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Schedule 1 – Family-friendly measures

2.1 Schedule 1 of the Fair Work Amendment Bill 2013 (the Bill) introduces five new family friendly arrangements into the *Fair Work Act 2009* (the Act) including:

- clarifying that any special maternity leave taken will not reduce an employee's entitlement to unpaid parental leave (Part 1);
- providing further flexibility for concurrent unpaid parental leave (Part 2);
- expanding access to the right to request flexible working arrangements to more groups of employees (Part 3);
- requiring employers to consult with employees about the impact of changes to regular rosters or hours of work (Part 4); and
- extending the right of pregnant women to transfer to a safe job (Part 5).[1]

2.2 Some of these measures were recommended by the Fair Work Act Review Panel (the Review Panel). Others have been developed through the consultation mechanisms outlined in Chapter 1.

2.3 However, the Business Council of Australia (BCA) stated that there was a significant lack of consultation with stakeholders on many of the provisions in Schedule 1 (family-friendly measures). BCA submitted:

> Significant aspects of this part of the Bill have not been put through any consultation process and tested. In fact, only two of the measures were raised in the context of the Fair Work Act Review panel recommendations. As a result there are substantial concerns about aspects of what is being proposed.[2]

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1 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 1.

2 BCA, *Submission 34*, p. 7.

2.4 Similar comments were made by ABI, which stated that:

> Because of lack of due process, ABI's preferred position is that the schedule is not enacted. Had due process, impact evaluation and proper consultation been followed, Schedule 1 would not be in the form it is.[3]

2.5 Each part of Schedule 1 is examined below.

Special maternity leave (Part 1)

2.6 Part 1 proposes to amend the unpaid special maternity leave provisions of the Act so that any period of unpaid special maternity leave taken by an eligible employee will not reduce that employee's entitlement to unpaid parental leave under s 70 of the Act.[4] The Part gives effect to the Review Panel's recommendation 4.

2.7 Unpaid special maternity leave assists employees' management of complications or unforeseen pregnancy related issues that preclude them from continuing employment.

2.8 The Act currently provides for an entitlement to unpaid special maternity leave for an eligible employee who is not fit for work while she is pregnant, including because she has a pregnancy-related illness (s 80). Section 80(7) provides that any period of special maternity leave taken under s 80, reduces the employee's entitlement to 12 months of unpaid parental leave.[5]

2.9 The Bill repeals s 80(7) of the Act.[6] The effect of this is that the taking of unpaid special maternity leave will not reduce an employee's entitlement to unpaid parental leave.[7]

Stakeholder feedback

2.10 The special maternity leave provisions in Part 1, Schedule 1 of the Bill were supported by employee organisations and some legal advisory services.[8] However, business, industry and employer organisations expressed varying levels of concern about the amendments.[9]

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3 ABI, *Submission 15*, p. 9.

4 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 15.

5 *Fair Work Act 2009*, s 80(7).

6 Item 9, Fair Work Amendment Bill 2013.

7 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 15.

8 Australian Council of Trade Unions (ACTU), *Submission 9*, p. 3; United Services Union (USU), *Submission 26*, p. 2; Australian Nursing Federation (ANF), *Submission 22*, p. 2; Shop,

2.11 The Australian Industry Group (AiG) submitted that 'this provision would appear to have few adverse impacts upon employers'.[10] In contrast, the Australian Chamber of Commerce and Industry (ACCI) rejected the proposal,[11] commenting that 'the costs to changing existing rules around unpaid parental leave have not been quantified and it is unclear what exact impact this may have on employers'.[12] Business SA commented that any additional leave should be capped to ensure that an employee is not able to be absent from the workplace for more than two years.[13]

2.12 Master Builders Australia (MBA) submitted that though it supports unpaid special maternity leave being granted on compassionate grounds, it does not believe that a legislative enactment is required, commenting that the matter should be 'dealt with between employers and employees at the enterprise level'.[14]

2.13 DEEWR stated that:

> some organisations have claimed that the bill has introduced new entitlements to special maternity leave … This is incorrect. The concept… of special maternity leave … [has] been included in federal workplace relations since 1996 and [has] had general application to all employees covered by the federal workplace relations system since 2005.[15]

Parental leave (Part 2)

2.14 Part 2 amends parental leave provisions of the Act with the aim of providing parents with greater flexibility when caring for children.[16] This proposal was not canvassed by the Review Panel.

Distributive and Allied Employees' Association (SDA), *Submission 37*, p. 6; Employment Law Centre of Western Australia (ELC), *Submission 40*, p. 1.

9 Australian Chamber of Commerce and Industry (ACCI), *Submission 12*, p. 10; Business SA, *Submission 2*, p. 5; Master Builders Association (MBA), *Submission 14*, p. 7; Australian Business Industrial (ABI), *Submission 15*, p. 9; National Famers' Federation (NFF), *Submission 3*, p. 8; Australian Motor Industry Federation (AMIF), *Submission 30*, p. 3; Business Council of Australia (BCA), *Submission 34*, p. 7; Australian Federation of Employers and Industries (AFEI), *Submission 38*, pp. 4-5.

10 Australian Industry Group (AiG), *Submission 32*, p. 4.

11 ACCI, *Submission 12*, p. 10.

12 ACCI, *Submission 12*, 16.

13 Business SA, *Submission 2*, p. 5.

14 MBA, *Submission 14*, p. 7.

15 Mr John Kovacic, Deputy Secretary, Workplace Relations and Economic Strategy, DEEWR, *Transcript of Evidence,* 24 May 2013, Melbourne, p. 24.

16 Items 12-15, Part 1, Schedule 1, Fair Work Amendment Bill 2013.

2.15 Currently, the Act regulates the taking of unpaid parental leave by both parents where they are employed by the same employer (an employee couple). The Act provides that members of an employee couple must each take unpaid parental leave consecutively (not concurrently) and in a single unbroken period, subject to limited exceptions.[17]

2.16 These exceptions include permitting the employee couple to take leave concurrently for a period of three weeks from the date of the child's birth or adoption.[18] By agreement with the employer, the three weeks concurrent leave may be taken earlier than the birth and up to six weeks from the date of the child's birth or adoption.[19]

2.17 The Bill amends these provisions by increasing the maximum period of concurrent leave available under the unpaid parental leave provisions from three to eight weeks. The amendments also enable the eight weeks leave to be taken in separate periods (of at least 2 weeks or a shorter period if agreed by the employer) at any time within the first 12 months of the birth or adoption of a child.[20]

2.18 The Bill also amends the applicable notice period required of employees to notify their employers of the taking of unpaid parental leave. Currently the Act requires the employee to give at least ten weeks' written notice or if not practicable, the employee can provide the notice as soon as is practicable.[21] The employee is then to confirm the intended start and end dates of the leave at least four weeks before the intended start date.[22]

2.19 The Bill proposes to repeal these sections and substitutes a new subsection. The new subsection would provide that an employee must give ten weeks' written notice of the taking of unpaid parental leave, except where a member of an employee couple intends to take second and subsequent periods of concurrent leave in accordance with the previous amendments (see above), in which case the notice period is at least four weeks. [23]

2.20 The requirement to confirm start and end dates would also be amended, to provide that this confirmation is not required in relation to second and subsequent periods of concurrent unpaid parental leave.[24]

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17 *Fair Work Act 2009*, s 72; Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 16.

18 *Fair Work Act 2009*, s 72(5).

19 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 16.

20 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 16.

21 *Fair Work Act 2009*, ss 71 and 72.

22 *Fair Work Act 2009*, s 74(4).

23 Fair Work Amendment Bill 2013, Explanatory Memorandum, pp. 16-17.

24 Fair Work Amendment Bill 2013, Explanatory Memorandum, pp. 16-17.

Stakeholder feedback

2.21 The parental leave provisions in Part 2 were supported by employee organisations and some legal advice services.[25] For example, the National Working Women's Centres (NWWCs) commented on the efficacy of the amendments:

> These changes will cater to the needs of a more diverse group of families and increase the bonding and relationships that are necessary with the birth or adoption of a child.[26]

2.22 Business and industry groups provided divergent feedback on the amendments contained in Part 2. AiG submitted that 'this provision would appear to have few adverse impacts upon employers'.[27]

2.23 However, ACCI did not support these changes on the basis of the anticipated financial impact on employers.[28] Other business and employer groups expressed similar concerns.[29]

Right to request flexible working arrangements (Part 3)

2.24 Currently, the Act provides that employees may request flexible working arrangements to assist with caring responsibilities where the employee is a parent or has responsibility for the care of a child, if the child is under school age or the child is under the age of 18 and has a disability.[30]

2.25 These proposed amendments contained in Part 3 give effect to, and build upon the recommendations of the Review Panel (recommendation 5).

2.26 The Review Panel noted that though employers are taking the right to request 'seriously', the narrow scope of the Act's current provisions contributed to the low level of formal requests being made.[31]

2.27 Part 3 proposes to extend the right to request a change in working arrangements to a wider range employees who have caring responsibilities and other circumstances including where the employee:

25 ACTU, *Submission 9*, p. 4; National Working Women's Centres, (NWWCs), *Submission 8*, p. 3; USU, *Submission 26*, p. 2; ANF, *Submission 22*, p. 2; SDA, *Submission 37*, p. 8; ELC, *Submission 40*, p. 2.

26 NWWCs, *Submission 8*, p. 3.

27 AiG, *Submission 32*, p. 4.

28 ACCI, *Submission 12*, p. 10.

29 Business SA, *Submission 2*, p. 5; ABI, *Submission 15*, p. 10; NFF, *Submission 3*, p. 10; Victorian Employers' Chamber of Commerce and Industry (VECCI), *Submission 17*, p. 3; AMIF, *Submission 30*, p. 5; BCA, *Submission 34*, p. 7; AFEI, *Submission 38*, pp. 4-5.

30 *Fair Work Act 2009*, s 65(1).

31 Quoted in DEEWR, *Submission 16*, p. 6.

- is the parent or has responsibility for the care, of a child who is of school age or younger;
- is a carer (within the meaning of the *Carer Recognition Act 2010*) encompassing all people who provide personal care, support and assistance to individuals who need support due to disability, a medical condition, mental illness or fragility due to age;
- is 55 years or older;
- is experiencing violence from a member of the employee's family; or
- provides care or support to a member of his or her immediate family or a member of his or her household who requires care or support because the member is experiencing violence from the member's family.[32]

2.28 These proposed amendments were recommended by the Review Panel.

2.29 Part 3 also provides that an employee who is a parent, or has responsibility for the care of a child, and who is returning to work after taking leave in connection with the birth or adoption of the child, is entitled to request to work on a part-time basis, to assist the employee to care for the child.[33]

2.30 The Explanatory Memorandum states:

> The terms of the [amendment] make clear that the reason the employee would like to change their working arrangement is because of the particular circumstances of the employee. That is, there must be a nexus between the request and the employee's particular circumstances.[34]

2.31 The amendment also provides a non-exhaustive list of what might constitute 'reasonable business grounds' for the purposes of refusing an employee's request for flexible working arrangements by their employer.[35] These include:

- the excessive cost of accommodating the request;
- that there is no capacity to reorganise work arrangements of other employees to accommodate the request;
- the impracticality of any arrangements that would need to be put in place to accommodate the request, including the need to recruit replacement staff;
- that there would be a significant loss of efficiency or productivity; or

32 Item 17, Fair Work Amendment Bill 2013 (proposed new subsection 65(1A)).

33 Item 17, Fair Work Amendment Bill 2013 (proposed new subsection 65(1B)).

34 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 17.

35 Item 18, Fair Work Amendment Bill 2013 (proposed new subsection 65(5A)).

- that there would be a significant negative impact on customer service.[36]

2.32 The EM states that the amendments do not limit the 'timing or nature of discussions' about flexible working arrangements, rather the provisions are drafted with the 'intent of [promoting] discussion between employers and employees about flexible working arrangements'.[37]

Stakeholder feedback

2.33 Extending the right to request flexible working arrangements provisions' was strongly supported by employee organisations, legal practitioners, domestic violence support services, carer organisations and the Australian Human Rights Commission.[38]

2.34 The following passage from the Australian Council of Trade Unions (ACTU) typified the sentiments expressed by organisations that supported the proposed amendment:

> Extending the right to these groups acknowledges the positive benefits workforce participation brings to these groups of workers as well as the significant benefits to the labour market and the national economy.[39]

2.35 However, business and industry organisations expressed some reservation at these proposals, and many did not support their inclusion in the Act.[40] ACCI rejected the proposed amendments to the current rights of employees to request flexible working arrangements, on the grounds that the costs to employers has not been quantified.[41]

2.36 AiG questioned the necessity of the provisions, commenting that in practice, many workers request and are granted flexible working arrangements without using the right to request provisions currently in the Act.[42] Similarly, MBA also opposed the proposed measures stating that

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36 Item 18, Fair Work Amendment Bill 2013 (proposed new subsection 65(5A)).

37 Fair Work Amendment Bill 2013, Explanatory Memorandum, pp. 17-18.

38 ACTU, *Submission 9*, p. 5; CPSU, *Submission 4*, p. 4; USU, *Submission 26*, p. 2; ANF, *Submission 22*, p. 2; SDA, *Submission 37*, p. 9; Textile, Clothing and Footwear Union of Australia (TCFUA), *Submission 39*, p. 5; Law Society of NSW, *Submission 6*, p. 5; NWWCs, *Submission 8*, p. 3; Australian Domestic and Family Violence Clearing House (ADFVCH), *Submission 20*, p. 1; Carers Victoria, *Submission 10*, p. 4; Australian Human Rights Commission (AHRC), *Submission 27*, p. 3; ELC, *Submission 40*, p. 2.

39 ACTU, *Submission 12*, p. 6.

40 ABI, *Submission 15,* p. 11; NFF, *Submission 3*, p. 13; HIA, *Submission 19*, p. 5; South Australian Wine Industry Association, *Submission 21*, p. 3; VECCI, *Submission 17*, p. 4; AMMA, *Submission 23*, pp. 24-25; AMIF, *Submission 30*, p. 7; BCA, *Submission 34*, p. 1; AiG, *Submission 32*, p. 5; AFEI, *Submission 38*, pp. 7-12.

41 ACCI, *Submission 12*, p. 10, 17.

42 AiG, *Submission 32*, p. 5.

workplaces offering flexible arrangements should be on a voluntary basis.[43]

2.37 Stakeholder feedback (both in support and in opposition to the Part 3) provided detailed discussion on the extension of the right to request flexible working arrangements. Broadly, this feedback can be categorised under the following headings:

- recommendations to include a requirement that employers give 'reasonable' or 'genuine' consideration of a request for flexible working arrangements;
- recommendations that an enforceable right to request be established with the FWC hearing employees' complaints of adverse or unreasonable refusals by employers;
- discussions about the 12-months of service eligibility requirement; and
- evidentiary concerns.

'Reasonable' or 'genuine' consideration to requests

2.38 The ACTU, Community and Public Sector Union (CPSU), United Services Union, Australian Nursing Federation and Carers Victoria recommended that the Bill be amended to also require that employers give 'reasonable' or 'genuine' consideration to a request by an employee for flexible working arrangements.[44]

2.39 For example, the CPSU recommended to that the Bill be amended to:

> place obligations upon an employer to give genuine or serious consideration to the request [for flexible working arrangements] and also make reasonable efforts to accommodate that request.[45]

2.40 The CPSU commented that such an amendment would give the Bill additional clarity whilst also giving employees confidence that their request would be appropriately considered.[46]

Creating an enforceable right to request in the FWC

2.41 Many organisations supportive of Part 3 recommended that the Bill create an enforceable right to request flexible working arrangements. Under such

43 MBA, *Submission 14*, p. 8.

44 ACTU, *Submission 12*, p. 7-11; CPSU, *Submission 4*, p. 4; USU, *Submission 26*, p. 4; ANF, *Submission 22*, p. 3; SDA, *Submission 37*, p. 4. Tim Lyons, Assistant Secretary, ACTU, *Transcript of Evidence,* 24 May 2013, Melbourne, p. 5.

45 CPSU, *Submission 4*, p. 4.

46 CPSU, *Submission 4*, p. 4.

a proposal, if a request was refused an employee or their industrial representatives could apply to the FWC for resolution.[47]

2.42 The Australian Human Rights Commission, advocated that the Bill establish a procedural appeals process through the FWC for decisions related to the right to request flexible working arrangements.[48]

2.43 Carers Victoria also expressed concern that neither the Act, nor the present Bill, allow an employee to appeal to the FWC in the event of an unreasonable adverse decision.[49]

2.44 NWWC was of the view that the provisions would leave workers with 'rights on paper only'. NWWC observed that an employee currently has no mechanism for appeal unless an agreement for flexible working hours is specifically included in an enterprise agreement.[50] Consequently, NWWC recommended that the FWC be granted powers to deal with disputes and make orders where appropriate in relation to requests for flexible working arrangements.[51]

2.45 The Department of Education, Employment and Workplace Relations, (DEEWR) responded to some of these concerns when this issue was first raised in the Review Panel's inquiry of 2012. The Review Panel found that as employers are giving serious consideration to requests for flexible working arrangements and reaching agreements with their employees about these requests, a formal appeal mechanism was not warranted.[52]

Removing the 12-months of service requirement

2.46 ACTU, Carers Victoria and the Australian Domestic and Family Violence Clearinghouse recommended the removal of the eligibility requirement of 12 months prior service.[53]

Evidentiary concerns

2.47 The issue of employees providing evidence of their grounds to request flexible working arrangements was the subject of comment from organisations that both supported and opposed the Bill.

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47 CPSU, *Submission 4*, p. 4; ACTU, *Submission 12*, p. 7-11; USU, *Submission 26*, p. 4; ANF, *Submission 22*, p. 3; AHRC, *Submission 27*, pp. 3-4; Carers Victoria, *Submission 10*, p. 11; ADFVCH, *Submission 20*, p. 2; SDA, *Submission 37*, p. 4; TCFUA, *Submission 39*, p. 5.

48 AHRC, *Submission 27*, pp. 3-4.

49 Carers Victoria, *Submission 10*, p. 11.

50 NWWCs, *Submission 8*, p. 4.

51 NWWCs, *Submission 8*, p. 4.

52 DEEWR, *Submission 16*, p. 10.

53 ACTU, *Submission 9*, p. 5; Carers Victoria, *Submission 10*, p. 8; ADFVCH, *Submission 20*, p. 3

2.48 Though Carers Victoria supported the family-friendly measures, it expressed concerns regarding the proof of an employee's carer status, as some employees may feel inhibited in 'disclosing information about their family member's condition or level of disability because they wish to protect their privacy and dignity'.[54]

2.49 Consequently, Carers Victoria recommended the development of guidelines to assist employers and employees, and noted the Victorian Equal Opportunity and Human Rights Commission's *Family Responsibilities – Guidelines for Employers and Employees* as a model example.[55]

2.50 The NFF stated:

> extending the right to request flexible working arrangements to (amongst others) employees with disabilities, who have caring responsibilities, who are over 55 years of age or older, or who are experiencing domestic violence from a family member could be easily exploited.[56]

2.51 Godfrey Hirst Australia expressed similar concerns regarding employees subject to family violence and recommended that an employee be required to provide

> some form of proof, such as a document issued by the police, a court, a medical practitioner or counselling professional, or a domestic violence support service, with any such information provided be subject to the *Privacy Act 1988*.[57]

2.52 Similar comments were made by MEA that stated that there should be a legislated requirement to produce evidence to the satisfaction of the employer.[58]

Consultation on changes to rosters or working hours (Part 4)

2.53 Part 4 proposes to insert new content requirements for modern awards and enterprise agreements that would require employers to 'genuinely consult' employees about changes to regular rosters or ordinary hours of work.

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54 Carers Victoria, *Submission 10*, p. 8.

55 Carers Victoria, *Submission 10*, p. 8.

56 NFF, *Submission 3*, p. 13.

57 Godfrey Hirst Australia, *Submission 13*, p. 7.

58 MEA, *Submission 11*, p. 10.

2.54 The amendments would require the employer to inform employees about a proposed change to their regular roster or ordinary hours of work and invite employees to give their views on the impact of the proposed change (particularly family and caring responsibilities). The employer would be required to consider those views.[59] These measures were not canvassed by the Review Panel's report.

2.55 The Explanatory Memorandum states that it is intended that the requirement to consult will:

> not be triggered by a proposed change where an employee has irregular, sporadic, or unpredictable working hours. Rather, regardless of whether an employee is permanent or casual, where that employee has an understanding of, and reliance on the fact that, their working arrangements are regular and systematic, any change that would have an impact upon those arrangements will trigger the consultation requirement in accordance with the terms of the modern award.[60]

2.56 DEEWR confirmed that:

> The rostering protections will instead apply to all employees with regular and systematic working hours, whether they are employed on a permanent or causal basis. … the requirement to consult on a change to working hours is not intended to apply to employees with irregular, sporadic or unpredictable hours of work.[61]

2.57 As the amendments would ensure that employers cannot make unilateral changes that 'adversely impact upon their employees' without consultation:

> the intention of the amendments is to promote discussion between employers and employees who are covered by a modern award or who are party to an enterprise agreement about the likely impact of a change to an employee's regular roster or ordinary house of work, particularly in relation to the employee's family and caring arrangements.[62]

2.58 The Explanatory Memorandum clarifies that employers and employees will still be able to negotiate a consultation term for inclusion in an enterprise agreement that meets the requirements of their specific workplace. However, the agreement must include a consultation term in

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59 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 20. See Item 21, Fair Work Amendment Bill 2013 (proposed new subsection 205(1A)).

60 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 20.

61 DEEWR, *Submission 16*, p. 14.

62 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 19.

accordance with this amendment. If the enterprise agreement does not provide a consultation term, the model consultation term (as set by this Bill) will be taken to be a term of the agreement.[63]

2.59 The amendments will apply to modern awards in operation on or after 1 January 2014. The Bill provides that the FWC must make a determination varying modern awards to include a consultation term which meets the new requirements set out in the Bill, by 31 December 2013. The FWC will be able to vary existing consultation terms to reflect the new requirements.[64]

Stakeholder feedback

2.60 Part 4 was supported by employee organisations and some legal advice services.[65] However, ACTU recommended that Part 4 be amended to require employers to give 'genuine' consideration to any views expressed by employees when engaging in consultation about changes to rosters or working hours.[66]

2.61 ACTU also recommended that the Bill require employers to 'make reasonable efforts to accommodate the needs of the employee' when making changes to rosters or working hours.[67]

2.62 Business and industry groups rejected amendments proposed in Part 4.[68] ACCI strongly disagreed with the measures stating:

> There is no evidence that the provisions are warranted. These proposals have not been the subject of an open consultative process… They impose onerous new statutory obligations to consult employees and allow union representation. They are not "light touch" regulation as any single breach of a modern award may subject an employer to a [financial] penalty [between] $10,200 [and] $51,000.[69]

63 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 22.

64 DEEWR, *Submission 16*, p. 14.

65 ACTU, *Submission 9*, p. 12; NWWCs, *Submission 8*, p. 3; USU, *Submission 26*, p. 2; ANF, *Submission 22*, p. 2; SDA, *Submission 37*, p. 12; ELC, *Submission 40*, p. 3.

66 ACTU, *Submission 9*, p. 13.

67 ACTU, *Submission 9*, p. 13.

68 Business SA, *Submission 2*, p. 11; NFF, *Submission 3*, p. 15; MEA, *Submission 11*, p. 11; ACCI, *Submission 12*, p. 17; MBA, *Submission 14*, pp. 10-12; ABI, *Submission 15*, p. 14; VECCI, *Submission 17*, p. 4; HIA, *Submission 19*, p. 7; South Australian Wine Industry Association, *Submission 21*, p. 4; AMMA, *Submission 23*, p. 25; AMIF, *Submission 30*, p. 8; AiG, *Submission 32*, p. 6; BCA, *Submission 34*, p. 6.

69 ACCI, *Submission 12*, p. 17.

2.63 The Business Council of Australia (BCA) stated:

> The amendments leaves the way open to increased third-party intervention in the management of businesses, and could (depending on the content of dispute settling clauses) result in the imposition of arbitrated outcomes in relation to what ought properly to be seen as matters for management.[70]

2.64 NFF commented that the provision is 'overly restrictive especially in relation to an agriculture workplace where the workflow is unpredictable at most times, depending on the weather and market'.[71]

2.65 DEEWR clarified these concerns:

> In respect of rostering protections, there have been claims that the consultations requirement for changes to rosters will apply to any change of hours. This is not the case. The new requirements would only apply to proposed changes to a regular roster or ordinary hours of work. Furthermore, the requirements will not arise where an employee has irregular, sporadic or unpredictable working hours.[72]

Safe job transfer during pregnancy (Part 5)

2.66 Part 5 provides a pregnant employee with an entitlement to be transferred to a safe job regardless of whether she has, or will have, an entitlement to unpaid parental leave.[73] These proposed measures were not canvassed by the Review Panel.

2.67 Under the amendments, an employee would be required to provide evidence (such as an medical certificate) of the kind that would satisfy a reasonable person that she is fit for work, but that it is inadvisable for her to continue in her present position during the risk period because of illness or risks arising out of her pregnancy or hazards connected with the position.[74]

2.68 The Bill also proposes a new entitlement that where evidentiary requirements are met, for the duration of the risk period, the employee

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70 BCA, *Submission 34*, p. 6.

71 NFF, *Submission 3*, p. 15.

72 John Kovacic, Deputy Secretary, Workplace Relations and Economic Strategy, DEEWR, *Transcript of Evidence,* 24 May 2013, Melbourne, p. 24.

73 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 22.

74 Item 29, Fair Work Amendment Bill 2013 (proposed new subsection 81(6)); Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 23.

must be transferred to an appropriate safe job with no other change to the employee's terms and conditions of employment.[75]

2.69 The definition of an 'appropriate safe job' is retained. An 'appropriate safe job' is a 'safe job that has the same ordinary hours of work as the employee's present position, or an agreed different number of hours'.[76] The current requirement that an employer pay the transferred employee at her full rate of pay for the original position prior to the transfer, for the hours that she works in the risk period is also retained.[77]

2.70 If there is no appropriate safe job available, the Bill provides that:

- where an employee is otherwise entitled to unpaid parental leave, the employee will be entitled to paid no safe job leave at their base rate of pay, as currently exists under the Act;[78] and
- where an employee is not entitled to unpaid parental leave, the employee is entitled to unpaid no safe job leave.[79]

Stakeholder feedback

2.71 The provisions establishing a right for pregnant employees to request a transfer to a safer job during their pregnancy was supported by all employee organisations and legal practitioners.[80]

2.72 Though supporting the proposed amendment, the Law Society of New South Wales was concerned that there is 'uncertainty' in the existing provisions relating to safe-job transfers.[81] The Society submitted that the Bill provide clarification on the following:

- whether written notice needs to be provided to the employer by the employee in order to enliven the access to transfer to a safe job or no safe job leave;
- whether there should be a requirement for the employee to define what specifically they are advised would be safe, and not safe, to assist the employer in determining whether there is an appropriately safe job in the workplace; and

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75 Item 29, Fair Work Amendment Bill 2013 (proposed new subsection 81(2)).

76 Item 29, Fair Work Amendment Bill 2013 (proposed new subsection 81(3)).

77 Item 29, Fair Work Amendment Bill 2013 (proposed new subsection 81(4)).

78 Item 29, Fair Work Amendment Bill 2013 (proposed new section 81A); Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 24.

79 Item 30, Fair Work Amendment Bill 2013 (proposed new section 82A).

80 For example, ACTU, *Submission 9*, p. 13; NWWCs, *Submission 8*, p. 3; USU, *Submission 26*, p. 2; ANF, *Submission 22*, p. 2; Law Society of NSW, *Submission 6*, p. 6; SDA, *Submission 37*, p. 14; ELC, *Submission 40*, p. 3.

81 Law Society of NSW, *Submission 6*, p. 6.

- the effect on the employee's entitlements if the appropriate safe job was a 'higher duty' rather than the assumed lesser role.[82]

2.73 NFF highlighted similar concerns.[83]

2.74 Other business and employer organisations rejected the proposed amendment on the grounds that they were unnecessary.[84] For example, ACCI stated:

> There is no evidence that these provisions are warranted and that employers and employees are not able to come to suitable arrangements when an employee requests a safe job despite not having a statutory right to unpaid parental leave.[85]

2.75 Australian Business Industrial (ABI) commented that employers are already obligated under work health and safety laws to ensure safe working conditions for all employees. ABI stated:

> These amendments are not about health or safety. They do not go to the safety of the woman or her unborn child, they address industrial entitlements. The employer's responsibilities under [existing] health and safety legislation mean that they must avoid exposing the pregnant employee to work which presents risks to her or her unborn baby.[86]

2.76 MBA argued that the new entitlements should be costed and 'other mechanisms for social support of pregnant women considered, having regard to the cost on businesses…. Hence, deferral of the Bill until this process has been completed is recommended'.[87]

Committee comment

2.77 Clearly there is a balance of views on the provisions contained within Schedule 1 of the Bill. The Committee recognises the concerns of some employers but is of the opinion that there are adequate safeguards in place to ensure that there is a balance between the needs of employers and employees in respect to the proposed schedule.

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82 Law Society of NSW, *Submission 6*, p. 6.

83 NFF, *Submission 3*, pp. 15-16.

84 AiG, *Submission 32*, p. 8; Business SA, *Submission 2*, p. 5; ACCI, *Submission 12*, p. 18; MBA, *Submission 14*, p. 12; ABI, *Submission 15*, p. 15; MEA, *Submission 11*, p. 12; VECCI, *Submission 17*, p. 5; AFEI, *Submission 38*, pp. 4-5.

85 ACCI, *Submission 12*, p. 18.

86 ABI, *Submission 15*, p. 15.

87 MBA, *Submission 14*, p. 12.