

ACTU Submission

Senate Education Employment and Workplace Relations Legislation
Committee Inquiry in to the Fair Work Amendment Bill 2013

Questions on Notice



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Senate Education Employment and Workplace Relations Legislation Committee

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Questions on Notice (ACTU appearance, Monday 22 April 2013, Melbourne, 9.45 am)

Question 1.

(Senator McKenzie) ACTU suggested definition of 'disability' for the purposes of s. 65(1A)(c)

Item 17 inserts a new s. 65(1A), which extends the right to request flexible work arrangements to circumstances including sub section (c) where the 'employee has a disability'.

The ACTU notes the context in which the new s.65 (1A)(c) appears in the Fair Work Act (FWA) 2009. Two significant observations are relevant.

- (1) The new section provides employees with a disability with a right to ask their employer for flexible work arrangements in order to meet their special needs. The provision does not give rise to a substantive right (such as might be applicable in other areas of disability law which is concerned with entitlements to financial assistance). The definition of disability for the purposes of eligibility to request flexible work arrangements should not be as restrictive as eligibility for financial entitlements.
- (2) The right to request flexible work arrangements in order to meet special or caring needs is clearly based on the employees' needs rather than on any category of disability. The needs of two employees with the same impairment or loss of function may be quite different because of their particular circumstances, including, the level of support they receive, their location and nature of work for example. This needs based approach should be paramount.

Further, the ACTU is cognisant of the benefits of keeping the provision simple and easy to understand so as to facilitate productive discussions between employees and employers. Using existing terminology is clearly of assistance in this regard.

For these reasons, the ACTU considers the definition contained in the **National Carer Strategy 2010-2020** as most appropriate. This definition is:

"For the purposes of this Strategy, the term 'people with disability' refers to people with all kinds of impairment from birth or acquired through illness, accident or the ageing process. It includes cognitive impairment as well as physical, sensory and psycho-social disability."

There is a more detailed definition of disability in s. 4 of the **Disability Discrimination Act 1992 (Cwlth)**, which could also be considered. This definition is:

"disability", in relation to a person, means:

- (a) total or partial loss of the person's bodily or mental functions; or
- (b) total or partial loss of a part of the body; or
- (c) the presence in the body of organisms causing disease or illness; or
- (d) the presence in the body of organisms capable of causing disease or illness; or
- (e) the malfunction, malformation or disfigurement of a part of the person's body; or

- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or*
- (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;*

and includes a disability that:

- (h) presently exists; or*
- (i) previously existed but no longer exists; or*
- (j) may exist in the future (including because of a genetic predisposition to that disability); or*
- (k) is imputed to a person.*

To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.

The ACTU advocates that a needs based approach is the critical foundation of the right to request provision. Such an approach provides clarity for both employers and employees, including for example, as to the scope of the new s. 65(1)(c). We support the model adopted in s.19 the Victorian Equal Opportunity Act (2010) which outlines the relevant factors employers should take in to account when considering employee requests for flexible work arrangements:

- 19 (2) In determining whether an employer unreasonably refuses to accommodate the responsibilities that an employee has as a parent or carer, all relevant facts and circumstances must be considered, including-*
 - (a) the employee's circumstances, including the nature of his or her responsibilities as a parent or carer; and*
 - (b) the nature of the employee's role; and*
 - (c) the nature of the arrangements required to accommodate those responsibilities; and*
 - (d) the financial circumstances of the employer; and*
 - (e) the size and nature of the workplace and the employer's business; and*
 - (f) the effect on the workplace and the employer's business of accommodating those responsibilities, including-*
 - (i) the financial impact of doing so;*
 - (ii) the number of persons who would benefit from or be disadvantaged by doing so;*
 - (iii) the impact on efficiency and productivity and, if applicable, on customer service of doing so; and*
 - (g) the consequences for the employer of making such accommodation; and*
 - (h) the consequences for the employee of not making such accommodation.*

The ACTU strongly advocates this model as it assists both parties to incorporate the degree of 'necessity' in the consideration of a request. We note that the proposed amendment adopts the circumstances listed in the Victorian legislation relating to the needs of the employer, but critically, does not adopt factors (a) and (h) which go to the needs of the employee and the consequences of a refusal of the request on the employee. This seriously undermines the

effectiveness of the provision and the FW Amendment Bill should be redrafted to include these considerations.

Question 2.

(Senator McKenzie) ACTU response to National Farmers Federation Submission regarding the potential effect of the Amendment Bill on regional and rural communities.

The NFF opposes most if not all of the amendments proposed by the FW Amendment Bill 2013 for similar reasons cited by other employer organisations. The ACTU addresses these reasons in its written submission. While the NFF submission alleges that the Bill has 'potential to significantly affect agriculture employers' it cites little or no evidence in support of that contention.

Having considered the NFF submission, the ACTU believes that it raises no substantive objections, grounded in evidence, that should persuade the committee to propose amendment to the Bill. Accordingly, we are content to reply on the material we provided to the Committee in support of the Bills passage.



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