MOTOR TRADES ASSOCIATION OF AUSTRALIA

MTAA Submission

Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023

Senate Education and Employment Legislation Committee

April 2023

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MOTOR TRADERS' ASSOCIATION OF NSW MTA

MTA QUEENSLAND

MTA WA Motor Trade Association of WA Automotive Institute of Technology

MTA MOTOR TRADE ASSOCIATION

ABOUT MTAA

The Motor Trades Association of Australia (MTAA) is Australia's peak national automotive association. MTAA's membership includes the Motor Traders' Association of New South Wales, the Victorian and Tasmanian Automobile Chamber of Commerce, the Motor Trades Association of the ACT, the Motor Trade Association of South Australia and Northern Territory, the Motor Trade Association of Western Australia, and the Motor Trades Association of Queensland.

MTAA represents new and used vehicle dealers (passenger, truck, commercial, motorcycles, recreational and farm machinery), repairers (mechanical, electrical, body and repair specialists, i.e. radiators and engines), vehicle servicing (service stations, vehicle washing, rental, windscreens), parts and component wholesale/retail and distribution and aftermarket manufacture (i.e. specialist vehicle, parts or component modification and/or manufacture), tyre dealers and automotive dismantlers and recyclers.

The automotive industry is a vital contributor to Australia's economy, employing approximately 385,000 people across 13 sectors and 52 trades, and contributing 2.1% of Australia's Gross Domestic Product (GDP). The automotive industry is also one of the largest employers of apprentices and trainees nationally, and the majority of automotive businesses (96%) are small and family-owned enterprises.

As the national-level body, MTAA represents the unified voice of Australia's automotive industry, identifying and monitoring issues affecting the automotive sector, and informing and advising Government on relevant industry impacts, trends, and proactively participating in the development of sound public policy on issues impacting the retail motor trades, small business and consumers.

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INTRODUCTION

1. This submission is filed on behalf of the MTAA to help inform the Senate Education and Employment Legislation Committee (the Committee) on the *Fair Work Legislation Amendment (Protecting Worker Entitlement) Bill 2023* (the Bill). In particular, MTAA would like to take the opportunity to highlight to the Committee aspects of the Bill that are of particular significance to its membership (and its small business members in particular).

2. In assessing the Bill, MTAA notes that to be effective any legislative response must be practical, objective and able to be implemented across a diverse range of workplaces, including those of small businesses. Consistent with the objectives of the *Fair Work Act 2009* (FW Act), it must also be fair – and provide a balanced framework for cooperative and productive workplace relations[1]. In this context, MTAA notes that in their current form, the amendments proposed by the Bill with regard to unpaid parental leave, do not meet this test – and in practice, will lead to outcomes that are both impractical and unfair.

3. Given MTAA's primary concerns with the Bill are contained to the proposed changes to unpaid parental leave, its submission to the Committee is limited to the changes proposed in Schedule 2 of the Bill. This should not however, of itself, be viewed as an implicit endorsement of the remainder of the Bill.

UNPAID PARENTAL LEAVE (SCHEDULE 2)

4. MTAA strongly supports the principle that the unpaid parental leave entitlement should assist employees in managing their work and care responsibilities. However, the needs of employees must necessarily be balanced with the operational requirements of the business for which they work. As outlined above, this means that in addition to ensuring consistency with the recent amendments to the *Paid Parental Leave Act 2010*, the amendments proposed by the Bill must also necessarily be consistent with the objectives of the FW Act – including the principles of fairness, flexibility (for businesses), certainty and stability for employers and their employees.

5. MTAA notes that in addition to recognising these principles, the High Court of Australia also provided helpful detail on the objective of fairness, finding that the stated objects of the Fair Work Act are intended to provide:

> *"… fairness, flexibility, certainty and stability for employers and their employees. "Fairness" necessarily has a number of aspects: fairness to employees, fairness between employees, fairness to employers, fairness between employers, and fairness between employees and employers."* [2]

6. MTAA submits that the amendments proposed in the Bill, in its current form, fail to meet these key principles and objectives. In particular, the proposal to more than triple the current flexible unpaid parental leave (FUPL) entitlement has exposed (and compounded) inherent flaws in the manner in which the FUPL entitlement is currently expressed, both in terms of quantum and notification requirements. Accordingly, MTAA has made 4 recommendations to address its

[1] *Fair Work Act 2009*, section 3.

[2] *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union Known as the Australian Manufacturing Workers Union (AMWU)* 271 CLR 495 at [14]

concerns, to improve fairness and certainty for employers and employees and help ameliorate the 'administrative nightmare' that would otherwise arise for employers (and small businesses in particular) in trying to maintain productive businesses where employees actively utilise FUPL. MTAA's specific concerns with FUPL may be summarised as follows:

- the disproportionate adverse impact on smaller businesses;
- confusion over the quantum of the entitlement for part-time and casual employees;
- insufficient detail in employee notification requirements for flexible unpaid parental leave; and
- the lack of certainty over employee notice period requirements.

Disproportionate adverse impact on smaller businesses

7. Whilst it may be considered trite, small and medium-sized enterprises are not 'little big businesses'. They do not have the same resources as public sector and large private sector employers to accommodate an unfettered employee right to FUPL [or for that matter, to administer the newly amended paid parental leave scheme]. In this context, the MTAA notes that whilst the FW Act itself acknowledges the special circumstances of small and medium-sized businesses[3], this is not reflected in either the existing FUPL entitlement or the amendments proposed in the Bill.

8. Put simply, the proposed amendments to FUPL do not give consideration to the disproportionate adverse impact on business operations, that an employee taking FUPL has, the smaller the size of the business. Self-evidently, it is far more possible to accommodate an employee absence on FUPL when that employee is 1 of 2000 employees (i.e. 0.05% of the workforce), than when they are 1 of 2 employees (i.e. 50% of the workforce). In the case of the latter, it can render the business inoperable. Attempting to fill FUPL absences that may take the form of 100 intermittent days over a period of 24-months is something qualitatively different to filling a single continuous absence. This is particularly the case in the automotive industry that is already subject to acute skill shortages – meaning the ability to find replacement labour to fill such potentially ad hoc absences may simply not be possible.

9. Accordingly, MTAA recommends that the Bill be amended to insert a new provision enabling a small and medium-sized enterprise to refuse an employee's notice to take FUPL on reasonable business grounds. In addition to being consistent with the objectives of the FW Act, it would promote fairness – including between employers and for other employees, by recognising the disproportionate impact an unfettered right to FUPL will have on smaller enterprises.

10. MTAA suggests that the provision should utilise the same dispute resolution process as provided from 6 June 2023 under sections 76B and 76C of the FW Act, introduced under the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (the SJBP Act), providing the employee with the ability to test the reasonableness of the refusal through the Fair Work Commission.

11. MTAA further notes that this would have the additional benefit of aligning with the flexible working arrangement changes also introduced by the SJBP Act, which mirror the aforementioned dispute resolution process from 6 June 2023, at sections 65B and 65C of the FW Act.

[3] *Fair Work Act 2009*, sub-section 3(g)

Recommendation 1:

Provide small and medium-sized business enterprises a right to refuse an employee's flexible unpaid parental leave notification on reasonable business grounds.

Confusion over quantum

12. The architecture of the current flexible unpaid parental leave (section 72A) appears to proceed on the basis that the existing entitlement of 30 days equates to (and is interchangeable with) 6 weeks. This is clearly evidenced in the Explanatory Memorandum to the *Paid Parental Leave Amendment (Flexibility Measures) Bill 2020*, by its explanation of how the then current PPL scheme would change – including that *"… the combination of the PPL period and the days taken within the flexible PPL period will not be able to exceed a total of 18 weeks or 90 days..."* [4]

13. This is currently reflected in the definition of *"notional flexible period"* at sub-section 72A(7) of the FW Act, which for the purposes of calculating an employee's flexible unpaid leave if taken in a single continuous period, requires it to be assumed that *"the employee ordinarily works each day that is not a Saturday or a Sunday…"*. That is, the notional flexible period is calculated on the basis of a 5-day week (Monday to Friday), rather than on the actual number of days per week ordinarily worked by an employee. This results in an entitlement of 100 days of FUPL equating to a notional flexible period of 20 weeks.

14. This interchangeability is also recognised in the Unpaid Parental Leave Fact Sheet published on 29 March 2023 by the Department of Employment and Workplace Relations (DEWR). The fact sheet provides guidance on the Bill and also expresses the entitlement in weeks – stating that the proposed changes would:

> *"Increase flexibility for working parents by allowing them to take up to 20 weeks of their 12-month unpaid parental leave entitlement flexibly (up from 6 weeks)."* [5]

15. Whilst this appears to be the clear legislative intention, it is not the effect of either the existing entitlement, or the proposed Bill as currently worded. That is, the proposed increase the current FUPL entitlement from 30 to 100 days must be read in conjunction with the current wording of sub-section 72A(2) (and as effectively mirrored in the proposed new sub-section 72A(2B)) which states that:

> "…*Flexible unpaid parental leave is available in full to pregnant part-time and pregnant casual employees…"*

    This means that in practice, the interchangeability of 20 weeks / 100 days (or for that matter, the current entitlement of 6 weeks / 30 days) only applies when the employee ordinarily works 5 days per week.

16. Therefore, as currently drafted, the number of weeks FUPL an employee is entitled to take, increases inversely with the number of days the employee ordinarily works:

[4] Explanatory Memorandum to the *Paid Parental Leave Amendment (Flexibility Measures) Bill 2020*, page 2.
[5] https://www.dewr.gov.au/protecting-worker-entitlements/resources/unpaid-parental-leave, page 1, viewed on 11 April 2023

- 5 days per week: 100 days = 20 weeks
- 4 days per week: 100 days = 25 weeks
- 3 days per week: 100 days = 33 1/3 weeks
- 2 days per week: 100 days = 50 weeks
- 1 day per week: 100 days = 100 weeks

17. This anomaly is further exacerbated if an employee also elects to take a period of continuous unpaid parental leave under section 71, as the proposed sub-section 71(6) uses the aforementioned definition of 'notional flexible leave' to derive the entitlement. That is, 100 days FUPL equates to a notional flexible period of 20 weeks regardless of how many days per week the employee ordinarily works. If we subtract this figure from 12 months (i.e. 52 weeks), it results in a common continuous period entitlement of 32 weeks.

18. This means that nominally, combining this continuous period entitlement with the maximum FUPL, employees would be entitled to the following maximum amounts of unpaid parental leave:

    - 5 days per week: 52 weeks
    - 4 days per week: 57 weeks
    - 3 days per week: 65 1/3 weeks
    - 2 days per week: 82 weeks
    - 1 day per week: 132 weeks

    That is, the only employees who would not be over the maximum total statutory entitlement of 12 months (i.e. 52 weeks) are those that ordinarily work 5 days per week.

19. There would appear to be two remedies to this problem. The first, and most logical, is to reframe the maximum FUPL entitlement as 20 weeks (rather than 100 days), to ensure that the entitlement is fair between employees (i.e. proportionate to the number of working days ordinarily worked) and is reflective of what appears to have been the original legislative intent. This approach would result in the following maximum FUPL entitlements:

    - 5 days per week: 20 weeks = 100 working days
    - 4 days per week: 20 weeks = 80 working days
    - 3 days per week: 20 weeks = 60 working days
    - 2 days per week: 20 weeks = 40 working days
    - 1 day per week: 20 weeks = 20 working days

20. Making consequential changes to sub-section 72A(2), the proposed sub-sections 72A(2B) and 72A(7), this would also resolve the current maximum amount of unpaid parental leave issue (i.e. continuous leave plus FUPL):

    - 5 days per week: 32 weeks + 20 weeks = 52 weeks = 260 working days
    - 4 days per week: 32 weeks + 20 weeks = 52 weeks = 208 working days
    - 3 days per week: 32 weeks + 20 weeks = 52 weeks = 156 working days
    - 2 days per week: 32 weeks + 20 weeks = 52 weeks = 104 working days
    - 1 day per week: 32 weeks + 20 weeks = 52 weeks = 52 working days

21. The alternative would be to retain the notional 100 days FUPL (ignoring that it is not available to all employees), amend the notional flexible period definition, and then provide tables/calculator to enable both employers and employees to determine exactly how many working days they are

entitled to (i.e. period of continuous unpaid parental leave and FUPL), based upon the number of days ordinarily worked per week. This will be necessary to ensure that employees do not end up going over the statutory maximum period of 12 months, which equates to the same number of working days outlined above.

22. MTAA notes that in regard to the alternative option, in addition to being unnecessarily complex, there is something inherently unfair and perverse in providing greater flexibility to employees that already have it. That is, under such a model an employee who works 5 days per week is entitled to a maximum of 20 weeks FUPL, whilst an employee who only works 1 or 2 days per week in entitled to a maximum of 52 and 50 weeks FUPL respectively.

Recommendation 2:

Express the entitlement to flexible unpaid parental leave in weeks (i.e. 20 weeks)

Insufficient detail in employee notification

23. As stated earlier, whilst MTAA strongly supports the principle that the unpaid parental leave entitlement should assist employees in managing their work and care responsibilities, the needs of the employee must necessarily be balanced with the operational requirements of the business for which they work. This is reflected in the objects of the FW Act, which aims to provide a balanced framework for cooperative and productive workplace relations, through laws that are fair and provide certainty and stability for employers and their employees.

24. MTAA notes that with the proposed amendments, the FUPL entitlement will more than triple – and will increasingly become a common (if not primary) means by which employees choose to take unpaid parental leave in future. It is therefore critically important that it works in practice.

25. Consistent with such a substantive change, and the broader objectives of the FW Act, there is a need for the notification process for FUPL to provide more certainty and specificity than the current arrangement where the employee simply notifies the employer of the total number of FUPL days intended to be taken.

26. Accordingly, the Bill should be amended to introduce a requirement on the employee to consult with their employer on both the intended number of FUPL days, and the likely manner (e.g. pattern) those days will be taken, at least 10 weeks prior to first commencing FUPL. Whilst such a cooperative approach would not require agreement to be reached, it would require the employee to consult in good faith to enable the employer to meaningfully plan for their absence. For example, knowing whether an employee intends to take their FUPL entitlement 1 day per week over an extended period, rather than on a 'one week on, one week off' basis (alternating with their partner) as early as possible makes a material difference in an employer's ability to cover the absence.

27. The introduction of a good faith consultation requirement also helps to ensure that the employee understands the operational requirements of the business, enabling them to factor this into their FUPL decision making process. For example, following consultation an employee might choose to take their FUPL on particular days of the week, or delay the taking of a particular period of FUPL to accommodate a short-term operational need for the business, as the best way to manage their work and care responsibilities.

28. This consultation process would also ensure that in the case of the proposed amendment for smaller businesses (Recommendation 1), that the ability to refuse on reasonable business grounds would be exercised less often – and when exercised, would allow sufficient time for an employee who wished to contest the decision, to have the matter resolved through application to the Fair Work Commission.

Recommendation 3:

Introduce a good faith consultation requirement over the intended pattern of flexible unpaid parental leave, in addition to the total number of days to be taken.

Lack of certainty over employee notice period requirements

29. MTAA notes that the proposed notice period requirements relating to FUPL (i.e. sub-sections 74(2) and 74(4B)) both enable an employee to fail to comply with the notice period if it is "not practicable", with notice being able to be delayed until after the leave has actually commenced. Indeed, under the proposed amendments, a note would be added at the end of 74(4B) that states as follows:

> *"Whether or not it is practicable for the employee to give notice at least 4 weeks before that day will depend on the employee's personal and family circumstances. For example, it may not be practicable for the employee to give notice at least 4 weeks before that day where the employee experiences a health issue, a pregnancy complication of an unexpected change in the employee's child care arrangements."*

30. MTAA submits that for the reasons outlined in the previous section, it is manifestly inadequate to have FUPL notifications complied with only where 'practicable'. This inadequacy is underscored by the above note, which provides no certainty whatsoever for an employer (or employee) as to the range of circumstances that might arise that would negate the necessity to comply with the notice period requirements.

31. MTAA submits that in order for the proposed FUPL arrangements to work effectively in practice, the minimum notice periods must be complied with unless there are exceptional circumstances. Non-compliance must be the exception, not the rule – with the onus on the employee to demonstrate any such exceptional circumstances. The above legislative note should be amended accordingly.

Recommendation 4:

Provide greater certainty by requiring minimum notice periods to be complied with unless there are exceptional circumstances (with the onus on the employee to demonstrate)