Ai GROUP SUBMISSION

Education and Employment Legislation Committee

Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022

19 August 2022

Ai GROUP

Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to provide a submission to the inquiry by the Senate Education and Employment Legislation Committee into the provisions of the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022* (**Bill**).

Family and Domestic Violence

Family and domestic violence is unacceptable and inexcusable in all its forms. It is a serious and pervasive social issue that must not be tolerated or condoned.

Federal, State and Territory Governments have implemented various payments and other measures to assist employees experiencing family and domestic violence. Governments have an important role to play in providing such a social safety net and it is appropriate that they continue to do so.

Employers typically take a flexible and compassionate approach to supporting employees experiencing family and domestic violence. They should be encouraged to continue doing so. However, employers have different capacities to provide paid leave to employees who are experiencing family and domestic violence.

As previously proposed by Ai Group, any legislated paid family and domestic violence leave entitlement should be publicly funded, such that the cost of the entitlement is not bourn by individual employers, but is instead shared more broadly. As is the case in relation to paid parental leave, this would not preclude employers from affording more generous paid leave entitlements, or indeed other forms of support, to their employees.

The Bill

The Bill seeks to introduce a new entitlement to 10 days of paid leave for full-time, part-time and casual employees who are experiencing family and domestic violence leave. It follows a decision[1] that was issued by the Fair Work Commission (**Commission**) on 16 May 2022 in relation to the proposed introduction of paid family and domestic violence leave in modern awards.

In its decision, the Commission gave detailed consideration to various elements of the proposed entitlement and sought to strike a balance between the interests of employees and employers. Specifically, it rejected various elements of the proposal advanced by the Australian Council of Trade Unions (**ACTU**) in those proceedings. It did so after considering the wide-ranging material before it; including witness evidence, survey evidence, research reports and submissions from various interested parties. In light of the introduction of the Bill, the Commission has indefinitely adjourned the proceedings before it.[2]

[1] *Family and Domestic Violence Leave Review 2021* [2022] FWCFB 2001.
[2] *Family and Domestic Violence Leave Review 2021* [2022] FWCFB 152.

The proposed legislative entitlement to family and domestic violence leave goes well beyond the Commission's provisional determination of what a paid leave entitlement should provide. Indeed, it contains some of the very aspects of the ACTU's proposal that were rejected by the Commission.

The deviation from that carefully considered approach proposed by the Commission also gives rise to various problems that undermine the workability of the proposed new entitlement and creates various unreasonable and anomalous outcomes. In this respect, we emphasise the significant practical difficulties that will arise because of the novel proposed method of calculating the rate of pay for the leave, foreseeable uncertainty over the circumstances in which casuals may be entitled to the leave and the complete absence of any mechanism for ensuring the entitlement operates on a 'pro-rata' or proportionate basis for part-time employees relative to full-time employees.

Any entitlement to paid family and domestic violence leave should be based upon the carefully considered and balanced approach proposed by the Commission in its decision. In the **attachment** to this submission, we have set out various specific elements of the Bill that should be amended.

The Bill has not been the subject of a Regulation Impact Statement. The explanatory memorandum to the Bill says that this is because the Commission's review of family and domestic violence leave in modern awards *'is equivalent to a Regulation Impact Statement'*.[3] Such an approach overlooks the major differences between the Bill and the entitlement contemplated by the Commission. Specifically, the Bill takes a more generous approach in relation to various elements of the proposed entitlement when compared to the Commission's decision. This includes requiring that the leave would be paid at a higher rate than that which was contemplated by the Commission as well as extending the entitlement to casual employees.

Consequently, there has not been any robust assessment of the cost impact of the proposed new entitlement. Such a deficiency, along with several of the other problems that we identify in these submissions, could be readily addressed by amending the Bill so that it more closely aligns with views of the Full Bench of the Commission.

[3] Explanatory memorandum at page 2.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for nearly 150 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, ICT, transport & logistics, engineering, food, labour hire, mining services, the defence industry and civil airlines.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government, underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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Attachment A

	Clause & Section Number	Effect of the Clause (in Summary)	Ai Group Submission
1	Clause 10 Section 106A(2)	All employees would be entitled to paid family and domestic violence leave, including casual employees.	The National Employment Standards (**NES**) do not presently afford any paid leave to casual employees. The provision of paid family and domestic violence leave would constitute a significant departure from this approach. The Commission determined that casual employees should not be granted an entitlement to paid family and domestic violence leave under awards. Employers should similarly not be required to provide such leave to causal employees pursuant to the NES. At the very least, the entitlement should not be extended to short-term casuals. The provision of paid leave would be inconsistent with the very nature of casual employment, whereby casual employees are not required to attend work and they are free to accept or reject work. As a result, the nature of their employment is clearly distinguishable from permanent employees. In this context, it would be unfair to require an employer to pay a casual employee for absences from work when there is no obligation upon a casual employee to actually attend work. Further, as the Commission observed in its recent decision, there are various complexities associated with implementing a paid leave entitlement for casual employees, by virtue of the nature of their employment.[1] This includes difficulties associated with ascertaining when the employee would be entitled to the leave and how much they should be paid for any such leave. We return to the latter issue below. It would be unfair and inappropriate to introduce a paid leave entitlement that is unclear in its application and operation. As was accepted by the Commission, the difficulties associated with constructing a clear and unambiguous entitlement for casuals is, in and of itself, a reason for not doing so.[2] If, despite our submissions and the Commission's views, the legislature decides that casuals should have paid family and domestic violence leave entitlements, such an entitlement should only apply to *'long term casuals'*, consistent with the approach in Division 4 (Requests for flexible work arrangements) and Division 5 (Parental leave and related entitlements) of the NES.
2	Clause 10 Section 106A(2)	10 days of paid family and domestic violence leave is available in full at the start of	The Bill would result in new employees having an entitlement to 10 days of paid leave upon commencement of employment. This would be unfair to employers and could result in various perverse, or at least unreasonable, outcomes. For instance, a full-time employee who has attended for work on only one day would immediately have an

[1] *Family and Domestic Violence Leave Review 2021* [2022] FWCFB 2001 at [814] – [816].
[2] *Family and Domestic Violence Leave Review 2021* [2022] FWCFB 2001 at [814] – [816].

		each 12 month period, including upon commencement of employment.	entitlement to be absent with pay for 10 days. Alternatively, a part-time employee who works two days per week would have an entitlement to be absent for five weeks. In its decision, the Commission accepted that an obligation to pay the whole entitlement to a new employee may have unfair consequences for employers, particularly small and medium employers or employers in industries which typically have a high turnover of labour.[3] The Full Bench expressed the view that the entitlement should instead accrue progressively in the manner contemplated in *Mondelez Australia Pty Ltd v Australian Manufacturing Workers' Union* [2020] HCA 29 (**Mondelez Case**) during an employee's first year of employment, subject to accepting Ai Group's proposal that employers should be able to elect to grant the leave in advance. This would be the fairest and most balanced approach. In the alternate, an approach similar to that prescribed in federal award sick leave clauses prior to the implementation of a legislative standard for personal/carer's leave[4] should be adopted, whereby: • For the first 10 months of employment, the leave would accrue at the rate of one day per month; and • In second and subsequent years of employment, the employee would become entitled to 10 days of leave at the commencement of each year of service.
3	Clause 10 Section 106A(2)	Part-time employees are entitled to 10 days of paid leave. It is not applied on a pro-rata basis, having regard to their ordinary hours of work.	It would be unfair to both employers and full-time employees for part-time employees to accrue the same entitlement as full-time employees. For example, as drafted, the Bill would give a part-time employee who works one day per week the equivalent of 10 weeks' of paid leave per annum. This would also be out-of-step with the remainder of the safety net. In its decision about paid family and domestic violence leave, the Commission held that the leave should be calculated on a pro-rata basis for part-time employees, based on their ordinary hours of work.[5] The same approach should be adopted in the Bill. This could be achieved by adopting a comparable scheme to the NES provisions granting an entitlement to personal / carer's leave.

[3] *Family and Domestic Violence Leave Review 2021* [2022] FWCFB 2001 at [839] - [845].

[4] For example, see the *Metal, Engineering and Associated Industries Award 1998*.

[5] *Family and Domestic Violence Leave Review 2021* [2022] FWCFB 2001 at [874].

4	Clause 16 Section 106B(1)(c)	An employee can take leave if it is impractical for them to do something to deal with the impact of family and domestic violence outside the employee's *'work hours'*.	The meaning of *'work hours'* is not clear. The explanatory memorandum to the Bill says little about the term, other than to explain that an employee's *'work hours'* may not be the same as their *'ordinary hours of work'*. It would appear, therefore, that an employee's *'work hours'* could include overtime. Any entitlement to paid leave should be limited to circumstances in which an employee is unable to attend for work during ordinary hours of work. An employee is generally not required to work overtime and can, therefore, refuse to do so. It would be unfair and inappropriate to require an employer to provide an employee with paid leave for such hours. This is to be contrasted to an employee's ordinary hours of work, during which a permanent employee is generally required to attend for work, subject to their absence being authorised by their employer. There are also various practical problems that may arise from determining what an employee's *'work hours'* are, if they are not confined to ordinary hours of work. For instance, overtime is generally not guaranteed and is often worked by employees on an ad hoc or as-needs basis. In some circumstances, an employee may be requested to work overtime with little notice. In what circumstances does overtime form part of an employee's *'work hours'*? Neither the Bill nor the explanatory memorandum make this clear. Our proposed approach would be consistent with that taken in the NES in relation to other forms of leave such as annual leave and personal / carer's leave.
5	Clause 18 Section 106B(2)	The definition of *'family and domestic violence'* would include circumstances in which such violence was perpetrated by *'a member of an employee's household'*.	The proposed extension of the definition of *'family and domestic violence'* is unwarranted. It would include any member of a person's household, regardless of the nature of the employee's relationship with them. For example, it would incorporate housemates. This proposed approach was rejected by the Commission in its recent decision. The nature and impact of any violence perpetrated in such scenarios can be distinguished from family and domestic violence, by virtue of the different nature of the relationship that exists between the employee and the perpetrator. As has previously been observed by the Commission, a definition that includes violence perpetrated in such situations would be too broad.[6]
6	Clause 19 Section 106BA(1)(a)	A full-time or part-time employee must be paid for the leave at their full rate of pay, *'as if the employee had not taken the period of leave'*.	It would be unfair upon employers for employees to be paid at *the 'full rate of pay'*. For instance, it would not be fair for an employer to be required to pay an employee for overtime not worked during a period of leave, expense-related allowances prescribed by awards when an employee does not incur the expense, or a penalty rate when the employee does not experience the disutility or disadvantage that justifies the penalty. The proposed requirement would also give rise to a raft of practical problems and complexities in its operation. Most obviously, it would put an employer in the position of needing to speculate as to what events may have occurred during the working day that could have given rise to various contingent entitlements that are commonly provided for under awards and enterprise agreements. This would be simply unworkable in many circumstances. For instance, industrial instruments commonly prescribe allowances that are payable where an employee undertakes a specific type of work or if particular circumstances arise (e.g. meal allowances that are payable for each rest break taken

[6] *4 yearly review of modern awards—Family & Domestic Violence Leave Clause* [2017] FWCFB 3494 at [112].

			during overtime, cold work allowances, hot work allowances, wet work allowances, dirty work, work in confined spaces, work at significant heights etc). Industrial instruments also typically require payment at a different rate where an employee temporarily performs *'higher duties'*. It will often simply not be feasible to identify whether these various amounts are payable to an employee where they are absent from work. This is because, in the absence of the employee in fact having worked, it cannot be ascertained whether the various amounts would have been payable. In many instances it would also be difficult, if not impossible, to determine how to comply with such an obligation in the context of employees paid piece rates or commissions that are payable on the occurrence of particular contingencies. The explanatory memorandum to the Bill states that employees would be entitled to *'amounts the employee would otherwise have earned, provided those amounts can be identified and calculated with a reasonable degree of certainty'*. It goes on to say that *'for irregular payments or amounts contingent upon certain events that may or may not have happened during the employee's rostered hours, an employer may not be liable to pay an employee those amounts'*.[7] The Bill does not, however, reflect this aspect of the explanatory memorandum. The proposed terms of the Bill simply require payment at the full rate of pay, which is defined by the Act as *'the rate payable to the employee'* including all separately identifiable amounts such as loadings, allowances, overtime, penalty rates etc.[8] Consistent with the annual leave and paid personal/carer's leave provisions in the Act, employees should receive their *'base rate of pay'* for their ordinary hours of work during periods of family and domestic violence leave.
7	Clause 19 Section 106BA(1)(b) & 106BA(2)	A casual employee must be paid for the leave at the full rate of pay, for the hours in the period *'for which the employee was rostered'*. This would include hours of work that were offered and accepted.	The Bill would not provide a workable framework for identifying how the amounts payable to a casual employee for family and domestic violence leave are to be calculated. The reference to the *'full rate of pay, worked out as if the employee had worked the hours in the period for which the employee was rostered'* does not provide the clarity that is necessary to ensure that the safety net is simple and easy to understand. Part of the difficulty with this approach is the uncertainty as to what precisely is meant by the term *'rostered'* as used in the Bill. Is this confined to rosters that are published and communicated to employees? Is an employee taken to have been rostered in any situation in which the employee has been offered potential work? Most awards do not require employers to publish rosters in relation to their casual employees. As a matter of practice, some employers may choose to issue rosters that provide casual employees with an *indication* as to when they may be required to work; however, employers have (and do exercise) the discretion to amend those rosters in accordance with their operational needs. This may result in changes to whether and when casual employees are in fact offered work. It would be very unfair if employers were required to provide casual employees with paid leave where they have provided an *indication* to them as to when they may be given work. No entitlement to paid leave should arise in such circumstances.

[7] Explanatory memorandum at [49].
[8] Section 18(1) of the Act.

			In addition, the issues raised above concerning the calculation of the *'full rate of pay'* in respect of permanent employees are also relevant to casual employees.
8	Clause 19 Section 106BA(3)	A casual employee can take *'a period of paid family and domestic violence leave that does not include hours for which the employee is rostered to work'*. The employee would not be entitled to payment for such leave.	The proposed provision is clearly confusing. It states that a casual employee can take paid leave for which the employee is not entitled to be paid. Moreover, the notion that a casual employee can take leave for a period during which they are not required to work is nonsensical. When, or more precisely in respect of which hours, would such leave be available?
9	Section 106E	NA	The Bill does not propose to specifically amend section 106E; however, in the context of paid family and domestic violence leave (as opposed to the current unpaid leave entitlement), the operation of the extant section 106E would be problematic. The Bill proposes an entitlement to 10 days of paid leave that would operate by reference to the definition of a *'day of leave'* in section 106E of the Act. This definition reflects a *'calendar day'* meaning of a *'day'*, granting leave over a 24 hour period without reference to an employee's ordinary hours of work. In contrast, the provisions of the NES dealing with the granting of paid personal / carer's leave (an entitlement which is analogous in many respects to an entitlement to paid family and domestic violence leave), provides for payments based on an employee's ordinary hours of work. This approach is reflected in the High Court's recent decision in the Mondelez Case, concerning the interpretation of the personal / carer's leave provisions in the Act. This approach ensures that an entitlement to 10 days is calculated in a manner that is proportionate to the ordinary hours of an individual employee and avoids numerous unreasonable outcomes. In the Mondelez Case, the High Court highlighted numerous examples of the unfairness of adopting an approach similar to that reflected in the Bill. As stated by Keifel CJ, Nettle and Gordon JJ: *42. Similarly, on the "working day" construction, part-time employees would be entitled to the same amount of leave as, or more leave than, full-time employees. For example, a part-time employee working one day per week for 7.6 hours would be entitled to ten days of paid personal/carer's leave per annum (the same as an employee working 7.6 hours five days a week) and would accrue the leave at five times the rate of a full-time employee. And a part-time employee who works 12 ordinary hours per week as a single shift would accrue 120 hours of leave (ten absences of 12 hours) – almost double the 72 hours of leave a full-time employee working 36 ordinary hours per week over five 7.2-hour days would accrue in a year. Additionally, a person who was employed one day per week by a number of employers would be entitled to ten days of paid personal/carer's leave from each employer. Such results would be directly contrary to a stated object of the Fair Work Act of "providing workplace relations laws that are fair to working Australians, are flexible for businesses, [and] promote productivity and economic growth". Moreover, the "working day" construction would not encourage "flexible working arrangements", another object of the Fair Work Act. It would discourage an employer from employing anyone other than one person working a five-day working week, rather than*

			employing a number of people over the course of that week, thereby avoiding employing a number of employees each being entitled to ten days of paid personal/carer's leave per annum. And, of course, it would not be consistent with assisting employees to balance their work and family responsibilities if the only working arrangement on offer was a five-day working week.[9] The adoption of an approach that fails to align the proposed paid leave entitlement to the ordinary hours of the employee, in a proportionate manner, will result in highly anomalous and unreasonable outcomes. These unfair outcomes could be readily addressed by adopting a similar approach to the provisions in the Act which deal with the quantum and payment of personal / carers leave (ss.96(1) and 99).

[9] *Mondelez Australia Pty Ltd v Australian Manufacturing Workers' Union* [2020] HCA 29 at [42].