to be strong, driven by non-mining business investment.⁸⁴² The economic and fiscal outlook is positive as noted in the Budget Overview section of Statement 1:

‘The Australian economy has proved remarkably resilient to the ongoing impacts of the pandemic, consistently outperforming expectations and exceeding pre-pandemic levels of activity by more than the major advanced economies.

A strong economic recovery is well underway, notwithstanding the pandemic and new shocks, such as the recent floods in Queensland and New South Wales and the Russian invasion of Ukraine. Economic growth forecasts have been revised upwards, driven by stronger-than-expected momentum in the labour market and consumer spending. Real GDP is expected to grow by 4¼ per cent in 2021-22, 3½ per cent in 2022-23 and 2½ per cent in 2023-24.

...

The strength of the economy, and in particular the labour market, combined with higher near-term commodity prices, has driven large upward revisions to tax receipts and reductions in unemployment benefit payments.

...

Net and gross debt as a share of GDP are both expected to be lower than at MYEFO and decline over time.

...

The Government has transitioned to the medium-term phase of its Economic and Fiscal Strategy. Priority is now being placed on growing the economy to reduce debt and rebuild fiscal buffers. This Budget puts Australia’s finances on a strong trajectory and demonstrates the fiscal dividend of Australia’s strong economic recovery.⁸⁴³

[781] The positive outlook is captured in Table 1.1: Major economic parameters, reproduced below:

Table 1.1: Major economic parameters

	Outcome	Forecasts				
	2020–21	2021–22	2022–23	2023–24	2024–25	2025–26
Real GDP	1.5	4¼	3½	2½	2½	2½
Employment	6.5	2¾	1½	1½	1	1
Unemployment rate	5.1	4	3¾	3¾	3¾	4
Consumer price index	3.8	4¼	3	2¾	2¾	2½
Wage price index	1.7	2¾	3¼	3¼	3½	3½
Nominal GDP	4.4	10¾	½	3	5¼	5

Note: Real GDP and Nominal GDP are percentage change on preceding year. The consumer price index, employment, and the wage price index are through-the-year growth to the June quarter. The unemployment rate is the rate for the June quarter.

⁸⁴² Ibid pp.51–52.

⁸⁴³ Ibid pp. 5-7.

Source: Australian Government (2022), *Budget 2022–23, Budget Paper No. 1*, 29 March, p. 6, Table 1.1.

8.2.6 Conclusion on the Broad Lines of Argument

[782] We have concluded the merits strongly favour the provision of a paid FDV leave entitlement. The ACTU has made good its ‘overarching premise’ that FDV is a workplace issue that requires a workplace response and that paid FDV leave is a critical mechanism for employees to maintain their employment and financial security, while dealing with the effects of FDV.

[783] The existing minimum safety net provided by the NES, insofar as it only provides for *unpaid* FDV leave, is not for practical financial reasons accessible to many employees experiencing FDV, particularly those who are low-paid, and for these reasons the safety net is not ‘fair and relevant’. The income security which paid FDV leave provides is a significant factor in allowing employees experiencing FDV to take the steps necessary to leave violent relationships or otherwise deal with the consequences of FDV, including relocating residences, participating in legal proceedings and accessing medical treatment and other forms of support. The ACTU has properly invoked our jurisdiction to vary modern awards in order to remedy this deficiency in the minimum safety net, and there is no good reason for us not to do so having regard to the current strength of the economy and labour market and, as we have found, the limited cost impact of providing a paid FDV leave entitlement in modern awards.

8.3 Elements of the Further Amended Claim

[784] In considering each of the main elements of the Further Amended Claim we have focussed on the merits of the particular proposal and the cost and complexity implications of an award term in the form sought by the ACTU. In respect of the latter point we have been particularly conscious of the special circumstances of small and medium-size businesses.

8.3.1 10 Days’ Paid FDV leave?

[785] ACCI submits that no evidentiary basis has been developed by the ACTU to justify the quantum of 10 days’ paid leave. It submits that where evidence has been filed relating to the actual use of leave by employees, such evidence does not support the proposition that 10 days is an appropriate minimum for a fair and relevant safety net beyond an assertion that it is a developing ‘industrial norm’ or simply that 10 days’ paid FDV leave per year is desirable.

[786] ACCI submits that the entitlement sought is significant and that no methodology has been developed to identify why the insertion of 10 days’ paid FDV leave is necessary to satisfy the modern awards objective for all modern awards. It is submitted that this means that the Full Bench is simply not in a position where it can make any informed judgment about what amount of paid leave (if any) is necessary.⁸⁴⁴

[787] ACCI further submits that:

⁸⁴⁴ ACCI submissions in reply dated 4 February 2021 [9.1] - [9.8].

- Data identifying how much unpaid leave is currently being taken is not an appropriate metric to transpose as an appropriate and necessary paid leave amount.⁸⁴⁵
- An approach whereby it is assumed that any amount of leave that an employee requires should be paid leave by the employer, regardless of the paid leave (or casual loading) already provided, is not a ‘fair and relevant’ safety net.⁸⁴⁶
- The fact that an employee is required or has taken unpaid leave to deal with FDV does not, in itself, support a proposition that such leave should be paid leave, or that all award covered employees should be provided with paid leave such that they are ‘covered’ in the event that they might be otherwise required to take unpaid leave.⁸⁴⁷

[788] ACCI submits that there does appear to be a distinction between an employee needing to absent themselves from work in order to address a FDV scenario and a requirement for employers to pay the employee during that absence. This is particularly so where there are pre-existing and overlapping entitlements which cover absences, as well as other forms of assistance found in the social safety net.⁸⁴⁸

[789] In response to the employer parties’ arguments about the necessity of 10 days’ paid leave the ACTU submits:

- The evidence shows that benefits to employees of FDV leave are extremely significant and that 5 days’ leave per annum is not sufficient. The ACTU compares the proposed entitlement with personal/carer’s leave and notes that the fact that not all employees will require 10 days paid FDV leave does not amount to evidence that 10 days is an inappropriate minimum standard. The ACTU further submits that the standard of 10 days’ paid FDV leave has developed over a number of years to an industrial norm and is evidence of the need of many employees for more than 5 days of unpaid FDV leave, and that there is a growing consensus among employers and employees that this need is met (for most employees, but not all) by the provision of 10 days’ paid leave.⁸⁴⁹
- The evidence does not show that the impact on employers of providing 10 days paid leave would be adverse. Using detailed average weekly wage data for award-covered employees from HILDA based on sex and age, Professor Duncan provides a range of costs estimates, and concludes that the cost impact on employers ‘may not be significant’.⁸⁵⁰

⁸⁴⁵ Ibid [9.9].

⁸⁴⁶ Ibid [9.10].

⁸⁴⁷ Ibid [9.12].

⁸⁴⁸ Ibid [9.17].

⁸⁴⁹ ACTU submissions in reply dated 21 February 2022 [65].

⁸⁵⁰ Ibid [66].

- It is not fair, relevant or necessary to require employees to exhaust other forms of leave before they can access FDV leave. This approach would introduce significant complexity to the operation of the entitlement and should be rejected.⁸⁵¹

[790] The Victorian Government submission provides data on the utilisation of the paid leave entitlement in 3 of its largest departments, the Department of Health, which employs approximately 4,335 employees, the Department of Families, Fairness and Housing, which employs approximately 6300 employees and the Department of Justice and Community Safety which employs approximately 10,855 employees.⁸⁵² For these Departments:

- an average of 0.3 per cent of employees accessed paid FV leave in the past year, and
- an average 8.56 days of a 20 day per annum entitlement were taken.⁸⁵³

[791] The second measure reported by the Victorian Government is that eligible employees used an average of 8.56 days in a year. The ACTU submits that this evidence is consistent with, and reinforces, evidence before the Commission as to the average number of days leave likely to be accessed, including Dr Stanford's estimates of between 7-8 days over the course of a year;⁸⁵⁴ the BOQ submission that eligible employees accessed an average of 3 days (but one employee accessed the full 10 days' leave);⁸⁵⁵ New Zealand research which suggested that the average utilisation was less than 5 days;⁸⁵⁶ and the Breckenridge research set out at [546] which is to similar effect.⁸⁵⁷

[792] Viewed collectively, the evidence suggests that eligible employees access an *average* number of between 5 and 8 days in a year to deal with FDV. This is, obviously, less than the ACTU's proposal for 10 days' paid FDV leave per year. However, the average should not determine the question of how many days of leave are necessary. In each setting where data is available, employers report that some employees require and are granted more than the average:

- (a) The Employer Survey Report found that for employees who sought more than 5 days of unpaid leave, the most common request was for 10 days, followed by 14 days;⁸⁵⁸ and that of employers who provided paid leave, very similar proportions provided 10 days (36.8 per cent) as provided 5 days (39.4 per cent).⁸⁵⁹

⁸⁵¹ Ibid [67].

⁸⁵² Victorian Government further submissions dated 28 March 2022 [11].

⁸⁵³ Ibid.

⁸⁵⁴ See Background Document 2 [182].

⁸⁵⁵ Ibid [208].

⁸⁵⁶ Ibid [211].

⁸⁵⁷ Ibid [212]. The average time off is 43 hours. Divided by 8 hours = 5.4 days.

⁸⁵⁸ Ibid [190].

⁸⁵⁹ Ibid [193].

- (b) The Monash Report found that one third of the respondents to its survey (all of whom experienced FDV) took some form of leave while experiencing FDV.⁸⁶⁰ With an average of 14 days leave offered by workplaces,⁸⁶¹ one third of respondents exhausted their full entitlement, with respondents taking between one and 90 days of leave.⁸⁶²
- (c) The Breckenridge research found that time off accessed by eligible employees ranged from 8 hours to 202 hours (or 25 days), with 11.4 per cent requesting one week or more leave.⁸⁶³

[793] The assessment of this evidence must, in our view, proceed through the prism of FDV leave being, as the Full Bench said in the *March 2018 FDVL Decision*, a ‘needs-based entitlement’. As a ‘needs based entitlement’ it can only be taken when, and to the extent, that it needs to be taken to deal with the impact of FDV. However, for the award of FDV leave to have its intended utility, it must be of a sufficient quantum to meet the needs and circumstances of employees who are experiencing FDV. That infers that the quantum of the entitlement should be such as to accommodate the upper range of leave which the evidence suggests may reasonably be required by the small minority of employees who need to take such leave. If, as we have found, the *average* use of FDV leave entitlements where they exist is 5-8 days per year, but a substantial proportion of employees who use FDV leave request up to 10 days (or even more where a greater entitlement exists), that supports the conclusion that the entitlement should be sufficient to allow an employee to access up to 10 days’ leave when they experience FDV (subject to the extent to which such an entitlement has previously been utilised).

[794] The assessment of the quantum of the FDV leave entitlement necessarily involves a broad evaluative judgment rather than producing a mathematically precise result. Comparisons with other types of leave entitlement are limited in their utility because the evidence suggests that the need to take FDV leave is a ‘low incidence, high consequence’ event, making a paid FDV leave entitlement somewhat unique. With these caveats, we are satisfied that the evidence supports a 10-day paid leave entitlement.

[795] ACCI’s submission that a 10-day entitlement intended to accommodate the needs of any employees experiencing FDV would not be a ‘fair and relevant’ safety net because it imposes the entire cost upon the employer, would have greater weight if it was supported by any evidence at all which demonstrated that such an entitlement would place an unfair or oppressive burden on employers. As earlier stated, no such evidence was adduced despite ACCI (and Ai Group) having been in a position to call evidence of this nature. The evidence concerning the emergence of paid FDV leave entitlements in enterprise bargaining is significant because it suggests a willingness on the part of a significant number of employers to at least accede to a paid FDV leave entitlement and, where they have done so, to recognise that an entitlement of 10 days of such leave is the appropriate quantum. There is no evidence of any such employer having subsequently experienced unforeseen or overly-burdensome costs as a result of agreeing

⁸⁶⁰ Ibid [200]. There were 302 respondents. Approximately two thirds (203) responded to the question about taking leave. Of those, 20.2 per cent accessed paid or unpaid FDV leave (20.2 per cent of 203 is about 41 persons), and 28.1 per cent accessed another form of leave (28.1 per cent of 203 is about 57 persons). 41 + 57 = 98, or about one third of 302.

⁸⁶¹ Ibid [203].

⁸⁶² Ibid [204].

⁸⁶³ Ibid [212].

to such an entitlement or that it has proved unworkable in any other respect. Accordingly, the ACCI submission does not rise above the level of hypothesis.

[796] For the above reasons, our *provisional* view is that an entitlement to 10 days' paid FDV leave per year is necessary. We deal separately with the way in which such an entitlement should accrue later in this decision.

8.3.2 The Extension of Paid FDV Leave to Casual Employees

[797] As set out in Chapter 3, the ACTU claim includes casual employees (see clause A(2)). The employer parties oppose the extension of a paid leave entitlement to casuals. Clause A(2) is set out below:

A Entitlement to family and domestic violence leave

(1) An employee is entitled to 10 days of paid family and domestic violence leave in a 12 month period.

...

(2) Paid family and domestic violence leave under subclause A(1) above:

(a) is available in full at the start of each 12 month period of the employee's employment; and

(b) does not accumulate from year to year; and

(c) is available in full to part-time and casual employees.

(3) For the purposes of subsection (2), if an employee is employed by a particular employer:

(a) as a casual employee; or

(b) for a specified period of time, for a specified task or for the duration of a specified season;

the start of the employee's employment is taken to be the start of the employee's first employment with that employer.

[798] The proposed rate of payment for casual employees was amended in the Further Amended Claim; we will return to this shortly.

[799] The ACTU submits that there is no valid reason to deny a casual worker the right to be absent on paid leave for the purposes of attending to matters associated with FDV and that 'the evidence suggests that casually employed workers are more likely to experience job and financial insecurity, particularly at the point of leaving a violent relationship, highlighting the need for access to paid leave to support escape.'⁸⁶⁴ The ACTU further submits that the evidence demonstrates that there is a real risk that if casual employees cannot access paid leave

⁸⁶⁴ ACTU submissions dated 30 July 2021 [105]-[107].

entitlements they may not take steps to seek assistance with an FDV situation, including seeking assistance to flee a violent relationship out of concern that they will suffer financial detriment.⁸⁶⁵

[800] The employer parties oppose the provision of paid FDV leave to casuals. Ai Group contends that this aspect of the claim should be rejected because it would:

‘(a) Be out of step with the treatment of paid leave under the safety net comprised of the NES and awards;

(b) Be incompatible with the definition of ‘casual employee’ as at s.15A of the FW Act;

(c) Give rise to various and likely insurmountable difficulties relating to the calculation of the remuneration and quantum of leave, given the inherently variable and uncertain nature of the amount of work undertaken by casual employees and the times at which they work; and

(d) Be inappropriate, as a matter of merit, given a core component of ‘casual employment’ is essentially the absence of a firm advance commitment to the provision or performance of work. In this context it would not be fair to require that an employer pay a casual employee for absences from work when there is no award derived, or even assumed, obligation upon a casual employee to actually attend work.’⁸⁶⁶

[801] In response to Ai Group’s first point, the ACTU submits that the test is whether or not paid leave is necessary to provide a fair and relevant safety net for casual employees and that the lack of a precedent for paid leave for casuals is not in itself a reason not to grant this aspect of the claim.⁸⁶⁷ The ACTU further submits that paid leave for casuals is unusual but not unprecedented and cites the following by way of example:

- *Long Service Leave (LSL)*: A number of states grant access to paid LSL for long-term casuals. For example, the *Long Service Leave Act 2018* (Vic) entitles full time, part time, casual, seasonal and fixed term employees to LSL where their employment has been continuous for 7 years. Under the Victorian Act, where an employee does not have fixed hours of work, the employee’s hours of work are averaged for the purposes of calculating LSL. The Victorian Act contains formulas to calculate ordinary pay where averaging is required.
- *Paid pandemic leave*: In 2020, the Commission established a (temporary) entitlement to paid pandemic leave for employees working in aged care covered by the *Aged Care Award 2010*, the *Nurses Award 2010*, and the *Health Professionals and Support Services Award 2020*. The Full Bench extended the entitlement to casual employees engaged on a regular and systematic basis, with payment based on an average of their earnings over the previous 6 weeks. There was no minimum service requirement for casuals to access the paid leave, and no requirement for a casual to work a consistent pattern of engagement.⁸⁶⁸ [Footnotes omitted]

⁸⁶⁵ ACTU final submissions dated 28 March 2022 [14].

⁸⁶⁶ Ai Group submissions in reply dated 4 February 2022 [322].

⁸⁶⁷ ACTU submissions in reply dated 21 February 2022 [71].

⁸⁶⁸ ACTU submissions in reply dated 21 February 2022 [72].

[802] At the hearing on 8 April 2022, Ai Group argued that the ACTU's reliance on paid pandemic leave is misplaced because that entitlement was granted in a very different context:

'It was a response to the pressing issue and specific context of the issue of the Pandemic. In a context where we had unions arguing that an absence of entitlements to casual leave - for casual employees - was causing people to work when they were sick, and spread the virus, and cause the deaths in people.'⁸⁶⁹

[803] Ai Group also submits that although the ACTU's Further Amended Claim adopts the framework of the paid pandemic leave entitlement, it leaves out the requirement that a casual employee must be employed on a regular and systematic basis to access the entitlement.⁸⁷⁰

[804] ACCI submits that the existing entitlements to personal/carers leave and annual leave are appropriate to deal with FDV and that casual employees are compensated for these entitlements by way of the casual loading.⁸⁷¹

[805] In reply to the employer parties' opposition to the provision of paid FDV leave to casuals, the ACTU submits:

- The test is whether or not paid leave is necessary to provide a fair and relevant safety net for casual employees. The lack of a precedent for paid leave for casuals is not in itself a reason not to grant this aspect of the claim.⁸⁷²
- There are precedents for casuals receiving paid leave entitlements.
- The argument that the definition of casual employees in s.15A of the FW Act is not compatible with paid leave is without basis as the definition expressly contemplates that a casual employee may work a regular pattern of hours.⁸⁷³
- Under the ACTU clause, an employee who takes FDV leave is only entitled to be paid for their leave if they were rostered to work during the period in which the leave is taken.⁸⁷⁴

[806] The ACTU also submits that a number of enterprise agreements extend paid FDV leave to casual employees.⁸⁷⁵

[807] In its final submissions, the ACTU notes that the Victorian Government has recently introduced a 2 year pilot scheme providing up to 5 days, or 38 hours, of sick or carer's pay to casual or self-employed employees in specific occupations. To be eligible, the employee must

⁸⁶⁹ Transcript, 8 April 2022, PN280.

⁸⁷⁰ Ibid PN281.

⁸⁷¹ ACCI submissions in reply dated 4 February 2022 [4.20]

⁸⁷² ACTU submissions in reply dated 21 February 2022 [71].

⁸⁷³ ACTU submissions in reply dated 21 February 2022 [73].

⁸⁷⁴ Ibid [74].

⁸⁷⁵ ACTU final submissions dated 28 March 2022 [16].

have worked an average of 7.6 hours per week, calculated by dividing the total number of hours worked by the number of weeks worked in the period. A casual employee who makes a claim under this scheme is paid at the national minimum wage.⁸⁷⁶

[808] The ACTU accepts that there are some operational challenges associated with extending paid FDV leave to casuals, including in relation to those casual employees whose hours of work are genuinely uncertain, but submits that these challenges are not insurmountable, and nor are they sufficient to deny workers access to paid FDV leave.

[809] In response to the employer parties' submissions and to clarify some of the operational concerns they raised, in its Further Amended Claim the ACTU made amendments to the proposed clause to clarify how paid leave would apply to casuals, by adding the following:

'C Rate of Payment

(3) For a casual employee with rostered or agreed hours, pay for leave taken under clause A(1) will be the rate of pay the employee would otherwise have earned (including any applicable incentive-based payments and bonuses; monetary allowances; shift loadings, penalty rates, rostered overtime, allowances and other entitlements) had the employee not taken paid family and domestic violence leave.

(4) For all other casual employees, a daily rate calculated based on the average weekly pay received by the employee in the previous 6 weeks, or where the employee has been employed for less than 6 weeks, for the duration of their employment. The daily rate is calculated by dividing the employee's average weekly pay by 5.'

[810] The operational difficulties associated with this aspect of the ACTU claim were discussed at the hearing on 8 April 2022. The ACTU responded to questions from Vice President Hatcher as follows:

'VICE PRESIDENT HATCHER: I'm asking you a prior question, that is, how do you tell what is a working day for the purpose of a casual who is not on a roster, that is, there's a sort of casual you might be working frequently, but the sort of casual you bring in as needed.

MS BURKE: Yes.

VICE PRESIDENT HATCHER: How do you tell what is a working day for that sort of employee so that they can take it off and be paid in the first place?

MS BURKE: It's about the right to refuse work without there being consequences that the employee is otherwise not engaged. Can I just take a moment to mute myself and confer with Ms Ismail? Sorry. Yes, thank you, so, Vice President, yes, it's about the employee's availability to work. So, if, for example - I'm aware that there are examples where a casual employee will say, 'Well, I'm available this week and you can call me for any shift' and people have rung up in the morning and told, 'Can you come in, we've got a shift for you.' In those circumstances, the employee is entitled to say, 'No, I can't, I need to take family and domestic violence leave on this day.' If that happens, then the rate of pay available to them is as calculated in clause (c).

⁸⁷⁶ Ibid [17]-[18].

VICE PRESIDENT HATCHER: I mean the conceptual problem is that an employer has no right to bring them in anyway, so really they're saying, 'Well, yes, I accept the shift, but I'm going to take it off and get paid.' Is that the way it looks?

MS BURKE: Yes, that's right.⁸⁷⁷

[811] We begin by noting that the existing entitlement to *unpaid* FDV leave extends to casuals. The *March 2018 FDVL Decision* noted:

'Second, 51 per cent of award-reliant female employees are employed on a casual basis, hence to exclude casuals from the scope of the model term would mean that a significant proportion of the employees most likely to need the protection of a minimum safety net entitlement to family and domestic violence leave would not be entitled to access the entitlement.'⁸⁷⁸

[812] As a general proposition we accept that casual employees experiencing FDV need the financial support provided by paid leave.

[813] It is uncontentional that FDV has a real and tangible impact on employees and employers in the workplace. The SWIRLS Report highlighted that higher participation of women in part-time and casual employment 'is especially significant when considering FDV leave',⁸⁷⁹ and that FDV 'erodes women's position in the workforce'.⁸⁸⁰ Women who are experiencing or have experienced FDV are more likely to be employed in casual and part-time work, than women with no experience of violence.⁸⁸¹ And as we have found, FDV is both a cause and consequence of gender inequality.

[814] Despite the intrinsic merit of extending financial support to casual employees experiencing FDV there are significant challenges in framing an appropriate term. As illustrated by the extract from the transcript set out above, these operational difficulties are particularly pronounced for casual employees who do not work rostered shifts. The provision of *paid* FDV leave to casuals would be a significant extension to the safety net.

[815] It is likely that any term framed to address the various operational difficulties would be complex and create particular challenges for small and medium sized businesses.

[816] We are also conscious that the NES does not extend paid leave to casuals. Casuals have access to *unpaid* leave under the NES; for example, compassionate leave, carer's leave and FDV leave, but not *paid* leave. Accordingly, the FW Act provides no precedent, nor a model for a workable scheme, for the provision of paid leave to casual employees. State legislation providing for the provision of paid LSL to long-serving casual employees is not a useful analogue for the scheme proposed by the ACTU, which serves the purpose of providing short-term leave to employees facing urgent and pressing personal circumstances. We agree with Ai

⁸⁷⁷ Transcript, 8 April 2022, PN117-PN122.

⁸⁷⁸ *March 2018 FDVL Decision* [247].

⁸⁷⁹ SWIRLS Report p. 1.

⁸⁸⁰ *Ibid* p. 5.

⁸⁸¹ McFerran L (2011) 'Safe at Home, Safe at Work', National Domestic Violence and the Workplace Survey, Australian Domestic and Family Violence Clearinghouse, A Project of the Centre for Gender-Related Violence Studies and Micromex Research, University of New South Wales p.2.

Group that not much can be taken from the 2020 decision to provide paid pandemic leave for regular and systematic casual employees in the aged care sector: that was a provision intended to meet a public health emergency for a temporary period, not to form a permanent part of the award safety net, and we have no evidence as to how that provision was applied in practice.

[817] We also note that the landscape of casual employment has been the subject of significant change in the recent past as a result of the enactment of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth), which added a new definition of 'casual employee' in s.15A of the FW Act, established new NES entitlements to casual conversion in Division 4A of Part 2-2 of the FW Act, and required the Commission to conduct a review of casual terms in all modern awards that resulted in variations to casual employment provisions in all such awards. Whether this has resulted in any change of importance to the size and makeup of the casual workforce is not discernible at this time and was not the subject of any evidence before us. This also weighs against us making the significant change to the safety net proposed by the ACTU, at least at this time.

[818] It is therefore our *provisional* view that paid FDV leave *not* apply to casuals.

[819] We note the ACTU submissions about the Victorian Government's paid personal/carer's leave pilot scheme which does provide paid support to casual employees.

[820] For completeness, we note that the *March 2018 FDVL Decision* rejected Ai Group's argument that the casual loading would compensate casual employees if they did not have an entitlement to 5 days' unpaid leave under the model term. We stated then that it was clear from an analysis of the decisions which have set the casual loading at 25 per cent that such a position must be rejected.⁸⁸² We maintain this view.

8.3.3 Expanding the Definition of FDV

[821] The ACTU claim proposes to expand the definition of 'family and domestic violence' to include violent, threatening or other abusive behaviour by a member of an employee's household. The proposed expansion of the definition also forms part of the Further Amended Claim, as follows:

'B Taking paid family and domestic violence leave

- (1) The employee may take ~~unpaid~~ paid family and domestic violence leave if:
 - (a) the employee is experiencing family and domestic violence; and
 - (b) the employee needs to do something to deal with the impact of the family and domestic violence; and
 - (c) it is impractical for the employee to do that thing outside the employee's ~~ordinary~~ hours of work.

⁸⁸² *March 2018 FDVL Decision* [247] citing *Re Metal, Engineering and Associated Industries Award 1998- Part 1 (2001)* 105 IR 27; *Re Request from the Minister for Employment and Workplace Relations – 28 March 2008 Award Modernisation (AM2008/1-12 (2008) 177 IR 364 [47]-[50]*.

Note 1: Examples of actions, by an employee who is experiencing family and domestic violence, that could be covered by paragraph (b) include arranging for the safety of the employee or a close relative (including relocation), attending urgent court hearings ~~or~~ accessing police services or attending appointments with medical, financial or legal professionals.

Note 2: The notice and evidence requirements of ~~section 107~~ must be complied with.

(2) ***Family and domestic violence*** is violent, threatening or other abusive behaviour by a close relative of an employee or member of an employee's household that:

(a) seeks to coerce or control the employee; and

(b) causes the employee harm or to be fearful.

(3) A ***close relative*** of the employee is a person who:

(a) is a member of the employee's immediate family; or

(b) is related to the employee according to Aboriginal or Torres Strait Islander kinship rules.

Note: ***Immediate family*** is defined in section 12.

(4) ***Immediate family*** means:

(a) a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or

(b) a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee.'

[822] In short, the ACTU submits that the definition of FDV should be extended to include FDV perpetrated by a member of an employee's household who is not related to the employee.⁸⁸³ It says:

'There is no justification for excluding employees subjected to violence by household members who are not 'related', from accessing a new modern award entitlement to paid family and domestic leave. Such a limitation would be inconsistent with well-established and widely accepted definitions of family and domestic violence, including those in criminal jurisdictions.'⁸⁸⁴

[823] The employer interests oppose the ACTU's proposed extension to the definition of FDV. Ai Group submits that the current NES definition of FDV 'essentially reflects, in substance although not form, that which was adopted by the Commission in the Model Term'⁸⁸⁵ and that in implementing the Model Term definition of FDV, the Commission 'gave effect to an agreed position reached between the major parties' which 'reflected a significant compromise by the parties on their respective preferred positions.'⁸⁸⁶

⁸⁸³ ACTU submissions dated 30 July 2021 [114].

⁸⁸⁴ Ibid [115].

⁸⁸⁵ Ai Group submissions in reply dated 4 February 2022 [296].

⁸⁸⁶ Ai Group submissions in reply dated 4 February 2022 [297].

[824] Ai Group submits that the ACTU's proposed definition is 'too broad and uncertain in its operation to be adopted in the context of a paid leave entitlement'⁸⁸⁷ and that the ACTU has not advanced any evidentiary material about the nature of FDV which 'undermines the ability of the Commission to assess the suitability of the proposed clause'. As a result, Ai Group contends that 'the Commission should place significant weight on the conclusions previously reached' in the *July 2017 Majority Decision*.⁸⁸⁸

[825] Ai Group also submits that the expanded definition proposed by the ACTU would 'substantially and unjustifiably' increase the breadth of the provision. It said:

'There is limited if any material that could be said to demonstrate a necessity for leave where the relevant behaviour is exhibited by an unrelated member of a household, such as a housemate. In particular, the evidence does not establish that in such contexts, the person experiencing the relevant behaviour will suffer relevantly similar consequences as those who experience FDV as defined for the purposes of the NES, or that there will be any impact on their employment or ability to attend work.'⁸⁸⁹

[826] We accept the submission made by the ACTU that a number of other legislative provisions have broader definitions of FDV and that some encompass violence perpetrated by a household member who is not related to or in a relationship with the victim/survivor.

[827] However, we are not persuaded to depart from the definition contained in the NES. The adoption of a different definition of FDV in modern awards to that in the NES would be confusing and add to the complexity of the safety net. Such an outcome would be inconsistent with the consideration in s.134(1)(g) 'to ensure a simple, easy to understand, stable and sustainable modern award system.'

[828] Definitional uniformity brings other benefits.

[829] The Victorian Royal Commission into Family Violence highlighted both practical and symbolic benefits of having a 'clear and comprehensive' definition:

'To define conduct as family violence is to express the community's shared condemnation of that conduct. It also determines the circumstances in which police can seek an intervention order on behalf of a victim and when a magistrate can make an order to protect a victim.'⁸⁹⁰

[830] The Australian Law Reform Commission (ALRC) made a similar observation in its 2010 report, *Family Violence – A National Legal Response*,⁸⁹¹ noting that there was 'substantial stakeholder support' for consistent definitions across different legislative frameworks.

⁸⁸⁷ Ibid [302].

⁸⁸⁸ Ibid [308].

⁸⁸⁹ Ibid [318].

⁸⁹⁰ State of Victoria, Royal Commission into Family Violence: Report and Recommendations, Vol I, Parl. Paper No. 132 (2014-16) p.16.

⁸⁹¹ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response*, ALRC Report 114, 2010 p.289.

[831] More recently, the House Committee Report noted that the evidence to its inquiry ‘revealed significant support for a more consistent approach to understanding and defining FDSV across jurisdictions’⁸⁹²:

‘All violence comes from a lack of respect, and we all have a role in changing the attitudes and behaviours that lead to violence.

Evidence to the inquiry suggested to the Committee that the lack of a uniform national definition of FDSV creates barriers to coordination and information-sharing across jurisdictions and contributes to poorer outcomes for victim-survivors.

The Committee agrees that significant benefits would flow from a consistent definition and shared understanding of FDSV across jurisdictions, which is inclusive of the range of relationships in which violence can occur, and the many and varied forms of violence, including non-physical forms of violence such as coercive control, reproductive coercion, economic abuse, and complex forms of violence.

The Committee is of the view that a shared understanding of FDSV is fundamental to our collective effort to end violence, and sends a clear message to the community about behaviours that should not be tolerated.’⁸⁹³

[832] Inserting a different definition of FDV in modern awards to the existing legislative definition in the NES will not promote the desirable objective of definitional uniformity. We reject the ACTU’s proposed extension of the definition of ‘family and domestic violence’.

8.3.4 The accrual and accumulation of paid FDV leave

[833] The establishment of an entitlement to paid FDV leave will require a mechanism for the accrual of such leave. We note at the outset that, in respect of the 5 days’ unpaid FDV leave per year currently provided for in the NES, s.106A(2) provides that the leave is available in full at the start of each year of employment but does not accumulate from year to year.

[834] The ACTU’s Further Amended Claim relevantly provides the following in respect of accrual and accumulation:

- ‘(2) Paid family and domestic violence leave under subclause A(1) above:
 - (a) is available in full at the start of each 12 month period of the employee’s employment; and
 - (b) does not accumulate from year to year;...’

[835] In this respect, the ACTU claim reflects s.106A(2) of the FW Act.

⁸⁹² *Inquiry into family, domestic and sexual violence*, House of Representatives Standing Committee on Social Policy and Legal Affairs, March 2021 [2.11].

⁸⁹³ *Ibid* [2.186]-[2.189].

[836] The ACTU submits in respect of this aspect of its claim that FDV leave is a ‘needs-based entitlement’ and should accordingly be available ‘upfront’. It relies upon the *March 2018 FDVL Decision* in which the Full Bench held that the entitlement to unpaid FDV leave should be available in full at the commencement of each 12 month period of employment rather than accruing progressively, because it is a needs-based entitlement rather than a reward for service. The ACTU submits that this applies equally to paid FDV leave, and that there is no evidence that this would impact adversely on employers.

[837] ACCI submits that the ACTU claim is extremely unusual in proposing that paid FDV leave does not accrue but is available ‘upfront’. ACCI submits this has practical consequences, particularly for small and medium size businesses with limited cashflow or cash reserves. While ACCI accepts that FDV leave is not a reward for service and is a needs-based entitlement, as per the *March 2018 FDVL Decision*, this does not explain why it would differ from paid personal/carer’s leave in terms of accrual. It would also mean that if the entitlement was fully utilised early in a year where the employee ceased their employment, the effective quantum of leave would be greater than 10 days per year.⁸⁹⁴

[838] ACCI’s position is that, in the event that a paid FDV leave entitlement is established, it should accrue progressively but not accumulate from year to year. However, as was properly recognised by ACCI, this position would not necessarily lead to a sensible industrial outcome. The following exchange occurred with ACCI’s representative at the hearing on 8 April 2022:

‘VICE PRESIDENT HATCHER: If it progressively accrued within a year but then didn't accrue from year to year, wouldn't you end up with a position that - let's say, for argument's sake, your day one was 1 January, you'd start off with zero on day one, you'd get up - say the entitlement was, for argument's sake, 10 days, you'd get up to 10 days at the end of the year, then you'd click back to zero the following year? Is that - I'm just trying to work out how that would marry together.

MR ARNDT: I have considered what your Honour is putting, and a third alternative would be that it is actually capped at the end of that first year and that it doesn't necessarily click back to zero. I have to acknowledge there would be an arbitrariness on day 364 of your employment, having whatever it is, X entitlement, and then, on day 366, going back to zero, I think we would have to accept that, but that's as far as I can take that.’⁸⁹⁵

[839] Ai Group submits that the ACTU claim for an ‘upfront’ entitlement available at the commencement of each 12 months would be unfair for employers, particularly in respect of the requirement to provide a new employee with 10 days of paid leave at the commencement of their employment, which could result in an employee accessing the entitlement before ever actually undertaking any work for the employer. Ai Group also submits that an ‘up front’ entitlement would be particularly unfair for employers in the context of awards covering industries or occupations where there is a high degree of turnover of employees, and also that the ACTU claim makes no adjustment to the annual 10-day entitlement proportionate with the quantum of work done by part-time and casual employees. Ai Group acknowledges what was said by the Full Bench in the *March 2018 FDVL Decision* concerning FDV leave being a needs-based entitlement, but contends that a different approach is warranted in relation to a paid leave

⁸⁹⁴ ACCI final submissions dated 28 March 2022 [8.14].

⁸⁹⁵ Transcript, 8 April 2022, PN224-PN225.

entitlement. It notes that under the NES, paid leave accrues progressively, and submits that FDV leave is in some respects similar or analogous to personal/carer's leave, which while being needs-based accrues progressively and operates on a pro-rata basis for part-time employees.⁸⁹⁶

[840] The ACTU acknowledges that no modern award entitlements to paid leave are available in full at the commencement of employment,⁸⁹⁷ however, submits that there are a number of forms of paid and unpaid leave in the NES that are available in full up front, including:⁸⁹⁸

- 5 days' unpaid FDV leave is available in full at the start of each 12 month period of the employee's employment, per s.106A(3) of the FW Act
- Unpaid carer's leave of up to 2 days per year is available from the commencement of employment, per s.102 of the FW Act
- Paid compassionate leave of up to 2 days per occasion is available from the commencement of employment, per s.104 of the FW Act.
- Community service leave, which is available on an unlimited 'per occasion' basis, is available from the commencement of employment, per s 108 of the FW Act. If the eligible community service activity is jury duty, the employee is entitled to be paid for the first 10 days of jury service: s.111; community service leave is otherwise unpaid.

[841] We consider that this is a finely balanced issue. On the one hand, consistent with the Full Bench's reasoning in the *March 2018 FDVL Decision*, the *raison d'être* of FDV leave is that it is available to meet emergency circumstances which are incapable of prediction in advance, which infers that the whole of the entitlement should be accessible at any time during the year. On the other hand, there is considerable force in the submissions of ACCI and Ai Group that a potential requirement for an employer to pay the whole of the entitlement at or near an employee's commencement of employment may have unfair consequences: the full cost may arise in respect of an employee who has performed little if any work for the employer. This effect will be accentuated for employers in industries which typically have a high turnover of labour. Additionally, in circumstances where we propose to introduce a new paid leave entitlement for employers to whom modern awards apply, the effect of the 'upfront' availability of the entitlement would be to impose the whole burden of the entitlement on all employers with respect to all their award-covered employees immediately.

[842] We are persuaded by the submissions of ACCI and Ai Group that the paid FDV leave entitlement should not accrue 'upfront' in the way proposed by the ACTU because of the potential cost consequences this will produce upon the commencement of the entitlement and in respect of new employees. In particular, we accept, as ACCI contends, that the provision of paid FDV leave 'upfront' will adversely affect small and medium-sized businesses with limited cashflow or cash reserves. However, this will in turn require some degree of accumulation of the entitlement from year to year in order to avoid the industrially nonsensical outcome of an

⁸⁹⁶ Ai Group reply submissions dated 4 February 2022 [378]-[385]

⁸⁹⁷ ACTU final submissions dated 28 March 2022 [8].

⁸⁹⁸ *Ibid* [8]-[9].

employee having an entitlement of 10 days as at the last day of each year of employment but a zero entitlement on the following day when another year of employment commences.

[843] Ai Group suggested that any unfairness to employees experiencing FDV associated with an accrued entitlement could be alleviated by enabling employers to elect to grant paid FDV leave in advance. We agree with this approach. The capacity to access paid FDV leave in advance of the accrual of such an entitlement will also facilitate the availability of paid leave to meet emergency circumstances.

[844] We note that most modern awards include a term allowing annual leave to be taken in advance of an entitlement to such leave accruing, by agreement between an employer and employee.⁸⁹⁹ The revised annual leave in advance model term provides a drafting framework in respect of an FDV leave in advance term.

[845] Our *provisional* view is that the entitlement to 10 days' paid FDV leave per year should accrue progressively during a year of service - in the same way as for personal/carer's leave under the NES, with accrual occurring accordingly to the methodology articulated by the High Court in *Mondelez Australia Pty Ltd v AMWU & Ors.*⁹⁰⁰ The entitlement should accumulate from year to year, but subject to a 'cap' whereby the total accrual available does not exceed 10 days at any given time. This will have the effect of operating as a phasing-in mechanism for the entitlement for the first 12 months after the entitlement takes effect.

8.3.5 The Proposed Rate of Pay for Paid FDV Leave

[846] The Further Amended Claim deals with the rate of payment for FDV leave at cl.C:

'C Rate of Payment

- (1) For a full-time employee, leave taken under clause A(1) shall be paid at the rate of pay the employee would otherwise have earned (including any applicable incentive-based payments and bonuses; monetary allowances; shift loadings, penalty rates, rostered overtime, allowances and other entitlements) had the employee not taken paid family and domestic violence leave.
- (2) For a part-time employee, pay for leave taken under clause A(1) will be the greater of:
 - (a) the rate of pay the employee would otherwise have earned (including any applicable incentive-based payments and bonuses; monetary allowances; shift loadings, penalty rates, rostered overtime, allowances and other entitlements) had the employee not taken paid family and domestic violence leave; or
 - (b) a daily rate calculated based on the average weekly pay received by the employee in the previous 6 weeks, or where the employee has been employed for less than 6 weeks, for the duration of their employment. The daily rate is calculated by dividing the employee's average weekly pay by 5.

⁸⁹⁹ See 4 yearly review of modern awards – annual leave [2016] FWCFB 3177.

⁹⁰⁰ [2020] HCA 29.

- (3) For a casual employee with rostered or agreed hours, pay for leave taken under clause A(1) will be the rate of pay the employee would otherwise have earned (including any applicable incentive-based payments and bonuses; monetary allowances; shift loadings, penalty rates, rostered overtime, allowances and other entitlements) had the employee not taken paid family and domestic violence leave.
- (4) For all other casual employees, a daily rate calculated based on the average weekly pay received by the employee in the previous 6 weeks, or where the employee has been employed for less than 6 weeks, for the duration of their employment. The daily rate is calculated by dividing the employee's average weekly pay by 5.⁹

[847] We have already dealt with the extension of paid FDV leave to casuals and we need say no more about the rate of pay for casuals under the ACTU claim.

[848] The ACTU contends that FDV leave 'should be paid at the rate of pay the employee would have received for the hours they would have worked had they not been on family and domestic violence leave, including applicable shift penalties and loadings'⁹⁰¹ and submits that:

'It is crucial for a number of reasons that workers affected by family and domestic violence, particularly those seeking to leave a violent relationship, do not experience any reduction in income. As outlined in the ACTU's lay witness evidence, family and domestic violence imposes a range of financial costs and stressors on individuals; particularly at the point of leaving a violent relationship, and especially when the person leaving has children to support. A drop in income can also be a trigger for an escalation in violence where the perpetrator is engaging in forms of financial abuse, including monitoring and controlling a person's finances.'⁹⁰²

[849] Ai Group contends that if paid FDV leave were granted (contrary to Ai Group's overarching position) it would not be necessary for the leave to be paid at a rate which includes shift loadings and penalties because such premiums are payable for the disutility associated with the performance of shift work or work at a particular time or on a particular day. That justification does not exist in circumstances where an employee is not actually working.⁹⁰³

[850] ACCI submits that if an entitlement to paid FDV leave is granted, the rate of pay should be consistent with the framework of modern awards and prescribe the award minimum pay rate. ACCI submits that the method of payment proposed by the ACTU (at an employee's 'actual' rate including applicable shift loadings and penalties) is 'very unusual for paid leave [and it] is not clear why such a distinction is justified.'⁹⁰⁴

[851] The Local Government Associations also oppose the ACTU claim for paid FDV leave to be payable at an employee's ordinary hourly rate plus applicable shift loadings and penalties, and submit that any paid FDV leave entitlement should be payable at the employee's base rate of pay, consistent with payment for annual leave and personal/carer's leave pursuant to ss.90 and 99 of the FW Act.⁹⁰⁵

⁹⁰¹ ACTU submissions dated 30 July 2021, [110].

⁹⁰² Ibid [111].

⁹⁰³ Ai Group submissions in reply dated 4 February 2022 [279], [392].

⁹⁰⁴ ACCI final submissions dated 28 March 2022 [8.17].

⁹⁰⁵ Local Government Associations submissions in reply dated 4 February 2022 [21]-[23].

[852] In reply, the ACTU submits there is nothing preventing the Commission providing a paid leave entitlement in modern awards:⁹⁰⁶

‘The safety net is comprised of both modern awards and the NES, and is not hierarchical: there is no justification for a submission that modern awards must contain the lowest possible minimum standard, whereas NES entitlements can provide for slightly better standards or entitlements than in modern awards.’⁹⁰⁷

[853] The ACTU also points to examples where modern awards require payment of weekend and shift penalties during periods of annual leave, such as clause 28.3(ii) of the *General Retail Industry Award 2020*, which entitles an employee to a loading of the greater of either 17.5 per cent of the employee’s minimum hourly rate for all ordinary hours of work in the leave period or the employee’s minimum hourly rate for all ordinary hours of work in the period inclusive of penalty rates.⁹⁰⁸

[854] The ACTU argues that the payment of FDV leave at an employee’s full rate of pay ‘would not “undermine” the status of modern awards as a minimum safety net’:

‘The modern awards objective requires the FWC to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions. It is open to the FWC to determine, taking into account the factors in s 134(1)(a) to (h), that payment of FDV leave at an employee’s full-rate of pay is necessary to ensure that the safety net is fair and relevant.’⁹⁰⁹

[855] Finally, the ACTU submits that ‘it is necessary for a fair and relevant safety net that FDV leave is paid at an employee’s actual rate of pay (including all applicable payments) because it is crucial to ensure income continuity during periods of FDV leave.’⁹¹⁰ The ACTU submits that:

‘This “income” approach recognises that “financial hardship and dependence represent significant barriers to women leaving violent relationships”. Additionally, by taking the economic burden off victim/survivors, the income approach “plays a critical part in reducing the economic costs associated with ... income support [and] also homelessness and other welfare services provided by government and non-government agencies.”’ [references omitted]⁹¹¹

[856] During the hearing on 8 April 2022, there was also a debate about whether the ACTU’s proposed definition captured over-award payments. We need not consider those matters in light of our conclusion in respect of this issue.

[857] We note at the outset that there is a close connection between the rate of pay while an employee is on paid leave and how the entitlement to that leave is accrued. We have earlier set out our *provisional* view that the entitlement to 10 days’ paid FDV leave should accrue

⁹⁰⁶ ACTU submissions in response to Background Document 1 dated 28 March 2022 [12].

⁹⁰⁷ Ibid [13].

⁹⁰⁸ ACTU submissions in response to Background Document 1 dated 28 March 2022 [13]

⁹⁰⁹ Ibid [14]

⁹¹⁰ ACTU final submissions dated 28 March 2022 [25].

⁹¹¹ Ibid [25]–[26].

progressively according to an employee's ordinary hours of work in the same way as personal/carer's leave accrues for the purposes of the FW Act, subject to a cap on the accumulation of such leave.

[858] In Chapter 6.6, we recorded our finding that employees who experience FDV often face financial difficulties as a result, such as relocation costs or becoming a sole parent; and may suffer economic harm as a result of disruption to workplace participation.

[859] This finding provides some support to the ACTU submission that 'one of the key policy justifications behind the provision of paid FDV leave is the need to minimise, as far as possible, the severe damage and disruption to a person's life and economic security caused by FDV, in particular the denial of the chance to earn the income they would otherwise have earned, which includes more than the person's base rate of pay.'⁹¹²

[860] However, we consider that it would be overly disruptive to the integrity of the safety net to establish, on an across-the-board basis, a new paid leave entitlement which operates on a radically different basis to the paid leave entitlements for which the NES currently provides. Under the NES, annual leave (s.90), personal/carer's leave (s.99), paid compassionate leave (s.106), paid jury service leave (s.111) and public holidays (s.116) are paid at the employee's 'base rate of pay' for the employee's ordinary hours of work. The general meaning of 'base rate of pay' is defined in s.16(1) as follows:

(1) The *base rate of pay* of a national system employee is the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following:

- (a) incentive-based payments and bonuses;
- (b) loadings;
- (c) monetary allowances;
- (d) overtime or penalty rates;
- (e) any other separately identifiable amounts.'

[861] Section 16 also separately defines 'base rate of pay' in respect of pieceworkers.

[862] The above definition excludes the elements of 'incentive-based payments and bonuses; monetary allowances; shift loadings, penalty rates, rostered overtime, allowances and other entitlements' included in the ACTU claim. The rationale for these exclusions includes that, in the case of shift loadings, penalty rates for unsociable hours and disability allowances, the relevant disability is not suffered when the employee takes leave and, in the case of overtime rates, the variable requirement to perform additional work does not apply during leave. The FW Act applies this rationale even to needs-based leave entitlements such as personal/carer's leave.

[863] We cannot identify a persuasive rationale for taking a different approach in the case of paid FDV leave only. It is correct, as the ACTU submits, that the Commission has power to award a leave entitlement on a more generous basis either in respect of any new award leave

⁹¹² Ibid [25].

entitlement or by way of supplementing a NES leave entitlement pursuant to s.55(4)(b). However, this is not a question of power but rather a question of policy as it relates to the establishment of a fair and relevant safety net. It is also correct, as the ACTU submits, that a number of awards provide for additional payment in respect of NES entitlements. This is generally confined to the payment of shift loadings or a leave loading in respect of annual leave and reflects industrial standards established long before the NES and the modern award system. It has never been the case that safety net leave entitlements have been established on the basis that they will provide full ‘income continuity’ for employees, nor as contended by the ACTU that the maintenance of such ‘income continuity’ is a standard feature of the ‘industrial norm’ concerning paid FDV leave, which it says has been established through the enterprise bargaining system.

[864] Accordingly, our *provisional* view is that the FDV leave entitlement should operate on the basis that it is paid at the employee’s ‘base rate of pay’ as defined in s.16 of the FW Act.

8.3.6 The Additional Unpaid FDV Leave

[865] In addition to the current NES unpaid FDV leave entitlement, the ACTU claim seeks an additional period of 5 days of unpaid FDV leave on a per occasion basis which will be accessible upon the exhaustion of the proposed paid FDV leave entitlement, as follows:

D Additional entitlement to unpaid family and domestic violence leave

(1) Upon exhaustion of the leave entitlement in clause A(1), employees will be entitled to up to 5 days unpaid family and domestic violence leave on each occasion for the purposes set out in Clause B(1).

(2) This section does not prevent the employee and the employer agreeing that the employee may take more than 5 days of unpaid leave to deal with the impact of family and domestic violence.

[866] The ACTU submits that it expects that ‘this provision will be rarely utilised, but for those that need it, the entitlement is critical.’⁹¹³ It further submits that there are other existing entitlements to unpaid leave on a ‘per occasion’ basis that provide a precedent for its claim in these proceedings including special maternity leave, carer’s leave, compassionate leave for casuals, and community service leave.⁹¹⁴ In its supplementary submissions of 21 December 2021, the ACTU relies on the Monash Report to submit that ‘supplementary unpaid leave of five days per occasion is necessary’.⁹¹⁵

[867] Ai Group opposes an additional unpaid leave entitlement and advances the following arguments:

(i) The material presently before the Commission does not enable it to properly assess the potential costs associated with the introduction of paid FDV leave and the additional 5 days of unpaid FDV leave. Accordingly, the Commission should not depart

⁹¹³ ACTU submissions dated 30 July 2021 [102].

⁹¹⁴ Ibid [103].

⁹¹⁵ ACTU supplementary submissions dated 22 December 2021 [65].

from the cautious approach previously taken in determining whether it is necessary and appropriate to introduce an additional 5 days of unpaid leave over and above any paid FDV leave entitlement that may be introduced.⁹¹⁶

(ii) The material does not establish that there is a widespread need for such leave to be reflected in the safety net. It cannot be accepted, and indeed is not submitted by the ACTU, that there is any pervasive or common problem of employees exhausting the current leave entitlement and their employment being terminated as a consequence; or of further absences not being accommodated if requested.⁹¹⁷

(iii) It is not necessary as contemplated by s.138, for awards to include terms affording a quantum of leave at a level that reflects the needs of employees in extreme circumstances.⁹¹⁸

(iv) It would not be fair to employers that they bear not only the cost and disruption flowing from paid FDV leave, but also an additional 5 days of unpaid leave on each occasion an employee experiences FDV.⁹¹⁹

(v) The granting of a ‘per occasion’ entitlement should be rejected for all of the reasons identified by the Commission in the *March 2018 FDVL Decision*.⁹²⁰

(vi) In 2018, the Commission expressed the view that it would take a ‘cautious approach’ to determining whether the introduction of an uncapped ‘per occasion’ unpaid FDV leave entitlement would be appropriate. In particular, the Commission pointed to the ‘considerable uncertainty’ relating to the likely utilisation of such an entitlement, given that it would be a new entitlement. There is still ‘considerable uncertainty’ surrounding the utilisation of unpaid FDV leave.⁹²¹

[868] ACCI submits that there is no basis to suggest that 10 days of paid leave and unlimited unpaid leave could be considered necessary to achieve the modern awards objective.⁹²²

[869] In Background Document 2, the ACTU was asked to identify the evidence it relies upon in support of its proposition that ‘supplementary unpaid leave of five days per occasion is necessary’.⁹²³ The ACTU’s response to this question was:

‘The evidence relied on by the ACTU is contained in paragraph 102 of its July submissions and paragraph 47 of its December submissions, as identified in response to decision points Y, Y.1 and Y.2 of the decision tree (in response to Question 13) of the first Background Paper.’⁹²⁴

⁹¹⁶ Ai Group submissions in reply dated 4 February 2022 [421].

⁹¹⁷ Ibid [422].

⁹¹⁸ Ibid [423].

⁹¹⁹ Ibid [427].

⁹²⁰ Ibid [428].

⁹²¹ Ibid [433].

⁹²² ACCI submissions in reply dated 4 February 2022 [2.19].

⁹²³ Background Document 2, question 15, p.45.

⁹²⁴ ACTU submissions in response to Background Document 2 dated 7 April 2022 [12].

[870] At [102] of the ACTU's submissions of 30 July 2021, it refers to the evidence of 2 lay witnesses and at [47] of its 22 December 2021 supplementary submissions, it refers to the SWIRLS Report. In Chapter 6, we set out the limitations of the lay evidence and the broad themes which emerge from it. We also set out the assistance to be drawn from the SWIRLS Report.

[871] At the hearing on 8 April 2022, the ACTU was asked to clarify the submission in the following exchange:

‘JUSTICE ROSS: I have re-read paragraph 102 of your July submissions and paragraph 47 of the ACTU's December submissions. It's not clear to me how those paragraphs reference any evidence to support the proposition that supplementary unpaid leave of the nature that you're seeking in the claim is necessary in the section 138 sense.

MS BURKE: Yes, I understand. Just a moment, please.

Yes, your Honour, the necessity of the additional unpaid - supplementary unpaid leave for five days - arises from the fact that if somebody continues to need time off work to deal with family and domestic violence and, of course, we're dealing with very limited proportion of people in this circumstance, then the need continues to exist regardless of whether leave is available or not. And so it's appropriate that it continue to be available. Other than that I don't have anything to add other than what is in our written submissions.’⁹²⁵

[872] We are not persuaded that the evidence relied on by the ACTU is sufficient to establish that additional unpaid leave on a per occasion basis is necessary in the sense contemplated by s.138 of the FW Act. Our *provisional* view is that we do not propose to grant this aspect of the ACTU claim. We note here that the NES entitlement to unpaid FDV leave will continue to apply.

8.4 Our Provisional View on a Model Paid FDV Leave Term

[873] We have rejected the element of the ACTU's claim which seeks an additional period of 5 days of unpaid FDV leave on a per occasion basis and we have formed the *provisional* view that paid FDV *not* apply to casuals.

[874] Our *provisional* view is that a model paid FDV leave term should have the following characteristics:

1. Full time employees and, on a pro-rata basis part-time employees should be entitled to 10 days paid FDV leave per year.
2. The entitlement to 10 days paid FDV leave per year should accrue progressively across the year in the same way as for personal/carer's leave accrues under the NES, with accrual occurring accordingly to the methodology articulated by the High Court in *Mondelez Australia Pty Ltd v AMWU & Ors*⁹²⁶ The entitlement should

⁹²⁵ Transcript, 8 April 2022, PN192–PN194.

⁹²⁶ [2020] HCA 29.

accumulate from year to year, but subject to a ‘cap’ whereby the total accrual does not exceed 10 days at any given time.

3. The FDV leave entitlement should be accessible in advance of an entitlement to such leave accruing, by agreement between an employer and employee.
4. The FDV leave entitlement should operate on the basis that it is paid at the employee’s ‘base rate of pay’ as defined in s.16 of the FW Act.
5. The definition of ‘family and domestic violence’ should be in the same terms as the definition in s.106B(2) of the FW Act (and not extend to FDV perpetrated by a member of the employee’s household who is not related to the employee).
6. In all other relevant respects the model FDV leave term should reflect the terms of s.106B.

[875] For convenience, we refer to this as the *provisional* model term.

[876] Compared to the ACTU claim, the *provisional* model term provides better alignment with existing NES entitlements and will have less impact on business in terms of employment costs and the regulatory burden. The accrual arrangements in the *provisional* model term will have the effect of operating as a phasing-in mechanism for the paid FDV leave entitlement for the first 12 months after the entitlement takes effect.

9. The Modern Awards Objective

9.1 General observations

[877] The modern awards objective is in s.134 of the FW Act and provides:

‘What is the modern awards objective?’

134(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

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

This is the **modern awards objective**.

When does the modern awards objective apply?

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

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

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

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

[878] The modern awards objective is very broadly expressed.⁹²⁷ A ‘fair and relevant minimum safety net of terms and conditions’ is a composite phrase within which ‘fair and relevant’ are adjectives describing the qualities of the minimum safety net to which the Commission’s duty relates. As the Full Court observed in the *Penalty Rates Review*:

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

...

As discussed “fair and relevant”, which are best approached as a composite phrase, are broad concepts to be evaluated by the FWC taking into account the s 134(1)(a)-(h) matters and such other facts, matters and circumstances as are within the subject matter, scope and purpose of the Fair Work Act. Contemporary circumstances are called up for consideration in both respects, but do not exhaust the universe of potentially relevant facts, matters and circumstances.’⁹²⁸

[879] This composite phrase requires that modern awards, together with the NES, provide ‘a fair and relevant minimum safety net of terms and conditions’, taking into account the matters in ss.134(1)(a)–(h) (the s.134 considerations).⁹²⁹

[880] It is not necessary for the Commission to make a finding that an award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.⁹³⁰ Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated — many of them may be characterised as broad social objectives.⁹³¹ In giving effect to the modern awards objective, the Commission is performing an evaluative function taking into account the s.134 considerations and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

⁹²⁷ *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 [35].

⁹²⁸ *Shop, Distributive and Allied Employees Association v The Australian Industry Group* (2017) FCR 368 [49]; [65].

⁹²⁹ *Penalty Rates Decision* [2017] FWCFB 10001 [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* (2017) FCR 368 [41]–[44].

⁹³⁰ *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 [105]–[106].

⁹³¹ See *Ibid*; albeit the Court was considering a different statutory context, this observation is applicable to the Commission’s task in the Review.

[881] Fairness in the context of providing a ‘fair and relevant minimum safety net’ is to be assessed from the perspective of the employees and employers covered by the modern award in question. As the Full Court observed in the *Penalty Rates Review*:

‘it cannot be doubted that the perspectives of employers and employees and the contemporary circumstances in which an award operates are circumstances within a permissible conception of a “fair and relevant” safety net taking into account the s.134(1)(a)-(h) matters.’⁹³²

[882] Further, in the *Penalty Rates Decision*, the Full Bench rejected the proposition that the reference to a ‘minimum safety net’ in s.134(1) means the ‘least ... possible’ to create a ‘minimum floor’:

‘the argument advanced pays scant regard to the fact the modern awards objective is a composite expression which requires that modern awards, together with the NES, provide ‘a fair and relevant minimum safety net of terms and conditions’. The joint employer reply submission gives insufficient weight to the statutory directive that the minimum safety net be ‘fair and relevant’. Further, in giving effect to the modern awards objective the Commission is required to take into account the s.134 considerations, one of which is ‘relative living standards and the needs of the low paid’ (s.134(1)(a)). The matters identified tell against the proposition advanced in the joint employer reply submission.’⁹³³

[883] The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.⁹³⁴ No particular primacy is attached to any of the s.134 considerations,⁹³⁵ and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[884] The observations set out above are uncontentious and applicable in these proceedings.⁹³⁶ In these proceedings it is also common ground that the considerations in ss.134(1)(da) and (e) are not relevant.

[885] As to the consideration in s.134(1)(e) – ‘the principle of equal remuneration for work of equal or comparable value’ – the words of the definition in s.302(2) are to be read into s.134(1)(e) such that in giving effect to the modern awards objective the Commission must take into account the principle of ‘equal remuneration for men and women workers for work of equal or comparable value’.⁹³⁷ As the ACTU submits:

‘[w]hile family and domestic violence disproportionately affects women, and can compound inequalities such as the gender pay gap and unequal caring responsibilities, s 134(1)(e) is

⁹³² (2017) 253 FCR 368 [53].

⁹³³ [2017] FWCFB 1001 [128].

⁹³⁴ *Edwards v Giudice* (1999) 94 FCR 561 [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 [81]–[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 [56].

⁹³⁵ *Penalty Rates Review* (2017) 253 FCR 368 [33].

⁹³⁶ These observations were set out at [169]-178] of Background Document 1. ACCI, Ai Group and the ACTU did not take issue with the propositions, see ACCI final submissions dated 28 March 2022 [7.35]; Ai Group final submissions dated 28 March 2022 [173]; ACTU submissions in response to Background Document 1 dated 28 March 2022 [10].

⁹³⁷ *Equal Remuneration Decision 2015* [2015] FWCFB 8200 [192].

concerned with the provision of equal remuneration between men and women for work of equal value. Accordingly, sub-section is neutral to the application.’⁹³⁸

[886] We now turn to assess our *provisional* model term in the context of the modern awards objective.

[887] We note at the outset that our *provisional* assessment of the modern awards objective set out below is a general, ‘global’ assessment. We accept that we must consider any specific circumstances raised in respect of each modern award and be satisfied that any proposed variation to that award is necessary to ensure that that award achieves the modern awards objective. This award-by-award process will commence once we have finalised the content of a proposed model term. We will consider award-specific issues in that process. As stated in Chapter 4.3, a modern award will only be varied if we are satisfied that the variation is necessary to ensure that the particular award achieves the modern awards objective.

9.2 The Section 134 Considerations

s.134(1)(a): relative living standards and the needs of the low paid

[888] In successive Annual Wage Reviews, the Expert Panel has concluded that a threshold of two-thirds of median full-time wages provides ‘a suitable and operational benchmark for identifying who is low paid’, within the meaning of s.134(1)(a).

[889] The most recent data for the ‘low paid’ threshold is set out below:⁹³⁹

Two-thirds of median full-time earnings	\$/week
Characteristics of Employment survey (Aug 2021)	1000.00
Employee Earnings and Hours survey (May 2021)	1062.00

[890] The ACTU submits that this consideration weighs in favour of granting its claim:

‘It is reasonable to assume that a proportion of those award-reliant employees who are low paid may be affected by family and domestic violence, particularly as women are more likely to be low paid and award reliant, and women are significantly more likely to experience family and violence than men. For those employees, financial stability is critical. Paid family and domestic violence leave will ensure that low-paid workers are not further disadvantaged by being required to take unpaid leave, or to jeopardise their employment, in order to deal with the consequences of family and domestic violence.’⁹⁴⁰

⁹³⁸ ACTU submissions dated 30 July 2021 [130].

⁹³⁹ MA000028; Australian Bureau of Statistics, *Characteristics of Employment, Australia, August 2020* (Report, 11 December 2020); Australian Bureau of Statistics, *Employee Earnings and Hours, Australia, May 2018* (Report, 22 January 2019).

⁹⁴⁰ ACTU submissions dated 30 July 2021 [121].

[891] Ai Group submits that s 134(1)(a) ‘is but one of many factors that must be taken into account ... It must be considered in the context of various other countervailing considerations that weigh strongly against the grant of FDVL.’⁹⁴¹

[892] ACCI submits that the proposed method of calculating paid FDV leave in the ACTU claim will not disproportionately benefit the low paid as:

‘[l]ow paid employees will be paid an entitlement worth less than higher paid employees covered by an award, in circumstances where it is likely that the financial resources of the higher paid employees will better able them to deal with the effects of FDV.’⁹⁴²

[893] Contrary to the argument advanced by ACCI, the central issue arising under s.134(1)(a) is whether an entitlement to paid FDV leave would assist the relative living standards and needs of the low paid. For the reasons given in the *July 2017 Majority Decision* this question is to be answered in the affirmative.⁹⁴³

[894] The following propositions are uncontentious:

- (i) FDV disproportionately affects women;
- (ii) the majority of award-reliant employees are probably also low-paid;⁹⁴⁴ and
- (iii) women are both more likely to be in low-paid employment and more likely to be paid at the award rate; 54.1 per cent of women are low paid, 57.4 per cent are award reliant, and 55.2 per cent of adult employee women are low paid and award-reliant.⁹⁴⁵

[895] The consideration in s.134(1)(a) strongly favours the variation of modern awards to include the *provisional* model term.

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

[896] Section 134(1)(b) requires that we consider ‘the need to *encourage* collective bargaining.’

[897] The ACTU submits:

‘[T]he introduction of a new award minimum of 10 days paid family and domestic violence leave *may encourage bargaining* for additional supports for employees experiencing family and domestic violence over and above this, for example a higher quantum of paid leave and/or other

⁹⁴¹ Ai Group submissions in reply dated 4 February 2022 [455].

⁹⁴² ACCI final submissions dated 28 March 2022 [7.36].

⁹⁴³ *July 2017 Majority Decision* [73].

⁹⁴⁴ By reference to the two-thirds of median weekly earnings benchmark: *Annual Wage Review 2015–2016* [2016] FWCFB 3500 [369]; [449].

⁹⁴⁵ Roger Wilkins and Federico Zilio, *Prevalence and Persistence of Low-Paid Award-Reliant Employment* (Research Report 1/2020, Fair Work Commission, February 2022) p 11, Table 3.

forms of financial and non-financial support, such as assistance with relocations.’⁹⁴⁶ (Emphasis added).

[898] Ai Group argues that the ACTU submission ‘is purely speculative’ and submits:

‘The Commission cannot be satisfied that the introduction of FDVL will encourage collective bargaining. There is no material before the Commission that might suggest this ... the material before the Commission demonstrates that the absence of FDVL will encourage employers to bargaining in relation to the issue of FDV. We acknowledge that this is not a matter relevant to the mandatory consideration at s.134(1)(b).’⁹⁴⁷

[899] ACCI submits that FDV leave is ‘currently the subject of enterprise bargaining in a number of contexts and industries’, but:

‘To introduce it as a uniform entitlement ... particularly at the level of 10 paid days, would be to remove the impetus of employees to bargain for the entitlement ... Forcing all employers to provide paid FDV leave ... *may*, depending on employer circumstances and perception of potential costs, actively discourage employers from engaging in *bargaining*.’⁹⁴⁸ (Emphasis added).

[900] In reply to a question posed in Background Document 1, the ACTU clarified that it did not submit that the introduction of a new award minimum of 10 days’ paid FDV leave will encourage collective bargaining generally, rather it submitted:

‘it may encourage bargaining *for additional supports for employees experiencing family and domestic violence over and above [a new minimum safety net standard], for example a higher quantum of paid leave and/or other forms of financial and non-financial support, such as assistance with relocations.*’⁹⁴⁹ [ACTU’s emphasis]

[901] Further, the ACTU says that the WAD Analysis demonstrates that there has been a ‘substantial increase’ of almost 23 per cent of employees covered by agreements with a FDV leave provision since the introduction of the unpaid FDV leave entitlement in 2018,⁹⁵⁰ and submits:

‘The ACTU accepts that it may not be possible to draw a direct link between the introduction of the modern award provision and the increase in employees covered by some form of FDV support in enterprise agreements. However, the introduction of the modern awards entitlement has clearly not discouraged, and may have encouraged, collective bargaining on workplace responses to FDV.’⁹⁵¹

[902] In short, the ACTU contends that s.134(1)(b) is a factor weighing in favour of its claim, while acknowledging:

⁹⁴⁶ ACTU submissions dated 30 July 2021 at [123].

⁹⁴⁷ Ai Group submissions in reply dated 4 February 2022 [457], [459].

⁹⁴⁸ ACCI submissions in reply dated 4 February 2022 [10.15]; [10.18].

⁹⁴⁹ ACTU submissions in response to Background Document 1 dated 28 March 2022 [16], referring to [122]-[123] of the ACTU submissions dated 30 July 2021.

⁹⁵⁰ ACTU submissions in response to Background Document 1 dated 28 March 2022 [17].

⁹⁵¹ *Ibid.*

‘the evidence does not unequivocally demonstrate the existence of a causal link between the unpaid FDV leave entitlement and increased collective bargaining on FDV leave (whether paid or unpaid) in agreements. However, it is open on the available evidence for the Full Bench to infer that it has. Conversely, it is not open to conclude that the introduction of paid FDV leave will discourage collective bargaining on the issue.’⁹⁵² [ACTU’s emphasis]

[903] The ACTU submits that the evidence in support of its submission includes:

- Of the organisations which currently report to the WGEA, there has been an increase from 12.1 per cent in 2016 to 35.5 per cent in 2020 of employers who offer paid FDV leave.⁹⁵³
- The number of enterprise agreements with paid FDV leave provisions grew from 1,096 agreements in 2016 to 1,502 agreements in 2019.⁹⁵⁴
- As at 30 June 2021, 60.6 per cent of all current enterprise agreements contained some type of FDV provision.⁹⁵⁵
- As at 30 June 2021, 1.13 million employees (or 63.5 per cent of all employees on current enterprise agreements) were covered by current enterprise agreements which contained paid FDV leave.⁹⁵⁶
- Enterprise agreements which contain paid FDV leave account for 28 per cent of all agreements approved since 2018, representing an increase of about half since 2016. It is estimated that close to 30 per cent of all current agreements contain paid FDV leave provisions.⁹⁵⁷

[904] In the context of this proceeding, the consideration in s.134(1)(b) is concerned with whether the introduction of a paid FDV leave term would ‘encourage collective bargaining’.

[905] In a number of Annual Wage Reviews the Expert Panel has pointed to the ‘complexity of factors which may contribute to decision making about whether or not to bargain’, and that complexity has led the Expert Panel to conclude that it is ‘unable to predict the precise impact [of its decisions] on collective bargaining with any confidence.’⁹⁵⁸ Further, various AWR Research Reports have examined factors that may have influenced changes in the collective agreement coverage of employees.⁹⁵⁹

⁹⁵² ACTU submissions in response to Background Document 2 dated 7 April 2022 [6].

⁹⁵³ Ibid [7](a), referring to Duncan Report [4].

⁹⁵⁴ Ibid [7](b).

⁹⁵⁵ Ibid [7](c), referring to Fair Work Commission, *Information Note – ACTU Supplementary Submission to the Family and Domestic Violence Leave Review*, 11 March 2022 p.3.

⁹⁵⁶ Ibid [7](d), referring to Fair Work Commission, *Information Note – ACTU Supplementary Submission to the Family and Domestic Violence Leave Review*, 11 March 2022 p.5.

⁹⁵⁷ Ibid [7](e), referring to Stanford Report [36], Table 1.

⁹⁵⁸ [2016] FWCFB 3500 [540].

⁹⁵⁹ Peetz D & Yu S (2017), *Explaining recent trends in collective bargaining*, Fair Work Commission, *Research Report 4/2017*, February; Peetz D & Yu S (2018), *Employee and employer characteristics and collective agreement coverage*, Fair Work Commission, *Research Report 1/2018*, February.

[906] Contrary to the ACTU’s submission, we are not persuaded that the variation of modern awards to include the *provisional* model term would encourage collective bargaining. The consideration in s.134(1)(b) weighs against the variation of modern awards to include the *provisional* model term.

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

[907] It is uncontroversial⁹⁶⁰ that in the context of s.134(1)(c), the promotion of social inclusion ‘through increased workforce participation’ means both *obtaining employment* and assisting employees to *remain in employment*.⁹⁶¹ That is, obtaining employment is the focus of s.134(1)(c).⁹⁶² Further, in the *Annual Wage Review 2015–2016 Decision* the Expert Panel observed that ‘social inclusion’ requires more than simply having a job. The Expert Panel endorsed the proposition that a job with inadequate pay can create social exclusion if the income level limits the employee’s capacity to engage in social, cultural, economic, and political life.⁹⁶³

[908] The ACTU relies on these observations in support of the following submission:

‘It follows that a job with inadequate safety net protections against the employment disruption that can occur as a result of needing time away from work to attend to matters arising from family and domestic violence can contribute to social exclusion and is contrary to the modern awards objective...[Further] the evidence filed by the ACTU, demonstrates how family and domestic violence disrupts employment and precludes workforce participation. This disemployment effect is particularly egregious for women.’⁹⁶⁴

[909] The ACTU further submits that the SWIRLS Report found ‘FDV has a significant impact on women’s paid employment’ utilising the following research that shows:

- (a) the employment conditions, patterns of participation and work trajectories of women who experience FDV changes significantly after experiencing FDV (Franzway et al., 2019).
- (b) Women experiencing FDV earn 35 per cent less than those who do not (Aeberhard-Hodges and McFerran, 2018).
- (c) FDV causes women to feel distracted, tired, unwell, or afraid at work, leading to absences and leave, often resulting in reduced income and disrupted work histories. (Aeberhard-Hodges & McFerran, 2018; Franzway et al., 2019).⁹⁶⁵

⁹⁶⁰ ACTU submissions in response to Background Document 1 dated 28 March 2022 [18]; Ai Group final submissions dated 28 March 2022 [175]; ACCI final submissions dated 28 March 2022 [7.38]

⁹⁶¹ *Penalty Rates Case* [179].

⁹⁶² *Penalty Rates Decision* [179].

⁹⁶³ *Annual Wage Review 2015–2016* [2016] FWCFB 3500, [467].

⁹⁶⁴ ACTU submissions dated 30 July 2021 [126]-[127].

⁹⁶⁵ ACTU submissions in response to Background Document 1 dated 28 March 2022 [20].

[910] Additionally, the ACTU relies on the Monash Report which concluded that ‘experiences of DFV impact significantly on an individual’s ability to attend work, to participate meaningfully in work, to fulfil their role expectations, and to progress their career ambitions.’⁹⁶⁶

[911] The ACTU submits that the lay witness evidence also explains how FDV disrupts employment for those who experience it and relies specifically on the following:

- Witness Statement of Dr Vicki Jones at [20]-[21]
- Witness Statement of Samantha Parker at [32]
- Witness Statement of Ellen Davies at [18]-[19]
- Witness Statement of Karyn Walsh at [21]
- Witness Statement of Gabrielle Craig at [15]-[16]
- Witness Statement of Carla Jones at [8]; [13].⁹⁶⁷

[912] ACCI submits:

‘it is not clear ... that there is any evidence before the Full Bench which identifies circumstances where employees have left employment due to a lack of FDV leave. We consider that the protection provided by NES derived unpaid FDV leave addresses this limb, and to award 10 days paid and unlimited unpaid leave would be to go beyond that which is necessary.’⁹⁶⁸

[913] Similarly, Ai Group submits:

‘The evidence does not establish that the workforce participation of employees experiencing FDV is compromised, notwithstanding the introduction of the unpaid FDV leave scheme. Nor does the evidence establish that the taking of unpaid leave is limiting the capacity of such employees to engage in ‘*social, cultural, economic, and political life*’. The ACTU’s submissions in relation to s.134(1)(c) are speculative and do not point to any evidence in this regard.’⁹⁶⁹

[914] Both ACCI and Ai Group agree with the proposition that their submissions are to be characterised as contending that s.134(1)(c) is a neutral consideration in the context of these proceedings and, contrary to the ACTU’s submissions, it is not a consideration that weighs in favour of granting the ACTU claim.⁹⁷⁰

[915] ACCI also observes that FDV can present a profound limitation on engagement in ‘social, cultural, economic, and political life’; but submits that there is no evidence to suggest

⁹⁶⁶ ACTU submissions in response to Background Document 1 dated 28 March 2022 [21].

⁹⁶⁷ Ibid [26].

⁹⁶⁸ ACCI submissions in reply dated 4 February 2022 [10.20].

⁹⁶⁹ Ai Group submissions in reply dated 4 February 2022 [461].

⁹⁷⁰ ACCI final submissions dated 28 March 2022 [7.39]-[7.40]; Ai Group final submissions dated 28 March 2022 [176].

that the current system of unpaid leave (or a lack of an award mandated system of paid leave) to deal with the effects of FDV represents such a limitation.⁹⁷¹

[916] In its submission of 4 February 2022, MGA advanced a separate point and submits that the granting of paid FDV leave may even act as a disincentive for the employment of women and thereby adversely impact upon social inclusion:

‘Although there are significant protections in place to prevent discrimination of women in the workplace, such as anti-discrimination laws and general protections, introduction of a paid FDVL entitlement may nevertheless inadvertently disincentivise some employers from engaging or continue to engage female employees as it is female employees that are more likely to experience family and domestic violence and require FDVL as a result.’⁹⁷²

[917] MGA argued there is evidence to suggest that requesting or taking parental leave, which is taken more frequently by women than men, contributes to discrimination against women and that women also ‘experience discrimination when applying for jobs due to gender stereotypes that perceive women as more likely to be absent from work due to carer’s responsibilities’.⁹⁷³

[918] The Commission’s economic research team have prepared the below chart, which charts female workforce participation against various key arbitral and legislative changes relating to leave, gender equality and equal pay.

[919] As noted in the SWIRLS Report, it may be accepted that, ‘[i]ncreases in the rates of labour force participation for women can largely be attributed to advancements in women’s education as well as greater access to childcare supporting women’s engagement with paid work, and the growth in traditionally feminised occupations.’⁹⁷⁴ The chart does not appear to suggest that the various changes to the award and legislative context have had any adverse impact on the female workforce participation rate. Indeed it is arguable that these changes have *supported* the consistent rise in the female participation rate.

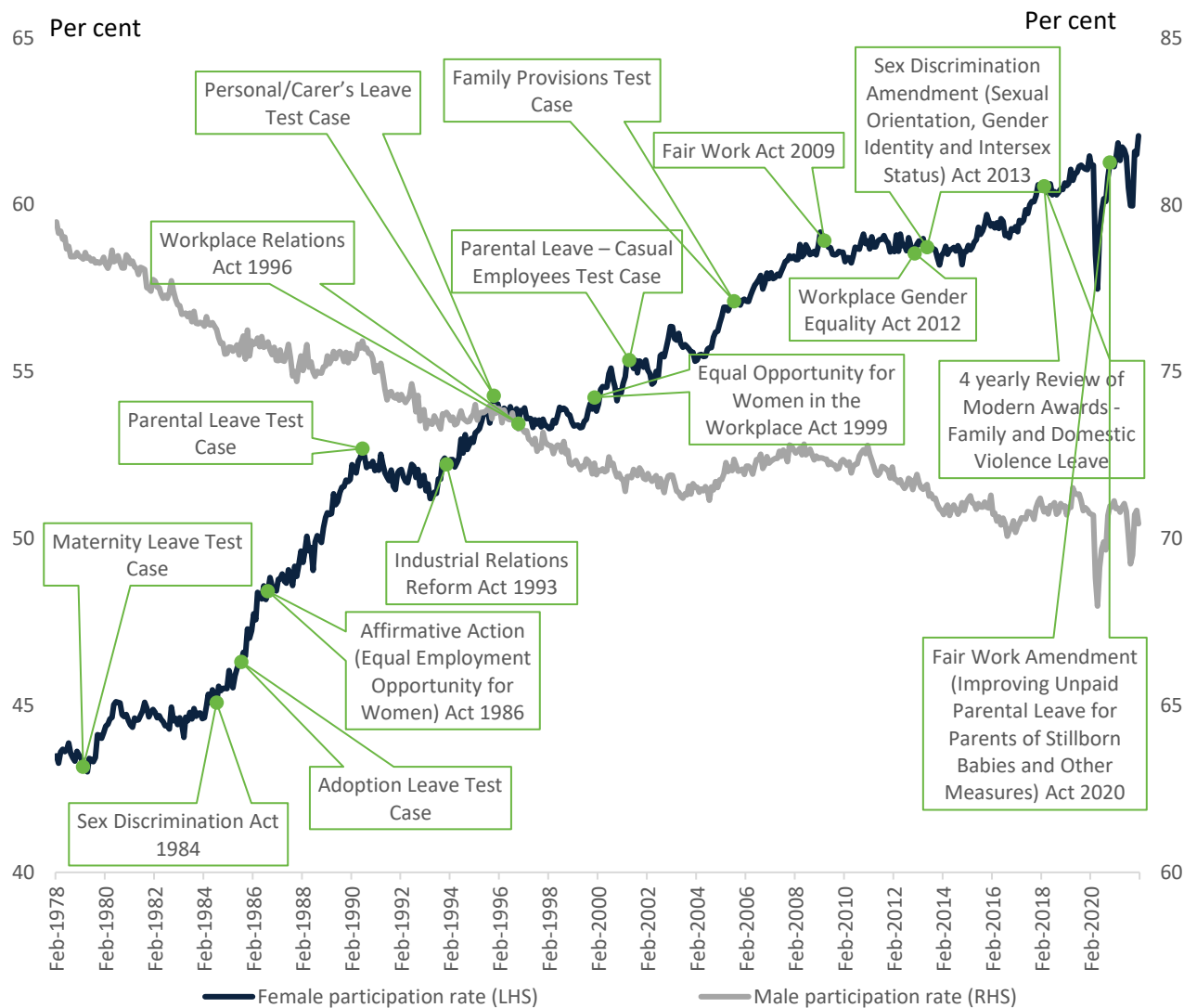
⁹⁷¹ ACCI final submissions dated 28 March 2022 [7.39]-[7.40].

⁹⁷² MGA submissions in reply dated 4 February 2022 [42].

⁹⁷³ MGA submissions in reply dated 4 February 2022 [42].

⁹⁷⁴ SWIRLS Report p.1.

Chart 9: Female workforce participation following various key arbitral and legislative changes relating to leave, gender equality and equal pay



[920] In Background Document 1, the MGA was asked whether it pressed its submission that granting paid FDV leave would act as a disincentive for the employment of women and if yes, the MGA was invited to identify the evidentiary basis for this. The MGA did not file a submission in response to the question put.

[921] Ai Group and ACCI were asked whether they supported the MGA’s contention that granting paid FDV leave would act as a disincentive for the employment of women.

[922] ACCI responded that it is unaware of any evidentiary basis to support MGA’s contention and observed that should evidence of that kind exist, such conduct would be in breach of the FW Act. It further submitted that even if such evidence existed, they would not

advance an argument that it is relevant for the determination of the Full Bench in the context of this case.⁹⁷⁵

[923] Ai Group submitted the introduction of a new obligation that imposes additional employment costs in relation to an entitlement that would likely be accessed disproportionately by women could, in theory, create a disincentive for employing women; however it submitted there is no evidence before the Commission in support of the proposition that the introduction of paid FDV leave would in fact result in employers not employing women, or becoming less likely to employ women.⁹⁷⁶

[924] In the absence of an evidentiary basis, the MGA's submission that granting paid FDV leave would act as a disincentive to employing women is mere speculation.

[925] Further, refusing to employ prospective female employees because they might exercise an entitlement to access paid FDV leave would contravene the general protections provisions of the FW Act, specifically ss.340 and 351. Relevantly:

- Section 340(1)(a) provides that a person must not take adverse action against another person because the other person has a workplace right. This includes a right under a workplace instrument such as a modern award (FW Act ss.341(1)(a) and 12), and a prospective employee is taken to have the workplace rights he or she would have had if they were employed in the prospective employment by the prospective employer (FW Act s.341(3)).
- Section 351 relevantly provides that an employer must not take adverse action against a prospective employee because of the person's sex.
- In respect of prospective employees, adverse action includes a prospective employer refusing to employ the prospective employee (FW Act s.342(1)).

[926] We reject the MGA submission that granting paid FDV leave would act as a disincentive to employing women.

[927] As we found in Chapter 6.6, employees who experience FDV often face financial difficulties as a result, such as relocation costs or becoming a sole parent; and may suffer economic harm as a result of disruption to workplace participation. In comparison to women with no experience of FDV, women experiencing or who have experienced FDV have a more disrupted work history; are on lower personal incomes; have had to change jobs frequently; and are more likely to be employed in casual and part-time work.

[928] Employment is an important pathway out of violent relationships. Paid FDV leave is a critical mechanism for employees to maintain their employment and financial security, when dealing with the consequences of FDV.

⁹⁷⁵ ACCI final submissions dated 28 March 2022 [7.41]–[7.42].

⁹⁷⁶ Ai Group final submissions dated 28 March 2022 [177].

[929] The evidence has led us to conclude that it is likely that there will be a significant positive impact in respect of female participation in the workforce. The primary reason for this conclusion is that women in the workforce who experience FDV may, as a result of having access to a paid leave entitlement, be able to maintain their employment to a degree which is not possible in the absence of such an entitlement.

[930] We are satisfied that the insertion of the *provisional* model term into modern awards will have a significant positive impact on the promotion of social inclusion through increased workforce participation.

[931] The consideration in s.134(1)(c) strongly favours the variation of modern awards to include the *provisional* model term.

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

[932] The ACTU contends that this is a neutral consideration while the opposing parties submit that it tells against the variation of modern awards to include the ACTU claim.

[933] ACCI submits:

‘In our submission the absence of an employee does have an impact on the manner in which work is performed. While this could be managed such that there was no meaningful difference, we submit that it is certainly possible that an employer will either lose output through an absence or be required to fund a replacement (overtime, casual, labour hire). We consider this limb to weigh against the grant of the claim.’⁹⁷⁷

[934] Ai Group submits:

‘The introduction of FDVL would adversely impact the efficient and productive performance of work; *indeed even more so than unpaid FDV leave*. This is because employees may be more likely to access FDVL than unpaid FDV leave. Further, the grant of the ACTU Claim would result in employees having access to a greater quantum of leave than the extant unpaid leave scheme. In addition to 10 days of paid leave, employees would be entitled to up to five days of unpaid leave on each relevant occasion. The proposed clause does not place a limit on the number of permitted occasions on which an employee can access unpaid leave.’⁹⁷⁸ (Emphasis added).

[935] In Background Paper 2, Ai Group was invited to identify the evidence it relied on in support of the assertion that unpaid FDV leave had an adverse impact on the efficient and productive performance of work.

[936] In response, Ai Group advances the following submission:

‘(a) It is axiomatic that employee absences undermine the efficient and productive performance of work in some circumstances. An employee absence will require an employer to consider and implement solutions for covering the employee’s absence, where practicable. The absence will

⁹⁷⁷ ACCI final submissions dated 28 March 2022 [7.43].

⁹⁷⁸ Ai Group submissions in reply dated 4 February 2022 [463].

result in the work that the employee would have performed either not being undertaken or being undertaken, in whole or in part, by another employee / employees. Those employees may not have the capacity and / or the skills to perform the relevant work as efficiently or productively as the absent employee.

(b) Our submission cited at [202] of the Background Paper, in relation to paid and unpaid FDV leave was advanced on that basis. (the submission cited at 2020 of BD1 states....

(c) The proposition that employee absences undermine the efficient and productive performance of work is demonstrated by Professor Duncan's evidence...⁹⁷⁹

[937] In essence, Ai Group advances 2 points:

1. Employee absences undermine the efficient and productive performance of work in some circumstances.
2. Employee absences will result in the absent employee's work either not being performed or being performed by someone else who may not be as productive as the absent employee.

[938] At a conceptual level it may be accepted that employee absences, particularly unplanned absences, may undermine the efficient and productive performance of work. But Ai Group's submission ignores the fact that employees experiencing FDV have an existing entitlement to be absent from work under s.106A, if the employee needs to do something to deal with the impact of the FDV and it is impractical for the employee to do that thing outside the employee's ordinary hours of work.

[939] The opposing parties have not provided any evidence that suggests that the use of the existing unpaid leave entitlement is having an adverse impact on the efficient and productive performance of work.

[940] Indeed, some of the material before us suggests that the introduction of 5 days' unpaid FDV leave has had a very limited impact on employers. As we note in Chapter 7.2.7, the House Committee Report records the National Retail Association as reporting that the impact of the existing entitlement on its members 'was negligible.'

[941] As to Ai Group's second point, it may also be accepted at a conceptual level; but there is no evidence upon which we can make an assessment of the likelihood of such an eventuality or upon which we can quantify the cost.

[942] Ai Group acknowledges the evidence before us suggests that FDV imposes significant costs on employers, including lost productivity due to absenteeism from work.⁹⁸⁰ Hence, to the extent that there is a relationship between FDV and the productive performance of work, productivity is negatively affected by FDV. The important point here is that employers are already paying the cost of FDV – through increased absenteeism and lost productivity.

⁹⁷⁹ Ai Group final submissions dated 28 March 2022 [178]

⁹⁸⁰ Ai Group final submissions dated 28 March 2022 [178] citing Professor Duncan's evidence at p.988 of the DCB [49].

[943] FDV leave helps individuals maintain their economic security; to access relevant services; and to safely exit to a life free from violence. To the extent that paid FDV leave reduces the incidence of FDV it may also improve the efficient and productive performance of work.

[944] We accept that inserting an entitlement to paid FDV leave into modern awards will increase the utilisation of such leave. On that basis there might be some increase in unplanned employee absences. This may have a consequent negative impact on the efficient and productive performance of work. On balance, the consideration in s.134(1)(d) weighs against the variation of modern awards to include the *provisional* model term.

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

[945] Section 134(1)(f) is expressed in very broad terms. The Commission is required to take into account the likely impact of any exercise of modern award powers ‘on business, including’ (but not confined to) the specific matters mentioned, that is, ‘productivity, employment costs and the regulatory burden’.

[946] ‘Productivity’ is not defined in the FW Act but given the context in which the word appears it is clear that it is used to signify an economic concept.

[947] The conventional economic meaning of productivity is the number of units of output per unit of input. It is a measure of the volumes or quantities of inputs and outputs, not the cost of purchasing those inputs or the value of the outputs generated. As the Full Bench observed in the *Schweppes Australia Pty Ltd v United Voice – Victoria Branch*:⁹⁸¹

‘... we find that ‘productivity’ as used in s.275 of the Act, and more generally within the Act, is directed at the conventional economic concept of the quantity of output relative to the quantity of inputs. Considerations of the price of inputs, including the cost of labour, raise separate considerations which relate to business competitiveness and employment costs.

Financial gains achieved by having the same labour input – the number of hours worked – produce the same output at less cost because of a reduced wage per hour is not productivity in this conventional sense.’⁹⁸²

[948] While the above observation is directed at the use of the word ‘productivity’ in s.275 of the FW Act, it has been held to be apposite to the Commission’s consideration of this issue in the context of s.134(1)(f).⁹⁸³

[949] The ACTU accepts that utilisation rates are relevant to consideration of s 134(1)(f), and relies on the evidence of its expert witness to submit:

‘[t]he provision of paid FDV leave equivalent to the high end of Dr Stanford’s utilisation estimates (namely 0.01 per cent of working time) would represent an increase in aggregate labour costs of

⁹⁸¹ [2012] FWAFB 7858.

⁹⁸² [2012] FWAFB 7858 [45]–[46].

⁹⁸³ *Horticulture Award 2020* [2021] FWCFB 5554 [512].

only 0.4 cents per hour worked. The evidence of both Dr Stanford and Professor Duncan suggest that even these small costs are likely to be largely (if not entirely) offset by the productivity gains associated with providing access to paid family and domestic violence leave, including improved staff retention and enhanced firm reputation and other benefits.’⁹⁸⁴

[950] The ACTU contends ‘[t]o the extent that there is a causal relationship or correlation between family and domestic violence and productive performance at work, and/or leaving employment altogether, productivity is negatively affected by family and domestic violence’⁹⁸⁵ and ‘[t]he evidence strongly suggests that paid leave assists victim/survivors of family and domestic violence to leave violent relationships, while remaining in employment.’⁹⁸⁶

[951] The ACTU relies on the evidence of Professor Duncan and Dr Stanford to submit that utilisation rates may have an ‘indirect impact on productivity ... by improving staff retention and enhanced firm reputation; and by enabling employees to take steps to escape FDV.’⁹⁸⁷

[952] The ACTU notes that the SWIRLS Report did not contain evidence about utilisation rates of FDV leave,⁹⁸⁸ however submits that the SWIRLS Report identifies research that confirmed that FDV impacts on women’s productivity at work by leading to feelings of unwellness, tiredness, distraction and absences from work.⁹⁸⁹ It says:

‘The [SWIRLS] Report found that FDV leave is likely to contribute to reduced staff turnover and hence less workplace disruption and reduced costs associated with recruitment and training; and that FDV leave may enhance the overall reputation and status of organisations, and any cost to employers of providing FDV leave would be significantly offset by the benefits of doing so.’⁹⁹⁰

[953] The ACTU submits the SWIRLS Report therefore suggests that to the extent that paid FDV leave will have a negative impact on employment costs, those costs will be offset by cost savings and improvements in productivity.⁹⁹¹

[954] ACCI says it ‘has no evidence’ that the ACTU’s claim ‘will result in extraordinary costs for all employers’; but argues it is ‘clear’ that the ACTU’s claim ‘will increase [costs] for employers at an acutely difficult and uncertain time for many employers, notably small and medium employers.’⁹⁹²

[955] Ai Group submits that s.134(1)(f) requires that consideration be given to the impact on individual businesses.⁹⁹³ and argues the ACTU’s claim will ‘increase the regulatory burden on employers’ as ‘employers will be required to administer a new and additional form of leave,

⁹⁸⁴ ACTU submissions dated 30 July 2021 [132].

⁹⁸⁵ Ibid [131].

⁹⁸⁶ Ibid [131].

⁹⁸⁷ ACTU submissions in response to Background Paper 1 dated 28 March 2022 [26].

⁹⁸⁸ Ibid [27].

⁹⁸⁹ Ibid [28].

⁹⁹⁰ Ibid.

⁹⁹¹ Ibid [29].

⁹⁹² ACCI submissions in reply dated 4 February 2022 [10.27].

⁹⁹³ Ai Group submissions in reply dated 4 February 2022 [278].

which will generally require them to make certain amendments to their payroll systems.’⁹⁹⁴ It submits this regulatory burden is not reduced by the existing unpaid leave entitlement:

‘[T]he existing leave entitlement is unpaid and therefore, many of the complexities associated with administering a paid leave entitlement have generally not been faced by employers to date. This is particularly relevant given that the ACTU’s proposed clause would require the payment of amounts other than the base rate prescribed by the relevant award and would appear to also include over-award payments.’⁹⁹⁵

[956] In response to Ai Group’s argument that the microeconomic impact of introducing paid FDV leave ‘would be significant’, the ACTU submits:

‘[T]he FWC does not have evidence from a single employer to substantiate that assertion, and it is not a *prima facie* proposition. The evidence is that utilisation rates of paid FDV leave are low, and correspondingly, so will be the cost of providing paid FDV leave. Further, that cost will be offset by a reduction in the existing costs to employers associated with employees affected by FDV. It does not follow that because an entitlement is beneficial to an employee that it is detrimental to an employer. Moreover, none of the opposing parties contest the evidence that the costs of family and domestic violence to the national economy, and to employers, are very high.’⁹⁹⁶

[957] In Chapter 6.6.2, we deal with the benefits for employers of introducing a paid FDV leave entitlement. While we accept that the introduction of paid FDV leave will be of some benefit to employers, the evidence before us is insufficient to quantify that benefit with any level of confidence or to conclude that the benefits would ‘largely offset’ the cost.

[958] We accept that the variation of modern awards to insert the *provisional* term is likely to give rise to variability in terms of employment cost at the enterprise level. For some employers, particularly those who do not currently provide paid FDV leave, it is likely that there will be some increase in employment costs, although the significance of this will depend on the number of employees who access the entitlement and the number of days of paid leave they take. The evidence before us in respect of utilisation rates suggests that such costs are unlikely to be substantial.

[959] As we found in Chapter 6.6.2 the provision of 10 days’ paid FDV leave is an emerging industrial standard in bargaining and over-award arrangements. The Employer Survey evidence suggests that one in 5 organisations already provide employees with paid FDV leave. The availability of paid FDV leave varied with business size; 20.7 per cent of organisations with one to 5 employees provided paid FDV leave, compared to 35.5 per cent of organisations employing more than 100 employees.

[960] It is also uncontentious that many employers are supportive of their employees and will act in a compassionate and collaborative manner towards employees experiencing FDV. The overwhelming majority of respondents to the Employer Survey provided employees with additional leave or support to that required by the FW Act or by an applicable enterprise

⁹⁹⁴ Ibid [477].

⁹⁹⁵ Ibid [479].

⁹⁹⁶ ACTU submissions in reply dated 21 February 2022 [53].

agreement or modern award. Some 71.9 per cent of respondents provided such additional leave or support *in all instances* and a further 15.8 per cent provided additional leave or support *in some instances*.⁹⁹⁷ The Employer Survey results, though indicative only, suggest that many employers would provide additional leave or support if they received a request from an employee experiencing FDV.

[961] In terms of the issue of regulatory burden, Dr Stanford's evidence is relevant, he says:

'I do not anticipate any significant impact from the extension of this benefit for the processes or costs of regulatory compliance. Employers are already required by the National Employment Standards to provide up to 5 days unpaid leave in cases of FDV, and hence have already been required to establish internal information, accounting, payroll, and management functions to implement and oversee those responsibilities. I do not anticipate any significant change in regulatory functions required as a result of converting that to paid leave. In fact, since the leave is paid, it would actually eliminate steps in the previous management system (associated with stopping and then re-starting the employee's pay).'⁹⁹⁸

[962] This aspect of Dr Stanford's evidence was not challenged in cross-examination and we accept it. In doing so it is important to appreciate that Dr Stanford was commenting on the ACTU claim, not the *provisional* model term. The *provisional* model term provides a better alignment with existing NES entitlements and, in contrast to the ACTU claim, does not extend paid FDV leave to casuals.

[963] The outcome in respect of the s.134(1)(f) consideration must be regarded as mixed. There will be some increase in employment costs for those employers who do not currently provide paid FDV leave entitlements, or provide less beneficial paid FDV leave entitlements, but in most cases, this is unlikely to be substantial, given the anticipated low utilisation rate. There is likely to be some offsetting productivity benefit for such employers, but this is not capable of being quantified in any meaningful way and we cannot be satisfied that this will provide a benefit of the extent necessary to defray the additional employment cost. We are not satisfied that the regulatory burden on employers will increase to any discernible degree. Ai Group's submission about the regulatory burden associated with administering a paid leave arrangement may have been more persuasive considered against the ACTU claim, rather than the *provisional* model term which provides that payment would be made at the base rate. On balance, the s.134(1)(f) consideration must be regarded as weighing against the variation of modern awards to include the *provisional* model term because we cannot be satisfied that the additional cost burden on some employers will be equalled by any productivity benefit. However, we do not propose to attribute much weight to this consideration in respect of our overall conclusion because, as stated, the additional cost is not likely to be substantial for any employer and for many it will be minimal.

⁹⁹⁷ Employer Survey p.27.

⁹⁹⁸ Stanford Report [92].

s.134(1)(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

[964] The ACTU submits that the application of a ‘common [FDV leave] entitlement across all modern awards will result in a simple, easy to understand and sustainable modern award system.’⁹⁹⁹

[965] Ai Group argues that the ACTU claim is ‘not simple and easy to understand’ and submits:

‘At a more basic level, it must be observed that the clause proposed runs a considerable length and is framed, in its structure, language and content, as though it is a legislative provision. Its inclusion in awards could not be said to be consistent with the objective of ensuring a simple and easy to understand award system...In addition; unpaid FDV leave first became a feature of the safety net in July 2018. Less than four years have since passed. The absence of evidence regarding the operation of that entitlement, which is now found in the NES, demonstrates that there is an insufficient understanding of how it is operating in practice and whether it is in fact necessary to provide for any further entitlements associated with FDV. The creation of a new form of leave in such circumstances would be inconsistent with the maintenance of a stable awards system.’¹⁰⁰⁰

[966] ACCI advances a similar argument.

[967] The arguments advanced by Ai Group and ACCI are put against the ACTU claim, not the *provisional* model term. The *provisional* model term addresses a number of the asserted complexities in the ACTU claim and provides a better alignment with the existing NES entitlement.

[968] Contrary to the position put by Ai Group and ACCI, we are not satisfied that the variation of modern awards to insert the *provisional* model term will give rise to a modern award system which is *not* simple and easy to understand.

[969] Obviously, a concluded view in respect of this issue will depend on the final terms of the model paid FDV leave term, but the alignment between the *provisional* model term and the NES is consistent with the need to ensure a simple, easy to understand modern award system.

[970] Ai Group also submits that the creation of a new form of leave less than 4 years after unpaid FDV leave became a feature of the safety net is inconsistent with the maintenance of a ‘stable and sustainable modern award system.’

[971] These proceedings arose out of the 4 Yearly Review conducted under s.156 of the FW Act. As is clear from the conclusion to the *March 2018 FDVL Decision*, the Full Bench considered that the introduction of 5 days’ *unpaid* FDV leave was ‘a cautious regulatory response’ to the issue of FDV and it proposed to revisit the issue in June 2021, including the question of whether provision should be made for *paid* FDV leave.

⁹⁹⁹ ACTU submissions dated 30 July 2021 [135].

¹⁰⁰⁰ Ai Group submissions in reply dated 4 February 2022 [486]; [488].

[972] In these circumstances we find Ai Group’s submission unpersuasive. The insertion of the *provisional* model term into modern awards is not inconsistent with the ‘need to ensure a ... stable and sustainable modern award system’.

[973] We regard s.134(1)(g) as a neutral consideration.

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

[974] The focus of s.134(1)(h) is on the aggregate (as opposed to the sectoral) impact of an exercise of modern award powers. ACCI concedes that the proposition that the national economy would be strengthened by the elimination of FDV is ‘hard to resist,’ but goes on to say that the extent of any such benefit cannot be quantified:

‘We consider that the evidence before the Full Bench is insufficient to make any finding in this respect.’¹⁰⁰¹

[975] Ai Group argues that the evidence before the Full Bench ‘does not enable it to draw any firm conclusions in relation to [s 134(1)(h)]’.¹⁰⁰²

[976] For the reasons given in Chapter 7.5, the variation of modern awards in accordance with the *provisional* model term would have no significant adverse impact on the employment growth, inflation and the sustainability, performance and competitiveness of the national economy. This consideration is neutral.

9.3 Our Provisional View

[977] As we have mentioned, our *provisional* assessment of the modern awards objective is a general ‘global’ assessment. We accept that we must consider any specific circumstances raised in respect of each modern award and that we must be satisfied that the variation of a particular award is necessary to ensure that award achieves the modern awards objective.

[978] The modern awards objective is to ‘ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions’, taking into account the particular considerations identified in ss.134(1)(a)-(h). We have taken those considerations into account, insofar as they are presently relevant, and, at a global level of assessment, it is our *provisional* view that the insertion into modern awards of the *provisional* model term for 10 days’ paid FDV leave is necessary to achieve the modern awards objective.

¹⁰⁰¹ ACCI submissions in reply dated 4 February 2022 [10.34].

¹⁰⁰² Ai Group submissions in reply dated 4 February 2022 [489].

10. Conclusion

[979] Our task in these proceedings is to assess the evidence and submissions against the statutory tests, principally whether a modern award provides a fair and relevant safety net of terms and conditions and whether a proposed variation is necessary for the award to achieve the modern awards objective.

[980] Variations to modern awards must also be justified on their merits and the introduction of a paid FDV leave entitlement into the modern award system would be a significant change.

[981] In Chapter 4.3 we accepted that our reasons would include a consideration of the *March 2018 FDVL Decision* and the facts and circumstances which have occurred since the implementation of that decision.

[982] Our consideration of the *March 2018 FDVL Decision* is set out in Chapters 4, 5 and 8. In various parts of our decision we reference the facts that have arisen and circumstances that have occurred since the implementation of the *March 2018 FDVL Decision*; including:

- (i) The introduction of an NES entitlement to 5 days unpaid FDV leave;
- (ii) The COVID-19 pandemic;
- (iii) The sharp rise in the availability of paid FDV leave in the past 5 years – a substantial proportion of the Australian workforce now has access to paid FDV leave and the provision of 10 days' paid FDV leave is an emerging industrial standard in bargaining and over-award arrangements
- (iv) Various Government initiatives to address FDV and its consequences;
- (v) The House Committee Report;
- (vi) The papers published as part of the Commission's research program and the evidence they contain;
- (vii) The expert evidence on the cost of the ACTU claim.

[983] As to matter (vii), the material before us addresses the lacuna in the evidence regarding the costs of paid FDV leave identified in the *July 2017 Majority Decision*.

[984] FDV is a ubiquitous and persistent social problem. While men can, and do, experience FDV, such violence disproportionately affects women. It is a gendered phenomenon. Since the age of 15, approximately one in 4 women (or 2.2 million women), compared to one in 13 men, have experienced at least one incident of violence by an intimate partner.

[985] FDV has a significant adverse impact on those who experience such violence. The effects of FDV are far reaching and extend beyond the individual directly affected to their families and the general community. The COVID-19 pandemic has seen an increase in the prevalence of FDV.

[986] The aggregate cost to the economy of violence against women, particularly FDV, is substantial. The SWIRLS Report estimates the impact of FDV costs employers up to \$2 billion a year.

[987] Employment is an important pathway out of violent relationships and paid FDV leave provides significant assistance to employees who experience FDV; it helps individuals to maintain their economic security; to access relevant services, and to safely exit to a life free from FDV.

[988] ACCI and Ai Group did not contest the proposition that paid FDV leave is desirable or at the very least is beneficial for some employees.

[989] ACCI accepts that there is ‘no contest’ that FDV is a ‘particularly offensive form of violence’ and that the ‘Australian system can improve its ‘systems’ for both preventing FDV and for supporting those who are affected by it’¹⁰⁰³ and that it is ‘unlikely to be contested that paid FDV leave will benefit employees experiencing FDV.’¹⁰⁰⁴

[990] Similarly, Ai Group submits that FDV is a ‘serious and pervasive social issue’, is ‘unacceptable and inexcusable’ and ‘must be strongly condemned.’¹⁰⁰⁵ Ai Group also acknowledges that ‘employers have a role to play’ in addressing FDV and submit that ‘it can readily be accepted that in some cases’ provision of additional support for employees experiencing FDV is ‘beneficial or desirable.’¹⁰⁰⁶ Indeed, Ai Group’s Federal Election Policy Statement advocated for a publicly funded FDV payment linked to the existing unpaid leave entitlement in the NES.

[991] The contested issue is *not* about whether paid FDV leave is desirable or beneficial to employees – it is about whether it is *necessary* to vary modern awards to achieve the modern awards objective by providing for paid FDV leave.

[992] ACCI and Ai Group identify various Government policy initiatives in support of their contention that it is not *necessary* to insert FDV leave terms into modern awards.¹⁰⁰⁷

[993] But, as we detail in Chapter 8.2.2, it is evident from its own policy statement that Ai Group accepts more needs to be done to respond to FDV and that persons experiencing FDV require further support. By implication, Ai Group considers that existing Government support measures are inadequate (or at least those support measures in place as at 20 February 2022 when the policy statement was released).

[994] The real issue in contention is *not* about whether there is a need to provide paid FDV leave; it is about who pays for it.

¹⁰⁰³ ACCI submissions in reply dated 4 February 2022 [2.2]–[2.3].

¹⁰⁰⁴ Ibid [8.51].

¹⁰⁰⁵ Ai Group submissions in reply dated 4 February 2022 [17(a)].

¹⁰⁰⁶ Ai Group final submissions dated 28 March 2022 [93]; [97].

¹⁰⁰⁷ See ACCI submissions in reply dated 4 February 2022 chapter 7; Ai Group details various Government responses to FDV in chapter 8 of its submissions in reply dated 4 February 2022.

[995] FDV is both a societal issue and a workplace issue. FDV has a real and tangible impact on employees and employers in the workplace.

[996] As we observed in Chapter 8.2.6, the ACTU has made good its ‘overarching premise’ advanced that FDV is a workplace issue that requires a workplace response and that paid FDV leave is a critical mechanism for employees to maintain their employment and financial security, while dealing with the consequences of FDV.

[997] We have concluded that the merits strongly favour a paid FDV leave entitlement. We have reached a *provisional* view as to the characteristics of a model FDV leave term (see Chapter 8.4). Further, at a ‘global’ level of assessment, we express our *provisional* view that the insertion of the *provisional* model FDV leave term into modern awards is necessary to achieve the modern awards objective.

[998] Finally, it is worth noting the following comment in the House Committee Report:

‘The Committee acknowledges the evidence that the rate of FDSV has not decreased over the life of the National Plan, and the rate of sexual violence is in fact increasing. In that respect – despite its success in bringing Australia’s governments together – the National Plan does not appear to have met its stated objective of a significant and sustained reduction in violence against women and their children.

The Committee also acknowledges the findings of the Auditor-General’s report into the coordination and targeting of domestic violence funding, which in the Committee’s view raises concerns about the Department of Social Services’ implementation of the National Plan.

The stark reality is that all Australian governments have much more work to do in preventing FDSV.’¹⁰⁰⁸

[999] We respectfully agree. More needs to be done to prevent FDV and more needs to be done to address the consequences of such violence. As mentioned in our discussion of the Monash Report, we accept that the introduction of paid FDV leave is not a panacea for the devastating effects of FDV; but it will provide a critical mechanism for employees to maintain their employment and financial security, while dealing with the effects of FDV.

¹⁰⁰⁸ House Committee Report [2.182]-[2.184].

11. Next Steps

[1000] This chapter sets out the next steps to be taken in the proceedings.

[1001] In Chapter 4.4 we set out the process we propose to follow in these proceedings. In brief that process is as follows:

- Step 1:** We consider the substantive merits of the ACTU's claim and whether modern awards should make further provision of FDV leave. If the merits favoured the ACTU claim, in whole or part we would express a *provisional* view as to the terms of any entitlement to FDV leave and whether that term should be inserted into modern awards on the basis that it was necessary to achieve the modern awards objective.
- Step 2:** If a *provisional* view was expressed in Step 1 then we will formulate a draft model term and provide interested parties with an opportunity to comment.
- Step 3:** The content of the model term will be finalised.
- Step 4:** Interested parties will be given an opportunity to make submissions on the *provisional* view that it is necessary, in the context of each particular modern award, to insert the model term to achieve the modern awards objective.
- Step 5:** Once a decision is made to insert the model term into particular modern awards interested parties will be given an opportunity to comment on the draft variation before it is finalised.

[1002] Plainly enough, this decision deals with Step 1.

[1003] In considering the 'Next Steps' we are conscious of issues that arose from the process adopted following the *March 2018 FDVL Decision* in which it was decided to provide 5 days' unpaid FDV leave to employees experiencing FDV. Aspects of that process are described in Chapter 1.

[1004] On the same day as the *March 2018 FDVL Decision* was published the Minister for Small and Family Business, the Workplace and Deregulation, the Hon Craig Laundy MP and the then Minister for Women, the Hon Kelly O'Dwyer MP released a joint statement announcing the Government's intention to introduce legislation amending the NES to extend the 5 days' unpaid FDV leave entitlement the Commission had determined to all workers covered by the FW Act.

[1005] On 3 May 2018, the Commission published a Statement¹⁰⁰⁹ containing a draft model term for 5 days' unpaid FDV leave. Interested parties were invited to comment on the draft model term. The final version of the model term was published on 6 July 2018 and draft

¹⁰⁰⁹ [2018] FWCFB 2440.

variation determinations varying all modern awards were issued shortly thereafter. Some 123 modern awards were subsequently varied and the new modern award entitlement to 5 days' unpaid FDV leave came into operation on 1 August 2018.

[1006] The FDV Leave Amendment Act commenced on 12 December 2018 and amended the FW Act to include an entitlement to unpaid FDV leave as part of the NES. The NES entitlement was in substantially the same terms as the model term determined by the Commission.

[1007] As there was now a NES entitlement to 5 days unpaid FDV leave, a question arose as to whether it was necessary to have a provision in modern awards in substantially the same terms. In a statement published on 11 February 2019,¹⁰¹⁰ the Commission expressed the *provisional* view that the model term be deleted from the exposure drafts produced as part of the 4 yearly review and replaced with a reference to the NES entitlement. That *provisional* view was confirmed on 25 July 2019.¹⁰¹¹

[1008] The net effect of the process adopted in respect of the 5 days' of unpaid FDV leave entitlement was to put the parties to the trouble of responding to a draft model term and an award-by-award process for the insertion of a model term into 123 modern awards, only to have that term removed after the FDV Leave Amendment Act commenced operation. Such a process expended the parties' resources and was likely to have confused the employers and employees covered by the relevant modern awards. We wish to avoid a similar outcome in these proceedings.

[1009] The adoption of the 5 step process set out above may be an exercise in futility if Parliament chose to amend the NES in light of this decision. We do not know the Commonwealth Government's attitude in this respect as it did not participate in the proceedings. We do know from the House Committee Report that the House Committee was of the view that these proceedings would provide 'a useful opportunity for evidence gathering and an evaluation of [FDV leave]' and stated:

'Given the scope of amendments to leave entitlements is a broad and complex issue that goes beyond the scope of this inquiry, the Committee defers to the pending Fair Work Commission review with regards to paid family violence leave.'¹⁰¹²

[1010] We also note that in the course of its submissions opposing the introduction of an award based FDV leave entitlement, ACCI submits:

'There is nothing distinctive about award-covered employees as compared to award-free employees relevant to their needs in relation to FDVL. As a group, award-covered employees are extraordinarily diverse and importantly *not* exclusively (or even primarily) low paid. Experience of FDV is not contingent on award-covered status and accordingly seeking to make FDVL contingent on award-coverage status seems likely to give rise to confusion, particularly where the basis for the distinction appears to be solely based on whether the Commission has jurisdiction or not.'¹⁰¹³

¹⁰¹⁰ [2019] FWCFB 767.

¹⁰¹¹ [2019] FWCFB 5144.

¹⁰¹² House Committee Report [8.223].

¹⁰¹³ ACCI final submissions dated 28 March 2022 [7.55].

[1011] We express no view as to whether the NES should be varied to provide for paid FDV leave in the terms of our *provisional* model term – that is a matter for Parliament, not the Commission. That said, clarity as to the Commonwealth Government’s intentions would plainly be of assistance.

[1012] We propose to adopt the following ‘next steps’:

1. The parties are to formulate a draft model FDV leave term based on our *provisional* views in Chapter 8.4. The formulation of such a draft term will be without prejudice to a parties’ ability to challenge any of our *provisional* views. The proposed draft model terms are to be filed by **4:00pm Friday 17 June 2022**;
2. The parties are to confer and submit draft directions in respect of the finalisation of these proceedings. Such directions are to:
 - (i) provide an opportunity for the parties to express a view on the draft model FDV leave terms proposed by other parties and the *provisional* views we express about the content of that term; and
 - (ii) provide the Commonwealth Government an opportunity to clarify its intentions regarding any amendment to the NES, should it choose to do so.

[1013] The draft directions are to be filed by no later than **4:00pm Friday 1 July 2022**.

PRESIDENT

Appearances:

Melbourne (via Microsoft teams):

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

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

Mr J Arndt on behalf of the Australian Chamber of Commerce and Industry

Hearing details:

Melbourne (via Microsoft teams).

[2022] FWCFB 2001

2022.

1 March.

8 April.

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Attachment A – NES entitlements

Subdivision CA—Unpaid family and domestic violence leave

106A Entitlement to unpaid family and domestic violence leave

- (1) An employee is entitled to 5 days of unpaid family and domestic violence leave in a 12 month period.
- (2) Unpaid family and domestic violence leave:
 - (a) is available in full at the start of each 12 month period of the employee’s employment; and
 - (b) does not accumulate from year to year; and
 - (c) is available in full to part-time and casual employees.
- (3) For the purposes of subsection (2), if an employee is employed by a particular employer:
 - (a) as a casual employee; or
 - (b) for a specified period of time, for a specified task or for the duration of a specified season;the start of the employee’s employment is taken to be the start of the employee’s first employment with that employer.
- (4) The employee may take unpaid family and domestic violence leave as:
 - (a) a single continuous 5 day period; or
 - (b) separate periods of one or more days each; or
 - (c) any separate periods to which the employee and the employer agree, including periods of less than one day.
- (5) To avoid doubt, this section does not prevent the employee and the employer agreeing that the employee may take more than 5 days of unpaid leave to deal with the impact of family and domestic violence.

106B Taking unpaid family and domestic violence leave

- (1) The employee may take unpaid family and domestic violence leave if:
 - (a) the employee is experiencing family and domestic violence; and
 - (b) the employee needs to do something to deal with the impact of the family and domestic violence; and
 - (c) it is impractical for the employee to do that thing outside the employee’s ordinary hours of work.

Note 1: Examples of actions, by an employee who is experiencing family and domestic violence, that could be covered by paragraph (b) are arranging for the safety of the employee or a close relative (including relocation), attending urgent court hearings or accessing police services.

Note 2: The notice and evidence requirements of section 107 must be complied with.

- (2) **Family and domestic violence** is violent, threatening or other abusive behaviour by a close relative of an employee that:
 - (a) seeks to coerce or control the employee; and

- (b) causes the employee harm or to be fearful.
- (3) A *close relative* of the employee is a person who:
 - (a) is a member of the employee's immediate family; or
 - (b) is related to the employee according to Aboriginal or Torres Strait Islander kinship rules.

Note: *Immediate family* is defined in section 12.

Attachment B – ACTU proposed variations – Further Amended Claim

The ACTU's Proposed Variation

Updated as at 28 March 2022

[single underlined text denotes amendments made as at 22 February 2022. See CB 849]

~~Subdivision CA – Unpaid~~ Family and domestic violence leave

406A Entitlement to family and domestic violence leave

- (1) An employee is entitled to ~~5~~ 10 days of ~~unpaid~~ paid family and domestic violence leave in a 12 month period.
- (1AA) This section does not prevent the employee and the employer agreeing that the employee may take more than 10 days of paid leave to deal with the impact of family and domestic violence.
- ~~(1A) Family and domestic violence leave is payable at an employee's ordinary hourly rate, including applicable shift loadings and penalties.~~
- ~~(1B) For a casual employee, family and domestic violence leave is payable at the rate of pay that the employer would be required to pay the employee for the hours of work in the period for which the employee was rostered, including any casual and shift loadings applicable.~~
- (2) ~~Unpaid~~ Paid family and domestic violence leave under subclause A(1) above:
- (a) is available in full at the start of each 12 month period of the employee's employment; and
 - (b) does not accumulate from year to year; and
 - (c) is available in full to part-time and casual employees.
- (3) For the purposes of subsection (2), if an employee is employed by a particular employer:
- (a) as a casual employee; or
 - (b) for a specified period of time, for a specified task or for the duration of a specified season;
- the start of the employee's employment is taken to be the start of the employee's first employment with that employer.
- (4) The employee may take ~~unpaid~~ paid family and domestic violence leave as:
- (a) a single continuous ~~5~~ 10 day period; or
 - (b) separate periods of one or more days each; or
 - (c) any separate periods to which the employee and the employer agree, including periods of less than one day.
- ~~(5) Upon exhaustion of the leave entitlement in clause X.1, employees will be entitled to up to 5 days unpaid family and domestic violence leave on each occasion for the purposes set out in Clause B(1). for the purpose of attending to activities related to the~~

~~experience of being subjected to family and domestic violence. To avoid doubt, This section does not prevent the employee and the employer agreeing that the employee may take more than 5 days of unpaid leave to deal with the impact of family and domestic violence.~~

106B Taking ~~unpaid~~ paid family and domestic violence leave

- (1) The employee may take ~~unpaid~~ paid family and domestic violence leave if:
- (a) the employee is experiencing family and domestic violence; and
 - (b) the employee needs to do something to deal with the impact of the family and domestic violence; and
 - (c) it is impractical for the employee to do that thing outside the employee's ~~ordinary~~ hours of work.

Note 1: Examples of actions, by an employee who is experiencing family and domestic violence, that could be covered by paragraph (b) ~~are~~ include arranging for the safety of the employee or a close relative (including relocation), attending urgent court hearings ~~or~~ accessing police services or attending appointments with medical, financial or legal professionals.

Note 2: The notice and evidence requirements of ~~section 107~~ must be complied with.

- (2) ***Family and domestic violence*** is violent, threatening or other abusive behaviour by a close relative of an employee or member of an employee's household that:
- (a) seeks to coerce or control the employee; and
 - (b) causes the employee harm or to be fearful.

- (3) A ***close relative*** of the employee is a person who:
- (a) is a member of the employee's immediate family; or
 - (b) is related to the employee according to Aboriginal or Torres Strait Islander kinship rules.

Note: ~~***Immediate family***~~ defined in section 12.

- (4) ***Immediate family*** means:
- (a) a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or
 - (b) a child, parent, grandparent, grandchild or sibling of a spouse or de factor partner of the employee.

C Rate of Payment

- (1) For a full-time employee, leave taken under clause A(1) shall be paid at the rate of pay the employee would otherwise have earned (including any applicable incentive-based payments and bonuses; monetary allowances; shift loadings, penalty rates, rostered overtime, allowances and other entitlements) had the employee not taken paid family and domestic violence leave.
- (2) For a part-time employee, pay for leave taken under clause A(1) will be the greater of:
- (a) the rate of pay the employee would otherwise have earned (including any applicable incentive-based payments and bonuses; monetary allowances; shift loadings, penalty rates, rostered overtime, allowances and other entitlements) had the employee not taken paid family and domestic violence leave; or

- (b) a daily rate calculated based on the average weekly pay received by the employee in the previous 6 weeks, or where the employee has been employed for less than 6 weeks, for the duration of their employment. The daily rate is calculated by dividing the employee's average weekly pay by 5.
- (3) For a casual employee with rostered or agreed hours, pay for leave taken under clause A(1) will be the rate of pay the employee would otherwise have earned (including any applicable incentive-based payments and bonuses; monetary allowances; shift loadings, penalty rates, rostered overtime, allowances and other entitlements) had the employee not taken paid family and domestic violence leave.
- (4) For all other casual employees, a daily rate calculated based on the average weekly pay received by the employee in the previous 6 weeks, or where the employee has been employed for less than 6 weeks, for the duration of their employment. The daily rate is calculated by dividing the employee's average weekly pay by 5.

D Additional entitlement to unpaid family and domestic violence leave

- (1) Upon exhaustion of the leave entitlement in clause A(1), employees will be entitled to up to 5 days unpaid family and domestic violence leave on each occasion for the purposes set out in Clause B(1). ~~for the purpose of attending to activities related to the experience of being subjected to family and domestic violence~~
- (2) This section does not prevent the employee and the employer agreeing that the employee may take more than 5 days of unpaid leave to deal with the impact of family and domestic violence.

106E Confidentiality

- (1) Employers must take steps to ensure information concerning any notice or evidence an employee has given under ~~section 107~~ clause G of the employee taking leave under this ~~Subdivision~~ clause is treated confidentially, as far as it is reasonably practicable to do so.
- (2) Nothing in this ~~Subdivision~~ clause X prevents an employer from disclosing information provided by an employee if the disclosure is required by an Australian law or is necessary to protect the life, health or safety of the employee or another person.

Note: Information covered by this ~~section~~ clause that is personal information may also be regulated under the *Privacy Act 1988*.

106F Operation of ~~unpaid~~ family and domestic violence leave and leave for victims of crime

- (1) ~~This Subdivision does not exclude or limit the operation of a law of a State or Territory to the extent that it provides for leave for victims of crime.~~

- (1) If an employee who is entitled, under a law of a State or Territory, to leave for victims of crime is also entitled to leave under this ~~Subdivision clause~~, that law this clause applies in addition to ~~this Subdivision that law~~.
- (3) A person who is a national system employee only because of section 30C or 30M of the *Fair Work Act* is entitled to leave under this ~~Subdivision clause~~ only to the extent that the leave would not constitute leave for victims of crime.

106G Entitlement to days of leave

What constitutes a day of leave for the purposes of this ~~Subdivision clause~~ is taken to be the same as what constitutes a day of leave for the purposes of section 85 and Subdivisions B and C of the *Fair Work Act*.

107G Notice and evidence requirements

Notice

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

Evidence

- (3) An employee who has given his or her employer notice of the taking of leave under this ~~Division clause~~ must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the employee has met the requirement in subclauses B(1)(a) and (c), and the leave is taken for the purpose in subclause B(1)(b).
 - ~~(a) if it is paid personal/carer's leave — the leave is taken for a reason specified in section 97; or~~
 - ~~(b) if it is unpaid carer's leave — the leave is taken for a permissible occasion in circumstances specified in subsection 103(1); or~~
 - ~~(c) if it is compassionate leave — the leave is taken for a permissible occasion in circumstances specified in subsection 105(1); or~~
 - ~~(d) if it is unpaid family and domestic violence leave, and the employee has met the requirement specified in paragraph 106B(1)(a) — the leave is taken for the purpose specified in paragraph 106B(1)(b), and the requirement specified in paragraph 106B(1)(c) is met.~~

Compliance

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

~~Modern awards and enterprise agreements may include evidence requirements~~

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

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

Attachment C – Research Reference List

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Attachment D

State-based approaches to FDV leave: An overview of state government public sector policies and agreements is presented in this section.¹¹¹⁹

New South Wales – Applies to NSW Government Sector employees – Department of Premier and Cabinet Circular C2020-07 (NSW Government, 2019) – <i>Government Sector Employment Act 2013</i> (NSW)		
FDV leave entitlement	Conditions	Other provisions
10 days paid FDV leave per calendar year	<ul style="list-style-type: none"> Available to both ongoing and temporary employees Can be accessed without the need to exhaust other existing leave entitlements first. Non-cumulative Can be taken in part-days, single days, or consecutive days 	<ul style="list-style-type: none"> Flexible working arrangements Changes to an employee's work location, work station, or contact details Increased security measures including secure parking and support from security staff Counselling support service (via EAP)
Western Australia – Applies to WA Public Sector employees – Premier's Circular 2017/07 – Model clause, to be incorporated into public sector industrial instruments as they are replaced. (WA Premier, 2017)		
FDV leave entitlement	Conditions	Other provisions
10 days paid FDV Leave per year (+ up to two days unpaid FDV leave)	<ul style="list-style-type: none"> Non-cumulative In addition to existing leave entitlements. May be taken as whole or part days off. 	<ul style="list-style-type: none"> Flexible work arrangements and safety plan agreements Access to employer sponsored confidential counselling services
South Australia – Applies to employees in the Public Service and public sector employees. – Determination of the Commissioner for Public Sector Employment - 3.1 Employment Conditions – Public Sector Regulations 2010 - Regulation 9(8) (SA Commissioner for Public Sector Employment Public, 2020)		
FDV leave entitlement	Conditions	Other provisions
up to 15 days special leave with pay	<ul style="list-style-type: none"> In addition to the general 15 days special leave with pay allowance for special purposes In addition to any other existing leave entitlements May be taken as consecutive or single days or hours 	<ul style="list-style-type: none"> Flexible work arrangements Safety planning to address risk in (and to/from) the workplace
Victoria – Applies to employees of Victorian Public Service Departments and Agencies. – Victorian Public Service Enterprise Agreement 2016 - Clause 48 (State of Victoria, 2019)		
FDV leave entitlement	Conditions	Other provisions

¹¹¹⁹ SWIRLS Report, table on pp8.

Up to 20 days of paid special leave per year	<ul style="list-style-type: none"> • Not cumulative • In addition to existing leave entitlements • May be taken as consecutive or single days or as a fraction of a day. • Consideration will be given to providing additional leave if/once the leave is exhausted • Can be taken without prior approval 	<ul style="list-style-type: none"> • Temporary or ongoing changes to work hours, patterns or shifts, job design or duties, relocation, & contact details • Counselling support service (via EAP) • Provision of information regarding current support services
Queensland <ul style="list-style-type: none"> – Applies to Queensland public service employees – Commission Chief Executive and Minister for Industrial Relations Directive – 03/20 (Queensland Government, 2020) – <i>Public Service Act 2008</i> (Sections 53 to 54A, 55) – Included in the Queensland Employment Standards provisions of the <i>Industrial Relations Act 2016</i> (sections 52 – 54) 		
FDV leave entitlement	Conditions	Other provisions
Minimum of 10 days paid leave per year	<ul style="list-style-type: none"> • No requirement to provide supporting documentation • Can be accessed without the need to exhaust other existing leave entitlements • May be taken as consecutive days, single days or a fraction of a day • Also available for purpose of supporting a person affected by FDV 	<ul style="list-style-type: none"> • Access to flexible working arrangements • Risk assessments and actions to address workplace safety needs (such as increased security measures) • Temporary or ongoing support and reasonable workplace adjustments • Counselling support service (via EAP)
Northern Territory <ul style="list-style-type: none"> – Applies to NT Public Sectors employees – Public Sector Employment and Management By-laws, Office of Commissioner for Public Employment – Miscellaneous Leave for Domestic and Family Violence purposes (By-law 18) (Northern Territory Government, n.d.) 		
FDV leave entitlement	Conditions	Other provisions
Leave with pay (unspecified)	None specified	<ul style="list-style-type: none"> • Various flexible work options including part-time work, Leave Without Pay, Recreation Leave at half pay, Long Service Leave at half pay, Personal Leave • Employee Assistance Program (EAP)
Australian Capital Territory <ul style="list-style-type: none"> – Applies to ACT Public Sector (ACTPS) employees – ACTPS Enterprise Agreements (ACT Government, 2019) 		
FDV leave entitlement	Conditions	Other provisions
Maximum of 20 days / shifts per calendar year	<ul style="list-style-type: none"> • Ongoing employees only • Casual employees entitled to unpaid FDV leave only 	—
Tasmania <ul style="list-style-type: none"> – Applies to Tasmanian State Service employees – Employment Direction pursuant to the <i>State Service Act 2000</i> - Section 17 (Tasmanian Government, 2013) 		
FDV leave entitlement	Conditions	Other provisions
Access to accrued personal leave entitlements	<ul style="list-style-type: none"> • May access their accrued personal leave at short notice, or without prior notice provided that notice is given at the earliest opportunity. 	<ul style="list-style-type: none"> • Access to flexible working arrangements • Employee Assistance Program (EAP)

	<ul style="list-style-type: none">• Paid special leave may be granted for an employee who has exhausted their full pay personal leave entitlements	
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Attachment E – Principal Findings

Prevalence of FDV

1. FDV is ubiquitous. While men can, and do, experience FDV, such violence disproportionately affects women. It is a gendered phenomenon.¹¹²⁰
2. The COVID-19 pandemic has seen an increase in the prevalence of FDV.

Impact of FDV

3. FDV has a significant adverse impact on those who experience such violence. The effects of FDV are far reaching and extend beyond the individual directly affected to their families and the general community. Family violence can also exacerbate existing mental health problems and increase the risk of subsequent depression.¹¹²¹
4. Employees who experience FDV often face financial difficulties as a result, such as relocation costs or becoming a sole parent, and may suffer economic harm as a result of disruption to workplace participation.¹¹²²
5. FDV has a real and tangible impact on employees and employers in the workplace.
6. FDV is both a cause and consequence of gender inequality. Women who are experiencing or have experienced FDV have a more disrupted work history, are on lower personal incomes, have had to change jobs frequently, and are more likely to be employed in casual and part-time work, than women with no experience of violence.¹¹²³
7. Employment is an important pathway out of violent relationships. Sustained periods of employment can provide financial security, independence, social networks and increased self-esteem.

Prevalence of paid FDV leave arrangements

8. The provision of 10 days' paid FDV leave is an emerging industrial standard in bargaining and over-award arrangements. There has been a sharp rise in the availability of paid FDV leave in the past 5 years. A substantial proportion of the Australian workforce now has access to paid FDV leave. Where employees are able to access paid FDV leave, it is relatively common for 10 days' paid leave to be provided.

¹¹²⁰ ABS (2017) '2016 Personal Safety Survey'.

¹¹²¹ Lum M et al (2016), *Examination of the health outcomes of intimate partner violence against women: State of knowledge paper*, Australia's National Research Organisation for Women's Safety p.20.

¹¹²² *March 2018 FDVL Decision* [65].

¹¹²³ McFerran L (2011) 'Safe at Home, Safe at Work', National Domestic Violence and the Workplace Survey, Australian Domestic and Family Violence Clearinghouse, A Project of the Centre for Gender-Related Violence Studies and Micromex Research, University of New South Wales p.2.

The utility of paid FDV leave

9. Paid FDV leave provides significant assistance to those experiencing FDV. Such leave helps individuals to maintain their economic security, to access relevant services, and to safely exit to a life free from violence.
10. The introduction of paid FDV leave will be of some benefit to employers. Employers are already paying the cost of FDV through increased absenteeism and lost productivity. Paid FDV leave will assist in reducing that cost. But the evidence before us is insufficient to quantify that benefit with any level of confidence or to conclude that the benefits would ‘largely offset’ the cost.
11. Varying modern awards in accordance with the *provisional* model term in Chapter 8.4 would have no significant adverse impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.
12. For some employers, particularly those who do not currently provide paid FDV leave, the employment costs may be significant depending on the number of employees who access the entitlement and the number of days of paid leave they take. The utilisation rate of a 10-day paid FDV leave entitlement is likely to be low which suggests that such costs are unlikely to be substantial.