Ai GROUP SUBMISSION

Productivity Commission

Carer Leave Inquiry

21 April 2023

Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to provide a further written submission in response to the Productivity Commission's Position Paper (**Position Paper**) released in February 2023 as part of its ongoing Carer Leave Inquiry (**the Inquiry**).

Carers contribute enormously to the welfare and wellbeing of the frail and elderly in the community and their role should be supported in the broader aged care system.

However, Ai Group does not support an amendment to the Fair Work Act's (**FW Act's**) National Employment Standards (**NES)** to introduce a new unpaid carer leave entitlement, including a proposed entitlement ranging from 3-12 months of unpaid leave.

Ai Group notes the Position Paper's assessment of a proposed entitlement to extended unpaid carer leave under the Fair Work Act's (**FW Act's**) National Employment Standards (**NES**) and the preliminary position that:

> Based on our analysis, overall there is not a strong case for amending the National Employment Standards to allow for an entitlement to 3–12 months of unpaid leave. And importantly, extended unpaid leave is not the highest priority for the majority of carers.

Ai Group agrees with this preliminary position.

An entitlement to extended unpaid carer leave would provide limited benefit.

Ai Group refers to its earlier detailed submission to the Inquiry and we reiterate our concerns that an extended unpaid carer leave entitlement would:

- Fail to address the varying needs of carers to continue with paid employment on flexible work arrangements or through more flexible forms of employment. The vast majority of caring arrangements extend beyond 2 years and involve the provision of 1-9 caring hours per week. An extended carer leave entitlement would be of limited practical benefit both in respect of the leave itself and the income foregone.

- Create an adverse cost burden on employers in terms of compliance and productivity costs and difficulties sourcing replacement employees with equivalent skills.

- Be detrimental to the sustainability of the aged care workforce, many of whom are informal carers.

- Promote reduced earnings for women taking time out of the paid workforce, contributing to the gender pay gap.

We also note that the recent and significant amendments to the FW Act introduced by the *Fair Work Amendment Legislation (Secure Jobs, Better Pay) Act 2022 (Cth)* would further reduce the need for a new NES entitlement to extended unpaid carer leave and add significantly to the regulatory burden on employers if an extended carer leave entitlement was also proposed.

Further information about the effects of the flexible work amendments is set out further below.

The FW Act's extensive flexible work amendments reduce the need for unpaid carer leave

Amendments to the FW Act's right to request flexible arrangements in the NES were made by *Fair Work Amendment Legislation (Secure Jobs, Better Pay) Act 2022 (Cth)* (**flexible work amendments**). These flexible work amendments are scheduled to commence on **6 June 2023.**

The flexible work amendments will introduce new obligations on employers who receive requests from eligible employees for a change in work arrangements, and impose the potential for new adverse consequences on employers who refuse those requests. The flexible work amendments would apply to eligible employees, including those employed carers who meet the definition of 'carer' under the *Carer Recognition Act 2010 (Cth).*

The flexible work amendments would make it more difficult for employers to refuse requests for flexible work arrangements. While Ai Group supports flexible work arrangements, Ai Group opposed the specific flexible work amendments as excessive and disproportionate to the repeated findings of Fair Work Commission research that had shown the current NES provisions were working effectively.[1] Ai Group's position in relation to key parts of the flexible work amendments is set out below in:

- Ai Group's submission to the Senate Committee Inquiry into the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022;* November 2022
- Ai Group's submission to the Senate Select Committee's Work and Care Inquiry, 19 September 2022

Under the flexible work amendments an employer may refuse the employee's request only if the employer has:

- discussed the request with the employee;
- genuinely tried to reach agreement with the employee to accommodate the employee's circumstances and not reached any agreement;
- has had regard for the consequences of the refusal on the employee; and
- reasonable business grounds for the refusal.

Under the flexible work amendments the employer must still provide a written response to the employee within 21 days of the employee's request, and the response must state one of the following:

- the employer grants the request; or
- following discussions between the employer and employee, there is an agreed change to the employee's working arrangements that is different to the original request and set out what that agreed change is; or
- that the employer refuses the request.

If the employer refuses the request, it must identify in its written notice:

- the reasons for the refusal;

[1] General Manager's Report into the operation of the provisions in the National Employment Standard relating to requests for flexible work arrangements and extension for unpaid parental leave under section 653 of the Fair Work Act 2009 (Cth) 2018- 2021, November 2021; Fair Work Commission, Australian Workplace Relations Study 2014, reported in General Manager's Report into the operation of the provisions in the National Employment Standard relating to requests for flexible work arrangements and extension for unpaid parental leave under section 653 of the Fair Work Act 2009 (Cth) 2012- 2015 p.37

- the employer's particular business grounds for the refusal and explain how those grounds apply to the request; and
- either:
    - set out any changes in the employee's working arrangements that would accommodate the employee's circumstances that the employer would be willing to make; or
    - state that there are no changes; and
- set out the effect of ss.65B and 65C relating to the dispute resolution procedure set out in the Amendment Act and the Fair Work Commission's (**FWC**) ability to arbitrate the dispute.

Significantly, the flexible work amendments introduce new rights for an eligible employee (including an eligible carer) to seek FWC orders under the FWC's arbitration powers for their employer to grant their flexible work request. The flexible work amendments contain new dispute resolution and civil penalty provisions in respect of flexible working arrangements, including:

- Provisions empowering the FWC to deal with disputes regarding flexible working arrangements by way of mediation and/or conciliation in the first instance or by arbitration.
- A new ability for the FWC to make certain orders in relation to flexible working arrangements if the dispute is dealt with by arbitration. In arbitrating the dispute, the FWC may order that:
    - the employer is taken to have refused the request in the absence of a written response to the employee;
    - the employer's refusal of the request is taken to be on reasonable business grounds or not on reasonable business grounds;
    - the employer comply with various procedural obligations to ensure compliance with s.65A; and
    - if, there is no reasonable prospect of the dispute being resolved, an order that the employer grant the request, or make other specified changes to the employee's working arrangements that accommodates the employee's circumstances.
- Prohibiting a person from contravening any order made by the FWC in relation to a dispute about flexible working arrangements.

Also significantly, the flexible work amendments introduce civil penalties (including up to $82,500 for a body corporate) for failure to comply with the NES provisions or an order made by the FWC. A failure to comply with the NES provisions includes an employer who refuses an employee's request for a change in work arrangements on grounds that are not reasonable business grounds. The FWC may make such findings in exercising its relevant arbitration powers as framed by the flexible work amendments.

The cumulative effects of the flexible work amendments including the imposition of civil penalties, would elevate risks for employers who refused requests for flexible work arrangements, including in circumstances where there may in fact be reasonable business grounds to do so.

The effect of the civil penalty and the right of an employee to enforce their request as a dispute before the Fair Work Commission, is also likely to lead more employees to stick to their requested arrangements rather than negotiate with their employer about an alternative flexible work arrangement that could be more easily accommodated by their employer.

The impact of the flexible work amendments, combined with any new NES obligation to provide extended carer leave would create a significant regulatory and cost burden for business – a number of which we have already detailed in our earlier submission.

For the reasons set out in our earlier submission and above, Ai Group does not support a further amendment to the NES to create a new entitlement to unpaid extended carer leave.

Review of the definition of 'carer'

Ai Group does not support the Position Paper's draft recommendation for the Australian Government to review the definition of 'carer' as it exists in the NES. We consider this issue to be outside the scope of the PC Inquiry with significant consequences as to the impact on other existing FW Act provisions, associated workplace laws, as well as disturbing terms in modern awards and clauses in enterprise agreements.

Federal, State and Territory anti-discrimination legislation in particular also provide protections for carers who are absent from work in addition to and beyond the terms of the FW Act. The FW Act's NES should not be viewed in isolation in terms of being absent from work for caring responsibilities.

Employers are currently under considerable pressure to comply with new and significant legal obligations arising from the Australian Government's workplace relations reform agenda. The Government has announced that further legislation containing significant workplace relations reforms will be introduced later this year. The *FW Amendment Legislation (Protecting Worker Entitlements) Bill 2023* is currently before the Parliament and contains extensive new obligations on employers regarding unpaid parental leave and other matters. Introducing a further review and subsequent legislative change would be crippling for many businesses.

Information provided to carers

Ai Group supports providing further information to employed informal carers about their new rights under the flexible work amendments. However, we do not support any new obligation on employers to do so and for reasons set out below do not consider this necessary.

As part of the commencement of the flexible work amendments, we anticipate that both the Fair Work Ombudsman (**FWO**) and the FWC would prepare new public information aimed at informing both employers and employees of the changed NES entitlements and new jurisdiction of the FWC. Section 682 of the FW Act sets out the functions of the FWO as including the provision of education, assistance and advice about workplace entitlements and compliance with the FW Act.

The changes to the NES brought by the flexible work amendments would also likely require the FWO to amend its Fair Work Information Statement to ensure it aligns with the new NES entitlement. The FWO is required to prepare a Fair Work Information Statement under the terms of section 124 of the FW Act. Section 125 of the FW Act requires employers to provide new employees with a copy of the Fair Work Information Statement. Accordingly, we expect that new employees would receive information from their employer about the flexible work arrangements under the NES by their employer providing them with an updated Fair Work Information Statement.

Conclusion

Ai Group does not support further amendments to the NES to create an entitlement to extended unpaid carer leave.

The aged care system needs to support the role and work of carers. Given the vast array of caring circumstances and extended duration of caring relationships, Ai Group considers it more effective and appropriate for carers to have continued access to flexible work arrangements and a flexible labour market. The recent flexible work amendments would add new procedural obligations for employers in receiving eligible employee requests for flexible work arrangements and would impose the risk of civil penalties and arbitrated outcomes for employers who so refused. The combined regulatory and cost burden on complying with the flexible work amendments and any new extended carer leave entitlement would be severe on many employers – of all sizes.

Creating an extended entitlement to carers leave would also likely add to constraints for care workforces and create additional and unfair costs burdens for employers. The gendered nature of care would also likely see reduced earnings for female workers who are more likely to access the leave.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

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

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

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

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

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

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