Submission to the Senate Standing Committee on Education, Employment and Workplace Relations Inquiry into the Fair Work Bill 2008.

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1. List of recommendations

Maximum Weekly Hours

1. That employees should not be required to work any additional hours whatsoever, except where there is genuine agreement.

2. That clause 62(3) of the Bill should be amended to include the consideration employee's contractual hours when determining whether additional hours are reasonable or unreasonable.

3. That the Office of Fair Work Ombudsman have a section that can respond quickly to complaints about employer requests to work unreasonable additional hours as this minimum entitlement will otherwise go unenforced.

4. That any averaging of hours of work should not exceed a 2 week period or an employee's regular pay period where that period exceeds 2 weeks.

Requests for flexible working arrangements

5. That the right to request flexible working arrangements be extended to include parents and carers of primary school age children given that, for example, the ordinary primary school day ends at 3:30pm.

6. That clause 65 of the Bill mirror the flexible working arrangements provisions for parents and carers in the Equal Opportunity Act 1995 (Vic) which provide that the employer must not unreasonably refuse to accommodate a request for flexible working arrangements.

7. That FWA have the power to, on the request of an employee, review a decision of an employer to refuse a request for flexible working arrangements and make orders binding on an employer.

8. That any request for flexible working arrangements made in accordance with clause 65 that is not responded to by an employer in accordance with clause 65(4) be taken to have been accepted by that employer.

9. That what constitutes "reasonable business grounds" should be clearly defined or at least it should be made clear that "reasonable business grounds" does not include anything in the way of or related to the concept of "managerial prerogative" and must relate to some kind of objective necessity or requirement directly related to an employer's business.

10. That it be made clear in clause 65 that the parent or carer making the request need not be the child's primary carer as it is sufficient if the child is in any way dependant on the employee making the request.

Parental leave and related entitlements

11. That there be an entitlement to a period of paid parental leave and that any parental leave (paid or unpaid) count as service for the purpose of calculating the accrual of entitlements such as annual leave, personal leave and long service leave

12. That employees be given an automatic right to the following:
    a. an increase in simultaneous parental leave of up to eight weeks at the time of the birth or adoption of a child; and
    b. the automatic right to return to work on a part-time basis after a period of parental leave until the child reaches school age.

13. That, prior to commencing employment, parental leave replacement employees must be informed that they are a temporary replacement for a person who is on parental leave and the date upon which the employment will end.

14. That an employee who has taken less than 12 months parental leave have an automatic right, not subject to "reasonable business grounds", to extend that parental leave to at least 12 months.

15. That the onus be placed on the employer to notify a pregnant employee or their employee partner of the notice and evidence requirements regarding parental leave.

16. That clause 74(7) of the Bill state that an employer cannot rely on the failure of an employee to comply with this section in order to deny the employee the right to take unpaid parental leave or to return to their pre parental leave position after the parental leave ends if the employer knew the employee or employee couple intended to take unpaid parental leave but the employer did not require or seek the employee's compliance with this section.

Annual leave

17. That all authorised leave/absences, whether paid or unpaid, should count as service for the purpose of calculating and accruing entitlements.

18. That it should be made clear in the NES that, once an employee's annual leave application has been approved by the employer, it cannot under any circumstances be later revoked.

19. That employees be entitled to take double the amount of accrued annual leave at half pay so that recreation leave can be maximised at no additional expense to the employer.

20. That a new clause be added to this Division stating that "where an employee has been directed to take paid annual leave because the employer's enterprise is being shut down for a period and the employee has not accrued enough annual leave to cover the shutdown period, the employee is entitled to be paid their base rate of pay for their ordinary hours of work for the whole or part of the shutdown period that is not taken as paid annual leave".

21. That provision be made in the Bill to allow commission only employees to access paid annual leave.

22. That it be made clearly unlawful for employers to prepay annual leave and personal leave.

Personal leave/carers leave and compassionate leave

23. That there should be no ability to cash out personal leave under modern awards.

24. That employees be entitled to elect to take personal leave at half pay so as to double the amount of available personal leave.

25. That it should be made clear in the NES that leave such as annual leave and personal leave cannot be prepaid.

26. That there be introduced into the NES, in addition to personal leave, carer's leave and compassionate leave, a right to take a further 2 days per year of personal leave for an unspecified reason.

Long service leave

27. That an award employee should be entitled to the more beneficial long service leave entitlement if, but for the award, they would have been entitled to more generous long service leave under a State Act.

28. That the long service leave NES allow for employees to take their long service leave at half pay thereby doubling the amount of available leave.

29. That all types of authorised leave, whether paid or unpaid, count as service for the purpose of accruing and calculating entitlements such as long service leave.

30. That an averaging provision be added to the long service leave Division or modern awards so that older workers and parents (mainly women) who have to convert from full-time to part-time are not systemically discriminated against when calculating their long service leave entitlements.

Public holidays

31. That the OFWO be given the capacity to obtain pre-emptive injunctions to prevent breaches of the NES so as to properly enforce the minimum safety net that is the NES.

32. That employees be entitled to two tradeable "cultural leave" days per year.

Notice of termination and redundancy pay

33. That all employees regardless of the size of the business they work for be entitled to redundancy pay.

34. That long term casual employees should also be entitled to redundancy pay.

35. That apprentices be entitled to redundancy pay.

36. That, in addition to notice of termination in writing, employers should also have to provide written reasons for dismissing an employee at the time of the dismissal.

37. That the minimum notice of termination requirements be increased for employees with more than 5 years of service.

Individual flexibility arrangements

38. That any allowance for individual flexibility arrangements be removed from the Bill.

Unfair dismissal

39. That FWA hold a workplace conciliation conference prior to a dismissal taking place. and issue a workplace conciliation certificate.

40. That FWA issue a workplace conciliation certificate.

41. That the time for filing of unfair dismissal claims be extended to 3 months from the date that the dismissal takes effect.

42. That there not be a mandatory minimum employment period for unfair dismissal protection but that a new employee may be placed on probation for a maximum of three months so long as they are informed of the probationary period in writing prior to the commencement of the employment and that, during the probation, they can be dismissed without notice and do not have protection from unfair dismissal.

43. That all forms of authorised leave, whether paid or unpaid, count as service for the purpose of calculating an employee's period of employment.

44. That certain amendments be made to the Bill to give employees improved rights in relation to the Small Business Fair Dismissal Code.

45. That any reference to a police report by an employer being sufficient evidence of serious misconduct be removed from the Small Business Fair Dismissal Code.

46. That in addition to the definition of "associated entities" that there also be included a reference to franchise arrangements and where there are common directors for the purposes of calculating an employer's number of employees.

General protections – workplace rights

47. That the meaning of "workplace right" under clause 341 include where a person erroneously but reasonably believed they had the relevant workplace right.

48. That employees should have workplace rights in relation to all laws, processes and proceedings relating to their employment e.g. superannuation, occupational health and safety etc. so long as the complaint (whether made directly to the employer or to an external body) or legal proceedings is against their employer.

49. That there be an obligation on employers to make reasonable adjustments to accommodate an employee or prospective employee's e.g. disability, family/carer

responsibilities etc. before being entitled to rely on the inherent requirements exception to adverse action discrimination.

50. That an employee need not provide a medical certificate to obtain the benefit of the temporary absence due to illness or injury protection.

51. That the length of any temporary absence may be extended where the employee is on authorised leave, whether paid or unpaid.

52. That there be a further discrimination ground of actual or presumed irrelevant criminal record.

53. That the discrimination grounds under clause 351 of the Bill be extended to include presumed or imputed grounds and also be extended to cover people with a personal association with a person with a discrimination ground.

54. That a subclause be added to clause 60 stating words to the effect that the outcome, symptom or a person's response to the discrimination grounds listed in clause 351 are taken to be one and the same as the discrimination ground.

55. That FWA be empowered to issue a fine or a penalty against a respondent for refusing to attend a scheduled conciliation.

Miscellaneous recommendations

56. That all Victorian employers and employees be defined as national system employers and employees.

57. That FWA advise all employees on AWAs and ITEAs of their right to unilaterally terminate their individual agreements after the agreement's nominal expiry date.

58. That all AWAs and ITEAs automatically terminate on a certain date e.g. 1 January 2011 regardless of their nominal expiry date.

59. That all Community Legal Centre lawyers be exempted from the requirement to obtain leave to appear before FWA.

2. Introduction

Job Watch Inc (**JobWatch**) welcomes the opportunity to provide a submission to the Senate Standing Committee on Education, Employment and Workplace Relations Inquiry into the Fair Work Bill 2008 (**the Bill)**.

JobWatch strongly supports the inquiry and congratulates the federal Government for implementing a new and fairer workplace relations system. Through this submission, JobWatch will comment on the following general areas contained in the Bill:

- The safety net (NES & modern awards);
- Maximum weekly hours;
- Requests for flexible working arrangements;
- Parental leave and related entitlements;
- Personal/carer's leave and compassionate leave;
- Long service leave;
- Public holidays;
- Notice of termination and redundancy pay;
- Individual flexibility agreements;
- Unfair dismissal;
- General protections; and
- Miscellaneous provisions.

The case studies provided in this submission are those of actual but de-identified JobWatch clients or callers to JobWatch's telephone information service.

2.1 About JobWatch

JobWatch is an employment rights community legal centre which, since 1980, has operated as the only service of its type in Victoria. The centre is funded primarily by the Victorian State Government's Department of Innovation, Industry and Regional Development.

JobWatch's core activities include:

- The provision of assistance by way of information and referral to Victorian workers via a free and confidential telephone information service which received 22,022 calls in the 2007/2008 financial year;
- A community education program that includes publications, information via the internet and seminars aimed at workers, students, lawyers, community groups and other organisations;
- A legal casework service provided by JobWatch's legal practice for disadvantaged workers; and
- Research and policy work on employment and industrial law issues.

JobWatch maintains a database record of our callers, which assists us to identify key characteristics of our callers and trends in workplace relations.

Our records indicate that our callers have the following characteristics:

- The majority are not covered by collective agreements and are only entitled to the minimum conditions under federal common rule awards or the minimum Standard under the *Workplace Relations Act 1996* (Cth) (**WR Act**);
- A significant proportion do not know what industrial instrument provides the terms and conditions of their employment;
- A large proportion are employed in businesses with less than 100 employees, a significant proportion of which have less than 20 employees;
- The vast majority are not union members;
- A significant number are engaged in precarious employment arrangements such as casual and part-time employment or independent contracting;
- Many are in disadvantaged bargaining positions because of their youth, sex, racial or ethnic origin, pregnancy status, socio-economic status or because of the potential for exploitation due to the nature of the employment arrangement, for example apprenticeships and traineeships; and
- Many are job seekers attempting to return to the labour market after long or intermittent periods of unemployment.

Additionally, JobWatch's legal practice has extensive experience in litigating breaches of the WR Act and industrial instruments. In 2006/2007, JobWatch's legal practice acted for 238 clients in employment law matters and made 47 court or tribunal appearances, predominately in the AIRC and the Federal Courts.

3. Statistical Analysis

Our records also indicate that last financial year JobWatch received the following number of enquiries about matters to be covered by the National Employment Standards (**NES**) and other provisions of the Bill:

Enquiry type	*Number of calls*	*% of total enquiries*
• Abandoned Employment	– 39 –	0.18%;
• AFPC Standard	– 30 –	0.13%;
• AWAs	– 165 –	0.74%;
• Collective Agreement	– 83 –	0.37%;
• Constructive Dismissal	– 333 –	1.49%;
• Discrimination – parental and carer status, and family responsibilities	– 255 –	1.15%;
• Freedom of Association	– 73 –	0.33%;
• Hours of work including overtime	– 214 –	4.04%;

- ITEA – 4 – 0.02%;
- Leave[1] – 787 – 3.53%;
- Long Service Leave – 390 – 1.75%;
- Maternity – 287 – 1.29%;
- Meal Breaks – 56 – 0.25%;
- Notice of Termination – 1,396 – 6.27%;
- Payslips failure to provide – 111 – 0.50%;
- Redundancy – 1113 – 4.99%;
- Resignation – 689 – 3.09%;
- Stand down – 155 – 0.70%;
- Termination Other – 1,828 – 8.20%;
- Transmission of Business – 156 – 0.70%;
- Unfair Dismissal – 1135 – 5.09%;
- Unlawful Dismissal – 1,582 – 7.19%; and
- Wages including non payment and underpayment – 1832 – 8.22%.

As the above indicates, we have a particular interest in and expertise regarding the working conditions of disadvantaged workers.

4. The minimum safety net – Chapter 2 – Part 2-2 – The National Employment Standards (NES).

JobWatch congratulates the federal Government for increasing the minimum safety net from the 5 entitlements in the current AFPCS to ten entitlements in the proposed NES. This submission will examine each of the Standards separately (excluding community service leave).

4.1 Preliminary issues

JobWatch is concerned that many employees will be excluded from the modern award system including employees in industries not traditionally covered by awards, such as the Information Technology industry, employees in emerging industries and employees earning over the $100,000 threshold for award protection. These employees are additional to those not traditionally covered by awards such as senior and managerial employees. The proposed NES and modern award system unfortunately still seems to intend to treat these employees differently and not give them the full benefit of a minimum safety net.

[1] This includes personal, annual and compassionate leave.

It is JobWatch's opinion that:

- Award coverage should be maximal so that all employees have a similar interest in maintaining a safety net. This will help ensure the award system maintains a broad base of community support and is stable and durable.
- Excluding workers earning in excess of $100,000 may contribute to disinterest in or opposition to the award system from higher income earners which will act to further entrench two categories of workers – award and non-award employees. This may prevent workplaces from moving beyond an adversarial culture to one of co-operation and collectivism.
- Awards ought to cover managerial staff and those earning in excess of $100,000. There are strong public interest reasons for ensuring all workers receive adequate rest, recuperation and family-friendly protections independently of their salary. It is against the public interest to allow the rights of higher income earners to rest, recuperation and family friendly arrangements to diminish. It is erroneous to assume that such staff are always in a strong bargaining position and able to negotiate such entitlements without these protections. For example, should the 21 year old manager of a fast food chain store be excluded from the relevant award due to the seniority of his or her role?
- Likewise, the NES should apply equally as a minimum safety net for all employees including managerial and high income employees such as shift workers earning in excess of $100,000. This is especially so considering that it is envisaged that modern awards will allow "annualised wage arrangements" pursuant to clause 139(1) (f) of the Bill.
- There should be a capacity to make new awards for industries not currently covered and for future industries. Many employees in the Information Technology industry, for example, are low paid recent TAFE graduates from culturally and linguistically diverse backgrounds and, as such, should not be excluded from award protection.
- Alternatively, there should be a "catch-all" award for employees in emerging industries who are not specifically covered by a designated award.
- If there is not a "catch all" award, there should also be a minimum wage in the NES otherwise employees not covered by an award due to the seniority of their role or because they work in an emerging industry will not have the protection of a minimum wage. It is erroneous to assume that every one of these workers will be able to negotiate a proper or sufficient wage with their employer.
- If an income threshold is going to be kept such that employees earning in excess of that amount do not receive award conditions and are not protected against unfair dismissal, then the proposed threshold of $100,000 should be reconsidered. Many employees covered by awards would already be earning close to $100,000, if not more, especially in the mining industry. The threshold should therefore be:
  a) increased to at least $150,000;
  b) indexed annually in accordance with wage growth figures; and

c) calculated on the basis of an employees ordinary time earnings and not all income including e.g. commissions, penalties, overtime and superannuation.

JobWatch understands that some of these matters have been dealt with by the Bill and the award modernisation process, but nevertheless JobWatch believes they bear repeating.

Additionally, JobWatch is concerned that, all too often, minimum standards such as the AFPCS (excluding the minimum wage provisions), are not enforced by the Workplace Ombudsman or Trade Unions and aggrieved individuals are often without the requisite resources to properly enforce their rights. In order for the 10 National Employment Standards to truly be a set of minimum conditions of employment, they need to be properly policed including, where necessary, pre-emptive action by the Office of the Fair Work Ombudsman (**OFWO**) in obtaining orders for injunctions to prevent breaches as well as responding to complaints in a timely fashion in order to preserve the employment relationship.

It is JobWatch's view that, a minimum entitlement that is not enforced is not a minimum entitlement at all.

4.2 Maximum weekly hours

4.2.1 JobWatch is concerned that, save for the reduction of the ability for employers to average hours of work from over a 12 month period to a 6 month period, the substance of Division 3 remains essentially the same as the WorkChoices – Maximum ordinary hours of work provision. This means an employer can still require an employee to work additional hours.

Regardless of the fact that an employee can in theory refuse to work the additional hours where the hours are unreasonable, in practice this is not the case. Employees feel compelled to work additional unreasonable hours due to the inherent power imbalance in the employer/employee relationship, especially where an employee does not have access to unfair dismissal.

Case study – forced additional hours

Karen is a Beauty Therapist who has, for the past 6mths, been working 45-55 hours per week, even though she was initially employed to work 38 hours per week. Recently her health has been suffering. At the start of each week Karen's employer says she can have Friday off but won't let her when it comes to the crunch.

4.2.2 The right of an employer to require employees to work additional hours also does not sit well with the employee's common law contract of employment which cannot, at law, be unilaterally varied. On this view, if an employee has a common law contract of employment in which it is agreed that she will work 38 hours per week, the employee does not have to work beyond those hours unless by agreement with the employer, such agreement taking place

by way of a temporary variation to the employment contract. The same applies for a permanent part-time or a casual employee.

<u>Recommendation 1</u>: that employees should not be required to work any additional hours whatsoever, except where there is genuine agreement.

In order to protect employees' contractual rights and work/life balance, JobWatch submits that employees should not be required to work any additional hours whatsoever, except by genuine agreement with an employer. Employers should have the right to request additional hours, but the obligation should not be on the employee to have to work those hours unless they have a sufficient reason not to as is currently set out in clause 62 of the Bill.

Alternatively, as a minimum, JobWatch also submits that clause 62(3) of the Bill should be amended to include the consideration of an employee's contractual hours when determining whether additional hours are reasonable or unreasonable.

<u>Recommendation 2</u>: That clause 62(3) of the Bill be amended to include the consideration of an employee's contractual hours when determining whether additional hours are reasonable or unreasonable.

4.2.3 Regardless, the factors to be taken into account in assessing whether any additional hours are reasonable are, by their very nature, unworkable in practice. This is due to the ad hoc nature of overtime/additional hours requests and the lack of any instant adjudication as to whether the requirement to work the additional hours is reasonable. In practice, the employee either agrees to work the additional hours to the detriment of her work/life balance or refuses at the risk of suffering the usual consequences such as termination, loss of hours or non-promotion.

Case study- refusal to work additional hours

Lyn was already working 50 hours per week when her boss asked her if she could work more hours. When Lyn said that she could not, her employment was terminated.

We are not aware of any cases since WorkChoices where the Workplace Ombudsman, a Union or an individual employee has commenced proceedings against an employer for breach of the Standard for requiring an employee to work unreasonable additional hours.

<u>Recommendation 3</u>: That the Office of Fair Work Ombudsman have a section that can respond quickly to complaints about employer requests to work unreasonable additional hours as this minimum entitlement will otherwise go unenforced.

JobWatch is also concerned that the ability to average hours of work over 6 months, instead 12 months under WorkChoices, is still too excessive and open to abuse by unscrupulous employers.

Case study – difficulties with averaging hours

Ron has been working as an assistant farm manager for a dairy farm for nearly 6 months. He is employed on a permanent full time basis and his terms and conditions are covered by an AWA. Under his AWA he is contracted to work 60.5 hours a week and if he works less hours during the week he has to make up those hours and if he works more than those hours he has to take time off. There has been a quiet period on the farm for some time so staff have not been working their contracted hours. Ron is worried that they will be working 16 plus hours a day, 7 days a week during the busy period to make up the 60.5 hour requirement. The AWA is silent on the maximum hours in a row an employee can work.

***Recommendation 4*: That any averaging of hours of work should not exceed a 2 week period or an employee's regular pay period where that period exceeds 2 weeks.**

4.3 Requests for flexible working arrangements

4.3.1. JobWatch congratulates the federal Government for including in the NES a right for certain workers to request flexible working arrangements where they are a parent of or have a responsibility for the care of a child under school age.

Nevertheless, JobWatch has the following concerns regarding clause 65 of the Bill:

- In only applying where the child being cared for is under school age, the right to request flexible working arrangements is too limited.

  ***Recommendation 5:* that the right to request flexible working arrangements be extended to include parents and carers of primary school age children given that, for example, the ordinary primary school day ends at 3:30pm.**

- The ability of an employer to refuse a request on "reasonable business grounds" and the lack of a right to have an independent third party (e.g. OFWO or Fair Work Australia (**FWA**)) review the employer's decision means that, in practice, an employer need not genuinely consider such a request or can make a decision based on subjective reasons. This will

render the right to request flexible working arrangements in the NES effectively meaningless.

Case study- refusal of flexible work arrangements

Katie works on a casual full time basis as a console operator at a service station. She is a single parent and her child is in day care when she is at work. Katie's child care provided is closed over the Christmas period and as a result she is not able to work because she has to look after her son. The employer has told Katie that if she isn't available over the Christmas period she is no use to him and she won't be getting offered shifts in the future.

4.3.2. Pursuant to the *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic) ("EO Amendment Act"), from September 2008 an employer must accommodate an employee's reasonable request for flexible working arrangements due to the employee's family responsibilities unless it is unreasonable for the employer to do so.

JobWatch acknowledges that clause 66 of the Bill states that State and Territory laws are not excluded but submits that clause 65 should mirror this legislation which provides an actionable right to the employee (not just a right to request) and places the onus on the employer to accommodate the request. The EO Amendment Act states as follows:

*"**14A Employers must accommodate employee's responsibilities as parent or carer***

(1) An employer must not, in relation to the work arrangements of an employee, unreasonably refuse to accommodate the responsibilities that the employee has as a parent or carer.

(2) 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 roles; 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 workplaces 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"*

***Recommendation 6*: That clause 65 of the Bill mirror the flexible working arrangements provisions for parents and carers in the Equal Opportunity Act 1995 (Vic) which provide that the employer must not unreasonably refuse to accommodate a request for flexible working arrangements.**

4.3.3 Alternatively, where a request for flexible working arrangements is rejected by an employer, there should at least be a right to have the decision reviewed by (**FWA**) with it having the power to make binding orders where a flexible working arrangements request has been denied for reasons other than reasonable business grounds.

***Recommendation 7*: That FWA have the power to, on the request of an employee, review a decision of an employer to refuse a request for flexible working arrangements and make orders binding on an employer.**

4.3.4 Additionally, where a flexible working arrangements request has been made but the employer fails to respond within the 21 day time frame in accordance with clause 65(4) (which in our experience is likely to happen all too often), the request should be taken to have been accepted by the employer. If the employer wishes to dispute its ability to accommodate the request on "reasonable business grounds", then it could apply to FWA for a determination.

***Recommendation 8*: That any request for flexible working arrangements made in accordance with clause 65 that is not responded to by an employer in accordance with clause 65(4) be taken to have been accepted by that employer.**

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 for a medium sized company. When he originally went 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. He can't do this as he has custody of his children every second weekend. Jon and the other employees have asked the employer to explain why the change to every weekend but they have not been given a reply.

<u>Recommendation 9</u>: That what constitutes "reasonable business grounds" should be clearly defined or at least it should be made clear that "reasonable business grounds" does not include anything in the way of or related to the concept of "managerial prerogative" and must relate to some kind of objective necessity or requirement directly related to an employer's business.

<u>Recommendation 10</u>: That it be made clear in clause 65 of that the parent or carer making the request need not be the child's primary carer as it is sufficient if the child is in any way dependant on the employee making the request.

4.4 Parental leave and related entitlements

4.4.1 JobWatch congratulates the Government on its move to provide, in certain circumstances, both parents with up to 12 months parental leave or up to 2 years for the one parent and to create obligations to consult about workplace change during parental leave.

Job Watch is also in favour of a statutory entitlement to a period of paid parental leave.

Any such period of parental leave (paid or unpaid) should count as service.

<u>Recommendation 11:</u> That there be an entitlement to a period of paid parental leave and that any parental leave (paid or unpaid) count as service for the purpose of calculating the accrual of entitlements such as annual leave, personal leave and long service leave.

4.4.2 However, in the absence of such provision being made, we would at least call for the inclusion in Division 5 of the recently recognised "rights of request", as stipulated by the Full Bench of the Industrial Relations Commission in the *Family Provisions Test Case 2005,* as automatic rights with limited exceptions.

<u>Recommendation 12</u>: that employees be given an automatic right to the following:

- ***an increase in simultaneous parental leave of up to eight weeks at the time of the birth or adoption of a child; and***
- ***the automatic right to return to work on a part-time basis after a period of parental leave until the child reaches school age.***

Employers should not be permitted to refuse requests for part-time work after parental leave unless they have reasonable and objective grounds for the refusal such as the considerations set out in the EO Amendment Act (see above).

Additionally, an employer should be obligated to inform any parental leave replacement employee that they are being employed on a temporary basis as a parental leave replacement employee. Currently, there is nothing in the Bill about replacement employees although there is under the current WR Act.

Case study – maternity leave replacement employee

Kerrie applied for and got a job as a full time pharmacy assistant. The job was advertised as a fixed term position but at the interview she was told that it would be ongoing. Kerrie has now received a copy of the employment contract and in one part of the contract it states that the position is a maternity replacement while in another part it states it is an ongoing position. She is uncertain where she stands.

Recommendation 13: ***that, prior to commencing employment, parental leave replacement employees must be informed that they are a temporary replacement for a person who is on parental leave and the date upon which the employment will end.***

4.4.3 JobWatch is also concerned that under clause 76(4) of the Bill an employer has the right to refuse an extension of parental leave request on "reasonable business grounds" for the same reasons as outlined in relation to the right to request flexible working arrangements above being:

(a) no recourse to FWA/OFWO by employee where a request refused;
(b) employer not obligated to genuinely consider a request; and
(c) employer may base decision on subjective reasoning.

Currently under the WR Act, where an employee has taken less than 12 months parental leave, that employee has an automatic right to extend that parental leave up to the 12 month limit. Under the NES proposal, an employee who has taken less than the full amount of parental leave entitlement will only be able to increase the length of their parental leave subject to the vague notion of "reasonable business grounds" without recourse to an independent arbiter where that request is denied. This is a backward step compared to the WorkChoices amendments.

Recommendation 14: ***that an employee who has taken less than 12 months parental leave have an automatic right, not subject to "reasonable business grounds", to extend that parental leave to at least 12 months.***

4.4.4 JobWatch is concerned that the notice requirements for parental leave under the NES, although an improvement on WorkChoices, are still too onerous on the employee. JobWatch submits that the notice requirements for parental leave should mirror or incorporate Section 67 of the *Industrial Relations Act 1996 (NSW)* which states the following:

"67 Employer's obligations

(1) Information to employees on becoming aware that an employee (or an employee's spouse is pregnant, or that an employee is adopting a child, an employer must inform the employee of:

a. the employee's entitlements to parental leave under this Part, and

b. the employee's obligations to notify the employer of any matter under this Part.

An employer cannot rely on an employee's failure to give a notice or other document required by this Part unless the employer establishes that this subsection has been complied with in relation to the employee."

This change would place the onus on the employer to make sure an employee is at least aware of the notice and evidence requirements regarding parental leave.

***Recommendation 15:* that the onus be placed on the employer to notify a pregnant employee or their employee partner of the notice and evidence requirements regarding parental leave.**

Case study – problem of onus being on employee

Susan had a verbal agreement with her employer regarding maternity leave. However, in her fourth month of leave she was contacted by her employer stating that the leave had not been finalised in writing and therefore she is not actually on maternity leave. The employer said that because of this she had abandoned her employment.

Alternatively, clause 74(7) of the Bill which states that "an employee is not entitled to take unpaid parental leave…unless the employee complies with this section" (being the notice and evidence requirements section) be amended in accordance with the following recommendation:

***Recommendation 16*: That clause 74(7) state that an employer cannot rely on the failure of an employee to comply with this section in order to deny the employee the right to take unpaid parental leave or to return to their pre parental leave position after the parental leave ends if the employer knew the employee or employee couple intended to take unpaid parental leave but the employer did not require or seek the employee's compliance with this section.**

It is JobWatch's experience that an extremely large proportion of employees on parental leave have only entered into informal parental leave arrangements with their employer, especially where the employer's business may be characterised as a small to medium enterprise. Anecdotal evidence suggests that this figure would be well in excess of 50% of employees on parental leave that call JobWatch.

If the above recommendations are not made, the current wording of clause 74(7) would allow many employers to simply refuse to allow employees who are on authorised but informal parental leave to return to their pre parental leave position which effectively undermines and weakens the whole of the parental leave entitlements division of the Bill. This is especially so where there is no obligation on the employer to inform a parental leave replacement employee that they are only employed on a temporary basis.

Case studies – informal maternity leave

Meredith had been employed full time as a Manager at a small florist for over 6 years; she is a friend of the owner of the business. Employment arrangements at the workplace are fairly informal – for instance there are no written contracts and everything is agreed to verbally. Meredith is currently on maternity leave and before she went on leave she informed the owner that she would like to return to work on a part time basis when her leave expired. She is due to return from maternity leave in a couple of months time and she contacted her employer who has now informed her that there may not be any work for her at all (an apprentice has been hired in a full time role in her absence and a lady was employed on a casual basis when Meredith went on maternity leave).

Kathryn worked for a couple years as a casual full time kitchen hand before she went on maternity leave. Upon commencing maternity leave she was verbally promised her job back and while on leave she contacted her employer about the date she wanted to return to work. Kathryn was told by her employer when she contacted them that there were no vacancies and she would have to wait until there was a vacancy. She is aware that the employer has taken on 2 new staff since then.

JobWatch calls on the federal Government to make these changes to the parental leave division of the Bill.

4.5 Annual leave

4.5.1 JobWatch congratulates the Government on its proposal to introduce a progressive rate of accrual for annual leave under the NES meaning that

employees will no longer have to wait to the end of a particular period (e.g. 12 months) to be entitled to paid annual leave.

Nevertheless, JobWatch has the following concerns and recommendations regarding this Division:

(a) Under clause 22 of the Bill, unpaid authorised leave or an authorised absence does not to count as service for the purposes of annual leave accrual.

Under WorkChoices (except in relation to parental leave), all authorised absences count as service for the purpose of calculating and accruing entitlements. The Government's proposal, in this respect, is retrograde and will leave employees worse off than under WorkChoices.

***Recommendation 17:* that all authorised leave/absences, whether paid or unpaid, should count as service for the purpose of calculating and accruing entitlements.**

(b) Under clause 88(2) of the Bill an employer is not to unreasonably refuse to agree to an employee's request to take paid annual leave.

In JobWatch's experience, it is all too common that an employee's request to take annual leave is unreasonably refused by the employer, including where an already approved request for annual leave is revoked shortly before the annual leave is to commence.

Case studies – employer revoking annual leave approval

Jim requested 24 working days off to attend a wedding overseas. After a verbal approval, Jim booked flights and accommodation etc Nevertheless, the leave was then rejected. The employer said that Jim would have to resign if he wanted to take the leave.

Brad is an apprentice who had applied for annual leave 8 months previously. Upon the leave being approved, Brad made plans and booked flights etc. The employer then revoked the approved leave.

***Recommendation 18*: that it should be made clear in the NES that, once an employee's annual leave application has been approved by the employer, it cannot under any circumstances be later revoked.**

JobWatch also submits that complaints about breaches of clause 88(2) of the Bill should be promptly investigated by the OFWO and that, if necessary, injunctions should be obtained preventing any continued breach.

<u>Recommendation 19</u>: that employees be entitled to take double the amount of accrued annual leave at half pay so that recreation leave can be maximised at no additional expense to the employer.

4.5.2 Each year around December and January, JobWatch receives a large number of calls from employees whose employer has shutdown their business for the holidays and directed their employees to take annual leave in circumstances where the caller has not accrued enough annual leave to cover the shutdown period. In most cases, the employee has little option but to go without pay for the whole or part of the shutdown period.

Case study – no annual leave during Christmas shutdown

Daisy worked as a retail analysis for a small retail company and she commenced her job a couple of months before Christmas. Over the Xmas/New Year period the company shut down for 2 weeks and Daisy was forced to take annual leave over that period. Daisy only had 2 days annual leave accrued and she was only paid for those 2 days and for the rest of the period she did not receive any pay.

JobWatch submits that this situation leads to unjustified economic hardship for these employees, especially as it usually occurs at a time of year when money is often short.

<u>Recommendation 20:</u> that a new clause be added to this Division stating that "where an employee has been directed to take paid annual leave because the employer's enterprise is being shut down for a period and the employee has not accrued enough annual leave to cover the shutdown period, the employee is entitled to be paid their base rate of pay for their ordinary hours of work for the whole or part of the shutdown period that is not taken as paid annual leave".

JobWatch is also concerned that, as annual leave only accrues on an employee's base rate of pay for ordinary time earnings excluding commissions etc, employees doing commission only based work may not be entitled to any paid annual leave whatsoever. Obviously, this situation should be rectified in the Bill.

Case study – no accrual of annual leave for commission based work

Frank has been employed as a permanent full time real estate agent for over two years. He receives a retainer of $400 a week plus commission and his employer pays superannuation and tax on his behalf. When Frank initially started he was told that employees were not entitled to paid annual leave and his employer discouraged people from taking leave. However, last year employees were informed that they were entitled to 4 weeks annual leave but only at their retainer rate.

<u>Recommendation 21</u>: that provision be made in the Bill to allow commission only employees to access paid annual leave.

4.5.3 JobWatch submits that it should be made clear in the NES that annual leave (as well as personal leave) cannot be prepaid to the employee by way of a loading or by any other means whatsoever.

JobWatch has had a number of clients who have been paid a loading on top of the award base rate to prepay personal leave and sometimes also annual leave. The result is that when the employee takes annual leave or personal leave they do not receive any pay as it has allegedly been paid in advance. The problem is that our clients have not banked the loading and so have no money to pay their bills if they are off work for a period of time.

JobWatch believes employees must feel free to absent themselves from work when they are not well, not only for their own welfare, but to protect other workers from sickness. Workers and their families are left vulnerable during a difficult period if they cannot access paid leave – picture a single-income family where the breadwinner is off sick with appendicitis and then recovering from surgery for a fortnight – with no income.

It should be noted that prepayment of entitlements is different to "cashing out" entitlements as, where a prepayment has occurred, the employee is still entitled to take the accrued annual leave or personal leave, it is just that they will not be paid for the time off as the employer claims that the employee has been paid in advance.

Case study – pre-paid annual leave

James was employed under a collective agreement which paid him an additional loading on top of his award base rate as a pre payment for personal leave and annual leave. This meant that when James took annual leave or sick leave he was not paid any money by his employer because the employer claimed that it had prepaid these entitlements.

JobWatch is of the view that there is a community standard to be protected in ensuring that there is a sufficient degree of paid time available to workers to attend to family and personal needs and enjoy recreational pursuits – and that that payment needs to be made at the time of the leave (not as a prepaid loading each week, so that the leave is effectively unpaid). Currently it is our experience that the Workplace Authority and the Workplace Ombudsman believe that there is nothing in the current legislation to prevent leave being prepaid. This means that sick workers, who have received a loading to include all leave, need to attend work or they will not receive any wages to pay their bills for that period of absence.

The quality of worker's lives will be better protected by entrenching "paid leave at the time it is taken" as an untradeable minima and a fundamental national employment standard.

***Recommendation 22*: that it be made clearly unlawful in Division 6 and 7 for employers to prepay annual leave and personal leave.**

4.6 Personal leave/carers leave and compassionate leave

4.6.1 JobWatch is concerned that the federal Government has maintained the WorkChoices position of allowing employees to cash out personal leave, pursuant to a modern award, so long as the employee remains entitled to a minimum 15 days accrued personal leave.

JobWatch is opposed to any cashing out provisions for personal leave in the NES or modern awards. If these provisions are going to remain, JobWatch submits that an employee should not be entitled to cash out accrued personal leave unless the balance of accrued personal leave remaining available to them will be sufficiently higher or unless the employee has the ability to take personal leave at half pay thereby doubling the amount of available personal leave.

***Recommendation 23*: that there should be no ability to cash out personal leave under modern awards.**

4.6.2 JobWatch is concerned that currently under section 659 2(a) of the WR Act and the relevant regulations, an employee may be lawfully terminated if they have been absent from work due to illness or injury for more than 3 months in a 12 month period. The exception is where the employee has been on paid personal/sick leave for the duration of the period. Unfortunately it is rare that an employee will have enough accrued personal/sick leave to cover such a long period.

For this reason, JobWatch submits that employees should be entitled to elect to take their personal leave at half pay thereby doubling the amount of personal leave time available. This amendment would help protect the unlawful dismissal rights of employees with no additional cost to employers.

***Recommendation 24*: that employees be entitled to elect to take personal leave at half pay so as to double the amount of available personal leave.**

4.6.3 JobWatch submits that it should be made clear in the NES that leave such as annual leave and personal leave cannot be prepaid.

JobWatch has had a number of clients who have been paid a loading on top of the award base rate to prepay personal leave. The result is that when the employee takes personal leave they do not receive any pay as it has been

paid in advance. The problem is that our clients have not banked the loading and so have no money to pay their bills if they are off work for a period of time. JobWatch believes employees must feel free to absent themselves from work when they are not well, not only for their own welfare, but to protect other workers from sickness. Workers and their families are left vulnerable during a difficult period if they cannot access paid leave – picture a single-income family where the breadwinner is off sick with appendicitis and then recovering from surgery for a fortnight – with no income.

Case study – pre-paid personal leave

Ingrid, a full-time, permanent worker, signed an AWA that provided a base rate approximately 30 cents an hour above the award rate of pay. However the AWA base rate was said to also include the special industry allowance, annual leave loading and prepaid personal leave. Ingrid contacted JobWatch following a week's absence from work because of illness - because the employer told her that she would not receive any pay if she was off work sick. When Ingrid complained that she needed her week's wages to pay her rent and buy food, the employer agreed to allow her to cash out her accrued annual leave for the week. Ingrid had no annual leave left to take a holiday from work.

It should be noted that prepayment of entitlements is different to "cashing out" entitlements as, where a prepayment has occurred, the employee is still entitled to take the accrued annual leave or personal leave, it is just that they will not be paid for the time off as the employer claims that the employee has been paid in advance.

Recommendation 25: that it should be made clear in the NES that leave such as annual leave and personal leave cannot be prepaid.

JobWatch is of the view that there is a community standard to be protected in ensuring that there is a sufficient degree of paid time available to workers to attend to family and personal needs and enjoy recreational pursuits – and that that payment needs to be made at the time of the leave (not as a prepaid loading each week, so that the leave is effectively unpaid). Currently it is our experience that the Workplace Authority and the Workplace Ombudsman believe that there is nothing in the legislation to prevent leave being prepaid. This means that sick workers, who have received a loading to include all leave, need to attend work or they will not receive any wages to pay their bills for that period of absence.

4.6.4 JobWatch submits that, to further bolster the minimum safety net, the Government should consider introducing to the NES the concept of two days personal leave for an unspecified reason in addition to personal leave,

carer's leave and compassionate leave. This is because currently employees who wish to take personal leave need to satisfy their employer, usually by providing a medical certificate, that they are sick or injured and unable to work. Accordingly, personal leave does not automatically cover employees who are not unfit for work but need to attend, for example, a medical appointment during work hours.

JobWatch proposes that "Personal Leave- Unspecified Reason" could be used for any purpose e.g. doctor and dentist appointments etc. Employees would not have to give a reason for taking personal time. However, employees could not take consecutive personal days without employer approval. Employees should notify their employer of required personal time as far in advance as possible. Personal time must be taken within the calendar year. Employees would not carry unused personal days over to the next calendar year and no payment would be made for unused personal days upon termination of employment or after notice of resignation.

Case study – medical appointment

Anita – in her late teens - was employed as a permanent full time clerk for a small transport company. She had an orthodontist appointment and was told by her boss that she can't make personal appointments and received a written warning. Anita had to get her braces off and asked her orthodontist to ring her employer, which he did, and an argument ensued between her orthodontist and her employer. She went ahead with her appointment (despite her employer's objection) and when she got into work at 11 am Anita was terminated by her employer because of attending the medical appointment

The benefit of this for of leave is that, for example, an employee wouldn't have to use annual leave or take unpaid leave to do necessary things, such as visiting doctors and dentists, during work time which is not usually covered by personal leave.

Recommendation 26: that there be introduced into the NES, in addition to personal leave, carer's leave and compassionate leave, a right to take a further 2 days per year of personal leave for an unspecified reason.

4.7 Long service leave

4.7.1 JobWatch congratulates the Government for including long service leave in the proposed NES.

Nevertheless, JobWatch is concerned that clause 27(2)(g) of the Bill does not allow award employees to access the often more beneficial State based long service leave schemes as was proposed in the NES exposure draft in April 2008. Unless modern awards are going to mirror all of the provisions

in State based long service schemes (which seems unlikely), award employees are going to be worse off in relation to long service leave than if they weren't covered by an award.

Case study – authorised leave not counting as service

Hayley had worked for her employer for 10.5 years. During this time, she took 6 months unpaid leave, which was authorised in writing by the employer. Hayley was told she was not entitled to long service leave because the continuity of her service had been interrupted by the unpaid leave.

***Recommendation 27:* that an award employee should be entitled to the more beneficial long service leave entitlement if, but for the award, they would have been entitled to more generous long service leave under a State Act.**

***Recommendation 28*: that the long service leave NES allow for employees to take their long service leave at half pay thereby doubling the amount of available leave.**

***Recommendation 29*: that all types of authorised leave, whether paid or unpaid, count as service for the purpose of accruing and calculating entitlements such as long service leave.**

4.7.2 It has come to JobWatch's attention over recent years that schemes such as long service leave and severance pay on redundancy systemically discriminate against older workers and parents (mainly women) for whom it has become necessary to commence working on a part-time basis. When these workers take their long service leave or severance pay, which they have accrued as full-time employees, they are only paid out at their current part-time rates.

Case studies – systemic discrimination

Lee – in his 60s - worked as field manager in the wholesale industry on a permanent full time basis for 6 years and then part time for 2 years. He has been made redundant by his employer. Lee has been told by his employer that his redundancy payment is based on his current ordinary hours of work - 24 hours he worked part time – and the 6 years he worked full time is not factored in the calculation.

Miguel – in the 45 to 59 age group - has worked as a stacker for a large supermarket company for 11 years and for the last 2 years he has worked on a permanent part time basis. Miguel was thinking of taking some long service leave and so approached his employer. He was told by his employer that the number of weeks he had due to him was based on the current hours he worked. Miguel believed that the number of weeks would be based on averaged number of hours he had worked over the whole 11 years

This form of systemic discrimination against older workers and parents (mainly women) could be easily ameliorated by taking into account service for the employer prior to the employee converting to part-time hours e.g. by averaging back the employee's hours over the last 1 year or 5 years whichever is the more beneficial to the employee.

<u>Recommendation 30</u>: that an averaging provision is added to the long service leave Division or modern awards so that older workers and parents (mainly women) who have to convert from full-time to part-time are not systemically discriminated against when calculating their long service leave entitlements.

JobWatch also advocates for the creation of a portability scheme to enable the portability of long service leave within industry sectors.

4.8 Public holidays

4.8.1 JobWatch submits that an employee should not be required to work on a public holiday even where the employer's request may be seen as "reasonable" or the employee's refusal to work may be seen as "unreasonable" under clause 114 of the Bill so long as sufficient notice has been given by the employee of their intention not to work.

It is our experience that, especially where an employee does not have access to unfair dismissal, an employer will simply insist that the employee has to work on the public holiday or else lose their job.

For this reason, JobWatch submits that the OFWO be given the capacity to better prevent breaches of the NES by seeking pre-emptive injunctions to prevent unlawful actions by employers before a breach of the NES has occurred. In JobWatch's experience, it often takes more than 3 months before an inspector from the Workplace Ombudsman even responds to a complaint about a breach of the AFPCS.

This is unacceptable where the breach relates to matters such as unreasonable request to work public holidays, unreasonable additional hours and unreasonable refusal of annual leave etc.

Case study – public holiday work

Luke works as an apprentice in Victoria. His boss does not pay penalty rates on public holidays. There was an upcoming public holiday, which Luke was told by his boss that he was expected to work. Luke was told that if he does not work the public holiday, his employment would be terminated.

<u>Recommendation 31</u>: that the OFWO be given the capacity to obtain pre-emptive injunctions to prevent breaches of the NES so as to properly enforce the minimum safety net that is the NES.

4.8.2 JobWatch also submits that the Government should consider introducing to the NES the concept of cultural leave.

"Cultural leave" would define the employee's ability to trade up to 2 designated public holidays for a leave day on a day of cultural significance to them. For example, a US citizen working Anzac Day in lieu of a holiday at Thanksgiving; a person observing a Jewish holy day in lieu of a Christian holy day; an indigenous person attending a traditional ceremony.

Case study – cultural leave

Jared has been working as a labourer at a recycling plant in Victoria for the past 12 months. Jared asked his employer if he could observe his religious rituals and attend church on Good Friday and Easter Sunday. His employer said that if he was not willing to work these days, Jared's regular shifts would be reduced, and he would be put on the 'on call' roster. Jared agreed to work these days reluctantly so as he would not lose any shifts.

<u>Recommendation 32</u>: that employees be entitled to two tradeable "cultural leave" days per year.

4.9 Notice of termination and redundancy pay

4.9.1 JobWatch congratulates the Government for including Redundancy entitlements in the proposed NES. Nevertheless, JobWatch has a number of concerns.

(a) *<u>Small Business Exemption</u>*

JobWatch submits that employees working for a business employing 15 or less employees should not be excluded from the redundancy pay NES.

The intention of the proposed redundancy pay NES is to compensate employees for lost non-transferable employee entitlements such as sick leave and long service leave and the inconvenience and hardship imposed by being made redundant. Employees of large and small businesses who are made redundant are equally in need of such compensation.

The proposed exemption appears to be based on the observation that small businesses can face particular challenges when managing employee engagement and dismissal.

JobWatch submits that any informational or human resources challenges faced by small business are best dealt with by the provision of free, government-funded, accessible, information, education and support for small business rather than by reducing small business workers' conditions.

In the case of the proposed redundancy pay NES, JobWatch submits that this informational and managerial support for small business, together with the proposed ability of businesses to apply to FWA for an exemption from paying redundancy pay on the basis of genuine financial difficulties, would sufficiently accommodate small business employers' circumstances without the need to reduce small business workers' rights.

Case study – no access to redundancy pay

Terry was 40 years old and had worked as a workshop manager for 17 years. His employer was moving the business to a different location and no longer required the workshop. Terry and 2 other employees in the workshop section were given 4 weeks notice of their positions being made redundant. On termination Terry received his annual leave, notice pay and long service leave entitlements, however he did not receive any redundancy pay because, even though his employer's business was continuing, it employed 15 or less employees.

Recommendation 33: that all employees regardless of the size of the business they work for be entitled to redundancy pay.

(b) *Long term casuals*

JobWatch submits that long term casual employees, that is, those employed for more than 12 months on a regular basis, should be

afforded the same notice and redundancy pay entitlements as permanent employees.

Whilst casual employment provides flexibility for employers, it removes employment security and usually also access to paid sick leave, notice and redundancy pay for employees. It is well documented that a major portion of the Australian workforce is made up of casual employees and women and young people make up a high proportion of casual employees.

JobWatch submits that, in the interests of parity between long term casual and permanent employees, men and women, young and older workers, and in order to help curb the casualisation of the workforce, the notice and redundancy NES ought to apply equally to permanent employees and casual employees with 12 months or more regular service.

Case study – Long term casuals

Louise worked as full-time casual in a chemical factory for 14 years until she was made redundant when the employer went into liquidation. Despite 14 years of loyal service, Louise was not entitled to redundancy pay.

Recommendation 34: that long term casual employees should also be entitled to redundancy pay.

(c) *Apprentices*

JobWatch submits that redundancy pay NES ought to apply to apprentices.

Under Division 11, apprentices are entitled to notice of termination or pay in lieu of notice and, as most apprenticeships take approximately 4 years, apprentices are generally permanent full-time employees with an expectation of ongoing employment with the same employer after the completion of their apprenticeship. In this respect, apprentices should be afforded the same entitlements as other permanent employees, which are designed to compensate those employees for their length of service, loyalty and for lost non-transferable employee entitlements such as sick leave and long service leave as well as for the inconvenience and hardship imposed by being made redundant. There is no valid reason why apprentices should not be afforded redundancy entitlements.

Case study – apprentices and redundancy

Peter – in his early 20s – has worked as an apprentice furniture maker for over 2 years. The small company he works for is closing its doors at the end of the year and Peter is being made redundant but Peter, as an apprentice, is not entitled to redundancy pay.

Recommendation 35: that apprentices be entitled to redundancy pay.

4.9.2 JobWatch supports the requirement in the Bill that notice of termination must be in writing. Additionally, JobWatch recommends that, not only should notice of termination be in writing, but that written reasons for the termination should also be required to be provided to an employee whose employment is terminated. This would act to clarify issues at an early stage and prevent employers from changing their version of events when subsequent legal proceedings are issued.

In JobWatch's experience, it is not uncommon for an employee's employment to be terminated on grounds that would seem harsh, unjust or unreasonable but, when unfair dismissal action is taken by that employee, the employer's response to those proceedings is often to say that their was a shortage of work or to subsequently accuse the employee of theft or to manufacture some other convenient defence.

Recommendation 36: that, in addition to notice of termination in writing, employers should also have to provide written reasons for dismissing an employee at the time of the dismissal.

Case study - no reasons given for dismissal

Erica had worked for nearly five years as a supervisor in the health industry. On return from her honeymoon she received a letter from her employer stating that she was terminated. Erica cannot imagine why she would be dismissed. She had left for her honeymoon on good terms with her employer and the letter gives no reasons for her dismissal.

4.9.3 Notice of termination – long term employees

JobWatch also submits that the amount of notice of termination required to be given by an employer to long term employees should be increased from the current maximum of 4 weeks for an employee

under 45 years of age with more than 5 years service. For example, in the United Kingdom, employees with 12 or more years of service are entitled to a minimum of 12 weeks notice.

Recommendation 37: ***that the minimum notice of termination requirements be increased for employees with more than 5 years of service.***

5. Individual flexibility arrangements

5.1 JobWatch supports the federal Government legislating for a move away from an industrial relations system that allows and encourages individual bargaining of minimum terms and conditions to an industrial relations system based on an expanded minimum safety net and good faith collective bargaining.

Nevertheless, JobWatch is concerned that the Bill requires modern awards and collective agreements to contain "flexibility terms" that allow for individual flexibility arrangements to be negotiated between an employer and individual employees that vary the operation of the award or enterprise agreement without the approval of an independent third party such as FWA.

The Bill's explanatory memorandum provides the innocuous example at paragraph 570 of an employee negotiating varied working hours to accommodate parental responsibilities such as picking up and dropping children off at school – something which can already be achieved via common law employment contract negotiations or under the NES right to request flexible working arrangements or under State based equal opportunity legislation.

However, modern awards appear to be going to allow individual flexibility arrangements to also be made in relation to the following:

- overtime rates;
- penalty rates;
- allowances; and
- leave loading[2].

JobWatch has strong reservations about this form of individual agreement because, even though the Bill states that any agreement of this sort must be in writing and be genuinely agreed to by the employee, employers will soon start making offers of employment to prospective employees that already containing a proposed individual flexibility arrangement on a take it or leave it basis regardless of the protections in clause 341(3) which gives prospective employees workplace rights protection.

5.2. JobWatch submits that this less formal system of individual agreement making is open to even more abuse by unscrupulous employers than the previous federal Government's Australian Workplace Agreements because of the inherent power imbalance between employees (including prospective employees) and employers and the lack of any third party intervention to guarantee that an employee is "better off overall" under the individual arrangement.

[2] see for example Hair and Beauty Industry Award 2010 (MA000005)

Case study – individual negotiations

John works as a supervisor in a medium sized manufacturing company. He was recently called in by management and told that they are trying to get everyone on the same pay scale and as result his base pay will drop by 50 cents an hour. John was told that the loss in base pay will be compensated by an increase in allowances, however, those allowances won't be paid when he is on sick leave or annual leave. As a result John will be financially disadvantaged when he is on annual leave or sick leave.

Although an aggrieved employee may have the right to make a complaint to the OFWO, it is JobWatch's experience that employees will not make such a complaint during their employment with the offending employer and so these employees will be missing out on minimum entitlements during the life of their employment. Additionally, it is usually not too difficult for an employer to provide other lawful reasons why a prospective employee who was not willing to agree to an individual flexibility arrangement was unsuccessful in their job application.

Whether or not the OFWA will be able to recover any underpayments arising due to an unlawful individual flexibility arrangement or successfully prosecute employers who coerce employees into individual flexibility arrangements remains to be seen. JobWatch suggests the shear volume of complaints expected and the related evidentiary difficulties will make this an almost impossible task.

Additionally, as clause 139(1) (f) of the Bill envisages that modern awards will allow "annualised wage arrangements", it is arguable that workplace flexibility regarding penalties, overtime, allowances and loadings is better dealt with under those provisions as there is less likelihood that employees will be underpaid.

For these reasons, JobWatch strongly opposes the Bill allowing any form of individual flexibility arrangements in modern awards or enterprise agreements.

Recommendation 38: that any allowance for individual flexibility arrangements be removed from the Bill.

6. Unfair dismissal

6.1 JobWatch congratulates the federal Government for increasing protections for workers in relation to unfair dismissal, workplace rights and unlawful discrimination. Nevertheless, JobWatch has a number of concerns regarding these changes which will be dealt with in this section.

(A) **Unfair dismissal – 7 day timeframe**

In the past, JobWatch has advocated for the current 21 day timeframe for the filing of unfair dismissal claims to be extended to 3 months as is the case in the United Kingdom, New Zealand and Canada. Unfortunately, the Bill proposes to reduce this already very short timeframe to 7 days after the dismissal has taken effect.

JobWatch strongly opposes this proposed change.

It is understood that the main reason for the proposed change is to expedite unfair dismissal claims so that there is a greater possibility that the employment relationship can be maintained thus making reinstatement the primary unfair dismissal remedy.

JobWatch submits that, if this is the case, then that end would be better served by FWA offering or, where one or both parties make a request, mandating that, prior to an actual dismissal taking place, the parties attend a conciliation conference at the workplace facilitated by FWA. The outcome of the workplace conciliation conference should be documented in a "workplace conciliation certificate" which may become relevant in any subsequent unfair dismissal proceedings.

Recommendation 39: that FWA hold a workplace conciliation conference prior to a dismissal taking place. and issue a workplace conciliation certificate.

The outcome of such conciliation might be that the employment relationship is preserved because, as a result of the conciliation, the employee agrees to attend to the matters complained of by the employer or the employer comes to the realisation that they do not have a valid reason to dismiss the employee. Alternatively, if the matter cannot be resolved and a dismissal occurs and subsequently an unfair dismissal claim is made, the conciliation certificate may be used by FWA in ascertaining an appropriate remedy or as to whether costs should be ordered against either of the parties. The workplace conciliation certificate may also be used by FWA to inform itself and to limit the scope of any hearing that may be required.

Recommendation 40: that FWA issue a workplace conciliation certificate.

JobWatch submits that, if this workplace conciliation conference system was implemented, the Bill could achieve both the goals of preserving the employment relationship and extending time for the filing of unfair dismissal claims.

Recommendation 41: that the time for filing of unfair dismissal claims be extended to 3 months from the date that the dismissal takes effect.

JobWatch suggests that one of the factors likely to be considered by a FWA member when considering whether reinstatement is an option is how much time has passed since the dismissal and consequently how quickly the dismissed employee filed their unfair dismissal claim. On this view, if a dismissed employee was genuinely seeking reinstatement, they would be advised to file their unfair dismissal claim as soon as possible.

6.2 It is JobWatch's opinion that, because of the 7 day timeframe, there will initially be a reduction in the number of unfair dismissal claims being made because workers will simply miss the deadline.

> **Case study - expiration of time**
>
> Jack had been employed as a spray painter for over 6 years when he was dismissed without warning for alleged poor performance. He was so upset about the dismissal that he was bedridden with depression for two weeks.

Nevertheless, once the general public become familiar with the 7 day timeframe, dismissed workers will have little option but to file their unfair dismissal claim so as to at least preserve their rights pending the outcome of any job search activities. However, JobWatch believes that, once a worker has paid their filing fee and filed their unfair dismissal application, they will be more invested in seeing through their unfair dismissal claim, regardless of the merits, than looking for a new job.

This phenomenon would be avoided if dismissed workers had 3 months to file their unfair dismissal claim because it is more likely than not that a dismissed worker would only file their unfair dismissal claim if they had not obtained new employment in the proceeding 3 months.

Additionally, the 7 day timeframe is going to place an additional burden of FWA members because it is highly likely that their will be a large increase in the number of out of time applications and related hearings.

6.3 There also seems to be some inconsistency in the Bill because, in addition to decreasing the time to file an unfair dismissal claim from 21 to 7 days, the Bill increases the time to file what is effectively an unlawful termination claim under clause 366 from 21 days to 60 days. This inconsistency is even further exacerbated by the fact that under clause 368 (being a general protections claim) FWA must hold a conference and note 2 to this clause states that "one of the recommendations that FWA might make is that an application be made under Part 3-2 (which deals with unfair dismissal)" however, the time for filing an unfair dismissal application will have well and truly passed by that time. So presumably, FWA would then have to hold an extension of time hearing after already having held a conference.

JobWatch submits that these divergent timeframes are an unnecessary inconsistency that only acts to further complicate matters for disadvantaged and vulnerable workers as well as creating inefficiencies in the FWA process.

(B) **Unfair dismissal – minimum employment period**

JobWatch opposes maintaining and, for small business, extending the minimum employment period to qualify for unfair dismissal protection.

Prior to WorkChoices, the WR Act stipulated a 3 month probationary period for employees during which time an employee could be dismissed without notice and without the right to make an unfair dismissal claim regardless of

the size of the employer. JobWatch supports a return to this position. Unfortunately, the Bill not only maintains WorkChoices' 6 month "qualifying period" for unfair dismissal protection, but extends that period in relation to small business to 12 months.

JobWatch submits that this proposal is unjustified.

***Recommendation 42*: that there not be a mandatory minimum employment period for unfair dismissal protection but that a new employee may be placed on probation for a maximum of three months so long as they are informed of the probationary period in writing prior to the commencement of the employment and that, during the probation, they can be dismissed without notice and do not have protection from unfair dismissal.**

In JobWatch's view, it is likely that small business owners are working more closely with their employees than in large business and so consequently are usually in a better position to ascertain whether an employee is suited to the position. There is no reasonable explanation as to why a small business owner would require an additional 6 months on top of what is already an excessive qualifying period.

Additionally, in considering whether a dismissal was unfair under clauses 387(f) and (e) of the Bill, FWA must consider how the size of the business impacted its dismissal procedures and whether there was human resources management available to the employer. JobWatch submits that these provisions already provide small business with adequate grounds with which to respond to unfair dismissal claims, especially considering the likely application of the Fair Dismissal Code.

JobWatch also suspects that unscrupulous small business owners will quickly adjust to the 12 month minimum employment period for unfair dismissal access and begin moving staff on prior to the expiration of 12 months of service or even begin hiring employees on alleged 12 month fixed term contracts in order to achieve ongoing immunity from unfair dismissal claims. In JobWatch's opinion, the 12 month minimum employment period is open to abuse.

Case studies – termination without reason within qualifying period

Sue worked as a clerk for a small printing company. She had been with the firm for nearly 12 months when she was terminated. Sue was given silly reasons for her termination like not taking notes properly and not being a team player. She received no warnings and there was no hint of any problems before she was sacked.

Tony worked in sales and marketing on a permanent full time basis. He had been with the company for just over 6 months when he was terminated by his employer without any notice. Tony could not understand why he was terminated as prior to his termination he had been commended for his work and given a bonus. He was just told by his employer that he was a "very expensive resource".

Tom - in his late 40s - has been employed as an accountant for a small accountancy firm. He had been with the firm for nearly 12 months when he was terminated. Tom was given no reason for his termination - all he was told was that the role had not worked out and he is being replaced. Tom is working out his 2 week notice period but does not understand why exactly he has been terminated.

Edith had been employed as a Manager for nearly 12 months at a small cafe. She was terminated from her position without any reason being provided by her employer.

If the 6 and 12 month minimum employment periods are going to remain in the Bill, JobWatch submits that all forms of authorised leave count as service for the purpose of calculating an employee's period of employment. In JobWatch's experience, it is not usual for an employee to take unpaid leave in the first 12 months of employment because they haven't accrued sufficient annual leave or personal leave and it would be unjustified for an employee to not to qualify for unfair dismissal protection in those circumstances.

Case study – unpaid authorised leave

Mao had been working as a Finance Manager for a small firm for nearly 12 months when his mother fell seriously ill in China. He informed his employer that he would have to take leave to look after his mother. Mao met with his boss and was told that they would grant him leave. Mao arrived back at work after been away in China for 5 weeks and was told by his employer that things didn't work out while he was overseas and the best option was for was him to be let go. Mao was required to work out a week's notice but was informed by his employer that one week of his notice period would be withheld as he had used up all his accrued annual leave.

***Recommendation 43*: that all forms of authorised leave, whether paid or unpaid, count as service for the purpose of calculating an employee's period of employment.**

6.4 The Small Business Fair Dismissal Code

JobWatch has strong concerns about the application of the Small Business Fair Dismissal Code (FDC) and Checklist. As discussed earlier, JobWatch is of the opinion that there are already enough protections against unfair dismissal claims for small business under clause 387 (f) and (e) – criteria for assessing harshness and 383 (b) – 1 year minimum employment period.

JobWatch is concerned that the FDC will effectively become a rubber stamp protection against unfair dismissal claims whereby unscrupulous employers will retrospectively, after a dismissal has taken place, complete the FDC Checklist and then claim the dismissal was consistent with the FDC.

JobWatch submits that this problem could be avoided by amending the Bill and the FDC to include one or more of the following:

(a) that for the Checklist to be sufficient evidence of a fair dismissal it must be co-signed by the employee;

(b) that a dismissed employee may complete their own FDC Checklist which, if contradictory to the employer's Checklist, the employer cannot rely on its Checklist as evidence of a fair dismissal;

(c) that all warnings given to an employee regarding capacity or conduct must be in writing and be produced to FWA to be considered as sufficient evidence; or

(d) that an employee allegedly dismissed fairly pursuant to the FDC is entitled to elect to have a hearing (similar to the current jurisdiction hearings at the AIRC) regarding whether the dismissal was consistent with the FDC.

<u>Recommendation 44</u>: that certain amendments be made to the Bill (as listed immediately above) to give employee's improved rights in relation to the Small Business Fair Dismissal Code.

6.5 Summary Dismissal

JobWatch is also concerned that under the FDC a mere report to the police will be sufficient evidence to support a claim that an employer was entitled to summarily dismiss an employee for serious misconduct.

Case study – likely police report to defend claim

Alex has worked as an IT manager for the past 2.5 yrs. About one month ago Alex advised his employer that he was seeing a psychologist because he was suffering from insomnia. He called work recently to say he was sick and couldn't come in. A few hours later Alex was phoned by his employer and was summarily dismissed. The employer told Alex that he was being terminated because of theft. This was the first time Alex had heard of the allegation and says he has done nothing wrong and wants to challenge his termination.

<u>Recommendation 45</u>: that any reference to a police report by an employer being sufficient evidence of serious misconduct be removed from the Small Business Fair Dismissal Code.

6.6 Unfair dismissal – associated entitles – calculating 15 employees

Under the Bill, a small business is defined as an employer with 15 or less employees including employees of "associated entities" pursuant to section 50AAA of the *Corporations Act* 2001 (Cth). Whilst this is a much broader definition than the current "related bodies corporate" under the WR Act, it still would not appear to cover situations where there is a common director among a number of otherwise unrelated companies or where the employer company is part of a larger franchise arrangement.

JobWatch currently receives a large number of calls from employees who do not have access to unfair dismissal protection because employees in their employer's other businesses cannot be counted due to the nature of the employer's corporate structure.

Case study – calculating 15 employees

Tom worked in the hospitality industry. He was a cook in a café/restaurant which is part of a franchise group. Some of the franchises employ more than 15 employees, whereas others, like his, employ only a handful of staff. Tom believes he was sacked unfairly but his rights to access unfair dismissal remedies will differ from the rights of employees in the larger franchises.

If there has to be a distinction drawn between businesses with 15 or less employees and those with over 15 employees, JobWatch proposes that there be a legislative recognition of the relationship between franchises and the relationship between businesses effectively run by the same people e.g. where there are common directors. Currently, franchise businesses and businesses controlled by the same directors/shareholders are not recognised as being 'related bodies corporate' for the purpose of counting the number of employees of a business and it appears that the same will occur under the Bill's use of "associated entities" definition.

Recommendation 46: ***that in addition to the definition of "associated entities" that there also be included a reference to franchise arrangements and where there are common directors for the purposes of calculating an employer's number of employees.***

In JobWatch's view, it is unfair and unjustified that certain employees, through no fault of their own, will have less rights than other employees just because their employer employs, whether deliberately or not, less than a certain amount of employees.

7. General protections – workplace rights

JobWatch applauds the federal Government for expanding employee protections to include circumstances where adverse action has been taken against an employee in relation to an employee's workplace rights including, in addition to dismissal, where an employee or prospective employee's position has been altered to the employee's prejudice.

Nevertheless, JobWatch suggests the following further improvements:

A. Erroneous workplace right

Although clause 341 (1) of the Bill defines the meaning of workplace right very broadly, it would not seem to cover the situation where adverse action occurred because an employee complained about, sought to exercise or made inquiries to their employer about a workplace right to which the employee erroneously thought they were entitled.

In JobWatch's experience, it is not uncommon for a friend or family member to erroneously tell an employee that they should be receiving, for example, penalty rates or overtime etc. and then when the employee inquires or complains to the employer about their purported workplace right they are dismissed.

Case study – erroneous workplace right

Keith had been employed as an Admin Officer on a casual part-time basis by a local council for a number of years. His colleagues, who are employed through an agency, receive a higher hourly rate of pay than him and Keith raised with the Council why he wasn't paid the same hourly rate as those employees. Since Keith raised the issue of his hourly rate with his employer he has not received any work with them for the last 5 months.

Sue worked as an apprentice in a bakery and believed she was being underpaid. After complaining to her employer that she was being underpaid she was dismissed. It later turned out that she was not being underpaid.

JobWatch submits that this scenario could be avoided by amending clause 341 of the Bill to include a new subclause that states "this includes any situation where a person may not actually have a workplace right or entitlement but it was reasonable in the circumstances for the person to believe they had the relevant workplace right or entitlement".

Recommendation 47: ***that the meaning of "workplace right" under clause 341 include where a person erroneously but reasonably believed they had the relevant workplace right.***

B. Workplace rights

Clause 341 (2) sets out what is meant by a process or proceeding under a workplace law or workplace instrument however it is significantly narrower than Section 659 (2) (e) of the WR Act as it limits the process or proceeding to being in relation to a workplace law or workplace instrument. The section then goes on to list 11 examples, none of which include State or federal anti-discrimination, workers' compensation or occupational health and safety laws.

Under 659 (2) of the current WR Act, not only would State or Federal anti-discrimination, workers' compensation or occupational health and safety laws likely be included, but the current section is also not limited to workplace laws or instruments but includes all laws, so long as the complaint or proceedings is against the employer.

This is an important difference because, for example, JobWatch receives a large number of calls about unpaid superannuation about which the appropriate course of action is to make a complaint to the Australian Taxation Office (ATO).

Case study – complaint to ATO about unpaid superannuation

Sunil worked for about 5 months as a Bookkeeper for a manufacturing firm on a permanent full time basis. He was dismissed summarily by his employer and was told it was for performance reasons. However, Sunil believes the real reason he was sacked was because he raised concerns with his employer about his entitlements and informed his employer that he made a complaint to the ATO about tax issues and superannuation.

Under the Bill currently, if an employee made a complaint to the ATO about their unpaid superannuation and adverse action was taken against them by their employer because of that complaint, the effected employee would not seem to have a right to make a claim to FWA under Division 3 – Workplace rights.

JobWatch also receives a large number of calls from employees who have been terminated for complaining directly to their employer about unpaid wages and entitlements but it is unclear whether this situation would be covered by clause 341.

Case study – direct complaint to employer

Simon worked full time as a driver for a large company. He approached his boss about queries he had in relation to non-payment of penalty rates and an alleged unilateral alteration to a timesheet he'd submitted. The following day his employment was terminated. His boss has a reputation for sacking employees who query issues.

JobWatch submits that these unwanted situations could be easily remedied or clarified by amending clause 341(1)(b) and 341(2)(k) to make it clear that the proceeding or process can be under any law so long as it is against the employer. Clause 341(c)(ii) should also be amended to make it clear that the complaint or inquiry does not need to be made externally but can be made directly to the employer.

Recommendation 48: ***that employees should have workplace rights in relation to all laws, processes and proceedings relating to their employment e.g. superannuation, occupational health and safety etc. so long as the complaint (whether made directly to the employer or to an external body) or legal proceedings is against their employer.***

C. Division 5 – other protections – discrimination

Clause 351 of the Bill provides that an employer can take adverse action and lawfully discriminate against an employee or prospective employee e.g. on the grounds of race, disability etc. if the adverse action is taken because of the inherent requirements of the particular position concerned.

JobWatch submits that, before lawful adverse action can be taken by an employer, the employer must first be required to make reasonable adjustments to accommodate the employee or prospective employee's particular situation e.g. disability or family/carer responsibilities etc. This amendment would also bring the Bill into line with most State and Federal disability discrimination laws.

Case study – reasonable adjustments

Tina worked as a picker for over 16 years with the same employer. After two knee replacements, her doctor said that she could work on a part-time basis but her employer dismissed her saying she could no longer do her job. No consideration was given to whether or not the employer could reasonably accommodate her request for part-time work.

Recommendation 49: that there be an obligation on employers to make reasonable adjustments to accommodate an employee or prospective employee's e.g. disability, family/carer responsibilities etc. before being entitled to rely on the inherent requirements exception to adverse action discrimination.

D. Temporary absence – illness or injury

Clause 352 states that an employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations.

The current regulations in relation to the equivalent section under the WR Act place a heavy emphasis on the ill or injured employee having to provide a medical certificate to obtain the protection of the section. JobWatch submits that the new regulations should shift the focus away from the requirement that an employee must provide a medical certificate before s/he is entitled to rely on this provision. It ought to be recognized that in some situations, an employee may attempt to provide the necessary documentation but the employer prevents them from doing so and/or dismisses the employee before they have a chance to submit the documentation.

Case study – medical certificate

Lynn worked as a cleaner in a private school. She called in sick because of pneumonia. A few days later she called the school to keep them informed of her condition. She informed her employer that she had a medical certificate but was told not to worry about the documentation and to just focus on getting better. She was dismissed and her job was given to the cleaner who had temporarily replaced her.

Recommendation 50: that an employee need not provide a medical certificate to obtain the benefit of the temporary absence due to illness or injury protection.

Additionally, a temporary absence is currently defined as an absence of up to 3 months. A temporary absence may also be longer than 3 months if the employee is on paid sick leave for the duration of the absence. JobWatch submits that the new regulations should be drafted so that the absence may be longer than 3 months if the absence has been authorised by the employer in advance e.g. by the employer granting annual leave or unpaid leave or the employee has otherwise been on authorised leave until or immediately before their dismissal.

Recommendation 51: that the length of any temporary absence may be extended where the employee is on authorised leave, whether paid or unpaid.

Further or in the alternative, see *Recommendation 24* regarding the right to take personal leave at half pay so as to double the amount of personal leave available. The effect of this recommendation would also be to extend the protection against unlawful dismissal for a temporary absence due to illness or injury.

E. Additional discrimination grounds

JobWatch submits that in addition to the discrimination grounds listed in clause 351, there should also be the ground of actual or presumed criminal record.

Actual or presumed irrelevant criminal record: this would be in line with the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) (HREOC), which makes it unlawful to discriminate in employment on the basis of criminal record. There is an important reason for including this ground in the Bill and not merely relying on the provisions of the *HREOC Act*. That is, currently, if a person complains under the *HREOC Act*, s/he can only go as far as conciliating the matter through the Australian Human Rights Commission. Beyond that, there are no enforcement mechanisms. If this ground is included in the Bill, an employee whose employment has been terminated for a discriminatory reason will be able to file an application with FWA and, if necessary, proceed to the Federal Magistrates' Court or the Federal Court of Australia for relief.

Recommendation 52: that there be a further discrimination ground of actual or presumed irrelevant criminal record.

Case study – irrelevant criminal record

Dimitri has a history of drink driving and he has even spent a short time in jail because of it. However, he has never been charged or found guilty of a dishonesty offence. He secured employment as a cleaner in a large suburban shopping complex. After working for three weeks, his employer found out about his criminal record and terminated his employment. He was told his services were no longer required because of his record. Dimitri was devastated, having competently run his own cleaning business in the past.

Additionally, most anti-discrimination Acts also state that the particular discrimination ground e.g. sexual preference may be presumed or imputed i.e. where

the person doesn't actually have the ground or attribute and also may be extended to cover people with a personal association with the person with the ground or attribute. The current WR Act and clause 351 of the Bill do not have these additional protections which JobWatch submits is an inadequacy. For example, currently and under the Bill it would be lawful for an employer to take adverse action against an employee because of the race, colour, religion or national or social extraction etc of that employee's wife or other personal associate.

***Recommendation 53*: that the discrimination grounds under clause 351 of the Bill be extended to include presumed or imputed grounds and also be extended to cover people with a personal association with a person with a discrimination ground.**

F. Multiple reasons for action

Clause 360 of the Bill states that, in relation to general protections, "a person takes action for a particular reason if the reasons for the action include that reason". The purpose of this clause and the current equivalent section in the WR Act is to protect employees from adverse action where there may be a number of reasons for an employee's dismissal e.g. where an ill employee is terminated ostensibly because they failed to complete a task on time but the underlying reason for failing to complete the task on time was due to their absence from work due to illness etc.

JobWatch is concerned that the recent High Court case of *Purvis*[3] may have the effect of weakening this clause or, at worst, rendering it completely ineffective.

In *Purvis*, a school expelled a student with an intellectual disability that allegedly caused violent outbursts. A complaint was made on the student's behalf alleging direct disability discrimination. The question was whether to include the manifestation of the disability (the violent outbursts) as part and parcel of the disability and therefore exclude it from the analysis of the comparator, or whether the violent outburst was to be considered objectively as part of the 'same or similar circumstances.' The majority of the Court thought that it was the outburst that led to his expulsion and it would seem artificial to remove this aspect from the objective circumstances.[4] The High Court found that the school did not directly discriminate against the student because the school would have also expelled a violent student who did not have an intellectual disability so the student was not treated differently than the Comparator would have been treated.

Although *Purvis* was a decision relating to the *Disability Discrimination Act* 1992 (Cth), JobWatch believes that it has set a precedent that may be highly persuasive, if not binding, on lower Courts when deciding discrimination matters under the current WR Act and the Bill when it is enacted. In relation to the example above, the test in *Purvis* means that a respondent employer could successfully argue that it was the employee's failure to complete the task on time and not the employee's illness or absence due to illness that was the reason for the dismissal.

In other words, this test makes it too easy for a respondent employer to evade liability for adverse action or discrimination by claiming that their action or conduct was because of a consequence of the employee's e.g. race, religion, disability etc.

[3] *Purvis v NSW* [2003] HCA 62.
[4] Per Gummow, Hayne and Heydon JJ, *Purvis* at 185, 186.

Hence, several commentators have suggested that legislators incorporate the reasoning of the minority judgements of McHugh and Kirby JJ in *Purvis* into the drafting of anti-discrimination legislation.[5] Their Honours stated that:

'Discrimination jurisprudence establishes that the circumstances of the person alleged to have suffered discriminatory treatment and which are related to the prohibited ground are to be excluded.' [6]

In *Sullivan v Department of Defence* [(1992) EOC 92-421 at 79,005], Sir Ronald Wilson said:

> *'It would fatally frustrate the purposes of the Act if the matters which it expressly identifies as constituting unacceptable bases for differential treatment could be seized upon as rendering the overall circumstances materially different, with the result that the treatment could never be discriminatory within the meaning of the Act'.*

JobWatch supports this view.

Recommendation 54: that a subclause be added to clause 60 stating words to the effect that the outcome, symptom or a person's response to the discrimination grounds listed in clause 351 are taken to be one and the same as the discrimination ground.

G. Conferences at FWA

Under the unfair dismissal and workplace rights provisions of the Bill, FWA will be conducting conferences to deal with these disputes. In JobWatch's experience, it is all too common for unscrupulous employers, sometimes under legal advice, to refuse to come to a conference as a litigation strategy. Currently, and under the Bill, the AIRC/FWA has no power to make employers attend conciliations or to penalise employers if they do not attend.

Case study – non-attendance at conciliation

Joan was a receptionist whose employment was terminated whilst she was on maternity leave. Joan made an unlawful termination claim against her employer and conciliation was scheduled but the employer refused to attend. Another conciliation was scheduled and the AIRC wrote to the employer saying it must attend but again the employer refused to attend. Only when the matter was commenced in the Federal Magistrates' Court and a mediation was scheduled did the employer become involved in the case. The employer later admitted that it was advised not to attend the conciliations.

Recommendation 55: that FWA be empowered to issue a fine or a penalty against a respondent for refusing to attend a scheduled conciliation.

[5] Kate Rattigan, The Purvis Decision: A Case for Amending the Disability Discrimination Act 1992 (Cth) [2004], 28 MULR 532.
[6] Per McHugh and Kirby JJ, *Purvis* at 119

H. General protections court applications

Under clause 371(2) of the Bill, an applicant only has 14 days from the date of a conciliation certificate to issue their application in the relevant court.

JobWatch submits that this time frame is far too short.

Currently, under the WR Act, where a person has made an unlawful termination claim in relation to a prohibited reason, that person has 28 days from the date of the conciliation certificate to file a Notice of Election to Proceed with the AIRC and then has a further 14 days to file their application in the Federal Magistrates' Court which is itself a very quick time frame considering the amount of work required to be done in preparing the Court documents. If this timeframe is reduced to just 14 days, an unrepresented applicant would have little chance of instructing a lawyer within that time to prepare the court documents let alone obtain an initial appointment or receive advice about the merits of their claim, especially considering that lawyers may not be entitled to appear before FWA.

JobWatch submits that the proposed 14 days timeframe for filing general protected court applications should be extended to at least the current 42 days but preferably 60 days to maintain uniformity of time frames within the Bill.

Recommendation 56: that that the proposed 14 days timeframe for filing general protected court applications be extended to at least the current 42 days but preferably to 60 days so as to maintain uniformity within the Bill.

8. Miscellaneous recommendations

8.1 Referral of industrial relations powers from Victoria to Commonwealth

Clause 14 sets out what is meant by a "national system employer". Currently clause 14 does not state that all employers in Victoria, due to Victoria's referral of its industrial relations powers to the Commonwealth in 1996, are defined as national system employers.

If this change is not made, it will mean that most of the Fair Work Act will not apply to employees of non-constitutional corporations in Victoria and so, as Victoria does not have an industrial relations system, these employees may not have a minimum safety net or any other protections.

Recommendation 56: that all Victorian employers and employees be defined as national system employers and employees.

8.2 Sunset clause for AWAs and ITEAs

JobWatch is concerned that most employees who are currently on Australian Workplace Agreements (AWAs) or Individual Transitional Employment Agreements (ITEAs) will not be aware of their entitlement to unilaterally terminate their AWA or ITEA after the nominal expiry dated has passed. These employees are likely to

continue on their AWA or ITEA long after they could have terminated their individual agreements and reverted back to the relevant award or workplace instrument. This means that these employees will be missing out on what could be thousands of dollars of wages and entitlements.

JobWatch submits that this situation could be avoided if the Bill required the following:

(a) that FWA is to contact each and every employee covered by an AWA or ITEA on or before the nominal expiry date of their individual agreement and inform them that they have the right to unilaterally terminate their AWA or ITEA; and

(b) that all AWAs and ITEAs automatically terminate on a certain date e.g. 1 January 2011 regardless of their nominal expiry date.

Recommendation 57: that FWA advise all employees on AWAs and ITEAs of their right to unilaterally terminate their individual agreements after the agreement's nominal expiry date.

Recommendation 58: that all AWAs and ITEAs automatically terminate on a certain date e.g. 1 January 2011 regardless of their nominal expiry date.

8.3 Community Legal Centres be exempted from requiring leave to appear before FWA

Clause 336 of the Bill states that the objects of part 3-1 (General protections) are, among other things, to protect freedom of association by ensuring that persons are:

(i) free to become, or not become, members of industrial associations; and

(ii) free to be represented, or not represented by industrial associations etc.

In contradiction to these freedom of association objects, clause 596(1) of the Bill states that "a person may be represented in a matter before FWA…by a lawyer or paid agent only with the permission of FWA". Subclause (4) goes on to provide that for these purposes a person is taken not to be represented by a lawyer or paid agent if the lawyer or paid agent:

(a) is an employee or officer of the person; or

(b) is an employee or officer of an organisation, peak council or bargaining representative that is representing the person etc.

JobWatch submits that clause 596(1) of the Bill fails to comply with the Bills own freedom of association objects. This is because, employees who cannot afford, choose not to or are unaware of their right to be a member of a trade union are not entitled to be legally represented before FWA whereas union members have a guaranteed right to legal representation.

This means non-union members are treated less favourably by the Bill because they are not entitled to legal representation before FWA as of right.

Whilst it is likely that FWA will grant leave to have legal representation more often than not, JobWatch submits that all Community Legal Centre lawyers be included in being exempt from requiring leave to appear before FWA.

Case study - unrepresented applicant

Felicity was employed as a kitchen hand for a small bakery on a casual full time basis. She had to take time off work to look after her sick children. Her employer fired her stating that although they had sympathy for her sick children, they needed someone there every day.

Felicity put in an unlawful termination application at the AIRC and had a conciliation conference pending. An IR consultant acting on behalf of her employer contacted Felicity before the hearing and asked her what she wanted and he said he hoped they could come to an arrangement to avoid allowing things to run their course in the AIRC. The employer has tried to suggest that her termination was due to her performance, not carer responsibilities, but Felicity says that is not true. Felicity says there was a previous occasion where she had to care for a sick child, and the employer was unhappy about her absence. Felicity doesn't know what to say to the IR consultant as she is unrepresented and wants to know what she should do.

***Recommendation 59:* that all Community Legal Centre lawyers be exempted from the requirement to obtain leave to appear before FWA.**

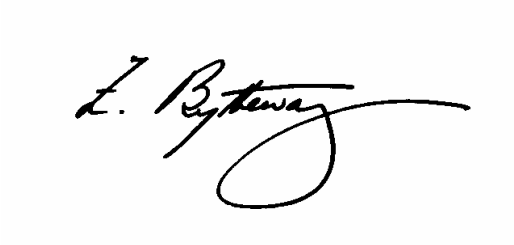
As Community Legal Centres, including JobWatch, only act for vulnerable and disadvantaged workers with meritorious claims, the granting of an exemption from the requirement to obtain leave to appear before FWA would go some way to ameliorate the disadvantage likely to be suffered by non-union member employees who find themselves unrepresented before FWA as well as assist FWA in dealing with the matters that come before it.

To this end, attached to this submission are 5 letters from Community Legal Centres in support of this recommendation.

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

For further information, please contact Ian Scott of JobWatch's Legal Practice on (03) 8643 1118.

Yours sincerely,



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JobWatch Inc

Authorised by Zana Bytheway, Executive Director

List of attachments.

1. letter from Employment Law Centre WA Inc.
2. letter from Peninsula Community Legal Centre Inc.
3. letter from Nth Melbourne Legal Service Inc.
4. letter from Disability Discrimination Legal Service Inc.
5. letter from Youthlaw – Young People's Legal Rights Centre Inc.