Submission Number: 3
Date Received: 28/02/2012

Submission to the

House Standing Committee on Education and Employment

Inquiry into the

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

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1. Introduction

This submission supports the introduction of the Fair Work Amendment (Better Work/Life Balance) Bill 2012 (Cth) ('Better Work/Life Balance Bill'). Many amendments contained in the Bill would bring important improvements to the Fair Work Act 2009 (Cth) ('FW Act'). Other proposed amendments in the Better Work/Life Balance Bill unfortunately though are unduly limited and the Bill ought to be amended in the ways outlined in this submission.

2. Welcome Features of the Better Work/Life Balance Bill 2012

Favourable features of the Bill include:

2.1 **The insertion of an enforcement mechanism, through the ability of Fair Work Australia to make a 'flexible working arrangements order' (cl 306F), contravention of which is a civil remedy provision (cl 306H).** At present the FW 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 FW Act.[1] It cannot be litigated directly, as no cause of action arises where an employer refuses a request on wholly unreasonable grounds. This characteristic of the scheme attracted much criticism

[1] FW Act s 65(5), s 44(2). See also s 739(2), s 740(2).

in submissions to the 2009 Senate Inquiry into the Fair Work Bill.[2] The 2012 Better Work/Life Balance Bill rightly addresses this main shortcoming of the current FW Act provisions. The current situation is not conducive to good employment relations. The legislative provision of a legal right to employees and a concomitant legal obligation on employers, at the same time as denying an enforcement mechanism to ensure compliance, is confusing and unhelpful to both employers and employees, as well as to others. The present lack of an avenue of enforcement in the FW Act may bring the law into disrepute in the eyes of lay people. In this respect the 2012 Bill provides an important improvement on the FW Act.

2.2 **Standing to apply to Fair Work Australia for a 'flexible working arrangements order' (cl 306F(2)).** The Better Work/Life Balance Bill provides that the employee may apply for a flexible working arrangements order, as may an employee organization that represents the employee's interests, the Sex Discrimination Commissioner, Age Discrimination Commissioner, and Disability Discrimination Commissioner (cl 306F(2)). It is appropriate that trade unions and these Commissioners have standing to apply for an order. The Race Discrimination Commissioner should also have standing in this regard, and the 2012 Bill ought to be amended in this respect. Issues of conflict between work and care, kinship and cultural commitments, can be heightened for Indigenous people, and for people from culturally and linguistically diverse backgrounds.

2.3 **The extension of a right to request beyond the issue of care per se into the broader work/life context (cl 306D).** A broader focus on the intersections and conflicts between work and life (including community and kinship commitments, volunteering, study and participation in sport) will assist in the achievement of a decent work agenda.[3] It is also likely to lessen resentment by co-workers towards mothers of infants and young children who seek flexibility through mechanisms designed and limited solely to parents and carers of young children and children with a disability. In addition, many Australian employers are already offering broad right to request schemes, and have been doing so in increasing numbers prior to the commencement of the FW Act.[4] In this sense the

[2] The Senate, Standing Committee on Education, Employment and Workplace Relations, Parliament of Australia, *Fair Work Bill 2008 [Provisions]* (2009) [2.30].
[3] ILO, *Decent Work*, 1999; Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work*, 2nd edn, 2011, 2.5.2.4.
[4] Barbara Pocock, Natalie Skinner and Reina Ichii, *Work, Life and Workplace Flexibility: The Australian Work and Life Index 2009*, Centre for Work + Life, University of South Australia, 2009, p 54, p 59. See also Natalie Skinner and Barbara Pocock, 'Flexibility and Work-Life Interference in Australia' (2011) 53 *Journal of Industrial Relations* 65; CCH, 'Results of Flexible Work 2010 – A Pulse Survey' (June 2010) 184 *Equal Opportunity Alert* 1, 3.

expansion proposed in the 2012 Better Work/Life Balance Bill would simply represent the FW Act catching up with existing employer best practice on flexibility.

2.4 **The broadening of care relationships recognized (cl 306E**). At present the FW Act mechanism is limited to requests that relate to meeting the care needs of pre-school aged children and children with a disability under the age of 18. This is unduly restrictive, and may produce resentment by co-workers towards mothers who seek flexibility through this mechanism. As noted above, many Australian employers are already offering broader right to request schemes, and have been doing so since prior to the commencement of the FW Act provisions.[5] The extension in the 2012 Better Work/Life Balance Bill to employees who have 'responsibility for the care of another person' would provide an important improvement on the current FW Act scheme. Although care responsibilities to young children and children with a disability are a prominent source of work and care conflict, conflicts relating to care responsibilities towards older children without a disability and towards adults are also significant. The Productivity Commission has found, for example, that 'the responsibilities [of parents] often increase when children with disability leave school, as school provides a de facto form of respite. Accordingly, the rationale for flexible working hours is stronger where a person is caring for a [adult] child with disability.'[6] The Productivity Commission has recommended that the FW Act right to request mechanism be extended to apply in relation to children with a disability over the age of 18 years and who require a high level of care.[7] Care responsibilities towards other adults may also be substantial. These people might be the partner of the employee, a relative, a person in an Indigenous kinship network, a friend, or a person who shares a house with the employee. There is no good reason to ignore care responsibilities to a wide range of people. This is especially so in the context of an overriding test that would be structured around whether the employer can establish that its refusal of a request was 'justified' (explained below).

2.5 Notably a similar right to request scheme enacted in the United Kingdom in 2002 has been incrementally extended over the years and now applies in relation to parents and carers of children up to the age of 16, and workers in relation to a wide range of adults in need of care, including relatives, spouses, civil partners and people who live at the

[5] Ibid.
[6] Productivity Commission, *Disability Care and Support: Inquiry Report*, Vol 2, No 54, 31 July 2011, 728-9.
[7] Ibid, recommendation 15.5.

same address as the employee.[8] Developments in the UK have been influential in Australian debates, and were referred to explicitly in the 2005 *Parental Leave Test Case*.[9]

3. Aspects of the Better Work/Life Balance Bill 2012 that Require Amendment

In some important respects the Better Work/Life Balance Bill fails to address key limitations of the current framework of Part 2-2 Div Division 4 in the FW Act:

3.1 **Delete the preconditions of service.** The current FW Act, and the 2012 Bill as currently drafted, limit the right to request to 'national system employees' who have completed 12 months 'continuous service' with their employer prior to making the request, or are a 'long term casual employee'.[10] These preconditions are unduly restrictive. They are highly gendered in that they disproportionately exclude employment arrangements that are dominated by women of child-bearing age.[11] This is especially problematic as the experience of work and care conflict is highly gendered, with women reporting higher levels of work and care tension. Conflict between work and care presents a principal source of women's inequality in the labour market. In this way the requirements in the FW Act of 12 months service or status as a long term casual, repeated in the 2012 Bill, limit the potential of the scheme to generate transformative change. The Bill should be amended so that the right to request scheme simply extends to all 'national system employee[s]'. The length and characteristics of an employee's engagement, instead of presenting a complete bar to access to the scheme, are better positioned as relevant

[8] Employment Rights Act 1996 (UK) s 80G(1)(b), inserted by the Employment Act 2002 (UK). See also Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 (SI 2002 No, 3236) and the Flexible Working (Procedural Requirements) Regulations 2002 (SI 2002 No. 3207). The provisions were subsequently extended by the Work and Families Act 2006 (UK) and Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2006 (SI 2006 No. 3314). See Gwyneth Pitt, *Employment Law*, 8th edn, 2011, pp 187-8.

[9] *Parental Leave Test Case 2005* (2005) 143 IR 245 [395].

[10] FW Act s 65(2); see also s 60, s 12 definition of 'long term casual', s 22 definition of 'continuous service'; Better Work/Life Balance Bill 2012 cl 306D(2), cl 306E(2).

[11] See eg, Sara Charlesworth and Iain Campbell, 'Right to Request Regulation: Two New Australian Models' (2008) 21 *Australian Journal of Labour Law* 116, 122, who write that '[i]n 2006 …, 21% of working women of child bearing age (25-44 years) had less than 12 months service with their current employer', citing Australian Bureau of Statistics, *Labour Mobility Australia*, 2006, Cat No 6209.0. See also Australian Bureau of Statistics, *Australian Labour Market Statistics*, July 2009, Cat No 6105, ABS, Canberra, 2009; Australian Human Rights Commission, *Australian Human Rights Commission Submission to the Senate Education, Employment and Workplace Relations Committee* (2009) [8].

considerations in assessing whether it was 'justified' for the employer to reject the request for changed working arrangements (explained below).

3.2 **Extend the scheme to prospective employees.** As presently drafted the FW Act requires that the person requesting a change in working arrangements must actually be currently engaged in employment. In other words, the request mechanism cannot be used by a job applicant to seek accommodation in relation to a potential position.[12] The Better Work/Life Balance Bill 2012 does not alter this situation. The Bill ought to be amended so that a person seeking employment may request flexible work arrangements. This would be in keeping with the Part 3-1 General Protections which apply to 'prospective' employees and employers.[13] Again, the particular circumstances of the request would be relevant in determining whether the potential employer was 'justified' in rejecting the request (explained below).

3.3 **Replace 'reasonable business grounds' and 'serious countervailing business grounds' with a test of 'justified'**. At present the FW Act provides that an employer may refuse a request on 'reasonable business grounds'. That phrase is not defined or further articulated in the FW Act, and the 2005 *Parental Leave Test Case*, which first formulated a right to request in Australia, does not assist to clarify its meaning.[14] It is not a phrase used elsewhere in the FW Act, apart from the parental leave provisions, which have not been interpreted in case decisions.[15]

3.4 The Better Work/Life Balance Bill 2012 retains the phrase 'reasonable business grounds' in relation to requests not linked to care (cl 306D(5)) but replaces it with the phrase 'serious countervailing business grounds' in relation to requests linked to care needs (cl 306E(5)). Both these phrases are largely unknown in Australian industrial law, and are ambiguous. It will be some time before case decisions begin to more closely articulate these concepts. For example, what does the word 'serious' mean in the context of 'serious countervailing business grounds'? The meaning of the phrase 'reasonable business grounds' is also far from clear. On its face it is uncertain whether the 'reasonable business grounds' test calls for a narrower investigation of the employer's perceived business reasons alone and whether those reasons were reasonable, or whether it justifies and indeed requires a broader assessment of reasonableness in all the circumstances, balancing the employer's interests with the employee's situation, as

[12] Beth Gaze, 'Quality Part-time Work: Can Law Provide a Framework?' (2005) 15 *Labour & Industry* 89 at 106.
[13] FW Act s 342(1) item 2.
[14] *Parental Leave Test Case 2005* (2005) 143 IR 245.
[15] FW Act s 76(4).

well as the impact on other employees. It should be noted that as the clause is worded, the concept of reasonableness attaches to the employer's 'business grounds'; the wording of the phrase does not necessarily indicate that a broader consideration of reasonableness per se is warranted. Nonetheless, the ordinary meaning of the word 'reasonable' may suggest a broader approach.[16]

3.5 Providing two different tests in relation to care and non-care requests runs the risk of causing confusion and uncertainty in the minds of managers, employers and employees. The nuanced difference between the two phrases is unclear and is likely to be lost in the actual management practices of employers.

3.6 Both tests of 'reasonable business grounds' and 'serious countervailing business grounds' ought to be replaced with a single requirement that the employer establish that it was 'justified' in rejecting the employee's request for accommodation. As the reasons why the employer rejected a request are solely within the employer's knowledge, it is appropriate to place the onus on the employer to establish that it was 'justified' in rejecting the request of the employee. This would operate as a reverse onus of proof. Notably, a reverse onus of proof is in keeping with the adverse action protections in Part 3-1 (FW Act s 361) and the unlawful termination provisions in Part 6-4 Div 2 (FW Act s 783).[17] The concept of 'justified' would then be explained by a non-exhaustive list of factors to take into account. That list should emphasis the public interest in furthering the objects of the Act, including to assist employees to balance work and life, and work and care, by providing for flexible working arrangements, to promote social inclusion, fairness, and non-discrimination. The legislation should make it clear that the disadvantage to the employee in not being accommodated is an important consideration.

3.7 **Alteration of the Objects of the FW Act / new Part 2-7A.** The Better Work/Life Balance Bill 2012 does not propose to alter the objects of the FW Act, or insert new objects for the proposed new Part 2-7A. The 2012 Bill should be amended to include an object of

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[16] Where words are undefined in legislation, they are to be given their ordinary meaning: Acts Interpretation Act 1901 (Cth) s 15AB. The *Macquarie Dictionary* defines 'reasonable' as 'endowed with reason', 'agreeable to reason or sound judgement: a reasonable choice': *Macquarie Dictionary*, 5th edn, 2009, Sydney. In order for a decision to be 'endowed with reason' or a 'sound judgement', it might be said that it must be preceded by a process of considering and weighing up various factors.

[17] The Explanatory Memorandum to the Fair Work Bill acknowledges that in the absence of a reverse onus in relation to the adverse action, 'it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason' under Part 3-1: EM to the Fair Work Bill [1461].

achieving substantive equality, and not merely formal equality. It ought to be recognized that the attainment of substantive equality may require accommodation by an employer of an employee's care and community responsibilities. In addition, section 3(d) of the FW Act ought to be amended to read 'assisting employees to balance work and life, including care and community responsibilities, by providing for flexible working arrangements'.