

# A case for an extended unpaid carer leave entitlement?

## Productivity Commission

**ACCI Submission**

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## Introduction

1. ACCI welcomes the opportunity to respond to the ‘*A case for an extended unpaid carer leave entitlement?*’ position paper (**Position Paper**) released by the Productivity Commission (**Commission**) following its inquiry into the potential impact of amending the National Employment Standards (**NES**) to provide for a minimum statutory entitlement to extended unpaid carer leave.
2. Overall, ACCI broadly supports the Commission’s findings and recommendations for the following reasons.
  - Flexibility measures will always be a preferable solution to legislating leave entitlements for addressing the needs of carers because they can accommodate the needs of both employees and employers.
  - ACCI strongly supports efforts to increase employees’ awareness of existing entitlements and flexibility measures.
  - ACCI does not support the insertion of a new entitlement to extended unpaid leave in the NES.
3. This submission will respond to each finding, recommendation, and information request provided by the Position Paper consecutively.

## Draft finding 1 — An entitlement to extended unpaid leave for carers of older people should be designed to maximise the net benefits to the community

4. ACCI agrees with the Commission’s finding that, were an unpaid carer leave entitlement introduced, its design should be guided by evidence about the costs and benefits of its impact and the need to minimise potential undesirable consequences. These costs and benefits should be considered from the perspective of both employers and employees.
5. The design of any entitlement, were it considered necessary, should also be guided by the object of the *Fair Work Act 2009* (Cth) to “provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by”:<sup>1</sup>

ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards ...
6. The NES is intended to provide a “safety net” of “minimum terms and conditions”. Given that the entitlement would be inserted into the NES, its design should also be guided by this object, which should tend in favour of an entitlement that is more limited.

## Draft finding 2 — A provisional model of extended unpaid carer leave, aligned to existing standards

7. ACCI maintains its concerns about the utility of an entitlement to unpaid leave for carers of a single block of 3-12 months, given the understanding that the burden on carers usually involves regular (eg, weekly) responsibilities, for which reduced hours of work through flexibility measures seems more appropriate.

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<sup>1</sup> *Fair Work Act 2009* (Cth) s 3 (emphasis added).

Nevertheless, ACCI maintains that an entitlement to unpaid leave in multiple short blocks would potentially be even less useful and agrees with the Commission's finding that:<sup>2</sup>

Compared to an entitlement to extended leave, flexible work arrangements are more suited to allowing carers to fulfill episodic care needs, and there is scope to help carers make greater use of such arrangements ...

8. ACCI welcomes the Commission's finding that the entitlement should provide for a minimum duration of leave. ACCI agrees that this feature would, to some degree, assist employers with filling the vacancy that is subsequently created.
9. The other design features appear broadly acceptable, were an entitlement to be introduced, apart from two further concerns:
  - a. its application to regular casual employees; and
  - b. its application to employees of small businesses.
10. With respect to casual employees, while ACCI understands the Commission's desire to maintain the precedent set by unpaid parental leave,<sup>3</sup> casual employees are already able to freely reject offers of work. Accordingly, a right to extended unpaid leave is largely incongruent with the nature of casual employment, which would in effect simply be a right to return to work after a specified period.
11. It should also be noted that it is not "reasonable" for all regular casual employees "to expect ongoing engagement with their employer".<sup>4</sup> A regular casual employee is a casual employee who has been employed "on a regular and systematic basis".<sup>5</sup> This does not require any reasonable expectation of continuing employment on that basis, which is a separate and second limb for the protection of regular casual employees from unfair dismissal.<sup>6</sup> An extended entitlement to unpaid leave for regular casual employees can provide them with a "right to return to work after an absence"<sup>7</sup> even where the employer did not intend on offering the employee, and the employee had no reasonable expectation of, an ongoing engagement into the future.
12. With respect to small businesses, ACCI's view is that small businesses should be exempt from any new entitlement to extended unpaid leave. Small businesses are disproportionately impacted by vacancies because they have a lesser capacity to fill them. Unlike larger businesses, small businesses are less able to change the working arrangements or responsibilities to replace the employee who is on leave. Small businesses generally take longer to find new employees, are disproportionately impacted by the cost of hiring, and are less able to offer temporary employees alternative opportunities following the return of the employee on leave.
13. While the Commission is correct in finding that "[a]ll leave entitlements apply to small businesses",<sup>8</sup> there are other non-leave entitlements in the NES that do apply differently depending on the size of the business. Small business employers are exempt from the obligation in the NES to provide redundancy pay.<sup>9</sup> Small

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<sup>2</sup> Position Paper 31.

<sup>3</sup> Position Paper 34.

<sup>4</sup> Position Paper 33.

<sup>5</sup> *Fair Work Act 2009* (Cth) s 12.

<sup>6</sup> *Fair Work Act 2009* (Cth) s 384(2)(ii).

<sup>7</sup> Position Paper 33.

<sup>8</sup> Position Paper 34.

<sup>9</sup> *Fair Work Act 2009* (Cth) s 121(1)(b).

business employers are also exempt from the obligation in the NES to make offers of casual conversion.<sup>10</sup> Small businesses will also be treated differently under the new rules in the NES relating to requests for flexible working arrangements and extended unpaid parental leave.<sup>11</sup>

14. Further, the cumulative impact of recent legislative changes on small businesses remains unknown. The workplace relations system has undergone significant changes as a result of the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022*, *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022*, *Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Act 2023*, and particularly, the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*, all of which have a propensity to increase compliance costs that will disproportionately impact smaller businesses. The Federal Government will also introduce two further pieces of legislation into the Parliament this year which will seek to amend the *Fair Work Act 2009* and likely impact small businesses.<sup>12</sup> Until the cumulative impact of these changes is understood, a more cautious approach should be taken.

## Information request 1

15. The Commission has sought feedback on the design features of the provisional model of the entitlement. The Commission is encouraged to consider our foregoing submissions in relation to *Draft finding 2* as feedback on the provisional model.
16. Additionally, with respect to the Commission's particular request for feedback regarding "the potential costs and benefits of taking carer leave as a reduction in working hours over an extended period",<sup>13</sup> ACCI reiterates the greater utility of flexibility measures for reducing working hours over an extended period. Flexibility measures, such as the right to request flexible working arrangements (which will become significantly more favourable to employees following the commencement of Part 11 of Schedule 1 of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* on 6 June 2023), are more effective at minimising and balancing the costs and benefits of reductions in working hours than leave entitlements. This is because they require negotiation between employees and employers, rather than forcing one-size-fits-all changes in working arrangements on employers, and offer employers avenues for rejecting unreasonable requests.

## Draft finding 3 — Extended unpaid leave in the National Employment Standards is not the highest priority

17. ACCI welcomes the Commission's finding that inserting an extended unpaid leave entitlement into the NES is "not the highest priority" and notes the Commission's research that has shown that "[t]he number of carers who would benefit would be small and the net benefit to the community would be modest at best."<sup>14</sup>
18. ACCI agrees with the Commission's findings that "[t]he entitlement would impose costs on employers, which could be passed through to their employees in the form of lower wage growth and reduced employment

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<sup>10</sup> *Fair Work Act 2009* (Cth) s 66AA.

<sup>11</sup> *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) ss 65A(5), 76A(5).

<sup>12</sup> Tony Burke, 'Address — National Press Club' (Speech, National Press Club, 1 February 2023).

<sup>13</sup> Position Paper 37.

<sup>14</sup> Position Paper 48.

opportunities” and “[u]pcoming changes to the flexible working arrangements provisions of the *Fair Work Act 2009* are expected to make it easier for carers to negotiate flexible work, perhaps obviating the need for change”.<sup>15</sup>

19. ACCI encourages the Commission to maintain these positions both in light of its research and the unknown impact of the substantial changes to the flexible working arrangements provisions of the *Fair Work Act 2009* resulting from the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*, which is unlikely to be able to be properly assessed until at least a year after their commencement on 6 June 2023.
20. Although it remains speculative, in response to *Information request 2* below, ACCI will discuss its views relating to what the likely impact of these changes will be.

#### **Draft finding 4 — The case for an entitlement is similar for all carers**

21. ACCI does not disagree with the Commission’s finding that the “[t]he case to amend the National Employment Standards to include an entitlement to extended unpaid leave for carers of people with disability or illness is similar to the case for creating such an entitlement for carers of older people.”<sup>16</sup>
22. However, if a case were deemed to be made out for the insertion of an entitlement to extended unpaid leave for carers of older people, ACCI submits that the same case would need to be made out for the insertion of such an entitlement into the NES for other categories of carers. In other words, caution should be taken to not extrapolate findings made in relation to the needs of carers of older people in a broader context in relation to carers. An entitlement to unpaid leave for all carers must be deemed necessary across the board for “ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions”.<sup>17</sup>

#### **Draft finding 5 — Informal carers need timely and high-quality supports**

23. ACCI agrees with the Commission’s finding that “[c]ontinued progress with current and planned reforms to increase access to, and reduce waiting times for, [f]ormal care and respite care services for aged care recipients] is essential” for supporting informal carers.<sup>18</sup>

#### **Draft finding 6 — Working carers need access to flexible working arrangements**

24. ACCI agrees with the Commission’s finding that “[t]he changes to the flexible working arrangements provisions of the *Fair Work Act 2009* (due to commence in June 2023) are expected to make it easier for carers to negotiate working arrangements with their employers that will help them balance their work and care commitments”.<sup>19</sup> ACCI will discuss the likely impact of these changes below in response to *Information request 2*.

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<sup>15</sup> Position Paper 48.

<sup>16</sup> Position Paper 50.

<sup>17</sup> *Fair Work Act 2009* (Cth) s 3.

<sup>18</sup> Position Paper 56.

<sup>19</sup> Position Paper 58.

## Draft finding 7 — Evaluation of the effect on carers of legislative reforms to flexible working arrangements

25. As previously stated, ACCI agrees with the Commission’s finding that “[t]here would be merit in waiting to consider the effect on carers of the upcoming changes to the flexible working arrangements provisions of the *Fair Work Act 2009* prior to any decision on whether or not to introduce an entitlement to extended unpaid carer leave.”

## Draft recommendation 1 — Providing information about how to request flexible work to working carers

26. ACCI agrees with the Commission’s finding that “[t]he Australian Government should ensure that carers of older people are provided with tailored information about flexible working arrangements and how to request them” through regularly provided fact sheets.<sup>20</sup>
27. This tailored information should explain not only employees’ rights to request flexible working arrangements under the NES, but also the availability of Individual Flexibility Arrangements (IFAs). As submitted in response to the Issues Paper, IFAs are designed to address the very circumstances which the Commission has been asked to address in examining the need for an entitlement to unpaid carer’s leave. By addressing the vast underutilisation of IFAs, a more cooperative approach between employers and employees with caring responsibilities can be taken.
28. Additionally, increasing employees’ awareness of IFAs will mitigate the risk of award-noncompliance that may result from the informal agreements to vary working arrangements that likely occur daily and widely across the workforce. In many businesses, employers and employees will be freely making informal agreements to allow the employee to undertake caring responsibilities, such as by finishing work early one day and working later on another day, which risk breaches to modern awards. In an increasingly litigious workplace relations system, improving employees’ awareness and utilisation of IFAs would mitigate these risks by instead increasing the prevalence of variations to the effect of modern awards to legitimise these agreements that are presently informal.
29. ACCI supports the proposal to provide carers with the fact sheets when they contact the Carer Gateway. ACCI would not support any proposal to impose new obligations on employers to provide new employees with additional information sheets, as is currently required in relation to the Fair Work Information Statement,<sup>21</sup> and will be required in relation to the Fixed Term Contract Information Sheet.<sup>22</sup> These information sheets impose unnecessary obligations on employers and ACCI is unconvinced of their utility.

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<sup>20</sup> Position Paper 60.

<sup>21</sup> *Fair Work Act 2009* (Cth) s 125.

<sup>22</sup> *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) s 441.

## Draft recommendation 2 — Reviewing definitions of care relationships in the National Employment Standards

30. ACCI has some concerns about the Commission's recommendation that "the Australian Government should review the eligibility restrictions in the National Employment Standards which limit access to carer leave based on strictly defined relationships between the employee and the person they care for".<sup>23</sup> If the care relationships were drastically expanded, the usage of the entitlements may increase substantially, which may be seen to justify an increased quantum in leave days, which would impose further costs on businesses. Any expansions to permitted care relationships for the unpaid and paid carer's leave entitlements should be limited and justified by a proven need.
31. That said, ACCI will, of course, engage with any review of the permitted care relationships. In particular, were this recommendation adopted, ACCI considers that an analysis of the utility of a limited proposal of expanding the permitted care relationships to include siblings of parents would not be objectionable.

### Information request 2

32. With respect to the Commission's request for further information regarding the expected effects on carers of the upcoming changes to the flexible working arrangement provisions in the *Fair Work Act 2009*, ACCI submits that it is likely that there will be an increased usage in this NES entitlement by carers. Not only are the provisions now more favourable to employees, with employers bearing greater obligations to negotiate the request with the employee and the Fair Work Commission having the power to arbitrate disputes arising from refusals, but it is also probable that there will be an increased awareness of these provisions due to their greater prevalence in recent public discourse.
33. However, this is ultimately speculative. As with other flexibility measures available under the *Fair Work 2009*, for example, in the case of IFAs, there is always a possibility that a lack of awareness results in little change for the working arrangements of carers.
34. Accordingly, three priorities must be pursued.
  - a. First, sufficient time must be given to allow for the effects of the legislative changes to be properly assessed. At minimum, at least a year following the commencement of the changes should be allowed before examining their impact.
  - b. Second, the effect of the changes should be examined through empirical analysis.
  - c. Third, the interim focus should be on increasing employees' awareness of the flexibility provisions.

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<sup>23</sup> Position Paper 62.



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