Submission Number: 10
Date Received: 29/02/2012

jobwatch
Employment Rights Legal Centre

Submission to the House Standing Committee on Education and Employment Inquiry into the Fair Work Amendment (Better Work/Life Balance) Bill 2012.

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1 Introduction

Job Watch Inc (**JobWatch**) welcomes the opportunity to make a submission to the Inquiry into the Fair Work Amendment (Better Work/Life Balance) Bill 2012 (**the Bill**).

JobWatch strongly supports any measures that increase the rights of workers to obtain appropriate flexible working arrangements and a better work/life balance and congratulates the Greens for introducing the Bill.

If enacted, the Bill will remedy current deficiencies in the *Fair Work Act 2009* (Cth) (**FW Act**), namely, for example, that the current alleged "right to request flexible working arrangements" is devoid of any enforcement mechanism and is very limited in its application as it only applies to employees with certain parental or carer responsibilities[1].

The focus of JobWatch's submission will be on the following:

- The need for law reform in relation to flexible working arrangements;
- Recommendations to improve the operation and increase the scope of the Bill; and
- Unintended consequences.

The case studies provided in this submission are based on actual but de-identified callers to JobWatch's telephone information service and/or clients of its legal practice.

2 About JobWatch

2.1 Core Activities

JobWatch is an employment rights community legal centre which is committed to improving the lives of workers, particularly the most disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria. The centre receives State and Commonwealth funding to do the following:

[1] See FW Act sections 44(2), 65 and 545 Note 4.

a) Provide information and referral to Victorian workers via a free and confidential telephone information service;

b) Engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other organisations;

c) Represent and advise disadvantaged workers; and

d) Conduct law reform work with a view to promoting workplace justice and equity for all Victorian workers.

2.2 Database of JobWatch's callers: key characteristics

JobWatch is well-placed to contribute to this Inquiry. Since 1999, we have maintained a comprehensive database of our callers. To date we have collected over 148,000 records. We start a new record for each new caller or for callers who have contacted us before but who are calling about a new matter. One record may canvass multiple workplace issues including, for example, contract negotiation, discrimination, personal leave and maternity leave. Our database allows us to report on our callers' experiences and enables us to track any changes in demographic trends.

Of relevance to this Inquiry, our records indicate the following:

a) The vast majority of our callers are not union members;

b) A significant proportion of our callers do not know which industrial instrument provides the terms and conditions of their employment; and

c) Since 1999, approximately 5000 callers have contacted us regarding issues related to flexible working arrangements.

Additionally, the JobWatch legal practice is experienced in acting for clients negotiating or attempting to negotiate flexible work arrangements.

3 Flexible working arrangements and the need for law reform

Currently, there is not an enforceable mechanism by which employees can obtain flexible working arrangements under the FW Act. Whilst section 65 of the FW Act states that certain employees with parental or carer responsibilities can request

flexible work arrangements, its objectives are merely aspirational as an employer's refusal of such a request cannot be challenged. In JobWatch's opinion, a right or law that cannot be enforced is not a true right or law at all.

It is therefore self-evident that the law in relation to flexible working arrangements is in dire need of reform. This is a long held view by JobWatch and JobWatch has made many submissions to this effect including in relation to the recent FW Act Review 2012, the National Employment Standards exposure draft in 2008, the Senate Standing Committee Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act in 2008 and the Fair Work Bill Inquiry in 2009.

This lack of enforceability allows employers to refuse even the most reasonable requests for flexible working arrangements without fear of having their decision scrutinised by an independent and neutral third party such as Fair Work Australia (**FWA**).

Case study – unreasonable refusal of flexible work arrangements

Jon has been employed as a bus driver for over 6 years on a permanent full time basis. When he originally applied for the job he was told that he would be required to work every second weekend. Jon's employer is now claiming he has to work every weekend. However Jon can't do this as he has custody of his children every second weekend. Jon has asked the employer to explain why the change is required and he has confirmed that he still needs every second weekend off but he has not received any response from the employer. Jon is concerned he may have to quit his job in order to be able to see his kids.

Even though employees often have certain rights under State, Territory and/or Commonwealth anti-discrimination laws regarding family responsibilities, anti-discrimination proceedings can be protracted, complicated and expensive and that is when a complaint is actually filed. In JobWatch's experience, many workers who have had requests for flexible working arrangements denied by their employer (like Jon in the above case study) do not ever identify themselves as being the victim of unlawful discrimination and so do not ever make a complaint.

Case study – older worker wanting part-time hours

Derek is an older worker who has been working full-time most of his life but now wants to work part-time rather than fully retire. He asked his employer about this but was told it's full-time or it's nothing.

Recommendation 1.

For these reasons, employees who have had their request for flexible working arrangements refused by their employer should have recourse to the independent industrial umpire, being FWA, for a quick, inexpensive and just review of the employer's decision and FWA should be empowered to make binding orders giving effect to such flexible work requests where appropriate. To maintain the status quo is untenable.

4 Recommendations to improve the operation and increase the scope of the Bill

JobWatch fully supports the Bill but makes the following further recommendations to improve the operation and increase the scope of the Bill:

a) **Clause 306C:** JobWatch submits that this clause could inadvertently limit State and Territory laws that are otherwise beneficial to employees, for example, the flexible working arrangements available under the *Equal Opportunity Act 2010* (Vic)[2] (**EO Act Vic**). This is because it is not possible to ascertain, due to the nature of the rights afforded and the individual nature of each case, which laws are in fact more beneficial.

Currently, in Victoria, the State law is clearly more beneficial because it is actually enforceable but, if the Bill becomes law, which law is more beneficial will become uncertain.

Recommendation 2.

JobWatch would prefer this clause to simply state: "This Act is not intended to apply to the exclusion of State and Territory laws that provide employee entitlements in relation to flexible working arrangements".

The Bill's Explanatory Memorandum makes reference to a clause 306C (2) but the Bill does not. JobWatch submits that clause 306C(2) need not be included in the Bill as it is redundant.

b) **Clause 306D (1):** There seems to be a typographical error in clause 306D (1) requiring the removal of the word "make".

[2] See EO Act Vic section 19.

c) **Clauses 306D & 306E (2) (b) (i):** Both these clauses refer to the term "long term casual" meaning to have an entitlement under the Bill, a casual employee must have been engaged on a regular and systemic basis for a period of at least 12 months. Permanent employees also have to meet a 12 month qualifying period.

Recommendation 3.

JobWatch submits that there should not be any qualifying period to be able to request flexible working arrangements and, where denied, seek a flexible working arrangements order from FWA. This is because, for example, where an employee requires flexible working arrangements to be able to care for a family member or member of their household, their length of continuous service is irrelevant to their need for the flexible working arrangements as opposed to entitlements such as redundancy pay, long service leave and notice of termination which reward or compensate an employee for their length of continuous service.

Case study – flexible work arrangements for a parent with less than 12 months service

Judy was employed on a permanent full time basis as a manager in a retail outlet. A couple of months after she commenced employment, she asked her employer for a variation to her contracted hours to accommodate her family responsibilities. Her employer initially reluctantly agreed however shortly afterwards, he terminated her employment. The reason given was that he had sold the business however Judy discovered that he had simply replaced her with a new manager who was prepared to work full time hours. Judy was not paid her final wages, notice of termination or accrued annual leave.

Case study – flexible work arrangements for a parent with less than 12 months service

Peter was employed as a casual labourer on a regular and systematic basis for 4 months. Peter's wife became ill and as a result, he was required to temporarily stay home to care for their baby. Peter called his employer numerous times to request to take some carer's leave due to his family responsibilities. As his employer did not answer the phone, he left numerous messages. His employer did not return any of his calls and when he finally

got through to his employer 2 days later, he was angry with Peter for taking time off and dismissed him on the spot.

It should be noted that the EO Act Vic does not have a length of continuous service requirement in relation to the right to obtain flexible working arrangements.

Recommendation 4.

Alternatively, In order to reasonably extend the scope and effect of the Bill whilst also being consistent with the FW Act, JobWatch submits that casual employees employed by large employers, being employers with 15 or more employees, should have the benefit of the Bill after six months of regular and systematic service. This is consistent with the FW Act's unfair dismissal provisions whereby regular and systematic casuals engaged by large employers become protected against unfair dismissal after six months of regular and systematic service[3].

Similarly, permanent employees of large employers should also have the benefit of the Bill after 6 months continuous service. This is also consistent with the FW Act.

d) **Clauses 306D (4) & 306E (4):** Both these clauses state that the employer must give a written response to a request for flexible working arrangements within 21 days stating whether the employer grants or refuses the request.

JobWatch questions the need for employers to have 21 days to respond given that there is usually a sense of urgency attached to most requests for flexible working arrangements, for example, where there is an emergency or unexpected illness etc (see Jon's case study on page 5).

Recommendation 5.

JobWatch submits that the employer's written response should be provided within seven days so as to avoid unnecessary delays.

Additionally, in JobWatch's experience, many employers simply refuse to respond to a request for flexible working arrangements (see Jon's case study on page 5).

JobWatch is concerned that currently the Bill does not make it clear that an

[3] See FW Act section 384 (2).

employee can apply for a flexible working arrangements order at FWA where an employer has failed to provide a written response.

Recommendation 6.

JobWatch submits that a sub-clause (7) should be added to clauses 306D and 306E stating that where an employer fails to respond in writing to a request for flexible working arrangements under this division, the request will be deemed to have been refused by the employer.

This amendment will better clarify the circumstances in which an employee can apply to FWA for a flexible working arrangements order.

e) **Clauses 306D and 306E (5):** These clauses state the grounds upon which an employer may refuse a request for flexible working arrangements however there is a different test depending upon whether the employee making the request has responsibility for the care of another person or not.

Recommendation 7.

JobWatch submits that the "serious countervailing business grounds" test should be the only basis upon which a request for flexible working arrangements can be denied. The use of two tests, the other being the "reasonable business grounds" test, devalues one class of employees' right to seek flexible working arrangements (i.e. the class of employees without carer responsibilities) and will ultimately lead to confusing and divergent case law on the meaning of both tests.

Recommendation 8.

To that end, JobWatch submits that the Bill have included in it a note about what FWA should consider when dealing with a flexible working arrangements application. For example, under the EO Act Vic the following explanation is provided regarding flexible work requests under its section 19:

"In determining whether an employer unreasonably refuses to accommodate the responsibilities that an employee has as a parent or carer, all relevant facts and circumstances must be considered, including-

(a) the employee's circumstances, including the nature of his or her responsibilities as a parent or carer; and

(b) the nature of the employee's role; and

(c) the nature of the arrangements required to accommodate those responsibilities; and

(d) the financial circumstances of the employer; and

(e) the size and nature of the workplace and the employer's business; and

(f) the effect on the workplace and the employer's business of accommodating those responsibilities, including-

(i) the financial impact of doing so;

(ii) the number of persons who would benefit from or be disadvantaged by doing so;

(iii) the impact on efficiency and productivity and, if applicable, on customer service of doing so; and

(g) the consequences for the employer of making such accommodation; and

(h) the consequences for the employee of not making such accommodation."

f) Clause 306F: This clause provides FWA with the power to make flexible working arrangements orders. In relation to this clause, JobWatch recommends the following:

i) Time limit for filing

There should be a time limit for filing a flexible working arrangements application at FWA so as to provide certainty and finality for both parties.

Currently, under this clause, it appears as though an employee can file their application any time after their request has been refused by their employer. Clearly it would be ridiculous if an employee could file their application months or even years after their request has been refused.

Recommendation 9.

JobWatch submits that that a sub-clause (3) should be added to clause 306F stating as follows:

*"A flexible working arrangements application must be made within **14***

days *of the date that the employee or the employee organisation (as the case requires) receives the employer's written response or, if no response is received, within 14 days of the date that the response should have been received in accordance with division 2 of this part".*

As it is often the case that there is a sense of urgency regarding requests for flexible working arrangements, a two week timeframe for filing an application at FWA seems appropriate. This timeframe is also consistent with the current time limit for filing an unfair dismissal claim under the FW Act.

Additionally, there does not seem to be any need for FWA to be empowered to accept an application out of time as an employee who misses the 14 day time limit can simply restart the process from step one.

Recommendation 10.

ii) Lawyers and paid agents

The clause should confirm, possibly by way of a note, that applicants and respondents may be represented by a lawyer or paid agent in accordance with section 596 of the FW Act.

g) Revoking or varying an order

In JobWatch's experience, it is not uncommon for an employee who has successfully negotiated flexible working arrangements with their employer to, after a period of time, want to revert to their previous hours. For example, consider the case of a working mother who negotiated to convert from full-time to part-time work when she returned from maternity leave but who now wants to return to full-time work because her child has started school or is otherwise in full-time care. Another example would be where an employee works part-time so as to care for an elderly family member who subsequently dies.

Sadly, it is also not uncommon for employers to deny such a request on the basis that they already gave the employee what they wanted and they are under no obligation, legal or otherwise, to allow the employee to revert to their previous hours.

Case study – employer refusal to allow employee to increase hours

Sally converted from permanent full-time to permanent part-time after returning from maternity leave. She always intended to revert to full-time in the future but never made this clear to her employer at the time. Now Sally's employer won't let her return to full-time hours on the basis that she never told them that that was what she wanted.

Recommendation 11.

For this reason, JobWatch submits that there should be included in the Bill a mechanism by which FWA can, on application by the employee or employee organisation, vary or revoke a flexible working arrangements order.

This is also required to protect unrepresented applicants who may not consider asking FWA to make the order for a limited period of time such that the employee automatically reverts to their previous hours at the expiry of the flexible working arrangements order.

h) Period of order

Recommendation 12.

To this end, JobWatch submits that an additional clause should be added to the Bill that sets a maximum period for all flexible working arrangements orders after which time an order will automatically lapse unless an application is made by the employee, prior to the order lapsing, to have the order renewed or varied.

Recommendation 13.

JobWatch submits that the period of any flexible working arrangements order should not be longer than two years.

5 Unintended consequences

JobWatch is concerned that employees who apply for flexible working arrangements orders seeking to reduce their hours of work may inadvertently negatively effect their employment entitlements.

For example, an employee who converts from full-time to part-time will accrue less annual leave and personal leave and, if their position is made redundant or they take or are paid out long service leave, they will most likely be paid out in accordance with their part-time hours.

Case study – unintended consequences of converting to part-time

Miguel has worked as a stacker for a large supermarket for 11 years. For the last two years he has worked on a permanent part-time basis. Prior to that he was full-time. Miguel asked his employer about taking his long service leave and he was told by his employer that his long service leave would be based on his current hours. Miguel did not think about this when he converted to part-time hours.

Recommendation 13.

Ideally, a clause should be added to the Bill stating that during the life of a flexible working arrangements order all of the employee's other conditions and entitlements remain unchanged and continue to accrue as though a flexible working arrangements order was not in force.

This would mean, for example, that an employee whose position was made redundant whilst a flexible working arrangements order was in force allowing the employee to work part-time rather than full-time, would be paid redundancy pay calculated on the employee's full-time hours.

Recommendation 14.

Alternatively, as a minimum, there should be information and services available to advise employees regarding potential unintended consequences of obtaining a flexible working arrangements order from FWA[4].

JobWatch would welcome the opportunity to discuss any aspect of this submission further.

Yours sincerely,

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Job Watch Inc

[4] JobWatch is well placed to advise and assist employees regarding applying for flexible working arrangements orders.