The Parliament of the Commonwealth of Australia

Advisory report on the Fair Work Amendment (Better Work/Life Balance) Bill 2012

House of Representatives
Standing Committee on Education and Employment

MAY 2012
Canberra

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Deputy Chair	Mr Rowan Ramsey MP
Members	Mrs Karen Andrews MP
	Mr Adam Bandt MP (from 16/02/12 to 25/06/12)
	Mrs Yvette D'Ath MP
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*Mr Bandt is a supplementary member of the Committee for the purposes and duration of the inquiry into the Fair Work Amendment (Better Work/Life Balance) Bill 2012.

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Terms of reference

The terms of reference are the text of the Fair Work Amendment (Better Work/Life Balance) Bill 2012.

List of abbreviations

ACTU	Australian Council of Trade Unions
AFEI	Australian Federation of Employers and Industries
Ai Group	Australian Industry Group
APTIA	Australian Public Transport Industrial Association
DEEWR	Department of Education, Employment and Workplace Relations
FWA	Fair Work Australia
IFA	Individual Flexibility Arrangement
NES	National Employment Standards
UFUA	United Firefighters Union of Australia

List of recommendations

Recommendation 1

In light of the Independent Review of the *Fair Work Act 2009* currently underway, the Committee recommends the Bill be reconsidered after the Independent Review of the Act has been completed and the Government's response has been released.

1

Fair Work Amendment (Better Work/Life Balance) Bill 2012

Referral and conduct of the inquiry

1.1 On 16 February 2012, the Fair Work Amendment (Better Work/Life Balance) Bill 2012 (the Bill) was referred to the House of Representatives Standing Committee on Education and Employment (the Committee) by the House of Representatives Selection Committee.

1.2 The Bill was introduced in the House of Representatives on 13 February 2012 by the Member for Melbourne, who was subsequently appointed to the Committee for the purposes of this inquiry. The Bill had received a first reading in the House at the time of drafting this report. A copy of the Bill is provided at Appendix A.

1.3 The inquiry was advertised by media release and in *The Australian* as well as inviting submissions directly from stakeholders.

1.4 The Committee received 23 submissions, three exhibits and conducted one public hearing in Canberra. Lists of submissions and exhibits, and details of the hearing, are available at Appendices B, C and D respectively.

Context of the inquiry

1.5 The Bill proposes to amend the *Fair Work Act 2009* to broaden the scope of flexible working arrangements provisions, strengthen the grounds for claims to flexibility from employees with caring responsibilities and

enable Fair Work Australia (FWA) to determine and enforce flexible working arrangements orders.

1.6 The Committee's consideration of the Bill occurred in an environment of significant review of flexible working arrangements. For instance, the Government has recently received the following reports that consider, among other matters, flexible working arrangements:

- the Productivity Commission's *Caring for Older Australians* released on 8 August 2011;[1]
- the Productivity Commission's *Disability Care and Support* released on 10 August 2011;[2]
- the Advisory Panel on the Economic Potential of Senior Australians' *Realising the economic potential of senior Australians – turning grey into gold*, released on 12 December 2011;[3] and
- the Australian Law Reform Commission*'s Family Violence and Commonwealth Laws – Improving Legal Frameworks* released on 8 February 2012.[4]

1.7 Flexible working arrangements are also under active consideration by the following reviews that are scheduled to report back to government by the end of May:

- an independent review of the *Fair Work Act 2009*; and
- the Department of Education, Employment and Workplace Relations (DEEWR) consultation on expanding the right to request flexible working arrangements under the National Carer Recognition Framework.[5]

1.8 Additionally, the General Manager of Fair Work Australia (FWA) is currently conducting research into:

- the extent to which individual flexibility arrangements under modern awards and enterprise agreements are being agreed to, and the content of those arrangements, and

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1 Productivity Commission, *Caring for Older Australians, Report No. 53*, 28 June 2011, pp. 339-341.

2 Productivity Commission, *Disability Care and Support, Report No. 54, Vol. 2*, 31 July 2011, pp. 728-729.

3 Advisory Panel on the Economic Potential of Senior Australians, *Realising the economic potential of senior Australians – turning grey into gold*, 2011, p. 24.

4 Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks, Report No. 117*, 8 February 2012, ch. 16.

5 Ms Jody Anderson, DEEWR, *Transcript of Evidence*, 23 March 2012, p. 34.

- the operation of the provisions of the National Employment Standards (NES) relating to employee requests.

1.9 This research is conducted under section 653 of the *Fair Work Act 2009* and required to be reported by 26 November 2012.[6]

Background—current provisions for flexible working arrangements

1.10 Current provisions for flexible working arrangements are set out in the National Employment Standards (NES) at Part 2-2 of the *Fair Work Act*. Division 4 of this part provides for requests for flexible working arrangements and section 65 specifies employees who are eligible to make a request:

> (1) An employee who is a parent, or has responsibility for the care, of a child may request the employer for a change in working arrangements to assist the employee to care for the child if the child:
>
> (a) is under school age; or
>
> (b) is under 18 and has a disability.
>
> (2) The employee is not entitled to make the request unless:
>
> (a) for an employee other than a casual employee—the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or
>
> (b) for a casual employee—the employee:
>
> (i) is a long term casual employee of the employer immediately before making the request; and
>
> (ii) has a reasonable expectation of continuing employment by the employer on a regular and systemic basis.[7]

1.11 Examples of the type of changes an employee is entitled to request include changes in hours of work, work patterns and location of work.

1.12 The remainder of section 65 requires that a request for flexible working arrangements must be in writing and set out the detail of and reasons for the change[8] and that the employer:

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6 Ms Kristin Letts, DEEWR, *Transcript of Evidence*, 23 March 2012, p. 34.

7 *Fair Work Act 2009*, s. 65 (1 & 2).

- must provide a written response within 21 days;[9]
- may refuse a request only on reasonable business grounds;[10] and
- must include details of the reasons for refusing a request in the response.[11]

1.13 Sections 144 and 202 of the Act also provide for individual flexibility arrangements (IFA) to meet 'genuine needs' of the employers and employees within awards and enterprise agreements. On entering an IFA the employer is required to ensure that the employee would be better off overall than they would have been had the IFA not been entered into.[12]

Outline of the Bill

1.14 The Bill has one Schedule of 23 amendments to the *Fair Work Act 2009*. Item 8 repeals division 4 of part 2-2 of the *Act*. Some elements of division 4 are retained in item 12, which inserts a new part (Part 2-7A) with amended flexible working arrangements provisions.

1.15 Item 13 provides penalties for contravening a flexible working arrangements order (as determined in Part 2-7A).

1.16 Further, item 17 requires Fair Work Australia (FWA) to conduct research into the operation of Part 2-7A, particularly into requests for changed working arrangements.

1.17 The other proposed amendments are consequential amendments.

Part 2-7A, Division 2—Flexible working arrangements

1.18 Part 2-7A proposes eligibility requirements for employees and processes for requesting changes to working arrangements. The Bill inserts Part 2-7A as a new section, so that the right to request flexible working arrangements would no longer be part of the NES.

1.19 Division 2 of part 2-7A comprises two clauses. Clause 306D proposes to extend the right to request flexible working arrangements from employees

8 *Fair Work Act 2009*, s. 65(3).
9 *Fair Work Act 2009*, s. 65(4).
10 *Fair Work Act 2009*, s. 65(5).
11 *Fair Work Act 2009*, s. 65(6).
12 *Fair Work Act 2009*, ss. 144(4) & 203(4).

who are caring for children under certain circumstances to all employees and their representative organisations.

1.20 Clause 306E proposes to explicitly extend and strengthen the right to request flexible working arrangements for any employee who has responsibility for the care of another person.

1.21 The clause extends the right to request flexible working arrangements from employees caring for children in certain circumstances to employees who have responsibility for care of another person.

1.22 The right of carers to request flexible working arrangements is strengthened by requiring employers who refuse a request to show 'serious countervailing business grounds' that warrant the refusal. This test is higher than the 'reasonable business grounds' proposed to apply to all other requests.[13]

1.23 Otherwise, the eligibility of employees to request flexible work arrangements (in terms of required periods of service with an employer), the procedures by which the request and the employer's response are made are the same as those under the current Act.

Part 2-7A, Division 3—Flexible working arrangements orders

1.24 Division 3 of Part 2-7A proposes to provide a power to Fair Work Australia to make enforceable orders 'to ensure that an employer complies with proposed section 306D or 306E.'[14]

1.25 Subclause 2 of clause 306F specifies that FWA may only receive applications for fair working arrangements orders from:

> (a) an employee or organisation whose request under subsection 306D(1) or 306E(1) for a change in working arrangements has been refused;
>
> (b) an employee organisation that is entitled to represent an employee covered by paragraph (a);
>
> (c) the Age Discrimination Commissioner, the Disability Discrimination Commissioner or the Sex Discrimination Commissioner.[15]

1.26 Flexible working arrangements orders may be implemented in stages (as provided in the order), as FWA deems appropriate.[16]

13 Fair Work Amendment (Better Work/Life Balance) Bill 2012, c. 306E(5).
14 Fair Work Amendment (Better Work/Life Balance) Bill 2012, c. 306F(1).
15 Fair Work Amendment (Better Work/Life Balance) Bill 2012, c. 306F(2).
16 Fair Work Amendment (Better Work/Life Balance) Bill 2012, c. 306G.

1.27 Further, the Bill would make contravening a term of a flexible working arrangements order subject to a civil remedy provision.[17]

1.28 Division 3 also addresses the possibility of inconsistencies arising between flexible working arrangements orders and modern awards and enterprise agreements, in which event:

> (1) A term of a modern award has no effect in relation to an employee to the extent that it is less beneficial to the employee than a term of a flexible working arrangements order that applies to the employee.
>
> (2) A term of a flexible working arrangements order has no effect in relation to an employee to the extent that it is inconsistent with a term of an enterprise agreement that applies to the employee.[18]

Submitter concerns

1.29 Stakeholders expressed either strong support for or opposition to the proposed extension of the right to request flexible working arrangements and provide an enforcement mechanism.

1.30 Stakeholders who supported the proposal argued that it would help increase and maintain workforce participation and provide support to otherwise vulnerable employees with little bargaining power. They argued that the Bill would encourage employees not currently covered by a right to request, to seek changes to their working arrangements instead of withdrawing from the workforce when their circumstances might require these changes.

1.31 Some stakeholders who supported the proposed extension of flexible working arrangements argued that the Bill did not go far enough and called for the removal of required minimum periods of employment before requests could be made.[19]

1.32 Stakeholders who opposed the Bill, argued that proposing changes to flexible working arrangements was premature when the Government was currently considering its response to a number of reports and awaiting the

17 Fair Work Amendment (Better Work/Life Balance) Bill 2012, c. 306H.

18 Fair Work Amendment (Better Work/Life Balance) Bill 2012, c. 306I.

19 For instance, Ms Anna Chapman, *Submission 3*, pp. 4-5; Women & Work Research Group, *Submission 8*, pp.6-7; Centre for Work + Life, *Submission 9*, p. 3; Job Watch, *Submission 10*, p. 8 and Work and Family Policy Roundtable, *Submission 11*, p. 4.

findings of further reviews on this matter.[20] In particular, stakeholders expressed reservations that the Bill pre-empted the comprehensive independent review of the *Fair Work Act* due to report to government by 31 May 2012.

1.33 Ai Group also suggested that the current flexible working arrangement provisions have proved sufficient with the vast proportion of flexible working arrangements being agreed directly between employers and employees.[21]

1.34 Apart from the broader debate relating to the desirability of extending the scope of the right to request flexible working arrangements, specific concerns with the Bill that emerged in evidence focused on the proposed:

- removal of flexible working arrangements from the NES;
- introduction of enforceable flexible working arrangements orders; and
- retention of certain eligibility requirements for the right to request flexible working arrangements.

Removing flexible working arrangements provisions from the NES

1.35 The Bill proposes removing flexible working arrangements provisions from the NES and inserting amended provisions in the new Part 2-7A. The NES are minimum standards that were developed through extensive consultation with employer and employee organisations. Notably, as minimum standards, the NES cannot be overridden by an enterprise agreement.

1.36 Inserting flexible working arrangements provisions outside the NES would mean that they are no longer a minimum standard. A flexible working arrangements order could be made for an employee, but it would not be part of the NES and thus could be overridden by an enterprise agreement. The Ai Group described an arrangement whereby a collective agreement could override flexibility for individuals as 'counterintuitive'.[22]

1.37 The Department of Education, Employment and Workplace Relations (DEEWR) suggested that the proposed removal of flexible working arrangements from the NES could cause public confusion as the NES are

20 For instance AFEI, *Submission 14*, p. 4; Business Council of Australia, *Submission 16*, p. 1; ACCI, *Submission 20*, p. 1 and APTIA, *Submission 21*, p. 2.

21 Mr John O'Callaghan, Ai Group, *Transcript of Evidence*, 23 March 2012, p. 2;

22 Ms Genevieve Vaccaro, Ai Group, *Transcript of Evidence*, 23 March 2012, p. 6.

'broadly understood and were developed through extensive consultation.'[23]

1.38 Job Watch supported the maintenance of flexible working arrangements within the NES on the grounds that:

> Since [the NES] is becoming a recognised set of minimums that smaller employers can become aware of and understand … putting [flexible working arrangements] in a different section of the Act … will be more complicated for smaller employers … Even a set of employees or a union that is not the most sophisticated can point to the NES and say, "We need this in our enterprise agreement – full stop…"[24]

1.39 Some stakeholders appeared unaware that the Bill proposed to remove flexible working arrangements provisions from the NES.[25] Others expressed awareness of the proposal, but were uncertain as to the reason and what ramifications such a move might have.[26]

1.40 Of the nine organisations and one individual that appeared at the public hearing, which included employer, employee and carer organisations, all expressed outright opposition to or reservation at the proposed removal of flexible working arrangements from the NES.[27]

1.41 By contrast, a late submission received from the United Firefighters Union of Australia (UFUA) supported the Bill 'in that it specifically provides that flexible arrangements cannot be inconsistent with a term of an enterprise agreement.' UFUA argued that 'individual circumstances must be balanced in the context of the workplace or industry.'[28]

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23 DEEWR, *Submission 18*, p. 9.

24 Mr Ian Scott, Job Watch, *Transcript of Evidence*, 23 March 2012, p. 2.8

25 For example, Women & Work Research Group, *Submission 8*, p. 7; Work + Family Policy Roundtable, *Submission 11*, p. 1; ACTU, *Submission 12*, p. 3; AFEI, *Submission 14*, p. 2; Working Women's Centre SA, *Submission 19*, pp. 1-2.

26 For example, Carers Australia, *Submission 15*, p. 2; Ms Belinda Tkalcevic, ACTU, *Transcript of Evidence*, 23 March 2012, p.8.

27 Mr Genevieve Vaccaro, Ai Group, *Transcript of Evidence*, 23 March 2012, p. 2; Ms Belinda Tkalcevic, ACTU, *Transcript of Evidence*, 23 March 2012, p. 8; Ms Mary Reid, Carers Australia, *Transcript of Evidence*, 23 March 2012, p. 16; Ms Anna Chapman, *Transcript of Evidence*, 23 March 2012, p. 22; Ms Alexandra Heron, Women and Work Research Group, *Transcript of Evidence*, 23 March 2012, p. 22; Ms Sara Charlesworth, Centre for Work+Life, *Transcript of Evidence*, 23 March 2012, p. 22; Mr Ian Scott, Job Watch, *Transcript of Evidence*, 23 March 2012, p. 28; Ms Sandra Dann, Working Women's Centre SA, *Transcript of Evidence*, 23 March 2012, p. 28; Ms Anna Davis, Northern Territory Working Women's Centre, *Transcript of Evidence*, 23 March 2012; Ms Jody Anderson, DEEWR, *Transcript of Evidence*, 23 March 2012, p. 35.

28 UFUA, *Submission 22*, p. 2.

1.42 The Committee notes the NES is a consolidated baseline of minimum employment standards, and so strongly disagrees with the proposed removal of flexible working arrangements provisions from the NES. The current facility that allows flexible working arrangements to operate within the framework of enterprise agreements does not unduly expose workplaces or industries to unacceptable outcomes because flexibility is based on a right to request and thus can be denied on reasonable business grounds.

1.43 DEEWR indicated that as Part 2-7A was outside the NES, it would rely on a different enforcement framework. The Department expressed concern that this might increase the workload of Fair Work Australia.[29] The proposed enforcement framework will be considered in greater detail in the next section.

Flexible working arrangements orders

1.44 The Bill proposes to empower Fair Work Australia to make enforceable flexible working arrangements orders. Employee advocates generally supported the proposal for FWA to make flexible working arrangements orders. [30] Ms Anna Chapman typified support for flexible working arrangements orders:

> At present the [Fair Work] Act rule that the only basis for an employer to refuse a request for flexibility is 'reasonable business grounds' is not enforceable as a contravention of Part 2-2 Division 4 of the … Act. It cannot be litigated directly, as no cause of action arises where an employer refuses a request on wholly unreasonable grounds.[31]

1.45 Carers Australia expressed concern that 'trying to impose [orders] on employers simply invites resistance' and stated that it was hesitant about the compulsory aspect of the proposal because 'the very last thing we want to do is to give employers a reason for not employing carers.'[32]

1.46 Ms Chapman called this suggestion 'nonsensical' because 'the majority of employees are likely to be carers at some stage' and drew a parallel with

29 DEEWR, *Submission 18*, p. 9.

30 Ms Anna Chapman, *Submission 3*, pp. 1-2. See also Workplace Research Centre, *Submission 7*, pp. 3-4, National Network of Working Women's Centres, *Submission 17*, pp. 3-4; Ms Belinda Tkalcevic, ACTU, *Transcript of Evidence*, 23 March 2012, p. 8.

31 Ms Anna Chapman, *Submission 3*, p. 1.

32 Ms Susan Taylor, Carers Australia, *Transcript of Evidence*, 23 March 2012, pp. 15-6.

arguments that the Sex Discrimination Act would result in discrimination against the employment of women. [33]

1.47 Carers Australia cautioned that caring requirements can be unpredictable and subject to change and warned that forcing a rigid process or an inflexible order onto employers and employees may not actually achieve flexibility.[34] The Ai Group echoed concerns that FWA orders were not easily altered or terminated.[35] Job Watch sought the insertion of additional clauses in the Bill to allow for revoking or varying an order.[36]

1.48 The Ai Group expressed in principle opposition to third-party arbitration suggesting that flexible working arrangements orders would be contrary to the purpose of the *Fair Work Act* in replacing a framework that has facilitated bargaining and cooperation with a move to a more adversarial system with resolution by arbitration.[37]

1.49 The power to impose flexible working arrangements orders appears to be at odds with one of the objects of the *Fair Work Act;* namely to support:

> a system that has at its heart bargaining in good faith at the enterprise level, as this is essential to maximise workplace cooperation, improve productivity and create rising national prosperity…[38]

1.50 The proposal moves away from the principle of encouraging dialogue between employees and employers so that a mutually agreeable arrangement can be struck. The principle underlying a right to request flexible working arrangements and requirement to respond is the facilitation of a better understanding by each party of the requirements of the other.

Retention of eligibility requirements for requests

1.51 Clauses 306D and 306E retain present minimum required periods of employment for employees to be entitled to request flexible working arrangements.

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33 Ms Anna Chapman, *Transcript of Evidence*, 23 March 2012, p. 24.

34 Ms Susan Taylor and Ms Mary Reid, Carers Aust, *Transcript of Evidence*, 23 March 2012, p. 18.

35 Ms Genevieve Vaccaro, Ai Group, *Transcript of Evidence*, 23 March 2012, p. 4.

36 Job Watch, *Submission 10*, pp. 11-12.

37 Ms Genevieve Vaccaro, Ai Group, *Transcript of Evidence*, 23 March 2012, p. 3 and pp. 4-5. See also AFEI, *Submission 14*, p. 2.

38 Hon Julia Gillard MP, *House of Representatives Hansard*, 25 November 2008, p. 11190.

1.52 Many submitters called for these eligibility requirements to be shortened or removed.[39] For instance, the Work + Family Policy Roundtable commented that the requirement for 12 months of continuous service with an employer prior to requesting flexible working arrangements disadvantages already vulnerable employees who may have patchy work history due to caring responsibilities.[40]

1.53 The Women and Work Research Group suggested that the eligibility requirement be shortened to six months,[41] while Ms Anna Chapman, the Work + Family Policy Roundtable, Job Watch and the National Working Women's Centres called for the abolition of these eligibility requirements.[42] Job Watch argued that the right to request flexible working arrangements:

> does not relate to something such as unfair dismissal where the employer needs some time to work out whether the employees is suitable … It is not something that compensates an employee for their length of service. Emergencies and illnesses happen out of the blue…'[43]

1.54 Eligibility to access flexible working arrangements has been the subject of recent reviews that are presently under consideration by the Government. Furthermore, this matter is under active consideration as part of a series of further reviews. The Committee looks forward to the Government's response to these reviews where any proposal to change flexible working arrangements provisions will be provided within the context of more comprehensive and systematic changes to the workplace relations system.

Concluding comments

1.55 The Committee notes the Government's commitment to review flexible working arrangements, particularly in relation to the right to request for people with responsibility for the care of another person, and endorses the

39 For instance, Carers Queensland, *Submission 1*, p. 6; Women and Work Research Group, *Submission 8*, p. 7; Centre for Work + Life, *Submission 9*, p. 3; Job Watch, *Submission 10*, p. 7; Work + Family Policy Roundtable, *Submission 11*, p. 4.

40 Work + Family Policy Roundtable, *Submission 11,* p. 4.

41 Women and Work Research Group, *Submission 8*, p. 7.

42 Ms Anna Chapman, *Transcript of Evidence*, 23 March 2012, p. 21; Assoc Prof Sara Charlesworth, Work + Family Policy Roundtable, *Transcript of Evidence*, 23 March 2012, p. 21; Mr Ian Scott, Job Watch, *Transcript of Evidence*, 23 March 2012, p. 28; Ms Sandra Dann, Working Women's Centre SA, *Transcript of Evidence*, 23 March 2012, p. 29.

43 Mr Ian Scott, Job Watch, *Transcript of Evidence*, 23 March 2012, p. 28.

National Carer Recognition Framework and the consultations DEEWR is currently holding under the National Carer Strategy.

1.56 The majority of the Committee also supports the principle embodied in the Bill that the right to request flexible working arrangements should be extended to classes of employees other than carers, particularly those affected by domestic and family violence.

1.57 Most evidence to the inquiry supported the proposed extension of the right to request flexible working arrangements to broader categories of carers and other employees. However, concerns were expressed about the other aspects of the Bill. Perhaps, the most emphatic of these was the proposed removal of flexible working arrangements from the NES. There appears little merit in removing flexible working arrangement provisions from the NES.

1.58 The Committee is also concerned that by proposing that Fair Work Australia be able to impose flexible working arrangements orders, the Bill would alter the objectives of the workplace relations system as provided by the *Fair Work Act 2009*. It would be inappropriate to recommend a change that would alter the fundamentals of Australia's industrial relations framework without extensive and transparent consultation especially where other, more comprehensive reviews, are due to report to Government shortly or where recent reports are under active consideration.

1.59 The Committee notes the review of the *Fair Work Act*, and other reviews that have considered flexible working arrangements as well as the policies that will inform the Government's comprehensive response to these reviews. Subject to the above comments, the majority of the Committee supports the general principle of people having greater rights to request flexible working arrangements, but recommends that the Bill be considered after the Independent Review of the Act has been completed and the Government's response has been released.

Recommendation 1

In light of the Independent Review of the *Fair Work Act 2009* currently underway, the Committee recommends the Bill be considered after the Independent Review of the Act has been completed and the Government's response has been released.

Amanda Rishworth MP

Chair

Appendix A—Text of the Bill

2010-2011-2012

The Parliament of the

Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

Fair Work Amendment (Better Work/Life Balance) Bill 2012

No. , 2012

(Mr Bandt)

A Bill for an Act to amend the Fair Work Act 2009, and for related purposes

Contents

A Bill for an Act to amend the Fair Work Act 2009, and for related purposes

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the Fair Work Amendment (Better Work/Life Balance) Act 2012.

2 Commencement

This Act commences on the day after this Act receives the Royal Assent.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments

Fair Work Act 2009

1 Paragraph 5(8)(a)

Omit "or an equal remuneration order (see Part 2 7)", substitute ", an equal remuneration order (see Part 2 7) or a flexible working arrangements order (see Part 2 7A)".

2 Section 12

Insert:

flexible working arrangements order: see subsection 306F(1).

3 Subparagraph 43(2)(a)(ii)

Omit "and", substitute "or".

4 At the end of paragraph 43(2)(a)

Add:

(iii) a flexible working arrangements order (see Part 2 7A); and

5 Subsection 44(2)

Omit "65(5) or".

6 Subsection 44(2) (note 1)

Repeal the note, substitute:

Note 1: Subsection 76(4) states that an employer may refuse an application to extend unpaid parental leave only on reasonable business grounds.

7 Subsection 44(2) (note 2)

Omit "65(5) or".

8 Division 4 of Part 2 2

Repeal the Division.

9 Section 146 (note)

Omit "65(5) or".

10 After paragraph 172(1)(c)

Insert:

(ca) matters pertaining to flexible working arrangements;

11 Subsection 186(6) (notes 1 and 2)

Omit "65(5) or".

12 After Part 2 7

Insert:

Part 2 7A—Flexible working arrangements

Division 1—Introduction

306A Guide to this Part

This Part provides processes for changing working arrangements.

Division 1 deals with preliminary matters.

Division 2 deals with requests for flexible working arrangements, including flexible working arrangements for employees who are carers.

Division 3 provides for the making of flexible working arrangements orders by FWA to ensure that employers comply with this Part.

306B Meanings of *employee and employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

306C State and Territory laws that are not excluded

(1) This Act is not intended to apply to the exclusion of laws of a State or Territory that provide employee entitlements in relation to flexible working arrangements, to the extent that those entitlements

are more beneficial to employees than the entitlements under this Part.

(2) However, a law of a State or Territory has no effect in relation to an employee to the extent that it provides an employee entitlement in relation to flexible working arrangements that is inconsistent with a term of an enterprise agreement that applies to the employee.

Division 2—Requests for flexible working arrangements

306D Requests for flexible working arrangements

Employee or organisation may request change

(1) An employee, or an employee organisation that is entitled to represent the employee, may request the employer to change the employee's working arrangements.

Note: Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.

(2) Neither the employee, nor the organisation, is entitled to make the request unless:

(a) for an employee other than a casual employee—the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or

(b) for a casual employee—the employee:

(i) is a long term casual employee of the employer immediately before making the request; and

(ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

Formal requirements

(3) The request must:

(a) be in writing; and

(b) set out details of the change sought and of the reasons for the change.

Responding to the request

(4) The employer must give the employee, or the employee organisation (as the case requires), a written response to the request within 21 days, stating whether the employer grants or refuses the request.

(5) The employer may refuse the request only on reasonable business grounds.

(6) If the employer refuses the request, the written response under subsection (4) must include details of the reasons for the refusal.

306E Requests for flexible working arrangements—carers

Request for change for employee who is a carer

(1) An employee who has responsibility for the care of another person, or an employee organisation that is entitled to represent the employee, may request the employer to change the employee's working arrangements to assist the employee to care for the other person.

Note: Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.

(2) Neither the employee, nor the organisation, is entitled to make the request unless:

(a) for an employee other than a casual employee—the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or

(b) for a casual employee—the employee:

(i) is a long term casual employee of the employer immediately before making the request; and

(ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

Formal requirements

(3) The request must:

(a) be in writing; and

(b) set out details of the change sought and of the reasons for the change.

Responding to the request

(4) The employer must give the employee, or the employee organisation (as the case requires), a written response to the request within 21 days, stating whether the employer grants or refuses the request.

(5) The employer may refuse the request only on serious countervailing business grounds.

(6) If the employer refuses the request, the written response under subsection (4) must include details of the reasons for the refusal.

Division 3—Flexible working arrangements orders

306F FWA may make flexible working arrangements order

Power to make flexible working arrangements order

(1) FWA may make any order (the **flexible working arrangements order**) it considers appropriate to ensure that an employer complies with section 306D or 306E.

Who may apply for flexible working arrangements order

(2) FWA may make a flexible working arrangements order only on application by any of the following:

(a) an employee or organisation whose request under subsection 306D(1) or 306E(1) for a change in working arrangements has been refused;

(b) an employee organisation that is entitled to represent an employee covered by paragraph (a);

(c) the Age Discrimination Commissioner, the Disability Disability Discrimination Commissioner or the Sex Discrimination Commissioner.

306G Implementation of flexible working arrangements in stages

A flexible working arrangements order may implement changed working arrangements in such stages (as provided in the order) as FWA thinks appropriate.

306H Contravening a working arrangements order

An employer must not contravene a term of a flexible working arrangements order.

Note: This section is a civil remedy provision (see Part 4 1).

306I Inconsistency with modern awards and enterprise agreements

(1) A term of a modern award has no effect in relation to an employee to the extent that it is less beneficial to the employee than a term of a flexible working arrangements order that applies to the employee.

(2) A term of a flexible working arrangements order has no effect in relation to an employee to the extent that it is inconsistent with a term of an enterprise agreement that applies to the employee.

13 Subsection 539(2) (after table item 9)

Insert:

Part 2-7A—Flexible working arrangements

9A	306H	(a) a person to whom a flexible working arrangements order relates; (b) an organisation entitled to represent a person to whom a flexible working arrangements order relates	(a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court	60 penalty units

14 Subsection 545(1) (note 4)

Omit "65(5),".

15 After paragraph 557(2)(f)

Insert:

(fa) section 306H (which deals with contraventions of flexible working arrangements orders);

16 After paragraph 576(1)(f)

Insert:

(fa) flexible working arrangements (Part 2 7A);

17 Paragraph 653(1)(c)

Repeal the paragraph, substitute:

(c) conduct research into the operation of the provisions of the National Employment Standards relating to requests for extensions of unpaid parental leave under subsection 76(1); and

(ca) conduct research into the operation of Part 2 7A in relation to requests for changed working arrangements; and

18 After paragraph 675(2)(e)

Insert:

(ea) a flexible working arrangements order

19 At the end of subsection 716(1)

Add:

; (g) a term of a flexible working arrangements order.

20 Subsection 739(2)

Omit “65(5) or”.

21 Subsection 739(2) (note)

Omit “65(5) or”.

22 Subsection 740(2)

Omit “65(5) or”.

23 Subsection 740(2) (note)

Omit “65(5) or”.

B

Appendix B—Submissions

1	Carers Australia QLD
2	Australian Domestic & Family Violence Clearinghouse
3	University of Melbourne
4	Australian Law Reform Commission
5	Carers NSW
6	Ryan Carlisle Thomas Lawyers
7	Workplace Research Centre
8	Women & Work Research Group
9	Centre for Work + Life
10	Job Watch Inc
11	Work + Family Policy Roundtable
12	ACTU
13	Australian Industry Group
14	Australian Federation of Employers and Industries
15	Carers Australia
16	Business Council of Australia
17	NT Working Women's Centre
18	Department of Education, Employment & Workplace Relations
19	Working Women's Centre SA
20	Australian Chamber of Commerce and Industry

21 Australian Public Transport Industrial Association

22 United Firefighters Union of Australia

23 Australian Human Rights Commission

C

Appendix C—Public hearings and witnesses

23 March 2012, Canberra

Australian Council of Trade Unions

Ms Belinda Tkalcevic, Legal and Industrial Officer

Carers Australia

Ms Mary Reid, Business Manager

Ms Susan Taylor, Senior Policy Adviser

Centre for Work + Life

Assoc Prof Sara Charlesworth, Acting Director

Department of Education, Employment & Workplace Relations

Ms Jody Anderson, Branch Manager, Workplace Relations Policy Group

Ms Kristin Letts, A/g Director

Ms Alison Morehead, Group Manager, Workplace Relations Policy Group

Mr Jeremy O'Sullivan, Chief Counsel, Workplace Relations Legal Group

Department of Education, Employment and Workplace Relations

Mr Adrian Breen, A/g Branch Manager, Workplace Relations Legal Group

Job Watch Inc

Mr Ian Scott, Principal Lawyer

NT Working Women's Centre

Ms Anna Davis, Co-Coordinator

Qld Working Women's Service

Ms Kerriann Dear, Director

The Australian Industry Group

Mr John O'Callaghan, Executive Officer

Ms Genevieve Vaccaro, Adviser, Workplace Relations Policy

University of Melbourne

Ms Anna Chapman, Senior Lecturer, Centre for Employment and Labour Relations Law

Women & Work Research Group

Ms Alexandra Heron, Research Associate

Working Women's Centre SA

Ms Sandra Dann, Director, Committee of Management

Additional comments – Mr Bandt

I welcome the Committee's majority support for the principle behind my Bill, namely that our workplace laws should help people achieve a better work/life balance.

I also welcome the support from most groups who made submissions to the Inquiry for broadening and strengthening the right to request flexible working arrangements.

However, I make two points.

First, I acknowledge there is not a consensus regarding the best way to implement some aspects of the proposed changes. In particular, there is an issue as to whether it is appropriate to move 'flexible working arrangements' outside the NES framework, as proposed in the Bill. In this regard, I do not agree with the Committee's conclusions regarding this matter in paragraphs 1.42 and 1.57 of the report, although I accept that there is an issue that needs to be resolved.

It is important to understand the rationale behind this element of the Bill.

After a series of attacks from both Labor and Coalition governments, awards now contain very few protections. Enterprise agreements are now the place where many long fought for and hard-won protections are contained. If enterprise agreements are not given primacy then there is a possibility that flexible working arrangements may (inadvertently) provide a way to 'contract out' of such an agreement.

The Bill as drafted therefore reflects the fact that in the current legislative environment, enterprise bargaining and enterprise agreements may be the primary mechanisms for providing better industrial outcomes, including around work/life balance.

By inserting 'flexible working arrangements' into the list of permitted bargaining matters, as proposed in the Bill, this will encourage new agreements to include such issues.

Where an enterprise agreement does include such matters, they would take precedence. This is important because there may be some areas where, for example, it is not appropriate to have someone working for a very short period of hours. It is probably best left to the enterprise to determine this.

It may not be appropriate to have highly skilled emergency services professionals working two or three hours a week, for example. This situation could have the potential to undermine the important level of skills, training and teamwork required to perform many of these jobs. I note the submission from the United Firefighters Union of Australia to this effect.

Of course, such protections must not be used as a barrier to women participating in such highly regulated workplaces. There is force in the submissions to the Inquiry that requiring full-time work in highly regulated workplaces has been a barrier to women's participation. Indeed, that is one of the key points of this Bill: to make it easier for those with caring responsibilities, who are still most often women, to enter or remain in the workforce.

A balance needs to be struck. In my view, it remains preferable that such balances be struck by the employees and employers concerned, taking into account the specific nature of the industries concerned. This will ultimately lead to better work/life outcomes. Against this must be weighed the demonstrated strong preference for the National Employment Standards remaining a clearly understood set of universal minimum conditions.

One solution, not explored at length during this inquiry, may be to allow enterprise agreements to take precedence but require them to meet a 'work/life balance' test so that all people are able to get and keep jobs at that enterprise and so that any barriers to participation are removed.

Given the Recommendation of the Committee to consider the Bill after the Independent Review Report and the Government's response, I consider it is appropriate to also revisit this issue at that time.

Secondly, paragraphs 1.44 to 1.50 and 1.58 deal with whether requests for better work/life balance should be enforceable. There were some very strong submissions to the Committee that if requests are not enforceable or justiciable, the right may be of little value. I am pleased that the Committee has not decided to keep the 'unenforceable' status quo and has instead left the door open to making this right enforceable. This issue too should be considered after the Independent Review of the Act, at which time the strong evidence before the Committee on this question should be re-examined.

Adam Bandt MP

Dissenting report – Mr Ramsey, Mrs Andrews and Mr Tudge

The Coalition members of the House of Representatives Education and Employment support the committee's decision to recommend the House defer consideration of this bill until after the Government responds to any recommendations the review of Fair Work Australia may make to the Government are responded to.

However in doing so the Coalition members do not necessarily endorse the general thrust of the legislation, which is to place further enforceable responsibilities on employers.

The Coalition members are concerned definitions of carers, and their entitlement to request flexibility is unclear and that "serious countervailing business concerns" is a standard too difficult for businesses to prove.

The Coalition members are of the opinion better results will be achieved if employers are encouraged to work in a co-operative fashion with their employees rather than engaging in an environment of confrontation by government regulation enforcing particular outcomes.

While the Coalition members support the decision to defer Parliament's consideration of this bill until after the review of the Fair Work act is complete and the government has responded, this does not endorse the structure of the review.

Former Federal Court Judge Raymond Finkelstein once said "it is naive to think that a judge's background, education, heritage and personal ethical views do not influence their decisions".

To this end the Coalition members are concerned the review of Fair Work is being conducted by a hand chosen group of people who are likely to reach conclusions favourable to the government.

The Coalition members are also concerned the Fair Work review does not have instructions to consider productivity, flexibility or militancy problems to which the Fair Work act may be contributing.

In this light while the Coalition members consider it prudent to wait for the government's consideration of the review, it is not of the mind that a prima facie case exists to support the legislation in any case.

The intent of the bill and many submissions make the claim that the bill will bring more flexibility to the workplace. Coalition members strongly believe this will not be the case – indeed it is likely to lead to confrontation in the workplace where an atmosphere of co-operation and mutual benefit is much more productive for all concerned.

Rowan Ramsey MP

Deputy Chair

Karen Andrews MP

Alan Tudge MP