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Committee Secretary
House of Representatives Standing Committee on Education and Employment
PO Box 6021
Parliament House
Canberra ACT 2600
Australia

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

Dear Committee Secretary,

The Australian Chamber of Commerce & Industry (ACCI) and its members welcome the opportunity to provide feedback to the Committee on proposals contained in the *Fair Work Amendment (Better Work/Life Balance) Bill 2012 (the Bill)*.

Through our membership, ACCI represents over 350,000 businesses nationwide, including over 280,000 enterprises employing less than 20 people, over 55,000 enterprises employing between 20 -100 people and the top 100 companies.

The proposals, if passed, would have significant implications for all employers.

On 20 December 2011 the Minister for Employment and Workplace Relations, Hon. Bill Shorten MP, announced that the Government would request an independent Panel to conduct a Post Implementation Review (PIR) of the *Fair Work Act 2009* with its final report due to the Government by 31 May 2012. The terms of reference indicate, *inter alia*, 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*". The review will report on "*areas where the evidence indicates that the operation of the Fair Work legislation could be improved consistent with the objects of the legislation*". ACCI and its members have provided detailed written submissions to the Panel.[1]

Given that the Panel is conducting an inquiry into the operation of the fair work laws, we consider that the Committee would be best placed to await its report before progressing with its inquiry. Once the report is complete and the findings are known these results should inform any legislative response Government or Members of Parliament, may then choose to make. ACCI would therefore recommend that the Committee not progress the legislation until the review process, as announced on 20 December, is fully completed.

In the interim, and should the Committee proceed with its inquiry (contrary to ACCI's position), we wish to indicate that at this stage we do not support the measures for the reasons attached to this letter and wish to draw the Committee's attention to a number of related matters (**Attachment A**).

[1] Information on the review can be found here:http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Pages/Home.aspx

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IOE
CACCI
ICC International Chamber of Commerce The world business organization
AUSTRALIAN MADE

Yours sincerely,

David Gregory

Director - Workplace Policy

ATTACHMENT A

ACCI Preliminary Response to the Fair Work Amendment (Better Work/Life Balance) Bill 2012

Matters Pertaining

1. The amendments to insert a new s.172(1)(c) of the *Fair Work Act 2009* (the Act) is not required, as any matter "pertaining to the relationship between an employer that will be covered by the agreement and the employer's employees who will be covered by the agreement" is already permitted under s.172(1)(a). Therefore, proposed clause 10 of Schedule 1 is not required.

Proposed Part 2-7A

2. The amendments outlined in Schedule 1 propose significant changes to the existing s.65 provisions of the Act. There is no limitation under the Act for an employee to approach an employer and request a change to working conditions. The request and any changes must be consistent with the requirements of a binding and relevant industrial instrument (such as a modern award or enterprise agreement).

3. Since the *WorkChoices* amendments in 2005, which created a statutory set of national minimum employment standards (in the form of the Australian Pay and Conditions Standard or APCS), there has been a desire by some interest groups to create new or expanded individual employment rights without proper consideration on how it may impact employers. Employers are increasingly concerned over this push for the creation of new or expanded employee rights, particularly when the ink is barely dry on new national statutory rights (which commenced only 24 months ago) and the General Manger of Fair Work Australia is yet to complete its first three yearly report on the operation of key NES provisions.[2]

4. Many leave entitlements under the NES (and prior to this, under the APCS) arise from a long history of test cases before the Australian Industrial Relations Commission (AIRC), with many cases vigorously fought between unions and employer organisations over a considerable length of time. The resultant test case "standards" which were inserted into federal industrial awards was the result of these arbitrated outcomes.

5. The APCS has been retained and expanded in the form of the NES. As Parliament is responsible for maintaining the statutory safety-net, it is important than any

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[2] The General Manager of Fair Work Australia is part way through completing its reporting obligations under s.653 of the Act. The General Manager must provide, within three years of the commencement of that section, a report to the Minster on the operation of the provisions of the NES relating to requests for flexible working arrangements under subsection 65(1) and requests for extensions of unpaid parental leave under subsection 76(1).

consideration for a new employment rights which will affect hundreds of thousands of employers, be assessed through a number of filters to ensure that any change is balanced and workable for all employers. Any change should be evidence-based and must be accompanied by a Regulation Impact Statement. ACCI notes that a Regulation Impact Statement or Regulatory Impact Analysis did not accompany the bill.

6. ACCI believes that the proposals, however well intentioned, are not backed up by evidence which suggests that the there is currently a systemic inability for employees to make requests to alter their working arrangements. All employees (regardless of employment status) are already protected against adverse action and are currently able to request changes to the working arrangements and an employer cannot take adverse action under Part 3-1 of the Act for discriminatory reasons, *inter alia*, because of the person's carer's responsibilities.

Individual Flexibility Arrangements

7. The Government made a number of express commitments to industry in 2007 as follows:

Extracts From Government's Forward with Fairness Policies[3]
Each and every award will contain a flexibility clause that enables arrangements to meet the genuine individual needs of employers and employees (FWF IP, p.11);   *This may include matters such as rostering and hours of work; all up rates of pay; provisions that certain award conditions may not apply where an employee is paid above a fixed percentage as set out in the award; and an arrangement to allow the employee to start and finish work early to allow them to collect their children from school without the employer paying additional penalty rates for the early start (FWF IP, p.11);*   *An employer and employee will be able to have Fair Work Australia check a proposed arrangement to ensure it has complied with the flexibility clause of the award (FWF IP, p.12);*   *Under Labor's new collective enterprise bargaining system all collective agreements will be required to contain a flexibility clause which provides that an employer and an individual employee can make a flexibility arrangement. The aim of the flexibility clause is to enable individual arrangements which are genuinely agreed by the employer and the employee (FWF IP, p.14).*

[3] ALP, *"Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces"*, April 2007 (FWF); ALP, *"Forward with Fairness – Policy Implementation Plan"*, August 2007 (FWF IP).

8. The Government indicated that IFAs were to deliver a level of individual flexibility and could accommodate employees with tailored conditions. The strong and overwhelming view of employers is that they are not meeting key expectations.

9. IFAs have added safeguards, can be terminated at short notice and an employer cannot force an employee to sign one or make it a condition of employment. They are not "AWAs by another name" as some unions would misrepresent them.

10. The Act provides as follows:

Division 5—Mandatory terms of enterprise agreements

202 Enterprise agreements to include a flexibility term etc. Flexibility term must be included in an enterprise agreement

(1) An enterprise agreement must include a term (a flexibility term)

that:

(a) enables an employee and his or her employer to agree to an arrangement (an individual flexibility arrangement) varying the effect of the agreement in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer; and

(b) complies with section 203.

Effect of an individual flexibility arrangement

(2) If an employee and employer agree to an individual flexibility arrangement under a flexibility term in an enterprise agreement:

(a) the agreement has effect in relation to the employee and the employer as if it were varied by the arrangement; and

(b) the arrangement is taken to be a term of the agreement.

(3) To avoid doubt, the individual flexibility arrangement:

(a) does not change the effect the agreement has in relation to the employer and any other employee; and

(b) does not have any effect other than as a term of the agreement.

Model flexibility term

(4) If an enterprise agreement does not include a flexibility term, the model flexibility term is taken to be a term of the agreement.

(5) The regulations must prescribe the model flexibility term for enterprise agreements.

11. The model (default) IFA term for agreements can be found in Schedule 2.2 of the Fair Work Regulations 2009:

Schedule 2.2 Model flexibility term

(regulation 2.08)

Model flexibility term

(1) An employer and employee covered by this enterprise agreement may agree to make an individual flexibility arrangement to vary the effect of terms of the agreement if:

(a) the agreement deals with 1 or more of the following matters:

(i) arrangements about when work is performed;

(ii) overtime rates;

(iii) penalty rates;

(iv) allowances;

(v) leave loading; and

(b) the arrangement meets the genuine needs of the employer and employee in relation to 1 or more of the matters mentioned in paragraph (a); and

(c) the arrangement is genuinely agreed to by the employer and employee.

(2) The employer must ensure that the terms of the individual flexibility arrangement:

(a) are about permitted matters under section 172 of the Fair Work Act 2009; and

(b) are not unlawful terms under section 194 of the Fair Work Act 2009; and

(c) result in the employee being better off overall than the employee would be if no arrangement was made.

(3) The employer must ensure that the individual flexibility arrangement:

(a) is in writing; and

(b) includes the name of the employer and employee; and

(c) is signed by the employer and employee and if the employee is under 18 years of age, signed by a parent or guardian of the employee; and

(d) includes details of:

(i) the terms of the enterprise agreement that will be varied by the arrangement; and

(ii) how the arrangement will vary the effect of the terms; and

(iii) how the employee will be better off overall in relation to the terms and conditions of his or her employment as a result of the arrangement; and

(e) states the day on which the arrangement commences.

(4) The employer must give the employee a copy of the individual flexibility arrangement within 14 days after it is agreed to.

(5) The employer or employee may terminate the individual flexibility arrangement:

(a) by giving no more than 28 days written notice to the other party to the arrangement; or

(b) if the employer and employee agree in writing — at any time.

12. ACCI is concerned that IFAs are not delivering sufficient individual flexibility as promised. Employers are discouraged to utilise an IFA in the manner purported in the explanatory memorandum to the Fair Work Bill 2008 (p.137) or FWO Best Practice Guide No 3 *"Use of individual flexibility arrangements"* (p.2), both examples extracted below:

Case study
The benefits of an IFA

Dave is a full-time industrial chemist at Rosie Industries Pty Ltd. Dave's employment is covered by the Rosie Industries Pty Ltd Enterprise Agreement which includes a flexibility term allowing IFAs to be made about the hours an employee works within the Agreement's span of hours. Dave wants to coach his son's under 10s football training on Tuesday afternoons. Dave makes an IFA with his employer allowing him to start and finish work half an hour early on Tuesdays without the usual penalty rate that would apply for the first half hour. Dave is better off overall because he can attend his son's training, something he values as a significant non-financial benefit.

Illustrative example

Josh works as a membership consultant at a gymnasium. Under the enterprise agreement applying to his employment, the ordinary hours of work are 37 ½ hours each week to be performed in a span between 8am and 6pm each day. Hours worked outside this span attract penalty rates. Josh's employer usually requires membership consultants to work from 9am to 5.30pm.

In his spare time, Josh coaches an under-12s footy team. To do this, he needs to be able to leave work at 4pm on Tuesdays and Thursdays each week. He wants to start work at 7.30am on these days, but usually this would attract a penalty under the terms of the agreement. The agreement allows the employer and an employee to make an individual flexibility arrangement that varies the terms of the agreement dealing with hours of work and penalty rates.

Josh approaches his employer and asks whether the employer will make an individual flexibility arrangement with him under which the employer agrees that Josh can work from 7.30am to 4pm on Tuesdays and Thursdays. Josh agrees that he will not be paid a penalty on these days, even though he starts work at 7.30am. Josh is genuinely happy to agree to this arrangement because it enables him to balance his work and personal commitments. The employer agrees to this arrangement.

The employer must ensure that Josh is better off overall under the individual flexibility arrangement than under the agreement. Often this will require the employer to make a comparison of the relevant financial benefits that the employee would receive under the agreement, and the agreement as varied by the individual flexibility arrangement. In Josh's case, however, he has agreed under the individual flexibility arrangement to give up a financial benefit (penalty rates) in return for a non-financial benefit (leaving work early). It is intended that, in appropriate circumstances, such an arrangement would pass the better off overall test. Because the better off overall test is being applied here to an individual arrangement, it is possible to take into account an employee's personal circumstances in assessing whether the employee is better off overall. Relevant factors in Josh's case that suggest the individual flexibility arrangement is likely to pass the better off overall test are:

- Josh initiated the request for the individual flexibility arrangement, suggesting that he places significant value on being able to leave work early to coach the footy team;
- Josh genuinely agreed to the arrangement;
- the period of time falling outside the span of hours is relatively insignificant. It is only one hour out of the 37 ½ hour ordinary week that Josh works.

13. A Full Bench decision of Fair Work Australia (considering multiple fast food employer agreements) has cast doubt that the example in the FWO Best Practice guide can actually be used, when it ruled that a "preferred hours" clause (which allows an employee to nominate which hours it prefers to work, without paid penalty rates being applicable), was less beneficial than the relevant award. These clauses were a feature in many approved pre-*Fair Work Act 2009* agreements (both collective and individual agreements), with the Tribunal ruling that it generally offended the *"no disadvantage test"* (which is similar to the BOOT) and was not permitted:[4]

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[4] [2010] FWAFB 2762. The decision can be found here: http://www.fwa.gov.au/fullbench/2010fwafb2762.htm

> **[69]** The reference instruments provide for work on public holidays, Saturday or Sunday or for late work or additional hours to be paid for at a rate in excess of the basic hourly rate of pay regardless of whether an employee nominates such work as their preferred hours or not. Under the Retail Agreements some or all of such work is paid for at a rate in excess of the basic hourly rate of pay if the employee has not nominated the work as their preferred hours and at the basic hourly rate of pay if the employee has nominated the work as their preferred hours. Accordingly, the Retail Agreements contain at least one term or condition of employment that is less beneficial than the terms and conditions in the relevant reference instruments, that is the payment for some or all of such work at the basic hourly rate of pay rather than at a rate in excess of the basic hourly rate of pay if the employee has nominated the work as their preferred hours.

14. Employers have reported that they are uncertain as to whether they should enter into an IFA with an employee, given the prospects of possible legal action, if it is found that the IFA was not validly made (ie. did not pass the BOOT) and the employer is liable to back-pay and penalties for non-compliance with the relevant award.

15. The decision of FWA also casts doubt on the ability of an IFA to trade off financial benefits (ie. penalty rates) with non-financial benefits (ability to leave work earlier or later due to the personal preference which the employee values).

16. Moreover, a number of trade unions have engaged in an industrial strategy of limiting the use of Individual Flexibility Arrangements (IFA) in enterprise agreements and opposing agreements where they contain an IFA that is as flexible as the default regulation model clause or the model clause in modern awards.

17. A union has no power to reduce the flexibility in a modern award (absent a successful application to vary it before Fair Work Australia). There are also union IFA clauses that require a majority of the workforce to agree to changing the application of certain conditions in an agreement. This is equally offensive to the principle that IFAs were supposed to be available to individual employees and their employer. It reaffirms why ACCI continues to support both collective and individual enterprise agreements in the workplace, supported by a statutory minimum safety-net of terms and conditions. As employees and employers are also able to agree to vary the terms of a modern award or enterprise agreement through an Individual Flexibility Arrangement, ACCI is concerned that unions have a co-ordinated industrial strategy to limit the use of IFAs in enterprise agreements. This denies employees and particular cohorts of employees, denied the ability to make an IFA as it suits their needs.

18. Unions are limiting the number of matters an IFA can deal with in bargaining and rendering it fundamentally ineffective as a vehicle for promised flexibility.

19. One trade union leader indicated publicly that he *"would be seeking to have the capacity for individual bargaining prohibited at other companies"* following a large manufacturer agreeing to water down the Government's own default IFA clause.[5]

20. The ACTU's Bargaining Kit advises affiliates to not adopt the model clause and adopt the ACTU's model clause instead, which is designed to be narrow in its range:[6]

> **Features of a flexibility clause**
>
> Unions should pay particular attention when drafting agreements to include a flexibility provision. In the absence of a flexibility term being included in the agreement that is submitted to the employees and FWA for approval, the Model term will be included. The Model flexibility term is very broad. It is modelled upon the individual flexibility clause in modern awards, and permits individual agreements to be made on a range of matters otherwise covered by the enterprise agreement, without the involvement or consent of the union.
>
> *Content*
>
> The government model clause, which is drawn from the modern award clause, adopts a very broad approach to flexibility. Unions are reminded that the Act provides that it is up to the parties to decide which 'terms' of the agreement can be varied through an IFA. However it is probably not open to the parties to agree that no terms shall be varied in this way. It is likely that FWA will take the view that section 203(2)(a) mandates that at least one term of the agreement be subject to an IFA. But it is legally open to agree that flexibility will be limited to trivial terms of the agreement or, as the ACTU model clause does, to wrap the mandatory safeguards around existing flexibility provisions in awards.
>
> *Safeguards*
>
> The Act requires the flexibility term to contain 'warnings' about the use of IFAs. These are generally straightforward, and the ACTU model adopts the government's model safeguards. However, it is open to the parties to add additional safeguards. These include: a cooling off period, a right to resign from the arrangement by giving a shorter period of notice; and removal of the employer's right to initiate the use of an IFA. The ACTU sample clause does not adopt any of these devices in our sample clause, because the scope of our clause is so narrow.

21. The ACTU model IFA clause is headed *"GOVERNMENT MODEL – NOT RECOMMENDED"*.

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[5] Australian Mines And Metals Association, *"Individual Flexibility Arrangements (under the Fair Work Act 2009) - The Great Illusion"*, Research Paper, 2010. http://www.amma.org.au/home/publications/AMMA_Paper_IFAs.pdf; Hannan, E., *"New workplace laws failing Julia Gillard's flexibility test"*, *The Australian* (17 September 2009).

[6] ACTU Bargaining Kit, pp.17 – 18. ACTU *"Fair Work Bargaining Guide"*, Version 2.2 (11 March 2011). Accessed here: http://www.qcu.asn.au/index.php?option=com_content&view=section&layout=blog&id=12&Itemid=109

22. The Kit also recommends unions to consider inserting *"Collective Flexibility"* clauses, which requires the union to consent to flexibility over key terms and conditions of an agreement.

23. The obvious objective is to insert restrictive single issue IFA clauses and other clauses subject to collective union authorisation.

24. The following table from a recent Productivity Commission (PC) report into the retail industry illustrates this point:[7]

Table 11.5 **Flexibility terms in FW Act agreements lodged between 1 July 2009 and 31 December 2010**

	Retail		*All Industries*	
	Agreements	*Employees*	*Agreements*	*Employees*
	%	%	%	%
Model flexibility clause or greater[a]	88.5	89.8	62.4	63.1
Specific flexibility clause	12.4	10.3	39.4	39.0
Total[b]	100.9	100.1	101.8	102.1

[a] This includes agreements containing the model clause, agreements where the model clause has been incorporated by FWA, agreements containing a term that allows individual flexibility agreements about any matter in the workplace agreement and agreements where no flexibility term is present. The model flexibility term allows for individual flexibility agreements (IFAs) about one or more of five listed matters under a workplace agreement (see box 11.7). [b] The flexibility term data totals more than 100 per cent because agreements may contain more than one such term.

Source: DEEWR Workplace Agreements Database.

25. The PC has indicated that the evidence provided to it *"suggests that there may be scope to improve the operation of IFAs"*.[8]

ACCI Recommendation

26. The Committee should recommend that the existing uncertainty for employers and employees be removed through minor technical amendments to the *Fair Work Act 2009*. The Act should be amended to ensure that an enterprise agreement IFA clauses must be at least equivalent to the default IFA model clause (and model clause in all modern awards). There should be no ability to limit the matters currently allowed under the Government's own model IFA clause. It should also be clarified for both employers and employees that preferred-hours arrangements and minimum engagement provisions (contained in modern awards) are able to be varied by an IFA.

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[7] Productivity Commission 2011, Economic Structure and Performance of the Australian Retail Industry, Report no. 56, Canberra, at p.349. The report can be accessed here: http://www.pc.gov.au/projects/inquiry/retail-industry/report,

[8] Ibid, at p.352.