Submission to the

Senate Standing Committee on Education, Employment and Workplace Relations

Inquiry into the

Fair Work Amendment Bill 2013 (Cth)

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1. Introduction

This submission comments on the proposed amendments contained in Part 3 of Schedule 1 of the Fair Work Amendment Bill 2013 (Cth). It does not comment on any other Part or Schedule of the Bill.

One of the proposed changes contained in Part 3 of Schedule 1 would bring an important improvement to the Fair Work Act 2009 (Cth) ('FW Act'). In other respects though, Part 3 of Schedule 1 is disappointing. The Bill's proposals are unduly limited, and represent a wasted opportunity to bring about substantive improvements in the right to request scheme under the FW Act.

The statutory objectives of the FW Act speak of "promot[ing] social inclusion" and "assisting employees to balance their work and family responsibilities by providing for flexible working arrangements" through "a balanced framework for cooperative and productive" and "fair" workplace relations. [1] These objectives provide the criteria for assessing the proposals contained in Part 3 of Schedule 1 of the 2013 Bill.

2. An Important Improvement: The 2013 Bill proposes to broaden the care relationships and circumstances recognized in the right to request scheme (Bill item 17).

At present the FW Act mechanism is limited to requests that relate to meeting the care needs of pre-school aged children and children with a disability under the age of 18.[2] This is unduly restrictive and the extensions in the 2013 Bill's proposed new s 65(1A) are welcome. Sound research exists to amply justify

[1] FW Act s 3.
[2] FW Act s 65(1).

extending the right to request mechanism to broader care relationships, and also to extend it in relation to older workers, and workers dealing with family violence. [3]

3. Requires Amendment: The articulation of "reasonable business grounds" (Bill item 18).

At present, an employee's request for flexible working arrangements may only be rejected by the employer on "reasonable business grounds".[4] Notably, the FW Act does not define or explain the meaning of the phrase, "reasonable business grounds". Nor does it specify a list of factors for an employer to take into account in deciding whether it has "reasonable business grounds" to reject a request in a particular instance. In other words, interpretation of this concept is left at large for both the employer and the employee concerned. Moreover, "reasonable business grounds" is not a concept that has a history or known meaning in industrial law.[5] For all these reasons at present it is a test that is ambiguous in meaning.

This lack of articulation and direction given to employers and employees in the right to request mechanism stands in stark contrast to other uses of the concept of reasonable in the FW Act, such as:

- an employer must not require an employee to work additional hours (above 38 hours per week for a full time employee) unless those extra hours are "reasonable".[6]
- employees are entitled to be absent from work on a public holiday, but that "an employer may request an employee to work on a public holiday if the request is reasonable".[7]

Cases interpreting the additional hours rule and the public holiday provision adopt a methodology of balancing up the employee's interests with the interests of the employer. The factors listed in the legislative provisions are examined.[8] The Explanatory Memorandum to the Fair Work Bill 2008 confirms that in relation to both these two sets of rules, the appropriate methodology for assessing reasonableness is "a balancing exercise between factors".[9] These two sets of rules illustrate a general trend in the FW Act that the test of reasonableness necessitates a weighing of various factors that go to the employee's interests as well as the employer's objectives.[10]

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[3] See eg, Productivity Commission, *Disability Care and Support: Inquiry Report*, Vol 2, No 54, July 2011; Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, ALRC Report 117, February 2012, chaps 15-18.

[4] FW Act s 65(5).

[5] The 2005 *Parental Leave Test Case 2005* (2005) 143 IR 245, which first formulated a right to request in Australia, does not assist to clarify its meaning. The same phrase, used in the right to request an extension of parental leave suffers from the same shortcomings (s 76(4)).

[6] FW Act s 62(1), (3).

[7] FW Act s 114(2), (3).

[8] See eg, *MacPherson v Coal & Allied Mining Services Pty Ltd (No 2)* [2009] FMCA 881 (9 September 2009) at [61] (not challenged on appeal in *Coal & Allied Mining Services Pty Ltd v MacPherson* [2010] FCAFC 83 (12 July 2010)); *The Australian Workers' Union v Australian Trainers' Association* [2009] FWA 418 (9 October 2009) at [9]; *Williams v Macmahon Mining Services Pty Ltd (No.2)* [2009] FMCA 763 (14 August 2009) at [28]-[29]; *Pietraszek v Transpacific Industries Pty Ltd* [2011] FWA 3698 (28 June 2011) at [70]-[90].

[9] Explanatory Memorandum to the Fair Work Bill 2008, at [250], [452].

[10] A further example is provided by casual conversion clauses in modern awards where an employer "must not unreasonably" refuse such a request. See eg, Hospitality Industry (General) Award 2010 (which contains a list of factors, including both the employee's interests in addition to the employer's concerns). Fair Work Australia has

The current "reasonable business grounds" test in the right to request mechanism goes against the general trend of how reasonableness is construed in industrial law as comprising an inclusive list of factors to be weighed up. The 2013 Bill does not adequately address the shortcomings of the current FW Act test of "reasonable business grounds". Indeed, it might go against everyday understandings of the meaning of reasonableness.[11] Importantly, item 18 in the 2013 Bill does not on its face appear to envisage a weighing up or balancing process by the employer. Rather, the way that proposed s 65(5A) is drafted suggests that each of the matters listed in (a) to (e) is conclusively a "reasonable business ground". Items (a) to (e) are not drafted as matters to be weighed up by the employer in coming to its decision whether to grant the request.[12] Importantly, none of the listed matters go to the employee's interests in having the request granted, and the greater good that may come to the workplace through more flexible working arrangements.

The Bill ought to be amended to ensure that the employer goes through a process of weighing up various factors, including the harm to the employee in not being accommodated, good management practices of flexible working arrangements, in addition to the employer's own interests, as part of its process of deciding whether it can accommodate the employee's request. This process of the employer should emphasis the public interest in furthering the objects of the Act. Such a methodology makes good management sense, and is in keeping with broader industrial approaches to a reasonableness test.

As a separate (but related) point, it is noted that the choice of words used in item 18 to articulate the inclusive list of "reasonable business grounds" themselves do not provide adequate guidance to employers and employees. For example, how would an employer know whether, for example, a cost was "too costly" (under proposed s 65(5A)(a)), or whether a perceived negative impact was "significant" (under proposed s 65(5A)(d), (e))? Surely "impractical" will always be a question of degree (proposed s 65(5A)(c)).

4. Requires Amendment: The lack of an enforcement mechanism.

Currently, the FW Act provides that the rule stating that the only basis for an employer to refuse a request is "reasonable business grounds" is not enforceable as a contravention of Part 2-2 Division 4.[13] It cannot be litigated directly as a civil remedy provision, as no cause of action arises where an employer refuses a request on unreasonable grounds.

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interpreted this criterion of reasonableness as invoking a methodology of weighing different factors, including the employer's objectives and concerns, in addition to the legitimate expectations and wishes of the casuals themselves to have the option to convert, as well as the impact on other employees of the employer: *Australian Manufacturing Workers' Union v Christie Tea Pty Ltd* [2010] FWA 10121 (3 December 2010) at [14]-[18]. See similarly in South Australia, the Clerks (South Australia) Award [2004] SAIRComm 4 (28 January 2004) at [127]-[130].

[11] Indeed, the ordinary meaning of reasonableness may suggest a weighing up and balancing of various matters. For example, the Macquarie Dictionary defines "reasonable" as "endowed with reason", "agreeable to reason or sound judgement: a reasonable choice". *Macquarie Dictionary*, 5th edn, 2009, Sydney. In order for a decision to be "endowed with reason" or a "sound judgement", it might be said that it must be preceded by a process of considering and weighing up various factors.

[12] This appears to be at odds with the Explanatory Memorandum which indicates that each of (a) to (e) "may" constitute "reasonable business grounds": [38]. See also [23].

[13] FW Act s 65(5), s 44(2). See also s 739(2), s 740(2). It is of course important to acknowledge that relevant employers are legally bound to comply with all aspects of the FW Act request mechanism, whether a particular provision is able to be directly enforced as a civil remedy provision or not: FW Act s 44.

Indirect enforcement though of this obligation may arguably arise through other mechanisms. Importantly, the merits of an employer's refusal of a request for accommodation are reviewable where the employer has consented, under an agreement or an employment contract, to dispute resolution over a refusal of an employee's request.[14] In addition, where an enterprise agreement contains a term that provides a similar request mechanism, a contravention of that term is able to be pursued as a breach of the enterprise agreement.[15] And finally, an unreasonable refusal of a request by an employer may be able to be pursued as discrimination under anti-discrimination law, and perhaps most obviously for Victorian employees under the Equal Opportunity Act 2010 (Vic).[16]

In contrast to the rule that the employer may only refuse a request on "reasonable business grounds", the rules in the FW Act scheme requiring the employer to give the employee a written response within 21 days stating whether the request is granted, and where refused including "details of the reasons for the refusal", are directly enforceable as contraventions of Part 2-2 Division 4. These are civil remedy provisions.[17]

The 2013 Bill does not seek to make any change to the enforcement framework of the Act's right to request. This is very disappointing and represents a missed opportunity to substantively improve the scheme. All aspects of the right to request scheme should be made directly enforceable through the FW Act civil remedy provisions. It makes no sense to make some rules – such as the 21 day provision - directly enforceable, but not others. The merits of an employer's refusal should be open to challenge by an employee. The reasons for this view have been well articulated by others, and there is no need to repeat them here.[18]

In addition, as the reasons why the employer rejected a request are solely within the employer's knowledge, it is appropriate to place the onus on the employer to establish that it had "reasonable business grounds" to reject the request of the employee. This would operate as a reverse onus of proof. Notably, a reverse onus of proof is in keeping with the adverse action protections in Part 3-1 and the unlawful termination provisions in Part 6-4 Div 2.[19]

5. Requires Amendment: Preconditions of service.

[14] FW Act s 739(2), s 740(2). From 1 July 2010 to 30 June 2012 60 applications were made to FWA to deal with a dispute under s 739 relating to flexible working arrangements: FWA, *Annual Report 2010-2011*, FWA, Melbourne, 2011, at 81 (Table G5); FWA, *Annual Report 2011-2012*, FWA, Melbourne, 2012, at 24 (Table 11).
[15] FW Act s 50.
[16] Equal Opportunity Act 2010 (Vic) s 17, s 19, s 22, s 32. The FW Act request mechanism does not exclude the operation of state law that provides more beneficial entitlements for employees to flexible work arrangements. Indeed, the FW Act contains an explicit direction in that regard: FW Act s 66.
[17] FW Act s 65(4), (6), s 44(1), s 539.
[18] See, eg, the views recorded in the following: The Senate, Standing Committee on Education, Employment and Workplace Relations, *Fair Work Bill 2008 [Provisions]*, Parliament of Australia, Canberra, 2009, at [2.30]; House of Representatives Standing Committee on Education and Employment, *Advisory Report on the Fair Work Amendment (Better Work/Life Balance) Bill 2012*, House of Representatives, Canberra, 2012, at [1.29]-[1.34]; R McCallum, M Moore and J Edwards, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, Australian Government, Canberra, 2012, at 96.
[19] FW Act s 361, s 783. The Explanatory Memorandum to the Fair Work Bill acknowledges that in the absence of a reverse onus in relation to the adverse action, "it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason" under Part 3-1: [1461].

Currently the FW Act limits the right to request to "national system employees" who have completed 12 months "continuous service" with their employer prior to making the request, or are a "long term casual employee".[20] These preconditions are unduly restrictive. Disappointingly, the 2013 Bill does not address this inadequacy. The preconditions are highly gendered in that they disproportionately exclude employment arrangements that are dominated by women of child-bearing age.[21] This is particularly notable as the experience of work and care conflict is highly gendered, with women reporting higher levels of tension between work and care. Conflict between work and care presents a principal source of women's inequality in the labour market. The right to request scheme should simply extend to all "national system employee[s]". The length and characteristics of an employee's engagement, instead of presenting a potential complete bar to access to the scheme, are better positioned as relevant considerations in assessing whether it was justified for the employer to reject the request for changed working arrangements.

6. Requires Amendment: New objective needed.

The 2013 Bill does not propose to alter the objects of the FW Act, or to insert new objects for Division 4 of Part 2-2. The Bill should be amended to include an object of achieving substantive equality, and not merely formal equality.

[20] FW Act s 65(2); see also s 60, s 12 definition of "long term casual", s 22 definition of "continuous service".
[21] See, eg, Sara Charlesworth and Iain Campbell, 'Right to Request Regulation: Two New Australian Models' (2008) 21 *Australian Journal of Labour Law* 116, 122, who write that "[i]n 2006 …, 21% of working women of child bearing age (25-44 years) had less than 12 months service with their current employer", citing Australian Bureau of Statistics, *Labour Mobility Australia*, 2006, Cat No 6209.0. See also Australian Bureau of Statistics, *Australian Labour Market Statistics*, July 2009, Cat No 6105, ABS, Canberra, 2009.