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

Senate Education and Employment Legislation Committee

ACCI Submission

19 August 2022



Australian
Chamber of Commerce
and Industry



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1. INTRODUCTION

1. ACCI has been a party to the creation of family and domestic violence (FDV) leave entitlements domestically and internationally across the past five years, in Fair Work Commission proceedings (FWC), amendments to the *Fair Work Act 2009* (Fair Work Act), and the International Labour Organisation (ILO) through the making of its Convention 190 and Recommendation 206.
2. Employers and unions have at various points differed in their positions as to the best means to address FDV, and its intersection with work and workplaces. However throughout it has been clear that all parties have participated in the process with the goal of better addressing this critical area of concern that particularly impacts women and children.
3. ACCI has consistently maintained in the FWC, in relation to amendments to the Fair Work Act, and in the making international labour standards that FDV is a very serious and pervasive social, personal, and familial harm that is absolutely unacceptable and must be strongly condemned, prevented, and acted on by our community. The business community supports long overdue community-wide recognition of FDV, community-wide measures to combat FDV and better support for those exposed to FDV, overwhelmingly women and children.¹

FWC Review Decision

4. The FWC has conducted two significant reviews into FDV:
 - a. The 2016 Review, awarding unpaid leave: [\[2018\] FWCFB 1691](#).
 - b. The 2021 Review, awarding paid leave: [\[2022\] FWCFB 2001](#).
5. The outcome of the first review was 'codified' in 2018 as the existing unpaid FDV leave standard in the National Employment Standards (NES) in the Fair Work Act.² Modern awards currently make cross reference to the NES, and address confidentiality of FDV information, for example the following from the General Retail Industry Modern Award:

32. Unpaid family and domestic violence leave

Unpaid family and domestic violence leave is provided for in the NES.

NOTE 1: Information concerning an employee's experience of family and domestic violence is sensitive and if mishandled can have adverse consequences for the employee. Employers should consult with such employees regarding the handling of this information.

NOTE 2: Depending upon the circumstances, evidence that would satisfy a reasonable person of the employee's need to take family and domestic violence leave may include a document issued by the police service, a court or family violence support service, or a statutory declaration.

¹ [2022] FWCFB 2001, [233]

² Fair Work Act 2009, ss.106A-106E, through the [Fair Work Amendment \(Family and Domestic Violence Leave\) Act 2018 \(No. 169, 2018\)](#)

6. The NES entitlement to unpaid FDV leave is in “substantially the same terms as the model term”, settled constructively by employers and unions in the first review proceedings.³
7. On 16 May 2022, a Full Bench of the FWC handed down its second review decision awarding paid FDV leave. The FWC examined each element of the ACTU’s amended 2021 claims for paid leave in detail, and awarded:
 - a. 10 days paid FDV leave.⁴
 - b. A standard that progressively accrues and accumulates to a maximum of 10 days.⁵
8. The FWC specifically examined and rejected further ACTU claims for:
 - a. Paid FDV leave to apply to casuals.⁶
 - b. The 10 days to be “available in full at the start of each 12-month period of the employee’s employment”, rather than accruing.^{7 8}
 - c. Payment not at ordinary rates but at “at 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) had the employee not taken paid family and domestic violence leave”.^{9 10}
 - d. A proposed extension to the definition of ‘family and domestic violence’.¹¹
9. This was a decision of a Full Bench of the FWC, arbitrated as an independent adjudication under the Fair Work Act based on substantial evidence and detailed argument encompassing:
 - a. 2 days of hearings (following multiple days in the first review), plus conferences.
 - b. 2 expert witnesses¹² and 10 lay witnesses.¹³
 - c. 52 submissions / lodgements, from 15 different organisations and state governments.
 - d. A survey of 1340 employer respondents, and detailed survey report.¹⁴
 - e. 4 published reports and 3 information notes to support the case / FWC consideration.

³ [2022] FWCFB 2001, [10]

⁴ [2022] FWCFB 2001, [796]

⁵ [2022] FWCFB 2001, [845]

⁶ [2022] FWCFB 2001, [818]

⁷ [2022] FWCFB 2001, [834]

⁸ [2022] FWCFB 2001, [842]

⁹ [2022] FWCFB 2001, [846]

¹⁰ [2022] FWCFB 2001, [860]-[864]

¹¹ [2022] FWCFB 2001, [832]

¹² [2022] FWCFB 2001, [70]

¹³ [2022] FWCFB 2001, [246]

¹⁴ www.fwc.gov.au/documents/sites/family-domestic-violence-leave/correspondence/am202155-report-survey-analysis-101221.pdf

10. The FWC delivered its decision in May 2021, and awarded paid FDV leave as an integrated package, following its consideration of the above evidence, submissions, research, surveys etc, and the model advanced by the ACTU. The FWC also made the 16 May 2022 FDV leave decision in accordance with its statutory requirements, based on its independent consideration of:
 - a. “equity, good conscience, and the merits of the matter”;¹⁵ and
 - b. “the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin”.¹⁶

4 Key Issues

11. The Bill proposes an approach to implementing paid FDV leave which:
 - a. Substantively differs from the FWC’s decision in the FDV Leave Review 2021.
 - b. Includes aspects of the ACTU’s claims in the 2021 Review that were expressly rejected by the FWC based on independent examination of evidence and the merits of the claims.
12. There are four key areas in which the Bill gives rise to concerns for ACCI members, and will likely generate practical problems in workplaces:
 - a. The extension of paid FDV leave to casual employees - which was rejected by the FWC (Section 2).
 - b. Providing 10 days paid leave in full, from commencement, rather than accruing the leave progressively – which was rejected by the FWC (Section 3).
 - c. Providing the entitlement in full to part-time employees, rather than pro-rata (Section 4).
 - d. The rate at which the leave will be paid, with the FWC rejecting the ACTU’s application for a full or replacement rate in favour of the base or ordinary rate, consistent with the long-standing and well-established approach to providing paid leave (Section 5).
13. Section 6 addresses commencement.

Approach

14. Given the FWC’s decision to award a paid FDV entitlement, ACCI supports:
 - a. Codification of the FWC’s May 2022 FDV Leave Review decision into the NES.

¹⁵ Fair Work Act s 578(b).

¹⁶ Fair Work Act s.578(c).

- b. Adding 10 days paid FDV leave to the NES, payable at base or ordinary rates, accruing progressively following commencement, accumulating to a cap of 10 days, and applying on a pro rata basis where applicable.
- c. Paid FDV leave applying to full and part time employees, but not to casual employees.

2. CASUALS

15. The ACTU claim in the 2021 FDV Leave Review expressly proposed that FDV leave be “available in full to part-time and casual employees”¹⁷. The FWC found in regard to the proposed extension to casuals that:

[814]... there are significant challenges in framing an appropriate term. As illustrated by the extract from the transcript set out above, these operational difficulties are particularly pronounced for casual employees who do not work rostered shifts. The provision of paid FDV leave to casuals would be a significant extension to the safety net.

[815] It is likely that any term framed to address the various operational difficulties would be complex and create particular challenges for small and medium sized businesses...

16. Ultimately, the FWC determined that:

[818] It is therefore our provisional view that paid FDV leave not apply to casuals.

The Bill

17. Proposed s 106B(1)(b) and (3) would extend paid FDV leave to casual employees, contrary to the express findings of the FWC in the FDV Leave Review 2021.
18. This would be imposed notwithstanding the operational difficulties found by the FWC, the significant extension to the safety net, and the complexity and particular challenges for small and medium sized businesses.

Cost

19. The FWC found significant problems in seeking to apply paid FDV leave to casual employment. This led the FWC to reject the approach now proposed in s 106B of the Bill.
20. To expand upon these concerns:
- a. Cost: An employer, including a small business would effectively be asked to pay for a given shift:
 - i. The base rate for the originally rostered employee who did not end up working due to FDV, plus
 - ii. A 25% casual loading for the originally rostered employee who did not end up working due to FDV, plus

¹⁷[2022] FWCFB 2001, [797]

- iii. Any applicable penalty rate for the originally rostered employee who did not end up working due to FDV, plus
 - iv. The base rate for the replacement employee, plus
 - v. A 25% casual loading for the replacement employee, plus
 - vi. Any applicable penalty rate for the replacement employee.
- b. That is six separate pay components for one shift, for example for a casual employee of a small business, such as a country pub, or a small cafe.
 - c. Consider a small pub operating under the *Hospitality Industry (General) Award 2020*. An employee who supplies liquor to patrons (Food and Beverage Attendant Grade 2) is entitled to a minimum hourly rate of \$21.72.¹⁸ If they are a casual employee working on a Sunday, their hourly wage will be 175% of their ordinary rate, taking it to \$38.01.¹⁹
 - d. If the employee uses FDV leave for a six-hour shift, the business will be out of pocket \$228.06. They will also have to find another casual employee to fill this vacancy, costing a further \$228.06.
 - e. For a small pub, \$456.12 is a significant effective wage bill for the shift of a single employee.
 - f. What of an employee who works casually and is called in on an as needs basis, such as in a café when it gets busy? If they respond to the call offering a shift, and cannot do it due to FDV leave requirements, this seems to trigger a pay obligation on the employer. This seems to be the scenario envisaged by the ACTU²⁰, but this is not going to be practical for most employers, particularly small employers, recalling that they will still need to find a replacement employee, doubling the cost.

Operation

- 21. In addition to concerns about cost, the practical operation of the entitlement for casual employees risks being extremely difficult for employers to manage. In order for a casual employee to be able to use the entitlement, they first must be offered and accept the offer to work on the particular day.
- 22. Paragraph [810] of the FWC's May decision directly illustrates the "operational difficulties associated with this aspect of the ACTU claim" which now arise again as the Bill has been drafted to apply such leave to casual employees, contrary to the FWC decision:

VICE PRESIDENT HATCHER: I'm asking you a prior question, that is, how do you tell what is a working day for the purpose of a casual who is not on a roster, that is, there's a sort of casual you might be working frequently, but the sort of casual you bring in as needed.

¹⁸ Hospitality Industry (General) Award 2020 cl 18.1.

¹⁹ Ibid cl 29.2.

²⁰ [2022] FWCFB 2001, [810], see response of Ms Burke

MS BURKE [Counsel for the ACTU]: Yes.

VICE PRESIDENT HATCHER: How do you tell what is a working day for that sort of employee so that they can take it off and be paid in the first place?

MS BURKE: It's about the right to refuse work without there being consequences that the employee is otherwise not engaged. Can I just take a moment to mute myself and confer with Ms Ismail? Sorry. Yes, thank you, so, Vice President, yes, it's about the employee's availability to work. So, if, for example - I'm aware that there are examples where a casual employee will say, 'Well, I'm available this week and you can call me for any shift' and people have rung up in the morning and told, 'Can you come in, we've got a shift for you.' In those circumstances, the employee is entitled to say, 'No, I can't, I need to take family and domestic violence leave on this day.' If that happens, then the rate of pay available to them is as calculated in clause (c).

VICE PRESIDENT HATCHER: I mean the conceptual problem is that an employer has no right to bring them in anyway, so really they're saying, 'Well, yes, I accept the shift, but I'm going to take it off and get paid.' Is that the way it looks?

MS BURKE: Yes, that's right.'

23. The FWC subsequently rejected this aspect of the ACTU, given this exchange, the weight of evidence against it, and long standing industrial practice and precedent.
24. The “conceptual problem” identified by Vice President Hatcher will pose a serious practical challenge to employers, who offer shifts to casual employees, who in turn accept the offer but simultaneously, or shortly thereafter, do not work.
25. This is not to minimise or dismiss the gravity of the grounds upon which an employee may not be able to work, however, it does demonstrate the operational difficulties of providing a paid leave entitlement to casual employees. There is a better approach, outlined below.

Alternatives to FDVL for Casual Employees

26. There is nothing inherent in the nature of casual employment that necessarily means that a casual's need for financial support when facing FDV situations is less than that of a full or part time employee. ACCI supports financial assistance for casual employees facing FDV.²¹
27. At issue is whether a leave-based entitlement is the appropriate payment mechanism, in light of the consequences it would have on businesses, particularly those with smaller revenues and workforces, and the inherent practical inapplicability of paid leave to casual employment. For the reasons discussed above, and the reasons sustained by the FWC, a paid leave entitlement is *not* the appropriate mechanism for providing financial assistance for casual employees facing FDV.
28. An alternative approach is needed, to perform the functions of the paid FDV leave entitlement provided to full and part time employees, but suitable to casual employment.

²¹ [2022] FWCFB 2001, [814]

29. A government payment is the superior, more practical, and more equitable approach to providing urgent financial assistance to casual employees subject to FDV.
30. There are already several payments available to casual employees facing FDV, including:
 - a. The Crisis Payment for Extreme Circumstances Family and Domestic Violence, through Services Australia.²²
 - b. The Escaping Violence Payment, of up to \$5,000²³ administered by UnitingCare Australia.
 - c. The Australian Red Cross Family and Domestic Violence (FDV) Financial Assistance Program for non-citizens.²⁴
 - d. Family Violence Flexible Support Packages in Victoria.²⁵
31. The existing crisis payments should be reviewed to determine the extent to which they are accessible to casual employees, or could be rapidly extended to form the basis for a new form of urgent government funded support payment for casual employees facing FDV.
32. If the existing supports cannot be applied or modified, the introductory period under the Bill should be used to create additional urgent government support payments for those who work casually and experience FDV, and the Bill amended to apply to casuals.
33. The costly and administratively burdensome imposition of a leave entitlement on small businesses and casual employment would be avoided, while still urgently financially supporting casual employees facing FDV.
34. It may actually be that an emergency style payment, expedited by government or able to be paid directly by frontline services, will be available to casual employees more rapidly than the next pay cycle from an employer.

²² <https://www.servicesaustralia.gov.au/crisis-payment-for-extreme-circumstances-family-and-domestic-violence>

²³ <https://www.unitingvictas.org.au/services/family-services/family-violence-services/escaping-violence-payment/>

²⁴ <https://www.redcross.org.au/migration/family-and-domestic-violence-financial-assistance-program/>

²⁵ <https://www.vic.gov.au/flexible-support-packages>

3. ACCRUAL v UPFRONT

35. The ACTU's claim in the FDVL Review 2021 also addressed how an employee should gain access to paid FDV leave. The ACTU sought to have 10 days paid FDV leave "available in full at the start of each 12-month period of the employee's employment", while employers argued for any paid FDV leave to progressively accrue in accordance with clearly established industrial practice for other forms of paid leave.
36. The FWC carefully considered the two approaches, proving paid FDV leave in full up front, versus accrual, in the FDV Review 2021, describing this as "a finely balanced issue".²⁶ The independent industrial umpire found that:

On the one hand, consistent with the Full Bench's reasoning in the March 2018 FDVL Decision, the *raison d'être* of FDV leave is that it is available to meet emergency circumstances which are incapable of prediction in advance, which infers that the whole of the entitlement should be accessible at any time during the year.

On the other hand, there is considerable force in the submissions of ACCI and Ai Group that a potential requirement for an employer to pay the whole of the entitlement at or near an employee's commencement of employment may have unfair consequences: the full cost may arise in respect of an employee who has performed little if any work for the employer. This effect will be accentuated for employers in industries which typically have a high turnover of labour. Additionally, in circumstances where we propose to introduce a new paid leave entitlement for employers to whom modern awards apply, the effect of the 'upfront' availability of the entitlement would be to impose the whole burden of the entitlement on all employers with respect to all their award-covered employees immediately.²⁷

37. The FWC rejected the ACTU claim and decided not to provide the full entitlement as 10 days, in full upfront, to new starters, as follows (emphasis added):

[842] We are persuaded by the submissions of ACCI and Ai Group 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, as ACCI contends, that the provision of paid FDV leave 'upfront' will adversely affect small and medium-sized businesses with limited cashflow or cash reserves...

[845] Our provisional view is 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, with accrual occurring accordingly to the methodology articulated by the High Court in Mondelez Australia Pty Ltd

²⁶ [2022] FWCFB 2001, [841]

²⁷ [2022] FWCFB 2001, [841], emphasis added.

v AMWU & Ors.

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.

38. The approach in the Bill (10 days paid FDV leave upfront, from commencement) is inconsistent with the outcome of the FWC’s independent review and the position arbitrated after considering substantial evidence and submissions.
39. The Bill would adopt an element of the ACTU’s claim directly at odds with the FWC’s consideration of evidence and merits, that was specifically rejected on the basis of:
 - a. “Potential cost consequences” for new employees.
 - b. “Adversely affect(ing) small and medium-sized businesses with limited cashflow or cash reserves”.²⁸

²⁸ [2022] FWCFB 2001, [842]

4. NO PRO-RATA FOR PART TIME EMPLOYEES

40. Schedule 1 of the Bill seeks to amend the existing unpaid FDV leave entitlement in Subdivision CA of the FW Act primarily to replace the word “unpaid” with “paid”.
41. While these may be relatively straightforward amendments, their impact would not be simple, or fair in practice in some areas of application.
42. The Bill proposes no amendment to s 106E of the Act, which provides:

What constitutes a day of leave for the purposes of this Subdivision is taken to be the same as what constitutes a day of leave for the purposes of sections 72A and 85 and Subdivisions B and C.
43. As explained in the Explanatory Memorandum to the Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018:

New section 106E makes clear that what constitutes a day of leave for the purposes of the new entitlement to family and domestic violence leave is designed to be the same as what constitutes a day of leave for the purposes of pre-adoption leave (in section 85), unpaid carer’s leave (in Subdivision B of Division 7) and compassionate leave (in Subdivision C of Division 7).
44. Kiefel CJ, Nettle and Gordon JJ explained in the High Court decision of *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29 (*‘Mondelez’*) at [27] that:

In those provisions referred to in s 106E, a “day” is not calculated according to an employee’s ordinary hours of work. Rather, they authorise an absence for the portion of the 24-hour period that would otherwise be allocated to working.
45. Hence, the definition of what constitutes a “day” for the purposes of the existing unpaid FDV leave entitlement is different from the definition of what constitutes a “day” for the purposes of paid personal/carer’s leave.
46. For paid personal/carer’s leave, a “day” is calculated by reference to an employee’s ordinary hours of work, being equivalent to one fifth of a standard five-day working week. In other words, the entitlement to “10 days” of paid personal/carer’s leave provides employees with “an amount of paid personal/carer’s leave accruing for every year of service **equivalent to ... 1/26 of the employee’s ordinary hours of work in a year**”: *Mondelez* at [45] (Kiefel CJ, Nettle and Gordon JJ) (emphasis added).
47. This distinction deprives the new paid FDV leave entitlement in the Bill from applying on a pro-rata basis, as with other paid leave entitlements for part time employees (a very longstanding and widely applicable approach to part time employment).
48. This raises significant concerns regarding the fairness and complexity of the entitlement, which were intentionally avoided in the creation of the comparable paid personal/carer’s leave entitlement in the NES.

49. Even putting aside the imbalance between full time and part time employees, who would both receive the same quantum of leave in working days despite their obvious difference in hours actually worked, not providing the entitlement to part time employees on a pro rata basis will lead to inequitable outcomes between different part time employees who arrange their hours differently.
50. Consider two part time employees working at the same business:
 - a. One works 3 hours per day, on all five days of the week,
 - b. The other works 7.5 hours per day for just two days per week.
51. They both work 15 hours per week. However, as a result of the way this entitlement has been crafted in the Bill, the first employee will be entitled to receive 2 weeks or 30 hours of paid FDV leave per year. But, the second employee will be entitled to receive 10 days at 7.5 hours per day or 75 hours of paid FDV leave per year. This is effectively 5 of their working weeks as paid FDV leave.
52. This is unfair to employees who choose to work the same number of hours but across multiple days, rather than working them over fewer days. Many mothers seek to organise their work into shorter shifts across multiple days around school hours, and risk being treated inequitably, recalling that it is women and mothers who face greatest exposures to FDV.
53. Not only does this have the potential to cause workplace conflict and distress for employees who work more spread-out hours, it disproportionately punishes businesses that offer part time employment under a narrow spread, often at the request of the employee.
54. This is not the case for other entitlements referred to in s 106E because they are not paid forms of leave (except compassionate leave, which only provides for 2 days for each permissible occasion, and is unpaid for casual employees).
55. As noted by Kiefel CJ, Nettle and Gordon JJ in *Mondelez* at [27], for those entitlements and the current *unpaid* FDV leave entitlement, the fact that a “day” simply means a 24-hour period of absence:

... is unsurprising ... unlike paid personal/carer's leave, none of the types of leave mentioned in s 106E is paid (except compassionate leave).
56. However, the changes proposed by the Bill to the FDV leave entitlement of course mean that it would become paid, and something currently apparently innocuous becomes unfair and impractical. This is evidently at odds with the justification for defining a “day” for the purposes of a leave entitlement, as stated by the High Court.
57. This should be rectified. The Bill should also amend s 106E as follows:

Entitlement to days of leave

What constitutes a day of leave for the purposes of this Subdivision is taken to be the same as what constitutes a day of leave for the purposes of Subdivision A ~~sections 72A and 85 and Subdivisions B and C.~~

5. RATE OF PAYMENT

58. Proposed s 106BA²⁹, 'Payment for paid FDV Leave' in the Bill, would see FDV leave paid :

“at the employee’s full rate of pay, worked out as if the employee had not taken the period of leave”.

59. This is in direct contrast to the long-standing and well-established approach to paid leave generally, the prevailing approach in the NES, and established industrial precedent and practice:

FAIR WORK ACT 2009 - SECT 90

Payment for annual leave

(1) If, in accordance with this Division, an [employee](#) takes a period of [paid annual leave](#), the [employer](#) must pay the [employee at](#) the [employee's base rate of pay](#) for the [employee's](#) ordinary hours of work in the period.

FAIR WORK ACT 2009 - SECT 99

Payment for paid personal/carer's leave

If, in accordance with this Subdivision, an [employee](#) takes a period of paid personal /carer's leave, the [employer](#) must pay the [employee at](#) the [employee's base rate of pay](#) for the [employee's](#) ordinary hours of work in the period.

60. Such a payment above the employee’s base rate may deprive employers of the capacity to afford a replacement employee. As discussed with the cost of casual employees, this level of payment will be significant for many small businesses, given that the employer essentially must bear the cost of double the wage, plus double all loadings, overtime and penalty rates. Margins are not such that employers can be assumed to be able to pay full, ‘as worked’ rates, twice for a single shift.
61. Furthermore, smaller businesses are more directly award reliant and as such unlikely to apply annualised salaries or loaded rates. Where a salaried or loaded rate approach applies there is generally no difference between the base rate and full rate of pay (which wraps in allowances, overtime etc). Thus, applying this paid leave at the full rate makes no material difference in many larger business settings, but for small businesses the difference is significant. And of course, it is smaller businesses with lower margins and miniscule financial reserves that have least capacity to pay twice, at full or ‘as worked’ rates, rather than base rates consistent with decades of industrial precedent and practice.
62. In the interests of protecting small businesses from unsustainable costs, there should not be such a departure from the long-standing approach to paid leave.

²⁹ Bill, Item 19, p.5

Inconsistency with the FWC Review Decision

63. In addition, the approach in the Bill is directly inconsistent with the FWC decision.
64. In the Family and Domestic Violence Leave Review 2021 [\[2022\] FWCFB 2001](#), the ACTU sought a rate of payment for a full time employee as follows:

For a full-time employee, leave taken under clause A(1) shall be paid at 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) had the employee not taken paid family and domestic violence leave.

65. This approach, an ‘as worked’ or ‘projected’ rate, was expressly rejected, with the FWC finding:

[860] ...we consider that it would be overly disruptive to the integrity of the safety net to establish, on an across-the-board basis, a new paid leave entitlement which operates on a radically different basis to the paid leave entitlements for which the NES currently provides. Under the NES, annual leave (s.90), personal/carer’s leave (s.99), paid compassionate leave (s.106), paid jury service leave (s.111) and public holidays (s.116) are paid at the employee’s ‘base rate of pay’ for the employee’s ordinary hours of work.

The general meaning of ‘base rate of pay is defined in s.16(1) as follows:

‘(1) The base rate of pay of a national system employee is the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following:

- (a) incentive-based payments and bonuses;
- (b) loadings;
- (c) monetary allowances;
- (d) overtime or penalty rates;
- (e) any other separately identifiable amounts.’

[861] Section 16 also separately defines ‘base rate of pay’ in respect of pieceworkers.

[862] The above definition excludes the elements of ‘incentive-based payments and bonuses; monetary allowances; shift loadings, penalty rates, rostered overtime, allowances and other entitlements’ included in the ACTU claim. The rationale for these exclusions includes that, in the case of shift loadings, penalty rates for unsociable hours and disability allowances, the relevant disability is not suffered when the employee takes leave and, in the case of overtime rates, the variable requirement to perform additional work does not apply during leave. The FW Act applies this rationale even to needs-based leave entitlements such as personal/carer’s leave.

[863] We cannot identify a persuasive rationale for taking a different approach in the case of paid FDV leave only...

...It has never been the case that safety net leave entitlements have been established on the basis that they will provide full 'income continuity' for employees, nor as contended by the ACTU that the maintenance of such 'income continuity' is a standard feature of the 'industrial norm' concerning paid FDV leave, which it says has been established through the enterprise bargaining system.

[864] Accordingly, our provisional view is that 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.

66. The approach taken in the Bill (proposed s 106BA) is identical to that which the FWC:
 - a. Expressly rejected in May 2022 following its consideration of significant evidence, witnesses, submissions, research and reports, and substantial analysis of practical and workplace considerations.
 - b. Found to be "overly disruptive to the integrity of the safety net".
 - c. Found to be "radically different" to the treatment of paid leave under the NES.
67. The descriptors 'overly' and 'radically' were deliberately used by the Full Bench to expressly reject the full rate / 'as worked' approach sought by the ACTU, in favour of applying the established 'base rate' approach, consistent with paid leave generally, other NES, and clear industrial precedent and practice over many decades.
68. The approach proposed in the Bill seeks to reverse the decision of the independent FWC on an identical claim, reached after consideration of a substantial evidentiary case, a significant number of witnesses, and days of hearings.
69. There will also be confusion created by having payment for one form of leave differ from all others under the NES and from the definition in s 16 of the Fair Work Act.
70. The approach proposed in the Bill will also require employers to speculate what an employee *would* have earned on a particular shift, which, in circumstances involving variable payments based on contingent allowances, piece or km work or involving commissions, may be impossible.
71. It also removes the long-established nexus between payment of particular penalties and loadings and an employee incurring particular costs in the performance of work or undertaking work under particular, adverse work conditions.

Casuals

72. The particular difficulties and inapplicability of paid leave being extended to casuals (Section 2) are underscored by the proposed approach to calculating pay for such casual employees (proposed s.160BA(1)(b), (2) and (3)).
73. As set out in Section 2, an employer would need to pay the full projected rate (including penalty rates and loadings), plus a casual loading, and would need to also do so for the employee taking paid FDV leave, plus the same rate again to the person who ends up coming in to perform the shift.

74. We also foresee a scenario which may lead to disputation:
- a. Employee A is a casual rostered for a 4-hour shift, 8pm to midnight. They take FDV leave and are paid for 4 hours, at casual rates, under the Hospitality Award, which is 125% of their classification rate plus \$2.37 per hour.
 - b. They are replaced by Employee B, however Employee B who ends up working the shift, works 6 hours because it is busy, and finishes at 2am.
 - i. Employee B is paid for 2 hours more than Employee A.
 - ii. Employee B sees their final two hours paid at the higher rate of 125% of their classification rate plus \$3.55 per hour. So 2 hours more pay, at a higher rate.
 - c. The risk of disputation comes from Employee A. They may well complain that they got less for not working the shift than the employee who worked, where in reality they received the rate for their rostered hours.
 - d. The only reason that Employee B earned more money is based on the actual demand on the evening concerned, perhaps in this example a pub staying open for an extra 2 hours because there was custom. We foresee practical ambiguity between the expectation of full placement rates and the realities for casual employees inherent in how they work and how they are engaged. We foresee a risk of unnecessary disputation and grievance.
 - e. Such examples further exemplify why the FWC determined paid leave should not extend to casuals.

6. COMMENCEMENT

76. The EM indicates that:

To provide time for payroll and other necessary adjustments, the new paid entitlement would commence on 1 February 2023 for employees employed other than by a small business 2 employer.

To recognise the unique needs of small business with limited human resources, an additional transition period of six months would be provided for employers who meet the definition of small business employer in the Act as at 1 February 2023.

77. The Minister for Employment and Workplace Relations on introducing the Bill indicated that:

It's a fair question to ask why the government is providing these lead times for business. The truth is, I wish the starting date was years ago rather than next year. But I need to ensure the entitlement is understood both by workers and by employers.

For example, I don't want a worker being refused leave simply because the employer didn't yet understand the new entitlement. I want there to be a chance for business to work through essential principles, such as how to describe the leave entitlement on a payslip without using terms that could make an awful situation even worse.

We will work with businesses, large and small, so they will be equipped to have a sensitive conversation with their employee, understand their obligations, and have appropriate mechanisms and payroll practices in place to sensitively manage leave information.

78. ACCI appreciates the Government had a difficult balance to reach in determining the commencement of the new leave entitlement, and that some would have been seeking very rapid, and employers would argue rushed, commencement. Employers appreciate the approach taken, particularly for small business, through an additional commencement / notice period.

79. However, employers consider that the issues highlighted in this submission, in particular those which led the FWC to reject various approaches now proposed in the Bill, are not redressed purely by a reasonable notice period prior to commencement.

ABOUT ACCI

The Australian Chamber of Commerce and Industry (ACCI) is the largest and most representative business advocacy network in Australia. We speak on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses are also able to be members of our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, employing over 4 million Australian workers.

The Australian Chamber strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

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