



# **Submission to the Senate Education and Employment Committees**

**and in relation to the**

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



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## ABOUT US

Small Business in Australia are the backbone of the economy. We harness its diversity and provide its people with a voice, distinct from big business.

Established in 1979, The Council of Small Business Organisations of Australia (COSBOA) is a member-based not-for-profit organisation exclusively representing the interests of small businesses.

The capability, representation, and reach of COSBOA are defined by a mix of nearly 50 national and state-based association members. COSBOA's strength is its capacity to harness its members' views and advance consensus across policy areas common to many. Our member organisations work behind the COSBOA secretariat to assist us with policy development and guide our advocacy - not just for small businesses but also for the benefit of the Australians they employ.

In this capacity, COSBOA makes submissions and representations to the government, including its agencies, on issues affecting small businesses and to pursue good policy.

## CONSULTATION WITH MEMBERS

COSBOA's collaborative consultation on this issue has included discussions with representatives from the Australian Hairdressing Council (AHC), The Institute of Certified Bookkeepers, The Newsagents Association of NSW and ACT (NANA), CPA Australia, Master Grocers Association (MGA), Screen Producers Australia (SPA), Australian Retailers Association (ARA) and Pharmacy Guild of Australia. Our responses are based on the perspectives of our members, our consultation process, and our extensive experience with small and medium-sized enterprises across Australia.

## COSBOA POSITION

Family and Domestic Violence (FDV) in all forms is unacceptable. Small business people manage this compassionately and generously as it arises without legislation or regulation. The circumstances of FDV, and the varied nature of small business workplaces (sizes and structures), make regulation in this sensitive area difficult.

The proposal to amend the Fair Work Act 2009 to provide employees with ten days of paid family and domestic violence leave (FDVL) places small business people in a difficult position to manage FDV claims, as they do not possess the requisite knowledge, resources, and expertise to provide support to staff dealing with FDV.

COSBOA supports the provision of ten days' leave; however, as this is a societal issue, it argues that any financial aid should be made available via a government-paid scheme and the national welfare and counselling ecosystem.

## KEY RECOMMENDATIONS

A paid government scheme via a centralised government agency to help small business employees affected by FDV.

That payroll system providers be engaged with any implementation of this leave type to ensure confidentiality is considered appropriately.

A paid government scheme via a centralised government agency to support casual workers affected by FDV.

A single source website service and hotline to inform employers and victims better. It would provide important information, guidance materials and support to access an FDV expert support system with options for employee referrals.

A 12-month review, following the implementation of any new provision which would seek both qualitative and quantitative research.

## CONSIDERATIONS AND ISSUES

### A disproportionate cost for Small Businesses

COSBOA understands that the FWC full bench considered costs to business, and they found that the cost on business would not be substantial because the uptake is expected to be low. The Full Bench argued that the benefit to employees suffering from family and domestic violence was a more prevalent concern than the expected low cost of providing the benefits to workers. However, we argue that an assessment of cost as a whole is not an evaluation of the cost to an individual business, particularly a small business. The FWC stated 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 of employees who access the entitlement and the number of days of paid leave they take. The evidence before us in respect of utilization rate suggests that such costs are unlikely to be substantial.”*

The reliance on the argument that the introduction of this leave type is based on a low take-up does not consider the disproportionate cost of this leave when it is accessed; it is therefore flawed. The FWC considered the issue in aggregate, across all businesses, rather than the impact on individual workplaces (size and structure) and particularly where that employee is critical to the operation of the business on any given day, for example, a café with five employees or hair salon with ten employees, particularly where that ep.

Further cost modelling by ACCI, which stated costs of \$205 million or the ACTU of \$11.8 million, is equally problematic and ignores small businesses. Their argument, like the FWCs, attempts to quantify how high or low the take-up of the provision is; we argue this is less important and say it should consider the disproportionate cost this has over other leave types - both direct and indirect - when and if it is needed. This isn't someone texting their employer to say they will be sick. Instead, they are outlining a serious,

complex, and potentially dangerous or criminal matter that may have profound implications for the workplace.

Using the café as an example, a basic average fortnightly salary, including super for ten days, is about \$2,600. In a small café, this employee is critical to the operation and will need to be replaced while on leave, which means an additional \$2,600 is spent - a minimum duplication of cost. However, unlike other leave types, this issue comes with greater complexity and time to manage, which small business owners lack.

Firstly, in almost every situation, a small business employer would need to seek support or advice, not necessarily for the employee but for themselves – time they may not have. Then there is the time to manage the issue itself; this could involve conversations with other employees, mainly where the situation may involve an abuser attending the workplace. And what if the employee doesn't want that? The employer must understand by law that they have a positive obligation (i.e. must take steps) to ensure that any conversation or evidence provided about FDV is treated confidentially, as reasonably practicable. These indirect costs must be managed but are harder to quantify.

Using the café as an example, according to recent ATO industry benchmarks<sup>1</sup>, the average NET Profit for a café in Australia is around 10% of sales. Imagine a modest café with an annual turnover of \$500,000; they are left with \$50,000 to pay off loans and taxes and have something left over for themselves or potentially re-invest in their business. Suppose we assume as a minimum the labour cost of \$5200 (employee away + employee to replace). In that case, it is difficult to argue that this paid leave provision would not substantially impact this business, particularly when you consider that a quarter of small business owners spend over 50 hours in their business each week and seven days a week.

We argue strongly that this provision will disproportionately impact small businesses and further disadvantage them, not necessarily improving victims' outcomes.

***Recommendation:*** COSBOA recommends a paid government scheme via a centralised government agency to help small business employees affected by FDV.

## Support for Sole Traders and Female Employers

The Australian Small Business and Family Enterprise Ombudsman in 2020 used ABS labour force participation data to demonstrate the number of business owners/managers by gender. The data shows a steady upwards trend in the proportion of female business owners/managers over the last 20 years, with women now representing 35.4% of business owner/managers.”<sup>2</sup>

This is a crucial consideration for Government; what do we do to support women who are sole traders or managing a small business? How do they access support, particularly in sensitive situations where an abuser may have control or oversight of shared accounts or access to the business?

We argue, therefore, that a single centralised government agency would be the best place to provide support payments, which are otherwise not available to this significant cohort of women. Further, a

<sup>1</sup> <https://www.ato.gov.au/Business/Small-business-benchmarks/In-detail/Benchmarks-A-Z/A-C/Coffee-shops/>

<sup>2</sup> [https://www.asbfeo.gov.au/sites/default/files/2021-11/ASBFE0%20Small%20Business%20Counts%20Dec%202020%20v2\\_0.pdf](https://www.asbfeo.gov.au/sites/default/files/2021-11/ASBFE0%20Small%20Business%20Counts%20Dec%202020%20v2_0.pdf) p19

government agency in this circumstance can also assist in guiding a victim to counselling or expert support services.

**Recommendation:** COSBOA recommends a paid government scheme via a centralised government agency to assist and support sole traders and employers affected by FDV.

## Payroll systems and pay slips

One of our concerns in managing this leave is how it appears on pay slips and how the information will be recorded.

We note that specific notification and proof requirements may need to be met for an employee to access this leave. Employers must act "as far as it is reasonably practicable" to ensure the notice and any evidence provided are treated confidentially. This unavoidably results in circumstances where the employer will retain highly sensitive personal information about an employee. Employers must, therefore, delicately strike a balance between fulfilling these commitments and ensuring the health and safety of all other workers. This becomes complicated when the offender is violent and may enter a workplace or where they control (or have) access to their partners (the victims) emails or finances. How the employer manages any record of the leave and how it is reflected in payroll systems is something that will need to be managed carefully.

In New Zealand, for example, MYOB and XERO have categorised family violence leave separately from other leave types and have assigned it within their software. FVL is assigned separate from other leave types, and we understand it appears on the pay slip. Given the circumstances we encountered during our case study d where the victim is being controlled financially, this presents challenges for the victim and almost certainly would require some other mechanism to support. A referral to an expert in domestic violence would be essential in this situation and protects the victim from coercion.

**Recommendation:** COSBOA recommends that payroll system providers be engaged with any implementation of this leave type to ensure confidentiality is considered appropriately.

## Application of leave entitlement for Casuals

It has been a well-established principle that to make up for the fact that casuals don't have benefits like paid holiday and sick leave, casual workers are compensated with a "casual loading." Small businesses widely use casual workers to manage varied workloads and demands. Casual employees offer flexibility and are cost-effective because you pay for the hours they work, even though you must pay the casual loading, to compensate for the lack of paid leave rights.

Household Income and Labour Dynamics in Australia (HILDA) survey data demonstrates that smaller businesses are more likely to hire casual employees than medium and large-sized businesses. HILDA notes that "...a third of respondents who worked in smaller firms worked on a casual basis in 2015 compared with a fifth of people who worked in medium-sized firms and just over 9 per cent of employees

*of large-sized firms.”<sup>3</sup>*

Further, as we emerged from the pandemic lockdowns in 2020 and 2021, casual work was a common feature in small business workplaces as they continued to manage complex and ongoing restrictions on their operations. The Bill, however, extends provisions to casuals and goes further than the recommendation made by the Fair Work Commission, adding disproportionate costs to small businesses that had not previously needed to be contemplated.

COSBOA notes it has serious concerns with how businesses will be required to establish whether a casual worker is rostered on, as on many occasions, this can be less formal with no roster in place. The time-poor employer working in their business may ask an employee to work a particular day at short notice or allow a worker to select their preferred work times. Therefore, whether an employee was or wasn't working will be complicated compared to permanent work, which is regular and systematic, something that should be avoided for a victim of domestic violence. Embedding this type of leave for casuals will not assist in addressing the problem and will add complexity to a workplace.

***Recommendation:*** COSBOA recommends a paid government scheme via a centralised government agency to support casual workers affected by FDV.

## Benefits of a Government-Funded Program

COSBOA supports a government-funded scheme akin to the Parental Leave Pay scheme as the best solution for both the employer and the employee. A scheme funded through, for example, an agency like Centrelink or Services Australia would assist in shouldering the cost of FDV leave and, importantly, avoid the duplication of costs. For completeness, the cost borne by the employer is not just providing access to the leave provision but also the cost of replacing the employee whilst they are away from work – there are both direct and indirect costs.

Further, entrenched, pervasive social problems like domestic violence usually require long time frames to address the base cause - a social issue requiring governments' involvement. In addition, it requires support from experts in the field and employers cannot reasonably be expected to replace that role, even in some limited capacity. Employers, however, should be supported to become better informed and empowered to refer employees to help when needed. The government needs to be better at providing a **single source** of information on this issue.

COSBOA also argues that a scheme managed only by employers does not measure the pervasiveness of this social problem or assist the government in understanding whether this policy (a new leave provision) will effect change. A government-funded program, however, can better monitor and see the direct result of policies to support women in need. Additionally, it would ensure privacy and confidentiality can be maximised in the workplace and, in some cases, limit sensitive conversations between employees. It would also notably support dialogue between an employer and an expert support agency to best assist the employee.

<sup>3</sup>

[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1920/SmallBusinessSectorAustralianEconomy](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1920/SmallBusinessSectorAustralianEconomy)

Finally, the *Fair Work Act 2009*, as you would be aware, requires employers to keep certain personal information about employees in their employee records. Any personal data held by the employer would also need to be considered and its relationship to the Australian Privacy Principles. Whilst a paid government scheme does not necessarily alleviate an employer recording that FDV Leave has been taken, it would ensure more sensitive discussions happen outside the workplace and support the employer in maintaining confidentiality.

**Recommendation:** COSBOA recommends a single source website service and hotline to inform employers and victims better. It would provide important information, guidance materials and support to access an FDV expert support system with options for employee referrals.

**Recommendation:** COSBOA recommends a 12-month review, following the implementation of any new provision which would seek both qualitative and quantitative research.

## Impact of COVID-19

COSBOA believes what is missing from this new provision and what it fails to consider is that COVID-19 has profoundly impacted and continues to impact many small business owners. The pandemic is not over, and small businesses are not recovering quickly. They are stressed, exhausted, time-poor, and experiencing severe financial hardship.

The challenges experienced over the past few years due to COVID-19 have not diminished and, in many cases, have brought permanent and dynamic shifts in consumer behaviour, particular in CBDs. Many commercial CBD office businesses, including some light industrial businesses, continue to be impacted by COVID-19 for an extended time.

## SMALL BUSINESS PERSPECTIVE

The bill to have ten days paid family and domestic violence leave intended to be added to the industrial awards and national employment standards will make a challenging and terrible situation more complex and difficult. It does not meaningfully consider small workplaces in Australia.

More than 90% of workplaces have fewer than 20 employees, and many small businesses lack the resources for complex award administration or the money to hire workplace relations specialists. Furthermore, 60% of organisations have fewer than five employees, making it impossible for anyone in that number of employees to be an expert in workplace relations.

The current bill ignores the thousands of sole traders and home-based business people. These people can also be victims and are always ignored when health or welfare is considered. Home-based businesses are mainly women; what will we do if one of these people is experiencing domestic violence? They can't



go on leave, perhaps trapped in the house, and they are forgotten.

Many small business owners have shared that not all victims want to leave, they may prefer to go to work to escape a difficult situation, and they may want to work back or come in early. When they wish to leave, they may move out of a house into safer lodgings; they often need that leave during mid-week working hours. No employer will refuse that leave; no reasonable person will say no to such a request.

The FWC has noted the informal relationships between business owners and employees. It is also uncontentious that many employers are supportive of their employees and will act compassionately towards employees experiencing FDV. The general understanding is that small and regional businesses are more likely to be supportive in these informal ways. The narrative behind this is those small business owners can better understand their staff's personal lives because they often spend every day working beside them in the business.

Placing this type of leave in an industrial award, will for small business mean complications, costs, and processes. How will a victim prove they are a victim? Will it be a doctor's certificate, a police certificate, or a counsellor's statement? That is a process; the victim must tell the employer about the problem. What if the employee does not wish to do that? What if, as is often the case, they are embarrassed by the situation and afraid of what might come of divulging the facts of their situation? That is why we have carers, personal or compassionate leave already in place to deal with people's situations.

What if someone wants to rort the system and falsely claim they have been a victim and claim the leave? Will there be an appeals process to the Fair Work Ombudsman? Does this also signal that the best workplace solution for an employee experiencing domestic violence is to send that person on leave? Is that the right message?

An alternative approach to the legislative route is to continue to highlight the problem and solutions. For workplaces, for concerned employers and workers, the best place is a website with suggested support processes and with warnings on not making things worse. When confronted with difficult situations, we, in small workplaces, want information then and there on what we should or can do.

With this as the basis for our submission, we acknowledge that this is a severe and pervasive social problem and provide the following recommendations that will best support small businesses and, notably, the victims themselves.

## CONCLUSION

COSBOA supports the provision of ten days' leave; however, as this is a societal issue, it argues that any financial aid should be made available via a government-paid scheme with support from the national welfare and counselling ecosystem. Government should be better at providing a single source website to support businesses that will need to manage this severe and pervasive problem and to help the victims themselves.

A government-funded program, like the one we have for paid parental leave, makes sense, and acknowledges that this is a social issue, not an issue that small businesses have caused but one they will bear a cost to manage. Additionally, we shouldn't add to any complexity of assistance for domestic violence victims.

In small workplaces, it is often apparent when there is a problem, and people will react as people do, in most situations, with support, respect and concern. Employers will and do provide support and time off

without it becoming compulsory. Help small businesses to help the victims, don't make their operations more complex.

The Fair Work Ombudsman has repeatedly stated that the workplace relations system is too complicated for small business people (and their employees). Let's not create more complexity or a barrier to normal human behaviour where people want to assist others in need. We do not need more rules, confusion, or to further burden small businesses and make them a financial casualty of a domestic violence incident.

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