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Carer Leave Inquiry

Productivity Commission

ACCI Submission

8 September 2022

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Chamber of Commerce
and Industry

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CONTENTS

Contents 1

Introduction 3

Overview 3

Proposal for of a new entitlement 3

Flexibility in the workplace relations system 4

Individual Flexibility Arrangements (IFAs) 5

Summary 7

Carer employment entitlements (Part 2) 8

When do employees use paid or unpaid leave or request flexible working arrangements to care for an older person? In what circumstances are the provisions inadequate? 9

Do the eligibility requirements for the paid and unpaid leave entitlements allow them to be used by informal carers of older Australians? If not, why? 10

Are there barriers that limit informal carers of older people from using the entitlements? 11

Are there specific Awards that provide entitlements to informal carers that are beyond those provided in the NES? 11

What is the rate of uptake of the existing leave entitlements by employees who are informal carers? 11

How often are leave or requests for flexible work arrangements to care for an older person denied by employers? How does this vary in different industries? 12

To what extent do employers currently provide leave or other entitlements above the NES standards to employees with caring responsibilities for older people? 12

Do employers have other policies to support employees who are informal carers? Are there examples of best practice? 13

Effects of an entitlement to extended unpaid carer leave (Part 3) 14

What data (other than from ABS, Carers Australia and HILDA) could we use to estimate: 14

• how many employees would take extended unpaid carer leave if they were entitled to do so, and how much more care they might provide 14

• how many of these employees would have left their job to provide care in the absence of the entitlement 14

• how many of these employees would have continued working while providing some informal care? 14

We seek your feedback on how the proposed entitlement might affect employer costs, behaviour and hiring practices and on the extent to which an entitlement to unpaid carer leave might dissuade some businesses from employing people, especially those expected to be most likely to use the entitlement. 14

How large are these effects likely to be in your industry? 14

Would there be differences in costs based on the size of businesses? 15

How targeted are these effects likely to be, and at which types of prospective employees? 15

Is there evidence from other employment entitlements (for example, unpaid parental leave) that we could draw on to infer these effects? 16
We seek your views on how we ought to assess the redistributive effects of the proposed entitlement to unpaid carers' leave and other policies that might support carers. 16
How do women and men experience different pressures to provide informal care? 16
How should we think about, and measure, the value of an entitlement to unpaid carer leave? Does it vary across employees? 16
How has the 'better off overall' test been applied when evaluating an entitlement that might not benefit all employees? 16
Have employers or employees sought to introduce an entitlement to extended unpaid carer leave into an enterprise agreement but found barriers to them doing so? If so, what were these barriers? 18
We seek your views on how an entitlement to extended unpaid carer leave ought to be designed. 18
Who should be eligible and why? What criteria should an employee need to meet and why? For example, tenure, relationship to the care recipient, and/or the nature of care required. 18
Should access to the proposed entitlement be once-off or occur more often? 19
How long should an entitlement to unpaid leave to care for an older person be? Why? 19
What should the process be for revising the return date, if any? 19
How should the entitlement be provided (for example in single block or in multiple) and why? What would likely be the consequences? 19
Should all employers be required to provide the entitlement? Why or why not? 21
What costs, perverse incentives or unintended consequences should the design of the entitlement aim to minimise or avoid? How might this be achieved? 21
What would be required practically to insert the proposed entitlement in the NES? 21

Extensions to carers other than carers of older people (Part 5) **22**
We seek your views on how we should consider whether reforms to supports for carers of older people should apply to other carers too. 22
In which ways does informal care of older people differ from the care that other people might require? 22
Are there reasons to have different policies for informal carers of older people than for informal carers of other types of people? 22

Conclusion **23**

ABOUT ACCI **24**

INTRODUCTION

Overview

1. ACCI welcomes the opportunity provided by the Productivity Commission ('**PC**') to respond to the Carer Leave Issues Paper.

2. Given ACCI's primary interest and expertise relevant to this inquiry are in workplace relations, this submission will address matters in the following sections of the Issues Paper:

   a. 'Carer employment entitlements' ('**Part 2'**);

   b. 'Effects of an entitlement to extended unpaid carer leave' ('**Part 3**'); and

   c. 'Extensions to carers other than carers of older people' ('**Part 5**').

3. The following sections of the Issues Paper are not directly addressed:

   a. 'Role of informal carers of older people' ('**Part 1**'); and

   b. 'Alternative policies to support informal carers of older people' ('**Part 4**').

4. However, the arguments raised in this submission will be germane to the importance of exploring alternative policies under Part 4. The PC should primarily focus on further developing ideas under Part 4 rather than recommending a new entitlement in the National Employment Standards ('**NES**') for providing informal care to older people, as discussed below.

Proposal for of a new entitlement

5. Commissioner Briggs made the following recommendation in the *Royal Commission into Aged Care Quality and Safety* ('**Royal Commission**'):

> By 30 September 2022, the Australian Government should examine the potential impact of amending the National Employment Standards under Part 2-2 of the *Fair Work Act 2009* (Cth) to provide for an additional entitlement to unpaid carer's leave.[1]

6. ACCI commends the Royal Commission for its work on this significant issue facing Australian society and its proposals for redress. However, our network respectfully disagrees with this recommendation.

7. The recommendation was made following the advice to the Royal Commission by Professor Andrew Stewart of the University of Adelaide, whose suggestions were that:

[1] *Royal Commission into Aged Care Quality and Safety* (Final Report March 2021) vol 3A, 211.

> … one option may be to amend the Fair Work Act to extend an entitlement to leave to care for an older family member, on the same basis that employees are currently entitled to leave to care for a newborn or newly adopted child.[2]

8. Such an amendment is an option, but it is by no means the only or preferable option if the objective is to enable more Australians to undertake informal caring responsibilities, while minimising adverse impacts on businesses.

9. Where employment obligations are not supporting other important priorities, the appropriate solution is not the expansion or introduction of new employee entitlements, but instead the promotion of flexibility in working arrangements and better empowering employers and employees to work together to better balance work and non-work commitments. Agreed flexibility to accommodate caring is a powerful tool which needs to be considered as it offers far more bespoke, personally targeted and relevant flexibility than any general regulation or rule.

10. Employment entitlements come at a cost. For businesses, particularly smaller businesses, that cost can be significant, depending on their size and the nature of the entitlement, as will be explored in addressing Part 3. Entitlements can be disruptive, expensive and unpredictable. This is also a consideration that needs to be balanced against the purpose or problem being addressed, and the solution for employees and employers does not always lie in additional entitlements or employment rules.

11. The question posed by the Royal Commission and the Issues Paper is whether a *new* entitlement, in addition to what is already contained in the NES, is necessary. In ACCI's view:

    a. the existing entitlements are adequate for undertaking short-term informal caring responsibilities;

    b. a new entitlement will be financially and administratively burdensome for businesses, and the negative impacts on businesses would exceed any societal benefits; and

    c. improving flexibility in the workplace relations system and empowering employers and employees to agree to flexibilities is a more effective solution for enabling employees to undertake longer-term informal caring responsibilities.

Flexibility in the workplace relations system

12. When contemplating alternative policies to support informal carers of older people under Part 4, improving flexibility in the workplace relations system should be given due consideration.

13. An object of the FW Act is to 'provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:'

[2] See ibid.

> (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements …[3]

14. Where there is a deficiency in the system, such as any widespread or general inability to undertake informal caring responsibilities for family members, the starting point for any proposed changes to legislation should be improvements to flexibility, which is the way the system is designed to operate.

15. Enhancing the flexibility of the workplace relations system resolves the tension between employees' work responsibilities and other obligations, without imposing unnecessary costs on employers. It is conducive to more harmonious workplaces and mitigates risks of dis-employment effects for prospective employees. Flexibility is also the best mechanism for accommodating diverse and unexpected caring demands placed on employees.

16. If some employees and employers are having difficulties in negotiating working arrangements to accommodate informal caring responsibilities, the starting point should focus on addressing inflexibility, not presuming a shortage of entitlements, regulatory gap or inadequacy.

17. There are some components of the FW Act which notionally aim at promoting flexibility, however if this problem persists, then they are evidently inadequate. These components include the ability to request flexible working arrangements (s 65),[4] mandatory flexibility terms in modern awards and mandatory flexibility terms in enterprise agreements.[5] Those flexibility terms in industrial instruments allow employee and employers to make Individual Flexibility Arrangements (**IFA**s). If IFAs continue to be insufficiently used, then consideration should be given as to how to improve their accessibility and utility for employees and employers, without watering down rights.

Individual Flexibility Arrangements (IFAs)

18. IFAs are a mechanism which the PC should be aware of and consider policies to improve their utilisation to better support the undertaking of informal caring responsibilities.

19. Section 144 of the FW Act provides that modern awards must include a term that enables the agreement of IFAs. Section 202 stipulates the same requirement for enterprise agreements. An IFA is an arrangement that varies the effect of the award or the agreement 'in order to meet the genuine needs of the employee and employer'.[6] An IFA is taken to be a term of the award or agreement once assented to.

[3] FW Act s 3.
[4] FW Act s 65.
[5] Ibid ss 144 and 202.
[6] See ibid.

20. Under s 653, the FWC is required to conduct research into the use of IFAs and report to the Minister its findings every three years. The most recent research conducted by the FWC,[7] which covered the period between 2018 and 2021, made the following findings, partly based on a survey of 78 key stakeholders across the Australian industrial relations system:

    a. the utilisation of IFAs is extremely low, with the majority of respondents having been involved in the making of fewer than 10 IFAs across the three year period (64.9%);[8]

    b. 43% of IFAs are initiated by the employee, 27% by the employer and 22% by both;[9]

    c. 37% of respondents' experience with IFAs related to their use under enterprise agreements, 26% in relation to their use under awards and 37% in relation to both;[10]

    d. employee-initiated IFAs most significantly includes flexibility relating to a change in start times (68%), a change in finish times (68%), a reduction in the number of days worked (61%), a change in days rostered to work (55%), reduced hours (48%), change from full-time to part-time (45%), and a change in location, such as working from home (42%);[11]

    e. the most common reasons for initiating IFAs were to address issues with overtime and penalties that result from the change (e.g., allowing the employee to work more hours on weekends, or forgo meal breaks to finish early), enabling shift-swapping, condensing the work week, and allowing the employee to work a particular pattern;

    f. the most common reasons for not using IFAs included the transience of the employees, the degree of administration required, other flexibility options such as contracts, employer policies that provide adequate flexibility, the short timeframe to terminate an IFA that does not provide employers with adequate certainty, a lack of knowledge, a lack of trust in the workplace, 'philosophical opposition to IFAs', and a desire by employees to not distinguish their working arrangements from those of others;[12]

    g. the most common reasons for refusing IFAs were concerns of fatigue that may arise if too many hours are condensed into a shift, financial concerns if the altered hours give rise to penalty rates or overtime, impact on customer service, and the additional payroll administration required;[13] and

    h. women were more likely to use IFAs than men.[14]

[7] General Manager's report into individual flexibility arrangements under section 653 of the Fair Work Act 2009 (2018-2021), <https://parlinfo.aph.gov.au/parlInfo/download/publications/tabledpapers/7cf7334d-80c5-4d64-939e-e33001934926/upload_pdf/AGD%20Tabling%20Item%20-%20FWC%20General%20Manager%20s653%20reports-IFAs.pdf;fileType=application%2Fpdf#search=%22Fair%20Work%20Commission%20General%20Manager%22>.
[8] General Manager's report into individual flexibility arrangements under section 653 of the Fair Work Act 2009 (2018-2021), 10.
[9] Ibid 11.
[10] Ibid 12.
[11] Ibid 13.
[12] Ibid 14.
[13] Ibid 15.
[14] Ibid 15.

21. These findings should be considered by the PC when examining, as we submit is necessary, alternative measures to promote flexibility in the workplace relations system to support caring, rather than pursuing the introduction of a new entitlement. IFAs are evidently not working in practice. The very purpose of IFAs is to address circumstances such as those targeted by this inquiry. Addressing the vast underutilisation of IFAs would be a potentially more effective and fair policy to better enable the undertaking of caring responsibilities.

22. Finally, as will be discussed below with respect to the existing leave entitlements, a significant issue relating to the utilisation of IFAs is simply the lack of awareness about their existence. Efforts should be made to familiarise employees and employers with these existing tools for obtaining greater flexibility in their working arrangements.

Summary

23. This inquiry should proceed based on an examination of:

    a. what economic or administrative circumstances may be impeding the use of existing provisions that should enable employers and employees to agree on flexible working arrangements to accommodate informal caring responsibilities;

    b. how those provisions can be improved;

    c. what educational and promotional efforts can be undertaken to improve employees' awareness of existing regimes; and

    d. what new provisions and regimes may be introduced into the FW Act to improve flexibility.

24. These important considerations should be fully canvassed, and options considered for recommendations to Government, before any consideration of a new entitlement. Flexibility, rather than an extension of regulation, is still the preferred option under the Fair Work Act and its objects set by Parliament, which should be germane to your considerations.

25. A new entitlement should be a last resort, only pursued where necessary for 'ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions'.[15]

[15] FW Act s 3(b),

CARER EMPLOYMENT ENTITLEMENTS (PART 2)

26. Before addressing the questions raised in Part 2 of the Issues Paper, it is worth considering the extent to which the existing employment entitlements already support employees undertaking caring responsibilities.

27. As noted in Part 2 of the Issues Paper, the two relevant leave entitlements are paid personal/carer's leave and unpaid carer's leave, contained in subdivisions A and B of Division 7 in the NES. The two entitlements can be examined together because they rely on the same wording, with only slight differences.

28. The personal/carer's leave entitlement enables all full and part time employees to access up to 10 days of paid leave per year to 'provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support' because of a 'personal illness', 'personal injury' or 'unexpected emergency'.[16]

29. The unpaid carer's leave entitlement similarly entitles all employees to 2 days of unpaid leave for each occasion 'when a member of the employee's immediate family, or a member of the employee's household, requires care or support' because of a 'personal illness', 'personal injury' or 'unexpected emergency'.[17]

30. The 'immediate family' of an employee includes 'a spouse, de facto partner, child, parent, grandparent, grandchild or sibling' as well as 'a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee'.

31. The term 'care' has been interpreted to refer 'serious attention, protection, a thing to be done, feel concern or interest, to provide for'.[18] The term 'support' has been interpreted to refer to 'carry part of the weight of, keep from falling or sinking or failing, give help or countenance to, to back up, assist by one's presence, assistance, encouragement, approval'.[19] Thus, the categories of actions for which leave is permitted are quite broad.

32. An 'unexpected emergency' has also been interpreted broadly. In *Wilkie v National Storage Operations Pty Ltd*,[20] Whelan J found that picking up a primary school child from school when alternative arrangements fell through constituted an 'unexpected emergency'. In *Trustee for The MTGI Trust v Johnston*,[21] the Full Court refused an application for review of a decision of the Fair Work Commission that needing to look after young children while a spouse was hospitalised constituted an 'unexpected emergency'.

[16] FW Act s 97.
[17] Ibid s 102.
[18] *Garuccio v WP Crowhurst Pty Ltd (t/as Solver Paints)* [2010] FWA 9595 at [109].
[19] See ibid.
[20] [2013] FCCA 1056.
[21] [2016] FCAFC 14.

33. The FW Act does not define 'illness' or 'injury' so they will take their ordinary meaning, which will also have comparable breadth. For example, in *Ms Paula Tracy v Ironbark Software Pty Ltd*,[22] Hunt C concluded that the inability to work of an employee who took leave due to stress (and obtained a medical certificate) 'would have been the same if she had been suffering from gastroenteritis, influenza, or any other ailment preventing her from performing work'.[23]

34. In summary, the existing entitlements are quite extensive and can be used to meet a wide range of informal caring responsibilities. Employees are eligible to use them in a range of circumstances that can substantially vary based on the nature of the care required, the relationship to the person who requires care and the event or incident which necessitates it.

When do employees use paid or unpaid leave or request flexible working arrangements to care for an older person? In what circumstances are the provisions inadequate?

35. As outlined above, in the vast majority of circumstances, the existing leave entitlements are adequate for undertaking caring responsibilities of older people, when they arise unexpectedly or sporadically.

36. There remains an open question as to whether any amendments to the existing provisions should be considered, which should certainly precede any contemplation of introducing a new entitlement. If that question is being seriously asked, it should potentially be posed separately from an Issues Paper and inquiry that is primarily targeted at examining whether a new entitlement should be inserted into the NES.

37. ACCI would not necessarily support, but would understand consultation by the government on the adequacy of these existing provisions for the purposes of caring for older people, on areas such as whether the required care or support should be extended to other circumstances associated with elderliness that may not necessarily constitute an 'injury', 'illness' or 'emergency'; and whether the definition of 'immediate family' should extended to include other relations, such as the siblings of parents and grandparents. This would be a consideration of amendments or adjustments to the existing framework not a new entitlement.

38. However, ACCI's preliminary view is that restricting the required care or support to circumstances of an 'illness', 'injury' or 'emergency' is sufficient for dealing with caring responsibilities for which the leave entitlement should be used. Where the nature of the care or support required arises instead due to something that is not an 'emergency' and is more predictable, regular or scheduled, then greater flexibility in working arrangements is the solution that should be preferred and pursued, as will be discussed below. Again we recall that s 65 already provides rights to seek changes in working time, locations etc to support caring.

39. With respect to the definition of 'immediate family', the existing definition is also likely satisfactory as it strikes the right balance between not excessively expanding the scope of the entitlement while still allowing reasonable uses.

[22] [2020] FWC 6601.
[23] Ibid at [131].

40. Overall, no amendments should be made to these provisions without evidence of inadequacy or without extensive consultation. ACCI contends that such inadequacy does not exist. However, canvassing amendment to the existing safety net may be a more palatable approach than simply introducing a new entitlement.

41. On the issue of requests for flexible working arrangements, ACCI cannot see any inadequacy in s 65 for enabling the undertaking of informal caring responsibilities for older people. In all such circumstances, the employee will fall within the definition of 'carer' under the *Carer Recognition Act 2010* (Cth) as they would be providing 'personal care, support and assistance to another individual who needs it because that other individual' 'has a medical condition' or 'is frail and aged'.[24] The existing threshold for when such a request can be refused by an employer, on 'reasonable business grounds',[25] is appropriate and should not be altered. Similarly, the requirement for employees to have worked for the employer for at least 12 months (and 'has a reasonable expectation of continuing employment by the employer on a regular and systematic basis' if they are a casual employee) is critical and should not be changed.[26]

42. With respect to IFAs, the PC should examine the findings discussed above. IFAs are intended to deal with circumstances such as those at the heart of this Issues Paper. If they are not adequately doing so, then obstacles need to be identified and addressed and the PC has an opportunity to make this recommendation to Government.

Do the eligibility requirements for the paid and unpaid leave entitlements allow them to be used by informal carers of older Australians? If not, why?

43. ACCI recognises that there may be some familial arrangements which are not presently covered by these leave entitlements but perhaps should be discussed. The siblings of parents and grandparents may be treated by many Australians as parental or grandparental figures in particular circumstances and excluding them from the scope of an employee's leave entitlements may, pending consideration and discussion of particular circumstances, be unnecessary or undesirable.

44. Additionally, the nature of the relationships for which the family and domestic violence leave provisions apply includes those who are 'related to the employee according to Aboriginal or Torres Strait Islander kinship rules'.[27] Options to extend scope for the personal/carer's leave and unpaid carer's leave in like manner may also need to be identified and further input invited through an interim report or discussion paper.

45. However, in each of these areas there must also be some sensible and practical limits on the degree of familial distance between the employee and the person who requires care. This especially the case for the unpaid carer's leave entitlement because of its unlimited nature.

[24] *Carer Recognition Act 2010* (Cth) s 5.
[25] FW Act s 65(5).
[26] Ibid s 65(2).
[27] FW Act s 106B(3)(b).

46. ACCI contends that the existing scope of the entitlements strikes the right balance between providing employees with flexibility and ensuring that employers (and co-workers, clients etc) are not overburdened by the exercise of leave entitlements.

Are there barriers that limit informal carers of older people from using the entitlements?

47. The most significant barrier is likely that raised in the Issues Paper — a lack of knowledge about the existing entitlements and capacities under the Fair Work Act. As noted on page 8, only 53% of primary carers are aware that personal/carer's leave can be used for caring responsibilities and 37% are aware of their entitlement to unpaid carer's leave. ACCI encourages the PC to make recommendations that the Fair Work Ombudsman should increase promotional efforts to make employees aware of these existing entitlements, given the substantial impact that it may have on allowing more employees to undertake caring responsibilities, mitigating the need for a new entitlement. Employer organisations and unions may also play a role with the support of Government.

48. There may also be scope for groups such as Carers Australia to promote the information resources of the Ombudsman to carers.

49. With respect to personal/carer's leave, this likely arises simply due to terminological ambiguity. Colloquially, the paid personal/carer's leave entitlement is frequently and widely referred to as 'sick leave', which obviously implies that it can only be used when the employee is ill. In a more formal setting, it can still sometimes be referred to as 'personal leave', which may imply that it can only be used for illnesses, injuries or emergencies affecting the employee *personally*.

Are there specific Awards that provide entitlements to informal carers that are beyond those provided in the NES?

50. ACCI is not aware of any such entitlements.

What is the rate of uptake of the existing leave entitlements by employees who are informal carers?

51. ACCI is not aware of the availability of this information. Care should be taken in drawing conclusions from any purported information which may be provided or estimated. A low rate of uptake would not suggest that the existing entitlements are unsuitable and therefore inadequate for undertaking caring responsibilities. Instead, it is likely reflective of the aforementioned lack of awareness that the entitlements can be used for those purposes.

52. However, this information is difficult to obtain. The vast majority of employers would not gather statistics about how their employees' leave entitlements are being used. This is particularly the case because the various purposes for which leave may be taken are bundled together. Any statistics that are gathered, are unlikely to differentiate between when that leave is being used for personal compared with caring matters. Even if employers' internal data did differentiate between those matters, it is unlikely to be specific enough to differentiate between when it is being utilised by an 'informal carer', in the sense of a caring for older person, compared with caring for a child, spouse etc.

53. This is compounded by the fact that in most instances, employers do not direct their employees to provide evidence under s 107(3) of the FW Act. Consequently, employers may not even know what the purpose of the period of leave is for and are simply respecting the exercise of rights by their employees, which may relate to private matters.

How often are leave or requests for flexible work arrangements to care for an older person denied by employers? How does this vary in different industries?

54. Similarly, this information is likely very difficult to obtain, and any purported estimates need to be treated with considerable caution.

55. Again, there may be an extent to which these needs are being dealt with informally, on a day-to-day basis, without recourse to formality or being recorded in time and wages records.

56. It is also critical to bear in mind that refusals of requests for flexible working arrangements based on reasonable business grounds is not necessarily indicative of an unwillingness of employers to pursue more flexible arrangements or find other ways to accommodate employees' caring responsibilities. The workplace relations system has for some time become increasingly bureaucratised, more tightly regulated and difficult to manage for employers.

57. This is not to suggest that employers are citing the complexity of the system as a reasonable business ground for making a refusal, which may or may not satisfy the statutory test depending on the degree of additional cost imposed and other matters, but rather to indicate that behaviourally and operationally, there can be strong structural disincentives against allowing greater diversity in work arrangements amongst employees.

58. The current trajectory of the development of the workplace relations system perpetuates business models that favour paperwork, notice-giving, evidence-gathering and rigid conformity to rules. This is compounded by the increasing attention given to criminalising and prosecuting employers for underpayments, or for lack of oversight and record keeping. Under the existing system, greater diversity in work arrangements amongst employees means more cost and more exposure to miscalculations which may lead to debilitating investigations and financial penalties.

To what extent do employers currently provide leave or other entitlements above the NES standards to employees with caring responsibilities for older people?

59. The framing of agreements between employers and employees as 'entitlements' is misguided. The best practice approaches to allowing employees to undertake caring responsibilities for older people, which occur widely and daily across the country, are informal agreements that allow employees to rearrange their working arrangements/time. Employers extensively and regularly provide this across a range of industries and sectors on a day-to-day basis, even if it is not encapsulated in statistical findings. This may be no more complex than a question of, "can I leave early and make up the time later in the week?". Albeit such an approach may not always be award compliant.

60. Allowing employees to work a certain day from home, make up missed time on a future shift and temporarily rearrange hours, are all examples of day-to-day practices agreed upon by employers that allow caring responsibilities to be undertaken. In the vast majority of cases, these agreements will be entirely informal.

Do employers have other policies to support employees who are informal carers? Are there examples of best practice?

61. As above, the best practice 'policies' are not formal policies at all, but rather good, high trust relations between employers and employees which are conducive to the making of informal arrangements. Simply because an employer does not have an official policy document that stipulates when employees can and can't rearrange working arrangements to undertake caring responsibilities, does not indicate that the organisation does not allow for employees to do so.

62. To characterise all measures which enable the undertaking of informal caring responsibilities as 'policies' implies some degree of officiality, formality and reduction to writing which is not going to be present in the majority of businesses, particularly small businesses. Nevertheless, many of them will enable these arrangements to take place. In fact, there is an argument that it is in smaller businesses in which employees and employers are more aware of their respective caring responsibilities that practical accommodations will be most likely, due to the smaller workforces.

EFFECTS OF AN ENTITLEMENT TO EXTENDED UNPAID CARER LEAVE (PART 3)

What data (other than from ABS, Carers Australia and HILDA) could we use to estimate:

• how many employees would take extended unpaid carer leave if they were entitled to do so, and how much more care they might provide

• how many of these employees would have left their job to provide care in the absence of the entitlement

• how many of these employees would have continued working while providing some informal care?

63. The only submission ACCI wishes to make in response to these questions is that it will vary significantly depending on the design and nature of any additional entitlement. These questions are welcome and should certainly be addressed before proceeding with any implementation of an entitlement. However, answers to them may be more forthcoming if there is something more concrete to respond to, recalling of course our primary emphasis on better harnessing the power of agreed flexibility. ACCI maintains the view that alternative options to a new entitlement should be more sufficiently explored before contemplating the introduction of a new entitlement into the NES.

We seek your feedback on how the proposed entitlement might affect employer costs, behaviour and hiring practices and on the extent to which an entitlement to unpaid carer leave might dissuade some businesses from employing people, especially those expected to be most likely to use the entitlement.

How large are these effects likely to be in your industry?

64. As above, this is difficult to ascertain and respond to without further indications of what 'the proposed entitlement' might actually be. ACCI would like to respond to a proposal in a future paper.

65. Further, the increased cost of labour indirectly caused by a new entitlement is one issue, but there are other potentially problematic aspects to a new entitlement for businesses. These include the unpredictability and unreliability of when this entitlement will be exercised. This can impose significant administrative burdens on businesses as they seek to fill vacated rosters and reduced workforces. This also impacts on co-workers and their time and commitments, and can impose additional costs (overtime, re-arranging rosters etc).

66. It is an open question whether cost or unpredictability would drive any negative effects in this area, but again potential hiring disincentives cannot be addressed without something more concrete to respond to.

67. The effect will be particularly large in the industries currently facing staff shortages. Long term absences can be extremely difficult to manage when the possibility of finding replacement staff is significantly impeded by a tight labour market.

Would there be differences in costs based on the size of businesses?

68. Any increase to the cost of labour or administration will disproportionately affect small businesses. This is the case for all entitlements. It is further compounded for those entitlements which are conferred on casual employees, which small businesses disproportionately employ.

69. To the extent that any new entitlement displaces successful informal agreements, greater formality and procedure, and scope for error and liability will particularly impact on small businesses.

70. The following potential costs to businesses should be borne in mind, which effect all businesses, but small businesses disproportionately:

    a. immediate lower productivity as a part of the production process formerly occupied by the worker is vacated;

    b. the cost of seeking out and hiring a replacement employee;

    c. the premium on remuneration required to convince a prospective employee to occupy a temporary position that may no longer exist when the employee on leave returns;

    d. the cost of training up the replacement employee to fill the position adequately;

    e. costs of onboarding; and

    f. other staff turnover costs.

How targeted are these effects likely to be, and at which types of prospective employees?

71. As will be discussed below with respect to the redistributive effects of a proposed entitlement, if there is any targeted effect, it will apply to those prospective employees who may experience different pressures to provide formal care.

72. Where it will differ from below, is that rather than the effects applying to prospective employees who actually experience greater social pressures to undertake caring responsibilities, it would likely apply to those who are *perceived* to experience them. In other words, perhaps women employees only marginally undertake more caring responsibilities than men. However, women of a certain age may be perceived to have greater caring responsibilities, even if this is not reflected in statistics. Consequently, that perception may lead to harmful effects for the hiring of those prospective employees.

73. However, this needs to be treated cautiously and ACCI advances no contention in this regard at this stage. Any disemployment effects or risks can only be assessed based on specific proposals and are always overcome by improving skills and employability across the community.

Is there evidence from other employment entitlements (for example, unpaid parental leave) that we could draw on to infer these effects?

74. ACCI is not aware of such evidence.

We seek your views on how we ought to assess the redistributive effects of the proposed entitlement to unpaid carers' leave and other policies that might support carers.

How do women and men experience different pressures to provide informal care?

75. ACCI has nothing additional to contribute beyond the statistics contained in the ABS Survey of Disability, Ageing and Carers estimates on pages 3 and 4 on the Issues Paper. Evidently, most primary carers are women.

76. However, it is important to remember that 'redistributive effects' should not be the purpose of any new entitlement or change to prescribed employment conditions. This is not consonant with the objects or structure of the FW Act and has not been a goal of our workplace relations system at any point. 'Redistributive effects' are irrelevant to whether it is necessary to provide employees with a fair and relevant minimum safety net of terms and conditions.

How should we think about, and measure, the value of an entitlement to unpaid carer leave? Does it vary across employees?

77. More important than the 'value' of the entitlement is its cost to employers. That should be ascertained before proceeding with any proposal. In regard to "value', clarity would be needed on perspective. Value to an employee? Value for the community? Value to governments that unpaid caring provides?

How has the 'better off overall' test been applied when evaluating an entitlement that might not benefit all employees?

78. The Commission has held that for these entitlements, 'the value is not easily quantifiable'. In Re Loaded Rates Agreements, the Full Bench stated that the following principle applies to the application of the BOOT:

> In respect of non-monetary, optional or contingent entitlements in an agreement, the assumption cannot readily be made that they have the same value for all employees. In the case of a contingent benefit, it will be necessary to make a realistic assessment about the likelihood of the benefit crystallising during the period in which the agreement will operate.

79. In the notable decision of *Hart v Coles Supermarkets Australia Pty Ltd*,[28] a full bench of the Commission considered an enterprise agreement that provided various benefits to employees that were 'contingent on the circumstances that may occur'.[29] These benefits included a carer's leave entitlement, as well as other leave entitlements, such as compassionate leave, emergency services leave and natural disaster leave. The agreement also provided leave entitlements that were 'contingent on the choice of the employee',[30] such as pre-approved leave arrangements, blood donor leave and defence service leave.

80. The Commission held that '[i]t would not be appropriate to attribute a value to these benefits on the assumption that all employees would access these benefits'.[31] The Commission rejected the respondent's contention that it would be 'reasonable to assume that 50% of the benefit of accessing each form of leave once per year is a reasonable basis to value these benefits'.[32]

81. The Commission stated:

> While we consider it appropriate to have regard to these benefits, we have some reservations about attributing a financial value to them because their take up is highly unlikely to be universal or uniform. However, **were a value to be attributed, we consider that the assessment should be based on an assumption of much less than a 10% access to each benefit in each year**. Again this is because the benefits will be greater for some groups of employees than others depending upon matters such as age and family circumstances. The scale of the benefits provided by the particular provisions in respect of these matters, with the exception of accident makeup pay, in the Agreement when compared to the Award is generally small.[33]

82. Consequently, although no clear formula was expressed, the Commission seems to have held that the entitlements should be evaluated by multiplying their monetary value by the extent to which they would be accessed by employees: in this case, less than 10%.

83. There are numerous other examples of decisions by the Commission which work through this process. As quoted by the High Court in *ALDI Foods Pty Ltd v Shop, Distributive & Allied Employees Association* (2017) 262 CLR 593, the assessment under the BOOT can be described as:

> "a question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds."[34]

84. Thus, the methodology deployed by the Commission is far from rigorous and is unlikely to be of much assistance to the PC, if an understanding of it is sought in the pursuit of estimating the total benefit of this proposed entitlement to employees. Other, more economic-focussed methods of calculating the value of the entitlement are preferable.

[28] [2016] FWCFB 2887
[29] Ibid at [21].
[30] Ibid at [19].
[31] Ibid at [20].
[32] Ibid at [20].
[33] Ibid at [23].
[34] *ALDI Foods Pty Ltd v Shop, Distributive & Allied Employees Association* (2017) 262 CLR 593, 621 [99] quoting *British Fame (Owners) v Macgregor (Owners)* [1943] AC 197 at 201.

Have employers or employees sought to introduce an entitlement to extended unpaid carer leave into an enterprise agreement but found barriers to them doing so? If so, what were these barriers?

85. ACCI is not aware of any specific attempts to introduce such an entitlement into an enterprise agreement. There are many problems with the enterprise bargaining system, which is fundamentally broken. However, solutions to begin to rectify these problems are beyond the scope of this inquiry, and are currently being considered by Government in the wake of the recent Jobs and Skills Summit.

86. A key barrier to the inclusion of further carer entitlements in enterprise agreements is likely to be union priorities. It seems unlikely that during the bargaining process, unions would give precedence to carer entitlements over other entitlements that may be more widely used or claims for more generous remuneration. The incentive for unions is generally not to pursue claims that affect a small number of employees.

87. The solution is to allow more flexibility to give individuals greater scope to agree to bespoke working arrangements that suit them and their needs. Currently, that scope is being determined at the collective level, which relies on majority support and union priorities. This is an obstacle to providing individuals with caring needs to ability to agree to flexible arrangements with their employer outside of the enterprise agreement system.

88. Additionally, a major barrier is the low value placed about non-monetary benefits by the FWC in the application of the BOOT. Given that such entitlements inevitably cost employers, there is reduced incentive currently to assent to their inclusion in enterprise agreements when they will not be taken into account or considered as a benefit to employees.

We seek your views on how an entitlement to extended unpaid carer leave ought to be designed.

89. Before briefly addressing each question below on the specific design of the entitlement, it is appropriate from the outset to again submit that insufficient work has been done to explore alternative options to a new entitlement in the NES, such as improving flexibility in the workplace relations system or modifying the existing carer leave entitlements, to justify contemplation of how a new entitlement ought to be designed.

90. It is worth recalling that nothing stops an employer and employee agreeing to any period of unpaid leave, and this regularly occurs where people travel, study, take a sabbatical etc. It must be established that this existing capacity could not accommodate caring before any right or entitlement were considered.

91. Informal arrangements enabled by genuinely flexible working arrangements are always the preferred solution over extending or creating unpaid leave entitlements, particularly for small businesses, given that they are far less disruptive and costly.

Who should be eligible and why? What criteria should an employee need to meet and why? For example, tenure, relationship to the care recipient, and/or the nature of care required.

92. If any new entitlement were contemplated , casual employees should not be eligible. The very nature of casual employment provides the requisite flexibility to undertake caring responsibilities, and additional income to support using this flexibility.

93. Additionally, the same criteria should be used as appear in s 102 of the FW Act for the existing entitlement for unpaid carer's leave. If there is any aspect to this existing entitlement that may be improved, then that modification should be canvassed for feedback.

94. However, it does not seem valid to proceed on the basis that the existing entitlement is inadequate in terms of its eligibility, and then introduce a new entitlement with different eligibility criteria, instead of rectifying the existing entitlement.

Should access to the proposed entitlement be once-off or occur more often?

95. This depends on the length, purpose and usage of the entitlement. It also depends on the resulting impact on the operations of the employer.

How long should an entitlement to unpaid leave to care for an older person be? Why?

96. As the existing entitlement provides, it should be for up to 2 days. However, given that a new entitlement is being contemplated, presumably the intention is for it to provide for a longer period. The illogicality of doing so is explained below.

What should the process be for revising the return date, if any?

97. This is where confusion arises on whether this is a proposal for short term leave or extended term leave, analogous to parental leave. Any revision to a return date should only be permissible at the mutual agreement of both the employer and the employee.

How should the entitlement be provided (for example in single block or in multiple) and why? What would likely be the consequences?

98. Here, is where the impracticality of the proposal for an entitlement is particularly stark. This is particularly the case, if one year of unpaid leave is under consideration, as canvassed in Box 5 of the Issues Paper, following a submission made to the Royal Commission.

99. If the entitlement is in a single block, then it serves little purpose in enabling employees to undertake informal caring responsibilities. An extended period, whether that be one month, or one year, is simply unsuitable for these activities. To ACCI's knowledge, the central problem which has given rise to this recommendation by the Royal Commission is not an ability to leave work for an extended period to care for older Australians. Rather, presently, there is a perception that employees are unable to undertake regular caring responsibilities, such as weekly or monthly commitments.

100. Taking a year off work to care for an older person, seems to a questionable priority of limited relevance in a society with a substantial social and aged care safety net. It is not clear what could be achieved in this period to provide care or support. Perhaps there are some circumstances such as where assistance is required to help move an older person into a permanent caring facility, but that is a matter of weeks or a few months at most, not 12 months. One year of unpaid leave, as proposed in Box 5, seems excessive if taken as a single block, and not suited to the purpose of this inquiry.

101. Alternatively, if the entitlement is to be provided in multiple blocks, with the intention that it can be used on an ongoing basis, then the real problem of inflexibility once again arises. If employees need 1 day per fortnight, for example, to undertake scheduled caring responsibilities, what they actually need is greater flexibility to renegotiate their working arrangements to enable them to undertake these responsibilities on an ongoing basis.

    a. The existing entitlement in the NES for requests for flexible working arrangements, which applies to the need to undertake caring, should be able to accommodate these responsibilities, and thus no new form of leave is needed.

    b. If that is unsuitable, an IFA should nevertheless be able to meet such a need, and no new form of leave is needed.

102. The entitlement would be essentially pointless / groundless if it takes either form: as a single block or multiple blocks. This arises because an entitlement is being contemplated before consideration of more appropriate solutions. Characterising what employees need to undertake these responsibilities as “unpaid leave” is misguided. Fundamentally, “unpaid leave” is simply a right to absent from work during hours which the employee is supposed to be working. Rather than providing employees with this right, they should be empowered to rearrange their hours with the agreement of their employer so that the need to be absent is eliminated. Such flexibility would be important to maintain employment continuity and labour market attachment for carers.

103. In other words, if an employee needs to be absent on Friday afternoons in order to take their elderly parent to scheduled medical appointments, they do not need leave. They and their employer need to be provided with the flexibility to rearrange the employee’s hours so that they do not work on Friday afternoons if that can be negotiated. If working on Friday afternoons is an inherent requirement of the position and allowing the employee to be absent during that time needs to be refused on reasonable business grounds, then providing employees with an entitlement to unilaterally decide that they will be absent, would be unjust to the businesses, and likely other employees, clients, customers etc.

104. Ultimately, if flexibility measures cannot be utilised because the position of employment requires the employee to not be absent during a certain period in which they have caring responsibilities, then the employee may become unsuitable for their previously agreed position and would need to seek different, more flexible work, perhaps differently roistered, closer to home etc. This may seem harsh however it is harsher to impose upon an employer and other employees a regular absence of an employee which is contrary to their business operations and the inherent requirements of the employee’s position, after the employee and employer have legally contracted for the employee to work during those hours, and after scope to agree to flexibility has been exhausted.

Should all employers be required to provide the entitlement? Why or why not?

105. Small businesses would need to be exempt from any new entitlement. Small businesses are still struggling immensely in the current economic circumstances and a new entitlement that potentially will result in an extended absence of staff or inflexibility or limitations on services or opening, is untenable.

106. This is particularly the case given the significant labour shortages in the economy. Many small businesses, especially in the hospitality sector, cannot find sufficient staff to meet their demand. At the same time, rising input costs and inflation mean that simply raising wages to attract more staff is unfeasible.

107. However, the above should not be interpreted as a concession or agreement that this is merited for any employer, and there should be an opportunity to revisit the 'scope question' based on more developed options being canvassed for further submissions.

What costs, perverse incentives or unintended consequences should the design of the entitlement aim to minimise or avoid? How might this be achieved?

108. Crucially, significant notice requirements should be necessary if the entitlement provides an extended period of leave. If emergency circumstances arise where early notice is not possible, then the existing entitlement already provides unpaid leave for emergency situations.

109. Employers need to know well in advance when an employee intends to be absent for an extended period of time. This is particularly the case in the current economic environment, for the reasons discussed above.

110. There should be a requirement that stipulates a need for employers and employees to reach an agreement about the use of an entitlement, including an opportunity for employers to provide input and explain whether or not it can be accommodated. It is not clear that existing s 65 of the Fair Work Act does not already provide scope for the accommodations now being canvassed.

What would be required practically to insert the proposed entitlement in the NES?

111. While in terms of legislative change, the insertion of a new entitlement may be relatively straightforward, if any new model is going to work effectively and sustainably, with widespread support rather than unwilling subjugation, it will require:

    a. proper and extensive consultation with industry groups and small businesses;

    b. consensus from the major social partners, perhaps through the National Workplace Relations Consultative Council; and

    c. a substantial period of notice, as has recently been proposed in relation to introducing paid family and domestic violence leave, including additional notice for smaller businesses.

EXTENSIONS TO CARERS OTHER THAN CARERS OF OLDER PEOPLE (PART 5)

We seek your views on how we should consider whether reforms to supports for carers of older people should apply to other carers too.

In which ways does informal care of older people differ from the care that other people might require?

112. The informal care from older people differs from other caring responsibilities because there are specific suggestions that easier access is needed. There has been a Royal Commission that made this recommendation. This has not occurred for other types of caring, and there are no Royal Commission findings in relation to them. It is important that the PC stays focussed on the particular issue it has been directed to and does not make broader recommendations extending to caring for other classes of people.

Are there reasons to have different policies for informal carers of older people than for informal carers of other types of people?

113. As above, there is a reason to have different policies here because of a difference in need and legal foundation. There was found to be a problem with the ability for employees to undertake informal caring responsibilities for older people. Such a finding has not been made for the informal caring of other types of people.

CONCLUSION

114. ACCI hopes that this submission will be useful for the PC in developing and progressing the next course of action for this inquiry, and specifically canvassing more developed propositions that can be better responded to. As made clear above, these should focus on better supporting flexibility, not additional prescription or entitlements.

115. To reiterate, ACCI submits that **before** any further consideration of the development of a new entitlement, the following other areas **must** be first rectified or properly considered for reform:

    a. measures which will improve flexibility in the workplace relations system to enable more employees to arrange their working hours so that they are able to undertake informal caring responsibilities;

    b. measures which may allow employees to bring forward access to accrued long service leave on request to undertake caring responsibilities; and

    c. policies which increase the knowledge and awareness of the existing entitlements and how they can be used.

116. ACCI looks forward to engaging with the PC further on those areas.

ABOUT ACCI

The Australian Chamber of Commerce and Industry (ACCI) is the largest and most representative business advocacy network in Australia. We speak on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses are also able to be members of our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, employing over 4 million Australian workers.

The Australian Chamber strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

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ASMI Australian Self Medication Industry

Australian Steel Institute

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ATIC Australian Tourism Industry Council

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LFRA

Live Performance Australia

Master Builders Australia

master plumbers Expert. Committed. Professional.

MTAA Medical Technology Association of Australia

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neca national electrical and communications association

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