1. ABOUT ACCI

1.1 Who We Are

The Australian Chamber of Commerce and Industry (ACCI) speaks on behalf of Australian business at a national and international level.

Australia’s largest and most representative business advocate, ACCI develops and advocates policies that are in the best interests of Australian business, economy and community.

We achieve this through the collaborative action of our national member network which comprises:

- All state and territory chambers of commerce
- 28 national industry associations
- Bilateral and multilateral business organisations

In this way, ACCI provides leadership for more than 350,000 businesses which:

- Operate in all industry sectors
- Includes small, medium and large businesses
- Are located throughout metropolitan and regional Australia

1.2 What We Do

ACCI takes a leading role in advocating the views of Australian business to public policy decision makers and influencers including:

- Federal Government Ministers & Shadow Ministers
- Federal Parliamentarians
- Policy Advisors
- Commonwealth Public Servants
- Regulatory Authorities
- Federal Government Agencies

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.
Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally;
- Business representation on a range of statutory and business boards and committees;
- Representing business in national forums including Fair Work Australia, Safe Work Australia and many other bodies associated with economics, taxation, sustainability, small business, superannuation, employment, education and training, migration, trade, workplace relations and occupational health and safety;
- Research and policy development on issues concerning Australian business;
- The publication of leading business surveys and other information products; and
- Providing forums for collective discussion amongst businesses on matters of law and policy.
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2. INTRODUCTION

1. The Australian Chamber of Commerce and Industry (ACCI) welcomes the opportunity to provide a further supplementary submission to the Australian Government’s inquiry into the Fair Work Act 2009 (the Act). This supplementary reply submission complements ACCI’s primary submission to the issues outlined in the “Fair Work Review Background Paper” (the Background Paper)\(^1\).

2. ACCI reiterates the concerns and recommendations raised by ACCI Chamber and Industry Association members to this inquiry.\(^2\) Chambers of Commerce and Industry Association members have been in extensive dialogue with individual employers and are at the coal face of providing advice and assistance to member employers. They have attempted to provide bona fide and constructive feedback to the Review Panel on the impact of the Act.

3. ACCI generally supports the issues and concerns raised by ACCI network members, individual employers and other business organisations.\(^3\)

4. The overwhelming evidence demonstrates that the general business community is of one voice, in expressing its concern that aspects of the current Fair Work system are not working as intended and are not delivering upon the promises made to industry prior to the commencement of the Act in July 2009 and January 2010.

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\(^3\) In particular, ACCI supports consideration of recommendations made by the following submitters which were not made in ACCI’s primary submission: POAGS Ltd submission (recommendations made at paragraphs 3.3, 4.1, 4.2); Woodside (recommendation at paragraph 6.5); VECCI submission (recommendations at pp.38 and 48); AMMA submission (recommendations made at pp. 9 – 18); AIG submission (recommendation 19(b) at p.25; 19(e) at p.26; 21 at p.28; 23 at p.28); Business SA submission (recommendation 3.8 at p.11); CCIWA submission (recommendations 14 – 26 at pp.10-13; recommendations 43 – 53 at pp.16-17; recommendation 60 at p.19); MBA submission (recommendations 5, 24 – 29, 34 - 46); NRA submission (recommendation 5, at p.6; recommendation 8 at p.7); CCINT submission (concerns expressed about impact of laws on the indigenous business community); NSWBC submission (recommendations 8 – 10, 13 – 17, 34).
5. It is clear that small, medium and large businesses across all industry sectors have had mixed experiences with the system. There was a telling absence of employer submissions which highlighted the positive aspects of the reforms on their business, which is a concern to ACCI and should be a concern to the Review Panel. It indicates that considered and sensible amendments are now required to be made by the Parliament. This contrasts to submissions generally from trade unions which indicate support for the Act, but also go further to recommend significant changes to the Act which would provide even greater rights and capacities for employees and unions.

6. The Post Implementation Review (PIR) process is designed to assess the impact of the existing Fair Work system on business. This assessment did not occur prior to the introduction of the Fair Work Bill 2008 before it was submitted to the Australian Parliament. The objective of the PIR is not to increase legal obligations on employers, nor is the PIR an opportunity for individuals or organisations to seek amendments to create or expand new rights and capacities which are not currently part of the Fair Work system.

7. ACCI relies upon the recommendations made in its primary submission but wishes to make one additional recommendation in light of numerous proposals made during this inquiry for significant changes to the National Employment Standards (NES).  

Stability for the Safety-Net

8. Given the number of proposals (both before the Parliament and made by various individuals and organisations to this inquiry), ACCI believes that since the WorkChoices amendments in 2005, which created a statutory set of national minimum employment standards (in the form of the Australian Pay and Conditions Standard or APCS), there has been a constant and unending push by unions and interest groups to create new or expanded individual employment rights without a considered views of the impact it may have on employers. Employers are increasingly concerned over this constant push for the creation of new or expanded rights, particularly when the ink is barely dry on new national statutory rights (which commenced only 24 months ago) and

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4 The primary submission referred to filing fees which are not current. A schedule of amendments to correct ACCI’s primary submission and insert the current filing fee is attached at Appendix A.
the General Manager of Fair Work Australia had yet to complete its three yearly report on the operation of key NES provisions.\(^5\)

9. Many leave entitlements under the NES (and prior to this, under the APCS) arise from a long history of test cases before the Australian Industrial Relations Commission (AIRC), with many cases vigorously fought between unions and employer organisations over a considerable length of time. The resultant test case “standards” which were inserted into federal industrial awards was the result of these arbitrated outcomes.

10. The APCS has been retained and expanded in the form of the NES. As Parliament is responsible for maintaining the statutory safety-net, it is important than any consideration for a new employment which will affect hundreds of thousands of employers, be assessed through a number of filters to ensure that any change is balanced and workable for all employers.

11. ACCI is aware of the following reviews which may lead to expanded rights under the NES:

a. Department of Education, Employment and Workplace Relations (DEEWR) consultations with NWRCC members on the possibility of amending s.65 to allow requests by: persons with care responsibilities for children under 16; persons with elder care responsibilities; and persons with care responsibilities for those with a serious long-term illness or disability;

b. Advisory Panel on the Economic Potential of Senior Australians third report, titled “Realising the economic potential of senior Australians”. The report recommends extending s.65 to people aged 55 and over;

c. Australian Law Reform Commission Inquiry into Family Violence and Commonwealth Laws and its final report (ALRC Report 117) – recommended additional paid leave for persons experiencing family violence and amending s.65 of to provide access to an employee: who is experiencing “family violence”, or who is providing care or support to another person who is experiencing family violence.

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\(^5\) The General Manager of Fair Work Australia is part way through completing its reporting obligations under s.653 of the Act. The General Manager must provide, within three years of the commencement of that section, a report to the Minister on the operation of the provisions of the NES relating to requests for flexible working arrangements under subsection 65(1) and requests for extensions of unpaid parental leave under subsection 76(1).
12. Suggestions before this inquiry include creating the following new rights: blood donor leave, domestic/family violence leave, extensions to the right to request provisions for certain cohorts of employees. Attachment A attempts to summarise a range of these proposals.

Supplementary Recommendation – NES Certainty and Stability

13. ACCI recommends that the NES needs a level of certainty and stability, similar to the stability which Parliament has indicated for modern awards. There should be an in-built consultative mechanism which should precede any substantial change to the NES which has the effect of creating new rights or expanding existing rights as follows:

a. An independent review of the NES should first be conducted prior the Government agreeing to any significant change to the NES (technical issues should not necessarily need to undergo this process). The review should be at arms length of the Government. ACCI’s preference is that the Productivity Commission conduct this exercise and should do so for all subsequent inquiries related to the NES. Currently, ACCI has been involved in multiple inquiries. The review process would consider submissions from interested parties and consider the benefits and costs of the proposals.

b. Any proposals should be discussed with the social partners under the normal NWRCC and sub-committee process.

c. There should be a Regulation Impact Statement which should be used to consider whether amendments should be introduced.

14. ACCI would welcome the opportunity to discuss these proposals in more detail with the Review Panel.

Compliance with Relevant International Conventions

15. Recommendation 8.1 and paragraphs [55] – [56] of the ACCI’s primary submission expresses concern over elements of the Act which compel bargaining and allow new bargaining related determinations to be made by FWA.

16. ACCI has received correspondence from the International Organization of Employers (IOE) on their preliminary analysis of 2-5 of the Act. The IOE is the Secretariat to the Employers’ Group at the ILO International Labour Conference, the ILO Governing Body and all other ILO-related meetings.
17. Employers’ or workers’ organizations may bring a complaint against any member state where they believe the principles of freedom of association are not being respected.

18. Whilst not provided to ACCI as a formal legal opinion, the correspondence indicates that elements of Part 2-5 Act may be the subject of a complaint made against Australia before the ILO and will require further examination. The correspondence is attached (Attachment B).

19. ACCI is seeking further advice in relation to other provisions of the Act.

UK Employer’s Charter

20. ACCI has also attached for the Review Panel’s benefit is a recent innovation of the UK Government’s Department for Business Innovation and Skills, in the form of a “Employer’s Charter” (Attachment C).

21. The Charter sets out, in relatively simple terms, what employers are able to lawfully do:

<table>
<thead>
<tr>
<th>UK Employer’s Charter</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>As an employer – as long as you act fairly and reasonably – you are entitled to...</strong></td>
</tr>
<tr>
<td>• ask an employee to take their annual leave at a time that suits your business</td>
</tr>
<tr>
<td>• contact a woman on maternity leave and ask when she plans to return</td>
</tr>
<tr>
<td>• make an employee redundant if your business takes a downward turn</td>
</tr>
<tr>
<td>• ask an employee to take a pay cut</td>
</tr>
<tr>
<td>• withhold pay from an employee when they are on strike</td>
</tr>
<tr>
<td>• ask an employee whether they would be willing to opt-out from the 48 hour limit in the Working Time Regulations</td>
</tr>
<tr>
<td>• reject an employee’s request to work flexibly if you have a legitimate business reason</td>
</tr>
<tr>
<td>• talk to your employees about their performance and how they can improve</td>
</tr>
<tr>
<td>• dismiss an employee for poor performance</td>
</tr>
<tr>
<td>• stop providing work to an agency worker (as long as they are not employed by you)</td>
</tr>
<tr>
<td>• ask an employee about their future career plans, including retirement.</td>
</tr>
</tbody>
</table>
22. A replication of the UK Charter in Australia would pose a number of challenges to employers as a result of the application, *inter alia*, of modern awards, aspects of the NES and unfair dismissal / adverse action provisions. However, there is significant merit in assisting business, particularly, smaller firms, with having a simple set outline of employer rights and expectations, which will provide a level of certainty and confidence to businesses.
3. REPLY TO OTHER SUBMISSIONS

ACTU

23. ACCI has considered the written submissions of the ACTU and other trade unions. Whilst not commenting on each submission or suggestions, ACCI wishes to comment on a number of specific submissions made in the ACTU’s submission.

24. At p.17 of the ACTU written submission, the following points are made:

25. In reply, ACCI makes the following points:

   a. Firstly, the fact that employers had some flexibility immediately before, during and in the wake of the GFC, is a testament to the system of regulation which existed at that time. This was obviously not the Fair Work laws which commenced in 1 July 2009 and 1 January 2010. Should the we have a second financial crisis or down-turn, the impact of the Fair Work laws will obviously be tested;

   b. Secondly, the ACTU single out the German system as “a more cooperative and fair labour relations” system, which has apparently fared better in recent years. The Review Panel should note that, in contrast to the Fair Work laws, the German laws do not require an employer to bargain when they do not wish to bargain, nor does the German system have a system of statutory national minimum wage/award wages and conditions.

26. The ACTU at p.36 make a number of points about the impact of penalty rates as follows:
27. The ACTU claim that “Australian employers have nothing to complain about”, in respect of its mandatory obligations to pay prescribed penalty rates under modern awards. As ACCI has previously indicated in its primary submission, feedback and evidence indicate that penalty rates can negatively impact employment opportunities and increase the costs of goods and services.

28. ACCI does agree with the ACTU at p.36, when it acknowledges that penalty “date back more than 100 years” re-affirming ACCI’s recommendation that there should be a merits based review of modern awards by the Productivity Commission.

29. The ACTU also state at p.37 that minimum work shifts under modern awards should be dealt with “through collective bargaining”:

Unions oppose this decision (which is being appealed), particularly because of the concern that employers will substitute schoolchildren (earning junior rates) for adults working afternoon shifts, leading to loss of shifts and income, particularly for women workers. The system needs to ensure that short shifts cannot be offered to one group of workers at the expense of others. These matters are best dealt with through collective bargaining, not through creating a two-tiered award system that discriminates between different groups of workers.

30. As the Review Panel would be aware, enterprise agreements cannot derogate from the modern award. This is why retail industry association members applied to vary the retail industry modern award and presumably why the SDA continues to spend considerable amounts of members’ fees on seeking to overturn the FWA decision before the Federal Court. ACCI has commented on the Terang Hardware case in its primary submission, which reiterates how the Fair Work laws have impeded the ability for businesses to employ young workers and how difficult it continues to be to obtain sensible changes to modern
awards. This is despite support from young workers who had been denied further employment opportunities as a result of the modern award.

31. At p.40 of the ACTU’s submission, it is claimed that the new bargaining regime has been “largely successful”:

> The new regime has been largely successful. Under Work Choices, approximately 8,000 collective agreements were registered each year, on average. Agreement-making has increased markedly since Work Choices ended: 24,053 agreements were made in in 2009-10, and 15,300 were made last financial year. As a result, registered agreement coverage has also increased significantly, from 39.2% of all employees in August 2008 to 43.4% of all employees in May 2010 (the most recent year for which data is available). Major companies that previously refused to bargain, like Telstra and the Commonwealth Bank, have successfully concluded enterprise agreements.

Collective agreements – at least those negotiated with unions – provide fairness to workers, because they provide above-average wages and above-average wage increases, a transparent classification structure and career path, ongoing union representation at the workplace, and a genuine dispute resolution mechanism.

32. However, ACCI’s primary submission indicated that the feedback to ACCI was one of mixed experiences, with many employers reporting a win-lose situation, rather than a win-win outcome. The ACTU seem to also imply that ‘more is better’ when it comes to assessing the benefits of enterprise agreement making under the Act. That the number of agreements approved, in and of itself, is a beneficial outcome or objective, should be seriously questioned if this is the ACTU’s main argument for assessing the outcomes of enterprise agreement making.

33. Submissions from employers indicate that enterprise agreement making is largely a one-way street in terms of delivering benefits to employees rather than employers and is often entered into to avoid industrial disputation with the relevant union. Other employers have avoided agreement making because of the difficulties associated with meeting the Better Off Overall Test.

34. For example, the Master Grocers Australia have indicated in its submission that it has not negotiated any agreements between 2010 – 2011 with its members, despite 200 agreements negotiated prior to this period⁶:

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⁶ Master Grocers Australia submission, 17 February, at pp.17-18.
Extract from Master Grocers Australia Submission

Agreement making

In the period 2007-2009 independent supermarkets were enthusiastic about making enterprise agreements. During that period employers were required to satisfy either the “no disadvantage test” or “the fairness test” prior to obtaining agreement approval from the Workplace Authority. These tests provided a lower hurdle for employers to overcome than in the current Act. The “better off overall test” is a far more rigorous test and the challenges that this test presents makes independent retailers reluctant to engage in a lengthy negotiation process that could be a futile exercise.

Statistics from Fair Work Australia reveal that in the period 2010-2011 there were 7782 approvals for enterprise agreements. But of that number MGA did not negotiate any new agreements on behalf of MGA Members.

In the period 2007 and 2009 MGA assisted independent retailers to make in excess of 200 collective agreements with their employees. During this time the agreements satisfying either the “no disadvantage test” or the “fairness test” was less prohibitive than the “better off overall test.” Since the introduction of the Fair Work Act MGA has renewed Union enterprise agreements, specifically with the Shops and Allied Employees Association, but we have not been overly engaged in the making of new store based enterprise agreements under the Act. Employers have consistently demonstrated a reluctance to enter into agreements because trying to meet the “better off overall test” is not a viable option.

35. Moreover, the ACTU’s statement that companies may have previously refused to bargain would actually suggest that there were legitimate business reasons for doing so. The example that the ACTU refer to re-affirms ACCI’s concerns over the compulsive bargaining aspects of the Act that was not present in the 1994 and 1997 versions of the federal system, are forcing some employers to the bargaining table who reluctantly agree to union terms in order to provide industrial stability and peace, rather than to improve business operations and reward more efficient work practices.

36. The benefits of enterprise bargaining can only be assessed within the paradigm of a truly voluntary system. The Fair Work system is not a voluntary bargaining system. This contrasts to the 1994, 1997 and 2005 federal industrial relations systems.
37. ACCI does agree with the ACTU when it suggests at p.52 that the Fair Work Ombudsman’s (FWO) advice should be “consistent with the views of the industrial parties, particularly in relation to award content”.

38. However, ACCI cannot agree with the ACTU when it suggests that the FWO should essentially should focus on prosecuting employers for unlawful conduct and not employees and unions:

Second, instead of devoting more resources to assisting un-unionised employees to enforce their workplace rights, the FWO wastes significant time and resources in investigating whether workers (and unions) have taken industrial action contrary to the Act. We are strongly of the view that these complex industrial matters are best left to FWA or the courts to resolve, rather than distracting the FWO from its core task of assisting vulnerable workers to enforce their rights.

39. This appears contrary to the ACTU’s position with respect to the Australian Building and Construction Commission, when it has repeatedly said that “there should be one set of laws for all workers, regardless of the industry they work in”.

7 Apparently, this position does not apply to the inspector investigating and prosecuting unlawful conduct against employees and unions.

40. ACCI has considered the recommendations pressed by the ACTU and affiliates, the majority of which are contrary to the recommendations ACCI has made in its primary submission and are therefore not supported.

41. However, ACCI agrees with a number of issues identified by the ACTU which may require further action as follows:


ACCI Response: The issue identified, is consistent with ACCI’s concerns and its recommendation 5.15 that public holidays for industrial relations purposes needs to be certain and stable. ACCI would welcome dialogue to achieve a consistent framework of public holidays for the purposes of the Act.

ACTU Issue (Appendixa 1, p.60): FWAs time has been taken up unnecessarily with numerous award variation applications which were clearly speculative and without foundation. FWA heard these applications to completion and determined them.

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7 ACTU Media Release, 28 September 2010, “ABCC must be abolished and construction laws should improve OHS and stamp out dodgy contractors”.
ACCI Response: ACCI is similarly concerned by procedural aspects of FWA dealing with applications made by individual employees and employers which often not consistent with the requirements of the Act. ACCI would welcome dialogue to consider options for FWA to process these applications in a manner that does not result in other parties and organisations expending considerable resources for unmeritorious applications.

ACTU Issue (Appendix 2, p.64): There is overly rigid insistence on telephone conciliation and the issuing of standard orders for the preparation of matters for arbitration.

ACCI Response: There is merit in having tri-partite dialogue with the FWA panel head and the President about administrative arrangements associated with processing unfair dismissal matters.

ACTU Issue (Appendix 2, p.64): Section 351(2)(a) is ambiguous, and does not clearly confine the defence to discriminatory conduct which is expressly authorised under an exception to State or federal laws

ACCI Response: Whilst ACCI understands that there may be different views as to the interpretation of s.351(2)(a), ACCI position is that the intent of s.351(2)(a) that s.351 which proscribes adverse action based on listed attributes, is only unlawful, if the action took place in a particular State or Territory under prescribed anti-discrimination laws as per sub-section (3), and would also be unlawful under those laws. This means that the State or Territory law would need to also proscribe conduct based on the same attribute and would require an examination of relevant exemptions/exceptions. ACCI’s submission to the federal anti-discrimination law consolidation project recommends that duplication should be removed at the federal level, by only having one federal anti-discrimination statute deal with discrimination matters and not three separate and concurrent anti-discrimination system which employers must comply with.

Other Submissions

42. ACCI has considered the recommendations pressed by other unions, individuals, academics and interest groups. Once again, the recommendations are generally not supported by ACCI, as they are contrary to the recommendations made by ACCI network members and by individual employers. If they were adopted, in part or in full, employers would be further prejudiced and would, inter alia, face the prospects of less flexibility, higher labour costs, excessive claims from unions which have no benefits to employers, give FWA less ability to terminate industrial action, give unfettered access to an employer’s premises, provide special rights to union members and union delegates than non-union employees, and provide less powers for the
inspectorate to prosecute employees and unions for breaches of the Act.

43. These recommendations would also be contrary to the Government’s commitments to industry as outlined in its 2007 Forward with Fairness policy and the objectives outlined by s.3 of the Act.

44. Policy makers must be particularly mindful that many businesses are small to medium sized without dedicated human resource professionals. Many owners work in their own business, work long hours, draw the equivalence of their employee’s wages, and make their contribution to the community through paying taxes and providing employment opportunities.

45. Many businesses operate on tight margins, have limited access to finance, have mortgaged their family home and struggle to make a decent return. Other businesses, particularly large firms, clearly have better resources and capacities, which is reflected in the benefits and policies formalised at the workplace. Businesses are not homogenous and any regulatory proposal must be acutely aware of these differences.

46. For the reasons provided in two very detailed written submissions to the Australian Law Reform Commission (ALRC) inquiry into Commonwealth laws and domestic family violence, ACCI does not support amendments to the Act as proposed by the ALRC and supported by other special interest groups. Once again, this does not mean that ACCI does not consider the issue an important policy matter for the community, but each new possible employment right has a commensurate cost and regulatory impact.

47. For example, the ALRC did not quantify the impact of a new family violence leave entitlement. ACCI provided the ALRC with the cost impact of an additional 10 days family violence leave based on conservative assumptions as follows:

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48. To reiterate, employers expect that this PIR is to assess the impact of the existing laws on business as a result of the Government exempting the Fair Work Bill 2008 from an RIS.

**Table: Estimated Cost of 10 Days “Family Violence” Leave**

ACCI estimates that the introduction of a new entitlement to 10 days paid “family violence” leave, using a conservative assumption that only 10% of the workforce will seek to access the new leave entitlement in any one year, will cost approximately (per annum):\(^9\)

- $13,054 for a small business with 50 employees
- $26,108 for a medium sized firm with 100 employees
- $130,540 for a large sized firm with 500 employees
- $522,000 for a very large firm with 2000 employees
4. OTHER LEGISLATIVE PROPOSALS

49. There are a range of legislative proposals that are currently before the Parliament which the Review Panel must consider. ACCI is concerned that these proposals considerably alter the operation of the Act and have been introduced into the Parliament before the PIR has concluded.

50. ACCI has attempted to outline legislation which has been introduced into the Parliament after the commencement of the Fair Work Act 2009 and prior to the completion of the PIR, in order to highlight why it is essential for these measures to await the outcome of the PIR.

Building and Construction Industry Improvement (Transition to Fair Work) Bill 2011

51. The Building and Construction Industry Improvement (Transition to Fair Work) Bill 2011 (BCII(TFW) Bill)) was introduced into the House of Representatives on 3 November 2010. ACCI notes that there was no Regulation Impact Statement (RIS) accompanying the legislation.

52. Because the Act will apply to the building and construction industry, as defined by the BCII (TFW) Bill, this is a matter which is relevant to this inquiry. The penalties for unlawful conduct will, if the Bill is passed by the Parliament, be located in the Act and not in the BCII (TFW) Bill.

53. Extracts from the Minister’s second reading speech illustrates the original intention of the Bill as follows (emphasis added):9

The government made a commitment to the Australian people that it would replace the Australian Building and Construction Commission (ABCC) with a new body to provide a balanced framework for cooperative and productive workplace relations in the building and construction industry.

This new body will be the Fair Work Building Industry Inspectorate (the building inspectorate).

The government also committed to consult extensively with industry stakeholders to ensure the transition to the new arrangements would be orderly and effective.

On this basis, the former minister appointed retired Federal Court Judge, the Hon. Murray Wilcox QC to consult and report on matters

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9 Second reading speech, Hon. Simon Crean MP, 3 November 2011.
related to the creation of the building inspectorate. Mr Wilcox consulted widely with industry and delivered his report to the government on 31 March 2009.

This bill honours the government's commitment and gives effect to the principal recommendations in Mr Wilcox's report.

The building and construction industry remains a critical sector of our economy, with immediate and direct impact on jobs, growth and productivity. This was particularly so during the global economic recession, during which the government's Nation Building and Jobs Plan ensured that the Australian economy remained one of the strongest in the developed world.

The government understands that the industry contains unique challenges for both employers and employees, and as a result we have always supported a strong building industry regulator to ensure lawful conduct by all parties.

The government believes that the ABCC needs to be replaced with a new body that is part of the mainstream Fair Work Australia system. This new regulator will operate in accordance with community expectations of a fair and just workplace relations system.

**Description of the Bill**

The principal object of the bill recognises the government's intention to provide a balanced framework for cooperative and productive workplace relations for the building and construction industry. A key objective of this bill is compliance with workplace relations law by all building industry participants, including employers, employees and their respective associations.

This bill aims to provide fairness in the industry by ensuring information, advice and assistance is available to all building industry participants in connection with their rights and responsibilities under relevant laws.

The bill provides effective means for investigating and enforcing relevant workplace laws while balancing the rights of building industry participants through the provision of appropriate safeguards in relation to the use of the building inspectorate's enforcement powers.

**ABCC to be replaced**

As I said earlier, this bill gives effect to the government's election commitment to abolish the ABCC and transfer its responsibilities to a specialist Fair Work building inspectorate. The bill provides that the
new building inspectorate will ensure compliance with general workplace relations laws, as prescribed in the Fair Work Act 2009, by all building industry participants.

The building inspectorate

The new building inspectorate will be headed by an independent director appointed by the minister. The director will manage the operations of the building inspectorate and will not be subject to oversight or control by other statutory office holders.

This model gives best effect to Mr Wilcox's recommendation that the director have 'operational autonomy' and reflects various stakeholder consultations on this point.

Consistent with Mr Wilcox's recommendations, the bill also creates an advisory board consisting of industry stakeholders to make recommendations to the director on the policies and priorities of the building inspectorate. While the advisory board will not determine the inspectorate's policies and priorities, the director will consider the advisory board's recommendations.

Scope and penalties

Consistent with Mr Wilcox's recommendations, the definition of 'building work' is amended to remove its coverage of off-site work; thereby focusing the scope of the inspectorate's operations to work on sites.

The building inspectorate will be charged with enforcing the building industry's compliance with the general law as prescribed in the Fair Work Act. In particular, and as recommended by Mr Wilcox, the bill removes:

- higher penalties for building industry participants for breaches of industrial law; and
- the broader circumstances under which industrial action attracts penalties in relation to the building industry.

The government is committed to implementing a strong but fair set of compliance arrangements for the building industry. The government has consistently stated that anyone who breaks a law should feel the full force of the law. The government understands that not all building industry stakeholders agree on all matters. The government's intention is to provide a balanced framework for cooperative and productive workplace relations, an environment in which there is no place for
people choosing which laws to obey and which ones to ignore. This goes for all industry participants—employers, employees and their respective associations.

54. The legislation was passed by the House of Representatives on 16 February 2012 with two significant amendments. These amendments insert s.73 and 73A into the BCII(TFW) Bill.

55. Proposed s.73 operates in two circumstances:

   a. where the regulator is an applicant in civil penalty litigation with another applicant or is a joint applicant; or

   b. where the regulator intervened in court proceedings (as of right pursuant to s.71).

56. In these circumstances, where the industrial parties to the litigation settle matters between them and a notice of discontinuance is filed, proposed s.73 requires the regulator to end its litigation.

57. Proposed s.73A operates where industrial parties to litigation (that does not include the regulator) reach a settlement that discontinues the litigation (or part of the litigation) between them.

58. In this circumstance the regulator is prevented from instituting proceedings in respect of “the subject matter of the settled matters”.

59. It is important for the Review Panel to note that the amendments:

   a. Were not contained in confidential exposure draft versions of the (BCII(TFW) Bill ) which were provided to the social partners as part of tripartite consultations under the NWRCC sub-committee process;

   b. Were not in the original Bill as introduced into the Parliament;

   c. Were not recommended by Justice Murray Wilcox in his report;

   d. Were not recommended by the Cole Royal Commission;

   e. Were not recommended by the majority Committee Senators in their report on the Bill.

   f. Are contrary to a number of explicit statements, as expressed in the second reading speech.
60. They go further than what the ACTU recommended in its submission to the Senate Committee inquiry. The ACTU recommended that there not be a separate inspectorate but that the FWO have a specialised division, by administrative arrangements, to enforce the Act. 10

61. If the amended BCII (TFW) Bill is passed, the powers of the Fair Work Building Industry Inspectorate, will be significantly weaker than the powers of inspectors under the Act. The ACTU and unions have strongly recommended that the same law which applies to employees in other industry sectors, must apply to workers in this industry. This amendment actually goes much further than what unions have recommended and should be rejected by the Senate.

62. This remains a significant concern to ACCI and its industry members and its effect cannot be understated.

63. **It is not a feature in any other law of this country and is a threat to the Rule of Law.**

64. ACCI supports submissions made by other organisations on the importance of retaining provisions which will act as a significant deterrence to unlawful conduct.

The Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011

65. ACCI notes that even before the PIR of the Act has concluded, the Government has introduced significant amendments to the Act in the form of the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 (FWA (TCF) Bill)). The FWA (TCF) Bill is currently before the Senate and its effect, if passed, is to extend most provisions of the Act which currently apply to national system employees to independent contractors who work in the TCF industry. Once again, there is no RIS accompanying the legislation, despite the concerns of businesses and contractors, as to its significant effect.

66. The Act extended the application of the modern award for the TCF industry to independent contractors and provided new enhanced union right of entry. As these features were new under the Act, there impact forms part of the PIR.

67. ACCI notes that several submissions from individuals in the TCF industry oppose extending employee obligations onto contractors. The

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10 ACTU submissions to Senate Committee Inquiry, at p.3.
following extract is from one submission which expresses concerns over the existing and recently introduced proposals:

When I graduate from my Fashion Design Diploma at the end of this year, I plan on emerging as an Australian Fashion Designer starting a label from home. I would like to draw your attention to the Fairwork Act and the Textile, Clothing, Footwear and Associated Industries 2010 (the TCFAI Award) Modern Award regime which will define me as an outworker, despite my Diploma of Applied Fashion Design and Technology. The current TCFAI Modern Award definition has a "catch all" definition where anyone working from home in the fashion industry is an OUTWORKER …yes, I can be considered an OUTWORKER if I sell to a boutique or department store, because of the deeming provisions of the award.

Most graduating & emerging Australian Fashion Designers starting out, establish a trading relationship with a fashion boutique on "indent". In the eyes of the law, MA000017- Schedule F that would mean boutique owners are required to pay me as an employee, including all benefits and entitlements under the National Employment Standards and unfair dismissal laws. This is unfair and an unworkable regime that disadvantages me and other graduating & emerging Australian Fashion Designers, and is making it very difficult starting up a new business, as no boutique owner will agree to employ me, and I don’t want to be employed by them either.

Beyond that as a fashion student/designer, if I hand out work to a "maker/outworker" to sample a design I am obligated by law to employ them with full benefits and entitlements, and that is against the law for me to employ them casually. Further I am aware that in the final form of the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 (the Bill) currently before parliament, deems all outworkers to be employees for most purposes of the Fair Work Act 2009 (Clth) (the FW Act) including the National Employment Standards, Superannuation and unfair dismissal laws. As a start-up business, in the beginning it will be challenging to pay myself, never mind employ a ‘maker/outworker’ on a regular basis, and pay all these entitlements. Again this is unworkable and in trading in such an environment, I face prosecution in breach of the TCFAI Modern Award 2010. The risks are too great.

ACCI draws the Review Panel’s attention to its most recent submission to the Senate Standing Committee on Education, Employment and Workplace Relations which has inquired into the proposals.12

69. ACCI recommends that the Government should not progress the legislation until this PIR has concluded.

Road Safety Remuneration Bill 2011 and the Road Safety Remuneration (Consequential Amendments and Related Provisions) Bill 2011

70. ACCI notes that even before the PIR of the Act has concluded, the Government has introduced significant amendments which affect national system employers and employees, principals and contractors (and others in the supply chain) in the form of the Road Safety Remuneration Bill 2011 and the Road Safety Remuneration (Consequential Amendments and Related Provisions) Bill 2011. The legislation was introduced into the House of Representatives on 23 November 2011 and would create a new Tribunal comprised of Fair Work Australia members and appointed experts. The Tribunal would have the power to set minimum rates and conditions for employee and owner drivers to the full extent possible under the Constitution. The legislation does not override existing state based owner-driver legislation, nor the Independent Contractors Act 2006. The “road transport industry” is defined by reference to the coverage of the existing 4 modern awards that apply in the industry (clause 4 of the Bill).

71. The legislation also applies to participants in the supply chain and allows the Tribunal to exercise a dispute resolution function (arbitration is only by consent).

1. ACCI expresses similar concern over the proposals and draws the Review Panel’s attention to its most recent submission to the House Standing Committee on Infrastructure and Communications. Whilst an RIS has been prepared, it relevantly does not support the underlying premise of the legislation stating that “[t]here is some research to suggest that the remuneration for drivers is a factor in safety outcomes, however data at this point in time is limited and being definitive around the causal link between rates and safety is difficult”. ACCI has provided a submission to the Committee which reiterates its response to the Directions Paper, “Safe Rates, Safe Roads” and has recommended that a response should be evidence-based and built upon a national consensus amongst all states and territory governments in consultation with the relevant industry.

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13 ACCI submission #13 which can be found here: http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ic/24nov/subs.htm
2. Representatives of DEEWR appearing at the Committee Inquiry on Wednesday 15 February confirmed that “Australia is the first country to seek to legislate in respect of dealing with safety and remuneration issues in the road transport industry”.

3. DEEWR also indicated that the legislation would not cover all employee or owner-drivers, indicating that the Government has sought to obtain a referral of powers from states and territories:

> Due to constitutional limitations the legislation will initially cover approximately 80 per cent of employees and 60 per cent of owner-drivers. However, the government has indicated its intention to expand coverage by exploring the possibility of referrals of power from state governments to enable expansion of the scheme to employees and owner-drivers not within the Commonwealth legislative power. The system complements existing and new initiatives in the road transport industry such as the National Heavy Vehicle Regulator.

72. ACCI recommends that the Government should not progress the legislation until this PIR has concluded.

**Paid Parental Leave and Other Legislation Amendment (Consolidation) Bill 2011**

73. ACCI notes that even before the PIR of the Act has concluded, the Government has introduced significant amendments to the Act in the form of the Paid Parental Leave and Other Legislation Amendment (Consolidation) Bill 2011, which makes amendments to the Act and NES. The legislation was introduced into the House of Representatives on 3 November 2011. The legislation was not accompanied by an RIS, with the explanatory materials stating “[t]he regulation impact statement for the Paid Parental Leave scheme appears at the end of the explanatory memorandum for the Paid Parental Leave Bill 2010”.

74. The measures should be considered by the Review Panel as they attempt to amend the NES.

**Fair Work (Job Security and Fairer Bargaining) Amendment Bill 2012**

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

75. ACCI notes that even before the PIR of the Act has concluded, the Australian Greens have introduced two separate pieces of legislation into the House of Representatives, which would, if passed, make significant amendments to the Act in the form of the Fair Work (Job
Security and Fairer Bargaining) Amendment Bill 2012\(^{14}\) and the Fair Work Amendment (Better Work/Life Balance) Bill 2012.\(^{15}\)

76. Both bills should not be progressed at least until this PIR has concluded.

\(^{14}\) The Bill homepage can be accessed here: [http://parlinfo.aph.gov.au/parlinfo/search/display/display.w3p;query%3Did%3A%22legislation%2Fbillhome%2Fr4741%22;rec=0](http://parlinfo.aph.gov.au/parlinfo/search/display/display.w3p;query%3Did%3A%22legislation%2Fbillhome%2Fr4741%22;rec=0)

5. **APPENDIX A**

At pp. 17, (recommendation 12.10) the amount of “$60.60” should be replaced with the figure of “$62.40”.

At pp. 19, (recommendation 13.6) the amount of “$60.60” should be replaced with the figure of “$62.40”.

At p.107, paragraphs [102] and [103] should be omitted.

At p. 150, the amount of “$60.60” should be replaced with the figure of “$62.40”.
### ATTACHMENT A

**SUMMARY OF PROPOSALS TO EXPAND EMPLOYEE RIGHTS UNDER THE NES AND/OR OTHER PROVISIONS OF THE FAIR WORK ACT 2009**

<table>
<thead>
<tr>
<th>Submitter</th>
<th>Proposals for new or expanded rights under the NES and/or other provisions of the <em>Fair Work Act 2009</em></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Australian Domestic and Family Violence Clearinghouse</strong></td>
<td>A National Employment Standard (NES) entitlement to a minimum of ten days additional paid leave for victims of domestic violence to attend to matters that are not covered by existing leave provisions: for example, going to court to get a domestic violence protection order or seeking the assistance of a domestic violence support service. Extending the section 65 right to request flexible working arrangements to victims of domestic violence, with no minimum length of service. The inclusion of ‘victim of domestic violence’ as a protected attribute under sections 351(1) and 772(1)(f).</td>
</tr>
<tr>
<td><strong>Australian Law Reform Commission</strong></td>
<td>As part of Phase Five of the whole-of-government strategy for phased implementation of reforms contained in Part E of this Report, the Australian Government should consider amending s 65 of the <em>Fair Work Act</em> 2009 (Cth) to provide that an employee: (a) who is experiencing family violence, or (b) who is providing care or support to another person who is experiencing family violence, may request the employer for a change in working arrangements to assist the employee to deal with circumstances arising from the family violence. The Australian Government should consider amending the National Employment Standards with a view to including provision for additional paid family violence leave.</td>
</tr>
<tr>
<td><strong>Australian Nursing Federation</strong></td>
<td>Fair Work Australia (FWA) should have the power to deal with disputes over whether an employer has reasonable business grounds to reject employee requests for flexible working arrangements and extensions of parental leave. Under subsections 65(5) and 76(4) an employer can refuse employee requests “only on reasonable business grounds”.</td>
</tr>
<tr>
<td><strong>Australian Services Union</strong></td>
<td>The Act should be amended to provide that all employees should have access to last resort arbitration. This should apply in the following situations: - To award free employees in respect to their NES entitlements or any other provision of the <em>Act</em>.</td>
</tr>
<tr>
<td><strong>Australian Workers’ Union</strong></td>
<td>Section 84 – Return to Work Guarantee - Employers should be obligated to retain the role using replacement employees or find a role suitable to the employee; and to consult about any changes during the period of maternity leave. Sections 90, 96 and Definition 16 – Payment of Leave at Base</td>
</tr>
<tr>
<td>Organisation</td>
<td>Proposal</td>
</tr>
<tr>
<td>--------------</td>
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<tr>
<td>Carers Australia</td>
<td>Use the established definition of carer; ensure coverage is extended to carers of people with a disability, a medical condition (including a terminal or chronic illness), a mental illness or the frail and aged; and to allow requests for flexible working arrangements to be made to an employer or prospective employer without specific ‘qualifying’ time frames. It would be much more common for the individual being provided with care to require assistance with transport and support to attend crucial medical appointments. Carers should be able to access paid or unpaid leave in order to attend to these matters which may prevent or slow further deterioration in a patient’s condition.</td>
</tr>
<tr>
<td>Carers NSW</td>
<td>The right to request flexible working arrangements be extended to all carers regardless of the age of the care recipient or the nature of their relationship.</td>
</tr>
<tr>
<td>CFMEU (Construction and General Division)</td>
<td>That s.130 of the FW Act 2009 be amended to provide that leave does accrue and can be taken during the first 26 weeks for which an employee receives workers compensation.</td>
</tr>
<tr>
<td>Community and Public Sector Union (PSU Group)</td>
<td>NES redundancy component of the safety net should not reduce the retention period and redeployment opportunities for employees.</td>
</tr>
<tr>
<td>Economic Security for Women (eS4W)</td>
<td>That legislation is introduced that entitles women in the workforce to lactation breaks and dedicated facilities in their workplaces to support breastfeeding. The right for workplace flexibility be made at anytime rather than the current 12 month qualifying period in which employees can request it from their employer.</td>
</tr>
<tr>
<td>JobWatch</td>
<td>That the right to request flexible working arrangements be extended to any employee who is a carer defined broadly in accordance with s4 of the Vic EO Act. In the alternative, that as a minimum, the right to request flexible working arrangements be extended to include parents and carers of primary school aged children. That the right to request flexible working arrangements be extended to all employees with “carer” responsibilities, regardless of their length of continuous service. Alternatively we recommend that the right to request flexible working arrangements be extended to all employees with “carer” responsibilities, regardless of their length of continuous service.</td>
</tr>
</tbody>
</table>
That section 65 of the FW Act mirror the flexible work arrangements provisions in the Vic EO Act and/or the United Kingdom's Employment Act.

That what constitutes “reasonable business grounds” should be clearly defined or at least it should be made clear that the term “reasonable business grounds” is not related to the concept of “managerial prerogative” but rather necessitates an objective requirement which is directly related to an employer’s business.

That the right to request flexible working arrangements be made a civil remedy provision so that it is enforceable.

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

That where a request for flexible working arrangements has been made but the employer fails to respond within the 21 day time frame in accordance with section 65(4), 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.

That any parental leave (paid or unpaid) should count as service for the purpose of calculating the accrual of entitlements such as annual leave, personal leave and long service leave.

That employees be given an automatic right to the following: an increase in simultaneous parental leave of up to eight weeks (as opposed to the current 3 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.

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.

That section 67 of the NSW Act be adopted so that there be an onus on employers to notify pregnant employees of the notice and evidence requirements regarding parental leave. Alternatively, we recommend that section 74(7) of the FW Act...
be amended so as to better protect employees in circumstances where an employer knows that an employee intends to take parental leave but does not require or seek the employee’s compliance with this section. In these circumstances, employers should be prevented from relying on an employee’s non-compliance with the notice requirements to deny the employee the rights associated with parental leave.

That the right to apply for an extension of unpaid parental leave be made a civil remedy provision so that it is enforceable.

Kingsford Legal Center

That a positive duty be placed upon employers to implement flexible working conditions and make reasonable adjustments for employees.

That the Fair Work Amendment (Better Work/Life Balance) Bill 2012 be adopted so that the RTR provisions extend to all employees who seek flexible working arrangements and employees with responsibility for the care of another person are provided with increased protection.

That the exception set out in s44(2) of the FW Act be removed to allow employees to challenge the "reasonable business grounds" provided by an employer.

That employees have the right to apply to FWA for resolution of disputes in relation to the RTR provisions.

That the burden of proof in demonstrating that “reasonable business grounds” exist be on the employer. It should be assumed that flexible working arrangements are able to be implemented unless the burden is met.

The FW Act should provide guidance as to the factors which employers should, and FWA must, take into account in determining whether "reasonable business grounds" exist.

That the right to 12 months of unpaid parental leave be extended to all employees, not just those with 12 months of continuous service.

That a new right to 3 months of unpaid parental leave be introduced for employees with less than 12 months of continuous service.

That employees experiencing family violence, or supporting a person experiencing family violence, be given the right to request flexible working arrangements. This right should not be contingent on having served a minimum period of continuous service and there should be an obligation on employers to respond to such a request as soon as practicable.

That employees experiencing family violence or supporting a
| National Working Women’s Centres | To introduce provisions that enable workers whose requests for flexible working arrangements are rejected to make an appeal to Fair Work Australia. Appeals should be conciliated in the first instance with the option of progressing to hearing if they are not settled. That the 'right to request' provision for employees be amended in the Fair Work Act to be 'an obligation to provide' for employers. A reporting mechanism to ensure that employers are aware of and upholding the NES with checks and balances as well as random audits is recommended to ensure compliance. Additionally, the prevalence of discrimination and harassment calls for stronger measures of compliance (preferably by way of entrenchment as a minimum entitlement) in preventing and responding to the damage that these can cause within workplaces. |
| NSW Society of Labor Lawyers | That the Fair Work Act be amended to provide access to arbitration in respect of disputes concerning the application of modern awards and the National Employment Standards. |
| David Peetz | The following changes need to be made to subsection (3) of section 62. First, precedence should be given to the wellbeing of the employee. After all, this is a legislative provision regarding maximum reasonable hours. The limits to maximum hours in awards, and subsequently legislation, arose in order to protect and advance the wellbeing of employees, not to advance the needs of the enterprise. The fact that, in some industries, power has shifted from workers to employers to enable the latter to increase usual hours does not mean that employee wellbeing has been protected. (The high level of labour turnover in the mining industry, well above that which would be predicted by its level of wages, is further evidence of this. Subsection (3) should therefore unambiguously state that the criteria presently specified in paras (a) and (b) have primacy over those that follow. Second, for reasons set out above, para (g), which gives as a criterion by which to assess reasonableness ‘the usual patterns of work in the industry, or the part of an industry, in which the employee works’, should be deleted and replaced by: (g) whether the circumstances leading to the requirement to work additional hours is a short-term issue for which no alternative arrangements could be found by the employer; Third, an employer should not be able to unilaterally suspend an |
employee for refusing to work additional hours if the employee does so because his or her roster has been unilaterally changed with the effect of forcing him to regularly work more than the maximum weekly hours. To do so should be considered an adverse action by the employer against the employee who is seeking to exercise their rights to work no more than maximum weekly hours. In turn, the onus of proof in arguing that it is reasonable to require the employee to work more than the additional hours should fall on the employer. Consideration should be given to enable Fair Work Australia, rather than a magistrates court, to deal with employer applications to require employees, who refuse to work additional hours, to in fact do so.

As a minimum, the right to request should apply not only to parents of pre-school age children but also to parents of school age children, and to carers. These groups are no less deserving of access to a right to request than parents of pre-school-age children.

In the near future, consideration should be given to extending the right to all employees, for equity reasons (parents of children at school also frequently require access to flexibility), to avoid resentment of employees with access to it, to make it work effectively, and to maximise the efficiency and flexibility gains for both employers and employees from it.

Accordingly, a right to a meeting, including a right to bring along a companion, should be included in the right to request, and should be modelled on the UK framework. This would go after subsection 65(3) and say:

If the employer does not know enough from the paperwork to fully agree to the employee’s request without a meeting – the employer must hold a meeting to consider the request within 21 days after the date an application is received.

The employee can, if they wish, have another worker employed by the same employer accompany them to the meeting.

The concept of ‘reasonable business grounds’, it should be noted, is narrower than that of ‘reasonable in all the circumstances’, appearing to require no consideration of the circumstances of the employee. Accordingly, the provision should be amended to say:

(5) The employer may refuse the request only if it is reasonable in all the circumstances to do so.

Alternatively, but not as effectively, the Act should specify criteria for “reasonable business grounds”. The Act provides no criteria by which the employer can determine whether an application should be rejected on “reasonable business grounds”.

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grounds”. This is likely to lead to uncertainty and would probably lead to more applications being rejected than would be the case if criteria were specified. It also increases the chances that employees whose requests are rejected would feel that they have not been given a fair hearing. A model is provided by the UK right to request, which sets out criteria for “reasonable business grounds”.

Hence subsection 65(5) should be amended by the addition of the words

Reasonable business grounds means a reason based on one of the following:

(a) Burden of additional costs.
(b) Detrimental effect on ability to meet customer demand.
(c) Inability to reorganise work among existing staff.
(d) Inability to recruit additional staff.
(e) Detrimental impact on quality.
(f) Detrimental impact on performance.
(g) Insufficiency of work during the periods the employee proposes to work.
(h) Planned structural changes.

A similar passage should be inserted in section 76. Alternatively, the dictionary (section 12) should be amended to include the above definition of reasonable business grounds.

The Act should include a right of employees to appeal an adverse decision, along the lines of the UK model.

Thus section 65 should be amended by the inclusion of a new sub-section along the following lines:

An employee has 14 days to appeal in writing to the employer after the date of notification of the employer’s decision.

The Act should include a right of employees to apply to Fair Work Australia for resolution of a dispute over a request for flexible working arrangements, where the employer has failed to follow the procedure properly or the decision by the employer to reject an application was based on incorrect facts. (This right is presently only available under section 739(2) where an enterprise agreement or other agreement or contract of
employment specifically allows his to occur.)

As with the provisions for right to request flexibility, the parental leave provisions refer to unspecified “reasonable business grounds” for refusing a request for an extension of unpaid parental leave. This fails to take account of employee considerations, creates uncertainty and increases the likelihood that a request will be incorrectly refused. Either this phrase should be replaced by words to the effect that the employer may refuse the request only if it is reasonable in all the circumstances to do so; or the meaning of “reasonable business grounds” should be clarified in the Act, as outlined above (section 76 or section 12)

An employee should have a right of internal appeal against a decision to refuse a 12 month extension of unpaid parental leave, along the lines canvassed in paragraphs Error! Reference source not found.-0 above (section 76).

The Act should include a right of employees to apply to Fair Work Australia for resolution of a dispute over a request for an extension of unpaid parental leave, where the employer has failed to follow the procedure properly or the decision by the employer to reject an application was based on incorrect facts (section 739 and 740), even if this right is not specified in an award or agreement.

Redundancy benefits should be payable to long term casual employees. Whether the line should be drawn at the traditional definition of long term casuals – 12 months service – or a longer period is debatable. For policy consistency, a 12 month period should define ‘long term casual’ for the purpose of redundancy pay, but as a transitional mechanism a longer period could initially be defined.

Hence section 123(c) should be amended by the addition of the words “other than a long term casual” after “casual employee”

<table>
<thead>
<tr>
<th>Redfern Legal Centre</th>
<th>The FW Act be amended to include an enforcement mechanism. Such a mechanism could usefully require employers to attend a conciliation, to allow a third party to lead a discussion between the parties about how flexible working arrangements could be used.</th>
</tr>
</thead>
</table>
| Ryan Carlisle Thomas  | The Act should be amended so as to:  
  i. provide (perhaps by Regulation) examples of what reasonable business grounds are, for the guidance of employers and employees;  
  ii. make the right to request flexible working arrangements an enforceable one;  
  iii. expand the range of employees who may request flexible working arrangements; and  
  iv. align the provision with complementary |
provisions in the Act, in particular those relating to personal/carer’s leave and general protections.

The Act should be amended so as to:
  i. provide examples (perhaps by Regulation) of what reasonable business grounds are, for the guidance of employers and employees; and
  ii. make the right to request additional parental leave an enforceable one.

Shop, Distributive & Allied Employees’ Association

FWA should have complete jurisdiction to arbitrate over disputed matters concerning the NES.

Amend the Fair Work Act to provide an unequivocal right for employees to be able to access arbitration where they have a dispute with their employer about a matter concerning the operation of the NES, an award or an enterprise agreement. The right to arbitration is so fundamental that it must be guaranteed in the Fair Work Act.

Amend s.115 to provide an additional public holiday whenever Christmas Day, Boxing Day or New Year’s Day fall on a Saturday or a Sunday to provide national uniformity.

Amend s.115 to add Easter Sunday as a public holiday.

The Act should be amended to make clear that s.114 does not “cover the field” in respect of voluntary work on public holidays and should facilitate the restoration of the entitlement for those who had voluntary work on public holidays prior to award modernisation.

Reinstate into the Act the entitlement to a day’s pay or a day in lieu when a public holiday falls on a non-working day of a full-time or a 5-day week part-time employee.

The Act should make a requirement on employers to make reasonable adjustments in their workplaces to accommodate the needs of parents and carers.

Amend s.65 and s.76 to include the right of appeal for refusal of flexible working provisions and the extension of parental leave.

Expand the right to request flexible working arrangements to be available to all carers. Failing that, then the following should apply;
  o S.65(1)(a) be amended from ‘school age’ to ‘16 years of age’. The caring responsibilities of a parent do not cease once a child is school age.
  o S.65(1)(b) be amended by deleting ‘18 years of age’. This would allow flexibility for those with caring responsibilities of those with a disability. Caring
responsible of a person with a disability does not end at a prescribed age.

Amend s.81(1) to provide transfer to safe work to all pregnant employees.

Amend s.71 to remove the requirement that parental leave may start in the six weeks before the expected date of birth of the child.

Amend s.77 to provide that employees should have the right to return to work earlier than previously advised, by advising their employer, and their employer then having up to four weeks to provide them with their previous position.

Amend s.351(2)(b) of the Act to include a positive and explicit stand-alone duty on duty holders to make 'reasonable adjustments' under the Act.

Develop a clear framework of rights and responsibilities in regards to disability discrimination which is consistent between jurisdictions.

Amend the Act to ensure compliance with ILO Convention 111.

Insert a special redundancy provision which requires an employer to demonstrate that a redundancy is bone fide, and reasonable accommodations cannot be made, where the redundancy is for an employee returning to work after a period of parental leave.

The Act should include a provision which prohibits discriminatory requests for employee information.

Remove s.195(3)(a) and no longer allow employees under 21 to be paid lower, unjustified rates due to their age.

Blood Donor Leave should be included as a recognised Community Service under the NES.

The NES should include a provision that ensures that shift workers/weekend workers do not have a combination of work/community leave that exceeds the rostering/working hours limits of the agreement or modern award.

An employee on personal leave should receive their full rate of pay as defined in s.18.

The list of factors for determining whether additional hours are reasonable or not to include:

(i) If an employee has safe transport home
(ii) Commitments an employee has in relation to education, community activities or social work.
| South Australia | Flexible Working Arrangements (Part 2-2, Division 4) should be expanded to include a broader section of the workforce; include a definition of ‘reasonable business grounds’; and include a capacity for Fair Work Australia to review a decision by an employer to reject a request for flexible working arrangements where there is some doubt as to whether the grounds for rejection are reasonable or where there has been a procedural breach.  
The National Employment Standard providing for Long Service Leave (Part 2-2, Division 9) should be simplified to reference each state and territory’s long service leave legislation (in the case of South Australia, the Long Service Leave Act 1987 (SA) and the Construction Industry Long Service Leave Act (1987)(SA)). |
| Textile Clothing and Footwear Union of Australia | The provisions need to be significantly strengthened to have any real practical effectiveness consistent with the aim of the Act in ‘assisting employees to balance their work and family responsibilities by providing for flexible working arrangements’. Enhancements would address the limitations outlined above including the drafting of a clear right to flexible working arrangements with a reverse onus to apply to the employer to prove that the request cannot be accommodated (objective test). Consistent with the TCFUA’s earlier comments regarding FWA’s lack of jurisdiction (absent consent of the parties) to arbitrate a dispute arising under an award/NES, there should be a clear and accessible remedy for a dispute under section 65 to be determined by FWA.  
In the TCFUA’s submission, there are a number of issues of concern regarding the NES on compassionate leave including:  
- The exclusion of casual employees from the entitlement to paid leave;  
- The low quantum of paid leave, particular in relation to circumstances of death; and  
The blanket exclusion of casual employees from paid compassionate leave (particularly in respect to a death of a member of the employee’s immediate family or household) compounds the insecure nature of casual employment for many workers.  
The TCFUA considers that the standard of 2 days paid compassionate leave is insufficient to address the emotional, financial and logistical consequences of dealing with a bereavement or caring for someone with a serious personal injury or illness. |
<p>| Todd, Patricia | The Act has provide some improvement in this area but many employees are excluded from the right to request flexible work arrangements, this should be extended to all carers. |
| United voice | That the National Employment Standards include provisions for |</p>
<table>
<thead>
<tr>
<th align="left">Work and Policy Family Round Table</th>
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</table>
| The NES on paid annual leave should be extended to casual workers (on top of the casual loading) as is currently the case under the NZ Holidays Act 2003 where casual workers are entitled to paid annual leave either as paid time off, or as a proportion of their hourly rate.  
The NES need to confine casual employment to work of a limited and genuinely short-term, seasonal or unpredictable nature.  
The NES should provide casual workers with the right to request conversion to permanent status where their work is ongoing, with employers required to reasonably consider such requests and show good reason for refusal.  
Tighter conditions on the imposition of overtime, with a concerted employer and community education campaign run by the Fair Work Ombudsman around the right to refuse additional hours.  
Minimum weekly hours for employees working less than full-time to ensure that part-time workers have access to predictable and sufficient hours.  
A minimum period of engagement for all casual workers of not less than 3 hours per engagement.  
The current right to request flexible working arrangements be extended to all carers of children and adults (as is the case in NZ).  
Based on a review of the operation of the right to request, policies be developed to extend the right to all employees (as in the Netherlands and Germany).  
A request may only be refused where reasonable, based on balancing employee as well as employer needs and be subject to the normal workplace grievance mechanisms in place where disputes arise about other National Employment Standards.
Employees who have worked for 10 of the 13 months prior to the leave (similar to the requirement for Paid Parental Leave) are protected by the Parental Leave and Related Entitlements NES.

Access to reasonable antenatal leave be included in this NES.

It be a breach of this NES if a worker is made redundant while pregnant, on parental leave, or on return to work from parental leave, unless the employer can demonstrate that this is a genuine redundancy.

As a statutory minimum, the NES should ensure that all employees, including current and new employees are provided by their employer with a document setting out their entitlements, their classification, pay rates, and their conditions of work under the relevant award and/or agreement on an annual basis.

Prospective employees are advised of their rights and entitlements under the NES, their classification, pay rates and their conditions of work under the relevant Modern Award and/or agreement at the time they are offered a position.
### 7. ACCI MEMBERS

<table>
<thead>
<tr>
<th>Organisation</th>
<th>Address</th>
<th>Contact Information</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ACT AND REGION CHAMBER OF COMMERCE &amp; INDUSTRY</strong></td>
<td>12A THESIGER COURT, DEAKIN ACT 2600</td>
<td>T: 02 6283 5200 F: 02 6282 2439</td>
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<tr>
<td></td>
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<td>E: <a href="mailto:chamber@actchamber.com.au">chamber@actchamber.com.au</a> W: <a href="http://www.actchamber.com.au">www.actchamber.com.au</a></td>
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<tr>
<td><strong>AUSTRALIAN FEDERATION OF EMPLOYERS AND INDUSTRIES</strong></td>
<td>PO BOX A233, SYDNEY SOUTH NSW 1235</td>
<td>T: 02 9264 2000 F: 02 9261 1968</td>
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<td>E: <a href="mailto:afei@afei.org.au">afei@afei.org.au</a> W: <a href="http://www.afei.org.au">www.afei.org.au</a></td>
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<td><strong>BUSINESS SA</strong></td>
<td>ENTERPRISE HOUSE, 136 GREENHILL ROAD, UNLEY SA 5061</td>
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<td><strong>CHAMBER OF COMMERCE &amp; INDUSTRY WESTERN AUSTRALIA</strong></td>
<td>PO BOX 6209, HAY STREET, EAST PERTH WA 6892</td>
<td>T: 08 9365 7555 F: 08 9365 7550</td>
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<tr>
<td><strong>CHAMBER OF COMMERCE NORTHERN TERRITORY</strong></td>
<td>CONFEDERATION HOUSE, SUITE 1, 2 SHEPHERD STREET, DARWIN NT 0800</td>
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<td>E: <a href="mailto:darwin@chambernt.com.au">darwin@chambernt.com.au</a> W: <a href="http://www.chambernt.com.au">www.chambernt.com.au</a></td>
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<td><strong>NEW SOUTH WALES BUSINESS CHAMBER</strong></td>
<td>LEVEL 15, 140 ARTHUR STREET, NORTH SYDNEY NSW 2060</td>
<td>T: 132696 F: 1300 655 277</td>
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<td>W: <a href="http://www.nswbc.com.au">www.nswbc.com.au</a></td>
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<tr>
<td><strong>VICTORIAN EMPLOYERS’ CHAMBER OF COMMERCE &amp; INDUSTRY</strong></td>
<td>GPO BOX 4352, MELBOURNE VIC 3001</td>
<td>T: 03 8662 5333 F: 03 8662 5462</td>
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<td>E: <a href="mailto:vecci@vecci.org.au">vecci@vecci.org.au</a> W: <a href="http://www.vecci.org.au">www.vecci.org.au</a></td>
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<td>SUITE 4.02, LEVEL 4, 22-36 MOUNTAIN STREET, ULTIMO NSW 2007</td>
<td>T: 02 9281 2322 F: 02 9281 0366</td>
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<td>E: <a href="mailto:bcapanna@accord.asn.au">bcapanna@accord.asn.au</a> W: <a href="http://www.accord.asn.au">www.accord.asn.au</a></td>
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<td><strong>AGRIBUSINESS EMPLOYERS’ FEDERATION</strong></td>
<td>GPO BOX 2883, ADELAIDE SA 5001</td>
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<td>E: <a href="mailto:aef@aef.net.au">aef@aef.net.au</a> W: <a href="http://www.aef.net.au">www.aef.net.au</a></td>
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<tr>
<td>Chamber of Commerce &amp; Industry Queensland</td>
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<tr>
<td>Industry House</td>
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<td>375 Wickham Terrace</td>
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<td>Brisbane QLD 4000</td>
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<td>T: 07 3842 2244</td>
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<td>F: 07 3832 3195</td>
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<td>E: <a href="mailto:info@cciq.com.au">info@cciq.com.au</a></td>
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<th>Tasmanian Chamber of Commerce &amp; Industry</th>
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<tr>
<td>GPO Box 793</td>
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<tr>
<td>Hobart TAS 7001</td>
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<tr>
<td>T: 03 6236 3600</td>
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<tr>
<td>F: 03 6231 1278</td>
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<tr>
<td>E: <a href="mailto:admin@tcci.com.au">admin@tcci.com.au</a></td>
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<tr>
<th>Australian Chamber of Commerce &amp; Industry</th>
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<tr>
<td>Level 10</td>
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<tr>
<td>607 Bourke Street</td>
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<tr>
<td>Melbourne VIC 3000</td>
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<tr>
<td>T: 03 9614 4777</td>
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<tr>
<td>F: 03 9614 3970</td>
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<tr>
<td>E: <a href="mailto:vicamma@amma.org.au">vicamma@amma.org.au</a></td>
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<th>Australian Food &amp; Grocery Council</th>
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<tr>
<td>Level 2</td>
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<tr>
<td>2 Brisbane Avenue</td>
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<tr>
<td>Barton ACT 2600</td>
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<tr>
<td>T: 02 6273 1466</td>
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<td>F: 02 6273 1477</td>
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<tr>
<td>E: <a href="mailto:info@afgc.org.au">info@afgc.org.au</a></td>
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<tr>
<th>Live Performance Australia</th>
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<tbody>
<tr>
<td>Level 1</td>
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<tr>
<td>15-17 Queen Street</td>
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<tr>
<td>Melbourne VIC 3000</td>
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<td>T: 03 9614 1111</td>
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<td>F: 03 9614 1166</td>
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<td>E: <a href="mailto:info@liveperformance.com.au">info@liveperformance.com.au</a></td>
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<td>W: <a href="http://www.liveperformance.com.au">www.liveperformance.com.au</a></td>
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<tr>
<th>Australian Paint Manufacturers' Federation</th>
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<tbody>
<tr>
<td>Suite 1201, Level 12</td>
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<td>275 Alfred Street</td>
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<td>North Sydney NSW 2060</td>
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<td>T: 02 9922 3955</td>
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<td>W: <a href="http://www.apmf.asn.au">www.apmf.asn.au</a></td>
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