Ai GROUP SUBMISSION

Senate Education and Employment Legislation Committee

Inquiry into the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023* (Cth)

18 April 2023

Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission to the Senate Education and Employment Legislation Committee's inquiry into the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023* (Cth) (**Bill**).

The Bill introduces some significant changes to the *Fair Work Act (2009 (Cth)* (**FW Act**), including changes which are contentious and detrimental to business.

Ai Group opposes the Bill as it is presently drafted. If the Bill is to be passed by the Parliament, it requires further amendment.

The Bill's provisions relating to flexible unpaid parental leave (**UPL**) would have severe and impossible consequences for employers, co-workers and replacement employees. The Bill pays no attention whatsoever to the need for employers to plan their workforces and businesses around more frequent, and multiple absences from work by employees on significantly expanded flexible UPL entitlements. The Bill's retention of the FW Act's notice provisions that would apply to a significantly expanded flexible UPL entitlement has not been properly thought through in terms of the impact on business and other employees.

The uncertainty, complexity and regulatory costs of administering flexible UPL as an NES entitlement will likely stunt the momentum of employers adopting their own paid parental leave schemes. Such schemes typically offer the employee's usual rate of pay for employees on parental leave and play an important role in limiting the loss of earnings experienced by parents (and disproportionately women) on periods of UPL.

The Bill's proposed duplication in the FW Act of an existing obligation on employers to pay superannuation under the *Superannuation Guarantee Charge Act 1992 (Cth)* is highly problematic and unnecessary. All employees are subject to the protections of superannuation legislation as administered by the Australian Tax Office (**ATO**). A further legal obligation on employers is not needed. The efficacy of the ATO as the lead Government agency providing advice and regulatory enforcement on superannuation will likely be diluted and undermined by a competing regulator in the Fair Work Ombudsman (**FWO**) and unions with standing to bring proceedings.

The Bill's removal of the requirement for employee consent to specific changes in the amounts that may be deducted from their pay will serve the interests of third parties, such as trade unions, who charge fees for services provided to individual members.

The Bill must be carefully examined by the Australian Parliament. It contains provisions that have the foreseeable potential to cause considerable detriment to employers, workplaces and the public utility of other Government bodies.

Ai Group's views on each specific Schedule of the Bill are outlined in the following sections.

Schedule 1—Protection for migrant workers

Summary of the proposed amendments

The Bill proposes to introduce a new provision in the FW Act which clarifies that a migrant worker in Australia is entitled to the benefit of the FW Act, regardless of their migration status.

Analysis

The proposed change would seek to give effect to Recommendation 3 of the Report of the Migrant Workers' Taskforce:

> *It is recommended that legislation be amended to clarify that temporary migrant workers working in Australia are entitled at all times to workplace protections under the [FW Act].*

The following provision is proposed:

> ***40B Effect of the Migration Act 1958***
> *For the purposes of this Act, any effect of the Migration Act 1958, or an instrument made under that Act, on the validity of a contract of employment, or the validity of a contract for services, is to be disregarded.*

It is intended that the proposed provision above would seek to make clear that the following scenarios would not affect the validity of an individual's contract of employment or contract for services for the purposes of the FW Act, namely:

- Where an individual does not have a right to work in Australia for the purposes of the Migration Act.
- Where an individual has contravened the Migration Act or breached a condition of their visa.
- Where an individual is no longer entitled to remain in Australia in accordance with their visa.

The provision will provisionally commence the day after the Bill receives Royal Assent.

Ai Group's position and recommendations

Ai Group has not identified any issues with this provision in the Bill.

Schedule 2 – Unpaid parental leave

Summary of the proposed amendments

The Bill would introduce very significant changes to the FW Act's unpaid parental leave provisions.

The Bill's proposed unpaid parental leave (**UPL**) amendments can be put into three broad categories relating to:

- Significantly expanding the FW Act's flexible UPL entitlements while retaining the FW Act's current employee notice provisions to employers;
- Removing various FW Act's restrictions on the taking of UPL by employee couples; and
- Introducing gender-neutral language to the FW Act's unpaid parental leave provisions as well as consequential amendments relating to the above.

We have summarised the proposed amendments in these three categories below.

The expansion of the FW Act's flexible unpaid parental leave entitlement

The Bill proposes a range of significant changes to the FW Act's flexible unpaid parental leave provisions. The Bill would:

- Increase the number of days that can be taken as flexible UPL from 30 to 100 days, unless a higher number of days is provided by the regulations (ie, to account for any further increase to the quantum of Government-funded parental leave pay). This equates to an increase from a 6-week absence from work to a 20-week absence from work, with that absence taken as flexible UPL from the employee's entitlement of 12 months (52 weeks) of UPL. Flexible UPL may be taken within 2 years from the birth or placement of a child.

- Allow pregnant employees to take flexible UPL 6 weeks before the expected birth of the child. Any flexible UPL accessed would be deducted from the employee's overall entitlement to flexible UPL. The means a pregnant employee may, for example, work part-time hours by combining periods of work with periods of flexible UPL before the birth of the child.

- Allow employees to commence flexible UPL before or after a period of continuous UPL. Currently, in order for an employee to access both continuous UPL and flexible UPL entitlements, the employee must take continuous UPL first and then take flexible UPL.

The proposed change would allow, for example, an employee to access a period of flexible UPL before the birth of the child, take a period of continuous UPL, then access their remaining flexible UPL entitlements.

In proposing these amendments, the Bill does not seek to amend the FW Act's current notice provisions for the taking of flexible UPL by employees. These notice provisions are set out in sections 74(1)and 74(4B) of the FW Act. Section 74(4B) requires an employee to provide their employer with 4 weeks written notice of the days on which the flexible UPL is to be taken. If it is not practicable for the employee to provide 4 weeks written notice, the employee may provide a lesser period, including no notice at all, depending on the circumstances.

The effect of the Bill in continuing with the FW Act's current notice provisions for a larger cohort of eligible employees under the Federal Government's paid parental leave scheme and who may access a significantly increased portion of their UPL as flexible UPL is set out further below.

The Bill's relationship with Government-funded parental leave pay

The Bill's proposed changes to flexible UPL is intended to align the entitlement to the recent changes to the government-funded paid parental leave scheme made by the *Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Act 2023* (**PPL Amendments 2023**) The PPL Amendments 2023 introduced significant changes to both the quantum and eligibility arrangements around Government-funded parental leave pay. This included the:

- Extension of Government-funded parental leave pay (**PLP**) from 18 weeks to 20 weeks by combining the current maximum of 18 weeks parental leave pay with the current 2 weeks of dad and partner pay. The 2 weeks' pay added to the 18 weeks is to be taken on a 'use it or lose it' basis by each claimant. The separate dad and partner pay will be abolished.
- Removal of the requirement that only the birth mother can apply for PLP and permits a larger cohort of defined persons to apply for PLP and removes the categories of primary, secondary and tertiary carers.
- Replacing the current individual income threshold of $156, 647 for an eligible primary claimant to PLP with a $350,000 family income limit.
- Removal of the current limitation of 6 weeks (30 days) on the portion of PLP that can be taken as flexible PPL days, allowing claimants to take the PLP in multiple blocks, including for ad hoc single days, within 2 years of the birth or adoption of the child. The current requirement on eligible claimants to not return to work is also removed.

The FW Act's UPL provisions are relevant to whether and how an eligible person can access Government-funded parental leave pay under the *Paid Parental Leave Act 2010 (Cth)* (**PPL Act**). To access Government-funded parental leave pay, a person must be absent from work caring for their child.

In Ai Group's submission to the Senate Committee poliInquiry regarding the *Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Act 2023* Ai Group indicated its broad support for the PPL Amendments 2023, but identified that appropriate amendments were required to the FW Act. Specifically, we highlighted that any retention of FW Act's current notice provisions would fail to provide employers with adequate time and information to plan for the employee's flexible UPL absence if those absences from increased from 30 to 100 days. The FW Act's notice provisions were made on the basis that the entitlement to flexible UPL was capped at 30 days.

The origins of flexible UPL were in the *Paid Parental Leave Amendment (Flexibility Measures) Act 2020 (Cth)* (**PPL Amendments 2020**) introduced by the former Federal Government to enable greater flexibility around accessing both Government-funded parental leave pay and the required leave from the workplace. Under the PPL Amendments 2020, Government-funded flexible parental leave pay was set and limited to 30 days on the basis that the parental leave pay could only be claimed by the 'primary claimant' (the birth parent) but that 30 days (6-weeks) of this 90-day (18-week) payment could be 'transferred' to a secondary claimant, typically the father and/or partner. A person accessing the 30 days of flexible parental leave pay was required to be absent from work and caring for their child. The FW Act was accordingly amended by the *Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020 (Cth)* to enable an employee to access a portion of their 12-month entitlement to UPL as flexible UPL, and capped at 30 days in line with the then PPL Act.

The effect of the PPL Amendments 2023 (referred above) is the removal of the 30-day cap on Government-funded parental leave pay and instead to treat *all* parental leave pay as flexible parental leave. Under the PPL Amendments 2023, the maximum entitlement to Government-funded parental leave pay is 100 days. The 100-day quantum may increase further if the Government proceeds to legislate a further increase to its Government-funded paid parental leave scheme. We understand this is likely given the Government's policy commitment of increasing parental leave pay to 26 weeks by 1 July 2026.

Flexible UPL - Ai Group's position and recommendations

When an employee is absent from work on UPL, it is ultimately the employer who is responsible for the continued running of the business in which the employee remains employed.

The Bill's expansion of flexible UPL entitlements with the retention of the current notice scheme in the FW Act will be near-impossible for employers to manage. Ai Group is concerned that various sections of the Bill have not been properly thought through in terms of its impact on business and other employees.

In this regard, the Bill's provisions require further amendment.

The Bill's significant increase in a 30-day absence from work on flexible UPL to 100 days has not been balanced with a corresponding adjustment to limit the effects of more frequent and ad hoc absences on employers. This 'breaking up' of a significantly greater portion of the UPL entitlement traditionally taken as a single continuous period, to multiple blocks and/or single days carries with it new and significant practical challenges for employers to manage workforce absences, workloads for existing staff members and decisions around replacement employees.

Specifically, the continued operation of the FW Act's 4-week notice provision fails to grant employers with sufficient information and timeframes to be able to plan for employee absences on flexible UPL where such absences are likely to be more frequent and ad hoc than is currently the case. The following scenarios that the Bill would permit illustrate this point:

Scenario One

A full-time IT manager advises his employer that he intends to take 100 days (or 20 weeks' worth) of flexible UPL and provides the minimum written notice of 10 weeks to his employer. In order for the employer to plan how an absence of 100 days can be managed, the employer asks the IT manager how and when the 100 days of UPL is to be taken. The IT manager does not provide any indication to the employer and is not required to until 4 weeks before taking the flexible parental leave.

Three months later, the IT manager subsequently gives his employer 4 weeks' notice that he will be absent from work for 10 weeks on flexible UPL. The employer asks what the employee intends to do with the remaining 50 days (10 weeks) of flexible parental leave. The employee is not required to provide an answer to this under section 74(3) of the Bill, but may only do so on 4 weeks' notice when the employee is ready to take the remaining or a further portion of flexible UPL.

The employer has only 4 weeks to find a replacement employee for the IT manager and is unable to find one willing to work a contract of only 10 weeks. Had the employer known earlier, the employer could have started recruiting for a replacement employee or engaged an external company to cover the IT services for the employee's absence. Further, the employer is unsure whether and when it will need the replacement employee for a further 10 weeks following the initial 10 weeks of UPL taken because the employee is not required to provide this information earlier than 4 weeks before the next period of flexible UPL is taken.

Scenario Two

A marketing professional advises her employer with 10 weeks' written notice that she intends to take 70 days of flexible unpaid parental leave within the next two years. The employer asks for more information about when this leave is to be taken. Under the Bill, the employee is not required to provide this information.

Six months later, the employee gives 4 weeks' notice that she will be absent from work for 30 consecutive days (6 weeks). The employee then returns for a period of 6 weeks and then gives a further 4 weeks' notice that that she will be absent for another 30 consecutive days (6 weeks) of flexible UPL. The employee returns for 8 weeks and then gives a further 4 weeks' notice she will be absent for a further 10 (2 weeks) on flexible UPL.

The fact that the employee make take rolling absences of flexible UPL on particular dates were not communicated to the employer from the outset because the employee is not required to disclose this information. During the three sets of absences, some responsibilities have been picked up by co-workers but other responsibilities have not been performed by anyone, adversely impacting the employer's business.

Other forms of extended leave such as annual leave or long service leave, which may also be taken as single days, is generally accessible by agreement with the employer, provided that the employer does not unreasonably refuse the request for leave.[1]

The lack of adequate notice provisions to support the Bill's flexible UPL provisions will create a raft of plainly foreseeable problems, including:

- adverse impacts on business continuity and productivity arising from inadequate time and information provided to an employer arising from multiple and ad hoc employee absences on flexible UPL;

- an unfair increase in workload for other employed co-workers;

- an inability for employers to plan for or communicate to replacement employees the likely duration of employment because of the limited information and time frames available to employers in managing flexible UPL absences;

- the stymieing and discouragement of employer-funded paid parental leave schemes due to the uncertain nature of flexible UPL absences serving as constraint on employer budgets, and/or as an additional cost to administering compliance with a changed NES entitlement.

The Second Reading Speech to the Bill states that "*notice periods [for parental leave] will remain the same, providing certainty for business.*" Ai Group strongly disagrees with this statement. The Bill's retention of the notice periods for UPL combined with a significantly expended flexible UPL

[1] See s.88 of the FW Act in respect of annual leave. Many state laws regulating long service leave allow for single day access by agreement between the employer and employee.

entitlement will in fact **introduce** uncertainty and disruption for business and is already causing concern within industry.

The Bill's notice provisions are unrealistic and artificial for the planning of flexible UPL absences

In addition, the Bill provides an unrealistic and artificial framework for a discussion between an employer and an employee taking UPL because it is limited to employee intention about how flexible UPL is to be taken but not when. This artificial separation of conversations is not in line with how employers and employees would generally discuss issues of extended or multiple absences. We have provided examples above of how the Bill would limit employer and employee discussions about planning flexible UPL absences.

The 'doubling up' with personal/carers leave mean more appropriate notice periods are required.

The Bill's flexible UPL provisions provide no distinction as to whether an employee urgently requires UPL because of a medical issue concerning a child or because the employee would like to spend time with their child. The wide variety of reasons and circumstances that may determine when and for how long an employee takes flexible UPL are reasons to amend the Bill to provide employers with more information and longer timeframes to manage flexible UPL absences.

The FW Act's National Employment Standards (NES) already contains cumulative entitlements to paid personal/ carer's leave. These forms of leave entitlements generally apply to unplanned or unexpected emergencies that prevent employees from attending work. It is apparent that the Bill proposes (for example see proposed statutory note in section 74(4B)), that a reason(s) for taking flexible UPL overlap with reasons recognized by the FW Act for the taking of personal/carer's leave.

Paid personal/carer's leave entitlements are still available to employees performing work who may be accessing flexible UPL from time to time. Casual employees who may also be working and taking flexible UPL would also still be entitled to unpaid carer's leave under the NES. Accordingly, it is unreasonable to cite unplanned employee circumstances as a reason to deprive employers of a capacity to receive sufficient information about the duration and specific days flexible UPL is to be taken by employees.

Rather, an employee's entitlement to UPL should be balanced by a consideration of the fact that in many circumstances a level of planning around UPL absences and household finances is likely to occur and the obvious and reasonable need for employers to manage their workforces in the context of the absence of an employee on UPL. Greater balance and fairness is needed in the Bill's UPL reforms to cater to the legitimate needs of workplaces.

The Bill would stunt the growth in employer-funded parental leave schemes

The Bill would stymie and discourage employers from adopting or expanding their own employer-funded paid parental leave schemes. The Bill would do this by creating additional and not insignificant costs to employers by increasing the administrative burden in managing flexible UPL entitlements and the uncertainty over when and for how long it would be taken.

There has been a steady increase in the proportion of employers who report to the Workplace Gender Equality Agency (**WGEA**) to adopt their own employer-funded paid parental leave schemes. Employer -funded parental leave schemes are important mechanisms to address gender disparity in earnings caused by unpaid absences from work. They also facilitate greater workforce retention and while enabling time for infant bonding and care.

It is likely that overly complex and uncertain UPL entitlements in terms of when and how the leave is taken, will absorb employer resources directed at meeting their new NES obligations. The uncertainty of when and how flexible UPL absences would be managed under the Bill's retention of current notice provisions would generate a range of resourcing pressures for employers. The uncertainty would also deter decisions around expenditure into business-funded arrangements and ultimately stymie any expansion or continuation of employer-funded schemes. This consequence of the Bill should be further reason to ensure that the Bill's flexible UPL provisions are set up to succeed in a way that is workable for business.

Necessary Amendments to the Bill:

For the Bill's flexible UPL provisions to engage with the reality that businesses are to manage UPL absences from work, the following amendments must be made to the Bill:

1. The Bill must include a repealing of the FW Act's section 74(4B).

Section 74(4B) is the current notice provision for a significantly smaller portion of flexible UPL that had limited usage under the government's paid parental leave scheme prior to the PPL Amendments 2023. It is no longer appropriate to continue as a notice threshold for flexible UPL set at 100 days as it does not provide employers with sufficient information or time to manage more frequent or ad hoc absences over a 2-year period.

2. The Bill must further amend section 74(3C) such that it reads:

> If any of the leave covered by the notice is to be taken under section 72A, the notice must specify the total number of days (***flexible days***) and the intended start and end days of all flexible unpaid parental leave that the employee intends to take in relation to the child. (amendment underlined)

Section 74(3C) of the FW Act requires that an employee advise their employer of the total number of days the employee intends to take as flexible UPL. The Bill would amend section 74(3C) to make it explicit in the subsection itself that this requirement only applies to employees taking flexible UPL. Section 74(3C), included as amended by the Bill, would not require an employee to advise their employer of the intended start and end dates of the flexible UPL, but only the total number of days. It is essential that section 74(3C) require employees intending to take flexible UPL to provide written notice of their intended dates, not just the number of days.

3. Amend section 74(4) of the Bill to refer to "and 72A" in lieu of section 72 (which the Bill would repeal), such that it reads:

> If the leave is to be taken under section 71 or 72A, then at least 4 weeks before the intended start date specified in the notice given under subsection (1), the employee must:
> (a) confirm the intended start and end dates of the leave; or
> (b) advise the employer of any changes to the intended start and end dates of the leave;
> unless it is not practicable to do so. (amendment underlined)

4. The Bill's proposed statutory note under section the FW Act's current 74(4B) (which should be repealed) should be placed under section 74(4) of the Bill, such that it reads:

> Note: Whether or not it is practicable for the employee to advise the employer of any changes to the intended start and end dates of the leave will depend on the employee's personal and family circumstances. For example, it may not be practicable for the employee to advise of any changes to the start and end days of the leave where the employee experiences a health issue, a pregnancy complication or an unexpected change in the employee's child care arrangements. (amendment underlined)

The effect of these necessary amendments to the Bill is to ensure that the significant extension of the flexible UPL entitlement, and in the variety of forms it may be taken, does not cause significant and unreasonable levels of hardship and disruption to employers and co-workers. The amendments ensure that more reasonable and necessary levels of information and timeframes are given to employers who have the ultimate responsibility of managing the employee's absence on UPL.

These amendments also work with the objectives of the Bill in aligning the FW Act's flexible UPL entitlements with the recent PPL Amendments 2023.

Accessing UPL for employee couples

The Bill proposes to remove the current limitations on employee couples taking concurrent leave and extending their period of UPL. This will mean that:

- Eligible employees can take up to 12 months of UPL and request a further 12 months of UPL, regardless of how much leave their spouse or de factor partner takes, up to a total of 24 months each.

- All eligible employees will be able to take UPL at any time during the 24-month period starting on the date of birth of the child.

- The current limit on employees taking no more than 8 weeks of concurrent leave will cease to apply, and an employee can take any amount of their leave at the same time as their partner.

The FW Act currently expresses the entitlement to take UPL differently depending on whether or not an employee is a member of an '*employee couple.*' The FW Act defines an employee couple as two national system employees who are the '*spouse or de facto partner of each other*'.

The Bill's provisions would align access to UPL consistent with the PPL Amendments 2023 that removed the PPL Act's eligibility definitions of primary and secondary carers. That is, the Bill would permit an eligible employee to take UPL regardless of whether they were the 'primary or secondary carer' indirectly assumed by reference to the timing and quantum of leave taken by the employee's spouse or partner. The Bill preserves the FW Act's section 70 in defining the UPL entitlement as leave associated with the birth or adoption of the child where the employee has or will have a responsibility for the care of a child.

Recognising that the care of infants does not fall on one parent is a policy objective that has other economic benefits. The workforce participation of women in particular is likely to be strengthened from a legislative framework that would permit the sharing of family and care responsibilities without the limitations that were set over a decade ago. Infant bonding with fathers, partners and other non-birth parents, also has obvious importance for the development of children.

Ai Group has not identified any issues with these provisions of the Bill.

Implementing gender neutral language

The Bill would replace references to gendered language such as '*he'*, '*she'* and '*maternity leave*' with gender-neutral terms such as '*the employee*' and '*parental leave*'.

The PPL Amendments 2023 also implemented more gender-neutral language in the PPL Act and is it appropriate to ensure terminology is aligned.

Ai Group has not identified any issues with these provisions of the Bill.

Proposed commencement date

The proposed amendments above will provisionally commence on 1 July 2023, or the day after the Act receives Royal Assent, whichever is later. The proposed commencement date is intended to align with the commencement of the PPL Amendments 2023. This means, however, that employers are not provided with a sufficient transitional period to implement the Bill's reforms. The Bill would urgently require all employers to update their payroll systems and policies and procedures to accommodate the Bill's changes. The Bill should accordingly be amended as Ai Group has suggested to ensure it can be managed by employers.

Schedule 3 – Superannuation

Summary of the proposed amendments

The Bill seeks to introduce a requirement under the FW Act's NES for employers to make contributions to a superannuation fund for the benefit of an employee so as to avoid liability to pay the superannuation guarantee charge under superannuation legislation. The key proposed provision is as follows:

> ***116B Employer's obligation to make superannuation contributions***
> *An employer must make contributions to a superannuation fund for the benefit of an employee so as to avoid liability to pay superannuation guarantee charge under the Superannuation Guarantee Charge Act 1992 in relation to the employee.*

The proposed provision is intended to extend an enforceable right to recover unpaid superannuation to all NES covered employees (and not just employees covered by a modern award or enterprise agreement that contains an entitlement to superannuation). The explanatory memorandum to the Bill (**EM**) notes that:

- Unions or the FWO could also seek to recover unpaid superannuation on behalf of an employee.
- The proposed change is not intended to replace, the Australian Taxation Office's (**ATO**) existing powers to recover superannuation amounts. The existing arrangement in respect of the FWO referring matters involving unpaid superannuation to the ATO will continue to operate.

The Bill proposes a provision at section 116D, which would prevent an employee, union or the FWO, from commencing proceedings to recover superannuation amounts, to the extent that such claim overlaps with an existing proceeding commenced by the ATO.

However, section 116D of the Bill does not prevent a claim from being made by an employee, union or the FWO, in circumstances where the ATO has:

- utilised enforcement activity other than court proceedings; or
- discontinued its own court proceedings and no final order for recovery was obtained.

Where a court awards compensation relating to a breach of the proposed provisions, the court must take into account the principle that compensation should usually be paid to a superannuation fund for the benefit of the employee. The EM provides examples of where it would not be appropriate to pay compensation into an employee's superannuation fund, namely:

- if the employee's account is closed, for example if the employee has reached preservation age and has withdrawn all their superannuation;
- if an employee earned superannuation while visiting Australia on a temporary visa and has departed the country; or
- if the employee is deceased.

However, the Bill does not contain comparable protections for employers who may have relied upon an ATO Ruling or other guidance material released by the ATO, in determining whether superannuation payments would be payable in certain situations. Instead, the EM merely notes that '*it is anticipated that a court would have due regard to any relevant administrative guidance produced by the ATO regarding the interpretation of superannuation obligations on which the employer has relied*'.

The proposed NES entitlement to superannuation does not apply to:

- the recovery of superannuation contributions above the minimum superannuation contribution amount (currently 10.5%);
- national system employers and employees who are only national system employers and employees due to a State's referral of power to the Commonwealth; and
- deemed employees under superannuation legislation (for e.g. certain types of contractors).

These provisions of the Bill will provisionally commence on the first 1 January, 1 April, 1 July or 1 October to occur after the end of the period of 6 months after the Act receives the Royal Assent.

Analysis

The Bill would duplicate an existing obligation on employers to make superannuation contributions under the *Superannuation Guarantee Charge Act 1992 (Cth).*

Legislating a right to superannuation in the National Employment Standards (**NES**), as proposed by the Bill, raises significant concerns around the integrity and efficacy of superannuation legislation and enforcement generally.

Superannuation is regulated by a suite of sophisticated legislation, which exists to ensure that mandatory superannuation contributions are made on behalf of employees. This includes the

Superannuation Guarantee (Administration) Act 1992 (Cth) (**SGAA**), the *Superannuation Guarantee Charge Act 1992* (Cth), the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Superannuation (Resolution of Complaints) Act 1993* (Cth).

The legislation comprehensively regulates superannuation by prescribing requirements and obligations concerning the making of superannuation contributions, and well-established systems and mechanisms for compliance and enforcement, including:

- the level of contributions required under the superannuation guarantee;
- payment by an employer of a '*superannuation guarantee charge*' for a specified quarter, if an employer fails to make sufficient superannuation contributions;
- defining '*Ordinary Time Earnings'*;
- providing employees with the freedom to choose a superannuation fund;
- providing for circumstances in which employees do not choose a fund;
- providing rules relating to superannuation provisions in enterprise agreements;
- enabling the Australian Taxation Office (**ATO**) to issue superannuation guarantee Rulings;
- giving extensive powers to the regulator, the ATO, to monitor compliance with the law and investigate employers who do not comply;
- giving the ATO extensive powers to enforce non-compliance, including taking legal action (including garnishee notices, director penalty notices, bankruptcy notices, creditor's petitions, statutory demands and wind-up action) up to and including court proceedings to prosecute employers and recover unpaid superannuation, and obtain associated penalties for non-compliance;
- other penalties for non-payment, late payment or underpayment of the superannuation guarantee contribution by employers, including a penalty:
    - if an employer makes a false or misleading statement;
    - for failing to keep adequate records;
    - for failing to provide a superannuation guarantee contribution statement;
    - each time an employer does not provide an employee's tax file number to the employee's superannuation fund or Retirement Savings Account; and
    - for entering into arrangements to avoid superannuation obligations;
- dealing with the tax deductibility of employer superannuation contributions, including providing for a different deduction status in different circumstances; and
- providing the ATO with a major education and advisory role in respect of superannuation.

In addition to obligations to make superannuation contributions to employees arising under the relevant legislation, an obligation also arises under the modern awards system. Clauses in modern awards require employers to '*make superannuation contributions to a superannuation fund for the benefit of an employee*' as required by the superannuation legislation set out above. An enterprise agreement can also include terms dealing with the payment of superannuation contributions; this is however properly a matter for agreement between the parties. Failure to make mandatory superannuation contributions on behalf of an employee to a superannuation fund where an

employee is terminated would also constitute a breach of s.117(2)(b) of the *Fair Work Act 2009* (**FW Act**) (which is not limited to award and enterprise agreement covered employees).

An employee with an entitlement to superannuation contributions pursuant to a modern award or enterprise agreement can pursue unpaid superannuation guarantee contributions through the fair work regime and a failure to make adequate contributions constitutes a breach of the FW Act. In such cases, an employer may be liable for significant pecuniary penalties. Accordingly, a large proportion of employees currently have access to a mechanism for directly recovering unpaid superannuation contributions.

Moreover, *all* employees can pursue unpaid superannuation through the ATO, which has primary responsibility for ensuring compliance with the superannuation guarantee and associated obligations. The ATO has access to vital and relevant superannuation information, and extensive enforcement powers to effectively enforce non-compliance. If there is a concern with the conduct or resourcing of the ATO, then these matter should addressed, in preference to creating a duplicate legislative obligation and alternate enforcement regime.

The introduction of a new right to superannuation in the NES risks the introduction of a range of inappropriate and unfair consequences, including the following:

(a) Employers may be exposed to enforcement activity from more than one regulator in relation to the same conduct under two statutory regimes;

(b) Employers would face a greater regulatory burden, having to deal with multiple statutory frameworks;

(c) An additional form of regulation would likely create confusion amongst employers and employees;

(d) Inconsistencies in relation to the interpretation and application of the two statutory frameworks may emerge;

(e) The concerns outlined at paragraph (b), (c) and (d) are compounded because the Bill would permit two regulators to be given responsibility for monitoring and enforcing compliance;

(f) The relevance of information published over many years by the ATO, as well as its private rulings, may be called into question, creating considerable uncertainty for employers and employees;

(g) If responsibility for compliance and enforcement is shared by the ATO and Fair Work Ombudsman (**FWO**), this may result in various inefficiencies and an inappropriate allocation of resources;

(h) Any duplication of rights and entitlements would create a dangerous precedent for the way in which legislation deals with (or, does not deal with) the same subject matter;

(i) The Fair Work Commission (**Commission**) would, in effect, be given jurisdiction to deal with disputes concerning the operation of superannuation legislation pursuant to s.739 of the FW Act, which they may not otherwise have jurisdiction to deal with, thereby exposing employers to another forum in relation to superannuation. Superannuation is not typically dealt with by the Commission and it is unclear whether the Commission would be particularly well placed to deal with technical matters associated with the operation of superannuation legislation; and

(j) Organisations who have commercial relationships with superannuation funds may gain standing to pursue unpaid superannuation contributions in certain circumstances, which could result in perceived or actual conflicts of interests.

Ai Group's recommendations

Ai Group does not support these provisions of the Bill.

In short, our overarching concerns relate to:

- the obvious unfairness to employers of being subject to multiple and potentially inconsistent enforcement efforts in differing jurisdictions, in relation to the same obligation;
- the likelihood that the proposed approach will undermine the efficacy and utility of the constructive role that the ATO currently plays in providing guidance to individual employers or industry related to complex superannuation obligations.

To address the abovementioned matters, we propose that amendments be made to the Bill that are directed at the following points.

1. **Ensuring that employers are not exposed to competing enforcement activity from two different regulators over the same matter**

   For the reasons described above, 116D should be amended to prevent multiple actions by an employee, union or the FWO in circumstances where the ATO has:

   - utilised enforcement activity other than court proceedings; or
   - discontinued its own court proceedings and no final order for recovery was obtained.

2. **Protecting employers that rely on ATO guidance**

The Bill should be amended to ensure that employers are not subject to any pecuniary penalty when they have adopted an approach to compliance with superannuation legislation that is consistent with current Administratively Binding Advice (ABA) or interpretive guidance issued by the ATO.

Section 116D only addresses the need to prevent enforcement proceedings under the FW Act if the Commissioner of Taxation has also commenced enforcement proceedings to recover an amount of superannuation guarantee charge from the employer in relation to the same employee.

It is conceivable that the limited scope of the Bill's section 116D and the wide discretion of the courts afforded by current sections of the FW Act could enable an employer to be subject to a pecuniary penalty under the FW Act, notwithstanding that the employer may have followed the advice or interpretative guidance of another regulator in another jurisdiction; namely the ATO.

The proposed approach of limiting a court's ability to impose a pecuniary penalty is not novel. Relevantly, s.167 of the FW Act prohibits a court from ordering that a person pay a pecuniary penalty in relation to a contravention of award terms in specified circumstances. A comparable provision should be implemented to prohibit a court from imposing a pecuniary penalty in relation to any conduct that was consistent with any ruling or guidance material published by the ATO.

The continued operation of mechanisms such as ABAs, are of significant public utility in promoting compliance with relevant laws and building confidence in specialized regulatory bodies, like the ATO. This is in the public interest and should be encouraged. It is particularly important in the context of the operation of superannuation entitlements. If the above amendments are not adopted, industry will be discouraged from engaging with the ATO in the future to proactively clarify entitlements.

To this end, the Bill should be amended to include an amendment to section 546 of the FW Act that explicitly prevents a Court from ordering a pecuniary penalty in circumstances where an employer has relied upon an ABA from the ATO. A statutory note already features in section 546 that limits the Court's ordinary of pecuniary penalties in other circumstances. It would not be controversial for a similar amendment to appear in relation to proceedings relating to superannuation if the FW Act is to duplicate an existing statutory obligation on employers.

3. **Limiting the capacity of the ATO to pursue matters ventilated in the workplace system**

The ATO should not be able to take any enforcement action in relation to the superannuation obligations pertaining to a particular employee if such matters are being ventilated, or have been ventilated, through the workplace relations system. This should include where matters have been dealt with through arbitration conducted by the Fair Work Commission. It would be reasonable for such a prohibition to not apply in the context of a dispute that has merely been the subject of conciliation proceedings before the FWC that have concluded.

Accordingly, the Bill should be amended to contain corresponding amendments to the *Superannuation Guarantee Charge Act 1992 (Cth)* to prevent multiple actions by the ATO where persons and organisations with standing under the FW Act have commenced enforcement proceedings as set out in section 116D of the Bill with Ai Group's recommended amendments.

4. **Limit the capacity of the FWC to deal with disputes over the operation of superannuation legislation**

Many enterprise agreements contain clauses permitting the Fair Work Commission to deal with disputes over the interpretation of the NES. In many instances they permit the Commission to arbitrate such matters. In agreeing to such clauses an employers would obviously not have envisaged that they could be dragged into the Commission over disputes regarding the proper interpretation of superannuation legislation if a union disagrees with the interpretation adopted by the employer (and potentially the ATO).

The Bill should be amended to prevent the Fair Work Commission from arbitrating disputes that, in essence, pertain to the interpretation of relevant superannuation legislation. Such matters are appropriately dealt with by a court. At the very least, the Bill should include measures to prevent employers subject to enterprise agreements, that are already in force, being drawn into dispute proceedings before the FWC over the operation of the proposed new NES entitlement pursuant to a dispute clause contained in such an agreement.

We have concerns regarding whether it would be valid, from a technical perspective, for the FWC to deal with a dispute, pursuant to an existing disputes clause in an EA, over a term of the NES that was not included in the legislation when the agreement was made. Regardless, it is obviously not fair for dispute provisions to operate in an unanticipated manner as a product of legislative changes implemented subsequent to the making of an enterprise agreement.

The unfairness of exposing employers to arbitration of disputes concerning the proposed new NES entitlements is compounded by the inclusion of provisions in many enterprise

agreements that provide that parties will be bound by the outcome of a dispute or otherwise limit a party's capacity to appeal a decision of the FWC in the context of a dispute.

Schedule 4 – Workplace determinations

Summary of the proposed amendments

The Bill proposes to clarify that when a workplace determination comes into effect in relation to an employee, any enterprise agreement that covers that employee in relation to that employment will cease to apply and can never apply again.

This proposed change appears to be consistent with the Fair Work Commission's approach in relation to this matter, however it is not currently stated in the FW Act.

This provision will provisionally commence the day after the Act receives Royal Assent.

Ai Group's position and recommendations

Ai Group has not identified any issue with this provision of the Bill.

Schedule 5 – Employee authorised deductions

Summary of the proposed amendments

Currently, under section 324 of the FW Act, there are various types of permitted deductions that may be made from an employee's pay by an employer, where the deduction is: authorised in writing by the employee, is principally for their benefit, and is the same amount as specified in the authorisation. The authorisation can be withdrawn in writing by the employee at any time.

The Bill would insert a new provision allowing an employee to agree in a written authorisation for multiple or ongoing deductions by their employer, rather than making an agreement on each occasion. Where an employee authorises multiple or ongoing deductions by their employer, the deduction may be authorised for a specified amount or amounts, or for amounts as varied from time to time. Specifically, a written authorisation must:

- for a single deduction – specify the amount of the deduction; or
- for multiple or ongoing deductions – specify whether the deductions are for a specified amount(s) or amounts as varied from time to time; and
- include any information prescribed by the *Fair Work Regulations 2009* (Cth) (**FW Regulations**).

Despite the above changes, the general rule is that a deduction cannot be made for an amount that may vary from time to time where it is directly and indirectly for the benefit of the employer (or a related party). For example, a direct benefit is where the deduction is being paid directly to

the employer, and an indirect benefit is where the deduction is paid to a subsidiary or related company of the employer.

The only exception to the general rule is where the deduction is '*reasonable'* under the FW Regulations. Currently, the FW Regulations provide that the following deductions are reasonable:

- A deduction where the employer (or a related party) provides goods or services to an employee in the ordinary course of the employer's business on the same or more favourable terms as those goods or services are provided to the general public (for e.g. a health insurer offering health insurance).
- A deduction where the purpose is to recover costs directly incurred by the employer as a result of the employee's voluntary private use of the employer's property that is authorised or unauthorised (e.g. the private use of a company vehicle, mobile phone, or corporate credit card).

These provisions will provisionally commence 6 months after the Act receives Royal Assent.

Ai Group's position and recommendations

Ai Group has reservations about these provisions of the Bill. We are still undertaking consultation with industry regarding the practical implications of the Bill, given the very short timeframe since the Bill's introduction to Parliament. We do however acknowledge that the Bill does appear to take into account, and address, a number of issues that we had pre-emptively raised through engagement with the Government prior to its introduction, in order to reduce the potential administrative burden of such changes on employers.

The Bill's amendments relating to employee authorized deductions would obviously benefit third party organisations who charge employees fees for various services provided to them as individuals - for instance union membership fees or health insurance premiums. By allowing one authorization to cover deducted amounts that may be varied from time to time, the Bill would better facilitate the ability for third party organisations to increase their fees payable by persons employed by an employer and for whom a payroll deduction authorization under s.324 is required.

Many employers who have entered into written authorized deduction agreements with their employees are subject to various fees and costs associated with exceeding a set number of changes to their payroll practices that are administered by their payroll provider. If employers were to agree to an employee authorization that would include the ability for an employer to deduct varying amounts from an employee's pay, it is likely that the employer would face an increase in payroll fees.

In many instances it may simply not be possible for an employer to process frequent changes to the quantum of deductions.

Employers should not be able to be forced to increase the quantum of any such changes without their agreement. The Parliament should give careful consideration to the practical implications of the proposed changes and whether they may give rise to a situation in which an employer could be forced to process changes to the quantum of deductions frequently or at short notice. Such outcomes would be unworkable.

Schedule 6 – Coal mining long service leave scheme

Summary of the proposed amendments

The Bill proposes a number of changes to the Coal Mining Long Service Leave Scheme (**Coal LSL Scheme**) by:

- Including casual loading (and potentially other amounts) in the calculation of:
  - the levy payments made by an employer into the Coal Mining Industry (Long Service Leave) Fund (**Coal LSL Levy**); and
  - a casual employee's LSL entitlement.
- Introducing new methods of calculating a casual employee's average working hours per week over a quarter (period of 13 weeks) for the purposes of determining their LSL accrual rate, including in circumstances where the casual employee does not perform any work in a certain week.
- Introducing new requirements for Coal Mining Industry (LSL Funding) Corporation (**Coal LSL**) to consult with DEWR and approve a Coal LSL Levy return form to be published on the Federal Register of Legislation.

Analysis

It is understood that the policy intent behind these proposed amendments is to ensure that casual employees are treated '*no less favourably*' than permanent employees for the accrual and reporting of long service leave entitlements in the black coal mining industry.

Ai Group appreciates the force of arguments that entitlements of casual and permanent employees should be aligned. However, the proposed changes go well beyond, and are inconsistent with, this policy objective. Modest amendments should be made to the Bill so that it operates in a manner that is better aligned with the policy objective. We below address two specific concerns that warrant amendment.

1. Problems associated with the new obligation to calculate the levy and entitlements by reference to an employee's 'ordinary rate of pay'

The proposed amendment to the definition of '*eligible wages*' in the *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992* (Cth) and the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth) departs from the definition of '*base rate of pay*' (which applies to permanent employees). The amendments would require the calculation of entitlements

and the levy on an amount which includes any applicable casual loading. This will increase the cost of the scheme for employers that engage casuals in a manner that is not aligned to the entitlement of full-time employees. While we do not support this amendment, we acknowledge that this is the clear intent of the changes.

However, the amendments will potentially also add further additional costs through the introduction of a new requirement to calculate the levy and entitlement by reference to a new concept of '*ordinary rate of pay*', which will apply where the casual loading cannot be quantified from the relevant industrial instrument when calculating a casual employee's long service leave entitlement or the Coal LSL Levy.

The creation of a requirement to calculate an entitlement or levy by reference to an employee's '*ordinary rate of pay*' where a quantifiable casual loading is not discernible will have unjustifiable (and potentially unappreciated) consequences.

A quantifiable casual loading may not be discernible from an industrial instrument for various legitimate reasons. This is not an improper practice. However, the specific approach proposed in the Bill would unreasonably and unnecessarily deal with such a situation by utilising a reference to 'ordinary rate of pay' that would capture various other payments, including shift loadings, penalty loadings, monetary allowances, and any other separately identifiable amounts. These amounts should be excluded. In many instances, such amounts would include a premium that is payable as a consequence for the experience of some disutility of actually working at certain times or in certain conditions and ought not be included in a leave calculation. This would result in an unjustifiable additional cost to employers.

The Bill should be amended to exclude the calculation of such amounts.

Ai Group's recommendations in relation to the proposed reference to 'ordinary rate of pay'

Ai Group submits that where a quantifiable casual loading is not discernible from an industrial instrument, the reference to '*ordinary rate of pay*' should, if it is intended to encompass a casual loading, the Bill should specifically exclude any separately identifiable amounts apart from incentive-based payment, bonuses or the casual loading. Potentially appropriate wording for such a change is set out below.

***Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth)**

Before subsection 39AC(3)

Insert:

(2) If a casual employee takes a period of long service leave, the employer must pay the employee for the long service leave no less than an amount that is equal to:

(a) if an industrial instrument that covers the employee specifies that the employee is to be paid a casual loading and the casual loading can be quantified—the base rate of pay (including incentive-based payments, bonuses and the casual loading) that would have been payable to the employee during the period had the employee not taken the leave; or

(b) otherwise—the ordinary rate of pay (including incentive-based payments and bonuses or casual loading and excluding any monetary allowances, loadings, and other separately identifiable amounts) that would have been payable to the employee during the period had the employee not taken the leave.

***Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992* (Cth)**

Subsection 3B(3)

Repeal the subsection, substitute:

(3) If an eligible employee is a casual employee, the employee's eligible wages are:

(a) if an industrial instrument that covers the employee specifies that the employee is to be paid a casual loading and the casual loading can be quantified—the base rate of pay paid to the employee, including incentive-based payments, bonuses and the casual loading; or

(b) otherwise—the ordinary rate of pay paid to the employee, including incentive-based payments and bonuses or casual loading and excluding any monetary allowances, loadings, and other separately identifiable amounts.

In seeking to constructively suggest the above amendments, we are not calling for the inclusion of casual loading in the calculation of entitlements or the levy. The inclusion of the casual loading in the calculation of entitlements or the levy is not justifiable by reference to aligning the entitlement of casual employees to permanent employees who, of course, do not receive such amounts. Further, it must also be observed that the simplistic requirement to include the casual loading in the calculation of entitlement and/or the levy will result in a degree of 'double dipping'. In the *Metal Industry Casual Employment Case*, the quantum of the casual loading increased from 20% to 25% in the Metal Industry Award, with subsequent flow-on to other federal awards. The logic for doing this was, in part, the different long service leave entitlements of permanents and casuals.[2] The implementation of the proposed amendments simply overlooks this consideration.

2. Problems associated with the proposed definition of 'working hours'

The Bill proposes a new method of calculating the entitlement to a period of leave of a causal employees through the application of an average process taking into account the 'working hours' of a casual employee over a 13 week period. The Bill would, in effect, implement a mechanism that takes into account the fluctuating hours of a casual employee from week to week. We do not

[2] See paragraphs [171]-[174].

object to the implementation of an averaging mechanism but submit that the specific method proposed should be adjusted to better align entitlements of casual and permanent employees by confining the requirement to an averaging of the ordinary hours worked by a casual employee (thereby excluding overtime hours).

The Bill departs from the approach taken in relation to permanent employees by requiring that *all* hours worked, including overtime hours, are taken into account in the calculation of entitlements. This is not justifiable by refence to any policy intent to align the entitlements of casual and permanent employees. The following definition of "working hours" is used to calculate the leave entitlement of permanent employees under s.39AA of *Coal Mining Industry (Long Service Leave) Administration Act 1992 (emphasis added)*:

"working hours" means:

(a) if the employee is a full-time employee at all times during the week--35 hours; or

(b) if the employee is a part-time employee at any time during the week--the lesser of the following amounts (or either of them if they are equal):

(i) the total number of ordinary hours of work of the employee as a part-time employee for the week;

(ii) 35 hours;"

As can be seen from the above extract from the current legislation, the working hours of a part-time employee are expressly limited to the "ordinary hours of work". Although there is no such comparable reference to ordinary hours in the definition of working hours for full-time employees, this is because the current legislation reflects an assumption that full-time employees in the coal mining industry will work 35 ordinary hours a week and accordingly simply defines the weekly 'working hours' as 35. The above definition does not take overt-time hours into account in the calculation of leave entitlements.

In contrast to the above approach, the Bill would require, in effect, that *all* hours worked by a casual employee (including overtime hours) must potentially be taken into account in calculating their leave entitlement.

The Bill should be amended to provide for the calculation of an entitlement by reference to the lesser of the "ordinary hours" worked during the relevant period or 35. Overtime hours are not generally taken into account in the calculation of the leave entitlement under other legislation schemes dealing with long service leave. This approach would still permit fluctuating hours of work to be taken into account where an employer implements an arrangement of ordinary hours of work that involves an averaging of such hours over more than a week.

Additional improvements to the COAL LSL scheme should be implemented urgently

In addition to raising the above issues, we also note that the amendments only address discrete issues raised by KPMG's report into the operation of the Coal LSL Scheme, which is pointed to as justifying the change.

The issues which have been selected for attention that relate to casual employee entitlements are obviously beneficial to employees and no doubt supported by relevant unions. A number of other important issues of significant concern to industry where however also raised in KPMG's report but are not addressed in the Bill. The Government should adopt a balanced approach by urgently addressing issues of concern to industry regarding the operation of the Coal LSL scheme as quickly as possible. As a matter of fairness, it would be preferable for all matters to be addressed at the same time. Only selectively addressing the discrete issues dealt with in the Bill exacerbates the unfairness of other deficiencies in the scheme's operation that should be addressed as quickly as possible.

Conclusion

The Bill is not a proposed Act of Parliament seeking to introduce modest or technical changes. The Bill presents significant changes to Australia's workplace laws and should be carefully scrutinised. The Bill does not sufficiently engage with the impact on business or the existence of other regulatory frameworks.

Ai Group does not support the Bill as presently drafted. If the Bill is to be passed by Parliament, it should be subject to further amendment as we have outlined.

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, retail, social and community services and civil airlines.

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

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

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

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