

FAIR WORK COMMISSION

Fair Work Act 2009 (Cth)

AM2021/55: Family and Domestic Violence Leave Review

Family and Domestic Violence Leave – Review

Reply Submissions of the ACTU

A Introduction and Overview

1. The Fair Work Commission (**FWC**) is conducting a review of the model term providing for five days unpaid family and domestic violence (**FDV**) leave (**Review**). As part of the Review, the ACTU is seeking a variation to all modern awards in the form of an entitlement to 10 days paid FDV leave.
2. In support of its application, on 30 July 2021 the ACTU filed expert reports from two economists and statements from 10 lay witnesses, as well as written submissions (**ACTU July submissions**). In November and December 2021, the FWC released four publications as part of its research program designed to assist the Review: a literature and data review (**SWIRLS Report**), an analysis of the Workplace Agreements Database (**WAD Report**), a qualitative assessment of employees' experiences of FDV leave (**Monash Report**), and a survey of employers (**Employer Survey**). On 22 December 2021, the ACTU filed further submissions addressing these publications (**ACTU December submissions**).
3. Since the service of the ACTU's July and December submissions, the FWC has received correspondence or submissions in support of the ACTU's application from the Queensland government,¹ Job Watch,² and the West Australian government.³ A submission of certain local government associations in respect of the *Local Government Industry Award 2020* supports the ACTU's application for paid FDV leave, although for five days instead of 10; and otherwise opposes the ACTU's application with respect to the rate of pay, the availability

¹ Dated 21 December 2021.

² Dated 22 December 2021. Job Watch supports the ACTU's application for 10 days paid FDV leave and the ACTU's proposed expansion of the definition of FDV, but submits, "*jurisdictional issues aside*" that eligible employees should be able to access personal leave once the paid FDV leave entitlement is exhausted. As to the jurisdictional issues, see paragraph 6 below.

³ Dated 23 December 2021.

of leave to casual employees, and the access to unpaid leave. The Associations support the ACTU's application for an expanded definition of family and domestic violence.⁴

4. Three employer groups oppose the ACTU's proposed variation in its entirety: the Australian Chamber of Commerce and Industry (ACCI),⁵ the Australian Industry Group (AI Group),⁶ and the Master Grocers' Australia Ltd (MGA)⁷ (together, **the opposing parties**). The ACCI and AI Group's membership does not appear to be confined to one particular award or set of awards.⁸ The majority of the MGA's members are covered by the *General Retail Industry Award 2020* and the *Timber Industry Award 2020*.⁹
5. None of the opposing parties have filed any evidence in support of their position, or in response to or addressing any of the ACTU's evidence, or the FWC's research program.¹⁰ The basis for their opposition is contained exclusively in the written submissions, which collectively comprise 251 pages.¹¹ Taking into account that on 11 March 2022, the parties will file submissions on the conclusions to be drawn from the evidence, and given the length of the opposing parties' submissions and the degree of overlap between them, the ACTU has sought in these reply submissions to identify and address the key legal arguments and broad merit-based themes in the opposing parties' submissions, as well as a number of distinct matters. These are:
 - (a) Whether the FWC has jurisdiction to extend the National Employment Scheme (NES) entitlement to paid personal/carer's leave to incorporate paid FDV leave.

⁴ Dated 3 February 2022.

⁵ Dated 4 February 2022.

⁶ Dated 4 February 2022.

⁷ Dated 4 February 2022.

⁸ In the context of the Employer Survey, both ACCI and the AI Group have declined to provide any information about the identity or characteristics of their members. See ACTU December Submissions, [26]; ACCI Submissions, [8.2]–[8.4]; AIG Submissions, [236]–[237].

⁹ MGA Submissions, [11].

¹⁰ The AI Group contends that it does not bear any onus to demonstrate that paid FDV leave will result in unfavourable consequences for employers, and no adverse inference should be drawn from this: AIG Submissions, [439]. Questions of onus and inferences to be drawn from the absence of evidence will be addressed in the evidentiary submissions to be filed on 11 March 2022. For present purposes it is sufficient to note that questions of onus are not determinative in the context of a review that has been instigated by the Commission of its own motion; and that regardless of whether any party bears a particular onus in FWC proceedings, the decision of whether a particular submission or assertion is to be supported by evidence is a forensic decision to be made by that party.

¹¹ Plus an additional 293 pages annexed to the AI Group's submissions, being copies of their submissions in AM2015/1 dated 28 November 2016 and 30 August 2017, which were made before the decision of the Full Bench to include five days unpaid FDV leave in all modern awards per *Re 4 Yearly Review of Modern Awards – Family and Domestic Violence Leave* (2018) 276 IR 1 (**2018 Decision**).

- (b) The proper approach to the review, including whether the ACTU's proposed variation is inconsistent with s 55 of the *Fair Work Act 2009* (Cth) (**FW Act**), and whether it is necessary to look at each award individually.
- (c) The extent to which there is a gap in the safety net, including the adequacy of current leave entitlements, and of existing social services directed to assisting persons affected by FDV.
- (d) Whether paid FDV leave is properly a matter to be determined by Parliament or at the enterprise level.
- (e) The impact on employers, including the cost, of providing paid FDV leave.
- (f) The terms of the ACTU's proposed variation, specifically:
 - i. The interaction with the NES.
 - ii. The application for 10 days leave;
 - iii. The application of paid FDV leave to casual employees;
 - iv. The definition of FDV;
 - v. Other matters.
- (g) Other matters raised in or by the opposing parties' submissions including the impact of the Covid-19 pandemic and the existence of other social ills.

(a) Does the FWC have jurisdiction to extend the application of paid personal/carer's leave?

6. The first issue to be considered during the Review is whether permanent employees should be able to access the NES entitlement to 10 days paid personal/carer's leave, for the purpose of taking FDV leave.¹²
7. The ACTU's position, for the reasons set out in its July submissions at paragraphs 7–28, is that it is not open to the Commission to extend the NES entitlement to paid personal/carer's leave to incorporate FDV leave, because that would exclude the operation of the NES by depriving employees of the full entitlement to 10 days paid personal/carer's leave; and would be detrimental to employees for that reason. Further, expanding the scope of circumstances in which an employee may take personal/carer's leave to circumstances beyond what is

¹² [2021] FWCFB 2047, [13].

expressly provided for in the statute (at s 97) may constitute a new form of leave, such that it could not be considered ancillary, incidental, or supplementary to the NES entitlement.¹³

8. The AI Group and ACCI submit that while allowing affected employees to access paid personal/carer's leave is preferable to implementing paid FDV leave, such a term would contravene s 55 of the FW Act, and therefore cannot be included in a modern award.¹⁴
9. There is no debate that employees who require FDV leave because of a personal illness or injury, and who are entitled to paid leave, may access personal/carer's leave for that purpose. In practical terms, the question is whether employees who require FDV leave for purposes other than contemplated by the statute, for example to attend court or seek alternative accommodation, should be able to take personal/carer's leave in those circumstances. The answer to the question is governed by the terms of the FW Act.
10. The MGA submits that a modern award term that extends the application of personal/carer's leave to employees who require leave for FDV-related purposes is supplementary to the NES, and would not exclude the NES,¹⁵ because an employee dealing with the consequences of FDV may not be 'not fit for work' as a result and so falls within the scope of s 97 of the Act.¹⁶
11. The words of the statute are not so broad as to permit (paid) absence because an employee is unfit for work. Section 97 provides that an employee may take leave if they are not fit for work *because of a personal illness, or personal injury*, and additionally in the case of carer's leave, because of *an unexpected emergency affecting the [family] member*. The MGA submission does not address the causal relationship between 'fitness for work' and 'because of a personal injury or illness' in s 97 of the Act. It contends that the benefit of personal/carer's leave is not 'lost' if employees are permitted to take this leave for a purpose other than as prescribed by the statute, but does not otherwise address the arguments made against its position, including (for example) in the ACTU's July submissions at paragraph 21¹⁷ which are directly relevant to the MGA's argument.

¹³ Contra s 55(4), and per 2018 Decision, [144].

¹⁴ AIG Submissions, [37]–[62]; ACCI Submissions, [5.1]–[5.4].

¹⁵ MGA Submissions, [16]–[23], esp [21].

¹⁶ MGA Submissions, [22].

¹⁷ The illustration in [21] of the ACTU's July Submissions was made in the 2014 proceedings and is quoted in the 2018 Decision at [134].

(b) The proper approach to the Review

Section 157 of the FW Act

12. There is no dispute between the parties that the Commission’s power in s 157 of the FW Act to vary a modern award is enlivened only if the Commission is satisfied that the variation is necessary to achieve the modern awards objective;¹⁸ that the ‘necessity’ requirement is reiterated in s 138 of the FW Act;¹⁹ that ‘necessary’ carries an imperative that is distinguishable from ‘desirable’;²⁰ of the approach to construction and satisfaction of the modern awards objective;²¹ and of the evidentiary and persuasive standards that any proponent for variation should meet.²²

Scope of the Review

13. The AI Group submit that the scope of the Review should not extend beyond the issues stated by the FWC to be considered during the Review²³ and the ACTU’s claim, and the material filed by the parties in relation to these matters.²⁴ The AI Group then submit that the Review is “*not a general inquiry into the issue of FDV, its impact on employees or the implementation of measures other than [leave] and access to paid personal/carer’s leave*”.²⁵ The meaning of this statement is unclear. The impact of FDV on employees is critical to the ACTU’s claim, and is the subject of evidence filed by the ACTU.
14. In any event, in exercising its modern award powers, the Commission is not bound by the rules of evidence and procedure, and may inform itself in relation to any matter before it, in such a manner that it considers appropriate.²⁶ In circumstances where the considerations of the modern awards objective include “*broad social objectives*”,²⁷ the Commission should not

¹⁸ AIG Submissions, [20].

¹⁹ Per AIG Submissions, [28].

²⁰ See ACCI Submissions, [3.2]–[3.4], [3.7]; AIG Submissions, [21], [29].

²¹ See ACCI Submissions, [3.5]–3.6]; AIG Submissions, [22] (quoting, without commentary, various paragraphs of the *Penalty Rates Decision* [2017] FWCFC 1001).

²² See ACCI Submissions, [3.8], [3.10]–[3.11].

²³ AIG Submissions, [11], referring to [2021] FWCFCB 2047, [13], where the Full Bench stated the issues to be considered during the Review are: (1) whether employees should be able to access paid personal/carer’s leave for the purpose of taking FDV leave (which has been addressed above); (2) the adequacy of the unpaid FDV leave entitlement; and (3) whether provision should be made for paid FDV leave.

²⁴ AIG Submissions, [14].

²⁵ AIG Submissions, [14].

²⁶ FW Act s 591, s590(1); and see 2018 Decision, [39].

²⁷ *Application to vary the Real Estate Industry Award 2020* [2020] FWCFCB 3946, [54].

be constrained in the evidence it may receive or consider when applying the requirements of s 134, s 138 and s 157 of the FW Act.

15. The ACCI submits that in assessing the ACTU's application to vary modern awards, the Full Bench "*will be required to assess the ACTU claim as if it were a review of the current FDV leave framework*".²⁸ This submission is not accompanied by any analysis of the relevant statutory provisions, nor is it suggested by ACCI that the conduct of the Review limits in some way the approach to be taken under s 157 of the FW Act. While the events between the implementation of the 2018 Decision and the current date are clearly *relevant* to the FWC's inquiry, the terms on which the Commission may exercise its power to vary a modern award repose solely in the terms of s 157: the variation must be necessary to achieve the modern awards objective. Contrary to the ACCI submission that the Full Bench "*must consider whether anything has changed since 2018*",²⁹ there is no additional constraint on the exercise of the Commission's modern award powers to the effect that a moving party must demonstrate there has been a material change in circumstances (or any other expression of that concept) since the 2018 Decision in order to justify the proposed variation.³⁰

The ACTU's claim and s 55 of the FW Act

16. The AI Group submits that the ACTU's claim for paid FDV leave is not permitted by s 55 of the FW Act because (1) it would exclude the NES entitlement to unpaid leave because employees would take up the paid award entitlement in favour of the unpaid NES entitlement; (2) the proposed clause is not permitted by s 55(2) of the FW Act; and (3) the proposed clause is not ancillary, incidental, or supplementary to the NES and so contravenes s 55(4) of the FW Act.³¹
17. The AI Group submissions in support of these arguments do not advance beyond an assertion of the purported conclusions. There is no analysis of the relevant statutory provisions in the context of the AI Group's arguments, and no authorities are cited in support (or otherwise). Their position is not supported by ACCI, which accepts that the proposed variation is a permissible modern award term, subject to satisfaction of the necessity requirement.³²

²⁸ ACCI Submissions, [6.7]. Emphasis added.

²⁹ Contra. ACCI Submissions, [6.8]–[6.11].

³⁰ *Re 4 Yearly Review – Fire Fighting Industry Award 2010* [2016] 261 IR 272, [39]; *Shop, Distributive and Allied Employees Association v Australian Industry Group* (2017) 235 FCR 368, [23]–[24], [39]–[40].

³¹ AIG Submissions, [63]–[71].

³² ACCI Submissions, [7.2]–[7.3], [7.7]–[7.8], [7.27].

18. As to the asserted conclusions:
19. First, while the ACTU's proposed variation is undoubtedly more favourable than the NES term, it does not follow that the NES provision is thereby excluded. The terms of s 55 make it clear that the NES provisions do not cover their respective fields.³³ Further, as the Full Bench observed in *Re 4 Yearly Review of Modern Awards – Family Friendly Work* (2018) 276 IR 249, “*any entitlement under an award or agreement that is more beneficial to employees than a minimum standard under the NES is likely to have [the] result*” that employees utilise the more favourable clause; but that is not equivalent to the exclusion of the NES entitlement. If the AI Group's first argument was correct, then parties could not bargain for terms in enterprise agreements that were more favourable than the NES entitlement. In effect, the AI Group's submission is that the NES are maximum standards, not minimum standards. That is not correct.
20. Second, s 55(2) of the FW Act is not a limiting or restrictive provision. The permissible content of modern awards is set out in Subdivision B of Part 2-3 of the FW Act. The ACTU's proposed variation is a term about leave, which is a permitted modern award term by s 139(1)(h) of the Act. Section 55(2) does not operate to read down s 139 or any of the provisions in Subdivision B.
21. Third, it is not necessary for a modern award term “*to operate in conjunction with or as an adjunct to a NES entitlement*”³⁴ for it to be a permissible modern award term. As stated above, the ACTU's proposed term is permitted by s 139(1)(h), which is contained in Subdivision B of Part 2-3 of the Act. Section 136(1) provides that “*a modern award must only include terms that are permitted or required*” by, relevantly “*(a) Subdivision B; or ... (c) Section 55*” (emphasis added). That is, a modern award term does not need to satisfy Subdivision B and be ancillary, incidental or supplementary to the NES entitlement, in order to be a permissible modern award term. If a modern award term is within the scope of s 139, then it must not contravene s 55 (per s 136(2)(b)), but that is not the same as requiring that the term satisfy both s 139 *and* s 55(4) to be a permissible term.
22. In any event, the ACTU's proposed term is supplementary to the NES entitlement. Both terms concern taking leave for the purposes of dealing with FDV. The meaning of “supplement” in s 55(4) of the FW Act, having regard to both its ordinary and natural meaning, and by reference to the notes to s 55(4)(b), includes increasing or improving the minimum standards

³³ *Re Casual Terms Award Review 2021* (2021) 309 IR 14, [31].

³⁴ AIG Submissions, [70].

provided for in the NES.³⁵ Both the paid FDV leave provision, and the unpaid FDV leave provision in the ACTU's proposed variation, are supplementary to the NES entitlement, within the meaning of s 55(4) of the Act.

Award-by-award analysis

23. ACCI and the AI Group observe that s 138 of the FW Act requires that each modern award be analysed separately to ascertain that it meets the statutory requirements.³⁶ The requirement to consider each individual award is not necessarily clear from the statutory language, and the employers' analysis of those provisions is brief.³⁷
24. There is nothing in the terms of s 157 of the FW Act or in the Commission's modern award powers which apply to the conduct of the Review that would preclude the Commission from taking an incremental approach to considering an application to vary all modern awards: first at a 'global' level, and later, any necessary award-by-award analysis.³⁸ In considering the parameters of this Review, it is relevant that (a) the ACTU's variation application is made in respect of *all* modern awards; and (b) no modern award currently provides for paid FDV leave.³⁹ In the circumstances, a global analysis is both a permissible and an appropriate approach to the Review.

(c) The safety net

Social services for persons affected by FDV

25. The opposing parties submit that it is appropriate for the Commission to take into account various government measures designed to assist persons experiencing FDV,⁴⁰ and have identified a range of measures that they contend demonstrate that paid FDV leave is not necessary within the meaning of s 138 of the FW Act.⁴¹
26. As stated above, the Commission is not constrained in the manner in which it may inform itself in relation to any matter before it.⁴² However, and without intending any disparagement

³⁵ See the discussion on this issue in *Re 4 Yearly Review of Modern Awards – Family Friendly Work* (2018) 276 IR 249, [155]–[158].

³⁶ ACCI Submissions, [7.4], AIG Submissions, [438].

³⁷ ACCI Submissions, [7.4].

³⁸ See 2018 Decision, [40]–[41].

³⁹ Cf. ACCI Submissions, [7.9]–[7.10].

⁴⁰ AIG Submissions, [4].

⁴¹ ACCI Submissions, [7.18], [7.21]–[7.26]; AIG Submissions, [75]; and see generally from [72].

⁴² FW Act s 591, s590(1); and see 2018 Decision, [39].

of the programs outlined in the opposing parties' submissions, the measures identified by the opposing parties are simply not relevant to the Review:

- (a) Regarding various government measures that have been proposed or foreshadowed, but have not yet been enacted, these cannot be said to be meeting the need that paid FDV leave is designed to meet, and should not be considered by the Commission as relevant matters in the Review.⁴³
- (b) Many of the government measures are either irrelevant to the question of the necessity of paid FDV leave (eg, the Family Violence and Cross-Examination of Parties Scheme⁴⁴ or the Office of the eSafety Commissioner's steps to make cyberspace safe for women⁴⁵), or are described in general (eg, the NSW Blueprint)⁴⁶ or aspirational (eg, the WA strategy⁴⁷) terms.
- (c) Relevantly, none of the existing (or proposed) measures meet the specific need that paid FDV leave is designed to meet, including the 'Escaping Violence' payment described in ACCI and the AI Group's submissions,⁴⁸ which can take weeks to be approved, and which is only available to persons who are not living with the violent partner, or have a plan to leave.⁴⁹

Existing statutory entitlements

- 27. The opposing parties contend that existing statutory protections and entitlements are sufficient to protect the interests of persons affected by FDV, and that the ACTU's Claim is therefore not necessary within the meaning of s 138.⁵⁰
- 28. The adequacy of entitlements such as annual leave, personal/carer's leave, and individual flexibility arrangements (made pursuant to an award clause, or s 65 of the FW Act, or informally), to meet the needs of persons affected by FDV was addressed by the parties in the 2014 application, and considered by the Full Bench in the 2018 Decision. In that Decision, the Full Bench rejected the employers' arguments that the various statutory entitlements

⁴³ See, eg, ACCI Submissions, [7.18]; AIG Submissions, [81]–[82]; [86]–[87].

⁴⁴ AIG Submissions, [91]–[94]

⁴⁵ ACCI Submissions, [7.18].

⁴⁶ AIG Submissions, [96]–[103]. See also ACCI Submissions, [7.26].

⁴⁷ AIG Submissions, [119]–[121].

⁴⁸ ACCI Submissions, [7.20]–[7.25]; AI Group Submissions [83]–[85].

⁴⁹ <https://www.unitingvictas.org.au/services/family-services/family-violence-services/escaping-violence-payment/>

⁵⁰ ACCI Submissions, Part 4; AIG Submissions, Part 9.

relied on by it afforded sufficient protection of the interests of persons affected by FDV. The ACTU relies on the 2018 Decision in respect of the adequacy of those entitlements.⁵¹

29. It bears repeating that paid leave entitlements are only available to permanent employees. Close to 67 per cent of all low-paid award-reliant employees are employed on a casual basis;⁵² overall, just 52 per cent of award-covered employees are employed on a permanent basis, and 49 per cent of award-covered women are employed on a permanent basis and can access paid leave.⁵³
30. The AI Group also relies on new rights of casual employees to convert to permanent employment, and occupational health and safety laws, as legal protections that may assist persons experiencing FDV;⁵⁴ and on award-based rights such as time off instead of payment for overtime clauses, make-up time clauses, and facilitative provisions.⁵⁵ There is little or no analysis of how those provisions meet the needs of employees (permanent or casual) who need to take authorised leave from work and maintain continuity of income to deal with FDV. To the extent those provisions form part of the broad network of employers' legislative obligations which are designed to protect employees' interests, they are too remote from the present problem to be relevant.
31. There remains the question of whether the existence of the unpaid modern award provision, and now the NES entitlement, have ameliorated the necessity for paid FDV leave.⁵⁶ Undoubtedly, the right of affected employees to be absent from work on short notice and without pre-approval from the employer (if the statutory requirements are met) provides a level of protection to affected employees that they did not previously have. The creation of a new workplace right was an important protection for employees who may otherwise face unfair dismissal or disciplinary action in certain circumstances. However, the availability of

⁵¹ In the 2014 proceeding, the AI Group relied on: statutory personal/carer's leave, annual leave, long service leave; continuity of service; the right to request a flexible working arrangement pursuant to s 65 of the FW Act; and protection against unfair dismissal, adverse action and unlawful termination: see Majority Decision at [39]. The Full Bench in the 2018 Decision rejected the argument: see [185]–[186]. In their submissions to this review at [147]–[157] and [161]–[171], the AIG identified statutory personal/carer's leave, annual leave, long service leave, the right to request a flexible working arrangement pursuant to s 65 of the FW Act, unfair dismissal and general protections laws; and at [179]–[183] and [189]–[190], award-based entitlements of, relevantly, individual flexibility agreements, and annual leave in advance clauses. ACCI relies on personal/carer's leave, annual leave, long service leave, and the right to request a flexible working arrangement: ACCI Submissions, [4.2]–[4.6], [4.28].

⁵² Fair Work Commission, *Research Report 1/2020: Prevalence and persistence of low-paid award-reliant employment*, February 2020, Table 8.

⁵³ ACTU July Submissions, [105].

⁵⁴ AIG Submissions, [172]–[178].

⁵⁵ AIG Submissions, [184]–[188], [191]–[192].

⁵⁶ ACCI Submissions, [8.53]–[8.54].

a remedy against adverse action is not enough. Income is critical to the concept of a safety net. In order to truly comprise a *safety net of minimum* terms and conditions of employment, FDV leave must be paid leave.⁵⁷

(d) Should paid FDV leave be a matter for Parliament or the enterprise?

A matter for Parliament?

32. The opposing parties contend that paid FDV leave is a matter for Parliament, and that government should have primary carriage of responding to FDV more generally. These submissions ignore that the Commission is empowered to vary modern awards to provide for paid FDV leave, and that in a recent inquiry, Parliament expressly deferred consideration of paid FDV leave to this Review.
33. As to the specific submissions made by the opposing parties, ACCI asserts that ‘global’ amendments in the nature of the ACTU’s application are “*much more appropriately determined by Parliament*”, but does not explain the basis for this submission.⁵⁸ The Commission is empowered by the FW Act (ie, by Parliament) to vary modern awards. There is nothing in the statutory power or its context to indicate that the power to vary modern awards is constrained by reference to Parliament’s ability to legislate on workers’ rights. To the extent that ACCI relies on the *Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018* as evidence that Parliament determined not to introduce paid FDV leave,⁵⁹ the evidence for that conclusion from the surrounding context is scant. If anything, the rapid passage of the Bill demonstrates that Parliament is minded to be guided by the Commission on the content of minimum standards in modern awards and, by extension, the NES.
34. The AI Group contends that FDV is “*a serious social issue that should be focus for governments*”.⁶⁰ This is a general statement concerning public policy, with which the ACTU agrees. However, no one body has exclusive responsibility for dealing with the impact of FDV. The ACTU does not contend that paid FDV leave will ‘solve’ the problem of family and domestic violence in Australia and the proposed variation should not be assessed by that standard.⁶¹

⁵⁷ ACTU December Submissions, [28], [63]–[65].

⁵⁸ ACCI Submissions, [7.13].

⁵⁹ ACCI Submissions, [7.14]–[7.19], [7.27]–[7.31]. Further, the failure of a private members’ bill is hardly conclusive evidence of the government’s position on the issue.

⁶⁰ AIG Submissions, [445].

⁶¹ Cf. ACCI Submissions, [8.50].

35. As the House of Representatives Standing Committee on Social Policy and Legal Affairs (**House Committee**) in its *Inquiry into family, domestic and sexual violence* (March 2021) noted, “governments cannot eliminate [family, domestic and sexual violence] on their own. ... there is an important role for business, community groups, and other non-government bodies in preventing and responding to [family, domestic and sexual violence] in our community. A whole-of-society approach is vital”.⁶²
36. The opposing parties’ position that FDV leave is a matter for government is undermined by their participation, or not, in the House Committee’s inquiry which included the question of paid FDV leave. ACCI declined to provide any evidence to the inquiry on this question.⁶³ The AI Group urged the Committee to “not do anything further in this space until we’ve at least read the [FWC’s] review”, being a reference to the present hearing.⁶⁴ Read with their submissions in the Review, the position of the AI Group appears to be that the Commission should not vary modern awards to provide for paid FDV leave because it is properly a matter for Parliament – but simultaneously, that a Parliamentary committee should not make any recommendations about paid FDV leave until the Review is completed.
37. Ultimately, the House Committee did not reject the introduction of paid FDV leave.⁶⁵ Rather, the Committee determined that amendments to leave entitlements was beyond the scope of the inquiry, and expressly deferred to the Commission’s consideration of the issue in this Review.⁶⁶

A matter for the enterprise?

38. The opposing parties, relying on the ACTU’s lay evidence⁶⁷ and evidence from the FWC’s research program,⁶⁸ contend that employers are typically supportive of employees experiencing FDV, and take a collaborative approach to providing support, whether at the enterprise level, or by terms agreed in enterprise bargaining.⁶⁹ This is not an accurate summary of the evidence. The ACTU’s lay evidence, in particular, demonstrates that being unable to afford to take leave is often cited as a reason for employees refusing or having to discontinue supportive measures, or being unable to leave a violent relationship.⁷⁰ Moreover,

⁶² House Committee Report, [2.185].

⁶³ House Committee Report, [8.221].

⁶⁴ House Committee Report, [8.157].

⁶⁵ Cf. AIG Submissions, [78].

⁶⁶ House Committee Report, [8.223].

⁶⁷ AIG Submissions, [235(a)–(d)].

⁶⁸ ACCI Submissions, [8.9], [8.35]; AIG Submissions, [235(f)–(q)].

⁶⁹ AIG Submissions, [232(b), (c)], [234].

⁷⁰ See ACTU July Submissions, [74], [76].

for those employees that did have access to paid FDV leave, the critical support provided by paid leave underscores, rather than undermines, the necessity of that provision to all employees.⁷¹

39. The opposing parties express concerns that the introduction of paid FDV leave may undermine progress or stifle efforts by employers, employees, and unions to negotiate and provide workplace-specific responses to employees affected by FDV, including via enterprise bargaining.⁷² These submissions are not supported by any evidence. No research or publication is identified in support of that hypothesis. Not a single employer has been called to give evidence to substantiate ‘concerns’ that provision of a minimum award-based entitlement will cause otherwise supportive employers to discard their efforts in this regard.
40. Regarding enterprise bargaining, the AI Group submits that the increase in FDV-related clauses in enterprise agreements since 2016 suggests that the absence of paid FDV leave may have encouraged collective bargaining on this issue.⁷³ This causal relationship is not explained. It is equally possible that the introduction of unpaid FDV leave to modern awards and later the NES, has encouraged collective bargaining on workplace responses to FDV more broadly, as acknowledged by ACCI,⁷⁴ and that the introduction of a paid FDV leave entitlement will further encourage bargaining on this issue.

(e) The impact on employers of providing paid FDV leave

Cost

41. The ACTU relies on two reports of Professor Duncan as to the estimated cost to employers of providing 10 days paid FDV leave per year to award-covered employees, and on two reports of Dr Stanford regarding the likely utilisation of a paid FDV entitlement by award-covered employees.
42. The opposing parties have filed no evidence to counter or contradict the evidence of Professor Duncan or Dr Stanford. There is no suggestion in the material that the calculations performed by Professor Duncan, or Dr Stanford’s analysis of utilisation rates, are incorrect.

⁷¹ See, eg, ACTU July Submissions, [75], [76], [77].

⁷² ACCI Submissions, [8.20(d)]; AIG Submissions, [232(b), (c)], [245]–[248], [249]–[251].

⁷³ AIG Submissions, [456]–[459]. The AI Group criticizes the ACTU submissions as ‘purely speculative’ on the relationship between paid FDV leave and bargaining – but then engages in the same exercise.

⁷⁴ ACCI Submissions, [10.10]–[10.11].

43. It does not appear to be seriously contested, at least on the evidence, that the cost of providing paid FDV leave is fundamentally unaffordable to Australian employers. ACCI acknowledges that it has “*no evidence*” that the provision of 10 days paid FDV leave will result in extraordinary costs for all employers.⁷⁵
44. It was open to the opposing parties to prepare their own analysis of the potential costs to employers of providing paid FDV leave, and/or to substantiate the assertion that paid FDV leave is unnecessary because employers are already properly responsive to the issue. The inferences to be drawn from the absence of this evidence will be addressed in the evidentiary submissions to be filed on 11 March 2022.
45. The highest that the criticism of Professor Duncan’s analysis is put is that the evidence of the cost of providing paid FDV leave “*cannot properly be measured*”,⁷⁶ but the opposing parties have not identified the standard or form of evidence that would constitute a robust or ‘proper’ measurement of the cost. Further, to the extent the opposing parties contend that the data is not sufficiently reliable to permit an accurate assessment of the likely cost of providing paid FDV leave,⁷⁷ the Commission should be cautious to accept any submission to the effect that data must be as close to perfect as possible if it is to be reliable. As observed by the House Committee, data collection in this area is challenging, and the Committee made four recommendations designed to improve data collection regarding FDV.⁷⁸ However, the limitations in the available data should not be used as an excuse to do nothing. The appropriate response is to assess whether conclusions can be drawn from the data that does exist.
46. The Duncan Report and the Stanford Report calculate the likely cost of providing paid FDV leave by reference to two assumptions based on the available data: first, the number of persons who have experienced FDV (prevalence rates), and second, the number of days leave (or time off work) taken by employees who report experiencing FDV (utilisation rates). Both Professor Duncan and Dr Stanford properly acknowledge and account for the limitations of the data relied on in their analysis.⁷⁹
47. In terms of prevalence data, the experts rely in part on data from the Australian Bureau of Statistics Personal Safety Survey (PSS), of which the most recent available data is from 2016. It is correct, as suggested by the opposing parties, that the PSS data may not reflect current

⁷⁵ ACCI Submissions, [10.27].

⁷⁶ AIG Submissions, [473].

⁷⁷ See, eg, ACCI Submissions, [8.12]–[8.15].

⁷⁸ House Committee Report, [2.47]–[2.77]; [2.211]–[2.221].

⁷⁹ See, eg, Duncan Report, [24], [28], [38] et seq; Stanford Report, [24], [35], [46], [56], [58], [75], [77].

rates of FDV.⁸⁰ The preponderance of the evidence indicates that rates of FDV have increased and have not decreased, in recent years.⁸¹ Any increase in the cost of providing paid FDV leave as a result of increased prevalence of violence is properly accounted for in Professor Duncan’s second and third analysis of the possible cost of providing leave, which each significantly increase (and in the ACTU’s submission, likely overestimate) the utilisation rates and therefore the cost of providing paid leave.⁸²

48. In terms of utilisation data, all parties acknowledge the limited evidence regarding utilisation rates generally, and specifically of the use of the unpaid FDV leave entitlement.⁸³ However, it does not follow that because there is limited utilisation evidence available, any such analysis of that evidence is of little weight.⁸⁴
49. The utilisation rates considered by Professor Duncan and Dr Stanford in their supplementary reports include evidence from the Employer Survey. The ACTU noted in its December submissions that there were legitimate questions about the representativeness of the persons to whom the survey was sent, and those who responded.⁸⁵ The opposing parties have declined to provide any information about the characteristics of the employers to whom the survey was sent.⁸⁶ The ACCI, somewhat circuitously, submits that the representativeness of the Employer Survey can be discerned in part from the answers to the survey,⁸⁷ but otherwise states that utilisation rates drawn from the Employer Survey must be treated with caution.⁸⁸ The AI Group nonetheless submits that the survey “*provides instructive and contemporary insights into the experiences of employers*”, but equally, that there is unreliable data about utilisation rates of FDV leave entitlements, including of the NES entitlement.⁸⁹ The collective views of the opposing parties as to the probative value of the Employer Survey are somewhat opaque, despite the fact that the Survey was distributed by those parties, to their members.

⁸⁰ AIG Submissions, [254]–[261].

⁸¹ See paragraph 93 below.

⁸² See ACTU July Submissions, [80(b)] and [80(c)]; and ACTU December Submissions, [42(b)] and [42(c)].

⁸³ ACTU December Submissions, [46]; AIG Submissions [267].

⁸⁴ Per AIG Submissions, [269].

⁸⁵ See ACTU December Submissions, [26].

⁸⁶ ACCI Submissions, [8.2]–[8.4]; AIG Submissions, [236]–[237].

⁸⁷ ACCI Submissions, [8.4].

⁸⁸ ACCI Submissions, [8.9(b)].

⁸⁹ AIG Submissions, [237], [264]–[278]. The AI Group submissions do not address the supplementary reports of Professor Duncan and Dr Stanford which expressly consider whether the utilisation data contained in the Employer Survey (among other matters) causes any change in their analysis of possible utilisation rates – and therefore cost – of paid FDV leave

50. The opposing parties' position is that the available material does not permit an accurate assessment of the likely utilisation rate, but also, that evidence of utilisation of the unpaid leave entitlement would not necessarily be a reliable proxy for estimating utilisation rates of paid FDV leave.⁹⁰ The opposing parties' position is effectively a statement that utilisation rates cannot be estimated. This submission is of little assistance to the Commission.
51. In circumstances where there is no single data source that can positively answer the question as to the likely utilisation rate of a paid FDV leave entitlement – and nor could it rationally be expected that such a source exist – the ACTU submits that the proper approach is to consider the evidence as a whole. Dr Stanford's reports perform that task. The overwhelming preponderance of the evidence is that utilisation rates are likely to be low, and correspondingly, so will be the costs of providing paid leave.
52. The opposing parties submit that low utilisation rates of FDV leave (paid and unpaid) suggests that the provision is not necessary to meet the modern awards objective.⁹¹ This is a false equivalence. Utilisation rates are not, can cannot, be a proxy for the necessity test. That paid FDV leave may not be used by all, or even a majority of, award-covered employees affected by family and domestic violence says nothing about the necessity of the provisions to those who need it, or those who use it.
53. The AI Group contends that the FWC must have regard, pursuant to s 134(1)(f), of the impact of the proposed variation on individual businesses. That is not precisely the terms of s 134(1)(f), which is expressed in very broad terms.⁹² The AI Group further asserts that the microeconomic impact of introducing paid FDV leave "*would be significant*".⁹³ But the FWC does not have evidence from a single employer to substantiate that assertion, and it is not a *prima facie* proposition. The evidence is that utilisation rates of paid FDV leave are low, and correspondingly, so will be the cost of providing paid FDV leave. Further, that cost will be offset by a reduction in the existing costs to employers associated with employees affected by FDV.⁹⁴ It does not follow that because an entitlement is beneficial to an employee⁹⁵ that it is detrimental to an employer. Moreover, none of the opposing parties contest the evidence

⁹⁰ ACCI Submissions, [8.9(b)]; AIG Submissions, [267]–[268].

⁹¹ ACCI Submissions, [8.9(c)], [8.29], [8.50], [9.6]

⁹² 2018 Decision, [289].

⁹³ AIG Submissions, [476]. Emphasis added.

⁹⁴ See ACTU July Submissions, [63], [64], [81], [83]; ACTU December Submissions, [44]; Duncan Report [11]–[19], [44], [47], [48]–[58].

⁹⁵ As accepted by ACCI in the ACCI Submissions at [8.51].

that the costs of family and domestic violence to the national economy, and to employers, are very high.

Other factors relevant to cost

54. The AI Group identify a number of matters, such as employers' current practices in dealing with employees experiencing FDV, that it submits are relevant to assessing the potential impact of the ACTU's proposed variation, and criticise the application on the basis that it does not take into account these matters (because there is no available evidence about them).⁹⁶ Whether or not these matters are truly relevant to the assessment of the cost of providing paid FDV leave is presently no more than an unsupported hypothesis. The AI Group and ACCI could have sought to have some or all of these matters captured by the Employer Survey, or to provide qualitative, or even anecdotal evidence, demonstrating the connection between these matters and the potential cost of paid FDV leave. Those parties chose not to put any such evidence before the Commission. It is open to the Full Bench to assume that the employer parties had access to members who could have given evidence in support of the parties' contentions.
55. While the opposing parties refer, in general terms, to the financial impact of the pandemic on small business,⁹⁷ they have not put any evidence before the Commission on if, or how, employers' capacity to meet their statutory obligations to provide paid leave has been affected by pandemic-related restrictions, which might be considered a useful proxy for the analysis of the potential impact of paid FDV leave on small business.

Inconvenience or disruption to employers' operations

56. Finally, the AI Group submits that the introduction of paid FDV leave, and/or the introduction of the ACTU's proposed variation "*may cause significant disruption to an employer's operations*" because the provision (like the current NES entitlement) affords employees the right to be absent from work with little notice and without the employer's agreement.⁹⁸ ACCI make a similar submission.⁹⁹
57. Employers do not have an absolute right to control when an employee must attend work, and routinely deal with the need to make operational adjustments because of an employee's unexpected absence, including because they are taking personal/carer's leave, unpaid carer's

⁹⁶ AIG Submissions, [273], [275]–[277].

⁹⁷ AIG Submissions, [476].

⁹⁸ AIG Submissions, [464]–[466].

⁹⁹ ACCI Submissions, [10.22].

leave, compassionate leave, and unpaid FDV leave. There is no evidence from any employer to the effect that their organisation had experienced significant disruption as a result of employees' exercising their statutory rights to take leave.

58. There is nothing about the provision of paid FDV leave that will require any employer to do anything that it does not already do as a consequence of (for example) employees taking an unanticipated period of sick leave. The AI Group's submission that employee absences which may occur at short notice or unexpectedly, is contrary to the need to promotion of the efficient and productive performance of work, must be rejected.¹⁰⁰ The need to promote the efficient and productive performance of work is not met by requiring employees to attend work who are otherwise experiencing circumstances that qualify them to take personal leave (because they are sick) or compassionate leave (because they are grieving) or unpaid FDV leave (because they need to seek emergency housing).

(f) The terms of the ACTU's proposed variation

Interaction with the NES

Unpaid family and domestic violence leave

59. The AI Group submits that the manner in which the ACTU's clause would interact with the NES is unclear, and the current drafting "*would result in employees having access to the leave provided by [the ACTU's] proposed provision in addition to the unpaid leave entitlement contained in the NES.*"¹⁰¹ This is not correct. An employee would not be entitled to the benefit of both the NES clause and the ACTU's proposed clause. The interaction between the two clauses is governed by s 55(6) of the FW Act, which provides that if a modern award includes a term permitted by s 55(4), then to the extent that the terms give an employee an entitlement that is the same as an NES entitlement, the terms operate 'in parallel', but not so as to give an employee a double benefit, and the provisions of the NES apply as a minimum standard.
60. In circumstances where an employee has exhausted the 10 days of paid FDV leave that they would be entitled to under the ACTU's proposed clause, they would be entitled to an additional five days unpaid FDV leave on each occasion, for the prescribed purpose. The first five day period of unpaid leave the employee accessed under the ACTU clause would be a similar benefit to that provided by the NES clause, and the two entitlements would operate 'in parallel', so that the employee would not receive a double benefit. The ACTU's clause

¹⁰⁰ AIG Submissions, [464]–[466].

¹⁰¹ AIG Submissions, [285].

provides an identical quantum of unpaid leave to the NES clause (five days per year), except that it is accessible to wider range of employees (ie, including employees experiencing violence from a member of their household). The ACTU clause is not detrimental to employees in any respect when compared with the NES. After the first five days was exhausted, any additional unpaid leave would be as a supplement to the benefit in NES clause, per s 55(4)(b).

Personal/carer's leave and compassionate leave

61. The AI Group contends that the ACTU's proposal would provide employees (other than casuals) with an entitlement to both paid FDV leave and paid personal/carer's leave, in circumstances where the employee is not fit for work because of a personal illness (physical or mental) or injury as a result of being subjected to FDV; and would also result in some employees having an overlapping entitlement to FDV leave and paid compassionate leave under the NES. The AI Group argues that this overlap is not consistent with a simple and easy to understand award system, is "*likely to result in significant complexity and potential confusion*", and is unnecessary.¹⁰²
62. The interaction between an entitlement to FDV leave and personal/carers leave and compassionate leave was considered in the 2014 proceeding. For similar reasons accepted by the Full Bench in that proceeding, there should be no requirement for employees to exhaust or utilise other paid leave entitlements before accessing paid or unpaid FDV leave. This approach is unnecessary, and would introduce significant complexity in relation to the operation of the clause for both employees and employers, as well as having a detrimental impact on women.¹⁰³ One of the key motivations for the ACTU's claim for a standalone entitlement to paid and unpaid FDV leave is to ensure that workers affected by family and domestic violence – predominantly women – are not required to deplete their leave balances that are expressly provided for other purposes in order to recover and escape from family and domestic violence.

10 days leave

63. The opposing parties submit that the quantum of leave in the ACTU proposal (10 days) is not necessary in the sense contemplated by s 138 of the Act. It is argued by AI Group that the 'adverse impact' upon employers of the proposal for 10 days leave will be 'exacerbated' by the rate at which the leave would be paid, the fact that the leave is available on

¹⁰² AIG Submissions, [287].

¹⁰³ 2018 Decision, [266]–[268].

commencement of employment rather than on an accrued basis, and the fact that other leave entitlements need not first be exhausted.¹⁰⁴ These issues are addressed below.

64. In 2018, the Full Bench determined, based on the available evidence at that time, that five days' unpaid FDV leave per annum represented a fair and relevant safety net entitlement.¹⁰⁵ While (as noted) there are still limitations that exist in relation to impact and utilisation data (some of which will likely persist in light of the sensitive nature of the entitlement in question), there is now more evidence available to the Full Bench about the impact on employees of FDV, and the utilisation of existing FDV leave entitlements.
65. That evidence shows that the benefits to employees of FDV leave are extremely significant.¹⁰⁶ Both the Monash and SWIRLS Reports identify a significant impact on affected employees' abilities to attend and meaningfully engage in work.¹⁰⁷ The evidence also shows that, as a consequence of these impacts on work, for a significant proportion of employees affected by FDV, five days leave per annum is simply not sufficient. Reflecting this reality, the Employer Survey shows that more than 90 per cent of employer respondents granted requests for more than five days unpaid FDV leave.¹⁰⁸ The fact that not all employees will require 10 days FDV leave does not amount to evidence that 10 days is an inappropriate minimum standard. Personal/carer's leave offers a comparable illustration. Many employees do not take all 10 days of their personal/carers leave per year, and some employees require much more than 10 days per annum. Despite this, 10 days of personal/carers leave is the minimum to satisfy the safety net. In relation to the quantum of FDV leave in the ACTU's claim, the evidence shows that the standard of 10 days has developed over a number of years from negotiations at the workplace level between employers and employees, based on the real and practical needs of employees who have experienced FDV, as well as the input of experts. The ACTU does not ask the Commission to 'codify' 10 days paid FDV leave within the award system simply because it is increasingly prevalent in enterprise agreements. Rather, the emergence of an industrial norm of 10 days paid FDV leave is evidence of the need of many employees for more than five days of FDV leave, and that there is a growing consensus among employers and employees that this need is met (for most employees, but not all) by the provision of 10 days paid leave.

¹⁰⁴ AIG Submissions, [348].

¹⁰⁵ 2018 Decision, [235].

¹⁰⁶ ACTU Initial Submissions [69] – [72].

¹⁰⁷ SWIRLS Report, [3]; Monash Report, page 19, 20, 22–25.

¹⁰⁸ Employer Survey.

66. The evidence does not show that the impact on employers of providing 10 days paid leave would be adverse. Using detailed average weekly wage data for award-covered employees from HILDA based on sex and age, Professor Duncan provides a range of costs estimates, and concludes that the cost impact on employers may not be ‘may not be significant’.¹⁰⁹
67. The interaction between FDV leave and other forms of leave is dealt with above. It is not fair, relevant, or necessary to require employees to exhaust other forms of leave before they can access FDV leave. This approach would introduce significant complexity to the operation of the entitlement and should be rejected.
68. FDV leave is a ‘needs-based entitlement’ and should accordingly be available ‘up front’. In the 2018 Decision, the Full Bench held that the entitlement to unpaid FDV leave should be available in full at the commencement of each 12 month period of employment, rather than accruing progressively, reasoning that the purpose of the entitlement is to “*enable employees to be absent from work when they need to do something to deal with the impact of family and domestic violence. It is not a reward for service (such as annual leave), but a needs-based entitlement (similar to unpaid carer’s leave in s.102).*”¹¹⁰ While these comments were made in relation to an unpaid FDV leave, they are equally applicable to paid FDV leave. There is no evidence that this would impact adversely on employers.

Casual employees

69. The ACTU’s proposed clause would entitle a casual employee to paid FDV leave, 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.
70. ACCI and the AI Group oppose the provision of paid leave to casual employees. The AI Group argues that (1) there is no precedent for paid leave being provided to a casual employee under the NES or within the awards system, and therefore paid FDV leave should not be extended to casuals; (2) the extension of paid leave to casuals would give rise to ‘insurmountable’ difficulties relating to the calculation of the remuneration and quantum of leave; (3) the extension of paid leave is incompatible with the new definition of ‘casual employee’ in s.15A of the FW Act; (4) it is inappropriate, as a matter of merit, to require that an employer pay a casual employee for absences from work when there is no award derived

¹⁰⁹ Duncan Report [44] and [45].

¹¹⁰ 2018 Decision, [253], [254].

obligation upon a casual employee to actually attend work.¹¹¹ ACCI argues that existing entitlements such as annual leave and personal/carers leave are adequate to deal with FDV, and the ‘premium’ paid by way of a casual loading adequately compensates casual employees for annual leave and personal carer’s leave, removing the necessity for paid FDV leave.¹¹²

71. First, the lack of a precedent for the extension of paid leave to casuals is not of itself a reason not to grant this aspect of the ACTU’s claim. The test is whether or not it is necessary to provide for a fair and relevant safety net to extend paid FDV leave to casuals. The ACTU relies on the evidence set out in its July submissions at paragraphs 105 to 109.

72. Second, there are precedents for the granting of paid leave to casual employees as part of the safety net. These examples demonstrate that the calculation of quantum and rates of pay for paid leave for casuals does not present ‘insurmountable’ difficulties. These include:

(a) *Long service leave (LSL)*: A number of states grant access to paid LSL for long-term casuals. For example, the *Long Service Leave Act 2018* (Vic) entitles full time, part time, casual, seasonal and fixed term employees to LSL where their employment has been continuous for 7 years. Under the Victorian Act, where an employee does not have fixed hours of work, the employee’s hours of work are averaged for the purposes of calculating long service leave. The Victorian Act contains formulas to calculate ordinary pay where averaging is required.¹¹³

(b) *Paid pandemic leave*: In 2020, the Commission established a (temporary) entitlement to paid pandemic leave for employees covered by the *Aged Care Award 2010*, the *Nurses Award 2010*, and the *Health Professionals and Support Services Award 2020*.¹¹⁴ The Full Bench extended the entitlement to casual employees engaged on a regular and systematic basis, with payment based on an average of their earnings over the previous six weeks. There was no minimum service requirement for casuals to access the paid leave, and no requirement for a casual to work a consistent pattern of engagement.¹¹⁵

73. Third, the argument that the definition of casual employees in s 15A of the FW Act is not compatible with an entitlement to paid leave is without basis. The definition (and conversion process) for casual employees in the FW Act expressly contemplates that an employee may

¹¹¹ AIG Submissions, [321]–[345].

¹¹² ACCI Submissions, [4.20].

¹¹³ *Long Service Leave Act 2018* (Vic) ss 3, 12(3), 15 and 16.

¹¹⁴ [2020] FWCFB 3940.

¹¹⁵ *Ibid*, [63].

work a regular pattern of hours as a casual employee. In any event, the paid pandemic leave decision demonstrates that working a consistent pattern of hours (in the number of days worked each week, the days of the week worked or the duration of each shift) is not a requirement for granting paid leave to a casual employee.¹¹⁶

74. Fourthly, AIG argues that it would not be fair to require that an employer pay a casual employee for absences from work when there is no award-derived, or even assumed, obligation upon a casual employee to actually attend work. Under the ACTU's clause, an employee who takes paid family and domestic violence leave is only entitled to be paid for their leave if they were rostered to work during the period in which the leave is taken.
75. Finally, ACCI argues that casuals should not be provided with access to paid FDV leave because existing entitlements are adequate, and casuals are compensated for existing paid leave entitlements by a loading. Central to the 2018 Decision to provide access to unpaid FDV leave was a finding that existing entitlements do not meet the needs of employees who experience family and domestic violence.¹¹⁷
76. The Full Bench said further at paragraph 248 in relation to casual loading:

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

The definition of FDV

77. The ACTU's proposed variation includes the extension of the definition of FDV to include violent behaviour by a member of the employee's household.
78. The AI Group opposes the extension of the definition, arguing that "...a definition which leaves open the question of whether an employee has experienced FDV to subjective considerations will result in foreseeable difficulties such as confusion or uncertainty as to whether what has occurred is FDV for the purposes of the entitlement, disputation and employers feeling compelled out of a concern to not breach the relevant provision to adopt an approach of granting such leave when it may not strictly arise."¹¹⁸

¹¹⁶ Ibid, [63].

¹¹⁷ 2018 Decision, [185]–[187].

¹¹⁸ AIG Submissions, [305].

79. These concerns do not appear to be directed to the proposed extension. It is not clear what is ‘subjective’ about whether a person is a member of an employee’s household.
80. The expressed concerns are purely speculative and have no basis in any evidence called by the employers (as there is none). The evidence in the Employer Survey does not indicate that employers are experiencing operational difficulties with the implementation of paid or unpaid FDV leave provisions, many of which are in the same or similar terms as the ACTU’s proposed clause. For example, about half of the respondents to the Employer Survey (42.6 per cent) never require employees to provide evidence of their need to take unpaid FDV leave. About a third require evidence to be provided some of the time, presumably depending on the circumstances of the particular claim. Just a quarter require evidence on every occasion.¹¹⁹ Of the 28 FDV policies received by the Commission, four are silent on the provision of evidence; twenty provide that evidence may be requested for access to paid or unpaid leave; and four require evidence in relation to paid or unpaid leave.¹²⁰ These results are consistent with the Monash Survey, which shows that about half of workers seeking FDV leave were required by their employer to provide documentation to support their leave request; while the other half were not required to provide evidence to support their request. The Monash Survey results show that workers have provided a range of documentary evidence of their need for leave, including a copy of an intervention order, letters from psychologists, psychiatrists, doctors, courts or lawyers, court documents, medical or doctor’s certificates, police reports, and statutory declarations. Only a small percentage of employees viewed the requirement for evidence to be a disincentive to accessing the leave.¹²¹ These results do not suggest that any significant ‘confusion or uncertainty as to whether what has occurred is FDV’ is occurring in workplaces, or is an issue of concern for employers administering this entitlement.

Household members

81. The ACTU’s proposal to extend the definition of “family and domestic violence” to employees subjected to violence by household members who may not necessarily be related to the employee is consistent with current workplace practices as well as definitions of FDV in many criminal jurisdictions:

¹¹⁹ Employer Survey, p 22, Chart 19.

¹²⁰ Employer Survey, p 37.

¹²¹ Monash Survey, p 31.

- (a) The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) covers violence in a ‘domestic relationship’, which includes a person who is living or who has lived in the same household as the other person, whether or not they are related.¹²²
- (b) The *Domestic and Family Violence Protection Act 2012* (Qld) extends to people in ‘an informal care relationship’, whether or not they are related.¹²³
- (c) The *Intervention Orders (Prevention of Abuse) Act 2009* (SA) extends the definition of domestic abuse beyond domestic partners and spouses, to any two persons who are in ‘some other form of intimate personal relationship in which their lives are interrelated and the actions of 1 affects the other’, whether or not they are related.¹²⁴
- (d) The *Restraining Order Act 1997* (WA) extends the definition of family relationship beyond spouses, defactos and intimate partners, to anyone in a ‘personal relationship of a domestic nature in which the lives of the persons are, or were, interrelated and the actions of one person affects, or affected, the other person’.¹²⁵
- (e) The *Domestic and Family Violence Act 2007* (NT) extends the definition of domestic relationship beyond family relationships to a person who ‘ordinarily or regularly lives, or has lived, with the other person’, whether or not they are related.¹²⁶
- (f) Of the 28 FDV leave policies that were provided to the FWC, five defined FDV in a way that encompassed a broader range of relationships than in the FW Act and which could include household members.¹²⁷
- (g) The evidence of Carla Jones provides an example of an employee entitled to leave under an enterprise agreement clause providing paid family and domestic violence leave after being subjected to sexual violence by an (unrelated) work-colleague who resided with her.¹²⁸

¹²² See s 5(d).

¹²³ See ss 13 and 20.

¹²⁴ See s 8(c).

¹²⁵ See ss 4(f) and 4(2).

¹²⁶ See s 9(d).

¹²⁷ Employer Survey, pages 30–33 (five policies define FDV more broadly than the FW Act: two by reference to the *Family Violence Protection Act 2008* (Vic) which includes household members in certain circumstances and three policies define FDV in a way that captures relationships including household members).

¹²⁸ Statement of Carla Jones, [18].

Unpaid leave

82. An entitlement to paid FDV leave under the ACTU's proposed clause arises only if it is 'necessary' for the employee to do something during working hours to deal with FDV, and it is impractical for the employee to do that thing outside the employee's ordinary hours of work. This is the same way in which the NES entitlement to unpaid leave operates.
83. Under the ACTU clause, once the paid leave component is exhausted, employees are entitled to access further periods of up to 5 days per year of unpaid FDV leave 'for the purpose of attending to activities related to the experience of being subjected to family and domestic violence'. The ACTU accepts that the test for paid and unpaid leave should be the same, and will amend its proposed variation to that effect, namely that leave is available only if it is 'necessary' for the employee to do something during working hours to deal with FDV, and it is impractical for the employee to do that thing outside the employee's ordinary hours of work.¹²⁹ As pointed out by AIG, employees are very unlikely to seek to access unpaid leave unless there is a pressing necessity to do so, because it will reduce their income.¹³⁰ This is particularly the case for employees experiencing FDV, which is almost always linked to a wide range of financial stressors on the individual employee and their dependents.

Two definitions of family and domestic violence leave?

84. Finally, the AI Group contends that the definition of FDV for the purposes of a paid leave entitlement should be more strictly or narrowly defined than the current statutory definition.¹³¹ This submission appears to be based on the AI Group's stated presumption that a paid FDV leave entitlement is open to exploitation by employees.¹³² There is no evidence from any employer who offers paid FDV leave, to whom the employer parties would presumably have access, to the effect that they were required to exercise their discretion to grant paid leave in circumstances where they suspected the employee's experience of FDV did not accord with their own understanding of what constitutes FDV, or was otherwise illegitimate. The submission by the AI Group is entirely without evidentiary foundation, and without merit. Further, as acknowledged by the AI Group, an entitlement to paid FDV leave that is based on a different definition of FDV to the entitlement to unpaid leave is contrary to s 134(1)(g),¹³³ and is fundamentally inequitable.

¹²⁹ The ACTU will shortly file an amended variation reflecting this change.

¹³⁰ AIG Submissions, [310] and [311].

¹³¹ See, eg AIG Submissions, [300], cf. s 106B(2) of the FW Act, and AIG Submissions, [309].

¹³² AIG Submissions, [305], [310], [311].

¹³³ AIG Submissions, [313].

The regulatory burden

85. The opposing parties contend that the introduction of paid FDV leave would increase the regulatory burden on employers in an onerous way. There is no evidence in support of this submission.¹³⁴

Non-award covered employees

86. ACCI note that the ACTU's proposed variation, if made, will apply to award-covered employees only, which is described as a "discrepancy", "without any meaningful rationale", which weighs against the consideration in s 134(1)(g).¹³⁵
87. This submission is misconceived. In exercising its powers under s 157 of the Act, the FWC is only empowered to vary modern awards.

(h) Other matters

The Covid-19 pandemic

88. The opposing parties observe that the Covid-19 pandemic has had a significant impact on how work is performed in Australia, and on public health and the national economy.¹³⁶ These observations, while undoubtedly correct, are general in nature and do not appear to be relied on in support of any specific argument in opposition to the ACTU's proposed variation, with one exception. The ACCI claim that 'pandemic conditions', which primarily appears to be a reference to individual, local, and global uncertainty, means that it is inappropriate to make any permanent change to the safety net. Further, ACCI observe that the pandemic has stymied the collection of relevant data concerning the operation of the NES entitlement, which has deprived the FWC of the proper evidentiary conditions in which to conduct the Review.¹³⁷
89. Three points may be made in response.
90. First, it is not productive to raise in early 2022 that pandemic conditions are not optimum for the conduct of the Review and to suggest the Review be deferred on that basis.¹³⁸ The Review was foreshadowed, and then commenced, in April 2021.¹³⁹ The disruptive nature of the

¹³⁴ AIG Submissions, [477]–[479].

¹³⁵ ACCI Submissions, [10.29]–[10.31]; see also [7.114]–[7.12].

¹³⁶ ACCI Submissions, [6.13]–[6.26]; AIG Submissions, [198]–[210].

¹³⁷ ACCI Submissions, [6.13]–[6.26].

¹³⁸ ACCI Submissions, [6.19], [6.24], [8.15].

¹³⁹ [2021] FCWCB 2047.

pandemic was then well-known. The ACCI did not object to the conduct of the Review at that time or suggest it be deferred.

91. Second, as noted in paragraph 45 above, data collection in this area is challenging. This was the case before the pandemic. The absence of a perfect data set is not a valid reason to defer the Review. The FWC, along with many other courts and tribunals, frequently considers applications for orders which proceed on imperfect or incomplete data, but in which there is nonetheless sufficient evidence on which to make a determination. The relevant question for the Full Bench is whether the evidence before it, which includes the FWC Research, is sufficient to satisfy the Full Bench that it is necessary to vary modern awards.
92. Third, the employers have not adduced any evidence as to the economic status of its members or of employers more generally as a result of the pandemic, nor sought to demonstrate in any measurable way the differences between award-covered employers' pre-pandemic economic position with the current, and projected, economic performance of those employers. General assertions to this effect are not equivalent to probative evidence, and the issue is sufficiently complex that the Full Bench cannot take 'judicial notice' that all award-covered businesses have suffered economic harm during the pandemic.
93. By contrast, the evidence is clear that rates of FDV have not declined in recent years,¹⁴⁰ and that the frequency and severity of FDV has increased during the pandemic.¹⁴¹

Other social issues

94. The opposing parties observe that employees may require or seek to take leave in response to a number of other social issues.¹⁴² These observations are not relied on in support of any argument for or against the ACTU's claim, and can be accordingly disregarded.

21 February 2022

D No. 06/2022

Kate Burke

The Australian Council of Trade Unions

¹⁴⁰ See ACTU July Submissions, [51].

¹⁴¹ See ACTU July Submissions, [53]–[55]; ACTU December Submissions, [31].

¹⁴² AIG Submissions, [215]–[231].