

## **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**

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

1. This document contains the ACTU’s response to the questions directed to it in the Fair Work Commission’s Background Document dated 11 March 2022 (**Background Document**) prepared for the review of family and domestic violence (**FDV**) leave (**Review**).

##### **Question 1: Is any issue taken with the observations at paragraphs 21–36?**

2. No.

##### **Question 3: Is any issue taken with the observations in paragraph 47?**

3. No. The observation is consistent with the ACTU’s submissions dated 30 July 2021 (**ACTU July Submissions, CB 146**) at paragraphs 29–31.

##### **Question 8: Are any of the propositions in paragraph 59 contested?**

4. No. It is erroneous to suggest that the Commission must not vary the terms of an award unless it is satisfied that there has been a material change in circumstances: contra *CFMEU v Angle American Metallurgical Coal Pty Ltd* (2017) 252 FCR 37, [46]. The Full Bench’s reasoning in the *Penalty Rates Case* in this regard was upheld by the Full Court of the Federal Court in *SDA v the Australian Industry Group* (2017) 253 FCR 368, [23]–[24].

##### **Question 9: Parties are invited to express their views on the appropriateness of the approach set out in paragraph 69.**

5. The ACTU considers that the approach set out in paragraph 69 of the Background Document is appropriate. It is consistent with the statutory framework, is efficient, and affords procedural fairness to interested parties.

**Question 12: Does any party take issue with the summary of the parties' submissions at paragraphs 70–167? Would any of the parties like to propose any amendments or additions?**

6. The Background Document contains an accurate summary of the ACTU's July Submissions (Background Document, [92]–[110] and [134]), the ACTU's December Submissions (Background Document, [111]–[113]) and the ACTU's February Submissions (in reply) (Background Document, [119], [126], [129], [135]–[136], [143], [145], [147], [154], [163]–[167]).
7. The ACTU confirms that on 28 March 2022, it filed an amended proposed variation and references in the Background Document to the proposed variation (at [94]–[95]) should be updated to reflect the amended variation.

**Question 13: The decision tree**

8. The Background Paper states:

*The ACTU claim seems to raise a number of decision points which are set out in the decision tree above. Parties are asked to identify their proposed answers to each of the numbered questions in the decision tree by reference to their submissions and the evidence (this should be done by referencing, rather than repeating in full, submissions already made, page numbers of the digital court book, the transcript, or the research reference list as appropriate).*

9. The ACTU's answers to the questions in the Decision Tree are set out below.

| Question                                                    | ACTU Response                                                                                                                                                              | ACTU Submission References |                         |                     |                                     |
|-------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------|-------------------------|---------------------|-------------------------------------|
|                                                             |                                                                                                                                                                            | July,<br>CB 146            | December,<br>CB 249     | February,<br>CB 821 | 28 March                            |
| X. Should there be an entitlement to <u>paid</u> FDV leave? | Yes.                                                                                                                                                                       | [97]–[101]                 | [38]–[40];<br>[63]–[64] | [31]                | --                                  |
| X.1: Is the definition of FDV in s 106B sufficient?         | No. It requires a minor amendment to include a member of an employee's household.                                                                                          | [114]–<br>[117]            | [72]                    | [77]–[81]           | --                                  |
| X.2: What should the quantum of paid leave be?              | <u>10 days</u> of paid family and domestic violence leave in a 12 month period. The clause should not prevent employers and employees negotiating additional unpaid leave. | [86]–[96]                  | [57] – [62]             | [63]–[66]           | Final submissions on evidence: [46] |

| Question                                                                      | ACTU Response                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | ACTU Submission References |                       |                     |                              |
|-------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------|-----------------------|---------------------|------------------------------|
|                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | July,<br>CB 146            | December,<br>CB 249   | February,<br>CB 821 | 28 March                     |
| X.2.1: Does the entitlement accrue progressively or is it available up front? | The entitlement should be available up front.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | --                         | --                    | [68]                | Final submissions: [8]–[11]  |
| X.3: Who should be entitled to the paid leave?                                | All employees experiencing FDV should be entitled to paid FDV leave, whether they are full-time, part-time or casuals. Paid FDV leave should not be available to perpetrators of FDV.                                                                                                                                                                                                                                                                                                                                                                              | [105]–[109]                | [20]; [33]; [67]–[70] | [69]–[76]           | See below.                   |
| X.3.1: If available to casuals, in what circumstances would this arise?       | A casual employee should be entitled to paid FDV leave when they are unable to undertake work because the employee is experiencing family and domestic violence.                                                                                                                                                                                                                                                                                                                                                                                                   |                            |                       |                     | Final submissions: [12]–[20] |
| X.4: In what circumstances should the leave be available?                     | <p>FDV leave should be targeted at matters arising from the impacts of FDV that must be dealt with, and that are impractical to deal with those matters outside working hours. As such, leave should be available when:</p> <ul style="list-style-type: none"> <li>• The employee is experiencing family and domestic violence; and</li> <li>• The employee needs to do something to deal with the impact of the family and domestic violence; and</li> <li>• It is impractical for the employee to do that thing outside the employee’s hours of work.</li> </ul> | [Per the clause]           |                       |                     |                              |
| X.4.1: Do the actions in s 106B sufficiently cover the circumstances in       | Section 106B should not be limited to matters that are impractical to deal with only outside the employee’s ‘ordinary’ hours of work. The                                                                                                                                                                                                                                                                                                                                                                                                                          | [113]                      | [71]                  | --                  |                              |

| Question                                               | ACTU Response                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | ACTU Submission References |                     |                     |                                                                   |
|--------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------|---------------------|---------------------|-------------------------------------------------------------------|
|                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | July,<br>CB 146            | December,<br>CB 249 | February,<br>CB 821 | 28 March                                                          |
| which an employee might need to take leave?            | word 'ordinary' should be deleted.<br>An amendment should be made to the note in s 106B(1) to include <i>attending appointments with medical, financial or legal professionals</i> as examples of actions covered by the FDV leave provision.                                                                                                                                                                                                                                                                                                                                                                               |                            |                     |                     |                                                                   |
| X.5: What should the rate of pay be for the leave?     | Under the ACTU's proposed amendments, employees would be paid the rate of pay the employee would otherwise have earned (including any applicable incentive-based payments and bonuses; monetary allowances; shift loadings, penalty rates, rostered overtime, allowances and other entitlements) ( <b>actual rate</b> ) had the employee not taken paid family and domestic violence leave, or, for part-time employees, the greater of their actual rate or a daily average rate; or, for casual employees with rostered or agreed hours, their actual rate, and for all other casual employees, their daily average rate. | [110]-[112]                | --                  | [69]                | Final submissions: [21]-[27]<br><br>Proposed variation, clause C. |
| Y. Should there be an entitlement to unpaid FDV leave? | Yes, unpaid FDV leave should be available once paid FDV leave is exhausted.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | [102]-[103]                | [47]; [65]          | [82]-[83]           | --                                                                |
| Y.1: What should the quantum of unpaid FDV leave be?   | Up to 5 days per occasion. The clause should not prevent employers and employees negotiating additional unpaid leave.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | [102]-[103]                | [65]                | [82]-[83]           | --                                                                |
| Y.2: Should it be available on a per occasion basis?   | Yes.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | [102] - [103]              | [65]                | [82] - [83]         | --                                                                |

| Question                                                                                                                  | ACTU Response                                                                                                                                                                                                                                                   | ACTU Submission References |                     |                       |          |
|---------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------|---------------------|-----------------------|----------|
|                                                                                                                           |                                                                                                                                                                                                                                                                 | July,<br>CB 146            | December,<br>CB 249 | February,<br>CB 821   | 28 March |
| Y.3: How would this interact with the NES entitlement?                                                                    | To the extent that the ACTU term gives an employee an entitlement that is the same as an NES entitlement, the terms would 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. | --                         |                     | [59] – [60]           | --       |
| Y.4: Should the employee be required to exhaust the paid leave entitlement before accessing the unpaid leave entitlement? | No. Employees should not be required to exhaust paid FDV leave before accessing FDV leave. Employees will be highly unlikely in practice to take unpaid FDV leave if paid FDV leave is available.                                                               |                            | [47]                | [60]; [67]; [82]–[83] | --       |

**Question 14: Is any issue taken with the propositions set out in paragraphs 167–178?**

10. No.

**Question 15: What does the ACTU say in response to ACCI's submission that the method of calculating paid leave in the ACTU's claim will result in modern awards regulating 'over award' payments?**

11. ACCI submits that:

*We do note that the paid component of the ACTU's Unlimited Unpaid/10 Day Paid Claim is payable at an employee's ordinary rate of pay. While this is typical for paid leave, ordinarily paid leave is derived from the NES and not modern awards. This will result in the modern award regulating 'over-award' payments which undermines the modern award status as a minimum safety net.<sup>1</sup>*

12. There is nothing preventing the FWC from providing for a paid leave entitlement in a modern awards if it determines that it is necessary. The safety net is comprised of both modern awards and the NES, and is not hierarchical: there is no justification for a submission that modern awards must contain the lowest possible minimum standard, whereas NES entitlements can provide for slightly better standards or entitlements than in modern awards.
13. Further, there are examples of modern awards requiring payment of weekend and shift penalties during periods of annual leave. For example under clause 28.3(ii) of the *General Retail Industry Award 2020*, an employee is entitled to a loading of the greater of either 17.5% of the employee's minimum hourly rate for all ordinary hours of work in the leave period; or the employee's minimum hourly rate for all ordinary hours of work in the period inclusive of penalty rates.
14. The payment of FDV leave at an employee's full-rate of pay would not 'undermine' the status of modern awards as a minimum safety net. The modern awards objective requires the FWC to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions. It is open to the FWC to determine, taking into account the factors in s 134(1)(a) to (h), that payment of FDV leave at an employee's full-rate of pay is necessary to ensure that the safety net is fair and relevant. Further explanation

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<sup>1</sup> ACCI Submission dated 4 February 2022 at [10.4]–[10.6], [CB 357](#).

of why it is necessary for FDV leave to be paid at an employee's full rate of pay are set out in the ACTU's Final Submissions.

**Question 16: Noting that s 134(1)(a) is only one of the matters that the Commission is required to take into account, is any objection taken to the adoption of the conclusion at [73] of the July 2017 Majority Decision in the context of the Full Bench's consideration of the ACTU's current claim?**

15. No.

**Question 17: Section 134(1)(b) speaks of the need to *encourage* collective bargaining (emphasis added). What is the evidentiary basis for the ACTU's assertion that the provision of 10 days paid FDVL may encourage collective bargaining?**

16. The ACTU has not submitted that the introduction of a new award minimum of 10 days paid family and domestic violence leave will encourage collectively bargaining generally; rather it has been submitted that it *'may encourage bargaining for additional supports for employees experiencing family and domestic violence over and above [a new minimum safety net standard], for example a higher quantum of paid leave and/or other forms of financial and non-financial support, such as assistance with relocations.'*<sup>2</sup> (emphasis added)
17. The WAD Report shows that there has been a 'substantial increase' of nearly 23 per cent of employees covered by agreements with some form of FDV provision since the commencement of the modern award entitlement to five days unpaid FDV leave.<sup>3</sup> The ACTU accepts that it may not be possible to draw a direct link between the introduction of the modern award provision and the increase in employees covered by some form of FDV support in enterprise agreements. However, the introduction of the modern awards entitlement has clearly not discouraged, and may have encouraged, collective bargaining on workplace responses to FDV.

**Question 18: Is any issue taken with the observation at paragraph 193?**

18. No.

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<sup>2</sup> ACTU July Submissions, [122]–[123], **CB 180**.

<sup>3</sup> **CB 1902**.

**Question 19: Specify the particular aspects of the evidence relied on in support of the ACTU’s submission dated 30 July 2021 at [126]–[127].**

19. In the 2018 Decision, the Full Bench found that “*employees who experience family and domestic violence often face financial difficulties as a result... and may suffer economic harm as a result of disruption to workforce participation*”,<sup>4</sup> and that “*Women who experience or are experiencing domestic violence have a more disrupted work history... have to change jobs frequently.. than women with no experience of violence*”.<sup>5</sup> The ACTU relies on these findings, which the Commission has identified may be adopted in this proceeding.<sup>6</sup>
20. The SWIRLS Report found that “*FDV has a significant impact on women’s paid employment*”,<sup>7</sup> citing research that shows for example, that:
- (a) the employment conditions, patterns of participation and work trajectories of women who experience FDV changes significantly after experiencing FDV (Franzway et al., 2019).<sup>8</sup>
  - (b) Women experiencing FDV earn 35 per cent less than those who do not (Aeberhard-Hodges and McFerran, 2018).<sup>9</sup>
  - (c) FDV causes women to feel distracted, tired, unwell, or afraid at work, leading to absences and leave, often resulting in reduced income and disrupted work histories. (Aeberhard-Hodges & McFerran, 2018; Franzway et al., 2019).<sup>10</sup>
21. The Monash Survey Report explored the impact of FDV on employment in detail, including employees’ ability to attend work, meaningfully engage in work and fulfil work expectations, and participate in the workplace environment. The Report concluded that “*experiences of DFV impact significantly on an individual’s ability to attend work, to participate meaningfully in work, to fulfill their role expectations, and to progress their career ambitions.*”<sup>11</sup>

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<sup>4</sup> 2018 Decision, [65(5)], [66].

<sup>5</sup> 2018 Decision, [95].

<sup>6</sup> See *Family and Domestic Violence Leave Review – Statement* [2022] FWCFB 24, [3].

<sup>7</sup> At **CB 1870**.

<sup>8</sup> At **CB 1870**.

<sup>9</sup> At **CB 1870**.

<sup>10</sup> At **CB 1870**.

<sup>11</sup> Monash Report, **CB 1934**, Part 4 (from **CB 1941**), **CB 1954**.



22. The ACTU's lay witnesses also explain how FDV disrupts employment for persons experiencing FDV.<sup>12</sup>

**Question 25: Is any issue taken with the observations at paragraphs 204–209?**

23. The ACTU does not take issue with the observations at paragraphs 204 to 207.
24. The ACTU does not take issue with the conclusions in the 2017 Majority Decision quoted in paragraph 208, insofar as that paragraph reflects the Full Bench's view at the time. The ACTU submits that the references in the second and third paragraphs to the absence of information concerning the difficulty of measuring the impacts of paid leave on employers and employees, should be limited to findings made at that point in time. They are not applicable findings in this Review.
25. As to the conclusions in the 2018 Decision, quoted in paragraph 209, the ACTU:
- (a) does not take issue with the first two paragraphs;
  - (b) the third to fifth paragraphs are conclusions limited to the point in time in which they were made, and are not applicable finding in this Review;
  - (c) the ACTU does not agree with the conclusions in the sixth paragraph, for the reasons set out in its July Submissions at paragraph 128 (CB 181) and paragraphs 131–132 (CB 181–82).

**Question 26: What does the ACTU say about the relevance of the SWIRLS research to s 134(1)(f)?**

26. In its July Submissions at paragraph 133, the ACTU noted that the SWIRLS research may perhaps consider evidence of utilisation rates. Utilisation rates are relevant to s 134(1)(f) of the FW Act because the extent to which a paid FDV entitlement is utilised may have a direct impact on employment costs and the regulatory burden, and an indirect impact on productivity, as Professor Duncan and Dr Stanford noted, by improving staff retention and enhanced firm reputation; and by enabling employees to take steps to escape FDV.

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<sup>12</sup> See Dr Jones' Statement, [20]–[21] at CB 1005–06; Parker Statement, [32] at CB 1080; Davies Statement, [18]–[19] at CB 1091; Walsh Statement [21] at CB 1326; Craig Statement, [15]–[16] at CB 1331 and C. Jones Statement, [8], [13] at CB 1342, 1343.

27. The SWIRLS Report did not include evidence about utilisation rates of FDV leave entitlements.
28. However, the SWIRLS Report identified research that confirmed the ACTU's July Submissions referred to above. It indicated that FDV impacts women's productivity at work by leading to feelings of unwellness, tiredness and distraction; and to absences from work.<sup>13</sup> The Report found that FDV leave is likely to contribute to reduced staff turnover and hence less workplace disruption and reduced costs associated with recruitment and training; and that FDV leave may enhance the overall reputation and status of organisations, and any cost to employers of providing FDV leave would be significantly offset by the benefits of doing so.<sup>14</sup>
29. The SWIRLS Report accordingly suggests that to the extent that paid FDV leave has a negative impact on employment costs, those costs will be offset by costs savings and improvements in productivity.

**Question 27: What is the evidentiary basis for the ACTU's submission that the additional costs due to paid FDV leave will be partially offset by productivity improvements and reduced absenteeism?**

30. Professor Duncan's Report at paragraph 44 (CB 986). Dr Stanford's Report at paragraphs 5-17 and 87 - 92 (CB 908-911 and 934-935); The evidence of Karyn Walsh at paragraph 17 (CB 1325). The SWIRLS report at page 6 (CB 1871).

**Question 29: Are there any corrections or additions to the summary of the ACTU's submissions in respect of the s 134 considerations at paragraphs 169 to 232?**

31. No.

28 March 2022

Kate Burke

The Australian Council of Trade Unions

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<sup>13</sup> CB 1870.

<sup>14</sup> CB 1871.