



29 February 2012

The Committee Secretary
House of Representatives Standing Committee on
Education and Employment
Parliament House
CANBERRA ACT 2600

Via email: ee.reps@aph.gov.au

RE: Comments by the Australian Council of Trade Unions (ACTU) on the Inquiry into the Fair Work Amendment (Better Work / Life Balance) Bill 2012

The ACTU welcomed the introduction of the new Requests for Flexible Work Arrangements provision of the Fair Work Act by the Labour Government in 2009.¹ The provision recognised the growing pressure on working families to balance work and caring responsibilities.

This increased pressure to balance work and caring responsibilities is largely due to changes in social, family and labour market structures with both partners of couple families now likely to be employed.²

In addition, the trend towards de-institutionalisation of care for dependents with a disability, or frail, elderly dependents has increased the need for support for workers with a wider range of caring responsibilities, particularly the sandwich generation of workers who care for both children and elderly parents.

Balancing work, life and family is a key issue for union members, with both women and men surveyed in the 2011 ACTU Census citing it as their second highest industrial priority after wages.³

In 2010, the ACTU welcomed the landmark introduction of the Paid Parental Leave scheme by the Labour Government and looks forward to the proposed introduction of Dad and Partner Pay in 2013. Paid Parental leave provides critical support to working parents of newborn babies to assist them maintain their connection to the paid workforce.

However, for paid parental leave to genuinely assist parents in their employment, employees returning from parental leave must also be entitled to appropriate flexibility in their work arrangements in order to accommodate their ongoing caring responsibilities.

The ACTU believes that unions, employers and governments have a responsibility to support employees to balance their work and caring responsibilities.

¹ Section 65, Fair Work Act, 2009

² ABS Social Trends 4102.0 December 2011, "Fifty Years of Labour Force: Now and Then", p. 2

³ Balancing Work and Family was the 2nd highest priority for both men and women workers who responded to the ACTU Census 2011.

Since the introduction of the Fair Work Act, the ACTU has advocated for improvements to the right to request flexible work arrangements provision. In 2009, the ACTU Congress identified the need to

“Extend the NES right to request flexible work arrangements to all employees whose caring responsibilities have an impact on their work schedule. Employers should be obliged to give proper consideration to an employee’s request and disputes should be able to be resolved by an independent party.”

Since then, unions have continued to note the significant number of cases where employees have:

- been excluded from accessing the right to request provision because of its narrow scope;
- been unsuccessful in appealing an employer’s unreasonable refusal because of a lack of access to dispute resolution provisions; or
- settlement has been reached, but only after a long and unnecessarily acrimonious process.

As currently drafted, the NES right to request a change to working arrangements to meet caring responsibilities is only available to those who care for a child under school age or a child with a disability who is under the age of 18 years of age.

Consequently, employees who care for school aged children, adult children with a disability or frail elderly dependents do not have a right to request changes to their work arrangements to meet their caring responsibilities.⁴ This unfairly discriminates between groups of employees with caring roles and fails to acknowledge the range of caring responsibilities of workers.

We welcome the government’s commitment to review the right to request a change to working arrangements provision in line with the National Carers Strategy but we note that the Strategy only addresses the needs of carers of elderly and adults with a disability.⁵ We note though, as part of the consultation process on expanding the right to request a change to working arrangements provision, the Government has extended the terms of reference to include consideration of the needs of carers of school age children. We submit that an outcome which left the needs of carers of school age children as the only group without a right to request a change to working arrangements to meet their caring responsibilities would be non-sensical and discriminatory.

The right to request a change to working arrangements to meet caring responsibilities or to extend unpaid parental leave⁶ are the only two provisions of the FWA which specifically deny workers the procedural justice of a right to appeal an unreasonable refusal unless they are able to negotiate the right as part of their workplace agreement.⁷ This discriminates against workers with low bargaining power, who, ironically, are more likely to be women with caring responsibilities.

In cases where employees have had access to dispute resolution, the process has been protracted, stressful and has damaged relationships between the parties. The ACTU has long advocated for the inclusion of an obligation on the employer to demonstrate that they have given proper consideration to, and made reasonable efforts to accommodate the employee’s request.

⁴ FWA, s.65(1)

⁵ Priority 3 of the National Carers Strategy 2011 includes ensuring carers had economic security and opportunity to participate in paid work.

⁶ FWA, s.76(4)

⁷ FWA, s. 186(6) and s.739(2)

Such an obligation would minimise the number of disputed decisions by giving guidance as to how parties are to consider a request. In our view, a useful model is found in section 14A of the Victorian Equal Opportunity Act (1995) which outlines the obligations of employers in considering an employees' request including weighing up the importance of the request on the employee's capacity to balance work with family and caring responsibilities against any potential effects the granting of such a request would have on the organisation.

To this end, the ACTU advocates for amendments to the NES right to request flexible work arrangements provision which:

- a) Extend the eligibility for the right to request a change to working arrangements to meet caring responsibilities to include *'any employee who cares for or supports, or expects to care for or support a dependant who reasonably relies on the employee for care'*;⁸ and
- b) Ensure all employees have a right to appeal an employer's unreasonable refusal of a request, clearly setting out the employer's obligations to properly consider the request and make reasonable efforts to accommodate the request.⁹

To the extent that the Fair Work Amendment (Better Work / Life Balance) Bill 2012 reflects these amendments, the ACTU would encourage all political parties to support the Bill.

We would further add our strong view that individual flexibility clauses are a wholly inappropriate mechanism to address the needs of workers with caring responsibilities.

Workers with family and caring responsibilities are particularly vulnerable to pressure to agree to individual flexibility clauses if it is the only way their employer will grant much needed changes to work arrangements to meet caring responsibilities. An analysis of Australian Workplace Agreements (AWAs) lodged in 2006 proved that 90% of AWAs removed basic award conditions in particular removed entitlements connected to working hours and compensation for working non-social or family friendly hours.¹⁰ The evidence consistently pointed to the increased effect of individual bargaining on women and workers with family responsibilities.¹¹

Finally, we would also like to point out that the proposed amendments to the right to request flexible work arrangements provision should be viewed in the context of a framework of relevant legislation which also plays a role in supporting workers with family caring responsibilities.

ACTU Congress 2012 will prioritise the following matrix of amendments to existing legislation to more effectively allow workers to manage work and family commitments and encourage equality of opportunity for workers with caring responsibilities:

- a) Extend employee rights to request flexible work arrangements in order to meet a wider range of caring responsibilities and ensure procedural fairness for all employees making such requests;
- b) Extend the amount and scope of carer's leave entitlements;

⁸ The ACTU also supports proposal for extending the right to request flexible work arrangements to include employees who are experiencing domestic violence: see Australian Law Reform Commission Report report, [Family Violence and Commonwealth Laws—Improving Legal Frameworks](#), 2012.

⁹ As outlined in the Victorian Equal Opportunity Act (1995) s.14A

¹⁰ Whilst the Government did its best to keep this data from the public eye, a Senate Inquiry revealed that almost 90% of AWAs removed a basic award condition. Hourly earnings growth in the female dominated retail and hospitality industries were the lowest across all industries, a reflection of the loss of penalty rates, overtime and other conditions of employment through AWAs.

¹¹ ABS figures show that the pay gap was worst for women on individual contracts. Female workers on AWA individual contracts earned an average of \$110.20 a week less than women on registered union collective agreements: ABS Cat no. 6410.0, 6302.0, March 2007

- c) Continue to build on the new government Paid Parental Leave and proposed Dad and Partner Pay schemes and improve and protect employer provided paid parental leave; and
- d) Improve provisions of the *Fair Work Act*, *Equal Employment Opportunity for Women in the Workplace Act* and anti-discrimination legislation to achieve greater equity and opportunity for employees with family responsibilities.

Yours sincerely

Ged Kearney
ACTU President