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ACTU Submission

House Standing Committee on Education and Employment

Inquiry into the Fair Work Amendment Bill 2013

unions australia

SECURE JOBS BETTER FUTURE

Introduction

The ACTU is the peak trade union body in Australia. For over 50 years the ACTU has played the leading role in advocating in the Fair Work Commission, and its statutory predecessors, for the improvement of employment conditions of employees. It has consulted with governments in the development of almost every legislative measure concerning employment conditions and trade union regulation over that period.

The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates. They have approximately 2 million workers who are members engaged across a broad spectrum of industries and occupations. Australians unions play a pivotal role in improving the living standards of millions of Australians and their families. Industrial legislation is a critical component of this work — it is a key to ensuring that the rights of workers are respected, and that they are able to advance their interests.

When the Fair Work Act commenced on 1 July 2009 it was the culmination of the long campaign for all Australians to repeal Work Choices and restore rights at work. Restoring rights at work meant ending AWA individual contracts; restoring unfair dismissal protections; strengthening the safety net; providing good faith bargaining; and improving the independent umpire's role in resolving disputes.

We welcome the opportunity to make this submission concerning the *Fair Work Amendment Bill* 2013 ("the Bill"). The Bill follows a process that began with the submissions to and consultations with the panel conducting the Post Implementation Review of the *Fair Work Act* and continued with consultations with Department of Education, Employment and Workplace Relations. From those processes the government decided to adopt a two stage legislative agenda to address the matters that had been raised by stakeholders throughout the consultative process. The first stage of amendments, focussed on minor, technical and non-controversial matters, was implemented through the *Fair Work Amendment Bill* 2012, most provisions of which are now in effect.

The Bill now before the Committee addresses several matters that are of significance to our affiliates and those they represent and which have we have raised throughout the consultative processes, in particular improved parental leave provisions, an expanded right to request flexible working arrangements and more effective right of entry provisions so to ensure workers and union representatives can access one another at the workplace. A prompt, effective and user friendly mechanism to stop workplace bullying and greater consultation around roster changes, two further reforms proposed by the Bill, are substantial initiatives that should improve the experience of workers in addressing common workplace problems that can negatively impact their job satisfaction and ability to work, sometimes with very severe consequences.

In the pages that follow we provide our detailed commentary on the provisions of the Bill. As is apparent, whilst we note with some disappointment that the some of the initiatives proposed do not extend as far as is necessary for an optimal outcome, we support the Bill and we would urge the Committee to recommend that it be passed with the amendments foreshadowed by the Minister in his Second Reading speech

Amendments proposed by Schedule 1 – Family Friendly Measures

Part 1 – Special Maternity Leave

Items 1 - 11.

Items 1 - 11 of the Bill amend sections 70 – 97 of the FW Act to remove the off-setting of unpaid special maternity leave against the unpaid parental leave entitlement.

The ACTU supports the amendment so that employees' use of unpaid special maternity leave will not reduce their entitlement to unpaid parental leave. The purpose of unpaid special maternity leave is to assist employees manage complications or unforseen pregnancy related issues that preclude them from continuing employment. The purpose of unpaid parental leave is to facilitate post birth recovery and maternal health, child health and welfare including breastfeeding and parental choice of child care options including care home based for infants. The two provisions are unrelated in purpose and should not be offset against each other.

Part 2 – Parental leave

Items 12 – 15.

Items 13 - 15 of the Bill amend ss. 72-74 of the FW Act to extend concurrent parental leave from 3 weeks to up to 8 weeks and remove the limitation that the leave must be taken within 3 weeks of (or up to six weeks by agreement with the employer) the birth or placement of a child. Separate periods of concurrent leave may be taken in blocks of no less than 2 weeks.

The ACTU advocated and won the right for parents to request 8 weeks concurrent parental leave in the Family Provisions Test Case in 2005. The provision was subsequently stripped from awards under the Howard Government's WorkChoices regime.

The ACTU again called for 8 weeks concurrent parental leave in its submission to the Productivity Inquiry into Paid Maternity, Paternity and Parental Leave in 2008.[1]

We support the amendments in Items 12-15 and note that the benefits of 8 weeks concurrent leave include giving families and young children a well-adjusted start in life through:

- Improved maternal health support, based on evidence of higher rates of caesarean deliveries and multiple births;
- Increased opportunity for fathers to bond with and care for their child, based on changing social norms which support encouragement of a greater sharing of the caring role between parents and enhanced quality of family life; and

[1] ACTU Submission to the Productivity Inquiry into Paid Maternity, Paternity and Parental Leave, May 2008, p.9

- Improved child health, reflecting a better understanding of the importance of the early years of a child's life to cognitive, physical and emotional development.

The ACTU also supports the provision of greater flexibility for parents to choose when to take concurrent parental leave, allowing employees to better tailor the entitlement to their particular family needs.

Part 3—Right to request flexible working arrangements

Items 16 – 18

Items 16 - 18 of the Bill amend 12 and sections 65 of the FW Act to extend the scope of employees entitled to request flexible work arrangements and clarify the business grounds upon which employers may reasonably refuse such requests.

The ACTU believes the need for employees to balance work and caring responsibilities is a critical issue. The ACTU Working Australia Census, which surveyed over 42,000 workers, found that having the flexibility to balance work and family responsibilities was the second highest priority for both women and men workers and the single biggest issue for women.[2]

This reflects demographic changes which have seen the number of women in the workforce double over the past 50 years;[3] the majority of families (55%) now have both parents in paid work[4] who are combining employment with an ever increasing amount of caring responsibilities.

Yet employment regulation and workplace practices have not kept pace with the changes brought about by a greater sharing of caring responsibilities in modern working families.

The ongoing trend away from residential care to home based care, has created a significant increase in the reliance on unpaid, informal care provided by family members, however many are unable to afford to care for others at the expense of paid work.[5] Combined with the projected shortage of paid carers, Australia faces a time bomb of unmet caring needs for chronically ill, disabled and elderly dependents.[6]

The FW Amendment Bill represents an opportunity for the legislation to more meaningfully address this fundamental change in social norms and work–family structures, so as to establish a sustainable framework for harmonious and flexible workplaces, a modern Australian labour market and a productive and competitive economy in to the future.

It is clear that Parliament intended to do this- Section 3 of the FW Act outlines the objectives of Australia's workplace relations system, including "assisting employees to balance their work and family responsibilities by providing for flexible working arrangements". The FW Act gives effect to this objective by providing

[2] ACTU, *"Voices From Working Australia",* Findings from the ACTU Working Australia Census, 2011

[3] ABS Australian Social Trends 4102.0 December 2011, "Fifty Years of Labour Force: Now and Then", p. 2: A recent comparison of ABS data collected 50 years ago highlights the strides women have made into the Australian labour force. The number of women returning to the workforce after having children has increased dramatically from 34% in 1961 to 59% in 2011. Women now make up around half of the paid labour force and total union membership in Australia.

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

[5] Australian Institute of Health and Welfare (AIHW), *The Future Supply of Informal Care 2003-2013*, October 2003.

[6] Australian Institute of Family Studies, Research Report No.16, p. 100: ageing of the population will result in a growth in demand for care. NATSEM (2004) projected that the number of older Australians requiring assistance because of severe or profound disability would rise by 160% between 2001 and 2031.

employees with the right to request flexibility in their working arrangements under s.65 of the FW Act. The collective bargaining framework of the FW Act also provides an opportunity build on this and unions in bargaining industries have a long history of pressing claims for employers to agree to working arrangements that meet the needs of their workforce.[7]

However, since the introduction of the FW Act in 2009, a number of aspects of the right to request provision have been identified as in need of reform and the ACTU welcomes the amendments proposed by the FW Amendment Bill 2013.

Item 17 of the Amendment Bill extends the scope of Subsection 65(1) to entitle employees to request flexible work arrangements if they:

(a) are parents, or have responsibility for the care, of a child who is of school age or younger;
(b) are carers (within the meaning of the *Carer Recognition Act 2010*);
(c) have a disability;
(d) are 55 or older;
(e) are experiencing violence from a member of the employee's family; or
(f) provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.

Item 17 also amends subsection 65(1B) of the FW Act to clarify that, without limiting subsection (1), an employee who:

(a) is a parent, or has responsibility for the care, of a child; and

(b) is returning to work after taking leave in relation to the birth or adoption of the child; may request to work part-time to assist the employee to care for the child.

The ACTU welcomes the extension of the right to request provision to a wider range of caring responsibilities and notes that these amendments reflect positions advocated by the ACTU in submissions to the FW Act Review; Australian Law Reform Commission (ALRC) Inquiry into Age Barriers to Work in Commonwealth Laws; and the ALRC Inquiry into Family Violence and Commonwealth Laws. We are however concerned that the adoption of the definition of "carer" in the *Carer Recognition Act* 2010 is such as to require a person to actually have commenced their caring responsibilities prior to the statutory right to request being activated, and this could lead to sub-optimal outcomes where an employer is only inclined to decide requests for flexible work strictly within the statutory framework.

The wording in sub clauses (e) and (f) of Item 7 precludes employees experiencing violence by a non-family member in the household access to the right. We would advocate use of the term 'family or domestic violence' as an accepted and well understood definition consistent with terminology used in relevant legal instruments, so that s.65(1) would entitle employees to make a request if they are:

(e) experiencing family or domestic violence; or

[7] Section 50 of the FW Act requires that a person not contravene an enterprise agreement

(f) providing care or support to a person who is experiencing family or domestic violence.

ACTU also advocates for the removal of s.65 (2) which restricts employees with less than 12 months service and certain casual employees from making make requests. Exclusion from the right to request flexible work arrangements for these employees is unjustified and further exacerbates their entrapment in low paid, precarious and insecure jobs.

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.

We are unsure of the benefit amendment to subsection 65(1B) would achieve, given the right already exists inter alia in s.65. We do however, strongly support recognition of the specific needs of employees returning to work from parental leave in light of the considerable body of evidence that, in particular, women returning from maternity leave are routinely denied requests for flexible work arrangements, discriminated against or 'restructured' out of organisations.

Discrimination case law offers an insight into the reality of managerial attitudes towards working mothers. In recent months alone, the following cases have come to public attention, for example:

- A media agency manager was made redundant after returning to work part-time following the birth of her baby. Evidence revealed the employer's desire to 'weed out' part-time staff, with one email by the Chairman, stating, *"I don't know what has happened in the past but the way we are going to operate in the future is that we are only having full-time employees on the payroll."*[8]
- A finance manager with the Commonwealth Bank, was similarly 'restructured' out of the organisation after returning to work from maternity leave and being told she was no longer required. Her lawyers said hers was the fifth such case they had handled against the Bank in as many years.
- A former director of a childcare centre was demoted to 'staff relief float' on a casual basis and when she returned from parental leave. Upon refusing to accept the demotion, her employer terminated her employment on the grounds of 'poor performance.'[9]
- A pregnant employee at printing company WongTas, who complained at being demoted, was told by the male director employees should resign when they fall pregnant and then "stay at home in bed".[10]
- Two former public relations managers for Virgin Blue who were made redundant whilst on parental leave provided evidence of executive management views that 'all females should be on contract so that when they get pregnant it's easy for the company to get rid of them.'[11]

The federal and various state human rights and equal opportunity commissions report growing numbers of discrimination complaints against employees requesting flexible work, noting that formal complaints are

[8] "*Discrimination Case is Settled Out of Court*", Sydney Morning Herald, 27 October 2011, p.3
[9] *Ucchino v Acorp Pty Ltd [2012] FMCA (27 January 2012)*
[10] Fair Work Ombudsman v **Wongtas** Pty Ltd (No 2) [2012] FCA 30 (2 February 2012)
[11] Unsuccessfully conciliated at FWA 3 February 2011, claim to be filed in FCA2011 : Workplace Express, 23 February 2011

only the tip of the iceberg in terms of what is happening in workplaces because most claims are not formally reported.[12]

In our view it would be appropriate if the amendments to s. 65(1B) provided additional rights to employees returning from parental leave. The ACTU has consistently advocated for an obligation on employers to make all reasonable efforts to accommodate parents' requests to return from parental leave on a part-time basis until their child reaches school age, and for unreasonable refusals of these requests to be appealable.

Item 18 extends the scope of Subsection 65(5) to provide that, without limiting subsection (5):

> (5A) reasonable business grounds include the following:
>
> (a) that the new working arrangements requested by the employee would be too costly for the employer;
> (b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;
> (c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;
> (d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;
> (e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

ACTU supports the amendments in Item 18 to s.65 (5) to clarify the grounds upon which an employer may reasonably refuse a request, noting however, that these are broad grounds. We advocate that to be effective the amendment should also include a requirement to ensure all options to accommodate a request have been explored before it may be reasonably refused.

In addition, without a right of appeal, employees have no recourse if their request is unreasonably rejected because an employer has not given the request genuine consideration or has not made any effort to accommodate the request.

To this end, we urge that the Bill be amended to:

a. Include requirement that employers properly consider and make reasonable efforts to accommodate an employee's request for flexible work arrangements; and

b. include a right for all employees to appeal an employer's unreasonable refusal to the Fair Work Commission.

<u>Obligation to genuinely consider a request</u>

Without an obligation on employers to genuinely consider a request, and because most unreasonable refusals are unlikely to be appealed, the success or otherwise of an employee's request is by and large subject to the vagaries of the attitudes of their line manager.

[12] AHRC Annual Report, 2011: For the period of 2010-2011 complaints 45% of complaints brought under the Sex Discrimination Act were conciliated, most with confidentiality agreements.

A recent study by the Australian School of Business and the Melbourne Business School found that "family friendly rights are of little use without senior managers who support them." The study found that "no one will take [rights to flexibility] up if you have a supervisor who gives you a hard time or the organisational culture impedes it."[13]

Similarly, the Australian Work and Life Index (AWALI) 2012 Report found that:

"In many workplaces getting flexibility is difficult especially where standard working arrangements are dominant, the climate is hostile to flexibility, or workers' anticipate a stigma arising from a request for flexibility. Improving things will require a basic knowledge of rights to request, and workers' confidence that their request will be treated seriously and not result in negative consequences."[14]

Feedback from workers indicates employees do not request flexible work arrangements if they have no chance of the request being given reasonable consideration and they are also likely to face negative consequences at work in the face of an inflexible workplace culture.

For example, almost one quarter of respondents to the Community and Public sector Union (CPSU) *What Women Want Survey 2010,* said taking time out for family and personal matters was frowned on in their workplace. One third said that unless you put work before family or personal matters you don't get noticed by management, with forty-five percent believing that taking time out for family reasons will disadvantage an employee's career prospects. Fifteen percent said the ability to work long hours to demonstrate commitment was very important or important in their job and over one third believed that employees who 'get ahead' work long hours on a regular basis (e.g. 50 hours).[15]

In our submission to the FWA Review, ACTU advocated for amendments to the FW Act which included an obligation on employers to genuinely consider a request. We further suggested that clearer guidance around the concept of the obligation to reasonably accommodate an employee's request would clarify matters for both employers and employees, and minimise the need for any further dispute resolution.

This would bring the FW Act more in line with similar provisions on the *Victorian Equal Opportunity Act 1995*, which clearly outlines the obligations of employers in considering a 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.

Similar legislation exists in UK and Europe. The UK legislation, on which the FWA right to request flexible work arrangements provision was modelled, places an obligation on employers to demonstrate that they have followed due process in considering an employee's request.

Page 45 of the Explanatory Memorandum (EM) for the Fair Work Bill already provides that a bare refusal with no explanation provided would be inadequate. However, the EM does not provide any examples to guide employers on how reaching a decision to refuse a request on reasonable business grounds should work in a practical sense.

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[13] Professors Cogin, J. & Saunders., K., Australian School of Business and Professor Williamson,I., Melbourne Business School, Research Paper, cited in the Australian Financial Review, Wednesday 3 April 2013 (p.41)

[14] Skinner, N., Hutchinson, C., and Pocock, B., "The Big Squeeze: Work, Home and Care in 2012", Australian Work and Life Index (AWALI), August 2012

[15] Community and Public Sector Union (CPSU) "*What Women Want*" Survey, 2010

The FW Act should be amended so that the written response provided to an employee contains clear evidence that the employer has properly weighed up a request, made efforts to accommodate the request and has a genuine operational reason for refusing the request.

We note that the FW Act Review Panel recommended that employers who refuse a request for flexible work arrangements should be required to hold a meeting with the employee to discuss their reason for refusal. This recommendation is not reflected in the proposed amendments.

We note that the policy objective of the right to request provision is not merely to "facilitate discussion" but to "assist employees to balance their work and family responsibilities by providing for flexible working arrangements". Further, the FWA Review panel recommendation to meet appears to apply after a decision has been made, limiting the scope for the meeting to discuss options to accommodate a request. The FW Amendment Bill should adopt the recommendation of the FWA Review Panel, clarifying that the obligation to 'meet' to consider a request includes genuine consideration of the employee's request and exploration of options to reasonably accommodate the request.

Interaction with General Protections

We note that whilst the general protections provisions of the Act (Part 3-1) apply to employees accessing the workplace right to request flexible work arrangements, those who disclose to an employer that they are experiencing domestic violence, but, for a range of reasons, decide not to pursue a formal request flexible work arrangements, would not be protected against any subsequent adverse action. Section 351 of the Fair Work Act 2009 (Cth) does not include discrimination on the grounds of experiencing domestic violence and an employer is not prohibited from taking adverse action against an employee or prospective employee because they are experiencing domestic violence.

Should the Human Rights and Anti-Discrimination Bill 2012 not extend the grounds of discrimination to include employees experiencing domestic violence, section 351(1) of the FWA (2009) should be amended to extend protection against discrimination to employees experiencing or caring for a person experiencing domestic violence.

Right of appeal

Under the FW Act, awards and agreements contain a dispute settlement term but by virtue of s. 739(2) requests for flexible working arrangements or to extend a period of unpaid parental leave, are the only entitlements in the FW Act which specifically preclude the FWC from dealing with disputes arising from a request unless otherwise agreed by both parties to an enterprise agreement. In our view all employees should have the right to appeal an unfair or unreasonable decision by an employer which affects their rights under the Act.

Indeed, the current legislation represents a weakening of the safety net position prior to the introduction of the NES, which provided a right to appeal a decision of an employer in relation to return from parental leave, via the Parental Leave Test Case.

Research collected by academics and anecdotal evidence collected by unions and NGOs, suggests biased attitudes of management are the key to unreasonable refusals of requests and point to the lack of an

appeal mechanism to address unreasonable refusals as critical to the efficacy of the provision.

A number of recent reports have identified the lack of an appeal mechanism as a significant barrier to the efficacy of the current right to request provisions of the FW Act.[16]

For example, the AWALI Report found that "*Without effective redress, a right to request is not much help in workplaces where cultures are resistant or arbitrary refusal is likely."*[17]

The recently released ACTU *'Time to Care'* Report, based on survey responses by union members across a wide range of industries, found that employees strongly felt that *"these matters shouldn't depend on the whims or moods of managers. Legislated rights on flexible hours would ensure that everyone knows where they stand, in advance."*[18]

UK legislation has enshrined the right to request flexible working arrangements since 2003- extending the right to carers in 2007 and to parents of older children in 2009. The legislation places a statutory duty on employers to give serious consideration to a request according to a set procedure and employees are able to appeal an unreasonable refusal if the procedure has not been followed.

The UK Coalition government in 2010 announced its intention to extend the right to all employees. In discussing options for introducing legislation to extend the right, the government noted that the most effective way to promote cultural change was to introduce statutory obligations, noting that *"even a sustained and extensive campaign is unlikely to have the significant effect on employment culture sought by this policy, and a major challenge would be reaching and convincing those who are resistant to change- which promotion campaigns will always struggle to achieve without the pressure of change in the operating environment of businesses."*[19]

Currently, in Australia the only employees who are able to appeal an unreasonable refusal are those in strong bargaining positions who have negotiated the right in their workplace agreement. Many employees do not have access to enterprise bargaining, in particular, women with caring responsibilities and employees in insecure employment who are concentrated low-paid, award-reliant workplaces are most in need of legislative protections.

In fact, some employers with access to legal and industrial advice specifically ensure employees are not able to use the dispute resolution processes outlined in their workplace agreements. For example, the *Telstra Enterprise Agreement 2010-2012* specifically states that the dispute resolution clause "does not apply in relation to disputes about whether Telstra has reasonable business grounds to refuse a request for flexible work arrangements or a request for extended parental leave under the National Employment Standards."[20]

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[16] For example: Australian Human Rights Commission, *"Investing in Care: Recognising and Valuing Those Who Care"* Report, February 2013; Carers Victoria, *"Sharing The Care: The Future of Caring in Australia*", July 2008 and the AWALI Report Op cit.

[17] Skinner, N., Hutchinson, C., and Pocock, B., "The Big Squeeze: Work, Home and Care in 2012", Australian Work and Life Index (AWALI), August 2012

[18] Australian Council of trade Unions (ACTU), "*Australians Want Time to Care*", Report, April 2013, p.10

[19] HM Government, Consultation on Modern Workplaces: Extending the right to request flexible working to all: Impact Assessment, May 2011

[20] Telstra Enterprise Agreement 2010-2012 C2011/3478

Recently published data from the Fair Work Commission indicates that the rate of applications for the Fair Work Commission to deal with disputes in relation to a refusal by an employer for flexible work arrangements is very low, as demonstrated in the table below: [21]

Quarterly Report Period	No. Applications to FWA
Oct-Dec 2011	10
Jul -Sep 2011	15
April – Jun 2011	6
Jan – Mar 2011	7
Oct – Dec 2010	2
July – Sep 2010	2
Total complaints July 2010 – Dec 2011	42

This is not surprising given employers are not legally obliged to seriously consider the request and, in any event, most employees do not have the right to take an appeal of an unreasonable refusal to the Fair Work Commission.

Overseas experience indicates that there is no reason to believe that allowing for either an obligation to seriously consider a request, or a right to appeal a refusal, will result in an increase in disputation. The UK conducted regular surveys of both employers and employees on the operation of the request provisions since its introduction into law in 2003. The most recent research indicates that 17% of employees have requested a change to their working arrangements, approximately 60% of requests were granted, and of the 40% refused, only 25% were appealed.[22]

The ACTU preferred appeal mechanism would be located in the NES as a minimum entitlement for all workers with an additional dispute resolution function conferred on the Fair Work Commission to deal with appeals against an employer's unreasonable refusal of a request.

Alternatively, the right to request flexible work arrangements (including a right to appeal unreasonable refusals) could be included as a compulsory model clause in modern awards. The clause should comply with FWC provisions for mandatory terms of awards.

At the very least, the ACTU strongly advocates that if the Government is not persuaded to implement the above recommendations, consideration should be given to implementing limited appeal rights on procedural matters only, as in the UK legislation. In this case, the FWC could make an order for an employer to comply with its obligations to genuinely consider or make reasonable efforts to accommodate an employee's request.

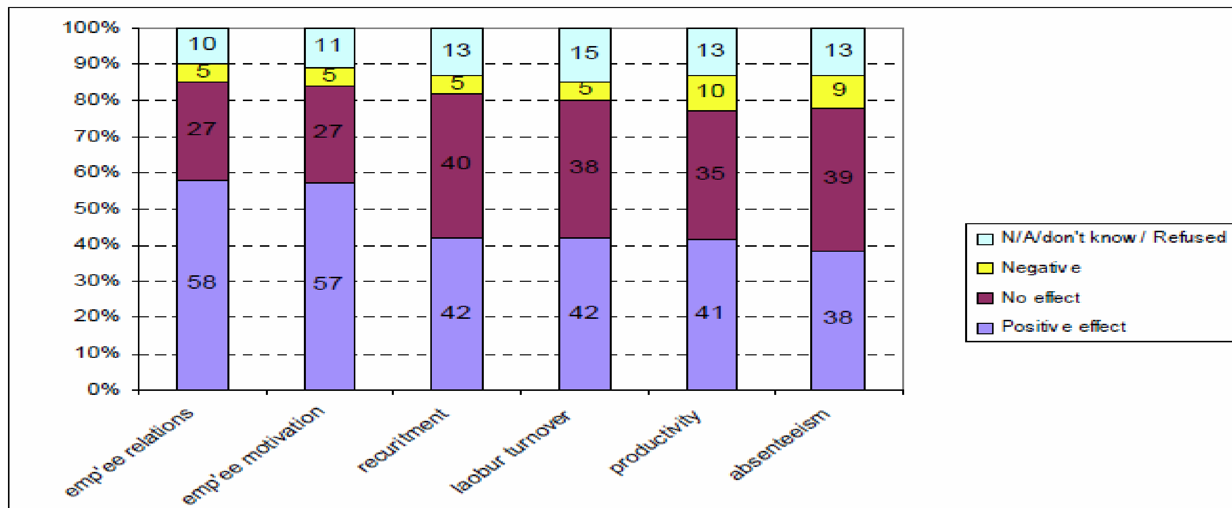
None of the proposed appeal mechanisms above are onerous and none give rise to a *right* to flexible work arrangements. Employers are still able to refuse requests on a very wide range of reasonable business grounds. The proposed appeal mechanisms simply provide those employees, whose requests for flexibility have been met with a flat 'no', to seek to enforce a right that the request be given genuine consideration.

[21] Fair Work Australia, Quarterly report to the Minister, October-December 2011

[22] The Third Work-Life Balance Employees Survey, March 2007, Employment Relations Research Series No.58 and The Third Work-Life Balance Employers Survey, December 2007, Employment Relations Research Series No.86.

These amendments will greatly enhance the efficacy of the right to request provisions in assisting workers with caring responsibilities to retain their connection to the paid workforce. There are considerable gains to be made by organisations, as summarised in the table below, indicating between 85% and 77% of UK employers report positive (or at the very least neutral) effects of the right to request legislation (including the obligation to genuinely consider a request and a right to appeal unreasonable refusals on procedural grounds) in their workplaces.

Employers perceived effects of flexible working (UK, 2007):[23]



Part 4—Consultation about changes to rosters or working hours

<u>Items 19-21</u>

The ACTU supports the amendments in Items 19-21 inserting a new s. 145A (1) requiring modern awards and ss.205 (1)and 205 (1)(a) enterprise agreements to include a term which requires employers to consult about a change to their roster or ordinary hours of work and which allows for representation in that consultation.

Sections 145A (2) and 205 (1) require the employer:

(a) to provide information to the employees about the change; and

(b) to invite the employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities); and

(c) to consider any views about the impact of the change that are given by the employees.

[23] HM Government, Consultation on Modern Workplaces: Extending the right to request flexible working to all: Impact Assessment, May 2011

The ACTU is concerned to ensure that amended s.145A (2) and s.205 (1) constitute a genuine obligation to consult with employees about proposed roster changes. To this end, we advocate the insertion the term 'genuine' sub clause (c) and an additional sub clause to *s. 145A (2) and s. 205 (1):*

(c) to genuinely consider any views about the impact of the change that are given by the employees; and

(d) to make reasonable efforts to accommodate the needs of the employee.

The proposed amendments to section 205(1) will of course necessitate revisions to the model consultation clause currently found in Schedule 2.3 of the *Fair Work Regulations*.

Part 5—Transfer to a safe job

Item 29

The ACTU supports the amendments set out in Item 29 which extends the right to be transferred to a safe job under s.81 to employees with less than 12 months service. All employees, irrespective of how long they have been employed by the employer should be entitled to a safe job.

Amended s. 82A provides that if no safe job is available, employees with less than 12 months service would be entitled to take unpaid no safe job leave.

These amendments complement the policy objective of the parental leave provisions (paid and unpaid) to encourage and support parents' ongoing connection to the labour market.

Amendments proposed by Schedule 2

Item 1

Item 1 proposes to insert a new paragraph to section 134(1). Section 134(1) sets out the modern awards objective. The modern awards objective is the central criterion against which all applications to the Fair Work Commission to make, vary or set aside modern awards must be judged.

The modern awards objective as it currently stands requires the Commission to "ensure that modern awards, together with the National Employment Standards, provide a fair and relevant safety net of terms and conditions..." taking into account particular matters. In essence, it is the legislative formulation of the safety net principle. The proposed amendment will add to the eight existing "particular matters" which must be considered in ensuring "a fair and relevant safety net". The new proposed matter for consideration is:

> "the need to provide additional remuneration for:
>
> - employees working overtime;
> - employees working unsocial, irregular or unpredictable hours;
> - employees working on weekends or public holidays; or
> - employees working shifts."

Neither the basic concept nor the social justification for a minimum safety net has been subject to a seismic shift since the inception of the award system. The safety net owes its existence to a desire to provide protections for employees that are seen as socially desirable or necessary, being protections that an unregulated labour market may not deliver to them. This is echoed in the objects to the Act which speak of "ensuring a guaranteed minimum safety net of fair, relevant and enforceable minimum terms and conditions" and "ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined". The safety net never did and does not now owe its existence to a desire to progressively limit the cost of labour to employers. Rather, the safety net has evolved on the basis of whether particular conditions of employment are a necessary or desirable minimum for workers and whether such conditions are achievable given the impact on employers and the economy more generally. In this framework, it is unsurprising that the minimum conditions contained in awards are rarely eroded: to do so would effectively require proof that economic and social development had regressed to a point where it is no longer economically sustainable to continue to provide such minimums, notwithstanding their desirability.

In this context, the proposed amendment should be uncontroversial because it merely reflects the status quo of workers being compensated for working particular patterns of hours – an acceptance that has been part of the safety net for over 100 years[24] and continues to this day.[25]

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24 *Barrier Branch of Amalgamated Miners Association v Broken Hill Pty Company Ltd* (1909) 3 CAR 1

25 [2013] FWCFB at [206] and [218].

Adequately recognising the impact of particular working arrangements is also consistent with International Standards, which should inform regulatory frameworks on working time. According to the International Labour Organisation (ILO), the UN agency responsible for the development and oversight of international labour standards, state regulation of working time is both justified and necessary. In regulating working time, it is not only hours of work, but the arrangement of working time or working schedules that are equally important.[26]

Based on its Decent Work agenda, developed and adopted by the ILO's tripartite constituency to guide the organisation's work, the ILO's Conditions of Work and Employment Programme has developed the concept of 'decent working time'.[27] There are five criteria to 'decent working time': it should be safe and healthy, family-friendly, promote gender equality, advance productivity and facilitate worker choice and influence.

A recent ILO publication synthesising international research on working time found numerous negative effects associated with working 'non-standard' work schedules (including shift work, night work, and weekend work), including substantially increased work–family incompatibility and adverse health outcomes.[28] The ILO has also recognised the effects of non-standard or unsocial working hours are not limited to individual workers, but also affect their families and communities.[29] The ILO has emphasised the need for governments to adopt policies that effectively regulate working time, including protecting workers against 'unsocial' working hours.[30] In this context, the legislative recognition of the role of loadings for particular working patterns or hours is consistent with the ILO position.

Finally, to workers who are likely to be award-reliant, and whose average weekly earnings are well behind most Australians, any reduction in wages which results from the removal of particular loadings and penalties is very significant. It is important to note in this regard that many of the industries which trade during times when penalty rates are payable are industries where award reliance is high. For example, in the Accommodation and Food Services Industry approximately 45.2% of employees are award reliant and in the Retail Industry 22.3% of employees are award reliant.[31] In practical terms this means that these workers are paid the lowest wage that is legally permissible. It is notable that the Minimum Wage Panel of Fair Work Australia has recognised that such workers have become increasingly low paid in a relative sense over time, concluding in its 2011-12 Annual Wage Review that "those reliant on award rates of pay have fallen behind the average earnings of workers and, in this sense, have not retained their relative standard of pay."[32] Penalty rates and like payments are accordingly exceedingly important to them.

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[26] See, eg, the Hours of Work (Industry) Convention 1919 (No. 1); Hours of Work (Commerce and Offices) Convention, 1930 (No. 30); and ; Forty Hour Week Convention, 1935 (No. 47); Weekly Rest (Industry) Convention, 1921 (No. 14); Weekly Rest (Commerce and Offices) Convention, 1951 (No. 106); Holidays with Pay Convention (Revised) 1970 (No. 132) and the Night Work Convention, 1990 (No. 171)

[27] Jon C Messenger, 'Towards Decent Working Time' in Jean-Yves Boulin, Michel Lallement, Jon C Messenger and Francois Michon (eds), Decent Working Time: New Trends, New Issues (International Labour Organisation), 2006, 420-21

[28] C Fagan et al, The Influence of Working Time Arrangements on Work-Life Integration or 'Balance': A Review of the International Evidence, Research synthesis paper prepared as an input to the report for discussion by the Tripartite Meeting of Experts on Working Time Arrangements (17-21 October 2011), ILO, Geneva, 2012. See also Jean-Yves Boulin, Decent Working Time: New Trends, New Issues, ILO, Geneva, 2006

[29] See, eg, Decent Working Time: Balancing Workers' Needs with Business Requirements, Conditions of Work and Employment Programme, ILO, Geneva, 2007, 6

[30] See, eg, Decent Working Time: Balancing Workers' Needs with Business Requirements, Conditions of Work and Employment Programme, ILO, Geneva, 2007, 6

[31] Source: ABS 6306.0

32 [2012] FWAFB 5000 at [183]

Amendments proposed by Schedule 3

Item 1

This Item proposes to amend the Guide at Division 3 of Part 1-1 to the Act to reflect the proposed insertion of a new Part 6-4B. This will assist users of the Act navigating its various provisions.

Item 2

This Item proposes to amend the definition section of the Act to support the proposed amendments. Given that the proposed new Part 6-4 B is largely self contained, the proposed approach of mainly providing cross references in the definitions section and providing the substantial definitions in Part 6-4B itself is sensible.

Item 3

This Item proposes to amend the table at section 539(2) of the Act, essentially providing for the enforcement of orders made under proposed Part 6-4B in the Courts under the same regime as applies to other orders made by the Commission, such as bargaining orders, minimum wage orders, equal remuneration orders, compensation or reinstatement orders, orders to stop or prevent industrial action, protected action ballot orders, orders resolving disputes concerning entry to premises and costs orders. The proposed standing rules are also consistent with those for other contraventions that affect workers. We support the existing enforcement mechanism being extended as proposed.

Item 4

This Item is would make an addition to the list of functions of the Commission listed at section 576 of the Act to reflect the amendments proposed by Schedule 3.

Item 5

This Item would add to the list of exclusions for the statutory contempt offence at section 675, such that contravention of an order made under proposed Part 6-4B would not be an offence under that section. Whilst this is consistent with the approach taken in respect of some other orders that may be made by the Commission, it is curious in circumstances where the conduct to which an order under Part 6-4B is directed could also constitute an offence under Health and Safety legislation (either insofar as that legislation casts positive duties on certain persons in its own terms or casts duties to comply with notices issued by Heath and Safety Representatives and the regulator). Given that non compliance would ordinary be expected to be met with a response through the existing civil enforcement mechanism, this is probably a minor issue particularly given that criminal enforcement in respect of the same conduct may be available to some extent under Health and Safety Law (in respect of individuals or businesses) and the general criminal law (in respect of individuals).

Item 6

This Item contains the proposed Part 6-4B, which contains the substantive provisions giving effect to the Commission's functions in respect of workplace bullying.

Workplace bullying can have a profound effect on all aspects of a person's health as well as their work and family life. Bullying behaviours can range from subtle behaviours that seek to exclude, isolate or marginalise, to extreme acts of physical violence resulting in death or serious injury. In the main, workplace bullying undermines self esteem, productivity and workplace morale. For some it can represent a permanent departure from the labour market and in extreme incidents can result in suicide.[33] While workplace bullying can involve a range of different behaviours, the elements of most definitions include repetitious, unreasonable, or unfair and inappropriate behaviour that attempts to undermine a worker or group of workers that creates a risk to health and safety.

As the Explanatory Memorandum to the Bill notes, the provisions form part of the Government's response to the "Workplace Bullying: We just want it to stop" report of the House of Representatives Standing Committee on Education and Employment (Report). As such a partial response, we are supportive of the provisions with some commentary on technical matters as below, and look forward to further discussion regarding implementation of the remaining recommendations of the Report.

The Chair's Foreword to the Report notes that:

> *"Although the Committee heard that Australian's approach to addressing workplace bullying, through a risk management rubric, is an example of international best practice, the Committee believes that there is real momentum in the Australian Community to do more to prevent and manage bullying, as well as better support those workers who have been bullied"[34].*

This is a sentiment with we which we concur. The ACTU and its affiliated unions have long recognised the serious problems posed by workplace bullying and the broader problems posed by related psychosocial hazards including: harassment, occupational violence, fatigue and work overload. In our submission to the inquiry that led to the Report, we called for a health and safety regulation dealing with psychosocial hazards more generally, along with a properly resourced and trained inspectorate to address risks arising from such hazards as properly defined. We also recommended that Safe Work Australia conduct research regarding the relationship between "unproven" bullying allegations pursued under health and safety law and the acceptance of claims for workers compensation arising from the same circumstances, as well as broader multi agency co-operation on data collection and policy development concerning workplace bullying. Importantly, we also recommended the establishment of "an easily accessible forum to resolve bullying complaints to ensure that bullying behaviours do not escalate and cause injury to workers." This is largely reflected in Recommendation 23 of the report, being that:

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[33] Bornstein, J, Bullies in Business, *Law Institute Journal,* June 2011.

[34] House of Representatives Standing Committee on Education and Employment, "Workplace Bullying: We just want it to stop", Commonwealth of Australia, October 2012, ISBN 978-0-642-79792-6 at p. *x*.

"The Committee recommends that the Commonwealth Government implement arrangements that would allow an individual right of recourse for people who are targeted by workplace bullying to seek remedies through an adjudicative process"[35].

At a workplace level it has been noted that early intervention is essential in managing the risks of bullying and can assist in rebalancing the power relationship that exists between bullies, targets and witnesses and prevent or limit further damage from taking place.[36] Victims and witnesses are often reluctant to speak-up because they fear that they might be victimised or be the target of bullying behaviours themselves.

In this setting, existing health and safety regulatory frameworks are often an ineffective deterrent against or response to workplace bullying. As breaches of WHS Legislation are criminal, the victim has no control over the enforcement of the law and there are procedural difficulties for regulators pursuing prosecutions. The burden of proof rests on the prosecution to prove all elements of the offence and the standard of proof to be discharged by the prosecution is beyond reasonable doubt. Furthermore, because bullying can involve from the subtle behaviours it can be difficult for OHS regulators to build sufficient evidence of repeated behaviours required to secure a prosecution for workplace bullying. As such responses to bullying are highly reactive and can take years before a matter can be brought before a court and long after the damage has been done to the victim. Indeed, the Committee in its report noted it could find no example of any psychological workplace bullying cases being pursued in the Courts in any State or Territory.[37]

In the absence of a compensable injury, which might attract a workers' compensation claim, all workers face significant barriers in accessing a remedy for bullying behaviours. This is clearly unacceptable because it relies on damage being suffered and offers no cure – prevention of the damage must be the first priority.

Workplace bullying thrives in an atmosphere where workers are fearful of speaking up about unreasonable behaviours because of fears of victimisation or because they may be the subject of bully behaviours themselves. Bullying cultures are often supported by a code of silence which allows destructive behaviours of this kind to flourish.

The recent "Lives on Hold" report on the Independent Inquiry into Insecure Work in Australia[38] estimates the number of workers engaged in insecure work to be in the region of 2.2 million workers. The characteristics of these roles can include unpredictable and fluctuating pay; inferior rights and entitlements; limited or no access to paid leave; irregular and unpredictable working hours; lack of security and or uncertainty over the length of the job and lack of any say at work over wages, conditions and work organisation.[39]

The report notes that workers engaged in labour hire arrangements felt unable to report bullying in the workplace, or occupational health and safety risks for fear that exercising their rights would lead to censure,

[35] *Ibid.* at p. 190.

[36] Field, E.M., "Bully Blocking At Work: A self help guide for employees and managers", Australian Academic Press, 2010.

[37] House of Representatives Standing Committee on Education and Employment, "Workplace Bullying: We just want it to stop", Commonwealth of Australia, October 2012, ISBN 978-0-642-79792-6 at p. *5*.

[38] Lives on Hold, Unlocking The Potential of Australia's Workforce, The Report of the Independent Inquiry into Insecure Work In Australia, ACTU 2012

[39] *Ibid.*

the loss of shifts or the loss of a job altogether.[40] The report describes the experiences of a worker who made a complaint in relation to physical aggressive behaviour by a female manager when the issue was raised she was subsequently sacked.[41]

We are pleased that the Bill proposes that the Commission be the forum for implementing the process recommended by the Report to stop workplace bullying. The Commission is a highly responsive and efficient institution with an intimate understanding of workplace dynamics. We look forward to consultation with the Commission concerning the implementation of proposed Part 6-4B (if passed), given the particular sensitivities involved and the risks of further conflict. Our comments on the particular provisions of proposed Part 6-4B are as follows:

789FC

We commend the Government on the standing criteria for the making of an application in proposed section 789FC. The adoption of the criterion that the worker "reasonably believes that he or she has been bullied at work" should minimise the scope for intimidating jurisdictional objections at the front end of the process which may have the tendency to discourage unrepresented applications from pursuing their complaints. We also commend the government for adopting the definition of worker from the *Work Health and Safety Act* 2011 rather than relying on the restrictive definition of employee, which would have limited the scope of the provisions to bullying occurring wholly within a traditional employment relationship. As to the fixing of an application fee by Regulation, we would encourage the government to not adopt an onerous fee that might have the effect of deterring applications. In this regard we would support the fees being set at the same level as apply for general protections and termination of employment applications.

789FD

The definition of "bullied at work" is largely consistent with that recommended by the Report and adopted in State jurisdictions, save for the necessary additions necessary to signpost the reliance on Constitutional heads of power. Regrettably the power relied on will not be sufficient to ensure the scheme applies throughout public and private sector employment. Apart from this limitation as to coverage of the scheme we are supportive of the substantive "bullied at work" definition save for some uncertainty as to whether it would extend to circumstances where conducted perpetrated by a group of individuals acting in concert did not manifest itself through *repeated* acts by *each member* of that group. We believe that the definition should extend to such circumstances and if the view of the Committee or the drafters is that it does not presently extend to such circumstances or there is some uncertainty we would recommend an "avoidance of doubt" subsection to clarify the matter (as has been adopted in relation to "reasonable management action carried out in a reasonable manner").

789FE

We commend the government on attaching a time imperative on the Commission beginning to deal with an application made under proposed Part 6-4B. As raised above, it is critical that action be taken to stop workplace bullying before it escalates and results in actual injury. The Commission's

[40] *Ibid.* at p. 15.
[41] *Ibid.*

commencing to act (whether or not it makes an order or otherwise succeeds in resolving the matter) should not of course prejudice any avenues of investigation being pursued under health and safety law.

789FF

We support the Commission having a discretion as to whether or not it makes an order and we strongly support the prerequisite for the order being tied to a risk of continued bullying at work and the object of the order being the prevention of that bullying. We consider it appropriate that the Commission have regard to all relevant matters in fixing the term of any order, including the matters specifically mentioned in subsection (2). We do however note that the uncertainty concerning the cumulative effect of conduct by individuals acting as a group, to which we have referred in our comments concerning section 789FD, likewise affects this provision given it is directed to making orders that will prevent a working being "bullied at work" as there defined.

789FG

This is the contravention provision which works in conjunction with Item 3 of the Schedule as referred to above.

789FH

This section would ensure that persons who have been discriminated against in connection with their role or responsibility under health and safety law remain eligible to pursue remedies under that law notwithstanding the making of an application under proposed Part 6-4B.

Amendments proposed by Schedule 4

Item 1

This Item would introduce new definitions to support the proposed new Division 7. We consider it sensible that a signpost to the location of the new definitions be included as proposed.

Item 2

This Item suitably amends the guide to Part 3-4 of the Act to indicate the presence of proposed new Division 7.

Items 3-6

These Items provide Notes that refer to other sections that might be relevant to users of the Act when contemplating the exercise of the rights in the sections referred to.

Item 7

This Item provides a new default rule concerning the location of interviews or discussions which occur pursuant to the rights contained in Subdivision A, AA and B of Division 2 of Part 3-4. Where the permit holder and the occupier are unable to reach agreement on a suitable location, the permit holder may, but is not obliged to, proceed to exercise their entry right:

> "…in any room or area:
>
> (a) in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks; and
>
> (b) that is provided by the occupier for the purpose of taking meal or other breaks." [42]

In our submission to the Fair Work Act Review panel, we described employers' efforts to frustrate attempts by workers to meet with unions at work. Examples include:

- Preventing the announcement of the arrival of the union official (or the employer's refusal to make such an announcement);
- Directing the official to meet workers at some far-off place (which cannot be reached during the lunch break);
- Staggering breaks so that there is never a time that all workers are on a common lunch break; and
- Directing the official to meet with workers in the room next to the manager's office, so that the employer can observe who attends.

Unions have an existing right to challenge some of these decisions in Commission, but it is often difficult to prove the employer's bad motive, even though the effect of the employer's conduct on union–employee

[42] Proposed section 492(3)

communication is clear.[43] In light of these restrictions, our Congress endorsed a policy that relevantly sought that right of entry provisions the Act:

- Must facilitate entry and discussions with workers where the workers choose to congregate, such as their lunch room;
- Must not restrict employees access to advice, information and union representation at work;
- Must prevent employers from requiring, directly or indirectly, that workers seek permission or identify themselves to the employer before accessing a union official who is on the premises; and
- Must ensure that any discussions as between workers and unions are not subject to any surveillance.

We have long held the view that the right of entry scheme of the Act should be focussed not just on entry to premises, but on access as between workers and unions. The proposed amendment under this Item should assist such access being made a reality in all workplaces.

We note that the entry rights that the proposed amendment will impact are different: One is a right to hold discussions with employees during meal times or other breaks (per Subdivision B), and the other is a right to conduct interviews at any time during working hours pursuant to a right to investigate a suspected contravention (Subdivision A and AA). In our view the proposed new section 492 will work most effectively in both circumstances where employers and permit holders apply themselves to the exercise of attempting to reach an agreement on an appropriate location for discussions or interviews to occur, including by respecting the privacy of workers who might wish to participate in interviews in respect of suspected contraventions. In circumstances where a failure to reach an agreement results in the permit holder taking the view that such an interview being conducted in a meal area would be a sub-optimal outcome, they may choose not to proceed with the interview and instead notify the Commission of a dispute under section 505 concerning the operation of Part 3-4.

The remainder of Item 7 introduces a new section 492A which reflects the de-coupling of the issues of location and route to location from section 492 in its current form.

<u>Items 8&9</u>

These Items provide or amend Notes that refer to other sections that might be relevant to users of the Act when contemplating the exercise of the rights in the sections referred to.

<u>Item 10</u>

This Item clarifies that the existing dispute resolution mechanism is to apply to all of Part 3-4 as proposed to be amended.

<u>Item 11</u>

This Item would amend section 505(5) to proscribe the types of disputes in relation to which the Commission may make orders that are additional to or inconsistent with the rights otherwise contained in Part 3-4. Such orders have as their object the resolution of a dispute about the operation of Part 3-4 and it

[43] Act, s 492(2)

sometimes necessary to make orders dealing in a very practical way about how entry rights might be exercised in order for them to meet that objective. We accordingly support the extension of this provision to cover the new rights proposed in Schedule 4.

Item 12

This Item introduces a new dispute resolution function to deal with disputes about the frequency of entry by permit holders to a particular premises. Whist we recognise that this amendment is responsive to a recommendation of the Fair Work Act Review Panel, we respectfully disagree with the panel that any additional amendment to the Act is necessary in order for the Commission to adequately deal with disputes of that nature. We also note that to the extent that there was any evidence before the panel of entry rights being exercised "too frequently", this was in large measure a function of the protocols adopted by employers, occupiers and project managers on large worksites. Such protocols effectively required the permit holders to treat a worksite as comprising a multitude of premises (depending on their physical location on the site and which contractor or sub-contractor was engaged there) and make separate entries (sometimes more than one on the same day) in order to exercise their rights under the Act.

We accordingly consider that if there is to be such a separate procedure, it is appropriate that it set a high bar before the Commission restrict the rights of permit holders. We support the bar set by proposed subsection 505A(4). We trust that the proposed section 505A will not result in permit holders or their organisations being penalised for overly "frequent" entry when the need for repeat visits is orchestrated by the employers or occupiers in demanding that separate entries be made to address workers who (notwithstanding that they work side by side) are employed by separate entities. We are of the view that the requirement in proposed section 505A(6) in particular that the Commission "..take into account fairness between the parties concerned" would prevent an employer or occupier who did not come to the dispute with "clean hands" from securing an order that penalised our affiliates from working within the confines that the employer and/or occupier had devised. In the event that the drafters are of a different view, or the section does not operate in the way we envisage, we would recommend an amendment be made.

Item 13

This Item proposes to amend section 506 to ensure that non compliance with any dispute resolution order in respect of Part 3-4 be enforceable in the usual way.

Item 14

This Item proposes to add a new Division 7 to Part 3-4, which addresses some issues that permit holders have encountered in attempting to exercise entry rights in remote locations. In many such locations, transport and/or accommodation is only accessible if the occupier of the premises supplies it (on whatever terms it chooses). This is particularly an issue in the resources sector where "fly in fly out" workers are engaged.

The essential scheme proposed by Item 14 is one that obliges the occupier to supply the permit holder or his or her organisation with the necessary transport and/or accommodation in particular circumstances, on a cost recovery basis. The dispute resolution function of the Commission under section 505 will be applicable to this scheme, however the only civil enforcement of it will be in respect of the obligations to

not exceed cost recovery. Our further comments in relation to the particular sections are as below.

521A-521B

These sections provide definitions of "accommodation arrangement" and "transport arrangement" to support the operation of Division 7. Such arrangements may be entered into either with the permit holder directly or the organisation to which they belong.

521C

This section provides the substantive rule concerning the provision of accommodation. No obligation may arise under the section unless the premises to which entry is sought is "..located in a place where accommodation is not reasonably available to the permit holder unless the occupier of the premises on which the rights are to be exercised provides the accommodation, or causes it to be provided." This appropriately captures the types of premises where permit holders have experienced difficulty under the existing rules. If this threshold is met, other conditions must be satisfied before the occupier would be obliged to enter into an accommodation arrangement as defined. We are of the view that the conditions prescribed are reasonable. We note in this regard that reference in the condition proposed in section 521C(2)(a) to the question of whether the provision of accommodation "would not cause the occupier undue inconvenience" is consistent with the interest of occupiers and employers as articulated in section 480(c) of the Act. We note that the Commission will have discretion to treat the conduct of the permit holder while in accommodation as conduct engaged in as part of the exercise of the permit holder's rights under Part 3-4. This could facilitate action being taken against the permit holder by the Commission in respect of such conduct, as part of the resolution of a dispute concerning the entry.

521D

This section provides the substantive rule concerning the provision of transport. No obligation may arise under the section unless the premises to which entry is sought is "..located in a place that is not reasonably accessible to the permit holder unless the occupier of the premises on which the rights are to be exercised provides transport, or causes it to be provided." This appropriately captures the types of premises where permit holders have experienced difficulty under the existing rules. If this threshold is met, other conditions must be satisfied before the occupier would be obliged to enter into a transport arrangement as defined. We are of the view that the conditions prescribed are reasonable. We note in this regard that reference in the condition proposed in section 521D(2)(a) to the question of whether the provision of transport "would not cause the occupier undue inconvenience" is consistent with the interest of occupiers and employers as articulated in section 480(c) of the Act. We note that the Commission will have discretion to treat the conduct of the permit holder while in transport so provided as conduct engaged in as part of the exercise of the permit holder's rights under Part 3-4. This could facilitate action being taken against the permit holder by the Commission in respect of such conduct, as part of the resolution of a dispute concerning the entry.

Item 15

This Item proposes to add the provisions obliging occupiers to not exceed cost recovery in respect of accommodation and transport in arrangements entered into under Division 7 to the enforcement table found at section 539(2) of the Act. This is necessary to ensure these new obligations may be enforced in the usual way.

Amendments proposed by Schedules 5-7

These schedules deal with minor and technical amendments as well as transitional provisions. We have no concerns regarding the minor and technical amendments and support the proposed commencement dates and transitional arrangements for the substantive components of the Bill.

Concluding remarks

We would urge the Committee to recommend that the Bill be passed. However, we would likewise urge further development of provisions that would provide a meaningful right of review in respect requests for flexible working arrangements and uniform coverage of the proposed workplace bullying jurisdiction of the Commission.

We note that in his second reading speech in support of the Bill, the Minister said:

> *"The Panel recommended that the Government implement amendments to the Fair Work Act providing for the Fair Work Commission to arbitrate to determine the content of an agreement where negotiations have reached an impasse, a specified time period has expired and conciliation has failed.*
>
> *The Government supports this recommendation and I will continue to work with employers and unions on these matters with a view to introducing further legislative reforms in this area during the Winter Sittings."*

We strongly support such amendments being developed and subject to stakeholder consultation as soon as possible. In our submissions and conferences with the panel undertaking the review of the Fair Work Act, we were supportive of a more balanced role for the Tribunal in resolving bargaining disputes. The current system too readily provides for arbitration for powerful employers that intentionally self harm in order to secure an arbitrated outcome, yet it fails to meaningfully intervene in protracted "first contract" and like situations. We are strongly of the view that the system should provide access to arbitration, in this limited context, in exceptional circumstances where all other options have been exhausted and the party seeking the intervention has not itself frustrated the bargaining process. We look forward to the opportunity to consult on a concrete proposal and will make further comments in this regard at the appropriate time.

The ACTU does not object to this submission being made public.

Please do not hesitate to contact us if we can assist the Committee further in its deliberations. If the Committee intends to conduct public hearings in relation to the Bill, the ACTU would welcome the opportunity to appear.

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