SUBMISSSION TO SENATE INQUIRY INTO THE *FAIR WORK BILL 2008*

David Peetz

Professor of Employment Relations

Griffith Business School

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January 2009

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General

1. The Fair Work Bill represents a major improvement in Australian industrial relations regulation, particularly by comparison with the 'WorkChoices' legislation that it seeks to replace. It contains a much better balance between the needs of business and th needs of employees. It provides a more appropriate set of minimum entitlements and a more effective and balanced framework for bargaining. It is simpler and far easier to read and comprehend. It retains some of the problems with the 'WorkChoices' legislation, including a tendency towards telling employers what is good and bad for them in their private relations with employees, even though they may have reached agreements that suit their mutual interests, but this is much less pronounced here than in the legislation that is being superseded.

2. That said, my comments on the Fair Work Bill focus on those aspects that were not specifically set out in the two *Forward with Fairness* policy statements that preceded the 2007 federal election. This is because in that election, in which industrial relations legislation was undoubtedly the most important policy issue, the electorate very clearly endorsed the industrial relations policy of the incoming Labor government and repudiated the 'WorkChoices' legislation that had been in effect since March 2006. Hence my submission focuses on specific matters of implementation or detail, or departure from the promises of *Forward with Fairness.*

3. The comments are sequenced broadly in the order of the relevant clauses in the Bill. The order in which they appear should not, therefore, be taken to indicate their order of priority or significance. Due to time constraints they do not purport to represent a comprehensive analysis of the Bill.

Right to request flexible working hours (clause 65)

Who can request a change (clause 65(2))

4. The Bill says

> (2) The employee is not entitled to make the request unless:
>
> (a) for an employee other than a casual employee—the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or
>
> (b) for a casual employee—the employee:

(i) is a long term casual employee of the employer immediately before making the request; and
(ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

5. This is an unduly negative approach to flexible working hours, implicitly setting an impediment to informal flexibility by indicating that casuals or employees with short job tenure are not allowed to even make a request. It would be more appropriate to word this the other way around, ie to indicate that an employer is not required to consider a request from a short term casual or an employee with less than 12 months service.

6. Hence clause 65(2) should be reworded as follows:

> (2) The employer is not required to consider the request unless it is made by an employee who:
> (a) for an employee other than a casual employee—has completed at least 12 months of continuous service with the employer immediately before making the request; or
> (b) for a casual employee—:
> (i) is a long term casual employee of the employer immediately before making the request; and
> (ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

Consultation (clause 65)

7. The steps involved in assessing an employee's request are manifestly inadequate. Although the Exposure Draft of the National Employment Standards referred to how the

> United Kingdom experience has demonstrated that simply encouraging employers and employees to *discuss options* for flexible working arrangements has been very successful in promoting arrangements that work for both employers and employees[1]

and stated that, on this issue, the

> proposed flexible working arrangements…sets out a process for encouraging discussion between employees and employers[2]

the proposed right actually contains no obligation on the employer to discuss options, or even the request, with the employee.

8. The UK right to request flexibility includes the following procedural rights for employees:

> An employer must hold a meeting to consider the request within 28 days after the date an application is received. (This is not necessary if the employer knows enough from the paperwork to fully agree to the employee's request without a meeting.)
>
> An employee can, if they wish, have a companion (another worker employed by the same employer) to accompany them to the meeting.

[1] p10, emphasis added
[2] p12

The companion must be a worker employed by the same employer, but not necessarily working at the same premises, and he or she can be the workplace trade union representative.

The companion can address the meeting or confer with the employee during it, but is not allowed to answer questions on the employee's behalf.

If the companion is unable to attend the meeting, the employee should re-arrange the meeting for a date within seven days of the originally proposed time, ensuring the new time is convenient to all parties; or, consider an alternative companion.

The employer must write to the employee informing them of their decision within 14 days after the date of the meeting.[3]

9. If there is no obligation on an employer to meet with the requesting employee, then the employer is much less likely to understand the circumstances of the request. This is especially the case for workers who might be disadvantaged in the labour market, including younger workers, and workers from a non-English speaking background, who may have difficulty in clearly expressing in writing all the aspects of their case.

10. To fully explain their needs, or to enable the employee to properly understand the implications of what is being said or proposed by the employer in response to the request, many employees will need the support of an accompanying person. This is especially the case for employees who are less confident, less articulate, less familiar with English, or less experienced.

11. Similarly, if there is no obligation on an employer to meet with the requesting employee, then the employer is much less likely to take the request seriously, or to feel a sense of obligation to attempt to meet the employee's request within the needs of the business. A meeting will reinforce the employer's appreciation of the personal circumstances of the employee concerned.

12. Accordingly, a right to a meeting, including a right to bring along a companion, should be included in the right to request, and should be modelled on the UK framework. This would go after subclause 65(3) and say:

    If the employer does not know enough from the paperwork to fully agree to the employee's request without a meeting – the employer must hold a meeting to consider the request within 21 days after the date an application is received.

    The employee can, if they wish, have a another worker employed by the same employer accompany them to the meeting.

Criteria (sub-clause 65(5))

13. The Bill provides no criteria by which the employer can determine whether an application should be rejected on "reasonable business grounds". This is likely to lead to uncertainty and would probably lead to more applications being rejected than would be the case if

[3] BERR (2007a). Flexible working: the right to request and the duty to consider. Part 1. *URN No: 07/1390/A1*. London, Department for Business Enterprise and Regulatory Reform.

criteria were specified. It also increases the chances that employees whose requests are rejected would feel that they have not been given a fair hearing. While the Exposure Draft indicates that Fair Work Australia will "provide general information and assistance to employers as to what may constitute reasonable business grounds", in the absence of any powers granted to Fair Work Australia in resolution of disputes, this will have little significant impact.

14. Under the UK right to request, "The business ground(s) for refusing an application must be from one of those listed below:

    (a) Burden of additional costs.

    (b) Detrimental effect on ability to meet customer demand.

    (c) Inability to reorganise work among existing staff.

    (d) Inability to recruit additional staff.

    (e) Detrimental impact on quality.

    (f) Detrimental impact on performance.

    (g) Insufficiency of work during the periods the employee proposes to work.

    (h) Planned structural changes."[4]

15. The Bill should specify criteria for "reasonable business grounds", based on the UK criteria set out above.

16. Hence subclause 65(5) should be amended by the addition of the words

    Reasonable business grounds means a reason based on one of the following:

    (a) Burden of additional costs.

    (b) Detrimental effect on ability to meet customer demand.

    (c) Inability to reorganise work among existing staff.

    (d) Inability to recruit additional staff.

    (e) Detrimental impact on quality.

    (f) Detrimental impact on performance.

    (g) Insufficiency of work during the periods the employee proposes to work.

    (h) Planned structural changes.

17. A similar passage should be inserted in clause 76.

[4] BERR (2007b). Flexible working: the right to request and the duty to consider. Part 2. *URN No: 07/1390/A2*. London, Department for Business Enterprise and Regulatory Reform.

18. Alternatively, the dictionary (clause 12) should be amended to include the above definition of reasonable business grounds

Refusal (clause 65)

19. The UK provisions provide for an internal right of appeal by the employee, if the employer rejects the application and the employee believes that the request has not been properly considered. The appeal procedure is simple, and is as follows:

> An employee has 14 days to appeal in writing after the date of notification of the employer's decision;
>
> If an appeal is made, the employer must arrange an appeal meeting to take place within 14 days after receiving notice of the appeal;
>
> The employee can be accompanied;
>
> The employer must inform the employee of the outcome of the appeal in writing within 14 days after the date of the meeting.
>
> When appealing against a refused request, an employee will have to set out the grounds for making the appeal and ensure that it is dated. There are no constraints on the grounds under which an employee can appeal.[5]

20. An appeal right ensures that a right to request will be taken seriously by the employer, and not dismissed on dubious grounds by lower level supervisory employees. In short, it encourages good business practice by employers. The UK legislation leaves it up to the employer to determine what mechanisms to put in place in case of appeals.

21. The Bill should include a right of employees to appeal an adverse decision, along the lines of the UK model.

22. Thus clause 65 should be amended by the inclusion of a new sub-clause along the following lines:

> An employee has 14 days to appeal in writing to the employer after the date of notification of the employer's decision.

Unresolved applications (subclauses 739(2) and 740(2))

23. The Bill provides no indication as to what should happen if the employee believes, rightly, that their application has been unreasonably rejected, in particular if they feel that the employer has not followed proper procedure in assessing the application. Indeed it explicitly prevents FWA from settling a dispute over whether an employer had genuine business grounds (subsections 739(2) and 740(2)).

24. The UK standard does not provide for third party arbitration of a dispute over whether the employer's business reasons are appropriate. However, it does allow for external formal complaints to be made for conciliation, mediation or arbitration (to an employment tribunal or ACAS arbitration) where either:

[5] Ibid.

the employer has failed to follow the procedure properly; or

the decision by the employer to reject an application was based on incorrect facts.

25. Such mechanisms help ensure that the employer follows sound procedures and bases decisions on the facts of the case, without allowing a third party to determine the business decisions of the employer.

26. The Bill should include a right of employees to apply to Fair Work Australia for resolution of a dispute over a request for flexible working arrangements, where the employer has failed to follow the procedure properly or the decision by the employer to reject an application was based on incorrect facts.

27. Even if the Parliament decides that employees should not have an automatic right through legislation to have FWA settle a dispute over whether an employer had reasonable business grounds, this should not preclude employers and employees reaching agreement that, if such disputes arise, the matter can be settled by FWA (or any other entity). If the parties agree that this form of arbitration is permissible, the law should not prevent them from doing so.

28. Accordingly, clause 739(2) should be amended by adding a sentence stating that FWA may deal with a dispute over whether an employer had reasonable business grounds under subsection 65(5) or 76(4) where the collective agreement that applies to the relevant employee permits such arbitration to occur.

29. Similarly, clause 740(2) should be amended by adding a sentence stating that a person other than FWA may deal with a dispute over whether an employer had reasonable business grounds under subsection 65(5) or 76(4) where the collective agreement that applies to the relevant employee permits such arbitration to occur.

30. This would also amend the note that appears at the end of clause 186.

Parental leave (clauses 78-85)

31. The Bill provides no criteria for determining "reasonable business grounds" for refusing a request for an extension of unpaid parental leave. This creates uncertainty and increases the likelihood that a request will be incorrectly refused. The meaning of "reasonable business grounds" should be clarified in the Bill, as outlined in paragraph 14 above (clause 76 or clause 12)

32. An employee should have a right of internal appeal against a decision to refuse a 12 month extension of unpaid parental leave, along the lines canvassed in paragraphs 19-21 above (clause 76).

33. The Bill should include a right of employees to apply to Fair Work Australia for resolution of a dispute over a request for an extension of unpaid parental leave, where the employer has failed to follow the procedure properly or the decision by the employer to reject an application was based on incorrect facts (clause 739 and 740).

Annual leave (clause 93)

34. The cashing out of annual leave is proposed in the Bill. There was no mention in *Forward with Fairness* of this.

35. The purpose of a statutory annual leave entitlement is to enable employees time to recuperate each year and spend some time with families, friends or relaxing personally. It is not, traditionally, something that has been cashed out. With high levels of work intensity, long working hours, high levels of stress and ongoing tensions between work and personal lives, with consequent adverse impacts on children,[6] it is important to maintain four weeks leave this as a genuine standard, and not permit it to be eroded for the sake of a few dollars. As it is, the most common reason why people do not take their full leave entitlement is workplace pressures, "whether it's a workplace culture that discourages holidays, the difficulty finding someone to cover for you, or the increased workload before you go and when you get back. Sometimes people save up their leave because they feel insecure in their jobs".[7]

36. The mere fact that cashing out of annual leave is now on the table for a national minimum standard, whereas only a short time ago it was severely admonished by members of both Houses,[8] is an indication of how easily such standards can be eroded in a relatively short time.

37. The Bill at subclause 93(2) includes an attempted protection by providing that, inter alia,

> (2) The terms must require that:
>
> (a) paid annual leave must not be cashed out if the cashing out would result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks;

38. However, this does not guarantee that employees will each year access their annual leave. An employee with at least one year's service who did not take any leave and cashed out all except his or her first year's entitlement would not be protected by this provision.

39. Clause 93(2) should be amended by the inclusion of additional protection, in particular that

> a maximum of one week's annual leave can be cashed out each year, and

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[6] Campbell, I. (2002). "Extended working hours in Australia." *Labour and Industry* **13**(1): 91-110. August. , D'Souza, R. M., L. Strazdins, L. L.-Y. Lim, D. H. Broom & B. Rodgers (2003). "Work and health in a contemporary society: demands, control, and insecurity." *Journal of Epidemiology of Community Health* **57**: 849–854. , Griffith Work Time Project (2003). Working time Transformations and Effects. Brisbane., Queensland Department of Industrial Relations, Pocock, B. (2006). *The Labour Market Ate My Babies*. Sydney, Federation Press, Strazdins, L., M. S. Clements, R. J. Korda, D. H. Broom & R. M. D'souza (2006). "Unsociable Work? Nonstandard Work Schedules, Family Relationships, and Children's Well-Being." *Journal of Marriage and Family* **68** 394–410. May , Shepanski, P. & M. Diamond (2007). An Unexpected Tragedy: Evidence for the connection between working patterns and family breakdown in Australia. Sydney, Relationships Forum Australia.

[7] Gittins, R. (2007). Why holidays are crucial. *Sydney Morning Herald*. 26 December.

[8] Danby, M. (2005). Hansard. Canberrra, House of Representatives. 11 August. 160, Grierson, S. (2005). Hansard Canberrra, House of Representatives. 9 November. 65, Pilbersek, T. (2005). Hansard. . Canberrra, House of Representatives. 8 November. 99, Murray, A. (2006). Hansard Canberrra, Senate. 9 November. 129.

such provisions can not be utilised if that employee has cashed out annual leave within the previous three years with that employer

Public holidays (clauses 114-116)

40. *Forward with Fairness* states that 'Where an employee works on a public holiday, they will be entitled to an appropriate penalty rate of pay or other compensation. This will be set out in the applicable award.'[9]

41. The Bill makes no reference to this entitlement to compensation for working on a public holiday. It is appropriate that the nature of the entitlement be set out in the relevant modern award, but if the existence of this entitlement is not specified in the Bill, the entitlement to compensation will be able to be repudiated by an agreement. Evidence indicates that agreements, including (non-union) collective agreements, were used to remove 'protected' conditions such as penalty rates and public holidays.[10]

42. Workers should be entitled to the benefits of public holidays. Public holidays exist for reasons of community celebration and benefit, and all workers should be entitled to such a benefit. For the majority of workers, this benefit takes the form of a day off to commemorate the particular occasion in the way that suits them. For a minority of workers – for example, some in essential services – it is not feasible for all to have a guaranteed day off. Those workers should be paid a significant premium for working that day, and also be entitled to a day off in lieu. Even a country with quite parsimonious minimum standards, such as New Zealand, protects public holidays. The Bill proposes to protect pubic holidays, but with some loopholes.

43. Accordingly, the Bill should contain a provision (after present clause 116) along the lines of the following:

    "Employees are entitled to compensation if they work on a public holiday. This entitlement to compensation:

    (a) shall be set out in the relevant award;

    (b) cannot be overruled by a workplace agreement or AWA"

Redundancy pay (clause 123)

44. The Bill excludes long term casual employees from entitlement to redundancy pay. This reflects the exclusion of casuals from the current AIRC standards, an exclusion that dates back to the original 1984 termination, change and redundancy decision by the then Australian Conciliation and Arbitration Commission. At the time of the 1984 decision, casuals represented only a small proportion of workers and they tended to occupy

[9] *Forward with Fairness*, p8

[10] As was also the case for AWAs. seeWorkplace Research Centre (2006). "The impact of WorkChoices on agreement making – a first glance." *ADAM Report* **50**: 9-19. September. , Charlesworth, S. & F. McDonald (2007). Going too far: WorkChoices and the Experience of 30 Victorian Workers in Minimum Wage Sectors. Melbourne, Industrial Relations Victoria, Department of Innovation, Industry and Regional Development. July, Victorian Workplace Rights Advocate (2007). Report of the Inquiry into the Impact of the Federal Government's Work Choices Legislation on Workers and Employers in the Victorian Retail and Hospitality Industries. Melbourne, Office of the Workplace Rights Advocate.

predominantly short-term (and part-time) jobs. But by November 2001 76 per cent of casuals still expected to be with the same employer in twelve months time.[11] And in 2006, some 37 per cent of casual workers were employed full-time.[12] This emergence of long-term casual employment is a 'recent phenomenon'.[13] Many casuals (perhaps over half) are not 'genuine' casuals in the sense of being people who are only engaged irregularly and for intermittent, short periods.[14] Rather, many are merely employees with regular work but insecurity of tenure, no redundancy pay and no rights to annual or sick leave.

45. Data from the ABS Retrenchment and Redundancy survey indicate that persons aged 25 and over accounted for the vast majority – 82 per cent – of retrenched 'long term' casuals (those with 12 months or higher tenure).[15] Indeed, 56 per cent were aged 35 or over. In 2001 'long term' casuals accounted for 42 per cent of retrenched casual employees. Some 23 per cent of retrenched casuals had been employed in the same job for at least two years; 15 per cent had been employed in the same job for at least three years; 9 per cent had been employed in the same job for at least 5 years; and a remarkable 4 per cent had been employed in the same job as casuals for at least 10 years.

46. Some 51 per cent of long term casuals who had been retrenched sometime in the preceding three years were still unemployed or out of the labour force in July 1997, compared to 37 per cent of retrenched permanent employees. In 2001, the gap was smaller but still to the disadvantage of long-term casuals. Retrenched casuals are disadvantaged relative to retrenched permanent employees in all age groups except the over 55 age group, in which the experiences of casuals and permanents are almost equally poor.[16]

47. Similarly, when measured by unemployment duration, retrenched long term casuals are more disadvantaged than are equivalent retrenched 'permanent' employees. In 2001, while 26 per cent of unemployed, previously permanent employees had unemployment duration of at least 26 weeks, the same was the case for about 41 per cent of unemployed, formerly long term casual employees.[17]

48. With casual employment possibly becoming 'more secure in terms of regularity of earnings and predictable working patterns, along with high expectations of continued employment for casual employees with their current employer',[18] it seems that the larger difference between long-term casuals and permanents is not in their expectations of

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[11] Australia (2003). Commonwealth Government Submission to Australian Industrial Relations Commission Redundancy and Termination of Employment Case. Canberra, Department of Employment and Workplace Relations.
[12] Australian Bureau of Statistics (6310.0). Employee Earnings, Benefits and Trade Union Membership, Australia. Canberra. various years.
[13] Australia Commonwealth Government Submission to Australian Industrial Relations Commission Redundancy and Termination of Employment Case.
[14] Murtough, G. & M. Waite (2000). The growth of non-traditional employment: Are jobs becoming more precarious? *Staff Research Paper*. Canberra, Productivity Commission. July.
[15] Australian Bureau of Statistics (6266.0). Retrenchment and Redundancy, Australia, unpublished data. Canberra. July 2001.
[16] Peetz, D. (2005). "Retrenchment and Labour Market Disadvantage: The Role of Age, Job Tenure and Casual Employment." *Journal of Industrial Relations* **47**(3): 294-309. September.
[17] Ibid.
[18] Australia Commonwealth Government Submission to Australian Industrial Relations Commission Redundancy and Termination of Employment Case.:174

continuing employment but in the degree of disadvantage they face when retrenched – and, given the low costs of doing so, the incentive on employers to retrench them.

49. The data demonstrate that the position of retrenched long term casuals is at least as difficult as that facing retrenched permanent employees with similar job tenure and in most respects is more difficult. They face longer periods of unemployment than equivalent permanent employees, and lower probabilities of finding work. Yet they receive no severance benefits except when union pressure is successfully applied (for example, in a 2002 dispute concerning the closure of Sydney's Hilton Hotel).

50. Implicitly, policy makers expect long term casual employees to put money aside each week to cover the potential hardship associated with redundancy, just as they are expected to do the same in relation to annual leave and sick leave. Whatever the merits of requiring them to save up for their relatively predictable annual leave each year, it is quite unrealistic to imagine this happens for the unpredictable contingency of redundancy. Even if the casual loading encompasses compensation for lack of access to redundancy pay – and outside of the Metals case it is highly debatable as to whether this is the case – it represents an inefficient distribution of compensation and is of no practical benefit to casuals when they are retrenched.

51. Whatever the significance of the casual loading, it is difficult to see how older workers with ten or more years service to an employer, retrenched into difficult labour market circumstances, facing even greater difficulties than permanent employees with similar age and tenure, should be denied severance benefits merely because they are classified as a casual employee – that is, not given annual and sick leave – by their employing organisation. Clearly there are such employees. With many casual employees not being 'genuinely' casual, the proliferation of long term casual employment has become a mechanism by which over a quarter of the workforce are defined outside of the safety net that ostensibly provides rights of access to recreation leave, sick leave and redundancy benefits to Australian employees.

52. Accordingly, redundancy benefits should be payable to long term casual employees. Whether the line should be drawn at the traditional definition of long term casuals – 12 months service – or a longer period is debatable. For policy consistency, a 12 month period should define 'long term casual' for the purpose of redundancy pay, but as a transitional mechanism a longer period could initially be defined.

53. Hence clause 123(c) should be amended by the addition of the words "other than a long term casual" after "casual employee"

Employees not traditionally covered by awards (clause 143(7))

54. This subclause is intended to prevent managerial employees and other employees who have traditionally not been covered by awards from being covered by modern awards. However, as it is presently expressed it runs the danger of excluding from future modern award coverage occupations that are newly emerging or that do not presently exist, even though these future occupations may essentially be working class or at least non-managerial in nature.

55. To avoid this ambiguity, sub-clause 143(7) should be amended by adding a provision that states that

(a) this section is not intended to prevent the coverage classes of employees in new or emerging occupations that have not previously been covered by awards but whose work is of a character that would warrant modern award coverage; and

(b) in deciding whether to extend modern award coverage to a new or emerging class of employees not previously covered by awards, FWA should have regard to the relative bargaining strength of the employers and employees who will be covered by the agreement.

Updating of standards (clause 156)

56. The Bill appears to indicate no role for Fair Work Australia in improving on or updating standards.

57. The experience with minimum wage setting is instructive. In countries where the level of minimum wages is set by the parliament, such as the United States and New Zealand, the minimum wage has been adjusted less than annually, leading to falls in its real value and considerable controversy and complaints from employers or employee representatives at various times. In Australia, where responsibility for setting minimum wages recently passed from an independent tribunal to government-appointed officials operating in a commission structure, there was a major loss of confidence in the fairness of the system.[19] Parliament may be a good institution for initially *establishing* rights, but it is not necessarily an effective one for *maintaining* them in line with movements in community standards.

58. In taking account of both international standards and Australian traditions, an appropriate balance has to be found between the role of parliament and the role of independent tribunals in setting minimum standards. Under the 'WorkChoices' legislation, excessive power was given to executive government, while independent tribunals were stripped of any role in the setting of standards. This was damaging to both the perceptions and the reality of fairness. An important role in standard setting should lie with the independent tribunal, in this case Fair Work Australia. Future Parliaments cannot be assumed to always and adequately reflect the nature of rising community standards and the ways in which these should be reflected in the minimum standards available to employees.

59. Australia's labour force and its social context are changing. The growing participation of women in paid work – one of the most persistent and significant trends of the past fifty years – demands new labour standards. Women, on average, have much greater caring responsibilities than men. Australia's work and care regime is shaped in significant ways minimum standards it puts in place. These have not kept pace with the workforce of the new century. Existing standards are certainly inadequate to this current workforce – one that is facing a diminishing labour supply arising from domestic demographic changes and restricted prospects of labour supply through skilled immigration. The Bill is a significant step towards resolving some of these weaknesses. But it does not, and cannot, resolve the issue for all time.

60. Patterns of minimum standards need not and should not be frozen in time: they must both lead and respond to change. As living standards rise, workers' social circumstances

[19] Munro, P., D. Peetz & B. Pocock (2007). Fair Minimum Standards. *An Australian Charter of Employment Rights*. M. Bromberg and M. Irving. Melbourne**:** 127-140.

evolve, the gender composition and care responsibilities of the workforce change and the pressures on workers shift, minimum standards must adapt. A fairly constructed body, such as Fair Work Australia, with high levels of legitimacy in the community, should also have the ongoing ability to establish new national standards in the future, where circumstances warrant, that reflect the needs and capacity of society as it evolves, ensuring that industrial standards facilitate change with equity. The test case procedures that have been used in the past by its predecessor bodies will ensure that any new national standards are not overly ambitious and are appropriate to the time. The four year reviews would be one convenient mechanism for considering any such test case. The criteria for amending minimum entitlements could sensibly include: the fairness and relevance of minimum terms and conditions; the needs of the economy; employees' ability to balance their work and family responsibilities; promoting social inclusion through workforce participation of both men and women; and changing social conditions.

61. Accordingly clause 156 should be amended, along the lines that:

> Nothing in this Act precludes FWA from reviewing the adequacy of conditions associated with the national employment standards or providing for superior entitlements through the four yearly review. In deciding whether to establish superior entitlements, FWA must have regard to: the fairness and relevance of minimum terms and conditions; the needs of the economy, including productivity and employment growth; employees' ability to balance their work and family responsibilities through flexible working arrangements; promoting social inclusion through workforce participation of both men and women; changing social conditions; and anything else FWA considers relevant.

Matters pertaining and permitted matters (clause 172)

62. *Forward with Fairness* promised that:

> Under Labor's system, bargaining participants will be free to reach agreement on whatever matters suit them.
>
> Labor believes that as long as bargaining participants bargain in good faith and are able to reach agreement, they should be free to do so without the need for government intervention or to comply with complex procedural rules and requirements.
>
> The only requirements will be that the terms of the agreement are lawful, the bargaining is conducted in good faith, the employees covered by the agreement are better off overall against the safety net and a majority of employees vote in favour of the agreement.
>
> Labor's system frees employers and employees from having to resort to side agreements and other deals to set out their arrangements under the Government's prescriptive and inflexible agreement making rules.

63. The Bill clearly breaches this commitment by requiring that agreements be on 'permitted matters', including 'matters pertaining to the relationship' between the employer and the employees or employee organisation (subclause 172(1)).

64. Although the restrictions are less onerous both in terms of content and penalties than the 'WorkChoices' provisions, they are an unnecessary intrusion into the relationship between employers and employees, in effect telling employers what is best for them. If employees and employers want to reach an agreement that deals in part with a social, environmental or community issue that is not directly pertaining to the employment relationship, they should be free to do so. Indeed in many cases it would be socially or environmentally desirable for them to do so.

65. The restriction is also unnecessary because the constitutional basis of the legislation – the use of the corporations power – does not require any such limitation (unlike, it could be argued, the previous use of the conciliation and arbitration power), a limitation which has led to considerable uncertainty over the years in the application of the law.

66. Subclause 172(1) should therefore be deleted.

Giving notice of intention to make greenfields agreement (clause 175)

67. This clause provides that a requirement to give notice

> does not apply if the employer does not know, **or** could not reasonably be expected to know, that the employee organisation is a relevant employee organisation in relation to the agreement.

68. The word "or" here does not appear to make sense. It should instead be "and". This also applies to comparable provisions in clauses 179 and 184.

When appointment of a bargaining representative comes into force (clause 178)

69. This provision states that

> An appointment of a bargaining representative comes into force on the day specified in the instrument of appointment.

70. It is quite possible, however, that an instrument of appointment (inadvertently perhaps) might not specify a date of effect. To avoid this invalidating the instrument, a sentence should be added stating that if no date of effect is specified, the instrument comes into force on the day in which it was signed.

Access period (clause 180)

71. Under this clause, the access period (the amount of time which employees are meant to have access to a proposed enterprise agreement before voting on it) is seven days. This seems an inappropriately short period of time for workers to consider the ramifications of an agreement, particularly where this is the first time that the agreement has been sighted by employees (unlikely to occur in a union bargaining context, or where a non-union agreement has been negotiated by bargaining agents, but more likely when the employer presents an agreement to a non-union workforce to approve).

72. Clause 180(4) should be amended to provide for a fourteen day access period, but provide that, where the bargaining representatives of the majority of employees and employer agree, this period can be reduced to seven days.

Voting on proposed agreement (clause 181)

73. Under this provision employers can request that employees vote by ballot or an electronic method. I do not see any provision that explicitly protects the secrecy of employees' votes, which may be a particular issue in relation to electronic voting. The clause should include a statement requiring that the method of voting should preclude the employer from being able to identify how any employee voted.

74. Similar comments apply to clauses 208 and 220.

High income threshold (clause 333)

75. This clause states that:

> The ***high income threshold*** is the amount prescribed by, or worked out in the manner prescribed by, the regulations.

76. We are advised in the explanatory memorandum that:

> It is intended that the high income threshold will be $100,000 per annum for full time employees, indexed from 27 August 2007 (the date this policy was announced) and then annually from 1 July each year

77. However, setting out this amount in the regulations rather than in legislation raises the possibility that a future government could effectively destroy the award system simply by regulation, by setting the high income threshold at a low level. While regulations are disallowable, the majority in the Senate required to disallow a regulation is greater than the number of votes required to block amending legislation. If a future government wishes to lower the high income threshold, it should have to do so by passing amending legislation through both Houses of Parliament, not through regulation.

78. Clause 333 should be amended to specify that the high income threshold shall be $100,000 per annum for full time employees as of 27 August 2007, indexed annually from 1 July each year by reference to a formula prescribed by regulations.

79. Alternatively, clause 333 should be amended by adding a sentence stating that the regulations cannot set the high income threshold in any particular year at a lower rate than it was in the preceding year.

Meaning of genuine redundancy (clause 389)

80. This provision defines a genuine redundancy as occurring where:

> (a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and

> (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

and specifies that it is not a genuine redundancy if the person could have been redeployed. However it does not deal with circumstances where redundancies are used to unfairly target particular individuals for termination, as has occurred at times.[20]

81. The EM (p247) explains that

> Whether a dismissal is a genuine redundancy does not go to the process for selecting individual employees for redundancy. However, if the reason a person is selected for redundancy is one of the prohibited reasons covered by the general protections in Part 3-1 then the person will be able to bring an action under that Part in relation to the dismissal.

82. However, the civil remedies that generally apply under Part 3-1 may be slower and more cumbersome than the unfair dismissal remedies under Part 3-2, which are designed to operate speedily and efficiently. Time can be of the essence in such cases, if an employer inappropriately targets particular individuals for dismissal.

83. Accordingly, clause 389 should be amended to include a statement that a person's dismissal was not a case of genuine redundancy if FWA is satisfied that *part of* the reason for the employee's dismissal was a prohibited reason under Part 3-1.

Application for unfair dismissal remedy (clause 394)

84. This clause requires that, subject to exceptional circumstances, an application for an unfair dismissal remedy be lodged within seven days of the dismissal. This is, by international standards, a very short time for lodgement of such a claim (for example in New Zealand it is, in effect, 90 days). It is so short that a dismissed employee may fail to lodge a claim simply because they are unaware at that point of their rights or of the seven day limit or are too upset to lodge a claim. The New Zealand legislation provides for a specific exemption from the time limit 'where the employee has been so affected or traumatised by the matter…that he or she was unable to properly consider raising the [dismissal] within the period specified'.[21]

85. While maintaining the seven day limit in usual circumstances, to ensure that, 'where reinstatement is appropriate, it remains a viable option',[22] it would be desirable to give FWA more guidance on what constitutes valid reasons for a delay beyond the seven day period. This would include where the employee was not aware and could not be reasonably expected to be aware of the seven day limitation, and where the employee was so affected or traumatised as to properly consider making an application within the period specified.

[20] eg (2001). R D Smith and others and Pacific Coal Pty Ltd, AIRC. 9 April.
[21] *Employment Relations Act 2000* (NZ), s115(a).
[22] *Forward with Fairness*, p19.

Pattern bargaining and equal remuneration (clause 412)

86. The pattern bargaining provisions are, to the best of my knowledge, unique internationally. No other enterprise-based industrial relations system of which I am aware has a prohibition on pattern bargaining, principally because pattern bargaining – a process whereby early agreements set the benchmark which are followed by later agreements – can be a natural way for enterprise based system to operate (as with, for example, the Japan spring wage negotiations, which represent strong pattern bargaining by both sides in an exclusively enterprise-based system). Trying to prohibit it would be like trying to outlaw notions of comparative wage justice or fairness in employee expectations. Employers may engage in pattern bargaining as much as unions.

87. That said, the Bill adopts a narrow definition of pattern bargaining, which appears in the end to focus on whether 'the bargaining representative is genuinely trying to reach an agreement with that employer' (clause 412), an impression which is confirmed by DEEWR evidence to this Committee.23 This is fundamentally an issue of bargaining in good faith, and would be more appropriately dealt with under the good faith provisions (clauses 228-233), rather than as a separate prohibition under clause 412. Handling pattern bargaining in this way would still appear to be consistent with the policy commitment that 'Labor will not allow industrial action to be taken in pursuit of pattern bargaining'.[24] Indeed, the insistence in clause 412 on genuinely trying to reach an agreement with that employer seems to mirror the provision in clause 413 that, in order for action to be protected, the union 'must be genuinely trying to reach an agreement', though subclause 412(5) attempts to create a distinction with other uses of that phrase. The main difference appears to be that subclause 412(4) places the burden of proof on unions to show that they were genuinely trying to negotiate in good faith.

88. One unintended consequence that might arise from the proposed pattern bargaining provisions is a potential inconsistency with equal remuneration objectives. In particular, women should not be precluded from making an enterprise bargaining claim for wages equivalent to those received by equivalent male employees in a different workplace. This is particularly the case as, in an enterprise-based wage system, the opportunities for women to achieve equal remuneration through FWA will be very limited, notwithstanding the existence of sections 302-306 on equal remuneration orders. This is indicated by the minimal use to which the previous equal remuneration provisions, inserted through the *Industrial Relations Reform Act 1994*, have been put.

89. Clause 412 should therefore include a provision stating that pattern bargaining does not include situations where a wage claim is based on seeking equal remuneration for men and women workers for work of equal or comparable value.

Protected action ballots (clauses 435-469)

90. *Forward with Fairness* stated that the secret ballot process for protected action 'will be fair and simple, and will be supervised by Fair Work Australia'. However, the secret ballot provisions in the Fair Work Bill take up 22 pages and encompass 36 clauses. This

[23] Senate Hansard, Standing Committee of Education, Employment and Workplace Relations, Reference: Fair Work Bill 2008, 11 December 2008, pEEWR 12.
[24] *Forward with Fairness Policy Implementation Plan*, p21.

is only five pages less than the 'WorkChoices' provisions and compares with the UK Trade Union Act of 1984 which introduced a pre-industrial action secret ballot regime in just two sections. The provisions still have the effect of putting workers and unions through a complex administrative process, to undertake legitimate industrial action, with opportunities for employer intervention in the process, the main impact of which is to tilt the bargaining process away from a level playing field.

91. These provisions should be shortened and simplified, in order to achieve the Bill's stated objective (clause 436):

> to establish a fair, simple and democratic process to allow a bargaining representative *to determine whether employees wish to engage in particular protected industrial action* for a proposed enterprise agreement (emphasis added)

92. The requirement (clause 443(1)(b)) that FWA be satisfied that the applicant has been genuinely trying to reach agreement with the employer is an unnecessary impediment to determining whether employees wish to engage in protected action. The question of whether they have genuinely been trying to reach agreement is more appropriately dealt with if industrial action takes place – an employer can seek a stop order if it persuades FWA that the union is taking industrial action without genuinely trying to reach agreement. By requiring FWA to find that the union has been genuinely trying to reach agreement, the Bill in effect invites employers into the process of determining whether that has happened, and therefore into the secret ballot process that determines whether *employees wish* to engage in industrial action.

93. Subclause 443(1)(b) should therefore be deleted.

Payments not to be made for industrial action (clause 474)

94. The Bill indicates that, for unprotected action, the employer is required to deduct at least four hours pay even when the action is for less than four hours.

95. This is another instance of the ill trying to tell employers what is good for them, and interfering in the relationship between employer and employee. It should be up to employers to determine how they are to respond to industrial action. The automatic deduction of four hours pay may mean that employees will walk off the job for four hours when they would otherwise do so for only half an hour. Thus this provision can add to employers' costs. It can also create inequities for employees. For example, employees who stopped work for 20 minutes to collect money for the widow of a colleague killed at work were, technically, engaged in unprotected industrial action. These employees lost, and would continue to lose under this provision, four hours pay for being off work for 20 minutes.[25] Another group of workers were two minutes late back to work after a meeting with a Member of Parliament and had four hours pay deducted from their pay packets,[26] while yet others lost four hours after a safety meeting started late and ran 30 minutes into work time.[27] While it is appropriate that workers lose pay for time they are off the job and unauthorised to do so, it is inequitable and promotes ill will to require that they are not paid for the hours that they do work.

[25] ABC (2006). Workers lose pay for helping widow. *ABC News Online*. 11 April.
[26] Koutsoukis, J. (2006). Wages docked over two minutes. *Age*. 26 November.
[27] AAP (2007). Postal workers docked for safety meeting. *Courier-Mail*. 25 January.

96. Clause 474 should be amended, and replaced by the provisions of clause 470.

Functions of the Fair Work Ombudsman and Fair Work Australia (clauses 577 & 682)

97. In clause 682, the stated functions of the Fair Work Ombudsman (FWO) include:

> (a) to promote:
>
> (i) harmonious and cooperative workplace relations; and
>
> (ii) compliance with this Act and fair work instruments;
>
> including by providing education, assistance and advice to employees, employers and organisations;

98. It is important that the 'education' function of the FWO does not gradually take de facto precedence over its enforcement functions. One major advance through the 'WorkChoices' legislation and its follow-up was the establishment of a serious enforcement function, after years of neglect that stretched back to the early 1990s. One of the reasons that enforcement was neglected was that the administrative agency (known at one time as the Awards Management Branch, after the Arbitration Inspectorate was absorbed into the federal bureaucracy) gradually took on the approach that 'education' was a key aspect of achieving the objective of compliance with the system. The focus on education meant that enforcement was diminished, and few prosecutions took place each year. As a result, there was a high degree of non-compliance with the system.

99. The education function is best separated from the enforcement function. Under the Bill, the functions of FWA, as set out in subclause 577(2), include

> (b) providing assistance and advice about, and undertaking activities to promote public understanding of, its functions and activities;

100. The proposed education, assistance and advice function of FWO largely duplicates the assistance, advice and 'promoting public understanding' function of FWA. These education and advice functions are best undertaken by FWA, removing the conflict of interest from FWO in undertaking both education and enforcement.

101. Accordingly, subclause 682(a) concerning the functions of the FWO should be amended by deleting the words 'including by providing education, assistance and advice to employees, employers and organisations'.

102. To avoid doubt, subclause 577(2) concerning the functions of FWA should also be amended, to include the word 'education' before 'assistance'

Reviews and reports about agreements (clause 653)

103. Whatever arrangements are put in place for the nature and administration of the national standards, it is important to assess their effectiveness once they are in place. While existing data series from the ABS can play some role in this, a proper assessment of the standards will require new survey work. Existing data for example, can tell us nothing about how many people apply for flexible work arrangements, how those applications are dealt with, how many succeed, how many are rejected, and the nature of the arrangements

eventually agreed to. Indeed, little systematic is now known about the state of workplace employment relations in Australia, the last major data collection having been undertaken in 1995 (the Australian Workplace Industrial Relations Survey, AWIRS), though a partial survey covering the three eastern seaboard states was undertaken in 2005/06.[28] Reports on agreement making, originally annual, became biannual and then triennial.

104. Annual reviewing and reporting is an excessive burden to place on bureaucrats (I know this because I was involved in the preparation of the first two such reports, as the Branch Head responsible for them). However, triennial reviewing is too infrequent for proper analysis of how the system is operating, particularly a new system such as that created by this Bill. While earlier reports included survey and commissioned data (including in one case AWIRS data), more recent review reports have concentrated on administrative data, and been considerably less enlightening.

105. I therefore recommend that subclause 653(1) be amended to replace reporting every 3 years with reporting every 2 years.

106. Alternatively, if the same industrial relations system remains fundamentally in place over a long period, triennial reporting could be introduced from the third report onwards.

107. I also recommend that the Bill be amended to give guidance on the General Manager of FWA on the breadth of information to draw on in undertaking the reviews. In particular, I recommend that clause 653(2) be amended by adding that the General Manager must take into account both administrative data collected by FWA and other relevant data, which might include surveys, which it may commission or which may be published by other persons.

Looking towards the future

108. Although the *coverage* of the right to request flexible working hours is consistent with the commitments in *Forward with Fairness*, I wish to raise an issue for the future state of the minimum entitlements safety net in this regard.

109. The proposed right to request flexible working hours is restricted to parents with children under school age. This is an overly narrow restriction on eligibility, one that fails to recognise the range of workers who may have a genuine family need for flexible working hours.

110. In the UK, the right to request flexible working is available to parents of young children under 6 years of age, or disabled children up to 18 years of age, and carers of adults in need of care.

111. In a report supported by the European Social Fund, the UK Equal Opportunities Commission commented:[29]

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[28] Morehead, A., M. Steele, M. J. Alexander, K. Stephen & L. Duffin (1997). *Changes at Work: The 1995 Australian Workplace Industrial Relations Survey*. South Melbourne, Longman.; Considine, G. & J. Buchanan (2007). Workplace Industrial Relations on the Eve of Work Choices: A report on a survey of employers in Queensland, NSW and Victoria. Sydney, Workplace Research Centre, University of Sydney. September.

[29] EOC (2007). Enter the timelords: Transforming work to meet the future. *Final report of the EOC's investigation into the Transformation of Work*. Manchester, Equal Opportunities Commission. June.

The ‘right to request’ is an effective tool in driving cultural change but, because it is only for specific groups, it has tended to reinforce the ‘concession culture’ that sees this as not about the business mainstream but only for special groups on an ad hoc basis. This approach can also lead to resentment from colleagues who see that they may have to make work changes to accommodate flexibility for parents and carers when no similar arrangements are on offer to them.

There is clear evidence from innovative employers that opening up new ways of working to everyone in the company delivers a wide range of business returns. This voluntary approach of ‘open to all’ flexible working is gathering ground, supported by many of the employer organisations, including the Institute of Directors and the CBI.

The Work Life Law Centre has compared the impact of the ‘right to request’ regulations in the Netherlands, UK and Germany and concludes that it makes business sense to extend flexibility rights to all employees. It reports that forward-looking employers have found it easier to manage the right to request flexible working if it applies to all employees, irrespective of care-giving status. Limiting the right to a sub-group such as parents of pre-school children, as is the case under UK law, not only causes resentment but also makes it more difficult to accommodate requests. Parents of young children tend to be fairly homogenous in their-demand for working hours; whereas when all employees are included there is a better chance of covering the whole array of the employers’ working-time needs. The Dutch and German right to request laws apply to all employees, irrespective of their reasons for wanting to change their working hours.[30]

There is strong evidence emerging that people would like the ‘right to request’ to be extended to all employees.

In our survey:

> 60% of people (58% men, 63% women) think the ‘right to request’ should be extended to all employees.
>
> 68% of people who supported the extension (65% men, 70% women) said it was likely they would use the ‘right to request’ for all employees if it were available.[31]

The DTI’s Third Work-Life Balance Survey reported that 90% of employees felt that employers should give all employees the same priority when considering requests to work flexibly.[32] The CIPD/KPMG survey found that 35% of employers were in favour of extending the right to request to all employees and only 3% were strongly against.[33]

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[30] Hegewisch, A. (2005). Employers and European Flexible Working Rights: When the Floodgates Were Opened. *Issue Brief*. San Francisco, Centre for work life law. Autumn.
[31] Holmes, K., C. Ivins, J. Hansom, D. Smeaton & D. Yaxley (2007). The future of work: individuals and workplace transformation. *Working Paper Series*. Manchester, EOC.
[32] Hooker, H., F. Neathey, J. Casebourne & M. Munro (2006). The Third work-life balance employees survey: executive summary. *Employment Relations Research Series No. 58*. London, DTI.
[33] CIPD/KPMG (2006). Labour market outlook. London, Chartered Institute of Personnel and Development. November

> European and UK case studies show that organisations will reap real benefits from flexible working once they go beyond a piecemeal response to individual requests and integrate flexibility into their broader strategic approaches.[34]
>
> While the right to request in the UK has been associated with improvements in working time flexibility in the UK, it is worth noting the EOC observation that:
>
> International research based on 8,000 companies in 32 countries shows that despite claims of a flexible labour market, Britain is lagging behind its competitors in flexible work arrangements. Only 48% of companies offer flexi-time compared with 90% in Germany, 94% in Sweden and 92% in Finland.[35]

112. As a minimum, the right to request should apply not only to parents of pre-school age children but also to parents of disabled children, regardless of whether they are at school, and to carers. These groups are no less deserving of access to a right to request than parents of pre-school-age children.

113. In the near future, consideration should be given to extending the right to all employees, for equity reasons (parents of children at school also frequently require access to flexibility), to avoid resentment of employees with access to it, to make it work effectively, and to maximise the efficiency and flexibility gains for both employers and employees from it.

114. Finally, there are 163 countries which provide a guaranteed right to paid maternity leave on childbirth.[36] Australia is not one of them, and indeed is one of only two developed countries not to have this right. In the near future, a right to paid parental leave should be introduced across Australia, with government funding complementing the right to unpaid leave.

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[34] Hegewisch Employers and European Flexible Working Rights: When the Floodgates Were Opened.

[35] EOC Enter the timelords: Transforming work to meet the future.

[36] Heymann, J., A. Earle, S. Simmons, S. M. Breslow & A. Kuehnhoff (2004). The Work, Family, and Equity Index: Where Does the United States Stand Globally? Boston, The Project on Global Working Families, Harvard School of Public Health.

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