Australian Government

Department of Education, Employment and Workplace Relations

Senate Standing Committee on Education, Employment and Workplace Relations

Inquiry into the Fair Work Amendment Bill 2013

Submission of the

Department of Education, Employment and Workplace Relations

Contents

1. Introduction

1.1. On 21 March 2013, the Hon Bill Shorten MP, Minister for Employment and Workplace Relations, introduced the Fair Work Amendment Bill 2013 (the Bill) into the Parliament.

1.2. The Bill includes a range of new family friendly measures announced by Government to alleviate some of the pressures on modern families and to encourage people with family responsibilities to participate in the workforce. The Bill implements the Government's response to a further five recommendations of the Fair Work Act Review Panel, as well as other changes arising from consultation with stakeholders following the release of the Review report. The *Fair Work Amendment Act 2012* responded to 16 recommendations of the Review Panel and Recommendation 44 has been responded to administratively.

1.3. The Government is continuing to discuss with stakeholders the remaining recommendations of the Review Panel.

1.4. The Bill also implements the Government's response to a key recommendation of the House of Representatives Standing Committee on Education and Employment's report: *Workplace Bullying "We just want it to stop"*.

1.5. The Bill will make amendments to:

- introduce new family friendly arrangements, including expanding the scope of the right to request flexible working arrangements provisions and establishing new consultation requirements to ensure that employers genuinely consult with employees about changes to regular rosters and working hours
- ensure that a pregnant employee can transfer to a safe job where one is available regardless of their length of service, increase the length of concurrent unpaid parental leave from three to eight weeks and allow greater flexibility about when parents can take the leave in the 12 months after the birth of the child, and provide that taking unpaid special maternity leave does not reduce an employee's entitlement to unpaid parental leave
- establish an individual right of recourse to the Fair Work Commission (FWC) for people who have been bullied in the workplace
- the modern awards objective to require that FWC takes into account the need to provide additional remuneration for employees working outside normal working hours when exercising functions in respect of modern awards
- provide FWC with greater power to deal with disputes about the frequency of right of entry visits, provide greater clarity over the location of interviews and discussions where the parties cannot agree and to include special provisions regarding access to remote worksites where access is reliant upon occupier provided transport and/or accommodation including cost recovery arrangements and conduct rules
- enact a range of technical and consequential amendments.

1.6. This submission to the Senate Education, Employment and Workplace Relations Legislation Committee Inquiry into the Bill provides information on the background to the amendments and on their anticipated application in the workplace. The submission also provides a brief background on the inquiry into workplace bullying by the House of Representatives Standing Committee on Education and Employment.

2. Fair Work Act Review

2.1. The *Fair Work Act 2009* (FW Act) gave effect to the Government's commitments to implement a fair and flexible workplace relations system for Australia. In 2009 the Government committed to undertake a review of the FW Act within two years after its full implementation.

2.2. On 20 December 2011 Minister Shorten announced the appointment of a three-member panel to conduct the review the FW Act (the Review). The Review Panel comprised Reserve Bank Board Member John Edwards, former Federal Court Judge, the Honourable Michael Moore and noted legal and workplace relations academic Professor Emeritus Ron McCallum AO.

2.3. The terms of reference for the Review requested the Review Panel to conduct an evidence-based assessment of whether the FW Act was operating as intended and the extent to which its effects have been consistent with the object set out in section 3 of the FW Act. The terms of reference also required the Review Panel to examine and report on areas where evidence indicates that the operation of the FW Act could be improved consistent with the objectives of the legislation. The terms of reference excluded consideration of the content of modern awards, which are the subject of a separate review process conducted by FWC that is still underway. The terms of reference were approved by the Office of Best Practice Regulation (OBPR).

2.4. The Review Panel received over 250 written submissions (207 initial submissions and a further 47 supplementary submissions). To supplement the written submission process, the Review Panel held a series of meetings and roundtable discussions with a large number of stakeholders between February and March 2012. Individual meetings were held with peak employer and employee associations, as well as with some individual entities, including state and territory government representatives.

2.5. The Review Panel's final report – *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* – was released on 2 August 2012. The OBPR assessed the final report as meeting the requirements of a post implementation review. In the report, the Review Panel found that the FW Act was operating as intended, consistent with the objects of the legislation. The Review Panel also found that important economic outcomes such as wages growth, industrial disputation, the responsiveness of wages to supply and demand, the rate of employment growth and the flexibility of work patterns have been favourable to Australia's continuing prosperity under the FW Act.

2.6. The Review Panel did not recommend wholesale changes, but instead made 53 mainly technical recommendations to further promote productivity, improve equity or correct anomalies with the FW Act.

3. Consultation

3.1. Through the Review process all key workplace relations stakeholders, including employers, employer organisations, employees, unions, state and territory governments, academics and others were given the opportunity to share their views on the operation of the FW Act. The process enabled the Review Panel to undertake an evidence-based assessment of the legislation to determine whether it was meeting its objectives and any areas for improvement.

3.2. The Review also followed extensive public consultation the Government undertook as part of the development of the FW Act, which included all key employee and employer stakeholders as well as state and territory ministers and officials. These consultations involved both a range of existing stakeholder groups, such as the National Workplace Relations Consultative Council (NWRCC), and several others established specifically to consult on the proposed legislation, such as the Small Business Working Group and the Business Advisory Group. Draft National Employment Standards were released for public comment and the text of the Fair Work Bill 2008 was also subject to an extensive examination through the Committee on Industrial Legislation (COIL) (a subcommittee of NWRCC) and a parallel process involving state and territory government representatives.

3.3. Development of the Fair Work Amendment Bill 2013 also follows extensive consultation with a number of employer and employee workplace relations stakeholders, including members of the NWRCC and state and territory governments.

3.4. The Minister consulted with the NWRCC on the amendments at a meeting on 7 March 2013. The Department conducted further consultations on the proposed amendments with NWRCC representatives at a meeting on 8 March 2013 and with state and territory officials at meetings on 1 and 8 March 2013.

3.5. Stakeholders were consulted on the detail of the Bill prior to its introduction into the Parliament through COIL at meetings on 14 and 20 March 2013 and meetings with state and territory government officials on 15 and 20 March 2013. At these meetings the Department provided copies of the draft legislation to stakeholders and sought their feedback on the proposed amendments.

4. Changes to the operation of the *Fair Work Act 2009*

Family friendly amendments

Right to request flexible working arrangements

4.1. In developing the amendments, the Government has conducted extensive consultations on expanding the right to request flexible working arrangements under the National Employment Standards (NES).

4.2. Under the National Carer Strategy, released in August 2011, the Government consulted with stakeholders on the option of expanding the right to request flexible

working arrangements to include eligible employees with caring responsibilities for the elderly, and caring responsibilities for those with a serious long-term illness or disability. The Government also sought the views of stakeholders on the option to expand the right to request flexible working arrangements to include eligible employees with caring responsibilities for school age children.

4.3. Consultations were also undertaken as part of the Fair Work Act Review. The Review contained an extensive discussion on the right to request and a wide range of stakeholders supported the view that the right should be extended. In their report, the Review Panel described survey findings, from Fair Work Australia (now FWC) in 2011, which showed a low number of employees were making requests for flexible working arrangements under the NES but that where requests were made, the majority were granted. Similar findings, based on the 2011 surveys as well as additional data collection and analysis, were reported by the General Manager of FWC in 2012[1]. Around 89 per cent of employees who made a written request for flexible working arrangements under the NES had their request granted without variation and around seven per cent said that their requests were granted with changes.

4.4. The Review Panel noted that employers are taking the right to request seriously, but that the narrow scope of the provisions may be contributing to the low level of formal requests being made. The Review Panel recommended that the FW Act be amended to extend the right to request flexible working arrangements to a wider range of caring and other circumstances (Recommendation 5). In making this recommendation, the Review Panel noted that an object of the FW Act is to help employees balance their work and family responsibilities by providing flexible working arrangements, and emphasised the importance of maintaining a skilled workforce by not disenfranchising those who may have caring responsibilities.

4.5. In addition to expanding the right to request, the Review Panel also recommended that employers and employees be required to hold a meeting to discuss the request, unless the employer has agreed to the request (Recommendation 5). The Government announced that it would not include an amendment of this nature on 11 February 2013.

4.6. Whilst the FW Act represented the first time the right to request flexible work arrangements was included in Australia's workplace laws, a right to request flexible working arrangements has had a longer history in a number of other countries, for example the United Kingdom (UK). The right to request flexible working was first introduced in the UK in April 2003 for employed parents of children under the age of 5 or under the age of 18 if the child is disabled. The right to request flexible working was extended to carers of some adults in April 2007 and in April 2009 for parents of children under the age of 17.

4.7. As cited by the Review Panel, research from the UK indicates that workplaces offering flexible working arrangements can achieve benefits in productivity and

1 O'Neill, B (2012) *General Manager's report into the operation of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave 2009–2012*, Commonwealth of Australia.

employee relations. A 2007 UK survey found that 47 per cent of employers thought that flexible working and leave arrangements had a positive effect on productivity[2]. Only 12 per cent of employers reported a negative effect, with the remainder reporting no impact. The survey also asked about the impact of flexible working on employee relations, motivation and commitment, recruitment, labour turnover and absenteeism and found that, for the most part, flexible working and leave arrangements had a positive effect or no effect on employee relations and human resources management.

Extending the right to request

4.8. Part 3 of Schedule 1 of the Bill implements Recommendation 5 of the Review Panel by expanding the right to request a change in working arrangements to:

(a) employees who are parents, or who have responsibility for the care, of a child who is of school age or younger;

(b) employees who are carers (within the meaning of the *Carer Recognition Act 2010*);

(c) employees with a disability;

(d) employees who are 55 or older;

(e) employees who are experiencing violence from a member of the employee's family;

(f) employees who 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 the member is experiencing violence from the member's family.

(a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger

4.9. A number of submissions to the Review emphasised that parents' caring responsibilities extended beyond pre-school age. As noted above, the Government has previously consulted on extending the right to request to parents of school age children as part of the National Carer Strategy. This amendment will assist parents in balancing work with caring responsibilities for school age children.

(b) the employee is a carer (within the meaning of the Carer Recognition Act 2010)

4.10. A significant number of submissions to the Review argued that the right to request should be extended to a broader range of carers, including those caring for the elderly and those caring for adult dependents with a disability. A number of recent reports and inquiries have also recommended that the right to request be extended to additional groups of carers. In addition, as set out above, the Government

2 Cited in United Kingdom Department for Business, Innovation and Skills, *Impact assessment: extending flexible working to parents of children aged 17,* October 2010, pp. 11–12.

consulted with stakeholders on expanding the right to request to a broader range of caring responsibilities as part of consultations on the National Carer Strategy.

4.11. The Productivity Commission's *Report into Disability Care and Support*, published in 2011, noted that the caring responsibilities of parents increase when children with a disability leave school, and recommended that the Government amend the FW Act to permit parents to request flexible leave from their employer if their child is over 18 years old (Recommendation 15.5).

4.12. Further, the Australian Work and Life Index Report, *The Big Squeeze: Work, home and care in 2012,* found that levels of work-life interference are comparable between employees providing care for young children and employees providing care for other groups, for example the elderly. The Report suggested that a greater scope of carers, in addition to those caring for children, could benefit from access to a right to request.

4.13. The Bill will extend the right to request to carers, as per the definition of carer outlined in the *Carer Recognition Act 2010* (Carer Recognition Act). As noted by Carers Australia in their submission to the Review, the definition of Carer outlined in the Carer Recognition Act reflects the diversity of unpaid carers in the community.

(c) the employee has a disability.

4.14. Extending the right to request flexible working arrangements to employees with a disability is intended to improve the capacity to remain in employment and is likely to improve the employment participation rates overall. It is also consistent with the *Disability Discrimination Act 1992*, which places a duty on employers to make reasonable adjustments for a person with a disability.

4.15. In their submission to the Review, the Australian Human Rights Commission argued that "the flexibility in working arrangements which assists workers with family and carer responsibilities is often the same as, or similar to, the flexibility which may be required by people with a disability in the workplace", and recommended that the right to request flexible working arrangements should be extended to employees with a disability. This argument is supported by the Human Rights and Equal Opportunity Commission Report, *WORKability II: People with Disability in the Open Workplace* (2005) which was the result of extensive national consultation.

4.16. Personalising the relationship between an employee with a disability and their employer assists both parties to make arrangements to meet their individual needs, depending on the nature of the disability and the job they are doing. In the United States, evidence-based research showed that 'customised employment' leads to positive employment outcomes for employees with disabilities[3].

(d) the employee is 55 or older.

4.17. Of the 5.9 million mature age (55+) people in Australia's population, 2.1 million are in the labour force (this represents 17.2 per cent of the total labour force). There is

3 United States Department of Labor, *Knowledge Development and Translation Initiative for Expanding Availability and Use of Customized Employment Report*, September 2009.

a strong economic incentive to implement policy initiatives that will serve to increase the participation rate of mature age employees with evidence indicating that a 7 per cent increase in mature age labour force participation would raise gross domestic product in 2022 by about 1.4 per cent, or $25 billion in 2010 dollars[4].

4.18. The Bill extends the right to request to those employees who are 55 years or older. While the Australian Bureau of Statistics defines mature age as being 45+, the preservation age (the age at which a worker can access their superannuation) is currently 55 and, as access to superannuation may influence a decision to retire, it is appropriate to allow employees in this age group access to flexible arrangements to encourage continued workforce participation.

4.19. Extension of the right to request flexible working arrangements to support mature age employees has been considered by a number of recent inquiry reports. For example, the Advisory Panel on the Economic Potential of Senior Australians report, *Realising the economic potential of senior Australians: turning grey into gold,* recommended that the Australian Government work with industry to extend flexible work arrangements to people aged 55 and over (Recommendation 15). In addition, the Consultative Forum on Mature Age Participation has emphasised that the 'ability to work part-time or flexible hours has been found to be the most important facilitator, after good health, for older people to work beyond retirement age'[5].

4.20. Similar initiatives have been implemented internationally. For example, in Germany workers over 55 years can reduce their working hours to make a gradual transition to retirement.

(e) the employee is experiencing violence from a member of the employee's family; and

(f) the employee provides 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 the member is experiencing violence from the member's family.

4.21. The 2012 Australian Law Reform Commission (ALRC) report, *Family Violence and Commonwealth Laws - Improving Legal Frameworks* recommended that the Government extend the right to request flexible working arrangements to victims of family violence (Recommendation 15). A significant number of submissions to the ALRC Inquiry supported the extension of the right to request flexible working arrangements to cover family violence, including, among others, the ACTU, the Australian Human Rights Commission, the Queensland Law Society and the National Network of Working Women's Centre's.

4.22. The ALRC and other stakeholders have emphasised the importance of access to flexible working arrangements in family violence situations, for example to allow victims of domestic violence to appear in court or to arrange alternative housing.

4 Grattan Institute (2012). *Game-changers: Economic reform priorities for Australia*. The Institute also notes that in New Zealand, a country with similar culture and social policy, 15 per cent per cent more of the 55-64 year old cohort are working than in Australia.

5 National Seniors Productive Ageing Centre, *Ageing and the Barriers to Labour Force Participation in Australia* (2011), prepared for the Consultative Forum on Mature Age Participation, 23.

The ALRC, in addition to a number of other stakeholders, also advocated for these amendments through submissions to the Review.

Right to request part-time work on return from birth or adoption related leave

4.23. The Bill also establishes an express right for an employee, who is a parent or who has responsibility for the care of a child, and who is returning to work after taking leave in relation to the birth or adoption of the child, to request to work part-time to assist the employee to care for the child.

4.24. Under the existing right to request provisions in the FW Act, parents returning from birth or adoption related leave are likely to already have access to the right to request flexible working arrangements. As reported by FWA's General Manager in 2012[6], however, less than 50 per cent of employees are aware of the right to request flexible work arrangement provisions in the NES.

4.25. The Bill makes the right to request part-time work explicit and promotes and encourages the capacity to make such a request to care for a young child. It is intended that making the right to request part-time work explicit in the FW Act will increase awareness of this right and lead to a greater number of employees making use of this provision on return from parental leave. Policies allowing employees to return to work part-time after the birth of a child or after a period of parental leave are already operating in a number of countries, for example in Ireland[7].

Reasonable business grounds

4.26. As with the existing right to request provisions, an employer will be able to refuse a request on reasonable business grounds. The Review Panel considered the issue of reasonable business grounds as the means for employers to refuse a request for flexible arrangements. Though a number of stakeholders argued that there should be an appeal mechanism associated with the right to request provisions, the Review Panel found that employers are taking requests for flexible work arrangements seriously and that in the majority of cases employees can negotiate flexible arrangements despite the absence of an appeal mechanism. This is supported by the previously mentioned FWC survey findings, which showed that around 89 per cent of employees who made a written request for flexible working arrangements under the NES had their request granted without variation[8].

4.27. The Review Panel also rejected arguments that a definition of 'reasonable business grounds' should be included in the legislation.

4.28. While the Bill does not include a definition of 'reasonable business grounds', given the centrality of reasonable business grounds in this framework, it does provide a

6 O'Neill, B (2012) *General Manager's report into the operation of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave 2009–2012*, Commonwealth of Australia.

7 In Ireland employees entitled to parental leave have the right to work part-time, provided an agreement with the employer can be reached. Similar policies exist in Germany and Denmark.

8 O'Neill, B (2012) *General Manager's report into the operation of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave 2009–2012*, Commonwealth of Australia.

non-exhaustive list of what may constitute such grounds[9]. This list will assist both employers and employees by providing guidance on sorts of situations where it is reasonable for an employer not to agree to a request. As is made clear in the Explanatory Memorandum the list is not exhaustive and reasonable business grounds will always be determined having regard to the particular circumstances of each workplace and the nature of the request made.

4.29. In addition to the reforms contained in the Bill, the Government will also amend the Fair Work Information Statement, provided to new employees, to ensure they are aware of their rights to request flexible working arrangements.

Parental leave and related entitlements

4.30. Part 1, Part 2 and Part 5 of Schedule 1 of the Bill amend parental leave and related entitlement provisions of the FW Act. The importance of enforceable entitlements for women during pregnancy and for parents after birth or placement of the child has been reflected in Australian workplace law since the *Industrial Relations Act 1988* (and since 1979 in federal awards) and is emphasised in international and domestic research. In reviewing international evidence, for example, the International Labour Organisation found that the provision of parental leave, including job protection during periods of leave, can greatly assist parents, particularly mothers, to remain connected to the workforce after the birth of a child[10].

4.31. Parental leave and related entitlement provisions in the FW Act are intended to protect the safety of pregnant employees and to support employees in maintaining an attachment to the workforce both during and post pregnancy. The FW Act introduced new parental leave entitlements and flexibilities including the right for both parents to separate periods of up to 12 months of unpaid parental leave or, alternatively, one parent a right to request an additional 12 months' unpaid parental leave.

4.32. Through this Bill, the Government is further strengthening the support that the FW Act provides to pregnant employees and new parents to continue to support and foster increased workforce participation for these groups.

4.33. Part 1 of the Bill responds to the Review Panel's recommendation that taking special maternity leave should not reduce an employee's entitlement to unpaid parental leave (Recommendation 4). Unpaid special maternity leave provisions in the FW Act provide that eligible employees who have a pregnancy-related illness and have exhausted paid personal/carers leave entitlements can take unpaid special maternity leave. Currently, any special maternity leave taken by an employee during pregnancy reduces that employees' entitlement unpaid parental leave.

9 A number of stakeholders proposed that 'reasonable business grounds' should be defined or guidance provided in the legislation, including the NSW Business Chamber and Australian Business Industrial (joint submission, Professor David Peetz, Jobwatch, Kingsford Legal Centre and Ryan Carlisle Thomas).

10 International Labour Organisation (2011) *Policies and regulations to combat precarious employment*.

4.34. The Review Panel formed the view that there is little justification for reducing an employee's overall unpaid parental leave entitlement on the basis that the employee is required (for reasons beyond her control) to access the special maternity leave entitlement. The Bill repeals section 80(7) of the FW Act, which specifies that a female employee's entitlement to 12 months of unpaid parental leave will be reduced by any amount of unpaid special maternity leave taken by the employee when she was pregnant.

4.35. Notes have also been inserted to clarify that a female employee may access any accrued paid personal/carers leave before taking unpaid special maternity leave. This clarification was sought by a number of stakeholders through the Review process, who argued that the interaction between paid personal/carers leave and unpaid special maternity leave is unclear.

4.36. The Bill also introduces measures to increase flexibility for parents accessing unpaid parental leave to support new parents in responding to the caring needs of their child. Part 2 of the Bill increases the amount of concurrent unpaid parental leave that can be taken by new parents from 3 weeks to 8 weeks. This builds upon the Family Provisions Test case decision in 2005, whereby the former Australian Industrial Relations Commission introduced an award provision to give an employee a right to ask his or her employer to increase simultaneous unpaid parental leave, up to a maximum of eight weeks. This will allow parents more flexibility to manage their work and family life and available resources in the year after the birth of their child.

4.37. The Bill also changes the way in which concurrent parental leave can be taken to provide more flexibility for working parents during the first 12 months of their child's life. Under the Bill, new parents would be able to choose when to take their concurrent leave, with the available 8 weeks able to be taken either as a continuous block, or in separate periods of no less than 2 weeks (unless the employer agrees), at any time during a partner's period of 12 months' unpaid parental leave.

4.38. The changes proposed in the Bill will also better align unpaid parental leave under the FW Act with Dad and Partner Pay, which provides up to two weeks' pay at the national minimum wage and which can be taken at any time during the first year after a child's birth or adoption. An employee is required to be on unpaid leave or not working during a Dad and Partner Pay period.

4.39. Finally, Part 5 of the Bill extends transfer to a safe job provisions to all pregnant employees who are fit for work but are unable to continue in their current position due to illness or risks arising from the pregnancy, or hazards connected with that position. The changes proposed under the Bill, however, do not extend paid no safe job leave to all employees. Existing eligibility requirements for access to paid no safe job leave will remain. If an employee does not meet these requirements they will be entitled to unpaid no safe job leave. This means that an employer will be required to transfer a pregnant employee with less than 12 months' service to a safe job during a risk period or, if no safe job is available, the employee will be entitled to unpaid no safe job leave (provided that evidence requirements are met).

4.40. Existing evidence requirements are still applicable. A number of illustrative examples are included in the Explanatory Memorandum to the Bill in order to provide guidance to employers and employees on the operation of transfer to a safe job provisions in the Bill.

4.41. These changes will ensure that all pregnant employees are safe at work and are not penalised as a result of their pregnancy without requiring an employer to provide paid leave for employees with less than 12 months' service or who will not be otherwise entitled to unpaid parental leave. The changes will also complement existing jurisdictional work, health and safety legislation, which generally places the primary duty of care on employers to ensure, so far as is reasonable practicable, the health and safety of their workers while they are at work.

Rostering protections

4.42. The Government is concerned that changes to rostering arrangements and regular working hours without proper consultation puts pressure on working families and limits the ability of people to participate in the workforce. For example, a couple who structure their working arrangements to minimise the use of childcare services could face significant hardship because of a unilateral change to one of their rosters that upsets these arrangements. Accordingly, the Bill includes new protections to ensure that employees are properly consulted about proposals to change rosters and regular working hours.

4.43. Under the FW Act, enterprise agreements must include a consultation term that requires the employer to consult employees on major workplace changes that are likely to have a significant effect on them. Modern awards generally also include consultation terms with similar requirements, although consultation terms are not mandatory for modern awards.

4.44. The Bill inserts new content requirements for modern awards and enterprise agreements to ensure those instruments include a consultation term which requires employers to consult with employees about changes to regular rosters or ordinary hours of work. Under the amendments the consultation term that must be included in a modern award or enterprise agreement will require an employer to consult with employees about a change to a regular roster or ordinary hours of work by:

- providing information to the employees about the change
- inviting employees to give their views about the impact of the change, including any impact in relation to their family and caring responsibilities, and
- considering any views put forward by those employees about the impact of the change.

4.45. The new requirements will ensure that an employer genuinely consults with employees about a proposed change to regular rosters or ordinary working hours and takes into account their views before making any change. Employers will be required to have particular regard to any impact a change may have on an employee's family and caring responsibilities, given that employees with such

responsibilities may face the most significant impact from a unilateral change in working hours.

4.46. The Bill does not include a definition of 'regular roster'. The rostering protections will instead apply to all employees with regular and systematic working hours, whether they are employed on a permanent or casual basis. As noted in the Explanatory Memorandum at paragraph 44 the requirement to consult on a change to working hours is not intended to apply to employees with irregular, sporadic or unpredictable hours of work.

4.47. The Bill provides that employees may be represented in consultations about changes to working hours, for example by an elected employee representative or union representative. The dispute resolution mechanisms of the relevant modern award or enterprise agreement will apply to the new consultation requirements. In circumstances where employers fail to comply with their obligations compliance with the new consultation arrangements may ultimately be enforced by application to the courts, as is currently the case for consultation terms. These provisions mirror the existing requirements for consultation terms in enterprise agreements and modern awards.

4.48. The new rostering protections will apply to enterprise agreements made on or after 1 January 2014. Employers and employees will still be able to negotiate a consultation term for inclusion in an enterprise agreement that meets the needs of their particular workplace, however the term must also meet the new consultation requirements. The model consultation term set out in the *Fair Work Regulations 2009* will be updated to reflect the new requirements and, as with existing arrangements, will be read into an enterprise agreement that does not include a term that meets the requirements of the FW Act.

4.49. The amendments will apply to modern awards in operation on or after 1 January 2014. The Bill provides that FWC must make a determination varying modern awards to include a consultation term which meets the new requirements by 31 December 2013. The Explanatory Memorandum clarifies that, where a modern award contains an existing consultation term, FWC will be able to vary the existing term to reflect the new requirements.

4.50. These new protections against unilateral changes to rosters and working hours complement other family friendly amendments introduced as part of the Government's response to the FW Act Review.

4.51. Some employer groups have raised concerns that these amendments may cause harm to the economy, businesses and jobs. The Government, however, is of the view that the amendments will promote discussion between employers and employees on changes to an employee's roster or regular working hours, ensuring their views are taken into account prior to any change being implemented. Importantly, it does not prevent an employer from changing rosters or regular working hours. Employers will retain their ability to make such changes, as long as they genuinely consult with employees and take account of their views before doing so.

Modern Awards Objective

4.52. On 14 March 2013 the Prime Minister, the Hon Julia Gillard MP, announced that a new modern awards objective would be inserted into the FW Act dealing with penalty rates.

4.53. Section 134 of the FW Act sets out the modern awards objective, which requires FWC to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant safety net of terms and conditions, taking into account the factors set out in paragraphs 134(1)(a)-(h).

4.54. Those factors include, for example, relative living standards and the needs of the low paid and the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.

4.55. The Bill amends the modern awards objective so that FWC must now also take into account the need to provide additional remuneration for employees working overtime, shift work, weekends or public holidays, or unsocial, irregular or unpredictable hours.

4.56. This measure is aimed at ensuring that FWC considers the need for extra remuneration for working weekends, shift work and other unsocial hours in its maintenance of the modern award framework. While many modern awards already provide for penalty rates for unsocial working hours, the new modern awards objective will help to ensure that FWC specifically considers these matters. FWC will retain the ability to determine whether or not the remuneration level in a modern award is appropriate and the level it should be set at based on the evidence presented to it.

Anti-bullying

4.57. On 26 May 2012 the Prime Minister and Minister Shorten announced an inquiry into workplace bullying by the House of Representatives Standing Committee on Education and Employment.

4.58. Over 300 individuals and organisations made submissions to the inquiry about the damaging, and in many cases, long lasting impact of workplace bullying. The inquiry looked at the nature, causes and extent of workplace bullying and considered proposals to prevent bullying and strategies to better support people who have been bullied.

4.59. On 26 November 2012 the Committee tabled its report Workplace Bullying "We just want it to stop". The Committee found that workplace bullying can have a profound effect on all aspects of a person's health as well as their work and family life, undermining their self-esteem, productivity and morale.[11] The impact of bullying can be extreme with its effects extending into all areas of day-to-day activities,

11 House of Representatives Standing Committee on Education and Employment. (2012) *Workplace Bullying: 'We just want it to stop"*, Parliament of the Commonwealth of Australia, Canberra, para 1.3.

family life and broader social engagement.[12] It also found that workplace bullying creates costs for employers by reducing employee morale and productivity, increasing absenteeism and staff turnover, increasing workers' compensation costs and in some cases a loss of business reputation.

4.60. The Committee made 23 recommendations to address workplace bullying. The Committee found that the majority of people who have been bullied at work 'just want it to stop' so they can work in safety and without harassment.

4.61. The Committee highlighted the difficulty that people who are bullied face in finding a quick and effective way to stop the bullying so that they are not placed at further risk of injury or damage while doing their job. The Committee found that people who had been bullied had to 'shop around' to find the right legislative or regulatory framework that could help them resolve matters quickly. Existing remedies under anti-discrimination law and the FW Act are not created as specific responses to workplace bullying and a result are not available to all bullied workers.[13].

4.62. Employers and workers also have a responsibility to prevent workplace bullying under work health and safety laws. Employers have a duty of care to provide, so far as reasonably practicable, a safe and healthy working environment for their workers. While workers have a duty to ensure their actions do not constitute a risk to health and safety of themselves or other persons at the workplace. However, the main difficulty that the Committee found with work health and safety laws was that it relied on the regulator to take enforcement action, and to establish that there has been a breach of a duty of care. Because breaches of work health and safety laws are criminal offences, the standard of proof required is beyond a reasonable doubt.[14] The Committee recommended that the individual right of recourse should sit in the civil law jurisdiction.[15]

4.63. The Committee recommended that workers who are bullied should be provided with an individual right of recourse to seek remedies through an adjudicative process. The Committee's report included discussion on the potential to amend the FW Act for this purpose. Many submissions supported a right of individual recourse that adopted the same principles and practices of effective dispute resolution that FWC already utilises and that are currently available to workers who have been adversely affected because of their workplace rights under the FW Act[16].

4.64. On 12 February 2013 Minister Shorten tabled the Government's response and indicated its support for the majority of the recommendations in the report, including the establishment of an individual right of recourse.

12 Ibid, para 1.21.

13 Ibid, paras 6.101 & 6.102.

14 Ibid, para 6.104.

15 Ibid, para 6.127.

16 Ibid, paras 6.123 & 6.126.

Anti-bullying measure

4.65. The anti-bullying amendments in the Bill allow workers who reasonably believe that they have been bullied at work to apply to FWC for assistance to resolve the bullying matter.

4.66. The Bill provides that a worker is bullied a work if, while the worker is engaged in a constitutionally covered business, another individual or group of individuals repeatedly behaves unreasonably towards the worker, and that behaviour creates a risk to health and safety. The definition in the Bill reflects the definition recommended by the Committee[17]. The Committee considered the existing definitions used by all jurisdictions and expert evidence and concluded that there were three criteria that were most helpful in defining bullying behaviour – the behaviour has to be repeated, unreasonable and cause a risk to health and safety. The Committee also found that balanced against this definition is the need for managers to be able to manage their staff. To this end, the Bill makes it clear that bullying does not include reasonable management action that is conducted in a reasonable manner.

4.67. The amendments will only apply where the worker being 'bullied at work' is at work in a constitutionally covered business. For this to occur, the person must be working for:

- a 'constitutional corporation', the Commonwealth, or 'Commonwealth authority', or a body corporate incorporated in a Territory, or
- or business or undertaking that is principally conducted in a Territory or Commonwealth Place.

4.68. The provisions will therefore not apply to state public sector employees.

4.69. To support the early resolution of matters, FWC will be required to commence to deal with a matter within 14 days of an application being made. This may involve seeking further information from the parties, bring the parties together to try and resolve the matter, or holding a hearing and making orders where appropriate. FWC may refer matters to work health and safety regulators. FWC already has the power to refer matters and is able to pass information to other regulatory bodies as appropriate.

4.70. FWC may dismiss applications on the grounds that they are frivolous or vexatious or without reasonable prospect of success relying on existing powers set out in section 587 of the FW Act.

4.71. In terms of orders, FWC must be satisfied that a person has been bullied at work. There must also be a risk that the bullying will continue. FWC's power to make orders is limited to preventing the worker from being bullied at work, and FWC will not be able to make an order for compensation or payment of a monetary amount.

17 Ibid, Recommendation 1.

4.72. In considering the terms of an order, FWC will be required to take into account (to the extent that FWC is aware):

- any final or interim outcomes of an investigation into the matter that is being undertaken by another person or body
- any procedures available to the worker to resolve grievances or disputes
- any final or interim outcomes arising from any procedures available to the worker for resolving grievances or disputes.

4.73. Breach of an order made by FWC will be a civil remedy provision and attract a maximum penalty of 60 penalty units (or up to $10 200 for an individual or $51 000 for a body corporate). This aligns with the maximum penalties applying to similar provisions in the FW Act, and in particular the general offence of breaching an order of FWC. Consistent with the enforcement of other provisions in the FW Act, an application in relation to a contravention of the civil remedy provision may be made by the person affected by the contravention, a Fair Work Inspector, or an industrial association to a federal court or eligible state or territory court.

4.74. The amendments in the Bill are intended to complement and do not conflict with existing work health and safety regimes. FWC will be able to refer matters to a work health and safety regulator where it considers this is necessary and appropriate.

4.75. The amendments provide a new pathway that recognises that workers who are bullied at work need a quick, fair and inexpensive way to make the bullying stop so that they can continue in their job in a safe and productive environment.

Right of entry

4.76. The Object of the FW Act is to provide a balanced framework for cooperative and productive workplace relations that promotes economic prosperity and social inclusion for all, including by enabling fairness and representation at work by recognising the right to freedom of association and the right to be represented. The Object of Part 3-4 of the FW Act, which deals with right of entry, is to establish a framework under which permit holders may enter premises for investigation and discussion purposes, which appropriately balances the rights of organisations to represent their members in the workplace to hold discussions with potential members and to investigate suspected contraventions of workplace law, Work Health and Safety law or workplace instruments, the right of employees to receive information at work and to be represented at work and the right of occupiers of premises and employers to go about their business without undue inconvenience. The Object of Part 3-4 in relation to the balance between the rights of organisations and the rights of occupiers and employers did not change in any significant way from the equivalent provisions in the *Workplace Relations Act 1996*.

4.77. Under the FW Act, union officials who have been issued with an entry permit by FWC (permit holders) may enter premises to hold discussions with eligible employees or TCF award workers or to investigate suspected workplace relations contraventions including by interviewing employees. Permit holders may only hold discussions or interviews with employees whose industrial interests the permit

holder's union is entitled to represent and may only do so during meal times and other breaks.

4.78. The Bill implements the Government's response to two of the Review Panel's three recommendations in relation to right of entry by improving existing arrangements in relation to location of discussions and the ability of FWC to deal with disputes over frequency of visits.

4.79. Schedule 4 to the Bill makes amendments in response to these recommendations of the Review Panel.

Location of discussions

4.80. The amendments in Schedule 4 will require a permit holder to hold interviews or discussions with eligible employees or TCF award workers in a room or location that has been agreed to with the occupier of the premises (the occupier). Where the parties cannot agree to a location, the amendments provide that the default location is the room or area in which one or more of the employees ordinarily take meal or other breaks and is provided by the occupier for that purpose.

4.81. Under existing arrangements the occupier of the premises can determine the location of discussions or interviews, so long as the location they request the permit holder to use is 'reasonable' (section 492(1)(a)).

4.82. Currently most parties agree on a suitable location for permit holders to hold discussions with eligible employees without conflict. The provisions of the Bill do not seek to alter the ability of parties to reach agreement of their own accord but rather to specify a default location in circumstances where agreement cannot be reached.

4.83. Union submissions to the FW Act Review indicated that the current arrangements for determining the location for discussions and interviews had resulted in disputes between permit holders and occupiers because the needs of the parties were not appropriately balanced. Although permit holders are not prevented under existing arrangements from raising objections to a room or location that an occupier requests they use, the occupier is not required to take their views into account.

4.84. Furthermore, it was submitted that in some circumstances occupiers were requiring discussions or interviews to be held in locations selected to discourage employees from participating in discussions. Case studies were provided which showed that locations appeared to have been selected to discourage participation due to their size or distance from the area where work was performed, or to intimidate workers due to the close proximity to managers' offices.

4.85. For example, the Review Panel's report noted instances of alleged unreasonableness in relation to location of discussions provided by the Australian Manufacturing Workers' Union in its submission to the Review, including:

- an employer providing access to only one room across a site 3 km long, where employees have a 20-minute break
- an employer providing access to half of a manager's office, divided by a partition, where the manager sits on the other side

- an employer providing access to a meeting room in an administration area that accommodates six employees where two lunchrooms are available, accommodating around 100 and around 30 employees respectively.[18]

4.86. FWC currently has the power to deal with and resolve disputes as to whether an employer's request for particular location is reasonable. However, it is in the interests of all parties that entry be conducted efficiently and disputes reduced.

4.87. Encouraging parties to agree to a location for interviews or discussions should assist to reduce the incidence of conflict between occupiers and permit holders. It will encourage parties to resolve any disputes between themselves by negotiating appropriate arrangements that meet the needs of both parties.

4.88. As permit holders are only entitled to hold discussions with eligible employees during mealtimes and other breaks, the Bill provides that any room or area provided by the occupier for the purpose of taking meals or breaks be used for discussions or interviews where another location cannot be agreed to. The wording of the provision makes clear that the room or area must be provided by the occupier for taking meals or breaks and would not therefore include an employee's desk. The room or area must also be one that is ordinarily used for meal or other breaks by one or more of the relevant employees.

4.89. The conduct rules applying to permit holders, occupiers and employers will also be retained. For instance, FWC will retain its capacity to restrict a permit holder's entry rights or the rights of the union they represent if either is found to have misused their entry rights. The Explanatory Memorandum at paragraph 142 explains that misuse use of rights in the context of the location of interviews and discussions might be, for example, where a permit holder repeatedly seeks to have discussions with a person in a lunch room to encourage that person to join the union when the person has made it clear that they do not wish to participate in such discussions.

Frequency of visits

4.90. A number of submissions to the FW Act Review argued that some employers were being unduly burdened by excessively frequent visits to workplaces by permit holders for discussion purposes. The Review Panel found that the number of visits by some unions in some workplaces had had an excessive impact on some employers. The Review Panel therefore recommended that FWC be given greater power to resolve disputes about the frequency of visits to a workplace in a way that balances the rights of occupiers and employers and those of unions (Recommendation 35).

4.91. Schedule 4 to the Bill implements this recommendation. The amendments reflect the Objects of Part 3-4 by balancing the right of employers to go about their business without unreasonable disruption and the legitimate exercise of entry rights by permit holders. They provide that FWC must take into account fairness between the parties and may only make an order if satisfied that the frequency of entry by a

18 McCallum, R; Moore, M & Edwards, J. *Towards more productive and equitable workplaces: An Evaluation of the Fair Work legislation* (2012), Commonwealth of Australia, p.197.

permit holder, or by multiple permit holders from a union, would require an unreasonable diversion of an occupier's critical resources.

4.92. The amendments will enable FWC to deal with disputes about frequency of visits for discussion purposes by making any order it considers appropriate. This may include, for example, orders imposing conditions on an entry permit or permits which may restrict how frequently a permit holder or permit holders from a particular union may enter a particular site.

4.93. FWC will determine in each case, based on the particular circumstances, what is an unreasonable diversion of an occupier's critical resources. This will ensure that FWC takes into consideration, for example, the relative size of the workplace and capacity for the employer to manage right of entry visits and mean that a permit holder's legitimate entry rights are not restricted without due cause. In line with the Object of the right of entry part of the FW Act the provisions are designed to balance the right of permit holders to have discussions with employees in the workplace with the right of occupiers of premises and employers to go about their business without undue inconvenience.

4.94. The new powers will not be extended to disputes about frequency of visits by permit holders to investigate suspected contraventions. This was not recommended by the Review Panel. There is already a high threshold a permit holder needs to meet in order to enter a workplace for investigation purposes and the FW Act already includes remedies to address any misuse of such rights.

Transport and accommodation arrangements for remote workplaces

4.95. Both employers and unions have raised with the Government concerns about the cost of transport and accommodation for right of entry visits at remote areas where the only means for the union official (the permit holder) to reach the site is by occupier or employer provided transport and/or where logistical reasons mean the official is required to stay overnight in occupier or employer-provided accommodation.

4.96. As noted at paragraph 159 of the Explanatory Memorandum remote sites are those where the only realistic means for the permit holder to access the premises is by transport provided by the occupier or where the only accommodation at the location, if it is required, is that provided by the occupier. These considerations, rather than the actual location of the premises, will be determinative. For example, if public transport is available to the location, or access can reasonably be achieved via travel on public roads in the permit holder's own vehicle or one provided by the permit holder's organisation, the provisions would not generally apply.

4.97. Currently these matters are generally agreed between occupiers, employers and permit holders or the union they represent. However, there is no mechanism to deal with circumstances where access and costs are disputed by the parties. Schedule 4 implements amendments to address this issue.

4.98. The provisions will not prevent an occupier and permit holder from reaching agreement privately about access and costs. However, where the parties cannot reach an agreement, the amendments place an obligation on an occupier to

facilitate the provision of accommodation and/or transport for a permit holder where it is required in order for them to exercise their entry rights and allows the occupier to obtain the costs of providing the assistance from the permit holder.

4.99. Under the proposed provisions, a transport or accommodation arrangement is only required to be entered into where specific criteria are met. The Bill includes provisions that providing or facilitating the transport or accommodation must be because access cannot occur without the assistance of the occupier, the arrangements must not cause the occupier undue inconvenience, there must be a specific request of the permit-holder and any request must be made within in a reasonable period before the assistance is required.

4.100. The Explanatory Memorandum at paragraph 172 outlines how the provisions are intended to work. It notes that, if it would be reasonable for the permit holder to travel part of the way using the permit holder's own transport or commercially available transport, the occupier is not obliged to provide transport for that portion of the permit holder's trip to the premises. For example, in the case of an agricultural property accessible by road, it would generally be reasonable to expect the permit holder to drive to the premises without the assistance from the occupier under these provisions.

4.101. The amendments will only apply to circumstances where, for example, the permit holder needs to stay overnight and no commercial accommodation is accessible because of the remoteness of the premises, or in the case of transport, that the only means for the permit holder to access the premises is transport provided, or organised, by the occupier (for instance, the provisions would not apply if the premises could be accessed by a private car or commercial airline).

4.102. The amendments will place a facilitative obligation on affected occupiers, however they will not require an occupier to bear the costs of the accommodation and/or transport. The Bill provides that the occupier is entitled to charge the permit holder, or the union the permit holder represents, a fee for accommodation and/or transport that is necessary to cover the cost to the occupier of providing it.

4.103. As noted by Minister Shorten in the Bill's second reading speech, *"…the access is to facilitate right of entry, not for 'helicopter joyrides'; this is not for employers to pay the cost of transportation'.* Accordingly the Bill provides that *'…if an arrangement for accommodation or transport is made, the occupier may charge the union or permit holder that amount necessary to cover the cost of that transport and/or accommodation"*.

4.104. For the avoidance of doubt, the Explanatory Memorandum at paragraph 173 clarifies that a permit holder who is being transported or accommodated by an occupier is responsible for complying with any health and safety requirements applying to the workplace. This is consistent with the duty on other persons at a workplace in workplace health and safety law.

4.105. The Bill also provides that FWC is able to treat the conduct of a permit holder while being accommodated or transported as conduct engaged in as part of the exercise of their entry rights under the FW Act. This requires a permit holder to maintain appropriate standards of conduct while being accommodated at and transported to

premises and means that they are subject to, for example, misuse of power provisions and the orders that FWC may make under those provisions.

Functions of the Fair Work Commission

4.106. Schedule 5 to the Bill implements amendments to the functions of FWC in response to Recommendation 1 of the Fair Work Act Review.

4.107. Specifically these amendments confer on FWC the function of promoting more co-operative and productive workplace relations and the prevention of disputes. While the Fair Work Act Review Panel (the Review Panel) did not consider that specific amendments to the FW Act were required to implement this recommendation, amending the provisions will provide greater clarity as to FWC's functions in this regard. This amendment has the support of both employer and employee representatives.

4.108. The amendments in Schedule 5 also make consequential changes to FWC's functions to reference the recently conferred jurisdiction to make orders in relation to the transfer of business from a state public sector employer (Part 6-3A) and textile clothing and footwear outworkers (Part 6-4A) following amendments made to the FW Act during 2012.

Technical amendments

4.109. The amendments in Schedule 6 to the Bill correct a number of minor technical and drafting issues in the FW Act and the FW Amendment Act 2012.

5. Greenfields and intractable bargaining

5.1. In its report the Review Panel indicated it considered *"that there is a significant risk that some bargaining practices and outcomes associated with greenfields agreements potentially threaten future investment in major projects in Australia."*[19]

5.2. The Review Panel made a number of recommendations to address this issue, including that the Government implement amendments to the Fair Work Act providing for Fair Work Australia (now the Fair Work Commission) to arbitrate to determine the content of an enterprise agreement where negotiations have reached an impasse, a specified time period has expired and conciliation has failed.

5.3. The Government has indicated it supports this recommendation.

5.4. As noted by Minister Shorten in the Bill's second reading speech, the Government supports the need to address greenfields negotiations that have reached an impasse and intractable bargaining disputes and is working with a range of stakeholders on developing amendments to deal with these matters, with a view to introducing further legislative reforms during the Winter Sittings.

19 McCallum, R; Moore, M & Edwards, J. *Towards more productive and equitable workplaces: An Evaluation of the Fair Work legislation* (2012), Commonwealth of Australia, p.171.