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—

SUBMISSION TO THE INQUIRY INTO THE FAIR WORK AMENDMENT (BETTER WORK/LIFE BALANCE) BILL 2012

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PRELIMINARY

Ryan Carlisle Thomas supports the thrust of the Fair Work Amendment (Better Work/Life Balance) Bill 2012. We have already made a submission to the Review of the Fair Work Act 2009 (the Act). Aspects of that submission are directly relevant to the Inquiry into the Fair Work Amendment (Better Work/Life Balance) Bill 2012.

Relevant extracts from the submission to the Review of the Fair Work Act 2009 are reproduced here, for ease of reference.

We would be happy to expand upon the content of this submission. Any queries may be referred to Philip Gardner (Partner) or Carol Andrades (Consultant).

FLEXIBLE WORKING ARRANGEMENTS

The relevant provisions

1. An employee may request flexible working arrangements only if he/she:

    a. has completed at least 12 months continuous service[1] (or if a casual, is a long term casual with a reasonable expectation of ongoing employment on a regular and systematic basis[2]) and
    b. is a parent, or has responsibility for the care of
    c. a child under school age[3] or for a child under 18 with a disability[4].

[1] s 65(2)(a); s 22(4)
[2] s 65 (2)(b); s 22(4)

No definition of 'reasonable business grounds'

2. There is a detailed process for determination of the request. It must be in writing, set out the details of the changes sought and the reasons for the change. The employer must provide a written response granting or refusing the request within 21 days. Finally, the request may be refused only on reasonable business grounds, which must be detailed in the refusal[5].

3. However, there is no definition of what 'reasonable business grounds' means, though the Explanatory Memorandum gives some examples[6] and suggests Fair Work Australia will provide guidance[7]. The examples in the Explanatory Memorandum are of limited assistance. As far as we are aware, there is no summary of relevant principles or similar guidance provided on the Fair Work Australia website.

Employer Right of Veto

4. The principal difficulty, however, is that, although an employer must provide the employee written details about a decision to refuse such a request[8], the decision cannot be tested by way of an order under the civil remedies provisions[9]. Nor can Fair Work Australia deal with disputes as to whether an employer had reasonable business grounds for refusing a request for flexible working arrangements, unless there is provision for it to do so in an enterprise agreement, contract, other written agreement or in the Public Service Act 1999[10] (and see below the comments on vulnerable workers).

Misleading Descriptor

5. In the circumstances, it is misleading to refer to the flexible working arrangements scheme in the Act as a 'right' or as a national employment 'standard', as if it were a minimum

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[3] s 65(1)(a); s 12 – the age at which a child is required to start attending school under relevant laws
[4] s 65(1)(b)
[5] s 65 (5) and (6)
[6] Explanatory Memorandum to the Fair Work Act Bill 2008 par 267
[7] Explanatory Memorandum to the Fair Work Act Bill 2008 par 268
[8] s 65 (4), (6)
[9] s 44 (2)
[10] s 739(2)

safety net entitlement[11]. Similarly, the statement in the Explanatory Memorandum, that '*the reasonableness of the grounds is to be assessed in the circumstances that apply when the request is made*'[12], generates the incorrect impression that there will always be some independent body or person who will make the assessment. As noted above, this will not always be so.

Grace and favour

6. In our experience, this puts employees with carer responsibilities in an invidious position. It exposes them to having to comply with a detailed process, which may require them to reveal embarrassing private information (for example the needs of a child with a disability or, where the need for care is a consequence of domestic dislocation, such as domestic violence, relevant details), but with no prospect of any enforceable right under the NES if their request is denied. The net effect is to put such employees in a position of asking their employers for a favour and hoping that the employer will have the grace to grant the request.

7. It follows that, if the goal is to provide a benchmark for bargaining and underpin enterprise agreements[13], the NES are deficient in so far as flexible working arrangements are concerned. For employees with parental and carer responsibilities, bargaining for flexible working arrangements therefore commences from a lower base, compared to bargaining for other NES components.

8. Such a scheme of grace and favour is patently incompatible with the objects of the Act[14] and relevant international obligations[15].

Restricted Access to the Provisions

9. As noted above, the Act also limits the range of employees who may request flexible working arrangements. It does not cater for those with responsibilities to care for school-age children or for adults who require care (for example, ageing or ill parents or partners

[11] See for example Explanatory Memorandum par 231-232
[12] Explanatory Memorandum par 267
[13] Explanatory Memorandum par 232
[14] s 3 (d) and (e)
[15] For example ILO 156 (Equal Opportunity and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities)

who require care). There may be compelling reasons why flexible working arrangements may be needed in order to care for such persons. Given the correlation between ageing and the need for care, and given Australia's ageing demographic, the latter categories should automatically be included among those who may require care.

10. There is no reason in principle why the categories of persons recognised for the purposes of personal/carer's leave[16] should not be consistent with those in relation to whom flexible working arrangements may be requested.

Integration with the General Protections provisions

11. The general protections provisions of the Act protect against adverse action on the basis of family or carer's responsibilities[17]. However, the inflexibility of the 'inherent requirements' defence detracts from that protection in cases where an employer insists, for example, that certain hours or shifts are an 'inherent requirement' of the work. Were the flexible working arrangements provisions to be enforceable, one might argue that the inherent requirements defence should not be a complete defence, but should be seen in the light of the parallel issue of whether an employer ought reasonably to accommodate the needs of a worker with parental and carer responsibilities. In the absence of an enforceable right to request flexibility, the 'inherent requirements' provision operates, in effect, to deprive employees of benefits which would otherwise be afforded by the general protections provisions.

12. The provisions concerning flexible working arrangements are especially problematic for vulnerable workers. As noted above, Fair Work Australia cannot deal with disputes as to whether an employer had reasonable business grounds for refusing a request for flexible working arrangements unless there is provision for it to do so in an enterprise agreement, contract, other written agreement or in the Public Service Act 1999[18].

13. Workers who are concentrated in low-paid and insecure sectors of the economy (for example, women, younger people, older workers and people from non-English speaking backgrounds) are unlikely to have the bargaining power to negotiate for the inclusion of appropriate clauses in an enterprise agreement, contract or other written agreement.

[16] s 97 – a member of the employee's immediate family or household who requires care and support
[17] s 351(1)
[18] s 739(2)

14. The net result is that there is a gap in the NES which operates to the clear disadvantage of vulnerable workers. It is also disappointing that the only two NES which are not enforceable are clearly more likely to disadvantage women, who are more likely to seek flexible working arrangements and extensions of unpaid parental leave. The correlation between gender and the likelihood of being a caregiver has been recognised in relevant jurisprudence [19].

Proposal

15. The Act should be amended so as to:

i. provide (perhaps by Regulation) examples of what reasonable business grounds are, for the guidance of employers and employees[20];
ii. make the right to request flexible working arrangements an enforceable one;
iii. expand the range of employees who may request flexible working arrangements; and
iv. align the provision with complementary provisions in the Act, in particular those relating to personal/carer's leave and general protections.

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[19] See for example *Howe v Qantas Airways Ltd* [2004] FMCA 242, in which the Court took judicial notice of the likelihood of women being caregivers.
[20] See for example Equal Opportunity Act 2010 (Vic) s 17