THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FAIR WORK AMENDMENT (FAMILY AND DOMESTIC VIOLENCE LEAVE) BILL 2018

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Jobs and Industrial Relations, the Hon Kelly O’Dwyer MP)
fair work amendment (family and domestic violence leave) bill 2018

outline

the fair work amendment (family and domestic violence leave) bill 2018 (the bill) would amend the fair work act 2009 (the act) to insert a new entitlement in the national employment standards (nes) to five days of unpaid family and domestic violence leave.

family and domestic violence is a significant community issue, which has a real and tangible impact on employees and employers in the workplace. it disrupts employment and precludes workforce participation because some employees who need time off work to deal with the impact of the family and domestic violence may see resignation as their only option. the effects of family and domestic violence are far reaching and extend beyond the individual directly affected to their families and the general community. the inclusion of unpaid family and domestic leave in the nes would provide invaluable support to employees who are experiencing family and domestic violence.

a new entitlement to unpaid family and domestic violence leave in the nes would also ensure, as far as possible, consistency in entitlements for employees in the national system. from 1 august 2018, as a result of the 26 march 2018 decision the fair work commission (the commission) made as part of the 4 yearly review of modern awards, a new clause providing five days of unpaid family and domestic violence leave took effect in 123 modern industry and occupation awards. the new clauses inserted by the commission only affect employees whose terms and conditions are set by those awards. many australian employers have also already implemented policies and entitlements to provide such support to their employees. however, there are still millions of australian employees in the national system who do not have access to family and domestic violence leave.

the entitlement in the bill to unpaid family and domestic violence leave is consistent with the new modern award entitlement that the commission inserted into all modern industry and occupation awards. after broad consultation, the commission finalised the wording of the model clause to be inserted into the modern awards on 6 july 2018.

in line with the commission’s model clause, the entitlement in the bill would:

- provide five days of unpaid family and domestic violence leave in a 12 month period;
- apply to all types of employees, including casual employees;
- be available in full at the commencement of each 12 month period, rather than accruing through the year;
- not accumulate from year to year; and
- be available in full to part-time and casual employees, rather than pro-rated.

employees would be able to access unpaid family and domestic violence leave if they are experiencing family and domestic violence, need to do something to deal with the impact of that family and domestic violence, and it is impractical to do that thing outside their ordinary hours of work. this could include such activities as making arrangements for their own safety
or for the safety of a close relative (including relocation), attending urgent court hearings, or accessing police services.

Employers would also be required to take steps to ensure information concerning any notice an employee has given, or evidence an employee has provided, of the taking of family and domestic violence leave is treated confidentially, as far as it is reasonably practicable to do so. There are two exceptions to this obligation, being that the obligation would not apply when a disclosure of information is required by a law of the Commonwealth, a State or a Territory, or where a disclosure is necessary to protect the life, health or safety of the employee or another person. Information concerning an employee’s experience of family and domestic violence is sensitive, and if mishandled can have adverse consequences for the employee. Employers should consult with such employees regarding the handling of this information.

The provision of this leave in the NES would recognise that employees experiencing family and domestic violence may need to undertake activities during working hours to deal with the impact of family and domestic violence, and would allow them time to do so as a minimum workplace entitlement. Contravention of a provision of the NES by an employer may give rise to a civil penalty. An employee who exercises the new workplace right to take family and domestic violence leave would also be protected from unlawful adverse action under the existing general protections provisions of the Act.
FINANCIAL IMPACT STATEMENT

Nil
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Bill

The object of the Fair Work Act 2009 (the Act) is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians. The National Employment Standards (NES) in the Act further this object by providing a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions for employees covered by the Act.

This Bill would amend the Act to introduce an entitlement to five days of unpaid family and domestic violence leave into the NES. The new entitlement is consistent with the entitlement in the Model Clause developed by the Fair Work Commission (the Commission), as part of the 4 Yearly Review of Modern Awards (4 Yearly Review).1 The Model Clause, which took effect in 123 modern industry and occupation awards from 1 August 2018, provides an entitlement to five days of unpaid family and domestic violence leave for employees whose terms and conditions of employment are set by one of those awards.

Under the new entitlement in the NES that would be inserted by the Bill, an employee who is experiencing family and domestic violence would be able to take the new leave if they need to do something to deal with the impact of family and domestic violence and it is impractical for the employee to do that thing outside their ordinary hours of work. Contravention of a provision of the NES by an employer may give rise to a civil penalty. An employee who exercises, or proposes to exercise, the new workplace right to take family and domestic violence leave would also be protected from unlawful adverse action under the existing general protections provisions of the Act.

The amendments in the Bill would assist employees affected by family and domestic violence to remain in continuous employment, which in turn would provide financial security, independence, social networks and increased self-esteem.

Human rights implications

The Bill engages the following rights:

- the right to work and to just and favourable conditions of work under Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);

---

1 On 26 March 2018, the Fair Work Commission (Commission) decided that an unpaid family and domestic violence leave entitlement should be inserted into all but three modern industry and occupation awards. On 3 May 2018, the Commission extended that decision to the three remaining modern industry and occupation awards and released a draft Model Clause to give effect to these decisions. After taking submissions on the drafting of the Model Clause, the Commission released the final Model Clause on 6 July 2018.
• the right of women not to be discriminated against based on gender under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Article 26 of the International Covenant on Civil and Political Rights (ICCPR); and

• the right to privacy and reputation under Article 17 of the ICCPR.

**Right to work and to just and favourable conditions of work**

Article 6 of the ICESCR requires the State Parties to the Covenant to recognise the right to work and to take appropriate steps to safeguard this right.

During the 4 Yearly Review, the Commission noted that family and domestic violence disrupts employment and precludes workforce participation, and that some employees who need time off work because they are experiencing family and domestic violence may see resignation as their only option. Access to family and domestic violence leave would minimise the employment disruption that occurs because of family and domestic violence by enabling an employee to take steps to deal with the impact of violence, while still maintaining their employment.

Article 7 of the ICESR requires that State Parties to the Covenant recognise the right of everyone to the enjoyment of just and favourable working conditions.

The introduction of the new entitlement in the Bill promotes the right to just and favourable working conditions. An employee may be able to access existing leave entitlements in the Act in some circumstances where they are experiencing family and domestic violence (e.g. personal/carer’s leave in certain situations). However, there are a number of purposes for which an employee would not be able to access existing leave entitlements in the Act, for example, where an employee needs to urgently find accommodation for themselves or attend an appointment with a lawyer. The new entitlement would grant employees in the national system a guaranteed minimum entitlement enabling them to take time off work where they might not otherwise have any leave available.

**Right of women not to be discriminated against based on gender**

The CEDAW provides that in relation to discrimination against women State Parties must:

• ensure the effective protection of women against acts of discrimination (Article 2(c));
• ensure the full development and advancement of women (Article 3); and
• take all appropriate measures to eliminate discrimination against women in the field of employment to ensure the same rights between men and women (Article 11).

Article 26 of the ICCPR requires State laws to guarantee equal and effective protection against discrimination on a number of grounds, including sex.

The UN Committee on the Elimination of All Forms of Discrimination against Women has stated that gender-based violence, including domestic violence, is a form of discrimination

---

2 4 yearly review of modern awards – Family & Domestic Violence Leave Clause [2017] FWCFB 3494 [79]-[82].
3 Ibid [61].
that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men. During the 4 Yearly Review, the Commission similarly noted that family and domestic violence is a gendered phenomenon in that it predominantly affects women.

The new entitlement to family and domestic violence leave provided for in the Bill positively engages the rights of women not to be discriminated against based on gender by providing a new leave entitlement that assists employees to manage the consequences of family and domestic violence, an issue that disproportionately affects women. As the Commission noted, the retainment of employment is an important pathway out of violent relationships, and sustained periods of employment can provide financial security, independence, social networks and increased self-esteem. The Commission further observed that women who are experiencing or have experienced domestic violence have a more disrupted work history, are on lower personal incomes, have had to change jobs frequently, and are more likely to be employed in casual and part-time work, than women with no experience of violence. The Commission also noted that separating from a violent relationship is difficult, and is associated with financial hardship following separation.

The new entitlement would enable an affected employee to take time off from work to engage in processes aimed at lessening the impacts of violence and preventing future violence, such as attending counselling sessions and engaging in police and court proceedings. Where an employee would not otherwise have access to a leave entitlement to engage in these processes, the entitlement provided for in the Bill would assist these employees to retain employment and the financial and personal benefits that come with employment, particularly during the difficult circumstances of experiencing family and domestic violence.

Right to privacy and reputation

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. Privacy guarantees a right to secrecy from the publication of personal information. For interference with privacy not to be arbitrary, it must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. Reasonableness in this context incorporates notions of proportionality to the end sought and necessity in the circumstances.

The Bill would provide that in order to access the new entitlement, an employee must provide to their employer notice of the taking of the leave and, if required by the employer, evidence that would satisfy a reasonable person that the leave is taken for the prescribed purpose.

Requiring an employee to provide this information engages the right to privacy. The purpose of the notice requirement is to assist employers to make arrangements to accommodate an employee’s absence from the workplace and the purpose of the evidence requirement is to ensure the entitlement is properly accessed. Allowing for relevant information to be provided to an employer is a suitable means of meeting these purposes.

---

5 4 yearly review of modern awards – Family & Domestic Violence Leave Clause [2017] FWCFB 3494 [49].
6 4 yearly review of modern awards – Family and Domestic Violence Leave [2018] FWCFB 1691 [102].
7 Ibid [95].
8 Ibid [97].
There is no alternative means of administering the leave entitlement that is reasonably practicable and has a less restrictive effect on the right to privacy. The Bill is modelled closely on the Model Clause, which was developed by the Commission and is in a form agreed by employee and employer representative bodies. As such, the least restrictive form of providing for the administration of the leave entitlement has been assured.

The restriction on the right to privacy that is needed to effectively administer the leave entitlement is adequate in its balance. The restriction is limited by the Bill also requiring employers to take reasonable steps to ensure that any information collected by an employer is treated confidentially. Employers would also be bound by any existing obligations in privacy legislation in relation to the disclosure of personal information. The notice and evidence requirements are consistent with those already provided for in the Act in respect of other leave entitlements.

Conclusion

This Bill is compatible with human rights because it advances the protection and enjoyment of human rights.

Minister for Jobs and Industrial Relations, the Hon Kelly O’Dwyer MP
NOTES ON CLAUSES

In these notes on sections, the following abbreviations are used:

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>Act</td>
<td>Fair Work Act 2009</td>
</tr>
<tr>
<td>Bill</td>
<td>Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018</td>
</tr>
<tr>
<td>Commission</td>
<td>Fair Work Commission</td>
</tr>
<tr>
<td>NES</td>
<td>National Employment Standards</td>
</tr>
</tbody>
</table>

Clause 1 – Short title

1. This is a formal provision specifying the short title.

Clause 2 – Commencement

2. The table in this clause sets out when the provisions of the Bill commence.

Clause 3 - Schedules

3. Clause 3 of the Bill provides that legislation that is specified in a Schedule to the Bill is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Bill has effect according to its terms.
**SCHEDULE 1 – AMENDMENTS**

**Overview**

4. Schedule 1 inserts new Subdivision CA of Division 7 of Part 2-2 into the Act. This new subdivision inserts a new entitlement in the NES to five days of unpaid family and domestic violence leave in a 12 month period. The new entitlement is available to employees of all types, including casual employees, and is available in full at the beginning of each 12 month period of the employee’s employment, but does not accumulate year to year. The entitlement is not pro-rated for part-time or casual employees.

**Fair Work Act 2009**

**Item 1 – Section 12**

5. Section 12 of the Act contains the Dictionary. Item 1 inserts three new definitions into the Dictionary:

   - ‘close relative’;
   - ‘family and domestic violence’; and
   - ‘unpaid family and domestic violence leave’.

6. The signpost definitions provided for ‘close relative’ and ‘family and domestic violence’ are required because of new section 106B inserted by item 5, which contains these two new definitions.

7. The new definition of ‘unpaid family and domestic violence leave’ defines the term to mean unpaid family and domestic violence leave to which a national system employee is entitled under new section 106A.

**Item 2 – Subsection 17(2) (note)**

8. Section 17 of the Act defines the meaning of ‘child of a person’. The note under subsection 17(2) provides an example of how the provision operates for leave entitlements in relation to immediate family under Division 7 of Part 2-2 (which deals with personal/carer’s leave and compassionate leave).

9. Item 2 is consequential to items 4 and 5. It omits reference to ‘and compassionate leave’ in the note and substitutes ‘, compassionate leave and unpaid family and domestic violence leave’, reflecting the inclusion of the new family and domestic violence leave entitlement.

**Item 3 – Paragraph 61(2)(e)**

10. Subsection 61(2) of the Act lists the matters to which the NES relates. Paragraph 61(2)(e) refers to ‘personal/carer’s leave and compassionate leave (Division 7)’.

11. Item 3 is consequential to item 4. It omits the reference to ‘and compassionate leave’ and substitutes ‘, compassionate leave and unpaid family and domestic violence leave’ which will be the new heading for Division 7.
Item 4 – Division 7 of Part 2-2 (heading)

12. Item 4 is consequential to item 5. Item 4 amends the existing heading, ‘Division 7 – Personal/carer’s leave and compassionate leave’, for Division 7 of Part 2-2 of the Act, by omitting ‘and compassionate leave’, and substituting ‘and unpaid family and domestic violence leave’, to reflect the inclusion of family and domestic violence leave in Division 7.

Item 5 – After Subdivision C of Division 7 of Part 2-2

13. Item 5 inserts the new Subdivision CA – Unpaid family and domestic violence leave, as part of Division 7 of Part 2-2 of the Act.

Section 106A – Entitlement to unpaid family and domestic violence leave

14. New section 106A contains the new entitlement to unpaid family and domestic violence leave.

15. New subsection 106A(1) specifies that the entitlement consists of 5 days of unpaid family and domestic violence leave in a 12 month period.

16. New paragraph 106A(2)(a) provides that unpaid family and domestic violence leave is available in full at the start of each 12 month period of the employee’s employment, and new paragraph 106A(2)(b) provides that the entitlement does not accumulate from year to year. This means that the new entitlement does not accrue progressively, but rather an employee gains the full benefit of the entitlement at the beginning of their employment, which resets to the full five days (if any unpaid family and domestic violence leave has been taken) with each 12 month period of employment.

17. New paragraph 106A(2)(c) provides that unpaid family and domestic violence leave is available in full to part-time and casual employees. This means that the new entitlement applies equally to all types of employees; i.e. there are no special or pro-rata arrangements or exceptions to modify the entitlement in relation to part-time or casual employees.

18. New subsection 106A(3) clarifies the operation of subsection 106A(2) in relation to non-permanent employees who may be engaged and re-engaged multiple times by the same employer.

19. Subsection 106A(3) provides that for the purposes of subsection 106A(2), if an employee is employed by a particular employer as a casual employee, or for a specified period of time, for a specified task or for the duration of a specified season, the start of the employee’s employment is taken to be the start of the employee’s first engagement with that employer.

20. The effect of subsection 106A(3) in relation to casual employees is to provide that while the nature of casual employment means that the employee is re-engaged with each shift of work, they will only get five days of unpaid family and domestic violence leave in a 12 month period with that employer, not five days per engagement.

21. Similarly, in relation to employees who are employed for a specified period of time, for a specified task or for the duration of a specified season, subsection 106A(3) means that these employees will get five days of unpaid family and domestic violence leave in a
12 month period which will reset on the anniversary of their first engagement with that employer, not a new five day entitlement with each re-engagement.

22. Subsection 106A(4) provides that an employee may take unpaid family and domestic violence leave as a single continuous five day period; or as separate periods of one or more days each; or as any separate periods to which the employee and the employer agree, including periods of less than one day.

23. Subsection 106A(5) is an avoidance of doubt provision to make it clear that nothing in section 106A prevents an employee and their employer from agreeing that the employee may take more than five days of unpaid leave to deal with the impact of family and domestic violence.

Section 106B – Taking unpaid family and domestic violence leave

24. New section 106B provides for when an employee can access unpaid family and domestic violence leave, and includes definitions of the terms ‘family and domestic violence’ and ‘close relative’.

25. New subsection 106B(1) provides that an employee may take unpaid family and domestic violence leave if:

- the employee is experiencing family and domestic violence (paragraph 106B(1)(a)); and
- the employee needs to do something to deal with the impact of the family and domestic violence (paragraph 106B(1)(b)); and
- it is impractical for the employee to do that thing outside the employee’s ordinary hours of work (paragraph 106B(1)(c)).

26. New note 1 to subsection 106B(1) indicates that examples of actions, by an employee who is experiencing family and domestic violence, that could be covered by paragraph (b) include arranging for the safety of the employee or a close relative (including relocation), attending urgent court hearings, or accessing police services. The examples included in this note are not a comprehensive list of actions covered by paragraph (b).

27. New note 2 to subsection 106B(1) indicates that the notice and evidence requirements in section 107 of the Act must be complied with.

28. New subsection 106B(2) defines ‘family and domestic violence’ as violent, threatening or other abusive behaviour by a close relative of an employee that:

- seeks to coerce or control the employee; and
- causes the employee harm or to be fearful.

29. New subsection 106B(3) defines a ‘close relative’ of the employee as a person who:

- is a member of the employee’s immediate family; or
Schedule 1 - Amendments

- is related to the employee according to Aboriginal or Torres Strait Islander kinship rules.

30. The new note to subsection 106B(3) indicates that the term ‘immediate family’, which is used in the definition of ‘close relative’, is defined in section 12 of the Act. Section 12 defines ‘immediate family’ to mean: a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee. Under section 12 of the Act, each of the terms ‘spouse’ and ‘de facto partner’ also includes a former spouse and a former de facto partner respectively. A former de facto partner of an employee, whether living at the same residence as the employee or not, is still covered by the definition of close relative.

Section 106C – Confidentiality

31. New section 106C concerns the confidentiality of information obtained by an employer relating to an employee’s notice given or evidence provided under section 107 of the Act for the taking of leave under new section 106B.

32. New subsection 106C(1) provides that employers must take steps to ensure information concerning any notice or evidence an employee has given under section 107 of the Act of the employee taking leave under new Subdivision CA is treated confidentially, as far as it is reasonably practicable to do so.

33. New subsection 106C(2) contains two exceptions to subsection 106C(1), providing that nothing in subsection 106C(1) prevents an employer from disclosing information provided by an employee if the disclosure is required by an Australian law, or is necessary to protect the life, health or safety of the employee or another person.

34. The note to new section 106C alerts the reader to the fact that information covered by section 106C that is personal information may also be regulated under the Privacy Act 1988.

Section 106D – Operation of unpaid family and domestic violence leave and leave for victims of crime

35. New section 106D provides how the new family and domestic leave entitlement in new section 106A interacts with laws of a State or a Territory that provide for leave for victims of crime.

36. Subsections 106D(1) and (2) deal with this interaction in relation to State or Territory entitlements to leave for victims of crime that overlap with the new family and domestic violence leave entitlement provided in Subdivision CA. Section 26 of the Act generally excludes the operation of State or Territory industrial laws, with some exceptions. Section 27 of the Act provides that one of those exceptions is a law of a State or Territory that deals with the subject matter of ‘leave for victims of crime’.

37. New subsection 106D(1) provides that new Subdivision CA of Division 7 of Part 2-2 (unpaid family and domestic violence leave) does not exclude or limit the operation of a law of a State or Territory to the extent that it provides leave for victims of crime. This means that if a State or Territory provides for leave for victims of crime, new Subdivision CA does not exclude or limit a national system employee’s access to that State or Territory entitlement.
38. New subsection 106D(2) provides that if an employee who is entitled, under a law of a State or Territory, to leave for victims of crime is also entitled to leave under Subdivision CA of Division 7, that law applies in addition to Subdivision CA. This means that where an employee is entitled to access both the new unpaid family and domestic violence leave under Subdivision CA, and a State or Territory leave for victims of crime entitlement, the employee can access both types of leave separately and in full.

39. New subsection 106D(3) deals with interaction with State laws in relation to the referrals of legislative authority made by certain States. Subsection 106D(3) provides that a person who is only a national system employee because of sections 30C or 30M of the Act is entitled to leave under Subdivision CA of Division 7 only to the extent that the leave would not constitute leave for victims of crime. In relation to these employees, ‘leave for victims of crime’ is an excluded subject matter from the referrals of legislative authority made by Victoria, New South Wales, Queensland, Tasmania and South Australia that bring these employees into the national system. New subsection 106D(3) makes clear that while new Subdivision CA of Division 7 may overlap with the subject matter ‘leave for victims of crime’, to the extent that employees who are national system employees only because of sections 30C or 30M are not accessing the leave as victims of crime, they may still access the new entitlement in Subdivision CA.

106E – Entitlement to days of leave

40. New section 106E provides that what constitutes a day of leave for the purposes of new Subdivision CA is taken to be the same as what constitutes a day of leave for the purposes of section 85 and Subdivisions B and C.

41. New section 106E makes clear that what constitutes a day of leave for the purposes of the new entitlement to family and domestic violence leave is designed to be the same as what constitutes a day of leave for the purposes of pre-adoption leave (in section 85), unpaid carer’s leave (in Subdivision B of Division 7) and compassionate leave (in Subdivision C of Division 7).

Item 6 – At the end of subsection 107(3)

42. Section 107 of the Act provides the notice and evidence requirements for employees taking leave under Division 7 of Part 2-2.

43. Item 6 is consequential to item 5, and includes a new paragraph to subsection 107(3), providing that if an employee has given his or her employer notice of the taking of unpaid family and domestic violence leave under the new Subdivision CA and has met the requirement specified in paragraph 106B(1)(a), then the employee must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for the purpose specified in paragraph 106B(1)(b) and the requirement specified in paragraph 106B(1)(c) is met. Depending on the circumstances, such evidence may include a document issued by a police service, a court or a family violence support service, or a statutory declaration.

44. The Bill does not amend subsection 107(5) of the Act, which provides that a modern award or enterprise agreement may include evidence requirements in relation to paid personal/carer’s leave, unpaid carer’s leave or compassionate leave. It is not intended to include unpaid family and domestic violence leave in this subsection.
Item 7 – In the appropriate position in Schedule 1

45. Item 7 inserts a new Part 8 – Amendments made by the Fair Work Amendment (Family and Domestic Violence Leave) Act 2018, containing new clauses 39 and 40 in Schedule 1 to the Act.

Clause 39 – Entitlement to unpaid family and domestic violence leave

46. New clause 39 is a transitional application provision that specifies how an employee who is employed at the time the new entitlement in Subdivision CA commences gains the benefit of the entitlement from that commencement date.

47. New subclause 39(1) provides that the new Subdivision CA of Division 7 of Part 2-2, as inserted by the Fair Work Amendment (Family and Domestic Violence Leave) Act 2018, applies in relation to an employee whose employment started before the commencement of that Act as if the period:

- starting on that commencement; and

- ending on the first day after that commencement that is an anniversary of the day the employment started;

were a 12 month period.

48. The effect of subclause 39(1) is that for employees employed at the time the new entitlement commences, they will gain the full benefit of the five days of unpaid leave from the date of commencement, rather than having to wait until the anniversary of the start of their employment as the entitlement is expressed in paragraph 106A(2)(a). After commencement of the amendments containing the new entitlement, the five days of entitlement will then reset on the day of the anniversary of when an employee’s employment started. For example, an employee who started employment with their employer on 10 April 2018 will gain the full five day entitlement upon commencement of the new provisions, and that entitlement will thereafter reset on 10 April each year of their employment with that employer.

49. New subclause 39(2) provides that for the purposes of this clause, if an employee is employed by a particular employer:

- as a casual employee; or

- for a specified period of time, for a specified task or for the duration of a specified season;

the start of the employee’s employment is taken to be the start of the employee’s first employment with that employer.

50. The effect of subclause 39(2) is that the transitional application arrangement provided for in subclause 39(1) applies to casual employees and employees who are employed for a specified period of time, for a specified task or for the duration of a specified season as though the start of their first employment with a particular employer is taken to be the start of the employee’s employment with that employer from which time the entitlement resets. This is the same approach taken for these employees as in subsection 106A(3).
Clause 40 – Resolving uncertainties and difficulties about interaction between enterprise agreements and unpaid family and domestic violence leave

51. New clause 40 provides a mechanism for employers, employees or employee organisations covered by an enterprise agreement to resolve any uncertainties or difficulties between the agreement and new Subdivision CA containing the new unpaid family and domestic violence leave entitlement. This mechanism applies to enterprise agreements that were made under section 182 of the Act before the commencement of the new entitlement.

52. Subclause 40(1) provides that, on application by an employer, employee or employee organisation covered by an enterprise agreement that was made before the commencement of new Subdivision CA, the Commission may make a determination varying the agreement to:

- resolve an uncertainty or difficulty relating to the interaction between the agreement and the following (the unpaid family and domestic violence leave provisions):
  i. the provisions of Subdivision CA of Division 7 of Part 2-2;
  ii. section 107 of the Act, to the extent that it relates to taking leave under that Subdivision; or

- make the agreement operate effectively with the unpaid family and domestic violence leave provisions.

53. Subclause 40(2) provides that a variation of an enterprise agreement under this clause operates from the day specified in the determination, which may be a day before the determination is made.

54. New clause 40 acknowledges that existing enterprise agreements may already provide employees with different forms of leave or an analogous entitlement that is accessible when an employee is experiencing family and domestic violence. Terms in existing enterprise agreements may, for example, use different definitions or operate differently to the new unpaid family and domestic violence leave entitlement, and therefore it may not be clear how the terms of those agreements will interact with the new entitlement. New clause 40 provides a mechanism for applications to be made to the Commission to resolve these questions.