

## **FAIR WORK COMMISSION**

### ***Fair Work Act 2009* (Cth)**

### **AM2021/55: Family and Domestic Violence Leave Review**

## **Family and Domestic Violence Leave – Review**

### **Outline of Submissions of the ACTU**

#### **A Introduction and Overview**

1. In March 2018, the Full Bench of the Fair Work Commission (**FWC**) determined to include in all modern awards an entitlement to five days unpaid family and domestic violence (**FDV**) leave. The new modern award entitlement came into operation on 1 August 2018. In December 2018, the Commonwealth Parliament amended the *Fair Work Act 2009* (Cth) (**FW Act**) to include as part of the National Employment Standards (**NES**) a right to five days unpaid FDV leave, in terms substantially the same as the modern award model term.<sup>1</sup> The modern award term was replaced, in July 2019, with a note referring to the NES entitlement. The effect of these changes is that since August 2018, all 2.23 million modern-award covered employees<sup>2</sup> have had a right to five days unpaid FDV leave; and from December 2018, that right has been expanded to cover all national system employees.
2. The FWC determined, in March 2018, that it would review the model term after three years' operation, to consider the following three issues:
  - (1) whether employees should be able to access paid personal/carer's leave for the purpose of taking family and domestic violence leave;
  - (2) whether any changes are needed to the unpaid model leave term; and
  - (3) whether provisions should be made for paid family and domestic violence leave.

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<sup>1</sup> Sections 106A–E and 107 of the FW Act.

<sup>2</sup> Australian Bureau of Statistics (**ABS**), *Employee Earnings and Hours*, May 2018.

## A.1 Summary of the ACTU's position

3. The ACTU's position on the three issues for consideration are as follows:

- (a) as to the first issue, the FWC does not have jurisdiction to vary modern awards to provide that employees should be able to access paid personal/carer's leave for the purpose of taking FDV leave, and should not do so in any event, because the operational effect of the term would be detrimental to employees in that the minimum entitlement to 10 days paid personal/carer's leave would be reduced;
- (b) as to the second issue, no changes are needed to the unpaid model leave term as it was removed from modern awards on 25 July 2019; and
- (c) as to the third issue, provisions should be made for 10 days paid FDV leave. Paid leave is necessary to ensure that employees are provided with a fair and relevant safety net of minimum terms and conditions of employment. The ACTU seeks a variation to modern awards in the terms at **Annexure A** to these submissions.

## A.2 Background

4. In 2014, as part of the four yearly review of modern awards, the ACTU applied under s 156 of the FW Act to vary all modern awards to include an entitlement to 10 days per year of paid FDV leave (**2014 application**). On 3 July 2017, the majority of the Full Bench published its decision which contained the preliminary view that it was necessary to make provision for FDV leave in modern awards (*Re 4 Yearly Review of Modern Awards – Family and Domestic Violence Leave Clause* (2017) 267 IR 576 (**Majority Decision**)). On 26 March 2018, the FWC determined that it was necessary to vary all modern awards to include a new entitlement to five days unpaid FDV leave (*Re 4 Yearly Review of Modern Awards – Family and Domestic Violence Leave* (2018) 276 IR 1 (**2018 Decision**)). A model term, which had previously been the subject of discussion and compromise between the ACTU and employer representatives, was inserted into all modern awards, effective 1 August 2018 ([2018] FWCFB 3936).

5. In the 2018 Decision, the FWC stated:

[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.

6. On 13 December 2018, the FW Act was amended to include an entitlement to unpaid family and domestic violence leave as part of the NES. The NES entitlement (**Annexure B**) was in substantially the same terms as the model term. Subsequently, on 25 July 2019, the FWC determined to remove the modern award term, and replace it with a note referring to the NES entitlement (at **Annexure C**).

**B. First issue: should employees be able to access paid personal/carer's leave for the purpose of taking family and domestic violence leave?**

7. It is not open to the FWC to extend the NES entitlement to paid personal/carer's leave to incorporate domestic violence leave because:
  - (a) the inclusion of a term in modern awards which expands the right of access to personal/carer's leave for purposes other than personal injury or illness potentially excludes, within the meaning of s 55(1) of the FW Act, the minimum NES entitlement to 10 days personal or carer's leave;
  - (b) a term in modern awards which expands the right of access to personal/carer's leave for purposes other than personal injury or illness is not 'ancillary' or 'incidental' or 'supplemental' to the NES entitlement within the meaning of s 55(4) of the FW Act;
  - (c) even if the proposed term did not exclude the NES, or was properly characterised as ancillary, incidental, or supplemental to a NES entitlement, the operational effect of the term would be detrimental to employees in that the minimum entitlement to 10 days paid personal/carer's leave would be reduced.
8. The FWC has power to vary a modern award or awards under s 157 where it is satisfied (1) that the proposed term is a permitted term within the meaning of s 139 of the FW Act;<sup>3</sup> and (2) the proposed term does not contravene s 55 of the FW Act.<sup>4</sup>
9. In addition to these matters, the FWC must also ensure that modern awards, together with the NES, meet the modern awards objective in s 134(1), and that the modern award contains only terms which are necessary to meet the modern awards objective, per s 138. Sections

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<sup>3</sup> Per s 136(1)(a) of the FW Act.

<sup>4</sup> Per s 136(2)(b) of the FW Act.

136(1)(b)–(d) and 136(2)(a) provide further guidance on what terms may be included in modern awards. Given the ACTU’s position that a term which extends the NES entitlement to incorporate FDV leave would contravene s 55 of the FW Act, the ACTU has not addressed these additional statutory criteria.

10. The first criterion above is easily dealt with. Section 139(1)(h) provides that a modern award may include terms about leave and arrangements for taking leave. Accordingly, the inquiry shifts to whether the proposed term contravenes s 55 of the FW Act.

### **B.1 The legislative provisions**

11. An assessment of whether the FWC has jurisdiction to vary a modern award to expand the circumstances in which an employee can access personal/carer’s leave involves the exercise of statutory construction.
12. The principles concerning statutory construction are uncontroversial. Legislation should be interpreted consistently with the intention of Parliament in enacting it. This is achieved by beginning with a consideration of the text itself and applying the literal, or ordinary and natural, meaning of the words<sup>5</sup> unless that interpretation would produce an absurd result, or a result inconsistent with the rest of the instrument. In cases where the literal approach would produce such an absurdity, inconsistency or ambiguity, the common law method entails identification of the purpose of the legislation<sup>6</sup> and interpretation of the words of the statute in a way consistent with that purpose.
13. The use of extrinsic materials is permissible in the interpretation of legislation either to confirm the ordinary meaning of the provision taking into account the purpose of the legislation; or to determine the meaning of the provision where the text is obscure, ambiguous or may lead to an absurdity.<sup>7</sup> What this means in practice is that where the meaning of a provision is ascertainable by reference to the natural and ordinary meaning of the words employed without the use of extrinsic materials, then the use of extrinsic material is limited to confirming that interpretation.<sup>8</sup>
14. Access to personal and carer’s leave is provided for in the NES. An employee other than a casual employee is entitled to paid personal/carer’s leave of 10 days per year for each year of

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<sup>5</sup> *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27, [45]–[51]; see also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [69], [78].

<sup>6</sup> Consistent with s 15AA of the *Acts Interpretation Act 1901* (Cth).

<sup>7</sup> *Acts Interpretation Act 1901* (Cth) s 15AB.

<sup>8</sup> See *Re Australian Federation of Construction Contractors; Ex parte Billing* (1986) 68 ALR 416, 420.

service.<sup>9</sup> The entitlement to take personal or carer's leave arises if any of the circumstances in s 97 are met:

### **97 Taking paid personal/carer's leave**

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

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

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.

15. Further, an employee is entitled to two days of unpaid carer's leave for each occasion when a member of the employee's immediate family, or a member of the employee's household, requires care or support for the same reasons set out in s 97(b) of the FW Act.<sup>10</sup>
16. The interaction between modern awards and the National Employment Standards are governed by ss 55–56 of the FW Act. Section 55 sets out the rules concerning the interaction between the NES and modern awards and enterprise agreements. A term of a modern award that contravenes s 55 has no effect.<sup>11</sup>

#### (1) A modern award must not exclude the NES: s 55(1)

17. Section 55(1) of FW Act provides:

**55(1)** A modern award ... must not exclude the National Employment Standards or any provision of the National Employment Standards.

18. The meaning of "exclude" in s 55(1) of the FW Act was considered by a five-member Full Bench in *Canavan Building Pty Ltd* [2014] FWCFB 3202 (*Canavan*).
19. The Full Bench considered whether an enterprise agreement contravened s 55(4) of the FW Act by including a clause providing for annual leave to be paid "*progressively in advance*" and "*incorporated into the [hourly] wage rate*" prescribed by the agreement.<sup>12</sup>

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<sup>9</sup> FW Act, s 96(1).

<sup>10</sup> FW Act, s 102.

<sup>11</sup> FW Act, s 56.

<sup>12</sup> Clause 41 of the agreement is set out in full in *Re Canavan Building Pty Ltd* [2014] FWCFB 3202, [6].

20. The Full Bench held that an offending term need not expressly exclude the NES in order to fall foul of s 55(1). The ordinary meaning of the language used in s 55(1) of the FW Act meant 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*”, then the provision would constitute a prohibited exclusion of the NES.<sup>13</sup> The Full Bench found that the specific clause proposed by Canavan Pty Ltd contravened s 55(1) of the FW Act because it excluded the entitlement to ‘paid annual leave’ in s 87, and the requirement in s 90(1) that payment be made at the base rate of pay for the employee’s ordinary hours of work ‘in the period’ at which the employee takes annual leave.<sup>14</sup> In subsequent applications of *Canavan*, the test has been described as an assessment of whether the proposed term will “*negate the effect*” of the NES entitlement.<sup>15</sup> On either iteration, the assessment is the same: will the minimum entitlement be reduced by the operation of the proposed term?
21. Applying *Canavan* to the question presently before the FWC reveals that any expansion of the circumstances in which an employee can access paid personal/carer’s leave would have the effect of reducing the minimum NES entitlement to 10 days paid personal/carer’s leave and therefore deny the employee the full benefit of the NES entitlement in s 97 of the FW Act.<sup>16</sup> For example, assume that a full-time employee is subject to domestic violence. She accesses three days of her personal leave to move house and seek an intervention order against her former partner. Later that year, she has the flu and takes four days off; her children then get sick and she needs to stay at home with them for six days. Her minimum entitlement is to 10 days paid personal/carer’s leave, but she is unable to receive the full benefit of the minimum entitlement because her leave balance has been depleted by circumstances which would not otherwise meet the criteria in s 97 of the FW Act.

(2) A modern award can include ancillary, incidental, or supplementary terms to the NES: s 55(4)

22. In case we are wrong about the exclusionary effect of the proposed term, we have also considered whether the proposed term can be characterised as a permissible term within the

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<sup>13</sup> *Canavan*, [36]; cited with approval in *Construction, Forestry, Maritime, Mining and Energy Union v OS ACPM Pty Ltd* (2020) 296 IR 351, [84]; *4 Yearly Review of Modern Awards – Plain language re-drafting* [2019] FWCFB 5145, [33]; *Construction, Forestry, Maritime, Mining and Energy Union* [2018] FWCFB 4429, [21]; *Loaded Rates Agreements* [2018] FWCFB 3610, [140].

<sup>14</sup> Although the decision in *Canavan* concerned a proposed term in an enterprise agreement, the principles are equally applicable to a term proposed in modern awards, because ss 55(1) and 55(4) of the FW Act apply to both enterprise agreements and modern awards. See also *4 Yearly Review of Modern Awards – Real Estate Industry Award 2010* [2017] FWCFB 3543, where the Full Bench stated that *Canavan* was also applicable to the terms of modern awards: at [118].

<sup>15</sup> *Per Re 4 Yearly Review of Modern Awards – Alleged NES Inconsistencies* (2015) 249 IR 358, [37].

<sup>16</sup> Although the Full Court did not refer to *Canavan* in its decision, this is consistent with the approach of the Full Court of the Federal Court in *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union* (2015) 231 FCR 298, [38].

meaning of s 55(4)(a) and (b), and if so, whether the term would have a detrimental effect when compared with the NES entitlement.

23. Section 55(4) of the FW Act relevantly provides:

**55(4)** A modern award ... 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.

24. The terms “ancillary”, “incidental”, and “supplemental” are not defined terms in the FW Act. Consistent with the approach to statutory interpretation set out above, it is appropriate that the words of the statute be given their ordinary or natural meaning.

25. Applying the *Macquarie* dictionary<sup>17</sup> definitions in each instance, a term will be *ancillary* to the operation of an entitlement of an employee under the NES if it is subsidiary or subordinate or in some way ‘helps’ the operation of the NES entitlement. A term will be *incidental* to the operation of a NES entitlement if it is “*liable to happen in connection with*” the operation of the term or is “*naturally appertaining to*” the operation of the term. A term which expands the circumstances in which an employee can access personal/carer’s leave does not sit comfortably with the meaning of *ancillary or incidental to the operation of s 97* of the FW Act.

26. A term will *supplement* a NES entitlement where it adds to complete a particular entitlement, supplies a deficiency, or reinforces or extends an entitlement. It is arguable that a term expanding the circumstances in which personal/carer’s leave can be deployed could be characterised as supplementary to the NES. There is some support for this interpretation. In *4 Yearly Review of Modern Awards – Annual Leave* [2015] FWCFB 5771, the Full Bench held that a proposed clause could properly be characterised as a term which supplemented the NES entitlement to annual leave, because it “***extended the circumstances in which an employer must comply with an employee’s request to take paid annual leave***”.<sup>18</sup> But that is not the end of the matter; the supplementary term must not be detrimental in operation to the employee.

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<sup>17</sup> The *Macquarie Dictionary* (5<sup>th</sup> ed, 2009).

<sup>18</sup> [2015] FWCFB 5771, [129]. Emphasis added.

(3) A modern award may not include supplementary terms where the effect of such terms is detrimental to the employee when compared to the NES: s 55(4)

27. The proper approach to the assessment of whether a supplementary term of a modern award is ‘detrimental’ to an employee within the meaning of s 55(4) is to measure the modern award term against the specific NES entitlement which the term is said to supplement.<sup>19</sup> Once the relatively straightforward step of identifying the correct comparator has been taken, the assessment of whether the modern award term has a detrimental effect to the employee is undertaken by applying the *Canavan* test, per *Australian Federation of Air Pilots v HNZ Australia Pty Ltd* [2015] FWCFB 3124. In that case, the Full Bench considered a clause in an enterprise agreement which mandated that a touring pilot take annual leave during part of a roster cycle. Section 88 of the FW Act provides that employees and employers may agree when an employee will take annual leave, and that an employer must not reasonably refuse an employee’s request. The Full Bench cited *Canavan* in support of its finding that the proposed clause “was not a term permitted by ... s 55(4) of the Act”, because it had the effect of depriving a touring pilot of the opportunity of reaching agreement with HNZ about when annual leave may be taken, which in turn denied employees the full benefit of s 88 of the Act.<sup>20</sup>
28. Taking the same example described in paragraph 21 above, it follows that a modern award term which expands the circumstances in which an employee can use their personal/carer’s leave beyond that prescribed by s 97 of the FW Act offends the prohibition in s 55(4) of the FW Act.

**C. Second issue: are any changes needed to the unpaid model leave term?**

29. The unpaid leave model term was removed from modern awards on 25 July 2019. Accordingly, this question is no longer applicable.
30. The unpaid leave model term was discussed at a series of conferences of union and employer representatives held in October 2017. While the parties disagreed on the quantum of the leave (5 v 10 days) and the nature of the leave that should be available (paid v unpaid); a compromise position was reached on the ‘machinery’ elements of the model term, including definitions, notice and evidence requirements, and privacy obligations.<sup>21</sup> The ‘machinery’

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<sup>19</sup> *Australian Rail, Tram and Bus Industry Union; Australian Municipal, Administrative, Clerical and Services Union v Australian Rail Track Corporation* [2013] FWC 6861, [47], [50].

<sup>20</sup> *Australian Federation of Air Pilots v HNZ Australia Pty Ltd* [2015] FWCFB 3124, [29]–[30] and see [6], [14].

<sup>21</sup> [2017] FWC 5445.

elements of the model term are in similar terms to those now contained in ss 106A–E and 107 of the FW Act.

31. The ACTU considers that a new provision should be added to all modern awards providing for 10 days paid FDV leave in the form set out at Annexure A to these submissions. For ease of reference, the proposed variation is drafted as an amended version of ss 106A–E and 107 of the FW Act. The variation is discussed in detail in the following section.

## **D. Third issue: should provisions be made for paid family and domestic violence leave?**

### **D.1 The variation application**

32. The proposed variation is in terms substantially the same as the current NES entitlement, with the following differences:
  - (a) Ten days paid leave is provided: A(1).
  - (b) Leave is payable at an employee’s ordinary hourly rate including applicable shift loadings and penalties: A(1A) and (1B).
  - (c) For a casual employee, 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: A(1B).
  - (d) Upon exhaustion of the paid leave entitlement, employees will be entitled to up to five days unpaid FDV leave on each occasion for the purpose of attending to activities related to the experience of being subjected to family and domestic violence: A(5).
  - (e) While the purposes for which an employee may take family and domestic violence leave are unchanged, the ACTU proposes an addition to the Note in B(1) to clarify that attending appointments with medical, financial or legal professionals are examples of actions that may be covered by the provision.
  - (f) The definition of family and domestic violence leave has been expanded to include violent, threatening or abusive behaviour by a close relative of an employee *or member of a person’s household*: B(2).

### **D.2 The statutory framework**

33. This review has been commenced by the FWC of its own motion. The FWC may vary a modern award or awards if it is satisfied that the variation is necessary to achieve the modern

awards objective, per s 157(1) of the FW Act. 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*”, taking into account the factors in s 134(1)(a) to (h).

34. The principles applicable to the exercise of power under s 157 are well established, and were recently summarised by the Full Bench in *Application to vary the Real Estate Industry Award 2020* [2020] FWCFB 3946 (Hatcher VP, Asbury DP, Spencer C) as follows:<sup>22</sup>

[54] The modern awards objective is very broadly expressed. It is a composite expression which requires that modern awards, together with the National Employment Standards (NES), provide a fair and relevant minimum safety net of terms and conditions, taking into account the matters in s 134(1)(a)–(h). Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question. 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. No particular primacy is attached to any of the s 134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[55] It is not necessary to make a finding that the award fails to satisfy one or more of the s 134 considerations as a prerequisite to the variation of a modern award. 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. In giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s 134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

[56] What is “*necessary*” to achieve the modern awards objective in a particular case is a value judgment, taking into account the s 134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence. It is also the case that where variations are not self-evident, an applicant seeking a change, must adduce probative evidence to support the contention that the variations are necessary to achieve the modern awards objective.

(citations omitted).

### **D.3 The evidence filed by the ACTU**

35. The ACTU will call on evidence from the following witnesses:

#### *Expert witnesses*

- (a) Professor Alan Duncan from the Bankwest Curtin Economic Centre, Curtin University, WA.

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<sup>22</sup> See also the detailed discussion in the 2018 Decision of the exercise of the FWC’s powers to vary a modern award, particularly concerning the modern awards objective, at [45]–[56], and [58]–[63].

- (b) Dr James Stanford, economist, and director of the Centre for Future Work, at the Australia Institute, ACT.

*Lay witnesses*

- (c) Gabrielle Craig, Assistant Principal Solicitor, Women's Legal Service, NSW.
  - (d) Marianne Crowe, a registered nurse at St Vincent's Hospital, Melbourne, Victoria.
  - (e) Stacey Davies, an Organiser at the United Workers' Union in Melbourne, Victoria, working in the early childhood education and care team.
  - (f) Carla Jones, Principal Industrial and Women's Officer of the Rail, Tram and Bus Union, Queensland Branch.
  - (g) Dr Victoria Jones, Head of the Medical Unit at the Women's Health Service, South Australia.
  - (h) Terese Kingston, a Service Support Worker at the Domestic Violence Resource Service in Mackay, Queensland.
  - (i) Tess Oxley, a paramedic in Sydney, NSW.
  - (j) Samantha Parker, Assistant Manager at the Women's Domestic Violence Court Advocacy Service, in the Blue Mountains, NSW.
  - (k) Penny Spalding, Assistant Secretary of the Queensland Teachers' Union.
  - (l) Kelly-ann Tansley, Director of Client Services and Deputy CEO of DV Connect, Queensland.
  - (m) Karyn Walsh, CEO of Micah Projects, Queensland.
36. The evidence to be called from Professor Duncan contains an estimate of the cost of providing paid FDV leave. Professor Duncan's estimates, based on different assumptions as to utilisation rates, range from between \$13.1 million and \$34.3 million. Dr Stanford's report examines the evidence to date about utilisation rates of existing paid FDV leave provisions, which are estimated at extremely low levels.
37. The ACTU will also call evidence from a significant range of professionals who provide support and services to persons who experience family and domestic violence. Their

observations, drawn from the aggregate experience of their professional lives, should carry considerable weight.

38. An outline of the findings to be drawn from the evidence relied on by these witnesses is set out in Part D.5 below.

#### **D.4 FWC Research and Research Reference List**

39. In order to assist the review, the FWC is conducting a research program, which comprises a literature and data review, analysis of the Workplace Agreements Database (**WAD**), a qualitative assessment of the experience of FDV leave, and a survey of employers. The research program is ongoing and has not been completed.

##### (1) Literature and Data Review

40. This is a review of literature and data examining the prevalence and impacts of family and domestic violence. The review may also consider state-based approaches to FDV leave. The FWC has engaged the Social Work Innovation Research Living Space (**SWIRLS**) at Flinders University to undertake the research program.
41. On 12 July 2021, the FWC published a list of research questions intended to direct the review (at [8]). The ACTU and the Australian Chamber of Commerce and Industry (**ACCI**) filed submissions in respect of the research questions on 19 July 2021. The FWC has indicated that each party's submissions will be conveyed to SWIRLS ([2021] FWCFB 4465, [5], [9]).

##### (2) Analysis of the Workplace Agreements Database

42. This analysis is intended to update evidence filed by AI Group in the earlier proceedings concerning the number of enterprise agreements that contain provisions for FDV leave. It will analyse terms in enterprise agreements dealing with FDV leave. The FWC has engaged SWIRLS to conduct this analysis. Further details of the proposed WAD analysis will be provided shortly ([2021] FWCFB 4465, [10]).
43. Part of the evidence of Dr Stanford (at [23]–[48]) draws on analysis of the terms of enterprise agreements dealing with FDV leave. Those parts of Dr Stanford's evidence may be reviewed following receipt of the WAD analysis conducted by SWIRLS.

### (3) Qualitative assessment of the experience of FDV leave

44. This will comprise qualitative research examining employee's experience of family and domestic violence by exploring their interaction with the various support services and systems. It will be conducted by the Monash Gender and Family Violence Prevention Centre.
45. The research will be conducted in two phases: (1) a national survey designed to gain insight into the workplace experiences of individuals with lived experience of family and domestic violence. The survey will be designed to collect both qualitative and quantitative data; and (2) supplementary to the survey, interviews with individual victim/survivors to gain more detailed insight into their views and experiences of accessing family violence leave and workplace supports ([2021] FWCFB 4465, [11]–[13]).

### (4) Employer survey

46. The FWC will conduct a survey of employers seeking information on the use and operation of the unpaid FDV leave entitlement. The draft survey, designed by FWC staff, was published on 23 April 2021. Interested parties have been asked to provide any comment on a draft of the survey by 4 August 2021.

## **D.5 Key propositions and evidentiary findings in support of paid leave**

47. The following section sets out the propositions and findings that the ACTU contends should be drawn from the evidence filed by it. However, because the FWC's research program, which the ACTU anticipates will contain valuable evidence relevant to its proposed variation, is not yet complete and available to the ACTU, these submissions are necessarily preliminary. The ACTU will file written submissions following the hearing of the evidence in accordance with any directions of the FWC.
48. The overarching proposition in support of the application is that the existing entitlements provided by the current regulatory framework do not meet the needs of employees who experience family and domestic violence. The creation of a workplace right to five days unpaid FDV leave was an important first step in ensuring that employees who need to take time off work to deal with the effects of family and domestic violence are able to do so without immediate threat to their security of employment. However, the safety net remains inadequate to meet the needs of those employees.
49. In the 2018 Decision, the Full Bench recognised that retaining employment is an important pathway out of violent relationships, whereas a lack of financial security has an adverse

impact on the ability to recover from family and domestic violence.<sup>23</sup> Financial security, in the form of paid leave for all employees, is critical for employees who need to do something to deal with the impact of family and domestic violence. The situation is particularly acute for award-covered employees, who are among the lowest paid workers in Australia, and where a person is seeking to leave a violent relationship or situation. The evidence demonstrates that security of income can be the difference between staying or leaving.

(1) Family and domestic violence is ubiquitous in Australia

50. The prevalence of family and domestic violence was the subject of considerable evidence led by the ACTU in the hearing of the 2014 application. In the 2018 Decision, the FWC made a number of findings based on that evidence about the extent and prevalence of family and domestic violence,<sup>24</sup> including that one in four women in Australia have experienced some form of family and domestic violence since the age of 15.<sup>25</sup> The ACTU continues to rely on that evidence, and the findings of the Full Bench.
51. Most recently, in March 2021, the House of Representatives Standing Committee Inquiry into family, domestic and sexual violence against women 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*”.<sup>26</sup>
52. A 2019 report of the Australian Government’s Institute of Health and Welfare explored the impact of family, domestic and sexual violence on particular groups and made findings including that:
- (a) In 2017–18, 22 per cent (26,500) of clients seeking specialist homelessness services as a result of family or domestic violence were children aged 0–9.
  - (b) People with disability were 1.8 times as likely to have experienced physical and/or sexual violence from a partner in the previous year, compared with people without disability.

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<sup>23</sup> 2018 Decision at [102], [283] and [303].

<sup>24</sup> 2018 Decision, [68]–[107].

<sup>25</sup> 2018 Decision, [80].

<sup>26</sup> House Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into Family, Domestic and Sexual Violence Against Women* (2021) at [2.27] – [2.46]

- (c) Younger women aged 18–34 were almost 3 times as likely to have experienced physical and/or sexual violence from an intimate partner and 6 times as likely to have experienced sexual violence than older women.
  - (d) People in remote and very remote Australia are more than 24 times as likely to be hospitalised for domestic violence as are people in major cities.
  - (e) People living in the most disadvantaged areas of Australia are 1.5 times as likely to experience partner violence as those living in areas of least disadvantage.
  - (f) Indigenous adults are 32 times as likely to be hospitalised for family violence as non-Indigenous adults.<sup>27</sup>
53. 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. For example, data released by the ABS in June 2021 shows that the number of police recorded victims of family and domestic violence related sexual assault increased by 13 per cent in 2020.<sup>28</sup>
54. A 2020 QUT Centre for Justice Research Report examining the impact of the COVID-19 pandemic on domestic and family violence services and clients found that:
- (a) 86 per cent of services reported an increase in the complexity of their client needs.
  - (b) 62 per cent of services reported increases in the number of clients accessing their services during the COVID-19 pandemic.
  - (c) 67 per cent of services reported new clients seeking their help for the first time during the COVID-19 crisis.
  - (d) Services reported increases in controlling behaviours from abusers, such as isolation (87 per cent); as well as an increased sense of vulnerability among victims (70 per cent), an inability to seek outside help (64 per cent), forced co-habitation with an abuser during lockdown (62 per cent), increased fear of monitoring by abuser (49 per cent), increased surveillance (47 per cent) and increased use of technology to intimidate (38 per cent).<sup>29</sup>

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<sup>27</sup> Australia Institute of Health and Welfare, *Family, domestic and sexual violence in Australia: continuing the national story* (2019) at pp 6 - 9 <[https://www.aihw.gov.au/getmedia/b180312b-27de-4cd9-b43e-16109e52f3d4/aihw-fdv4-FDSV-in-Australia-2019\\_in-brief.pdf.aspx?inline=true](https://www.aihw.gov.au/getmedia/b180312b-27de-4cd9-b43e-16109e52f3d4/aihw-fdv4-FDSV-in-Australia-2019_in-brief.pdf.aspx?inline=true)>

<sup>28</sup> ABS, *Recorded Crime – Victims* (2020).

<sup>29</sup> <https://research.qut.edu.au/centre-for-justice/wp-content/uploads/sites/304/2021/05/Breifing-Paper-Issue-12-May-2021.pdf>

55. In addition to this evidence, Marianne Crowe, a nurse who works in a specialist family violence support unit at St Vincent’s Hospital in Melbourne, has observed a ‘significant effect’ on the numbers of patients at St Vincent’s who are reported by medical staff as experiencing family violence.<sup>30</sup> Terese Kingston, a service support worker at Domestic Violence Resource Centre in Mackay, Queensland, has experienced a 20–25 per cent increase in demand for services at DVRS since the start of the pandemic, and concurrent increases in demand for police and domestic violence court services.<sup>31</sup>
56. The literature and data review to be conducted by SWIRLS will examine the prevalence and impacts of family and domestic violence in Australia, including the impact of COVID-19 ([2021] FWCFB 4030 at [7]–[9]).

(2) Family and domestic violence is a workplace issue

57. The application made by the ACTU in 2014 proceeded from the basic premise that family and domestic violence is a workplace issue in Australia. In the Majority Decision, Gooley DP and Spencer C found that family and domestic violence has a real and tangible impact on employees and employers in the workplace;<sup>32</sup> that finding was confirmed by the Full Bench in the 2018 Decision.<sup>33</sup> With the introduction of the unpaid leave term in all modern awards and the subsequent introduction of unpaid leave to the NES (the first new NES since the FW Act commenced), the proposition that family and domestic violence is a workplace issue is now unquestionably correct.

(3) The cost of family and domestic violence

58. As the Full Bench observed in the 2018 Decision, “*the emotional and personal costs of family and domestic violence cannot be measured; but some of its effects can, including the impact on health and children, and the employment and financial consequences*”.<sup>34</sup>
59. The employment and financial consequences of family and domestic violence affect the national economy, as well as individual employers and employees. For individuals, the employment and financial impact of family and domestic violence 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

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<sup>30</sup> Crowe, [16].

<sup>31</sup> Kingston, [18]–[21].

<sup>32</sup> Majority Decision, [54].

<sup>33</sup> 2018 Decision, [66], [180].

<sup>34</sup> 2018 Decision, [90].

pathway out of violent situations, with collateral benefits for employers, and the national economy.

*The cost to the national economy*

60. In the 2018 Decision, the Full Bench noted various Australian studies which attempted to assess the aggregate cost of violence against women. The reports, by PWC (2015), KPMG (2009) and Access Economics (2004),<sup>35</sup> were considered by the Victorian Royal Commission into Family Violence. Viewed collectively, the reports assessed the cost of FDV to the national economy of between \$8.1 billion (in 2002/03, including male victims) and \$21.6 billion (in 2014/15, excluding male victims).<sup>36</sup>
61. The data and literature review to be conducted by SWIRLS will further examine how family and domestic violence impacts on workplaces and the Australian economy.

*The cost to employers*

62. Family and domestic violence imposes significant costs on employers, including lost productivity due to absenteeism, recruitment and retraining costs. KPMG (2016) assumes that 7.2 workdays are lost each year from absenteeism due to physical violence, 8.1 days as a result of sexual violence, and 10.1 days as a result of stalking.<sup>37</sup>
63. By multiplying the number of days that employees impacted by family and domestic violence took off work by the average daily wage of award-covered employees, the Duncan Report estimates that the total cost to employers to be \$14.3 million per year, assuming that absenteeism rates are consistent across the economy<sup>38</sup>. Assuming that financial constraints play a significant role in employee absenteeism and reduced productivity, Professor Duncan concludes that employers can partly reduce these costs of lost production from time lost from work due to employees' financial stress by paying 10 days family and domestic violence leave.<sup>39</sup>
64. This evidence is consistent with the experience of Karyn Walsh, CEO of Micah Projects, who observes that *"In my experience as a manager, there is actually a cost saving in providing a staff member with dedicated paid leave to attend to all these matters and get settled, because they can then return to work ready to be focused and productive again. This also prevents a*

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<sup>35</sup> See 2018 Decision, [103]–[106].

<sup>36</sup> See 2018 Decision, [106].

<sup>37</sup> Quoted in the Duncan Report, [14]-[16], [53].

<sup>38</sup> Duncan Report, [51].

<sup>39</sup> Duncan Report, [51].

*person from having to hide what is impacting on their current life and work. Providing assistance enables a person to act on their safety plan in an organised and timely manner, reducing the disruption to work and home. If a person is not given access to paid leave these tasks can take months to complete, rather than a couple of weeks. That is not good for the worker or the employer. Providing a couple of weeks paid leave doesn't cost us much and, in my experience, there is actually more of a productivity cost of not providing access to paid leave than there is of providing it and helping someone get safe and return to work.*"<sup>40</sup>

### *The award-covered labour force*

65. There are approximately 2.23 million employees employed under modern awards in Australia. Close to half (approximately 48 per cent) are employed on a casual basis.<sup>41</sup> Women comprise 61 per cent of all award-dependent workers, and 51 per cent of all award-reliant women are casuals.<sup>42</sup>
66. Award-covered workers are low paid. The Expert Panel in the Annual Wage Review has consistently held that a threshold of two-thirds of median full-time wages provides an operational benchmark for identifying who is low-paid, within the meaning of s 134(1)(a) of the FW Act.<sup>43</sup> The most recent data for the low paid threshold, based on the ABS 'Characteristics of Employment Survey' dated August 2020, is that two-thirds of median full-time earnings is \$953.33 per week.<sup>44</sup>
67. In 2019, the average weekly wage of award-covered female employees was approximately \$811, and approximately \$958 for male employees.<sup>45</sup> That is, award covered employees of both genders are low paid within the commonly understood industrial meaning of that term; and award-covered female employees earn, on average, significantly *below* the low-paid benchmark of two thirds of median full-time wages.
68. Family and domestic violence disproportionately affects women.<sup>46</sup> Family and domestic violence has a range of extremely serious health impacts on women, and is often fatal. Intimate partner violence is the greatest health risk factor (greater than smoking, alcohol and

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<sup>40</sup> Walsh, [17].

<sup>41</sup> ABS, *Employee Earnings and Hours*, May 2018.

<sup>42</sup> ABS, *Employee Earnings and Hours*, May 2018.

<sup>43</sup> See 2018 Decision, [279].

<sup>44</sup> ABS, *Characteristics of Employment, Australia*, August 2020.

<sup>45</sup> Duncan Report, [29].

<sup>46</sup> 2018 Decision, [92].

obesity) for women aged 18-44.<sup>47</sup> In 2017–18, assault by a spouse or domestic partner accounted for 48 per cent of assault hospitalisations for females aged 15 and over.<sup>48</sup> On average, one woman a week is killed by a partner or former partner.<sup>49</sup>

### *The financial impact of family and domestic violence on employees*

69. Family and domestic violence has a significant adverse impact on those who experience such violence,<sup>50</sup> and on their families and community.<sup>51</sup> The impact can adversely affect all areas of a person's life. Most relevantly for the purposes of this review, the impact on employment and personal finances can be severe.

70. In both the Majority Decision and the 2018 Decision, the Full Bench found that:

Employees who experience domestic and family violence often face financial difficulties as a result, such as relocation costs or becoming a sole parent; and may suffer economic harm as a result of disruption to workplace participation.<sup>52</sup>

71. Employees affected by family and domestic violence will incur out-of-pocket costs arising from, for example, lawyers' and court fees, the cost of medical treatment, and relocation costs.<sup>53</sup> Further, paid leave is not simply necessary to meet the immediate expenses associated with family and domestic violence. For workers who need to find new accommodation as a result of leaving a violent relationship, it is critical to demonstrate continuity of income to rental agencies and lenders.<sup>54</sup>

72. The financial impact is particularly acute at the time of leaving, or contemplating leaving, a violent relationship or situation.<sup>55</sup> In the hearing of the 2014 application, Dr Peta Cox observed that data from the ABS *Personal Safety Survey (PSS)* confirmed that separation from a violent partner is associated with an elevated risk of violence, and with financial hardship following a separation. Two out of three women who left violent partners moved away from their homes, and seven out of 10 reported leaving behind property or assets.<sup>56</sup> The

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<sup>47</sup> Kim Webster, *A preventable burden: Measuring and addressing the prevalence and health impacts of intimate partner violence in Australian women: Key findings and future directions*, ANROWS (2016).

<sup>48</sup> Australian Institute of Health and Welfare, *Health impacts of family, domestic and sexual violence Snapshot*, 23 Jul 2020, accessed 29 July 2021 at <<https://www.aihw.gov.au/reports/australias-health/health-impacts-family-domestic-and-sexual-violence>>

<sup>49</sup> See 2018 Decision, [73].

<sup>50</sup> Majority Decision, [49]; 2018 Decision, [66].

<sup>51</sup> Majority Decision, [56]; 2018 Decision, [66].

<sup>52</sup> See Majority Decision, [60]–[61]; 2018 Decision, [66].

<sup>53</sup> See, eg, Walsh, [15] and [16]; Oxley, [12]; Jones, [25]; Tansley, [28].

<sup>54</sup> See C Jones, [22]; Crowe, [18]; Walsh, [21]; Spalding [12]; Parker, [27] and [28]; Tansley, [29]–[31]; Craig, [8] and [9].

<sup>55</sup> See, eg, Walsh, [19]–[22].

<sup>56</sup> See 2018 Decision, [97].

ACTU’s lay witnesses have also observed the impact of additional financial pressures at the point of leaving a violent relationship.<sup>57</sup>

(4) The necessity of paid leave

73. In the 2018 Decision, the Full Bench observed that employment is an important pathway out of violent relationships, and that sustained periods of employment can provide, among other things, financial security.<sup>58</sup> These findings are consistent with the evidence to be given by lay witnesses called by the ACTU.
74. For example, Marianne Crowe has worked frequently with patients admitted to the emergency department at St Vincent’s Hospital who are impacted by family violence. Her role included referring patients for further support and assistance, including into temporary accommodation. Based on Ms Crowe’s clinical experience, one of the two main reasons a patient would refuse assistance was because they were concerned about their job and/or financial situation, and could not afford to leave.<sup>59</sup> Further, a key barrier to accessing support for family and domestic violence victims is low income.<sup>60</sup>
75. Carla Jones, an Industrial and Women’s Officer at the RTBU in Queensland, describes how the provision of paid family and domestic violence leave has enabled a member to maintain sufficient income to support their children as they go through the upheaval of moving house, pre-school, and work location which was necessary to leave the violent relationship.<sup>61</sup> Ms Jones considers the availability of paid family and domestic violence leave to be life-saving.<sup>62</sup>
76. Terese Kingston, in her work at the Mackay Domestic Violence Court, has observed that a person making an application for a protection order will often need to attend court (which sits during weekday working hours) on numerous occasions. However, a person who cannot afford to take time off to finalise the court process will often withdraw the protection order application.<sup>63</sup> By contrast, Ms Kingston considers that paid family and domestic violence leave has been a “*game changer*” for people in the same crisis situation.<sup>64</sup>

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<sup>57</sup> See for example C Jones, [23] and Walsh, [16].

<sup>58</sup> 2018 Decision, [102].

<sup>59</sup> Crowe, [18].

<sup>60</sup> Crowe, [19].

<sup>61</sup> C Jones, [16], [23].

<sup>62</sup> C Jones, [20]–[21].

<sup>63</sup> Kingston, [11], [13].

<sup>64</sup> Kingston, [13].

77. There are numerous other examples in the evidence of the critical importance of paid family and domestic violence leave to employees who are experiencing violence, particularly for those who leave a violent situation.<sup>65</sup>

(5) The cost of providing paid FDV leave

78. The ACTU relies on the Duncan Report for evidence of the estimated cost of providing paid FDV leave. The literature and data review to be conducted by SWIRLS on behalf of the FWC will also consider the impact of family domestic violence leave on workplaces and the Australian economy. The ACTU submits that this research should also consider evidence of utilisation rates.<sup>66</sup>

79. Professor Duncan has prepared a range of estimates of the cost of providing 10 days paid FDV leave to award-covered employees. That analysis used the following inputs:

- (a) 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 (at Table 1 of the Duncan Report);
- (b) The average weekly wage of award-covered employees, by sex, using data from Wave 19 of HILDA (at paragraph 29 of the Duncan Report);
- (c) The estimated proportion of employed victims/survivors of FDV who took time off work in the 12 months following the reported incidence of violence (Table 2).

80. Applying these inputs, the Duncan Report provides a range of estimates of the costs of providing 10 days paid FDV leave to award covered employees:

- (a) 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.<sup>67</sup>
- (b) The above estimate adjusted to take into account the 2.4 per cent increase in wages as per the most recent minimum wage increase results in an estimate of a total cost of \$13.4 million.<sup>68</sup>

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<sup>65</sup> See, eg, Davies, [17]–[20]; Kingston, [14]–[17]; Walsh, [16], [19], [20], [25].

<sup>66</sup> [2021] FWCFB 4465, [8].

<sup>67</sup> Duncan Report, [39].

<sup>68</sup> Duncan Report, [40].

- (c) 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.<sup>69</sup>
  - (d) Applying assumptions from Dr Stanford’s 2016 report that uptake rates may double, the estimate increases to approximately \$34.3 million.<sup>70</sup>
81. Professor Duncan acknowledges that small and medium enterprises account for a significant proportion of employees under modern award pay settings and will therefore bear a greater burden of these costs. However, he concludes that these costs are likely to be largely offset by improved productivity and reduced absenteeism. Professor Duncan also observes that average wages reduce with the size of the business (the average award wage in large businesses (over 1,000 employees) is more than twice of the average wage in small businesses (under 20 employees), which provides further support for the estimates that the cost of 10 days paid FDV leave for award-covered employees “*may not be significant*”.<sup>71</sup>
82. Dr Stanford has reviewed published estimates of the utilisation of paid family and domestic violence leave entitlements from five sources across Australia and New Zealand, covering a six year period; and from three employers who volunteered data. The analysis (at Table 2 and Table 3) shows a utilisation rate of less than one per cent in all sources, and a total estimated utilisation rate of less than half of one per cent. Dr Stanford also finds that employees do not always utilise the full 10 day entitlement, finding that the average quantum of a claim is between 7 and 8 days of leave cumulatively across all absences associated with a claim.<sup>72</sup>
83. The effect of Dr Stanford’s estimates of likely utilisation rates, read together with Professor Duncan’s analysis, suggests that the actual cost of providing paid FDV violence leave to award-covered employees is low. Dr Stanford concludes that there would be no observable impact on overall employment costs, nor any observable negative impact on productivity.<sup>73</sup>
84. The evidence of Dr Stanford and Professor Duncan also suggests that an investment in employee’s safety in the form of 10 days paid FDV leave has benefits not only for workers, but for employers. As outlined above, direct benefits include a reduction in the costs of

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<sup>69</sup> Duncan Report, [37].

<sup>70</sup> Duncan Report, [41].

<sup>71</sup> Duncan Report, [44] and [45].

<sup>72</sup> Stanford Report, [53] and [85].

<sup>73</sup> Stanford Report, [89] and [90].

absenteeism and lost productivity.<sup>74</sup> There are also indirect benefits in terms of improved corporate image.<sup>75</sup>

85. These estimates are supported by research conducted in New Zealand, which passed legislation in July 2018 providing for 10 days paid family and domestic violence leave. The NZ analysis shows that for every woman whose experience of violence was prevented as a result of the workplace protections in a particular year, an average of \$3,371 (a conservative estimate) in production-related costs are avoided.<sup>76</sup>

(6) Ten days of leave is necessary to provide a minimum safety net

86. Five days FDV leave is an insufficient amount of time to protect employees experiencing family and domestic violence. Many employers provide significantly more than 10 days paid leave to their staff; a number of employers provide access to 20 days paid leave or more, and some provide unlimited paid leave.<sup>77</sup> By way of example, Penny Spalding, Assistant Secretary of the QTU, explains that for employees of the Queensland Department of Education, up to 10 days paid FDV leave can be authorised by School Principals, with additional paid leave able to be accessed on application to the Regional Offices and Director General.<sup>78</sup>

87. While employers provide a range of FDV leave entitlements, the evidence shows that the standard of 10 days has developed over a number of years as a consequence of the input of experts in the field and negotiations at the workplace level between employers and employees. For example, Debra Eckersley of Price Waterhouse Coopers explained to Commission in 2016 that their decision to provide 10 days paid leave was informed by their own research which had revealed a ‘common standard’ of 10 days, as well as the advice of experts in the field of family and domestic violence.<sup>79</sup>

88. The ‘common standard’ of 10 days leave has continued to spread throughout Australian workplaces. Dr Stanford conducts an analysis of enterprise agreements using data from the WAD, finding a “*trend increase in the proportion of newly approved agreements with paid*

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<sup>74</sup> Duncan, [13]-[16].

<sup>75</sup> Duncan, [17], [18], [19].

<sup>76</sup> Kahui S, Ku B, Snively S, *Productivity Gains from Workplace Protection of Victims of Domestic Violence* (commissioned by the New Zealand Public Service Association), March 2014.

<sup>77</sup> Media Release, CBA offers unlimited paid leave to employees affected by domestic and family violence, 11 October 2019, accessed at < <https://www.commbank.com.au/guidance/newsroom/unlimited-leave-to-employees-affected-by-domestic-violence-201910.html>>

<sup>78</sup> Spalding, [12].

<sup>79</sup> [Transcript, 17 November 2016](#), PN 1890 and PN 1893.

*FDV leave*”, with most agreements which provide paid FDV leave specifying 10 days of leave, suggesting a “*growing consistency in leave entitlements around that level of benefit*”.<sup>80</sup>

89. It is clear that not all employees dealing with family and domestic violence will need to access the full 10 days of leave per annum. Dr Stanford finds that the average quantum of leave taken is just over 7 days, measured cumulatively across all absences associated with each claim.<sup>81</sup>
90. The evidence shows that five days leave per annum is simply not sufficient to provide a fair and relevant safety net for employees dealing with family and domestic violence, particularly for those employees seeking to leave a violent relationship and/or employees who have dependents to care for. Family and domestic violence impacts on many aspects of a person’s life, including in the areas of health, children, access to legal and financial resources, and accommodation. 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 family and domestic violence can be extreme.<sup>82</sup>
91. In certain circumstances, employees may require *more* than 10 days leave per annum. For example, Ms Spalding gives evidence about a worker who needed (and was granted) a full term of paid FDV leave to recover from a violent relationship and prepare for court cases. However, Ms Spalding observes that employees accessing more than 10 days leave is not the norm; and estimates that the members she assists access on average between 5-10 days paid leave over the course of a calendar year.<sup>83</sup>
92. The evidence suggests that 10 days is a fair and reasonable minimum quantum of leave to extend to employees who are attempting to cope with the health and safety risks, financial stress, complexity, and trauma associated with family and domestic violence. For example:
  - (a) Karyn Walsh AM has over 40 years’ experience working with women and children experiencing family and domestic violence and has been awarded an Order of Australia for her work. Ms Walsh says that in her experience, *‘10 days paid leave annually does provide critical assistance to an employee who is currently acting on leaving a domestic violence situation or seeking services to assist in making decisions*

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<sup>80</sup> Stanford Report, [38], [41], [42].

<sup>81</sup> Stanford Report [53] and [85].

<sup>82</sup> Crowe, [18]; Oxley, [10]; Walsh, [16] and [22]; Kingston, [11]; Craig [10] and [11]; C. Jones, [16]; Tansley [24], [25], and [29]; V. Jones, [10]-[18], [24]-[25].

<sup>83</sup> Spalding, [13].

*across the various circumstances in which they may find themselves. Ten days paid leave is particularly of value when women have planned to leave the relationship and relocate to a place of safety.”*<sup>84</sup>

- (b) Kelly-ann Tansley has 12 years’ experience as a practitioner and counsellor working with women and children experiencing family and domestic violence and is the Deputy CEO of DV Connect in Queensland. She explains that: *“Leaving violence takes a significant amount of time and money, from the point of first contact with a service like ours, to safety planning, to being settled in a new situation and beginning the recovery process. In my experience, 10 days is required as a minimum and not necessarily consecutively for a woman to make the arrangements required to fully exit a violent relationship in a crisis situation where violence has rapidly escalated. Time is needed to obtain a protection order, access specialist family violence services, legal and health services, and for finding new accommodation. The other typical scenario I see is where someone plans to leave over a period of time, and the 10-day entitlement is accessed over the course of 6-12 months in 1-3 day blocks in order to take the steps required to implement a safety/exit plan, including arranging alternative accommodation, setting up bank accounts, contacting alternative schools, organising counselling and support to prepare children for leaving etc.”*<sup>85</sup>
- (c) Gabrielle Craig, Assistant Principal Solicitor at the NSW Women’s Legal Service, explains that it is common for clients escaping family and domestic violence to be involved in multiple court proceedings at the same time, and to have to attend different courts on multiple occasions. Ms Craig details a case study of a client who was required to attend court or be involved in various court process on seven separate occasions, each for close to a full day at a time.<sup>86</sup>
- (d) Dr Victoria Jones, Head of the Medical Unit at the SA Women’s Health Service observes that the *“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*

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<sup>84</sup> Walsh, [25].

<sup>85</sup> Tansley, [29].

<sup>86</sup> Craig, [8], [10], [11] and [16].

*financial difficulty. They often have a large number of conflicting appointments with various services at the point of leaving a violent partner.*<sup>87</sup>

93. Leave is clearly not the only form of support that can be offered to employees experiencing family and domestic violence. People have a range of different experiences with family and domestic violence, which require different types and levels of services and support. Carla Jones, Women’s Officer at the RTBU explains that “*All of the workers I have assisted with accessing work-related support to deal with family and domestic violence leave, including paid leave, have been in different situations and have required different solutions. Although there are some common themes, it is almost impossible to say “this is what family and domestic violence looks like and this is what people should get as a result”.*<sup>88</sup>
94. The range of workplace support offered by some employers is extensive and, in addition to paid leave, includes changes to work hours and location, assistance with safety planning, assistance with relocation arrangements and costs, access to counselling, safety adjustments at work, including changes to work design etc, and various other forms of financial and non-financial assistance. For example, Spalding annexes a copy of Education Department of Queensland policy on family and domestic violence at PS-3 to her statement, which details the wide range of workplace supports offered, including access to 10 days paid family and domestic violence leave, with the option to apply to access more paid leave if necessary.
95. The provision by employers of a wide range of workplace supports should be strongly encouraged and supported, including the provision of access to greater amounts of paid time off work where required by employees. However, 10 days leave is the *minimum* number of days to which all employees should have access. As is clear from the testimony provided by a wide range of service providers, sufficient time off work is a necessary precondition for access to other critical support services, including medical, legal, refuge, housing, safety planning, relocation, and counselling. A whole of community response to family and domestic violence 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 five days of unpaid leave per annum does not provide sufficient time to enable adequate access to such support.
96. The ACTU’s lay witness evidence demonstrates clearly that dealing with family and domestic violence is both time consuming and costly, and access to a sufficient amount of time off work is crucial to ensure that people can access necessary support services, particularly at the

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<sup>87</sup> V. Jones, [17].

<sup>88</sup> C. Jones, [19].

point of leaving a violent relationship. Governments and organisations around the country are undertaking a coordinated national effort to reduce violence and against women and children, including by increasing access to services for victims of domestic and family violence and sexual assault.<sup>89</sup> 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’s lay witness evidence demonstrates that not having access to sufficient and *paid* time off work is a key barrier to accessing support.<sup>90</sup>

(7) Leave must be paid in order to provide a minimum safety net

97. Economic security is the primary factor determining whether a person subjected to family and domestic violence remains in, escapes from or returns to a dangerous relationship. Without economic resources, leaving a violent relationship is extremely difficult. Research confirms that economic disadvantage is “*a barrier to achieving safety, security, independence, and wellbeing following violence*”, and, conversely that economic security gives women “*alternatives to abusive relationships, and the means to avoid and leave abusive partners*”.<sup>91</sup>
98. Following extensive consultation, hearings, and research, the Victorian Royal Commission into Family and Domestic Violence Report found that people subjected to family and domestic violence “*are more likely than other women to experience financial difficulty and many women experience poverty as a result of family violence, regardless of their prior economic circumstances.*” The Commission heard evidence that “*financial security is a significant protective factor in victims gaining freedom from abusive partners*”.<sup>92</sup>
99. 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. Despite the range of different support services provided by the witnesses, all give similar evidence about the importance of financial security in accessing them. For example:
- (a) Ms Crowe observes that: “*In my clinical experience over a number of years, there are a number of barriers to patients dealing with family violence accessing the*

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<sup>89</sup> See *The National Plan to Reduce Violence against Women and their Children 2010 – 2022, National Outcome 4*.

<sup>90</sup> See for example Crowe, [19]; Oxley [10]; Walsh [19]; Kingston, [13]; Davies, [18]; Jones, [18].

<sup>91</sup> Cortis N & Bullen J (2015), *Building effective policies and services to promote women’s economic security following domestic violence: state of knowledge paper*, Australia’s National Research Organisation for Women’s Safety, Landscapes, Issue 07, August at pp 2 and 8.

<sup>92</sup> Victorian Royal Commission into Family Violence Report, Volume IV, Chapter 21 ‘Financial Security’, 93.

*support they need, including language and cultural barriers, disability, mental health challenges and substance abuse. A key barrier to accessing support is low income. Often these barriers intersect. I have often supported 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. This is particularly the case if patients have dependents to care for.”<sup>93</sup>*

- (b) Tess Oxley, Paramedic in Western Sydney, states that: *“When I’m treating someone, I talk to the patient to try to ascertain what has happened to cause the injuries. If I can see or am told that it is a family and domestic violence situation, I offer to take the person to the nearest hospital where I can link them up with social workers or other qualified professionals. In my experience, the primary reason a patient will refuse to come to the hospital with me is because of the costs associated with it – usually the fact that they can’t afford to take time off work or don’t have access to any leave. People are often worried about the costs of the ambulance, even though they don’t have to pay for it. Financial worries are a particular issue because the people I assist are not wealthy people and have no savings to fall back on. I know this because they tell me they are worried about the financial impacts of attending hospital and the impact on their employment.”<sup>94</sup>*
- (c) Ms Walsh AM says: *“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.”<sup>95</sup>*
- (d) Dr Jones says: *“The point at which a woman leaves a violent partner is an extremely high-risk time. Women who attend our service are sometimes being stalked and are terrified of leaving their temporary accommodation, which is usually a hotel or motel at this stage, in case they are seen by the ex-partner or someone he knows. Frequently*

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<sup>93</sup> Crowe, [19]

<sup>94</sup> Oxley, [10]

<sup>95</sup> Walsh, [19] and [20]

*they are experiencing a significantly increased alertness 4 (hypervigilance) where anything that reminds them of their ex-partner (eg similar car) will lead to much anxiety and possibly panic attacks. The additional stress of not being able to afford a taxi and having to take public transport is often enough to discourage women from attending a much-needed health appointment. I have quite frequently seen patients who leave a relationship, make a start on establishing a new life and then get completely overwhelmed with the very large number of appointments they have to attend; often because of a concern about disruption to their work or not being able to afford to take leave from work. These women then disappear from our service and we assume they return to the dangerous relationship.”<sup>96</sup>*

100. The evidence presents a clear and consistent picture of the central importance of financial security to recovery and escape from family and domestic violence. Conversely, lack of financial security can have a profoundly negative impact on a person’s ability to recover from or escape violent situations. As Julie Kun, CEO of WIRE Women’s Services, explained in evidence in 2016, women without paid leave entitlements have to choose between being safe and being poor.<sup>97</sup> This is not a choice any worker should have to make in modern Australia.
101. The absence of paid FDV leave has a particularly adverse impact on women. The evidence shows that women are more likely than men to be subjected to family and domestic violence, and to experience the impact of such violence more severely, including being subjected to frequent, prolonged and extreme violence, and sexual assault. While men can and do experience family and domestic violence and should be able to access leave to deal with it when needed, family violence among adults is overwhelmingly a crime against women. 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 less likely to have access to them. 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. Women employed as casuals with no paid leave entitlements have no option but to make the unacceptable choice between their employment and their safety.

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<sup>96</sup> V. Jones, [18]

<sup>97</sup> See, AM2015/1 [Witness Statement of Julie Kun](#), (tendered and marked as **Exhibit B12**) at [22], [46]–[58].

(8) Supplementary unpaid leave of 5 days per occasion is necessary

102. The ACTUs proposal retains and reframes the existing entitlement to five days unpaid FDV leave as supplementary entitlement, accessible upon exhaustion of the paid leave entitlement, and extends the entitlement to a per occasion basis. It is expected that this provision will be rarely utilised, but for those that need it, the entitlement is critical. The ACTU lay witnesses explain that accessing more than 10 days leave is not the norm,<sup>98</sup> but that more than 10 days can be necessary when circumstances are more extreme. For example, Karyn Walsh explains that an ‘extreme case’ requiring more than 10 days paid leave could involve “*serious injury, extreme psychological abuse and financial control or the death of a family member*”<sup>99</sup>. In these situations, the capacity take additional time off work to access support is crucial.
103. Moreover, as submitted in the hearing of the 2014 application, 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.<sup>100</sup>

**E. The proposed variation**

104. The ACTU’s proposed variation provides for 10 days paid leave. The necessity for paid leave of 10 days duration is addressed above. This section deals with the remaining aspects of the proposed variation.

**E.1 Paid leave is available to casual employees**

105. Close to 48 per cent of award-reliant employees are employed on a casual basis, including 51 per cent of all award-reliant women.<sup>101</sup> Casual employees have no paid leave entitlements to rely on to deal with the consequences of family and domestic violence.
106. In 2018, the Full Bench determined that all employees should have access to unpaid family and domestic violence leave, including casuals. The Full Bench noted research suggesting that women who are experiencing, or have experienced, family and domestic violence “*are more likely to be employed in casual and part-time work*”, and concluded that to exclude casuals from the leave entitlement would mean that “*a significant proportion of the employees*

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<sup>98</sup> Spalding, [13].

<sup>99</sup> Walsh, [25].

<sup>100</sup> Section 80, s 102, s 104, ss 108–110.

<sup>101</sup> ABS, *Employee Earnings and Hours*, May 2018.

*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”*.<sup>102</sup>

107. For the same reason, an award entitlement to 10 days paid FDV leave should cover all employees, including all casuals. 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 family and domestic violence. In fact, 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.
108. The real-life impact of the current gap in the safety net on casuals is referred to in the ACTU’s lay witness evidence, including:
- (a) Tess Oxley, paramedic says: *“I learn a lot about a patient’s financial situation in talking to them because it is usually their main concern – the costs of treatment and disruption to their work. Often patients tell me their partners control all the money and they don’t have ready access to bank cards etc. Sometimes the only money that is theirs is the money they earn in a casual job and they tell me they can’t risk losing the work by taking time to seek healthcare because they have no leave to take.”*<sup>103</sup>
  - (b) Therese Kingston, DV support worker says: *“I see a lot of women who are either stay at home mums or casually employed on low hours. Being employed on a casual basis often means women are unable to gain approval for rental properties which means they are forced into crowded accommodation with family or friends, or must remain living in the same house as the perpetrator. ... We often see women at our service in severe financial hardship due to being in low paid/insecure and casual employment. Lack of a reliable and steady income means women are often unable to put money away for large bills and emergencies. We often assist women with food and fuel vouchers when they are unable to make ends meet due to receiving a car registration or electricity bill, for example.”*<sup>104</sup>
  - (c) Kelly-ann Tansley, Deputy CEO of DVConnect says: *“In my experience, the availability of paid family violence leave to our clients is ad hoc. Women employed casually in sectors like hospitality have no leave at all to fall back on – let alone paid leave. I see many of these women forced to resign and access Centrelink benefits in*

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<sup>102</sup> 2018 Decision, [247].

<sup>103</sup> Oxley, [12].

<sup>104</sup> Kingston, [13], [16].

*order to escape a violent relationship. Centrelink provides a crisis payment of \$300, and I see women who have left their homes with so little that they are forced to quit their jobs in order to access this small payment. They will often use it to buy underwear, nappies and essentials items of this nature. Unpaid leave is not sufficient to protect these workers.”<sup>105</sup>*

109. While other forms of paid leave entitlements under the NES are restricted to employees other than casuals, the above evidence demonstrates why it is particularly important that this form of paid leave be extended to all employees, including all casuals.

## **E.2 The rate of paid leave**

110. 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.
111. 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,<sup>106</sup> 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.
112. The ACTU submits that the SWIRLS literature and data review should consider the direct economic costs imposed by family and domestic violence on individuals.<sup>107</sup>

## **E.3 Further examples of activities which meet the criteria for taking FDV leave**

113. The ACTU seeks an amendment to the note in s 106B(1) to include that attending appointments with medical, financial or legal professionals as examples of actions covered by the leave provision. The Full Bench in the 2018 decision and in making the model award term, recognised that attendance to these activities should be covered by the provision.

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<sup>105</sup> Tansley, [25].

<sup>106</sup> See for example Crowe, [18]-[19]; Oxley, [10]-[13]; Walsh [16], [19], [20] and Parker [18]-[20].

<sup>107</sup> [2021] FWCFB 4465 at [7].

#### **E.4 Extension of definition of FDV to include violent behaviour by a member of a person's household**

114. The entitlement to 10 days paid family and domestic violence leave should be extended to conduct perpetrated against employees by household members who many not necessarily be related to the employee.
115. 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.<sup>108</sup> A number of existing enterprise agreements and workplace policies extend access to leave to employees experiencing violence from members of a household, without requiring the perpetrator to also be a relative. The example outlined in the statement of Carla Jones<sup>109</sup> details a situation where an employee was subjected to sexual violence by an (unrelated) work-colleague who resided with her. This employee was entitled to leave under the scope of the relevant EBA clause, which covers a 'domestic relationship', including a non-related household member.
116. 'Family' violence is often identified by reference to the relationship between the perpetrator and the person subjected to the violence, and 'domestic' violence is identified by the living arrangements of the people involved.<sup>110</sup> As the Australian Bureau of Statistics noted in 2013: *"The types of relationships [in which family violence occurs] also vary and can include family and co-habitation, while some are specific to family violence legislation, such as spouse and de-facto relationships. These definitions can be extended to include other relationships such as cultural and kinship relationships, foster care relationships, blood relatives who do not co-habit or care situations, such as elder abuse."*<sup>111</sup>
117. The ACTU's definition clarifies that the household member must be using 'violent, threatening or other abusive' behaviour that seeks to coerce or control the employee; and that causes the employee harm or to be fearful. There is no reason why an employee subjected to such violence in a domestic setting should be prevented from accessing family or domestic violence leave simply because the perpetrator was not a family member.

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<sup>108</sup> For example, the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) covers violence in a 'domestic relationship', which includes a person living or has lived in the same household as the other person.

<sup>109</sup> C. Jones, [18].

<sup>110</sup> See the Background Paper prepared by the FWC in AM2015/1, 15 September 2017 at [10].

<sup>111</sup> ABS, 4529.0 – Defining the Data Challenge for Family, Domestic and Sexual Violence, 2013.

## **F. Meeting the modern awards objective**

118. The current safety net of terms and conditions is not ‘fair’, as mandated 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.

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

119. In 2017, the majority of the Full-Bench accepted that low paid, award dependent employees are likely to have fewer financial resources ‘such that the impact of a loss of pay arising from the need to take unpaid leave will have a disproportionate impact on these employees’. The Full-Bench accepted that paid leave would ‘disproportionately benefit the low paid’ and therefore ‘assist the relative living standards and the needs of the low paid’.

120. In the *Annual Wage Review 2015-16*, the Fair Work Commission Expert Panel acknowledged that the available information, as a whole, suggested that the majority of award-reliant employees are probably also low-paid.<sup>112</sup> 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 and 57.4 per cent are award reliant; meaning 55.2 per cent of adult employee women are low paid and award-reliant.<sup>113</sup>

121. 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.

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<sup>112</sup> By reference to the two-thirds of median weekly earnings benchmark: *Annual Wage Review 2015–2016* [2016] FWCFB 3500, [369], [449].

<sup>113</sup> [Wilkins R & Zilio F \(2020\), Prevalence and persistence of low paid award-reliant employment, Fair Work Commission Research Report 1/2020](#), p 11, Table 3.

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

122. As noted by the Full Bench in the 2018 Decision, a modern award term will provide a minimum safety net standard that will underpin bargaining.<sup>114</sup> As noted by Dr Stanford, an increasing number of employers are providing access to paid family and domestic violence leave through enterprise agreements, with most agreements which provide paid FDV leave specifying 10 days of leave, suggesting a ‘growing consistency in leave entitlements around that level of benefit’.<sup>115</sup>
123. The provision of 10 days paid family and domestic violence leave in awards will flow through to enterprise agreements through the application of the ‘better off overall test’. The 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 forms of financial and non-financial support, such as assistance with relocations.
124. The precise number of employees now provided with access to paid FDV leave through enterprise agreements is not known. The ACTU expects that further information will be provided via the SWIRLS analysis of the Workplace Agreement Database and otherwise reserves its position on the relevance of s 134(1)(b) of the FW Act.

### Section 134(1)(c) – social inclusion

125. Section 134(1)(c) requires the Commission to ensure that modern awards, together with the NES, to promote social inclusion through increased workforce participation, which has been interpreted to mean both obtaining employment, and remaining in employment.<sup>116</sup> In the Majority Decision, the Full Bench accepted that the provision of paid family and domestic violence leave would promote social inclusion.<sup>117</sup>
126. As the Expert Panel in the *Annual Wage Review 2015–2016* observed, ‘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.<sup>118</sup> It follows that a job with inadequate safety net protections against the employment disruption that can occur as a result

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<sup>114</sup> 2018 Decision, [181].

<sup>115</sup> Stanford Report, [23] – [48]

<sup>116</sup> *Annual Wage Review 2015–2016* [2016] FWCFB 3500, [465]; 2018 Decision, [282].

<sup>117</sup> Majority Decision, [82].

<sup>118</sup> *Annual Wage Review 2015–2016* [2016] FWCFB 3500, [467].

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.

127. The findings of the Full Bench in the Majority Decision, the 2018 Decision, and 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.

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

128. This sub-section is neutral to the application.

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

129. This sub-section is neutral to the application.

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

130. While 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 concerned with the provision of equal remuneration between men and women for work of equal value. Accordingly, sub-section is neutral to the application.

Section 134(1)(f) – productivity, employment costs, and the regulatory burden

131. ‘Productivity’, in the context of s 134(1)(f) of the FW Act, “*is directed at the conventional economic concept of quantity of output relative to quantity of inputs*”.<sup>119</sup> To 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. The evidence strongly suggests that paid leave assists victim/survivors of family and domestic violence to leave violent relationships, while remaining in employment.
132. In the 2018 Decision, the Full Bench noted that the extent of the impact of the model term on business would depend on the extent to which it was utilised in practice.<sup>120</sup> The ACTU accepts that utilisation rates are relevant to consideration of s 134(1)(f). Dr Stanford finds that the available data regarding utilisation of paid FDV leave suggests that the provision of paid leave to victims of FDV “*does not lead to the loss of significant amounts of working time in*

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<sup>119</sup> See, eg, *Schwepps Australia Pty Ltd v United Voice – Victoria Branch* [2015] FWA 7858, [45]–[46].

<sup>120</sup> 2018 Decision, [290].

*workplaces which provide this benefit*". Dr Stanford finds that the cumulative total of paid days of FDV leave accounts for no more than one-hundredth of one percent of total working time, and in some case much less, generating no observable impact on overall employment costs. The 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 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.

133. The literature and data review to be conducted by SWIRLS on behalf of the FWC will consider the impact of family domestic violence leave on workplaces and the Australian economy, including perhaps evidence of utilisation rates.<sup>121</sup> The ACTU otherwise reserves its position on the relevance of s 134(1)(f) of the FW Act.

#### Section 134(1)(h) – performance of the national economy

134. The matters in s 134(1)(h) focus on the aggregate impact of an exercise of modern award powers. Dr Stanford concludes that the sustainability and performance of the national economy will be 'incrementally strengthened' by the provision of 10 days paid family and domestic violence leave in Modern Awards, considering the broad economic costs of FDV (\$20 billion across the national economy); combined with likely low utilisation rates and productivity benefits associated with providing the entitlement. Professor Duncan's report details the benefits to employees and employers of an entitlement to 10 days paid FDV leave, including reduced levels of family and domestic violence; productivity gains, such as reduced absenteeism and improved performance; and enhancements to corporate reputation.<sup>122</sup>

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

135. The application of a common entitlement across all modern awards will result in a simple, easy to understand and sustainable modern award system.

### **G. Conclusion**

136. The evidence shows that the provision of 10 days paid FDV leave as a minimum employment standard is not only desirable; it is critical. Five days unpaid leave is inadequate to provide

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<sup>121</sup> [2021] FWCFB 4465, [8].

<sup>122</sup> Duncan Report, [11]-[19] and [52]-[58].

the safety net that is necessary for employees to cope with the severe health impacts, financial stress, complexity, trauma and logistical challenge that is associated with escaping and recovering from family and domestic violence. People in these situations need both sufficient time and sufficient financial security to escape and recover.

137. The reduction of family and domestic violence is a national priority. Governments and organisations around the country are undertaking a coordinated ‘whole of community’ effort to address this issue, including by increasing access to critical services for people struggling with family and domestic violence. These efforts will not succeed unless people are entitled to sufficient and paid time off work to enable them to attend the wide range of support services needed to escape and recover from violence.
138. The ACTU’s lay witness evidence demonstrates that financial security is a critical factor in whether or not a person accesses support services in order to escape and recover from violence. Despite the range of different services represented in the ACTU’s evidence, all give similar evidence about the importance of employment and income security for people affected by family and domestic violence. Nurses, doctors, paramedics, lawyers and social workers all explain that in their experience, a key barrier to people accessing critical support is that they are either not permitted to be absent from work, or cannot afford to take time off without pay. This is particularly the case for women with children.
139. While significant national efforts are being made to reduce family and domestic violence, it is clear that current policy and regulatory settings are inadequate to effectively address the problem, and more must urgently be done. Rates of family and domestic violence are not declining. In fact, there is a growing body of evidence showing that the pandemic has increased both its prevalence and severity.
140. There is no doubt that the workplace plays a crucial role in the national effort to reduce family and domestic violence. The evidence filed by the ACTU outlines the wide range of support that some employers are now providing – not only access to paid leave but assistance with relocations, counselling and many other forms of financial and non-financial assistance. However, 10 days paid leave is the minimum level of support that all employees that should be guaranteed.
141. While there has been an increase in the provision of 10 days paid family and domestic violence leave for employees covered by enterprise agreements, award dependent workers remain unprotected. Women are more likely to be low paid and award reliant, and women are significantly more likely to experience family and domestic violence than men. For those employees struggling to cope with family and domestic violence, financial stability and

sufficient time off work is critical for escape and recovery. A lack of access to these things has extremely harmful consequences for these workers and their dependents, as outlined by the service professionals who will give evidence at the hearing.

142. Employers are already paying the costs associated with family and domestic violence. Paid FDV leave will partly help to reduce these costs. The ACTU's expert evidence builds on existing work which shows that the costs to employers of providing FDV leave are likely to be small, and will be largely 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.
143. The ACTU's evidence demonstrates that an entitlement to 10 days paid family and domestic violence leave is critical to keep workers safe, reduce costs for employers, and support national efforts to reduce the rates of family and domestic violence.

30 July 2021

Kate Burke  
Castan Chambers

The Australian Council of Trade Unions

## Annexure A: the ACTU's Proposed Variation

### ~~Subdivision CA~~ ~~Unpaid~~ Family and domestic violence leave

#### ~~106A~~ 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.
- (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:
  - (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 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~~ 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~~ 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.

### **106C Confidentiality**

- (1) Employers must take steps to ensure information concerning any notice or evidence an employee has given under section 107 of the employee taking leave under this Subdivision is treated confidentially, as far as it is reasonably practicable to do so.
- (2) Nothing in this Subdivision 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 that is personal information may also be regulated under the *Privacy Act 1988*.

### **106D 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.
- (2) 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, that law applies in addition to this Subdivision.
- (3) A person who is a national system employee only because of section 30C or 30M is entitled to leave under this Subdivision only to the extent that the leave would not constitute leave for victims of crime.

Note: Leave for victims of crime is a non-excluded matter under paragraph 27(2)(h).

### **106E Entitlement to days of leave**

What constitutes a day of leave for the purposes of this Subdivision is taken to be the same as what constitutes a day of leave for the purposes of section 85 and Subdivisions B and C.

### **~~Subdivision D~~—Notice and evidence requirements**

#### **107—Notice and evidence requirements**

##### *Notice*

- (1) An employee must give his or her employer notice of the taking of leave under this Division by the employee.

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

*Evidence*

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

*Modern awards and enterprise agreements may include evidence requirements*

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

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

## Annexure B: NES Entitlement

### Subdivision CA—Unpaid family and domestic violence leave

#### 106A Entitlement to 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.

### **106C Confidentiality**

- (1) Employers must take steps to ensure information concerning any notice or evidence an employee has given under section 107 of the employee taking leave under this Subdivision is treated confidentially, as far as it is reasonably practicable to do so.
- (2) Nothing in this Subdivision 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 that is personal information may also be regulated under the *Privacy Act 1988*.

### **106D 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.
- (2) 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, that law applies in addition to this Subdivision.
- (3) A person who is a national system employee only because of section 30C or 30M is entitled to leave under this Subdivision only to the extent that the leave would not constitute leave for victims of crime.

Note: Leave for victims of crime is a non-excluded matter under paragraph 27(2)(h).

### **106E Entitlement to days of leave**

What constitutes a day of leave for the purposes of this Subdivision is taken to be the same as what constitutes a day of leave for the purposes of section 85 and Subdivisions B and C.

### **Subdivision D—Notice and evidence requirements**

#### **107 Notice and evidence requirements**

##### *Notice*

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

##### *Evidence*

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

- (b) if it is unpaid carer's leave—the leave is taken for a permissible occasion in circumstances specified in subsection 103(1); or
- (c) if it is compassionate leave—the leave is taken for a permissible occasion in circumstances specified in subsection 105(1); 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 unless the employee complies with this section.

*Modern awards and enterprise agreements may include evidence requirements*

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

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

**Annexure C:**  
**Note in all modern awards referring to the NES entitlement to FDV leave**

**27. Unpaid family and domestic violence leave**

Unpaid family and domestic violence leave is provided for in the NES.

NOTE 1: Information concerning an employee's experience of family and domestic violence is sensitive and if mishandled can have adverse consequences for the employee. Employers should consult with such employees regarding the handling of this information.

NOTE 2: Depending upon the circumstances, evidence that would satisfy a reasonable person of the employee's need to take family and domestic violence leave may include a document issued by the police service, a court or family violence support service, or a statutory declaration.

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