



**4 yearly review of modern awards –
Family and Domestic Violence Leave Review 2021
(AM2021/55)**

This summary is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.

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

16 MAY 2022

Summary of Decision

16 May 2022

4 yearly review of modern awards – Family and domestic violence leave review 2021 (AM2021/55)

[2022] FWCFB 2001

President Justice Ross, Vice President Hatcher, Commissioner Spencer

Introduction

[1] Family and domestic violence (FDV) is a ubiquitous and persistent social problem. While men can, and do, experience FDV, such violence disproportionately affects women. It is a gendered phenomenon. Since the age of 15, approximately one in 4 women (or 2.2 million women), compared to one in 13 men, have experienced at least one incident of violence by an intimate partner. The COVID-19 pandemic has seen an increase in the prevalence of FDV.

[2] FDV has a significant adverse impact on those who experience such violence. In comparison to women with no experience of FDV, women experiencing or who have experienced FDV have a more disrupted work history; are on lower personal incomes; have had to change jobs frequently; and are more likely to be employed on a casual and part-time basis.

[3] The effects of FDV are far reaching and extend beyond the individual directly affected to their families and the general community. The aggregate cost to the economy of violence against women, particularly FDV, is substantial. Seymour K, Hirsch R, Wendt S and Natalier K (2021), *Family and Domestic Violence Leave Entitlement in Australia: A Systemic Review, Social Work Innovation Research Living Space, Flinders University*, November (the SWIRLS Report) estimates the impact of FDV costs employers up to \$2 billion a year.

[4] Employment is an important pathway out of violent relationships and paid FDV leave provides significant assistance to employees who experience FDV; it helps individuals to maintain their economic security; to access relevant services, and to safely exit to a life free from FDV.

Background to the FDVL Review

[5] A Full Bench of the Commission has issued a decision about whether modern awards should be varied to provide for paid family and domestic violence leave (FDV leave) and additional unpaid FDV leave (the Decision).

[6] These proceedings arose out of the 4 yearly review of modern awards and a review of FDV leave which was foreshadowed in a Full Bench¹ decision issued on 26 March 2018 (the *March 2018 FDVL Decision*).² In the *March 2018 FDVL Decision* the Commission decided to vary modern awards to provide employees experiencing FDV with an entitlement to 5 days unpaid leave and proposed to revisit ‘the question of whether provision should be made for *paid* family and domestic violence leave’ in June 2021 (the FDVL Review).

[7] The commencement of the FDVL Review was announced in a statement issued on 15 April 2021.³

[8] In conjunction with the FDVL Review the Australian Council of Trade Unions (ACTU) filed a claim which sought to vary all modern awards to insert an entitlement to 10 days’ paid FDV leave in a 12-month period and up to 5 days’ unpaid FDV leave on a per occasion basis (the ACTU claim).

[9] The overarching premise of the ACTU’s claim was that FDV is a workplace issue that requires a workplace response and that ‘paid leave provides a critical mechanism for employees to maintain their employment and financial security, while dealing with the effects of FDV’.⁴ The Full Bench accepted the overarching premise of the ACTU claim but not the elements of the ACTU claim.

[10] The Australian Chamber of Commerce and Industry, Australian Business Industrial and New South Wales Business Chamber Ltd (ACCI), Australian Industry Group (Ai Group) and Master Grocers Australia Ltd (MGA) opposed the ACTU claim generally, and each element of it.

Legislative Framework and Legal Issues

[11] Chapter 4 of the Decision deals with the legislative framework and some legal issues.

[12] The Full Bench summarised its task as being to assess the evidence and submissions against the statutory tests, principally whether a modern award provides a fair and relevant safety net of terms and conditions and whether a proposed variation is necessary in order for the award to achieve the modern awards objective. It accepted that variations to modern awards must be justified on their merits and that the Commission may only make the variations sought by the ACTU if it is satisfied that the variations are ‘necessary to achieve the modern awards objective’.

Submissions

[13] The parties’ submissions on the evidence are addressed in Chapters 6, 7 and 8 of the Decision. The submissions in respect of the modern awards objective are addressed in

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

² [2018] FWCFB 1691.

³ [2021] FWCFB 2047.

⁴ ACTU supplementary submission dated 22 December 2021 [28].

Chapter 9. All relevant submissions, evidence and research material was published on the [FDVL Review page](#) of the Commission’s website.

[14] Chapter 5 of the Decision provides a brief summary of the main merit and legal arguments advanced by the ACTU, ACCI, Ai Group and the MGA. [Background Document 1](#) provides a more detailed summary of the parties’ submissions.

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

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

[17] All of the parties in the proceedings agreed that FDV is a ‘particularly offensive form of violence’,⁵ a ‘serious and pervasive social issue’, is ‘unacceptable and inexcusable’ and ‘must be strongly condemned’.⁶ ACCI submitted it is ‘unlikely to be contested that paid FDV leave will benefit employees experiencing FDV.’⁷ The Full Bench also noted that Ai Group’s Federal Election Policy Statement advocated for a publicly funded FDV payment linked to the existing unpaid leave entitlement in the NES.

The Evidence

[18] The evidence is dealt with in Chapters 6, 7 and 8 of the Decision.

[19] The ACTU filed 2 expert witness statements: [Dr Stanford](#) dated 30 July 2021 and [Professor Duncan](#) dated 28 July 2021. [Supplementary reports](#) from Dr Stanford and Professor Duncan were filed on 22 December 2021. The Full Bench accepted that the reports of Dr Stanford and Professor Duncan addressed the lacuna in the evidence regarding the costs of paid FDV leave identified in the *July 2017 Majority Decision*.

[20] The ACTU also adduced evidence from 10 lay witnesses. A [confidentiality order](#) issued on 12 August 2021 applies to some of the lay witness evidence.

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

[22] A hearing took place on 28 February 2022 to deal with the objections to the evidence and the Commission issued its [rulings on the objections to evidence](#) on 28 February 2022.

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

- Fitz-Gibbon K, Pfitzner N, McNicol E and Rupanagudi H (2021), ‘[Safe, thriving and secure: Family violence leave and workplace supports in Australia](#)’, Monash University, December (the Monash Report)

⁵ ACCI submissions in reply dated 4 February 2022 [2.2]–[2.3].

⁶ Ai Group submissions in reply dated 4 February 2022 [3].

⁷ ACCI submissions in reply dated 4 February 2022 [8.51].

- [Survey analysis for the Family and domestic violence leave review 2021](#), December 2021 (the Employer Survey)
- Seymour K, Hirsch R, Wendt S and Natalier K (2021), '[Analysis of the Workplace Agreements Database for the Family and Domestic Violence Leave Review](#)', Social Work Innovation Research Living Space, Flinders University, November (the WAD Analysis)
- Seymour K, Hirsch R, Wendt S and Natalier K (2021), '[Family and Domestic Violence Leave Entitlement in Australia: A Systemic Review](#)', Social Work Innovation Research Living Space, Flinders University, November (the SWIRLS Report)

[24] The Commission also published a [Research Reference List](#) and the following Information Notes:

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

[25] The opposing parties elected *not* to call any evidence in the proceedings. The consequences of the opposing parties' election are discussed in Chapter 6.2. The Full Bench noted that a party asserting a particular fact or consequence can be said to bear the evidentiary burden of adducing or pointing to evidence which supports that assertion and concludes:

‘Contested assertions which are unsupported by evidence will only be accepted if the assertion made is logically persuasive.’⁸

[26] The balance of Chapter 6 deals with the reports published as part of the Commission's research program and the parties' comments on that research, some data on the prevalence and impacts of FDV and the results of the Workplace Gender Equality Agency's (WGEA) 2020-21 employer census.

[27] The evidence in respect of the cost of the ACTU claim is addressed in Chapter 7.

[28] The findings on the evidence are set out in Chapters 6.6 and 7.5 and are set out at Attachment A to this Summary of Decision document. An overview of the Full Bench's findings and observations on the evidence is set out below.

Family and domestic violence: prevalence and effects

[29] The Full Bench finds that FDV is ubiquitous, disproportionately affects women, has increased during the COVID-19 pandemic, and has a significant adverse effect on those who experience it as well as their families and the general community. The Full Bench also finds that FDV has a real and tangible impact in the workplace, and that women who experience FDV have a more disrupted work history, lower personal incomes, more frequent changes of jobs,

⁸ Decision [281].

and are more likely to be employed in casual and part-time work than women with no experience of violence. The Full Bench finds that FDV is both a cause and consequence of gender inequality, and affirms the finding made in the *March 2018 FDVL Decision* that employees who experience FDV often face financial difficulties as a result, such as relocation costs, or become a sole parent, and may suffer economic harm as a result of disruption to workplace participation.

The prevalence of FDV leave arrangements

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

[31] The WAD Analysis showed that just over 64 per cent of enterprise agreements approved between 7 July 2018 and 30 June 2021 have some type of FDV clause or provision, accounting for the majority of employees covered by these enterprise agreements. Around one-third of all enterprise agreements approved from 7 July 2018 to 30 June 2021 (32.8 per cent) have *paid* FDV leave provisions. The most common number of paid FDV leave days provided was 10 days.⁹

[32] The Decision also sets out the results of the WGEA's 2020-21 employer census which noted a 'sharp rise in the availability of paid FDV leave' in the past 5 years.¹⁰ The WGEA dataset covers almost 4.2 million employees (nearly 40 per cent of Australia's total labour force), employed in 4,474 organisations with 100 or more employees.

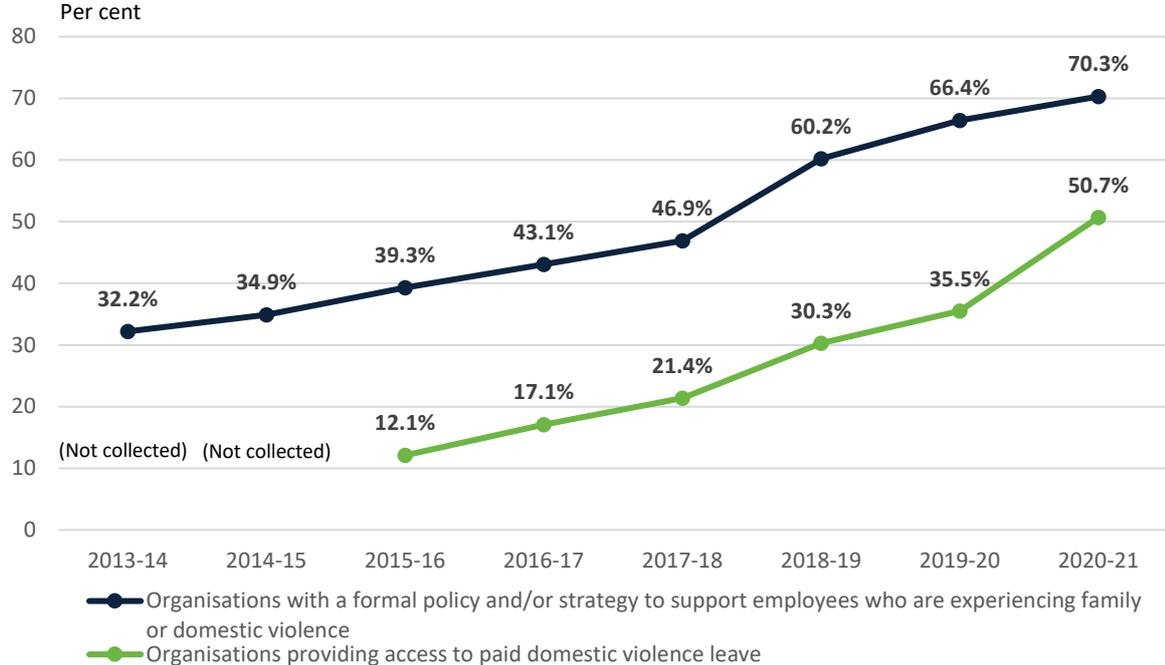
[33] Chart 35 from the WGEA 2020-21 census (reproduced below and numbered as Chart 8 in the Decision) shows that over 70 per cent of employers have a formal policy and/or strategy to support employees experiencing FDV and there has been a 'substantial jump' in employers offering paid FDV leave (12.1 per cent in 2015-16 to 50.7 per cent in 2020-21).¹¹

⁹ WAD Analysis pp.44–45.

¹⁰ Workplace Gender Equality Agency, *Australia's Gender Equality Scorecard: Key Results from the Workplace Gender Equality Agency's 2020-21 Employer Census*, (Report, February 2022) p.3.

¹¹ *Ibid* p.31.

Chart 8: Percentage of organisations with a formal policy and/or strategy to support employees who are experiencing family or domestic violence



Source: Workplace Gender Equality Agency (2022) ‘Australia’s gender equality scorecard: Key results from the Workplace Gender Equality Agency’s 2020-21 employer census’, February at p.31.

[34] The Full Bench made the following finding about the prevalence of paid FDV leave arrangements:

‘The provision of 10 days’ paid FDV leave is an emerging industrial standard in bargaining and over-award arrangements. There has been a sharp rise in the availability of paid FDV leave in the past 5 years. A substantial proportion of the Australian workforce now has access to paid FDV leave. Where employees are able to access paid FDV leave, it is relatively common for 10 days’ paid leave to be provided.’¹²

The utility of FDV leave

[35] In Chapter 6.6.2(ii) the Full Bench finds that an entitlement to paid FDV leave provides significant assistance to those experiencing FDV in that it helps individuals to maintain their economic security, to access relevant services and to safely exit to a life free from violence. The Full Bench also finds that the introduction of paid FDV leave is likely to be of some, albeit difficult to quantify, benefit to employers by reducing the absenteeism and lost productivity caused by FDV.

¹² Decision Attachment E [8].

Cost of the ACTU Claim

[36] Chapter 7 analyses the expert evidence adduced by the ACTU concerning the cost of its claim, noting that:

‘estimating the economy-wide or per-employee cost of the establishment of a paid FDV entitlement in all modern awards is an inherently problematic task. The entitlement is necessarily contingent in nature, and the task involved in estimating cost requires the making of assumptions as to the extent of the usage of such an entitlement (both as to the proportion of employees who will ever use it and the number of days of leave required if it is accessed) based on very limited data that is difficult to extrapolate to the entire modern award-covered workforce.’¹³

[37] The Full Bench also noted that Professor Duncan and Dr Stanford had both properly acknowledged and tried to account for the limitations in the data.

[38] The Full Bench concluded that the evidence supports a finding that varying modern awards in accordance with the *provisional* model term for paid FDV leave identified in Chapter 8.4, would have no significant adverse impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy. At the enterprise level, although the cost impact on employers will vary, it is unlikely to be substantial due to likely low employee utilisation rate of access to the entitlement and the existence of at least some offsetting benefits to employers.

Consideration

[39] Chapter 8 discusses the general case advanced by the ACTU for a paid FDV leave entitlement, and the response by the opposing parties. The Full Bench concludes that the merits ‘strongly favour’ a paid FDV leave entitlement. In particular, the Full Bench finds:

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

¹³ Decision [610].

- it is not persuaded that the issue of FDV should be left to the enterprise level and left unregulated by modern awards.

[40] Chapter 8.3 deals with the various elements of the ACTU’s claim:

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

[41] The Full Bench rejected the element of the ACTU claim which sought an additional period of 5 days’ unpaid FDV leave on a per occasion basis and formed the *provisional* view that paid FDV leave *not* apply to casuals.

[42] Chapter 8.4 sets out the Commission’s *provisional* view that a model FDV leave term should have the following characteristics:

1. Full time employees and, on a pro-rata basis, part-time employees, should be entitled to 10 days paid FDV leave per year.
2. The entitlement to 10 days paid FDV leave per year should accrue progressively across the year in the same way as for personal/carer’s leave under the NES, with accrual occurring according to the methodology articulated by the High Court in *Mondelez Australia Pty Ltd v AMWU & Ors.*¹⁴ The entitlement should accumulate from year to year, but subject to a ‘cap’ whereby the total accrual available does not exceed 10 days at any given time.
3. The FDV leave entitlement should be accessible in advance of an entitlement to such leave accruing, by agreement between an employer and employee.
4. The FDV leave entitlement should operate on the basis that it is paid at the employee’s ‘base rate of pay’ as defined in s.16 of the FW Act.
5. The definition of ‘family and domestic violence’ will be in the same terms as the definition in s.106B(2) of the FW Act (and not extend to FDV perpetrated by a member of the employee’s household who is not related to the employee).
6. In all other relevant respects, the model FDV leave term will reflect the terms of s.106B.

¹⁴ [2020] HCA 29.

[43] The Full Bench stated:

‘Compared to the ACTU claim, the *provisional* model term provides better alignment with existing NES entitlements and will have less impact on business in terms of employment costs and the regulatory burden. The accrual arrangements in the *provisional* model term will have the effect of operating as a phasing-in mechanism for the paid FDV leave entitlement for the first 12 months after the entitlement takes effect.’¹⁵

Modern Awards Objective

[44] The modern awards objective is to ‘ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions’, taking into account the particular considerations identified in ss.134(1)(a)-(h).

[45] Chapter 9 sets out the Full Bench’s *provisional* assessment on the modern awards objective, at a ‘global’ level. The Full Bench accepted that the Commission must consider any specific circumstances raised in respect of each modern award and be satisfied that any proposed variation to an award is necessary to ensure that award achieves the modern awards objective.

[46] It was common ground that the considerations in ss.134(1)(da) and (e) were not relevant to this proceeding. The Full Bench’s conclusions on the other s.134 considerations are extracted below.

s.134(1)(a): relative living standards and the needs of the low paid

[47] The Full Bench concluded that the consideration in s.134(1)(a) ‘strongly favours’ the variation of modern awards to include the *provisional* model term.

s.134(1)(b) the need to encourage collective bargaining

[48] Contrary to the ACTU’s submission, the Full Bench was not persuaded that the variation of modern awards to include the *provisional* model term would positively encourage collective bargaining and hence this consideration weighed against the variation of modern awards to include the *provisional* model term.

s.134(1)(c) the need to promote social inclusion through increased workforce participation

[49] The ACTU argued that this consideration supported the variation of modern awards to provide for paid FDV leave. ACCI and Ai Group contended that it was a neutral consideration in the context of these proceedings and did not weigh in favour of granting the ACTU’s claim.¹⁶

[50] In its submission of 4 February 2022, MGA advanced a separate point and submitted that the granting of paid FDV leave may even act as a disincentive for the employment of women and thereby adversely impact upon social inclusion:

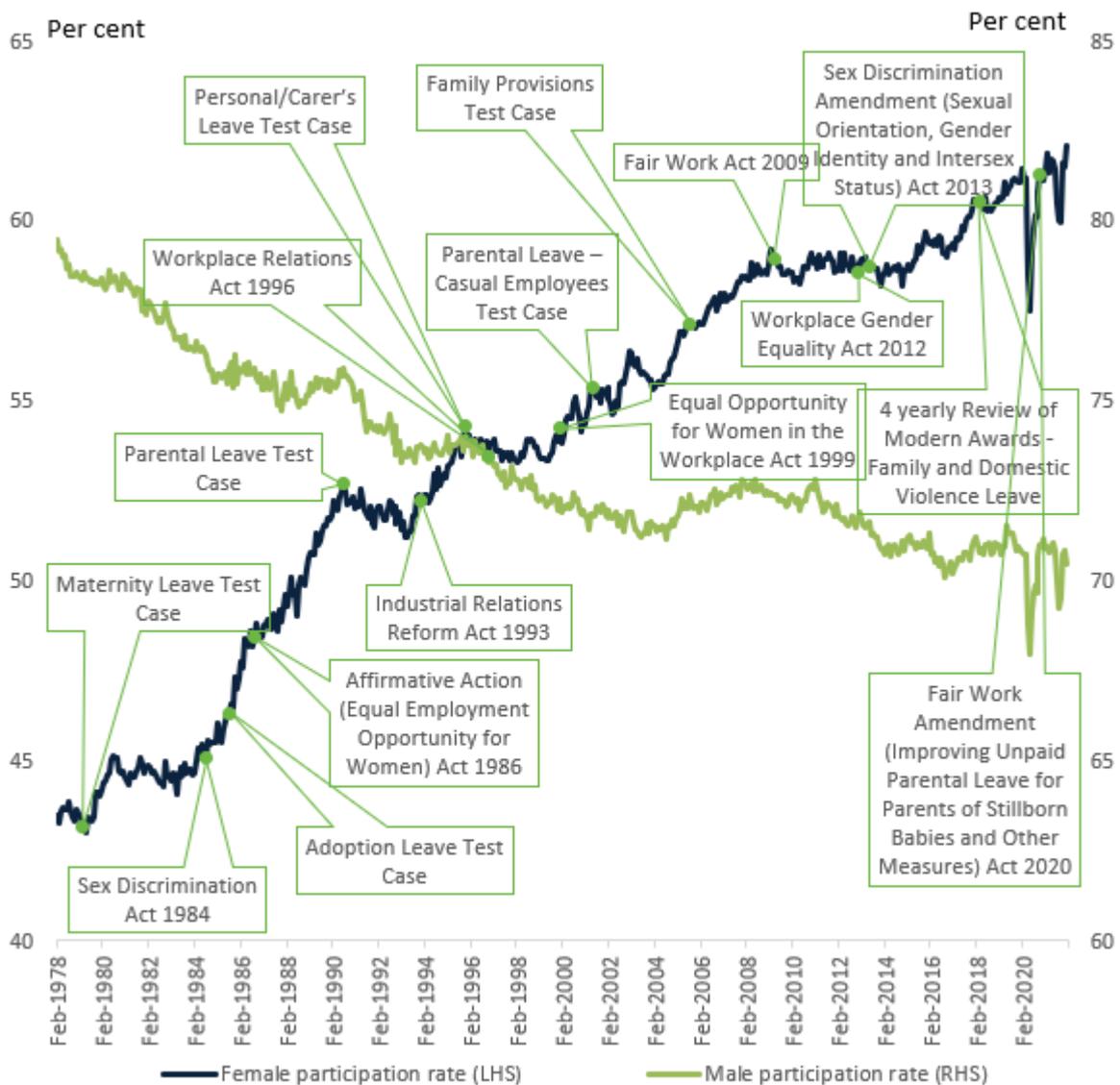
¹⁵ Decision [876].

¹⁶ ACCI final submissions dated 28 March 2022 [7.39]-[7.40]; Ai Group final submissions dated 28 March 2022 [176].

‘Although there are significant protections in place to prevent discrimination of women in the workplace, such as anti-discrimination laws and general protections, introduction of a paid FDVL entitlement may nevertheless inadvertently disincentivise some employers from engaging or continue to engage female employees as it is female employees that are more likely to experience family and domestic violence and require FDVL as a result.’¹⁷

[51] Commission staff prepared the chart below, which charts female workforce participation against various key arbitral and legislative changes relating to leave, gender equality and equal pay.

Chart 9: Female workforce participation following various key arbitral and legislative changes relating to leave, gender equality and equal pay



¹⁷ MGA submissions in reply dated 4 February 2022 [42].

[52] The Full Bench observed that, as noted in the SWIRLS Report, ‘it may be accepted that, [i]ncreases in the rates of labour force participation for women can largely be attributed to advancements in women’s education as well as greater access to childcare supporting women’s engagement with paid work, and the growth in traditionally feminised occupations.’¹⁸

[53] The Full Bench then said:

‘The chart does not appear to suggest that the various changes to the award and legislative context have had any adverse impact on the female workforce participation rate. Indeed it is arguable that these changes have *supported* the consistent rise in the female participation rate.’¹⁹

[54] The Full Bench rejected the MGA submission that granting paid FDV leave would act as a disincentive to employing women.

[55] The Full Bench observed that in the absence of an evidentiary basis, the MGA’s submission was mere speculation and went on to note that ‘refusing to employ prospective female employees because they might exercise an entitlement to access paid FDV leave would contravene the general protections provisions of the FW Act, specifically ss.340 and 351.’²⁰

[56] The Full Bench was satisfied that the insertion of the *provisional* model term into modern awards would have a significant positive impact on the promotion of social inclusion through increased workforce participation.²¹

s.134(1)(d) the need to promote flexible modern work practices and the efficient and productive performance of work

[57] The Full Bench concluded (at [943] – [944]):

‘FDV leave helps individuals maintain their economic security; to access relevant services; and to safely exit to a life free from violence. To the extent that paid FDV leave reduces the incidence of FDV it may also improve the efficient and productive performance of work.

We accept that inserting an entitlement to paid FDV leave into modern awards will increase the utilisation of such leave. On that basis there might be some increase in unplanned employee absences. This may have a consequent negative impact on the efficient and productive performance of work. On balance, the consideration in s.134(1)(d) weighs against the variation of modern awards to include the *provisional* model term.’

s.134(1)(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

¹⁸ SWIRLS Report p.1.

¹⁹ Decision [919].

²⁰ Decision [925].

²¹ Decision [931] – [933].

[58] The Full Bench accepted that the variation of modern awards to insert the *provisional* term was likely to give rise to variability in terms of employment cost at the enterprise level, noting that:

‘For some employers, particularly those who do not currently provide paid FDV leave, it is likely that there will be some increase in employment costs, although the significance of this will depend on the number of employees who access the entitlement and the number of days of paid leave they take. The evidence before us in respect of utilisation rates suggests that such costs are unlikely to be substantial.

As we found in Chapter 6.6.2 the provision of 10 days’ paid FDV leave is an emerging industrial standard in bargaining and over-award arrangements. The Employer Survey evidence suggests that one in 5 organisations already provide employees with paid FDV leave. The availability of paid FDV leave varied with business size; 20.7 per cent of organisations with one to 5 employees provided paid FDV leave, compared to 35.5 per cent of organisations employing more than 100 employees.

It is also uncontentious that many employers are supportive of their employees and will act in a compassionate and collaborative manner towards employees experiencing FDV.’²²

[59] The Full Bench concluded:

‘The outcome in respect of the s.134(1)(f) consideration must be regarded as mixed. There will be some increase in employment costs for those employers who do not currently provide paid FDV leave entitlements, or provide less beneficial paid FDV leave entitlements, but in most cases, this is unlikely to be substantial, given the anticipated low utilisation rate. There is likely to be some offsetting productivity benefit for such employers, but this is not capable of being quantified in any meaningful way and we cannot be satisfied that this will provide a benefit of the extent necessary to defray the additional employment cost. We are not satisfied that the regulatory burden on employers will increase to any discernible degree. Ai Group’s submission about the regulatory burden associated with administering a paid leave arrangement may have been more persuasive considered against the ACTU claim, rather than the *provisional* model term which provides that payment would be made at the base rate. On balance, the s.134(1)(f) consideration must be regarded as weighing against the variation of modern awards to include the *provisional* model term because we cannot be satisfied that the additional cost burden on some employers will be equalled by any productivity benefit. However, we do not propose to attribute much weight to this consideration in respect of our overall conclusion because, as stated, the additional cost is not likely to be substantial for any employer and for many it will be minimal.’²³

s.134(1)(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

²² Decision [958] – [960].

²³ Decision [963].

[60] The Full Bench concluded that s.134(1)(g) was a neutral consideration and said:

‘Obviously a concluded view in respect of this issue will depend on the final terms of the model paid FDV leave term, but the alignment between the *provisional* model term and the NES is consistent with the need to ensure a simple, easy to understand modern award system.

Ai Group also submits that the creation of a new form of leave less than 4 years after unpaid FDV leave became a feature of the safety net is inconsistent with the maintenance of a ‘stable and sustainable modern award system.’

These proceedings arose out of the 4 Yearly Review of modern awards conducted under s.156 of the FW Act. As is clear from the conclusion to the *March 2018 FDVL Decision* (see [204] above) the Full Bench considered that the introduction of 5 days’ *unpaid* FDV leave was ‘a cautious regulatory response’ to the issue of FDV and it proposed to revisit the issue in June 2021, including the question of whether provision should be made for *paid* FDV leave.

In these circumstances we find Ai Group’s submission unpersuasive. The insertion of the *provisional* model term into modern awards is not inconsistent with the ‘need to ensure a ... stable and sustainable modern award system’.²⁴

134(1)(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

[61] The Full Bench concluded that the variation of modern awards in accordance with the *provisional* model term would have no significant adverse impact on employment growth, inflation and the sustainability and competitiveness of the national economy; and this consideration was neutral.

Provisional view

[62] The Full Bench’s *provisional* global assessment in respect of the modern awards objective is in the following terms:

‘The modern awards objective is to ‘ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions’, taking into account the particular considerations identified in ss.134(1)(a)-(h). We have taken those considerations into account, insofar as they are presently relevant, and, at a global level of assessment, it is our *provisional* view that the insertion into modern awards of the *provisional* model term for 10 days paid FDV leave is necessary to achieve the modern awards objective.’²⁵

Conclusion and Next Steps

[63] The Full Bench concluded as follows:

²⁴ Decision [969] – [972].

²⁵ Decision [82].

‘We have concluded that the merits strongly favour a paid FDV leave entitlement. We have reached a *provisional* view as to the characteristics of a model FDV leave term (see Chapter 8.4). Further, at a ‘global’ level of assessment, we express our *provisional* view that the insertion of the *provisional* model FDV leave term into modern awards is necessary to achieve the modern awards objective.

Finally, it is worth noting the following comment in the House Committee Report:

‘The Committee acknowledges the evidence that the rate of FDSV has not decreased over the life of the National Plan, and the rate of sexual violence is in fact increasing. In that respect – despite its success in bringing Australia’s governments together – the National Plan does not appear to have met its stated objective of a significant and sustained reduction in violence against women and their children.

The Committee also acknowledges the findings of the Auditor-General’s report into the coordination and targeting of domestic violence funding, which in the Committee’s view raises concerns about the Department of Social Services’ implementation of the National Plan.

The stark reality is that all Australian governments have much more work to do in preventing FDSV.’²⁶

We respectfully agree. More needs to be done to prevent FDV and more needs to be done to address the consequences of such violence. As mentioned in our discussion of the Monash Report, we accept that the introduction of paid FDV leave is not a panacea for the devastating effects of FDV; but it will provide a critical mechanism for employees to maintain their employment and financial security, while dealing with the effects of FDV.’²⁷

[64] In Chapter 11, the Full Bench dealt with the next steps in the proceedings They said:

‘In Chapter 4.4 we set out the process we propose to follow in these proceedings. In brief that process is as follows:

Step 1: We consider the substantive merits of the ACTU’s claim and whether modern awards should make further provision of FDV leave. If the merits favoured the ACTU claim, in whole or part we would express a *provisional* view as to the terms of any entitlement to FDV leave and whether that term should be inserted into modern awards on the basis that it was necessary to achieve the modern awards objective.

Step 2: If a *provisional* view was expressed in Step 1 then we will formulate a draft model term and provide interested parties with an opportunity to comment.

Step 3: The content of the model term will be finalised.

²⁶ House Committee Report [2.182]-[2.184].

²⁷ Decision [997]-[999].

Step 4: Interested parties will be given an opportunity to make submissions on the *provisional* view that it is necessary, in the context of each particular modern award, to insert the model term to achieve the modern awards objective.

Step 5: Once a decision is made to insert the model term into particular modern awards interested parties will be given an opportunity to comment on the draft variation before it is finalised.

Plainly enough, this decision deals with Step 1.²⁸

[65] The Full Bench noted that they were conscious of the process that was adopted following the *March 2018 FDVL Decision*. They said that on the same day as the *March 2018 FDVL Decision* was published the Minister for Small and Family Business, the Workplace and Deregulation, the Hon. Craig Laundy MP and the then Minister for Women, the Hon. Kelly O'Dwyer MP released a joint statement announcing the Government's intention to introduce legislation amending the NES to extend the 5 days' unpaid FDV leave entitlement the Commission had determined to all workers covered by the FW Act.

[66] The Commission and the parties then engaged in a process of drafting a model term and the Commission subsequently varied 123 modern awards. The new modern award entitlement to 5 days' unpaid FDV leave came into operation on 1 August 2018.

[67] The FDV Leave Amendment Act commenced on 12 December 2018 and amended the FW Act to include an entitlement to unpaid FDV leave as part of the NES. A question then arose as to whether it was necessary to have a provision in modern awards in substantially the same terms. In a statement published on 11 February 2019,²⁹ the Commission expressed the *provisional* view that the model term be deleted from the exposure drafts produced as part of the 4 yearly review and replaced with a reference to the NES entitlement. That *provisional* view was confirmed on 25 July 2019.³⁰

[68] The Full Bench noted:

'The net effect of the process adopted in respect of the 5 days' of unpaid FDV leave entitlement was to put the parties to the trouble of responding to a draft model term and an award-by-award process for the insertion of a model term into 123 modern awards, only to have that term removed after the FDV Leave Amendment Act commenced operation. Such a process expended the parties' resources and was likely to have confused the employers and employees covered by the relevant modern awards. We wish to avoid a similar outcome in these proceedings.

The adoption of the 5 step process set out above may be an exercise in futility if Parliament chose to amend the NES in light of this decision. We do not know the Commonwealth Government's attitude in this respect as it did not participate in the

²⁸ Decision [1001]–[1002].

²⁹ [2019] FWCFB 767.

³⁰ [2019] FWCFB 5144.

proceedings. We do know from the Report of the House of Representatives Standing Committee on Social and Legal Affairs Inquiry into family and domestic violence (March 2021) that the House Committee was of the view that these proceedings would provide ‘a useful opportunity for evidence gathering and an evaluation of [FDV leave]’ and stated:

‘Given the scope of amendments to leave entitlements is a broad and complex issue that goes beyond the scope of this inquiry, the Committee defers to the pending Fair Work Commission review with regards to paid family violence leave.’³¹

We also note that in the course of its submissions opposing the introduction of an award based FDV leave entitlement, ACCI submits:

‘There is nothing distinctive about award-covered employees as compared to award-free employees relevant to their needs in relation to FDVL. As a group, award-covered employees are extraordinarily diverse and importantly *not* exclusively (or even primarily) low paid. Experience of FDV is not contingent on award-covered status and accordingly seeking to make FDVL contingent on award-coverage status seems likely to give rise to confusion, particularly where the basis for the distinction appears to be solely based on whether the Commission has jurisdiction or not.’³²

We express no view as to whether the NES should be varied to provide for paid FDV leave in the terms of our *provisional* model term – that is a matter for Parliament, not the Commission. That said, clarity as to the Commonwealth Government’s intentions would plainly be of assistance.’³³

[69] The Full Bench proposed to adopt the following ‘next steps’ in the FDVL Review.³⁴

1. The parties are to formulate a draft model FDV leave term based on our *provisional* views in Chapter 8.4. The formulation of such a draft term will be without prejudice to a parties’ ability to challenge any of our *provisional* views. The proposed draft model terms are to be filed by **4:00pm Friday 17 June 2022**;
2. The parties are to confer and submit draft directions in respect of the finalisation of these proceedings. Such directions are to:
 - (i) Provide an opportunity for the parties to express a view on the draft model FDV leave terms proposed by other parties and the *provisional* views we express in Chapter 7 about the content of that term; and
 - (ii) Provide the Commonwealth Government an opportunity to clarify its intentions regarding any amendment to the NES, should it choose to do so.

³¹ House Committee Report [8.223].

³² ACCI final submissions dated 28 March 2022 [7.55].

³³ Decision [1008]–[1011].

³⁴ Decision [1012].

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

- ENDS -

Attachment A – Principal Findings

Prevalence of FDV

1. FDV is ubiquitous. While men can, and do, experience FDV, such violence disproportionately affects women. It is a gendered phenomenon.³⁵
2. The COVID-19 pandemic has seen an increase in the prevalence of FDV.

Impact of FDV

3. FDV has a significant adverse impact on those who experience such violence. The effects of FDV are far reaching and extend beyond the individual directly affected to their families and the general community. Family violence can also exacerbate existing mental health problems and increase the risk of subsequent depression.³⁶
4. Employees who experience FDV often face financial difficulties as a result, such as relocation costs or become a sole parent; and may suffer economic harm as a result of disruption to workplace participation.³⁷
5. FDV has a real and tangible impact on employees and employers in the workplace.
6. FDV is both a cause and consequence of gender inequality. Women who are experiencing or have experienced FDV have a more disrupted work history; are on lower personal incomes; have had to change jobs frequently; and are more likely to be employed in casual and part-time work, than women with no experience of violence.³⁸
7. Employment is an important pathway out of violent relationships. Sustained periods of employment can provide financial security, independence, social networks and increased self-esteem.

Prevalence of paid FDV leave arrangements

8. The provision of 10 days' paid FDV leave is an emerging industrial standard in bargaining and over-award arrangements. There has been a sharp rise in the availability of paid FDV leave in the past 5 years. A substantial proportion of the Australian workforce now has access to paid FDV leave. Where employees are able to access paid FDV leave, it is relatively common for 10 days' paid leave to be provided.

³⁵ ABS (2017) '2016 Personal Safety Survey'.

³⁶ Lum M et al (2016), *Examination of the health outcomes of intimate partner violence against women: State of knowledge paper*, Australia's National Research Organisation for Women's Safety p.20.

³⁷ *March 2018 FDVL Decision* [65].

³⁸ McFerran L (2011) 'Safe at Home, Safe at Work', National Domestic Violence and the Workplace Survey, Australian Domestic and Family Violence Clearinghouse, A Project of the Centre for Gender-Related Violence Studies and Micromex Research, University of New South Wales p.2.

The utility of paid FDV leave

9. Paid FDV leave provides significant assistance to those experiencing FDV. Such leave helps individuals to maintain their economic security; to access relevant services, and to safely exit to a life free from violence.
10. The introduction of paid FDV leave will be of some benefit to employers. Employers are already paying the cost of FDV – through increased absenteeism and lost productivity. Paid FDV leave will assist in reducing that cost. But the evidence before us is insufficient to quantify that benefit with any level of confidence or to conclude that the benefits would ‘largely offset’ the cost.
11. Varying modern awards in accordance with the provisional model term in Chapter 8.4 would have no significant adverse impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.
12. For some employers, particularly those who do not currently provide paid FDV leave, the employment costs may be significant depending on the number of employees who access the entitlement and the number of days of paid leave they take. The utilisation rate of a 10 day paid FDV leave entitlement is likely to be low which suggests that such costs are unlikely to be substantial.