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Committee Secretary
Senate Education and Employment Committees
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Australian Foodservice Advocacy Body (AFAB- www.ausfab.org) is an integrated industry body for Australia's \$80 billion Foodservice sector, including tens of thousands of businesses that directly & indirectly employ hundreds of thousands of Australians. AFAB is the first complete collective of leading Foodservice industry people coming together to facilitate a platform for education, connectivity and leadership to embrace the changing face and capability of our industry. AFAB brings together senior Foodservice leaders – representing producers, manufacturers, distributors, hospitality and service providers – to create a fully integrated supply chain industry body for Australia's Foodservice sector.

In its March 2018 Family and Domestic Violence Leave Decision, the Fair Work Commission decided to vary modern awards to provide employees experiencing Family and Domestic Violence 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'.

It received submissions from employers, unions and other interested parties and conducted hearings. In May 2022, the Fair Work Commission handed down its Decision recommending 10 days paid family and domestic violence leave for award employees.

In the Fair Work Commission's 2021 Inquiry, the question of what workplace leave should be available to victims of family and domestic violence was considered in extensive detail. This consideration included: whether leave should be paid, how much leave was appropriate, how it should accrue, the rate at which it should be paid, and who should have access to leave. The Commission reached its decision after consideration of evidence and was based on the input and advocacy of a range of unions and employer representative bodies.

In its May 2022 Decision, the Fair Work Commission recommended:

- Full time employees and, on a pro-rata basis, part-time employees should be entitled to 10 days paid family and domestic violence leave per year.
- The entitlement to 10 days paid family and domestic violence leave per year should accrue progressively across the year in the same way as personal/carer's leave accrues under the National Employment Standards.
- The entitlement should accumulate from year to year but subject to a caveat whereby the total accrual does not exceed 10 days at any given time.



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- The paid family and domestic violence leave entitlement should be accessible in advance of an entitlement to such leave accruing, by agreement between an employer and employee.
- The paid family and domestic violence leave entitlement should operate on the basis that it is paid at the employee's 'base rate of pay' as defined in section 16 of the Fair Work Act.

While we are 100% supportive of paid family and domestic violence leave, we note that the Government's proposed legislation goes further than the model proposed by the Fair Work Commission in its Decision:

- It provides ten days of paid Family and Domestic Violence Leave in a 12-month period for casual employees.
- In relation to the accrual, employees would gain 10 days of paid family and domestic violence leave from the commencement date of 1 February 2023, rather than having it accrue like other leave entitlements and leading to P&L and Balance Sheet shock to tens of thousands of SME's.
- It provides for employees to access paid family and domestic violence leave at their full rate of pay for the hours they would have worked had they not taken the leave.
- It extends the definition of family and domestic violence to include conduct of a current or former intimate partner of an employee, or a member of an employee's household; and
- Extends the full paid entitlement to all employees when the International Labour Organisation Convention (No.190) concerning Violence and Harassment comes into force for Australia.

We also note that The Fair Work Commission considered all the issues proposed in the Bill many of which were put forward by the ACTU. We fully support the position of the Fair Work Commission.

- In reaching its Decision the Fair Work Commission clearly did not support the breadth of the ACTU proposals and found against them.
- 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.
- In relation to the accrual of leave, The Fair Work Commission said that the entitlement to 10 days' paid FDV leave per year should accrue progressively during a year of service - in the same way as for personal/carer's leave under the NES.
- 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.
- This will have the effect of operating as a phasing-in mechanism for the entitlement for the first 12 months after the entitlement takes effect.
- In relation to the extension of ten days of paid family and domestic violence leave in a 12-month period for casual employees, the Fair Work Commission



did not recommend this as the National Employment Standards do not extend paid leave to casuals.

- The Fair Work Commission also said that The Fair Work Act provides no precedent nor a model for a workable scheme for the provision of paid leave of any type to casual employees.
- There are significant operational difficulties in extending paid family and domestic violence to casuals, as noted by the Fair Work Commission, and even acknowledged by the ACTU during the hearings as follows: “The ACTU accepts that there are some operational challenges associated with extending paid FDV leave to casuals, including in relation to those casual employees whose hours of work are genuinely uncertain....”.

What the Fair Work Commission said in relation to casuals is extremely important to note as the Government is proposing changes that attempt to fundamentally change the way the Fair Work Act deals with paid leave and casual employees.

Noting the Fair Work Commission said, The Fair Work Act provides no precedent nor a model for a workable scheme for the provision of paid leave of any type to casual employees. Casual workers are often paid a 'casual loading' to compensate them for the lack of entitlements they receive, such as paid holiday and sick leave and this loading is extra money paid to casual workers over and above the normal hourly rate that full-timers or part-timers get paid in the same job. Even the ACTU acknowledged that there are significant operational difficulties in extending paid Family and Domestic Violence Leave to casuals, as noted by the Fair Work Commission.

In relation to the rate of pay the Fair Work Commission recommended the calculation of the payment should be based upon the employee's “base rate of pay,” not their full rate of pay, in the same fashion that the National Employment Standards paid leave entitlement operates. The Fair Work Commission also contended it would be “overly disruptive to the integrity of the safety-net” if it were to depart from the way all other paid leave entitlements which the National Employment Standards provides. The Fair Work Commission also noted that the Fair Work Act applies this rationale even to needs-based leave entitlement such as personal/carer's leave.

We agree with Fair Work Commission's model for paid domestic violence leave in enshrining of the 10 days paid family and domestic violence leave into the National Employment Standards to ensure a consistency of entitlements for employees. However, we have significant concerns with the Government's departure from the Fair Work Commission's proposed model after exhaustive collaboration with stakeholders to arrive at their Decision.

The proposed legislation departs from the carefully considered approach proposed by the Commission in various ways that undermine its workability and reasonableness by adopting elements of the ACTU proposal that the Commission had rejected.

The Bill should be amended to reflect considered views of the Commission based on the balanced views of all stakeholders.



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- The 10-day entitlement should apply to permanent employees rather than casuals; be calculated on a pro-rata basis for part-time workers; and should accrue progressively during an employee's first year of employment unless an employer agreed to grant it in advance.
- Employees should be paid their base rate of pay when accessing the leave as this is approach taken when an employee accesses personal / carer's leave instead of requiring employers to pay employees amounts including penalty rates, overtime rates and various allowances when they access the leave.
- We have significant accounting and finance concerns about how the rate of pay that must be provided to an employee could even be calculated in practice providing paid leave "upfront" will have practical consequences, particularly for small and medium sized businesses with limited cashflow and cash reserves. Noting the Fair Work Commission themselves at paragraph 842 of the Decision agreed saying: "We are persuaded by the submissions...that the paid FDV leave entitlement should not accrue 'upfront' in the way proposed by the ACTU because of the potential cost consequences this will produce upon the commencement of the entitlement and in respect of new employees. In particular, we accept...that the provision of paid FDV leave 'upfront' will adversely affect small and medium-sized businesses with limited cashflow or cash reserves."

Notwithstanding the research and consultation carried out by the Fair Work Commission, the Government has opted to propose legislation for a scheme for paid Family and Domestic Violence Leave which is far broader and potentially more costly and complex than the Fair Work Commission and industry previously contemplated and we do not support the deviations from the original Fair Work Commission Decision.

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