

FAIR WORK COMMISSION

Fair Work Act 2009 (Cth) s 156, s 157

AM2021/55: Family and Domestic Violence Leave Review

Family and Domestic Violence Leave – Review

ACTU Response to Background Paper 2

A Introduction and Overview

1. This document contains the ACTU’s response to the questions directed to it in the Fair Work Commission’s second Background Document dated 5 April 2022 (**Background Paper 2**) prepared for the review of family and domestic violence (**FDV**) leave (**Review**).

Question 7: Does the table (at pages 13–18) accurately reflect the submissions put in relation to the decision tree?

2. For the ACTU’s part, yes.

Question 8: the ACTU is invited to respond further to the ACCI submission about the potential for its claim to regulate ‘over award’ payments

3. In its submissions dated 4 February 2022 at paragraphs 10.3 to 10.6, ACCI submitted that if modern awards are varied to provide for paid FDV leave at an employee’s ordinary rate of pay (as opposed to the minimum rate of pay prescribed by the award),¹ then the result will

¹ The ACCI submission referred to the employee’s “ordinary rate of pay”, which reflects the language used in the ACTU’s proposed variation at that time. The ACTU’s proposed variation then provided at clause 1A that FDV leave is paid “at an employee’s ordinary hourly rate, including applicable shift loadings and penalties”. In opening submissions, counsel for the ACTU clarified that the reference to ‘ordinary hourly rate’ in the proposed clause is a reference to the employee’s actual hourly rate of pay (at PN 662–668). The amended proposed variation, dated 28 March 2022, at clause C provides that the rate of payment is the rate of pay the employee would otherwise have earned, including loadings, allowances and penalties. This rate of pay is referred to in these and other submissions of the ACTU as the employee’s **actual rate of pay**. As explained below, this is intended to refer to the employee’s actual award-based rate of pay, ie, including all applicable penalties, rostered overtime, etc, but not the employee’s contractual (above-award) rate of pay, where such a rate exists.

be that modern awards are regulating ‘over-award’ payments, which undermine the modern award status as a minimum safety net.

4. The ACCI submission appears to be directed to circumstances where an employee is covered by a modern award, but is paid above the award minimum rates (eg, by agreement with their employer). In such circumstances, the ACTU’s proposed Clause C should be read as referring to the employee’s award-based entitlement, as follows:
 - (a) Clause C(1), (2)(a) and (3) should be read as referring to “*the rate of pay that the employee would otherwise have earned pursuant to the award (including any award-based applicable incentive-based payments and bonuses; monetary allowances; shift loadings, penalty rates, rostered overtime, allowances and other award-based entitlements) had the employee not taken paid family and domestic violence leave.*”
 - (b) Clause C(2)(b) and (4) should be read as referring to “*a daily rate calculated based on the average weekly pay that would have been received by the employee in the previous 6 weeks pursuant to the award, or where the employee has been employed for less than 6 weeks, for the duration of their employment pursuant to the award...*”.
5. Additionally or alternatively, the ACTU proposes that a note or clause be added to Clause C to make it clear that the rates of pay referred to in Clause C are a reference to the rates of pay under the applicable award, and that nothing in Clause C is intended to regulate any contractual entitlement that an employee may have to above-award payments.

Question 9: is the ACTU submitting that s 134(1)(b) is a factor weighing in favour of their claim?

6. Yes. The ACTU acknowledges that the evidence does not unequivocally demonstrate the existence of a causal link between the unpaid FDV leave entitlement and increased collective bargaining on FDV leave (whether paid or unpaid) in agreements. However, it is open on the available evidence for the Full Bench to infer that it has. Conversely, it is not open to conclude that the introduction of paid FDV leave will discourage collective bargaining on the issue.

7. The evidence includes that:
- (a) Of the organisations which currently report to the Workplace Gender Equality Agency, there has been an increase from 12.1 per cent in 2016 to 35.5 per cent in 2020 of employers who offer paid FDV leave.²
 - (b) The number of enterprise agreements with paid FDV leave provisions grew from 1,096 agreements in 2016 to 1,502 agreements in 2019.
 - (c) As at 30 June 2021, 60.6 per cent of all current enterprise agreements contained some type of FDV provision.³
 - (d) As at 30 June 2021, 1.13 million employees (or 63.5 per cent of all employees) were covered by current enterprise agreements which contained paid FDV leave.⁴
 - (e) Enterprise agreements which contain paid FDV leave account for 28 per cent of all agreements approved since 2018, representing an increase of about half since 2016.⁵ It is estimated that close to 30 per cent of all current agreements contain paid FDV leave provisions.⁶
8. Recognising that the answer is finely balanced, the ACTU nevertheless contends that s 134(1)(b) is a factor weighing in favour of its claim. Alternatively, it is neutral.

Question 13: is any issue taken with the characterisation of the methodology set out at paragraphs 92 to 119 [regarding Professor Duncan’s methodology]?

9. No issue is taken with the characterisation of the methodology set out in paragraphs 92 to 119 of the Background Paper 2.⁷ The ACTU submits that those paragraphs accurately and succinctly set out the methodology used by Professor Duncan.
10. At paragraph 3.4(d) of their submissions, ACCI submit that Professor Duncan “*was unable to clearly explain*” why he did not ‘double’ Dr Stanford 2016 estimate of the number of days

² Duncan Report, [4].

³ Information Note – ACTU Supplementary Submission to the FDVL Review, page 3.

⁴ Ibid, page 5.

⁵ Stanford Report, [36] and see Table 1.

⁶ Stanford Report, [43].

⁷ Other than noting a typographical error at paragraph 120, where the reference to Professor Duncan (second line) should be a reference to Dr Stanford.

of leave taken by award-covered employees (7.8 days for women and 5.9 for men), which is relied on by Professor Duncan for part of his analysis. The ACTU suggests, respectfully, that ACCI has misunderstood the nature of the calculation in Table 4 of Professor Duncan's report. This is explained in paragraph 110 of Background Paper 2. Put another way:

- (a) The first line of Table 4 assumes that 20.1 per cent of award-covered women who experience FDV will take time off work, and 2.7 per cent of applicable men will take time off (see paragraph 102 of Background Paper 2), and that they will take 7.8 and 5.9 days of FDV leave respectively (applying the Stanford 2016 estimate of *number of days leave taken*), which will cost a total of \$13.1 million per year;
- (b) The third line in Table 4 assumes that 20.1 per cent of eligible women and 2.7 per cent of eligible men will take the full entitlement of 10 days of FDV leave, an estimated cost of \$17.1 million per year;
- (c) The fourth line of Table 4 assumes that 40.2 per cent of eligible women and 5.4 per cent of eligible men (ie, *double the proportion of eligible employees, per Dr Stanford's assumption*) will take 10 days FDV leave, an estimated cost of \$34.3 million per year.

Question 14: is any issue taken with the characterisation of the methodology set out at paragraphs 120 to 153 [regarding Dr Stanford's methodology]?

11. The ACTU makes some corrections to these paragraphs:⁸

- (a) Paragraph 122 should make clear that Dr Stanford's estimate is of "less than \$200 million per year across the whole economy".
- (b) Paragraph 123, (2), should read "between 0.0027% and 0.0078%".
- (c) Paragraph 123, (3), should read "Utilising data from the PSS, 0.23% to 0.46% of all employees ...".
- (d) Paragraph 128 should read "... in 2021 of 46 Australian employers from which 3 responses were received".

⁸ Excluding various typographical errors (which could happen to anyone), eg, at paragraph 121, 'the Dr Stanford...' should read 'that Dr Stanford'; paragraph 133, 'averaged'; paragraph 142, '0.01 per cent'.

- (e) Paragraph 129, third dot point, should read “0.0078%” (not 0.0098%).
- (f) Paragraph 134 should read “the cumulative total of paid FDVL accounted for between 0.001 to 0.013 per cent of total working time”.
- (g) Paragraph 141, first sentence, should note (per Stanford Report [79]) that this is an upper-boundary estimate reflecting the high cost assumptions made at each stage of the calculation. The second sentence of paragraph 141 should state that “the Stanford Report calculates that at a rate of utilisation...”.
- (h) Paragraph 143, “this calculated estimate...”.
- (i) The material described in ‘Step 6’ is more accurately described as background literature which informs Dr Stanford’s analysis rather than a step in Dr Stanford’s analysis.
- (j) Paragraph 144 should read “The Stanford Report cites prior research...”.
- (k) Paragraph 145 should read “A qualitative survey of 123 workplaces from which 33 responses were received...”.
- (l) Paragraph 147, first dot point, should read “Approved enterprise agreements with a paid FDVL provision...”.
- (m) Paragraph 151 should read, “Citing previous studies...”.

Question 15: what evidence is relied on in relation to the proposition that supplementary unpaid leave of five days per occasion is necessary?

12. The evidence relied on by the ACTU is contained in paragraph 102 of its July submissions and paragraph 47 of its December submissions, as identified in response to decision points Y, Y.1 and Y.2 of the decision tree (in response to Question 13) of the first Background Paper.

Question 17: the ACTU is invited to respond to the AI Group’s submissions (at paragraph 165) about the conclusions to be drawn from the evidence

13. The AI Group’s conclusions are below in italics. The ACTU’s response follows the proposed conclusion.

14. *First, that employers typically take a compassionate and collaborative approach to supporting employees that experience FDV.* The majority of the evidence relied on by the AI Group in this regard pertains to employers who provide paid FDV leave via an enterprise agreement or other formal policy – which suggests that the supportive approach taken by employers is at least to some extent mandated by the terms of the industrial instrument.⁹
15. While the ACTU accepts that many employers are supportive of their employees and will act in a compassionate and collaborative manner, the evidence does not establish that employers ‘typically’ take that approach, and nor would employers’ ‘typical’ practice be sufficient. As stated during the ACTU’s opening submissions, too many award-covered employees without a legal right to paid FDV leave rely solely on the goodwill of their employer. The subjective exercise of goodwill does not comprise a proper safety net.
16. Further and in any event, if the AI Group’s contention is correct, then it suggests that employers are not averse to providing paid FDV leave to those employees who need it, which indicates that s 134(1)(d) and (f) of the FW Act are neutral considerations.
17. *Second, that the introduction of paid FDV leave will increase employment costs.* The ACTU acknowledges that some employers will experience increased employment costs as a result of providing paid FDV leave. However, given the likely utilisation rates, it cannot rationally be said that employment costs will increase for all or even most employers. Moreover, the projected cost of providing paid FDV leave is low, both on a macro and microeconomic level. The ACTU will address the specific assertions in the AI Group’s submissions about these matters (see, eg, Background Paper 2 at paragraphs 283 and 285) at the oral hearing.
18. *Third, that the evidence does not enable a reliable assessment of the quantum of paid FDV leave that would be taken by employees.* The ACTU refers to its response to Questions 18 and 19 below.
19. *Fourth, that the evidence does not enable a reliable assessment of the microeconomic or macroeconomic costs of paid FDV leave.* This conclusion is premised on the acceptance of

⁹ Per the following paragraphs in the AIG Submissions: 235(a)(ii), (b), (d), (f), and (m) to (p); 238(a) and (c). The evidence derived from the employer survey (at paragraph 235(g) to (l)) should be treated with caution given the reluctance of the AI Group and ACCI to disclose anything about the characteristics of the employers who were sent the survey, and who answered it. The AI Group’s concerns about the representativeness or statistical significance of various surveys and research relied on by Dr Stanford does not appear to extend to the employer survey.

the third conclusion above. For the reasons set out above, that conclusion should not be drawn.

20. *Fifth, the evidence does not establish that employers will experience benefits as a result of the grant of paid FDV leave, which will offset some or all of the cost of providing paid FDV leave.* The ACTU has addressed this in paragraphs 37 to 40 below.
21. The Full Bench has sought clarification from the AI Group as to the meaning of its sixth conclusion (at paragraph 165, last dot point, of Background Paper 2). However, insofar as the AI Group is suggesting that some forms of domestic violence might justify paid leave while others do not, or warrant a lesser period of leave, the ACTU rejects the contention. There is no factual or credible basis for the AI Group's contention that the impact of economic abuse might give rise to a need for less leave than, for example, physical or sexual violence.¹⁰ The unpaid leave entitlement does not distinguish between forms of abuse, and the Full Bench should be not embark upon that exercise.

Question 18: the ACTU is invited to respond to AI Group's criticisms of Dr Stanford's evidence

22. Certain of the AI Group's criticisms are summarised below in italics. The ACTU's response follows the proposed conclusion. The ACTU will respond to the first, second and final criticisms in its oral submissions on 8 April 2022. However, in respect of the first point, to the extent AI Group wishes to press a submission that Dr Stanford did not bring an independent or objective mind to the task of preparing his report, it should consider that having failed to put a serious allegation of that nature to Dr Stanford, it should not in fairness be allowed to make it (quite aside from the absence of any merit in the submission).
23. *Third, that aspects of Dr Stanford's evidence regarding the pandemic are outdated.* This criticism is not directed to any particular conclusion by Dr Stanford and so goes nowhere. Further, it was not put to Dr Stanford; nor does it appear to acknowledge that family members of Covid-19-positive household members are still required to isolate at home for varying

¹⁰ The following report highlights the significant non-physical abuse present in cases of domestic homicide, including social abuse and economic or financial abuse: Australian Domestic and Family Violence Death Review Network & Australia's National Research Organisation for Women's Safety (2022), *Australian Domestic and Family Violence Death Review Network Data Report: Intimate partner violence homicides 2010–2018*, Second Edition, Research report 03/2022, ANROWS at pp 50 and 55, [Research Reference List 145](#).

periods across Australia, or that the financial stress on some households associated with the pandemic is ongoing.

24. *Fourth, that Dr Stanford's evidence ignores the microeconomic effects of paid FDV leave, which diminishes its utility to the Commission.* The AI Group do not explain even in general terms what the microeconomic effect of paid FDV leave is or is likely to be, and why and how this evidence is necessary. If the AI Group considered that the microeconomic effects of paid FDV leave was negative, and was relevant, then it could have put that evidence before the Commission.
25. *The fifth to tenth points concern the representativeness of various studies examined by Dr Stanford.* This point has already been addressed in the ACTU's submissions on evidence at paragraph 41.
26. *Eleventh, that because of various deficiencies in the research relied on by Dr Stanford, his evidence about the impact of FDV leave on employment costs is entirely unreliable.* This proposition was not put directly to Dr Stanford. It should have been. The closest that the AI Group came to suggesting to Dr Stanford that his estimates are "entirely unreliable" was that the sources he cited were not statistically representative or could not be indicative of the utilisation of a modern award entitlement. Dr Stanford gave appropriate and satisfactory answers to those questions (see ACTU's submissions on evidence at paragraphs 41 and 42).
27. *Twelfth, that Dr Stanford's evidence regarding the cost impact of paid FDVL is based on data in the PSS relating to victims of any form of violence.* That there was no basis for this assumption was not put to Dr Stanford. In any event, the ACTU relies on the evidence of Professor Duncan as to the estimated cost of providing paid FDV leave to award-covered employees. As set out above, Professor Duncan estimated the proportion of award-covered employees who experienced FDV *and* took leave, by reference to the PSS.

Question 19: the ACTU is invited to respond to AI Group's criticisms of Professor Duncan's evidence

28. As a preliminary comment on the AI Group's criticisms of Professor Duncan's evidence, it must be noted that the AI Group did not cross-examine Professor Duncan, and so none of these criticisms were put to Professor Duncan to afford him an opportunity to answer them.

Where the AI Group's criticisms are to the effect that Professor Duncan's conclusions are unsafe or unreliable (however expressed), then they should, accordingly, be disregarded.¹¹

29. The AI Group's criticisms are summarised below in italics. The ACTU's response follows the proposed conclusion. Where relevant, in response to this question, the ACTU has also addressed certain criticisms of Professor Duncan's evidence made by ACCI.
30. *First, reliance on the 2016 Breckenridge Report and the 2016 Stanford Report "wholly undermines" the reliability of Professor Duncan's analysis.*
31. Professor Duncan's estimates did not rely on the Breckenridge Report.
32. Professor Duncan's estimates relied on the 2016 Stanford Report in two respects. First, he applied Dr Stanford's estimates that the proportion of award-covered women affected by FDV who take time off will take an average of 7.8 days, and men an average of 5.9 days leave. This assumption *reduces* Professor Duncan's estimated cost of providing 10 days paid FDV leave (ie, because less than 10 days is used), from \$17.1 million to \$13.1 million.
33. Second, Professor Duncan applied Dr Stanford's assumption that the proportion of employees affected by FDV *and* who take time off work as a result (ie, 20.1 per cent of affected women and 2.7 per cent of affected men), will double with the introduction of a paid FDV leave entitlement to award-covered employees (ie, to 40.2 per cent of women and 5.4 per cent of men) (and noting that Professor Duncan has already utilised the highest available percentages of affected employees who took time off).¹² If this assumption is incorrect, then the cost of providing paid FDV leave is reduced from \$34.3 million to \$17.1 million.
34. Accordingly, if the AI Group's criticisms of the 2016 Stanford Report are valid, then the only conclusion is that the cost of providing paid FDV leave to award-covered employees is the middle range of Professor Duncan's estimates, namely, \$17.1 million per annum. The rest of Professor Duncan's analysis is untouched.
35. ACCI submits that the data in Professor Duncan's reports is dependent on several 'arbitrary' assumptions.¹³ The only 'arbitrary assumption' identified by ACCI in its written submissions is at paragraph 26 of Professor Duncan's report; but the reference in that paragraph is to

¹¹ By reason of the failure to comply with the rule in *Browne v Dunn*. See footnote 34 of the ACTU's submissions on evidence.

¹² As captured in the Background Paper 2 at [102].

¹³ ACCI Submissions, [3.4(b)], [3.7].

arbitrary assumptions *made by Dr Stanford in his 2016 Report*. Accordingly, as he explains in paragraph 26, Professor Duncan uses a different data source to Dr Stanford's 2016 report, namely, the PSS, using the Table Builder tool.

36. *Second, the PSS data has various limitations.* The AI Group's critique of the PSS is contained in paragraphs 254 to 263 of its submissions dated 4 February 2022. The substance of those criticisms appears to be that (1) it is not clear if the PSS data reflects recent trends;¹⁴ and (2) the PSS does not capture abuse perpetrated by a member of a person's household.¹⁵ As to the first critique, Professor Duncan has assumed that prevalence rates reflected in the 2016 PSS have remained stable in the period to 2021,¹⁶ and there is ample evidence to indicate that prevalence of FVD has not reduced.¹⁷ As to the second, while it is correct that the PSS does not capture abuse perpetrated by a member of a person's household, there is no suggestion that the absence of this data renders the entire PSS dataset unreliable for the purposes of Professor Duncan's estimates.¹⁸ At most, there may be a slight increase in prevalence rates, but this is controlled for by Professor Duncan utilising data that favours an over-estimate rather than an under-estimate of the cost (see paragraph 33 above), and by undertaking the sensitivity analysis summarised in the Background Paper 2.¹⁹
37. *Third, in relation to paragraph 47 of Professor Duncan's report, the cost burden of small and medium businesses will not typically be offset by existing FDV leave entitlements.* This criticism suffers from two deficiencies. First, it is unclear what the AI Group mean by 'small and medium businesses' (SMEs). This is highly relevant because SMEs encompass a very wide range of business sizes depending on the definition used.²⁰ For the purposes of his

¹⁴ See AIG Submissions dated 4 February 2022, [254]

¹⁵ See AIG Submissions dated 4 February 2022, [258], [261].

¹⁶ Duncan Report, [27].

¹⁷ See for example 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].

¹⁸ The AI Group also refers to ABS data to the effect that one in four women have experienced violence by an intimate partner since the age of 15 (at [256], [257]), but this is not relevant, because it is not a statistic used by Professor Duncan in his estimates. Instead, Professor Duncan applies data showing the numbers of persons who have experienced FDV in the previous 12 months. See Duncan Report, [27].

¹⁹ At [108]–[111].

²⁰ Eg, the ATO defines a 'small business' as one with an aggregated turnover of less than \$10 million; see <https://www.ato.gov.au/Business/Small-business-entity-concessions/Eligibility/Work-out-if-you-re-a-small-business-for-the-income-year/>. The ABS defines a small business as employing between 5 and 19 people and a medium business as employing between 20 and 199 people: see

report, Professor Duncan considers SMEs are those employing less than 100 people,²¹ and notes at paragraph 46 of his report that just 33 per cent of employees in SMEs have their wages set by modern awards.

38. Second, AI Group overstate Professor Duncan’s observations at paragraph 47 of his report. He simply notes that the additional cost burden (of providing paid FDV leave) “*may be less than the estimated value*”. It is a reasonable assumption that *some* SMEs already provide paid FDV leave and accordingly will not incur an additional cost of providing paid FDV leave if the ACTU’s proposal is granted, noting, as set out above, that just 33 per cent of employees in SMEs have their wages set by modern awards. Further, it is not contended that any offset will be across-the-board: Professor Duncan identifies that the 2016 Stanford Report assumes that about 15 per cent of a paid FDV leave entitlement is already covered by employers offering paid FDV leave. This is roughly consistent with the findings in the Employer Survey that 20 per cent of employers provided paid FDV leave,²² which includes 20.7 per cent of businesses employing just 1 to 5 employees²³ (the ABS defines businesses employing 0 to 4 persons not as small businesses, but as ‘micro businesses’). The AI Group contend that the respondents to the Employer Survey “*range in their size and the industry in which they operate*” and the survey “*therefore provides instructive and contemporary insights into the experiences of employers*”.²⁴
39. *Fourth, there is no quantification of the extent of any reduction in the cost to employers by reason of employees’ experiencing FDV, by providing paid FDV leave.* It is correct that Professor Duncan does not quantify the extent of any reduction in the cost that employers are already incurring, by providing paid FDV leave. That does not warrant the wholesale disregard of the proposition.
40. As stated in opening submissions, in assessing the cost to employers of providing paid FDV leave, it is wrong to proceed from the assumption that employers currently incur zero costs arising from employees’ experiences of FDV; there is a substantial body of evidence to the

https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1516/Quick_Guides/Data

²¹ By reason of the way data is reported in the ABS Employee Earnings and Hours survey. See the notes to Figure 2 at page 18.

²² See Background Paper 2, [192].

²³ FWC, Information Note – Paid Family and Domestic Violence Leave by business size.

²⁴ AIG Submissions dated 4 February 2022, [237].

opposite effect.²⁵ The ACTU contends that one benefit of providing paid FDV leave is that it will enable affected employees to take steps to escape from violent situations or relationships, which will in turn reduce the ongoing cost to employers associated with employees who are subject to FDV.²⁶ This is consistent with Professor Duncan’s observation in cross-examination that “*paid FDV leave allows those experiencing FDV... to more effectively deal with the consequences to potentially be better able to alter their situation*” (emphasis added).²⁷

41. The fifth critique by AI Group is that Professor Duncan’s evidence, “*at its highest*” supports a number of conclusions that are not definitive, and are speculative.
42. The ACTU agrees that Professor Duncan’s evidence supports the conclusions identified by the AI Group at paragraph 31(a) to (e) of its 28 March 2022 submissions.
43. The criticism that these conclusions are ‘not definitive’ is misconceived. Professor Duncan was asked to undertake a range of estimates of the cost of providing paid FDV leave to award-covered employees, of not providing paid FDV leave, and the benefits of providing paid FDV leave. Estimates are by their nature not definitive, and accordingly, Professor Duncan’s report is, responsibly, couched in appropriately measured language. It does not follow from the fact that estimates are provided (of both monetary and non-monetary costs of and outcomes from providing paid FDV leave), that the evidence is speculative, as the AI Group contends.
44. It is not clear if the AI Group’s position is that all conclusions that are not definitive are accordingly speculative, or if these are separate criticisms.
45. If the former, the conclusion does not follow for the reasons set out above.
46. If the latter (ie, that regardless of the definitive character of the conclusions, they are speculative), the AI Group did not put this allegation to Professor Duncan. It is unfair and unjustified for the AI Group to assert in submissions after the hearing that Professor Duncan’s conclusions are speculative (apparently based solely on his appropriate use of language) in circumstances where Professor Duncan was not afforded in cross-examination the opportunity to address such criticisms. The criticisms should be dismissed on that basis

²⁵ See ACTU’s Submissions dated 30 July at [62] and ACTU Submissions dated 22 December at [37].

²⁶ Cf. ACCI’s submissions at [3.10], [3.11].

²⁷ At PN871.

alone. Further and in any event, as set out above, the only basis for the submission appears to be Professor Duncan's careful and appropriate use of language in describing his conclusions. This criticism is unwarranted.

Question 20: the ACTU is invited to respond to AI Group's criticisms of its lay evidence

47. In the time available, the ACTU has not been able to complete a written response to the AI Group's criticisms of its lay evidence, although it notes that many of these criticisms are addressed in paragraphs 16 to 25 of its submissions on evidence.
48. The ACTU will otherwise address these criticisms at the oral hearing on 8 April 2022.

Question 22: the parties are invited to comment on the Victorian government data filed in its submission on 28 March 2022

49. The Victorian Government provides paid FDV leave in approximately 150 public sector enterprise agreements. Approximately 322,605 Victorian government employees have access to paid FDV leave or unpaid FDV leave for casual employees.
50. The Victorian government provided data in relation to approximately 21,500 employees (or about 6.5 per cent of government employees with access to FDV leave), relating to (1) the percentage of eligible employees who used the entitlement, and (2) the average number of days of leave taken.
51. As to the first measure, an average of 0.3 per cent of eligible employees accessed paid FDV leave in the last year. This is consistent with, and reinforces, evidence before the Commission that utilisation rates are likely to be low, namely:
- (a) Dr Stanford's overarching conclusion that a 10 day paid FDV leave provision would be utilised by between 0.23 and 0.46 of all employees each year.²⁸
 - (b) the Bank of Queensland submission that between 2018 and 2021 it provided "FDV support" to 21 employees (2.5 per cent of its 856 employees),²⁹ noting that it is possible that not all of those employees access paid FDV leave (because 'FDV support' is broader than paid leave).

²⁸ See Background Paper 2, [182].

²⁹ See Background Paper 2, [207], [208].

- (c) Research from six employers with a combined total of 18,800 employees in New Zealand (where there is a statutory right to 10 days paid FDV leave) which reported that between April 2019 and March 2021, 0.5 per cent of employees sought paid FDV leave.
- (d) Data provided from the WA government. Noting that the data is incomplete (see Question 23), nevertheless it is instructive that the WA government provides 10 days paid FDV leave to all WA public sector employees. As at September 2021, there were over 155,000 employees,³⁰ entitled to a collective total of 1.55 million days of paid FDV leave per year. In the 12 months between August 2020 and August 2021, a total of 869 days paid FDV leave was taken,³¹ representing 0.05 per cent utilisation of the total number of days FDV leave available to WA government employees.
52. If utilisation rates are likely to be low – and there is *no evidence* to the contrary – then it follows that so will the cost to employers.
53. The second measure reported by the Victorian government is that eligible employees used an average of 8.56 days per annum. This evidence is consistent with, and reinforces, evidence before the Commission as to the average number of days of leave likely to be accessed, including Dr Stanford’s estimates of between 7–8 days per year;³² the Bank of Queensland submission that eligible employees accessed an average of 3 days per year (but one accessed the full 10 days leave);³³ New Zealand research which suggested that the average utilisation was less than 5 days per year;³⁴ and the Breckenridge research to similar effect.³⁵
54. Viewed collectively, the evidence suggests that eligible employees access an *average* number between 5 and 8 days per year. This is, obviously, less than the ACTU’s proposal for 10 days paid FDV leave per year. However, the average should not determine the question of how many days leave are necessary. In each setting where data is available, employers report that some employees require and are granted more than the average:

³⁰ Background Paper 2, [209].

³¹ See the table at page 57 of Background Paper 2. The number of days leave taken, in the last two columns, are added together: $18+395.95+10.73+444.01 = 868.69$ days.

³² See Background Paper 2, [182].

³³ See Background Paper 2, [208].

³⁴ Background Paper 2, [211].

³⁵ Background Paper 2, [212]. The average time off is 43 hours. Divided by 8 hours = 5.4 days.

- (a) the employer survey found are that for employees who sought more than 5 days of unpaid leave, the most common request was for 10 days followed by 14 days;³⁶ and that of employers who provided paid leave, very similar proportions provided 10 days (36.8 per cent) as provided 5 days (39.4 per cent);³⁷
- (b) the Monash Report reported that one third of the respondents to its survey (all of whom experienced FDV) took some form of leave while experiencing FDV.³⁸ With an average of 14 days leave offered by workplaces,³⁹ one third of respondents exhausted their full entitlement, with respondents taking between one and 90 days of leave;⁴⁰
- (c) the Breckenridge research found that time off accessed by eligible employees ranged from 8 hours to 202 hours (or 25 days), with 11.4 per cent requesting one week or more leave.⁴¹

Question 24: is there any further data on utilisation that the parties wish to bring to the attention of the Full Bench? What if anything do the parties wish to say about this data?

55. The ACTU does not have any further data on utilisation rates to bring to the attention of the Full Bench. On the relevance of this data, it refers to and repeats its response to Question 22 above.

Question 25: is any issue taken with the summary of submissions set out in paragraphs 213 to 289?

56. The ACTU does not take any issue with the summary of its submissions, but notes the following minor corrections:

³⁶ Background Paper 2, [190].

³⁷ Background Paper 2, [193].

³⁸ Background Paper 2, [200]. There were 302 respondents. Approximately two thirds (203) responded to the question about taking leave. Of those, 20.2 per cent accessed paid or unpaid FDV leave (20.2 per cent of 203 is about 41 persons), and 28.1 per cent accessed another form of leave (28.1 per cent of 203 is about 57 persons). $41+57 = 98$, or about one third of 302.

³⁹ Background Paper, [203].

⁴⁰ Background Paper, [204].

⁴¹ Background Paper, [212].

- (a) At paragraphs 225(c)(ii) and 252, the reference to calculating the daily rate should read, “... *a daily rate calculated based on the average weekly pay received by the employee in the previous 6 weeks, divided by 5*”.
- (b) At paragraph 243, the reference to ‘operation challenges’ should be read as ‘operational challenges’.

7 April 2022

Kate Burke

The Australian Council of Trade Unions