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Submission

to the

House of Representatives Standing Committee on Education and Employment

Inquiry into the Fair Work Amendment (Better Work/Life Balance) Bill 2012

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FAIR WORK AMENDMENT (BETTER WORK/LIFE BALANCE) BILL 2012

INTRODUCTION

The Department of Education, Employment and Workplace Relations (DEEWR) notes the introduction of the Fair Work Amendment (Better Work/Life Balance) Bill 2012 (the Bill) into the House of Representatives on 13 February 2012 by Mr Adam Bandt MP.

The key amendments proposed under the Bill would considerably expand the *Fair Work Act 2009* (Fair Work Act) provisions, allowing all employees who have completed 12 months' continuous service and casual employees who have been engaged on a regular and systematic basis for a sequence of periods over a period of at least 12 months and have a reasonable expectation of continuing engagement:

- a right to request flexible working arrangements which can only be refused by an employer on 'reasonable business grounds'; and
- for employees with 'responsibility for the care of another person' a right to request flexible working arrangements which can only be refused by an employer on 'serious countervailing business grounds'.

The Bill would also allow:

- unions to make requests for flexible working arrangements on behalf of employees they are entitled to represent; and
- Fair Work Australia to make orders to ensure that an employer complies with the request mechanisms. Applications could be made to Fair Work Australia by the employee, their union, or the Age Discrimination Commissioner, Disability Discrimination Commissioner or the Sex Discrimination Commissioner.

The Department notes the policy objective of the Bill is to better facilitate work/life balance, particularly for carers. The Department believes that the Bill should be considered having regard to the objectives of the existing provisions of the Fair Work Act, any potential productivity gains, the impact on business, and implications for Fair Work Australia.

SUMMARY OF EXISTING PROVISIONS

The right to request flexible working arrangements was first introduced as a legislative entitlement under the Fair Work Act through the National Employment Standards (NES), and commenced operation on 1 January 2010.

Section 65 of the Fair Work Act is more narrow in its definition of an eligible employee than the Bill. Rather than including all employees it provides a right for an employee who is a parent or has responsibility for the care of a child under school age, or a child under 18 with a disability, to make a written request for flexible working arrangements. Employers can only refuse a request on reasonable business grounds.

Eligible employees are permanent full-time and part-time employees who have completed 12 months continuous service, and long-term casual employees engaged on a regular and systematic

basis for at least 12 months, who have a reasonable expectation of continuing regular employment.

Employers must either approve or refuse an employee's request in writing within 21 days. If the request is refused, the employer must also include reasons for the refusal. It is a contravention of the Fair Work Act if an employer does not respond according to these requirements (the applicable penalty provisions provide a maximum penalty of 60 penalty units, currently $6,600).[1]

Section 66 of the Fair Work Act provides that State or Territory laws that provide more beneficial employee entitlements in relation to flexible work arrangements are not excluded and continue to apply.

Individual flexibility arrangements

In addition to the right to request 'flexible working arrangements' under the NES, the Fair Work Act requires modern awards and enterprise agreements[2] to include a 'flexibility term'. A flexibility term is a term that enables an employee and employer to agree to an 'individual flexibility arrangement' (IFA) that will vary the operation of the award or agreement.

Unlike the right to request flexible working arrangements, which is only refusable on reasonable business grounds, IFAs require agreement between the employee and his or her employer.

The flexibility term of an enterprise agreement can provide for the effect of any enterprise agreement term to be varied in relation to a particular employee by an IFA. Flexibility terms of modern awards enable IFAs to vary the effect of award terms concerning when work is performed, overtime or penalty rates, allowances, and leave loadings. IFA's must reflect a genuine agreement between the employer and employee, must be in writing and signed, and must result in the employee being better off overall than they would have been if no IFA were in place. IFAs can be terminated by either the employee or employer giving 28 days written notice, or at any time if agreed by both the employer and employee in writing.

Objectives of the provisions

As part of the Australian Government's commitment to providing a fair and balanced workplace relations system, the Fair Work Act contains a safety net of 10 National Employment Standards (NES) which include a range of flexible working conditions designed to assist employees balance their work and family responsibilities. The NES are minimum entitlements. Employees and employers are free to negotiate arrangements which best meet their needs at the workplace level and which build on the NES.

Many of the provisions contained within the Bill are not consistent with the intended operation of the Fair Work Act. The legislated entitlement to request flexible working arrangements is designed to support families in balancing work and family responsibilities. In particular, the current provisions recognise the difficulties faced by working parents and others responsible for caring for children under school age and disabled children. They are also designed to promote discussion between employers and employees about the issue of flexible working arrangements. The legislation requires an employee to set out in writing the details of the change to working arrangements sought and the reasons for the change. Examples of flexible working arrangements

[1] See Sections 44(1) and 539 of the Fair Work Act
[2] See sections 144 and 202, respectively, of the Fair Work Act

that could be requested by an employee in accordance with the National Employment Standards include a reduction or change in working hours, flexible rostering, part time work or changes in location of work.

An employer must provide the employee with a written response to their request, whether it is accepted or refused, within 21 days. An employer can only refuse a request for flexible working arrangements on reasonable business grounds, and the written response must include details of the reasons for the refusal, so that the employee clearly understands why their request is being rejected. This may assist employees to amend their request or to reach a compromise position with their employer which best suits their needs, as well as the needs of the employer's business.

While the provision works to support eligible employees manage work and family responsibilities, the entitlement also includes certain provisions to ensure that the right to request flexible working arrangements will not impede the competitiveness and viability of businesses.

The Fair Work Act does not define 'reasonable business grounds' as it is the intention of the provision that reasonableness be assessed in the circumstances that apply when the request is made. Reasonable business grounds may include;

- the financial impact and the impact on efficiency;
- productivity and customer service;
- the inability to organise work among existing staff;
- the inability to recruit a replacement employee; and
- the practicality of the arrangements needed to accommodate the employee's request.

Whether an employer can accommodate a particular request for flexible working arrangements will vary depending on the employer's specific circumstances. That is why the reasonable business grounds relied on by an employer to refuse a request is not currently subject to an automatic right of review by a third party. However, the Fair Work Act does empower Fair Work Australia or some other person to deal with a dispute[3] about whether an employer had reasonable business grounds for refusing a request if this has been agreed in an employment contract, enterprise agreement, other written agreement, or is authorised by a public service determination. There were 10 applications to Fair Work Australia relating to a refusal of a request for flexible working arrangements in the December quarter for 2011.

NATIONAL CARER STRATEGY

The Government has already indicated its intention to consider expanding the right to request flexible working arrangements to those with caring responsibilities. DEEWR draws the attention of the House of Representatives Standing Committee on Education and Employment (the Committee) to the National Carer Strategy (the Strategy) which was launched on 3 August 2011 by the Hon Jenny Macklin MP, then Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon Nicola Roxon MP, then Minister for Health and Ageing and Senator Jan McLucas, Parliamentary Secretary for Disabilities and Carers. The Strategy is the second element of the National Carer Recognition Framework which also encompasses the *Carer Recognition Act 2010*.

Under the Strategy, the Government committed to consulting with stakeholders on options to expand the right to request flexible working arrangement provisions of the NES to include:

[3] See sections 739 and 740 of the Fair Work Act

- eligible employees with elder care responsibilities; and
- eligible employees with care responsibilities for those with a serious long-term illness or disability.

This proposal works towards addressing Priority 3 of the Strategy: *Economic Security – Carers have economic security and opportunity to participate in paid work.*

Expanding the right to request to those with elder care responsibilities and care responsibilities for a person with a serious long-term illness or disability would directly support the intent of the Strategy. It would also acknowledge that the number of Australians with elder care responsibilities is likely to increase as the population ages, and that care responsibilities for adults with disability can be as onerous for those caring for disabled children.

The consultation process is also covering the option to expand the right to request flexible working arrangements to eligible employees with care responsibilities for children under 16, ensuring consideration is given to the needs of more carers and reflecting the Government's commitment to ensuring employees have greater options for balancing work and family responsibilities. The Department notes that consideration of the Bill may pre-empt the outcomes of those consultations.

The Department anticipates the consultations will conclude over the coming months.

Expanding the right to request to carers

Carers wanting to work but unable to do so represent a potentially large pool of skilled labour. Access Economics research estimated that in 2010[4], almost 130,000 carers who were not in the paid workforce would have been employed if their caring responsibilities had not prevented them from doing so. DEEWR analysis of unpublished Australian Bureau of Statistics data found that of the 310,000 primary carers who were employed in 2009, 41,800 (13.5 per cent) needed some time off work at least once a week because of caring responsibilities[5].

If progressed, expanding the right to request as proposed may assist more parents and carers in managing their work and caring responsibilities. It may also encourage employees to remain at workplaces as their family circumstances change, which will in turn benefit employers as they retain the human capital investment made in the employee.

Workplace flexibility allows employers to retain staff by meeting individual staff needs, which may assist in increasing productivity and reducing costs associated with hiring and training. By demonstrating flexible workplace practices, employers can be seen as an 'employer of choice' to prospective employees, an important means of attracting staff.

The Department notes that this proposal also supports and complements current Government initiatives and the Government's broader productivity agenda. These include the *Building Australia's Future Workforce* package and the introduction of the *National Digital Economy Strategy*.

[4] Access Economics *The Economic Value of Informal Care in 2010*
[5] Source: ABS Survey of Disability, Ageing and Carers, 2009 (Cat. No. 4430.0), unpublished data.

A key objective of the *Building Australia's Future Workforce* package is to increase immediate and long term incentives for adults to participate in the economy and to assist people to engage with the workforce.

One of the eight goals of the *National Digital Economy Strategy* is that at least 12 per cent of Australian employees will have a teleworking arrangement – one form of flexible work. Ensuring the ongoing success of telework as a flexible working arrangement is dependent on employers agreeing to requests.

Expanding the right to request to carers of children under 16

Expanding the right to request to carers of children under 16 would ensure that consideration is given to the needs of more employees with caring responsibilities and recognise that children under 16 are largely reliant on parental support. It may also provide an opportunity to open up more avenues for parents struggling to balance work and family responsibilities. A recent study by the University of South Australia[6] found that there is an increased risk of strain from combining work and parenting responsibilities and that 49 per cent of fathers and 31 per cent of mothers are most likely to report insufficient sleep.

While there is no specific data available estimating the number of eligible parents of children under 16 years, from the best available data from the ABS as at January 2012[7] DEEWR estimates that, taking into account job tenure for eligibility for the current right to request provision of the NES, there are around 2.7 million eligible working parents of children under 15 years. Noting that a number of these parents would already be captured under the current NES entitlement to request flexible work arrangements for eligibile employees with children under school age, expanding the right to request to the remainder of these parents, and those of children aged 15–16 years, may assist them to better balance their work and family commitments. An estimated 1.2 million parents who are currently unemployed or not in the labour force with children under 15 years could potentially have access to the right to request flexible working arrangements, providing they become employed and stay with the same employer for 12 months or more, supporting their long-term job employment prospects.

Other relevant inquiries

The Government's proposal under the Strategy also responds to a number of recent reviews and inquiries that have recommended the expansion of the right to request flexible working arrangements to those with caring responsibilities.

It aligns with a recommendation made by the Productivity Commission (the Commission) in its August 2011 Inquiry report into Disability Care and Support. In its report, the Commission noted that the caring responsibilities of parents increase when children with a disability leave school and recommended that the Government amend the Fair Work Act to permit parents to request flexible leave from their employer if their child is over 18 years old, subject to a National Disability Insurance Scheme assessment.

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[6] 'A work-life perspective on sleep and fatigue—it's not just the shift workers who are at risk' http://www.workplaceexpress.com.au/files/skinner.pdf

[7] **Source:** ABS *Labour Force, Australia, Detailed - Electronic Delivery* (Cat. No. 6291.0.55.001), January 2012 datacube FM1.

The Commission's August 2011 report into Caring for Older Australians also referenced this recommendation and stated that if the Fair Work Act were to be amended along these lines, consideration should be given to including a right for carers of older people to request flexible working arrangements, if evidence can be produced that they are providing a sufficiently high level of care.

Consultation process

DEEWR is conducting consultations with two key stakeholder groups - referring states and territory governments under clause 2.11(a) of the *Multilateral Intergovernmental Agreement for a National Workplace Relations System for the Private Sector*, and a sub-group of the National Workplace Relations Consultative Council, which consists of peak employer organisations and unions.

The Department has also held discussions with Carers Australia and received a submission from the Women and Work Research Group at the University of Sydney.

Consultations have been held on an in-confidence basis.

OTHER RELEVANT REVIEWS AND INQUIRIES

The Department also draws to the attention of the Committee a number of other recent and upcoming reviews and inquiries which have, or will, consider the operation of the flexible working arrangements provision.

Fair Work Australia Research

The operation of the right to request flexible working provisions and the extent to which IFAs and being agreed to, and the content of those arrangements, will be considered as part of research which must be undertaken every three years by the General Manager of Fair Work Australia, in accordance with section 653 of the Fair Work Act[8]. The research must consider the circumstances in which employees make requests, the outcome of such requests and the circumstances in which such requests are refused.

The General Manager must, in conducting the research, consider the effect on the employment (including wages and conditions of employment) of the following persons:
(a) women;
(b) part-time employees;
(c) persons from a non-English speaking background;
(d) mature age persons;
(e) young persons; and
(f) any other persons prescribed by the regulations.

Currently s 653 requires the General Manager to report to the Minister on the research as soon as practicable after 26 May 2012 and within 6 months of that date.

[8] Further information about this process is at http://www.fwa.gov.au/index.cfm?pagename=admingmreporting

Fair Work Act Review

The Department notes that the Government has appointed an independent three-member Panel to conduct the post-implementation review of the Fair Work Act (the Review) and has established terms of reference for the Review[9].

The terms of reference provide that the Review 'is to be an evidence based assessment of the operation of the Fair Work legislation, and the extent to which its effects have been consistent with the Objects set out in Section 3 of the Fair Work Act'.

Issues raised by stakeholders regarding the operation of the flexible working arrangements provisions will be examined in the course of the Review and government will carefully consider any findings in this regard.

Australian Law Reform Commission report *Family Violence and Commonwealth Laws — Improving Legal Frameworks*

In July 2010, the then Attorney-General, the Hon Robert McClelland MP, asked the Australian Law Reform Commission (ALRC) to review the impact of Commonwealth laws on victims of family and domestic violence.

On 7 February 2012, the ALRC's final inquiry report *Family Violence and Commonwealth Laws—Improving Legal Frameworks* was tabled in Parliament[10]. Recommendation 17-1 of the report proposes that the Australian Government should consider amending section 65 of the Fair Work Act to provide that an employee who is experiencing family violence, or who is providing care or support to another person experiencing family violence, may request the employer for a change in working arrangements to assist the employee to deal with circumstances arising from the family violence.

The Government is currently considering the recommendation of the report.

Mature Age Advisory Panel

The Deputy Prime Minister and Treasurer, the Hon Wayne Swan MP and the Minister for Mental Health and Ageing, the Hon Mark Butler MP announced the establishment of the Advisory Panel on the Economic Potential of Senior Australians on 30 March 2011. The Panel was formed to provide advice to Government on harnessing the economic potential of a larger, more active group of older Australians.

The Chair of the Panel, Mr Everald Compton AM, presented the Treasurer with the Panel's final report on 12 December 2011[11]. Recommendation 15 of the report recommends that the federal government work with industry to extend flexible work arrangements to people aged 55 and over:

- by amending the NES to include the right to request flexible work for this age group or
- through best practice industry standards.

[9] Further information about the Review is available at http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Pages/Home.aspx

[10] Full report is available at http://www.alrc.gov.au/publications/family-violence-and-commonwealth-laws-improving-legal-frameworks-alrc-report-117

[11] Full report is available at www.treasury.gov.au/EPSA/content/default.asp

The Government is currently considering the recommendations of the report.

TECHNICAL ISSUES

Removing the 'flexible working arrangements' provisions in the Fair Work Act from the NES

A significant feature of the Bill is that it removes the 'flexible working arrangements' provisions from the NES and moves them to a new Part of the Fair Work Act. The Department notes that this may cause public concern given the NES are broadly understood and were developed through extensive consultation.

Removing the provisions from the NES would also result in a different enforcement framework being relied upon. The NES are civil remedy provisions, enforceable in the Federal Court, Federal Magistrates Court and eligible State or Territory courts and subject to pecuniary penalties. While the reason for an employer's refusal of an employee's request on 'reasonable business grounds' is not subject to review by the courts, applications for court orders in relation to a failure to provide a written response which includes reasons for refusal and contraventions of most other provisions of the NES can be brought by employees, employee organisations and Fair Work Inspectors.

Rather than relying on the existing enforcement framework, the Bill provides that Fair Work Australia can make orders to ensure employers comply with the new request mechanisms ('flexible working arrangements orders').

Under the Bill, employees would not be able to apply to the courts directly for breaches of the new right to request provisions, and penalties would not generally be able to be imposed for such breaches.

However, the Bill provides that contravening a 'flexible working arrangements order' is a civil remedy provision, in respect of which a court can impose penalties. For this to occur, an application must first have been made to Fair Work Australia for a 'flexible working arrangements order' and the employer must have breached such an order. This reflects that Fair Work Australia orders are generally enforceable in the courts. It is likely that this change would result in a significant increase to Fair Work Australia's workload.

The Department notes that Fair Work Inspectors are not permitted to apply to Fair Work Australia to seek a 'flexible working arrangements order'.

The Bill also provides different interaction rules than those currently provided for in relation to the NES. The NES are minimum entitlements which cannot be excluded by modern awards or enterprise agreements. By contrast, under the Bill, a term of an enterprise agreement will have no effect to the extent that it is inconsistent with a term of a 'flexible working arrangements order'. For example, if an industrial agreement provided that part-time or working from home arrangements were only available with management's approval, this would be likely to be inconsistent with a 'working arrangements order' compelling the employer to provide such an arrangement. Allowing an enterprise agreement to override a 'flexible working arrangements order' could result in unjust outcomes, e.g. if an employee who had the benefit of such an order had voted against approving the enterprise agreement.

If the Bill is progressed, further rules would need to be provided to govern the interaction between 'flexible working arrangements orders' and transitional instruments made under the former *Workplace Relations Act 1996*. Under the NES, terms of both award and agreement-based transitional instruments are void to the extent they are detrimental to an employee, in any respect, when compared with the NES.

Given these difficulties, the alternative option of making any proposed alterations to the existing flexible working arrangements provisions through the NES, rather than by creating a new Part of the Fair Work Act, could be considered.

Further technical considerations with the Bill

- Item 10 of the Bill would insert a new provision in the Fair Work Act, providing that matters pertaining to flexible working arrangements can be dealt with in enterprise agreements. This item is unnecessary, given that flexible working arrangements would already be considered a matter pertaining to the employment relationship under section 172(1)(a).

- Proposed section 306D provides that any national system employee, or an employee organisation entitled to represent the employee, may request the employer to change the employee's 'working arrangements'. The Department notes that the language in this provision is broad. The current provision (section 65) uses the term 'working arrangements' but is more tightly constrained because the purpose of any requested change to 'working arrangements' must be to assist the employee with the care of an under-school age or disabled child. If the Bill is progressed, the Department recommends that consideration should be given to expressly providing that such requests can only be made for purposes relating to work/life balance. The Department notes that new section 306D is likely to allow a union to make a request on behalf of all employees in a workplace, rather than a particular employee, which would undermine the policy intent of providing for flexibility for individual employees.

- Proposed section 306E provides an additional right to request changes to working arrangements to assist an employee to care for another person. Consideration could be given to including evidential requirements similar to those required in relation to personal/carer's leave under section 107 of the Fair Work Act, i.e. requiring evidence that would satisfy a reasonable person that the request is being made to allow the employee to fulfil caring responsibilities.

- Proposed section 306F(1) allows Fair Work Australia to make any order it considers appropriate to ensure an employer complies with the request mechanisms in the Bill. Preliminary advice from the Australian Government Solicitor is that section 306F(1) may result in constitutional issues relating to judicial power, but that such issues could be remedied by re-drafting the provision. Rather than allowing Fair Work Australia to make orders to ensure compliance with the request mechanisms, the provision could be re-drafted to allow Fair Work Australia to deal with a dispute or make an order providing an employee with flexible working arrangements, taking into account any 'reasonable business grounds' or 'serious countervailing business grounds' put forward by the employer. Similar drafting is used in relation to equal remuneration orders (section 302) and disputes about right of entry (section 505).

- The Department notes that a practical difficulty with proposed section 306F(1) is that it is likely to compel Fair Work Australia to either grant or refuse the original request for flexible working arrangements in its entirety. This is because the section allows Fair Work Australia to make orders for the purpose of ensuring that employers have complied with the requirements in section 306D or section 306E, rather than for the purpose of providing the employee with flexible working arrangements. Re-drafting section 306F(1) in the manner described above would avoid this difficulty.

- Flexible working arrangements orders can only be made on application by an employee, organisation, and the Federal Discrimination Commissioners (proposed new section 306F(2). Consideration should be given to allowing Fair Work Inspectors to make applications, given that they can currently make applications for orders in respect of contraventions of the NES.

- The Bill provides that the General Manager of Fair Work Australia must conduct research in relation to requests for changed working arrangements made under the new provisions. Currently the Fair Work Act requires the General Manager to conduct research relating to the operation of the current provisions on requests for flexible working arrangements under the NES, and to report to the Minister on that research. The Bill would need to be amended to ensure that research into requests already made under the NES are still required to be included in the first report.

- An amendment to the Fair Work Regulations 2009 would also be required in relation to a further requirement that the President of Fair Work Australia report to the Minister on the number of dispute applications made to Fair Work Australia each quarter concerning a refusal of a request for flexible working arrangements.

- If, as under the Bill, the right to request flexible working arrangements was made enforceable, consideration would need to be given to including a rule to govern the interaction between flexible working arrangements and the NES, as well as modern awards, enterprise agreements and IFAs. Such a rule could provide that flexible working arrangements cannot exclude terms of the NES, modern awards, agreements or IFAs. Consideration could also be given to providing an interaction rule similar to that provided for in respect of IFAs, i.e. that flexible working arrangements must leave the employee better off overall than they would have been had the employer not granted the arrangement.

- Proposed section 306E provides an additional right to request changes to working arrangements to assist an employee to care for another person, which can only be refused on 'serious countervailing business grounds'. The Department notes that there is currently a lack of clarity around the distinction between 'reasonable business grounds' and 'serious countervailing business grounds' and the higher threshold may have little practical effect. Alternatively, it could be interpreted strictly to mean, for example, that an employer can only refuse if allowing such a request would threaten the organisation's financial viability. It is understood that the higher threshold is drawn from the right to request provisions used in the Netherlands, and is the most rigourous of the tests employed in similar provisions in Europe. The Department also notes that the provisions in the Netherlands include some further limitations which have not been replicated in the Bill, e.g., requests are limited to changes in working time and part-time work hours, and do not extend to the location of work.