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Inquiry into the Fair Work Bill 2008

Submission relating to the Right to Request

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I have researched and taught discrimination law and work/family law to law students at Monash and Melbourne University Law Schools for over fifteen years. This submission relates solely to the provisions for a right to request flexible work in clause 65.

There are several difficulties with the expression of this right, including the qualifying period, the unconfined and unspecified range of reasons for refusal, and the lack of enforceability. In particular, the unenforceability of the provision in light of cl. 44(2) risks rendering this "right" completely ineffective.

It is **recommended** that:

1. No qualifying period of employment be required, or alternatively that a period of no more than six months be required.

2. The legislation specify the range of reasons on which such requests can be refused, on the same basis as the UK right to request in s.80F of the *Employment Rights Act 1996* (UK), which has been very successful. (A copy of the relevant provisions of the ERA is attached to this submission for ease of reference.)

3. As in the UK legislation, the *process* for dealing with such requests should be enforceable, but the *substance* of employer responses should not be reviewable under the Fair Work Act.

1. Qualifying period

The rationale for having a long qualifying period of one year is not clear. A qualifying period portrays the right to request as a reward for loyal employees, rather than as a normal aspect of employment negotiation between employer and employee in a wide range of circumstances. It is difficult to see why a new employee should not be able to request flexibility, especially since an employer's decision to refuse is not reviewable in substance under this Bill, and there is a wide range of reasons for refusal.

Many jobs, including the vast majority of professional and management jobs, are only advertised and offered on a full time basis. The effect of imposing the qualifying period is to make it likely that only existing employees who have already qualified before having a child will be able to take advantage of the right to request. Many parents and others who have caring responsibilities may not be able to work for 12 months on a normal (full time) basis to qualify to request flexible work. This inability would permanently exclude them from qualifying for flexible work, and confine workers with caring responsibilities to lower level and lesser paid work that is offered on a part time or casual basis.

The qualifying period thus limits the ability of carers (whether caring for a child, a person with a disability, or an elderly person) to seek a job on a basis consistent with their caring obligations, and will be one of the mechanisms that preserves quality, usually better paid, work for full time employees. A qualifying period, especially a long one, will operate as a barrier to quality work for women and men who have caring responsibilities for young children and reinforce the primacy of full time work and the gendered division of paid and domestic labour.

If it is necessary to retain a qualifying period despite these effects, then it is difficult to see any reason why a period longer than six months, as provided for in UK, is needed.

2. Grounds on which a request can be refused

Clause 65(5) provides that the employer may refuse the request only on reasonable business grounds. However, there is no guidance on what sorts of reasons fall within this term, leaving employers with little clarity as to what the scope and limits of "reasonable business grounds" are. This is likely to increase uncertainty and costs for all employers, especially small businesses. Arguably, they would be better served by the provision of a list of acceptable grounds for refusal of a request, in the same way as the successful UK model, which gives guidance to employers and directs their minds to the correct factors in considering a request.

In UK, Section 80G of the *Employment Rights Act 1996* provides that the employer can only refuse the application on one of a number of specified grounds, which are set out in 80G. They are:

- the burden of additional costs
- detrimental effect on ability to meet customer demand
- inability to re-organise work among existing staff
- inability to recruit additional staff
- detrimental impact on quality or performance
- insufficiency of work during periods the employee proposes to work
- planned structural changes

- other grounds as may be set out in regulations. (At the present time there are no other grounds.)

This list identifies the sorts of reasonable business grounds that provide a genuine basis for refusal of flexible work, as well as giving clear guidance to employers about what are, and what are not acceptable reasons for refusal. It encourages employers to consider whether they can accommodate the employee, which is the aim of the provision, while at the same time preserving management control.

In UK, as in Australia, the substance[1] of reasons for refusal of a request cannot be directly legally challenged (other than through a discrimination case), so that the list does not operate coercively, but rather as a guideline to ensure the correct issues are considered and that requests are not refused lightly or without proper consideration.

3. Lack of Enforceability

The complete lack of enforceability ensured by cl. 44(2) of the Bill is a major obstacle to the effectiveness of the right to request. It may well render the right nugatory, as recalcitrant employers could simply ignore requests, with no consequences.

The possibility of a discrimination claim will not be an effective primary enforcement mechanism. Such a claim under federal, state or territory anti-discrimination laws would in most cases involve court litigation in court with the risk of costs being payable if the case is lost, and the delays of a court process, including a preliminary conciliation process at the Australian Human Rights Commission or a state agency, and then a mediation process in court or tribunal before reaching a hearing. This renders it inaccessible to all except the best resourced employees, and far too slow to solve problems relating to the need to accommodate caring responsibilities.

It is very unlikely that a claim for discriminatory treatment in refusing a request for flexible work could be brought under clause 351(1) which prohibits discriminatory treatment. The content and elements of such a claim are not specified in the Bill and are very unclear at this stage. In light of cl. 44(2), a court is unlikely to find that a refusal under cl.65 is *taking "adverse action* against a person who is an employee, or prospective employee, of the employer *because of* the person's … family or carer's responsibilities." (cl. 351(1)). Clause 351(1) appears to cover only direct discrimination, and it is likely to be easy for an employer to prove that the refusal was not *because of* the carers responsibilities, but for other reasons.

In UK, the path chosen was to avoid reviewing the substance of an employer's assessment of business needs, but to ensure that correct *process* had been followed, and that factually correct information had been relied on. A refusal can be reviewed by the Employment Tribunal under s.80H of the *Employment Rights Act 1996* on the ground that either the required process was not followed (eg no answer was given, or the reason given was not within those permitted) or that it was based on incorrect facts. If the review succeeds, the Employment Tribunal can order reconsideration of the application, and award compensation to be paid by the employer to the employee. It has no power to require any particular outcome, merely to ensure that the process is followed in good faith.

[1] In UK, reasons for refusal can be challenged on procedural and good faith grounds – see part 3.

This level of enforcement seems essential to prevent the right to request from becoming a decorative dead letter. In difficult economic circumstances, the area covered by the listed business grounds will be expansive, but nevertheless employers should be required to considering a request honestly by the specified process. The current Bill entirely fails to require this and needs amendment in some way to ensure some degree of enforceability.

Conclusion

Certainty and clarity in the law are extremely important for businesses, especially small businesses. Costs for small businesses arise from lack of clarity and doubt about what the law requires, and are less likely where the law gives clear guidance on the limits that apply. It would be easier for businesses to abide by the law on the right to request if they were given a specific process to follow and an (adequately wide ranging) list of reasons that could be relied upon. Employers can then be expected to comply with this process in good faith.

Adoption of an enforcement structure and reasons proposed as in this submission, based on the UK model, would still protect good faith management decisions about flexible work from review. However if the Bill is adopted in its current form, the right to request flexible work will be potentially ineffective, and will entirely fail to remedy the impact of WorkChoices in removing the rights to request flexible work that had been granted by the AIRC in its Family Provision Test Case in 2005.

Beth Gaze
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UK *EMPLOYMENT RIGHTS ACT* Part 8A Flexible working

80F Statutory right to request contract variation

(1) A qualifying employee may apply to his employer for a change in his terms and conditions of employment if—

(a) the change relates to—

(i) the hours he is required to work,

(ii) the times when he is required to work,

(iii) where, as between his home and a place of business of his employer, he is required to work, or

(iv) such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations, and

(b) his purpose in applying for the change is to enable him to care for someone who, at the time of application, is a child in respect of whom he satisfies such conditions as to relationship as the Secretary of State may specify by regulations.

(2) An application under this section must—

(a) state that it is such an application,

(b) specify the change applied for and the date on which it is proposed the change should become effective,

(c) explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with, and

(d) explain how the employee meets, in respect of the child concerned, the conditions as to relationship mentioned in subsection (1)(b).

(3) An application under this section must be made before the fourteenth day before the day on which the child concerned reaches the age of six or, if disabled, eighteen.

(4) If an employee has made an application under this section, he may not make a further application under this section to the same employer before the end of the period of twelve months beginning with the date on which the previous application was made.

(5) The Secretary of State may by regulations make provision about—

(a) the form of applications under this section, and

(b) when such an application is to be taken as made.

(6) The Secretary of State may by order substitute a different age for the first of the ages specified in subsection (3).

(7) In subsection (3), the reference to a disabled child is to a child who is entitled to a disability living allowance within the meaning of section 71 of the Social Security Contributions and Benefits Act 1992 (c. 4).

(8) For the purposes of this section, an employee is—

(a) a qualifying employee if he—

(i) satisfies such conditions as to duration of employment as the Secretary of State may specify by regulations, and

(ii) is not an agency worker;

(b) an agency worker if he is supplied by a person (“the agent”) to do work for another (“the principal”) under a contract or other arrangement made between the agent and the principal.

80G Employer’s duties in relation to application under section 80F

(1) An employer to whom an application under section 80F is made—

(a) shall deal with the application in accordance with regulations made by the Secretary of State, and

(b) shall only refuse the application because he considers that one or more of the following grounds applies—

(i) the burden of additional costs,

(ii) detrimental effect on ability to meet customer demand,

(iii) inability to re-organise work among existing staff,

(iv) inability to recruit additional staff,

(v) detrimental impact on quality,

(vi) detrimental impact on performance,

(vii) insufficiency of work during the periods the employee proposes to work,

(viii) planned structural changes, and

(ix) such other grounds as the Secretary of State may specify by regulations.

(2) Regulations under subsection (1)(a) shall include—

(a) provision for the holding of a meeting between the employer and the employee to discuss an application under section 80F within twenty eight days after the date the application is made;

(b) provision for the giving by the employer to the employee of notice of his decision on the application within fourteen days after the date of the meeting under paragraph (a);

(c) provision for notice under paragraph (b) of a decision to refuse the application to state the grounds for the decision;

(d) provision for the employee to have a right, if he is dissatisfied with the employer’s decision, to appeal against it within fourteen days after the date on which notice under paragraph (b) is given;

(e) provision about the procedure for exercising the right of appeal under paragraph (d), including provision requiring the employee to set out the grounds of appeal;

(f) provision for notice under paragraph (b) to include such information as the regulations may specify relating to the right of appeal under paragraph (d);

(g) provision for the holding, within fourteen days after the date on which notice of appeal is given by the employee, of a meeting between the employer and the employee to discuss the appeal;

(h) provision for the employer to give the employee notice of his decision on any appeal within fourteen days after the date of the meeting under paragraph (g);

(i) provision for notice under paragraph (h) of a decision to dismiss an appeal to state the grounds for the decision;

(j) provision for a statement under paragraph (c) or (i) to contain a sufficient explanation of the grounds for the decision;

(k) provision for the employee to have a right to be accompanied at meetings under paragraph (a) or (g) by a person of such description as the regulations may specify;

(l) provision for postponement in relation to any meeting under paragraph (a) or (g) which a companion under paragraph (k) is not available to attend;
(m) provision in relation to companions under paragraph (k) corresponding to section 10(6) and (7) of the Employment Relations Act 1999 (c. 26)(right to paid time off to act as companion, etc.);
(n) provision, in relation to the rights under paragraphs (k) and (l), for the application (with or without modification) of sections 11 to 13 of the Employment Relations Act 1999 (provisions ancillary to right to be accompanied under section 10 of that Act).

(3) Regulations under subsection (1)(a) may include—
(a) provision for any requirement of the regulations not to apply where an application is disposed of by agreement or withdrawn;
(b) provision for extension of a time limit where the employer and employee agree, or in such other circumstances as the regulations may specify;
(c) provision for applications to be treated as withdrawn in specified circumstances;
and may make different provision for different cases.

(4) The Secretary of State may by order amend subsection (2).

80H Complaints to employment tribunals

(1) An employee who makes an application under section 80F may present a complaint to an employment tribunal—
(a) that his employer has failed in relation to the application to comply with section 80G(1), or
(b) that a decision by his employer to reject the application was based on incorrect facts.

(2) No complaint under this section may be made in respect of an application which has been disposed of by agreement or withdrawn.

(3) In the case of an application which has not been disposed of by agreement or withdrawn, no complaint under this section may be made until the employer—
(a) notifies the employee of a decision to reject the application on appeal, or
(b) commits a breach of regulations under section 80G(1)(a) of such description as the Secretary of State may specify by regulations.

(4) No complaint under this section may be made in respect of failure to comply with provision included in regulations under subsection (1)(a) of section 80G because of subsection (2)(k), (l) or (m) of that section.

(5) An employment tribunal shall not consider a complaint under this section unless it is presented—
(a) before the end of the period of three months beginning with the relevant date, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(6) In subsection (5)(a), the reference to the relevant date is—

(a) in the case of a complaint permitted by subsection (3)(a), the date on which the employee is notified of the decision on the appeal, and
(b) in the case of a complaint permitted by subsection (3)(b), the date on which the breach concerned was committed.

80I Remedies

(1) Where an employment tribunal finds a complaint under section 80H well-founded it shall make a declaration to that effect and may—
(a) make an order for reconsideration of the application, and
(b) make an award of compensation to be paid by the employer to the employee.

(2) The amount of compensation shall be such amount, not exceeding the permitted maximum, as the tribunal considers just and equitable in all the circumstances.

(3) For the purposes of subsection (2), the permitted maximum is such number of weeks' pay as the Secretary of State may specify by regulations.

(4) Where an employment tribunal makes an order under subsection (1)(a), section 80G, and the regulations under that section, shall apply as if the application had been made on the date of the order.