Australian Government

Department of Employment and Workplace Relations

Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023

Submission from the Department of Employment and Workplace Relations to the Senate Standing Committees on Education and Employment

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Introduction

The Department of Employment and Workplace Relations (the Department) welcomes the opportunity to make a submission to the Senate Education and Employment References Committee on the Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023 (the Bill).

The Bill aims to enhance worker protections, promote gender equality, remove unnecessary administrative burden, and clarify aspects of the workplace relations system. It seeks to amend the *Fair Work Act 2009* (Fair Work Act) and related legislation to:

- provide greater certainty for the work status of migrant workers by dealing with the interaction between the Fair Work Act and the *Migration Act 1958* (Migration Act);
- provide stronger access to unpaid parental leave (UPL) and complement recent changes to the *Paid Parental Leave Act 2010* (PPL Act);
- insert an entitlement to superannuation in the National Employment Standards;
- clarify the operation of Fair Work Commission workplace determinations;
- expand the circumstances in which employees can authorise employers to make valid deductions from payments due to employees, where the deductions are principally for the employee's benefit; and
- ensure that casual employees working in the black coal mining industry are treated no less favourably than permanent employees in the accrual, reporting and payment of their long service leave entitlements under the Coal Mining Industry (Long Service Leave Funding) Scheme.

Background

Last year, the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* delivered key reforms to improve job security and wages. In 2023, the Government is focused on delivering further reforms to close loopholes that disadvantage workers, and ensuring a sustainable, well-functioning and fairer workplace relations system.

The Bill is the first step towards these goals and supports continued implementation of the Government's workplace relations agenda and commitments made during the election and Jobs and Skills Summit.

The measures contained in this Bill implement technical and clarifying amendments to modernise, embed and extend basic protections into the Fair Work Act. The Bill also implements necessary changes to ensure the Fair Work Act is aligned with recent changes to Paid Parental Leave in the *Paid Parental Leave Amendment (Enhanced Paid Parental Leave for Families) Act 2023*.

Together, the amendments in this Bill will help ensure the Fair Work Act and related legislation operate as intended and contributes to a fairer workplace relations system in Australia.

Consultation

The Department consulted with businesses, unions and other key stakeholders in developing the Bill, including convening meetings with peak employer bodies.

The consultations on the proposed measures included the Minister advising a meeting of the National Workplace Relations Consultative Council of his intention to commence consultations, then the department convening bilateral meetings and a written submission process, with more than 70 organisations and individuals invited to respond. Fact sheets were also made available to the public, outlining the measures introduced by the Bill. This consultation process ensured that stakeholder contributions and feedback on measures were regularly considered during the development of the Bill.

Further details on consultation on the Bill appears at **Attachment A**.

Discussion

Protecting worker entitlements

Protecting migrant workers

The Bill inserts a new clause into the Fair Work Act which deals with how the Act interacts with the Migration Act. The effect of this clause would be to confirm that a breach of the Migration Act, or an instrument made under it, would not affect the validity of a contract of employment, or the validity of a contract for services, for the purposes of the Fair Work Act. This means that a temporary migrant worker working in Australia would continue to be entitled to the benefit of the Fair Work Act, regardless of migration status.

This principle would apply in circumstances including:

- a temporary migrant worker working in breach of a work-related visa condition
- a temporary migrant worker working without work rights
- a temporary migrant worker not having the right to be in Australia.

The intent of the amendment is to make explicit that a migrant worker working in Australia is entitled to the benefit of the Fair Work Act regardless of their immigration status, consistent with current practice. The change addresses a concern expressed by some advocates for temporary migrant workers that Australian workplace laws and conditions are unclear in how they apply to temporary migrant workers.

The operation of any sanctions under the Migration Act for breaches of immigration law, including visa conditions and the requirement to hold a valid visa that is in effect, would remain unaffected by the amendment. The Government has a range of policies and procedures in place to seek to protect migrant workers from visa cancellation where they have been exploited in the workplace.

The amendment gives effect to recommendation 3 of the MWT and recommendation 3 of the Senate Education and Employment Legislation Committee inquiry into the Government's Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022.

Superannuation in the National Employment Standards

The Bill implements the Government's election commitment to insert a right to superannuation in the NES.

Employers are already required to pay the superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992,* if they do not make contributions to a superannuation fund for the benefit of their employees. The entitlement to superannuation in the NES will be aligned with and refer to superannuation legislation and there would be no contravention of the NES provision where an employer has met their obligations under superannuation legislation.

The Bill will expand the number of employees covered by the Fair Work Act who have an enforceable workplace right to superannuation. Employees covered by modern awards or an enterprise agreement containing a term that requires an employer to make superannuation contributions can already apply to a court to recover unpaid superannuation using such terms. Employees covered by the NES entitlement, who did not have the benefit of such a term, will be able to apply to a court to enforce their right to superannuation, including by electing to use the small claims process within the federal courts. An employee organisation or a Fair Work Inspector could also enforce the entitlement for the employee's benefit.

The Australian Taxation Office (ATO) will still have primary responsibility for ensuring compliance with the superannuation guarantee and associated obligations. All employees will continue to be able to report superannuation underpayments to the ATO. The Fair Work Ombudsman will be able to make referrals of unpaid superannuation to the ATO and, in appropriate circumstances, pursue unpaid superannuation in a complementary role to the ATO, under both the new NES entitlement and pursuant to a term of a modern award, enterprise agreement, or other industrial instrument.

The Bill provides that an employee cannot use the new NES entitlement to recover unpaid superannuation through the court if the ATO has already commenced legal proceedings to recover those same amounts of unpaid superannuation. This is to ensure that employers cannot be subject to multiple actions under both the Fair Work Act and superannuation legislation for the same unpaid superannuation contributions.

The changes are proposed to come into effect at the beginning of the first financial quarter 6 months after Royal Assent. This will align the NES entitlement with the requirements under superannuation legislation for employers to make contributions on behalf of employees on a quarterly basis in order to avoid liability for the superannuation guarantee charge.

Coal mining long service leave scheme

The Coal Mining Industry (Long Service Leave Funding) Corporation (the Corporation) is a Commonwealth corporate entity established under the *Coal Mining Industry (Long Service Leave) Administration Act 1992* to regulate and manage long service leave entitlements on behalf of eligible employees in the black coal mining industry. Currently, employers pay a levy to the Coal Mining Industry (Long Service Leave) Fund (the Fund), which constitutes a percentage of an eligible employee's eligible wages, to allow employees in the black coal mining industry to carry their long service leave entitlements with them.

Both casual and permanent employees are eligible under the Coal Mining Industry (Long Service Leave Funding) Scheme (the Scheme). Recommendation 4 of the independent report *Enhancing certainty and fairness: Independent Review of the Coal Mining Industry (Long Service Leave Funding) Scheme* (the Report), concerns the fair treatment of casuals in the industry under the Scheme, in terms of the accrual, reporting and payment of their long service leave entitlements. Casuals in the black coal mining industry have been entitled to long service leave for many years – this measure improves their treatment under the Scheme; it does not create any additional entitlements.

The Bill implements amendments that will ensure that casual employees are treated no less favourably than permanent employees in respect of their long service leave entitlements.

Casual loading added

The Bill makes amendments to include casual loading in the definition of 'eligible wages' for the purposes of levy calculation, and in payment of the employee's long service leave entitlement. This will address confusion about whether the meaning of 'eligible wages' includes casual loading, and ensure casuals are fairly treated in the Scheme. This change will mean that the levy amounts to be paid by employers into the Fund and payment of an employee's long service leave entitlement by their employer will be calculated on an employee's base rate of pay plus incentive-based payments, bonuses and the casual loading identified in their industrial instrument. Alternatively, if the casual employee is paid at a rate that does not identify a specific amount as casual loading (e.g., a rolled-up rate), the levy amounts and payment of the employee's long service leave entitlement will be calculated on the employee's ordinary rate of pay, including incentive-based payments and bonuses.

Permanent employees accrue paid entitlements like personal leave and annual leave while on long service leave. The Bill provides equity for casuals as they will continue to receive casual loading (which was designed to compensate casuals for lack of paid entitlements and the insecure nature of their role) during their period of long service leave. Specifically including casual loading as part of the long service leave entitlement will alleviate possible disputes around some casuals taking a 'pay cut' during their period of long service leave. These amendments would make the Scheme broadly consistent with State and Territory portable long service leave schemes.

Accrual of long service leave entitlements

Amendments will be made to the definition of 'working hours' for the purpose of calculating an employee's accrual of long service leave to reduce unfair treatment between casual employees and permanent employees, when both may work the same rostered hours.

Under the Scheme, full-time employees are guaranteed to have 35 working hours a week counted (regardless of whether actual hours worked are less than 35) for the purposes of calculating their weekly long service leave accrual, whereas casual employees will only accrue the lesser of actual hours worked (which may be less than 35), or 35 hours a week (when they may have worked more than 35 hours). For example, a casual employee can work 48 hours one week and 24 hours the next (72 hours in the fortnight, a common schedule in the industry) but only count 59 hours of qualifying service for that fortnight (35 hours one week and 24 hours the next week). A full-time employee on the same roster will count a total of 70 working hours (35 hours in both weeks).

Under these reforms, casual employees' 'working hours' will be counted per week, averaged over all the weeks in a quarter (where a casual employee works for the entire quarter); or averaged over applicable weeks in the quarter (where the casual employee only works some

weeks in the quarter). Additionally, where a casual employee works 7 days on, 7 days off, a week off falling between two working weeks will still count as qualifying service and be included as a week over which working hours are to be averaged in the quarter. The amendments will also provide the Minister with a power to make rules that prescribe other circumstances where subsequent non-working weeks in a quarter will also count as qualifying service under the Scheme (due to novel shift or rostering arrangements that may exist in the industry). These amendments made by the Bill will ensure fairer calculation of casual employees' working hours where they may vary week-to-week and therefore equitable accrual of their long service leave entitlements. The employer reporting period (monthly) will remain the same, but the Corporation may be required to undertake a reconciliation process at the end of the quarter.

Changes to reporting requirements

Industry stakeholders have expressed concerns about the current employer return form. Specifically, the form requires employers to list all working hours for eligible casual employees each month, without indicating how these monthly amounts are used to calculate weekly long service leave accrual records for employees.

These amendments will require the Corporation to publish the employer return form on the Federal Register of Legislation via notifiable instrument, and to consult with the Secretary of the Department of Employment and Workplace Relations prior to the form's approval. This would result in greater transparency regarding the Scheme's reporting requirements.

Promoting gender equality

Unpaid parental leave

The Bill implements a Jobs and Skills Summit outcome by making changes to the National Employment Standards (NES) to provide stronger access to unpaid parental leave so families can share work and caring responsibilities. These changes mean more choice for families in how they take leave. This will encourage better sharing of care responsibilities in a child's early years, which in turn promotes gender equality.

Parental leave in Australia is facilitated by the unpaid parental leave provisions in the Fair Work Act and government-funded Parental Leave Pay under the *Paid Parental Leave Act 2010*. To access Parental Leave Pay, a parent must generally not be at work. Typically, employees use their 12-month unpaid parental leave entitlement under the Fair Work Act to take the necessary time off work to access Parental Leave Pay. Currently, employees can take 30 days (i.e. 6 weeks) of their unpaid parental leave entitlement flexibly.

The Bill increases an employee's entitlement to flexible unpaid parental leave to 100 days (20 weeks). This means employees will be able to take up to 100 days of their 12-month unpaid parental leave flexibly up to their child's second birthday or the second anniversary of their adopted child's placement. Pregnant employees will also be able to take some of their flexible unpaid parental leave starting 6 weeks prior to the expected date of birth of the child.

The increase in flexible unpaid parental leave complements recent reforms to Parental Leave Pay that will enable parents of children born or adopted after 1 July 2023 to claim up to 100 days of Parental Leave Pay on a flexible basis, including as single days. It would mean eligible employees have a right to take time off work to access the new flexible Parental Leave Pay entitlement. As under the current framework, unpaid parental leave is available in full to both parents and is not limited to parents also claiming Parental Leave Pay.

The Bill will also help families share work and caring responsibilities by giving employees more choice and removing unnecessary restrictions. Key changes include:

- Employee couples will be able to take unpaid parental leave at the same time. They will no longer be limited to taking no more than 8 weeks leave at the same time.
- Employees will be able to request an extension of up to 12 months' unpaid parental leave, regardless of the amount of leave the other parent has taken and without impacting the amount of leave available to the other member. Currently, employee couples are limited to a total of 24 months leave between them.
- Employees will be able to take flexible unpaid parental leave before and after a continuous period of unpaid parental leave. Currently, an employee's entitlement to unpaid parental leave ends upon taking a day of flexible unpaid parental leave, because (other than flexible unpaid parental leave) unpaid parental leave must be taken in a single continuous period.

- Employees will be able to commence unpaid parental leave at any time in the 24-month period following the date of the birth or placement of a child. For employees in a couple, they will no longer need to commence unpaid leave immediately after their partner finishes their leave.

The Bill substantively retains the existing notice requirements for taking unpaid parental leave, which recognise the importance of balancing certainty for employers to plan their workforce with flexibility for employees to adjust their leave plans where unexpected circumstances arise. Employees and employers can also agree to unpaid parental leave policies and notice requirements that are more beneficial than the minimum safety net provided by the NES. Broadly, the notice provisions require:

- 10 weeks prior to commencing leave—the employee must give notice of the start and end dates for any period of continuous unpaid parental leave and the total number of flexible unpaid parental leave dates they intend to take.
- 4 weeks prior to commencing leave —the employee must confirm their unpaid parental leave dates with their employer. The requirement to provide 4 weeks' notice before commencing a period of leave applies to both types of unpaid parental leave (i.e. continuous and flexible unpaid parental leave). An employee taking both types of leave will need to give 4 weeks' notice before commencing each type of leave.

The notice requirements can be reduced in certain circumstances where it is not practicable for an employee to give the required notice. The Bill includes a new note that provides guidance on when it might not be practicable for an employee to give notice of taking unpaid parental leave in accordance with the normal timeframes set out in the Fair Work Act. The note makes it clear that an employee's personal and family circumstances are relevant. For example, the employee may experience a health issue or pregnancy complication, or there may be an unexpected change in the employee's child-care arrangement.

It remains the case that an employer is not obliged to allow an employee take unpaid parental leave if they have not complied with the notice requirements in the Act. However, if an employer unlawfully refuses an employee's unpaid parental leave, they may be subject to civil penalties for contravening the NES. It is expected that in most cases employers and employees will maintain open communication about the employee's leave plans, avoiding the risk of any disputes arising. If there is a dispute, this can be dealt with like any other dispute under the NES, including at the FWC if necessary.

The amendments will commence the later of 1 July 2023 or the day after the Act receives Royal Assent. The amendments will apply to employees in respect of children whose date of birth or placement is on or after 1 July 2023, whether or not the employee had taken leave in respect of the child before the commencement of the unpaid parental leave provisions. This is consistent with the application of the reforms to Parental Leave Pay, which commenced on 26 March 2023 and apply to children born on or after 1 July 2023.

Where an employee has given notice of taking, or has taken, unpaid parental leave prior to commencement, the employee will have an opportunity to provide an updated leave notice in accordance with the amendments made by the Bill.

Removing unnecessary administrative burden

Employee deductions

The Bill will streamline the process for authorised deductions that are for the benefit of the employee by removing the requirement for a new written authorisation each time there is a change in the deduction amount. Under the changes, where an employer offers deductions, an employee will be able to choose whether they authorise only a set amount be deducted or whether they authorise an ongoing deduction for an amount that varies from time to time. This will reduce the administrative burden on employers and employees.

While neither the Bill nor the regulations provide that the employee must specify a monetary cap on the level of variation they are authorising, it would be open to the employee to do so should they choose.

The changes provide additional protections for employees by providing that, subject to certain exceptions, variable deductions cannot be made where they directly or indirectly benefit the employer. The existing limited circumstances – which are not being changed by this Bill – where variable deductions can be made for the employer's benefit include when it is made for goods or services that are provided in the ordinary course of the business of the employer (or related party), and those goods or services are provided on the same or more favourable terms than those offered to the general public. For example, an employee of a company that provides health insurance may have health insurance premiums for that company deducted from their pay if the policy was consistent with or more favourable than those offered to the general public.

It will generally be the obligation of the third party to whom the deduction is being paid to notify the employee of a change in the deduction amount. These obligations already exist under general contract law, Australian consumer law and certain industry specific provisions. An employer is not required to act as an intermediary to notify the employee of a change in the deduction amount. Employees will also be able to see the amounts deducted from their salaries on their payslips and are permitted to withdraw authorisations for deductions at any time.

The Bill has reduced as far as possible unnecessary administrative burden associated with the changes. Employers may continue to make deductions in accordance with existing authorisations if they comply with the current provisions, until those authorisations are withdrawn or updated. Employers may also make authorised deductions in reliance on authorisations made before the commencement of the provisions, if those authorisations comply with the new provisions.

Technical amendments

Workplace determinations

The Bill makes a minor and technical amendment to the Fair Work Act to expressly provide that when a workplace determination made by the Fair Work Commission commences operation, an enterprise agreement that was previously in place ceases to operate. While it is commonly understood this is how workplace determinations and enterprise agreements interact, this is not expressly set out in the Fair Work Act. The amendment will provide certainty for employees and employers and is not controversial.

The Department is aware that the Fair Work Commission has made 66 workplace determinations since the commencement of the Fair Work Act. A determination will commonly include a clause which states that the determination applies to the exclusion of other industrial instruments, including enterprise agreements.[1] This measure will not disrupt the application of determinations previously made by the Fair Work Commission. It provides consistency and certainty for parties by confirming that workplace determinations that came into operation before this amendment replaced any earlier enterprise agreement.

[1] For example, Department of Home Affairs Workplace Determination 2019 [AG501682].

Conclusion

The amendments in this Bill will contribute to a fairer workplace relations system. They help improve the wellbeing and financial security of workers in Australia and promote gender equality in Australian workplaces. The Bill allows families greater choice in how they share work and caring responsibilities and gives a broader range of employees and their representatives a right to directly pursue unpaid superannuation as a workplace entitlement.

The Bill will also benefit migrant workers, by clarifying that they are entitled to the protections of the Fair Work Act, and casual employees in the black coal mining industry, who will be treated no less favourably than permanent employees in respect of their long service leave entitlements.

The Bill also reduces administrative burden on businesses by reducing the need for employers to manage multiple authorisations for deductions which benefit employees, where an employee chooses to permit deductions that vary from time to time.

The Bill also makes minor, technical amendments to clarify the operation of workplace determinations.

Together, these amendments are an important step in the continued implementation of the Government's workplace relations agenda.

The Department appreciates the opportunity to provide a submission to this inquiry and is available to discuss the submission at a hearing of the Committee.

Attachment A – Consultation

The department undertook consultations through a written submission process and face-to-face or virtual meetings.

Letter recipients

The department wrote to 73 stakeholders on 10 and 13 February 2023. The department invited stakeholders to provide written submissions to questions on the measures that would be contained in this Bill. While submissions were due on Friday 17 February 2023, late submissions were accepted. In addition to leading business groups and unions, the department wrote to:

- Academics
- Women's advocacy alliances
- Social and community peak organisations
- Organisations with an interest in coal mining
- Superannuation organisations
- States and territories
- Commonwealth agencies such as the Fair Work Ombudsman.

A list of recipients is below:

No.	Organisation	No.	Organisation
01	Australian Council of Trade Unions	38	Queensland Treasury (QLD)
02	Australian Chamber of Commerce and Industry	39	Department of Premier and Cabinet (NSW)
03	Australian Industry Group	40	Chief Minister, Treasury and Economic Development Directorate (ACT)
04	Master Builders Australia	41	Department of Premier and Cabinet (VIC)
05	Business Council of Australia	42	WorkSafe Tasmania (TAS)
06	National Farmers' Federation	43	Office of the Commissioner for Public Employment (NT)
07	Council of Small Business Organisations of Australia	44	SafeWork SA (SA)
08	Minerals Council of Australia	45	Department of Mines, Industry Regulation and Safety (WA)
09	National Aboriginal and Torres Strait Islander Women's Alliance	46	Fair Work Commission
10	Harmony Alliance	47	Fair Work Ombudsman

No.	Organisation	No.	Organisation
11	Equality Rights Alliance	48	Australian Government Department of the Prime Minister and Cabinet, on behalf of the Women's Economic Equality Taskforce
12	Women with Disabilities Australia	49	Dr Joanna Howe
13	National Women's Safety Alliance	50	Federation of Ethnic Communities Councils Australia
14	The National Rural Women's Coalition	51	National Electrical Contractors Association
15	Professor Andrew Stewart	52	Manufacturing Skills Australia
16	Professor Shae McCrystal	53	Australian Retailers Association
17	Professor Anthony Forsyth	54	Australian Constructors Association
18	Dr Tess Hardy	55	Housing Industry Association
19	Professor Rae Cooper AO	56	Professor Jeff Borland
20	Professor Beth Gaze	57	Chief Executive Women
21	Emeritus Professor Sara Charlesworth	58	Australian Resources and Energy Employer Association
22	Professor Meg Smith	59	People with Disability Australia
23	Emeritus Professor Gillian Whitehouse	60	Live Performance Australia
24	Ashurst, on behalf of Coal Mining Industry Employer Group	61	Law Council of Australia
25	Construction, Forestry, Mining and Energy Union	62	Pharmacy Guild of Australia
26	Australian Manufacturing Workers' Union	63	Migrant Justice Institute
27	Communications, Electrical and Plumbing Union	64	Civil Contractors Federation
28	Professionals Australia (formerly the Association of Professional Engineers, Scientists and Managers Australia)	65	National Retail Association
29	Recruitment, Consulting and Staffing Association	66	Australian Hotels Association

No.	Organisation	No.	Organisation
30	Coal Mining Industry (Long Service Leave Funding) Corporation	67	Clubs Australia
31	Australian Workers' Union	68	Australian Construction Industry Forum
32	Association of Super Funds Australia	69	Australian Road Transport Industry Organisation
33	Financial Counselling Australia	70	Approved Employers of Australia (Pacific Australia Labour Mobility)
34	Australian Institute of Superannuation Trustees	71	Australian Small Business and Family Enterprise Ombudsman
35	Industry Super Australia	72	Australian Higher Education Industrial Association
36	Financial Services Council	73	Super Consumers Australia
37	Digital Service Providers Australia New Zealand		

Face-to-face and virtual meetings

Alongside the written submission process, the department convened virtual and face-to-face consultations on the measures to be contained in this Bill. These were held with:

- Women's Economic Equality Taskforce – **13 February**
- Master Builders Australia, Minerals Council of Australia, National Farmers' Federation, and the Council of Small Business Organisations of Australia – **16 February**
- Australian Chamber of Commerce and Industry, Business Council of Australia, and the Australian Industry Group – **17 February**
- Super Consumers Australia, and the Financial Services Council – **20 February**
- Australian Chamber of Commerce and Industry, Business Council of Australia, and the Australian Industry Group – **21 February**
- Australian Chamber of Commerce and Industry, Business Council of Australia, the Australian Industry Group, Coal Mining Industry Employer Group, Minerals Council of Australia, and the Australian Resources and Energy Employers Association – **22 February**
- Australian Council of Trade Unions – **23 February**
- State and territory workplace relations officials – **1 March.**

After reviewing the contributions made in written submissions and through the consultations, the department convened **two** consultations to consider the draft legislation for this Bill. In addition to seeking technical feedback on whether the draft legislation will operate as intended, the department invited participants to provide policy feedback on the measures.

Letters to state and territory Ministers

In addition to consulting with state and territory workplace relations officials, the Australian Government Minister for Employment and Workplace Relations, the Hon Tony Burke MP, wrote to his state and territory ministerial counterparts on **20 March 2023**.

In his letter, Minister Burke advised ministers on:

- the measures for the first half of the year to further improve the system, to be contained in the Protecting Worker Entitlements Bill, and the consultation with officials on these measures
- further consultation on the measures for the second half of the year.