Fair Work Amendment Bill 2013

Submission to the Senate Standing Committee on Education, Employment and Workplace Relations

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1. Introduction

Job Watch Inc (**JobWatch**) welcomes this opportunity to make a submission to the Senate Standing Committee on Education, Employment and Workplace Relations' inquiry into the *Fair Work Amendment Bill 2013* (Cth) (**the Bill**). JobWatch generally supports the proposed amendments contained in the Bill especially in relation to the following:

a) expanding the right of pregnant women to transfer to a safe job;
b) providing further flexibility in relation to concurrent unpaid parental leave;
c) ensuring that any special maternity leave taken will not reduce an employee's entitlement to unpaid parental leave;
d) expanding access to the right to request flexible working arrangements to more groups of employees (subject to the below recommendations);
e) requiring employers to consult with employees about the impact of changes to regular rosters or hours of work, particularly in relation to family and caring responsibilities;
f) taking into account the need to provide additional remuneration for employees working overtime, unsocial, irregular or unpredictable hours, working on weekends, public holidays or shifts;
g) improving right of entry laws; and
h) allowing a worker who has been bullied at work in a constitutionally-covered business to apply to the Fair Work Commission (**FWC**) (subject to the below recommendations).

Nevertheless, JobWatch has concerns regarding the Bill as follows:

a) the continued unenforceability of the flexible working arrangements provisions; and
b) procedural and practical issues regarding the anti-bullying measures.

These concerns will be the focus of JobWatch's submission.

2. About JobWatch

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

JobWatch was established in 1980 and is the only service of its type in Victoria. The centre is funded by State and Federal funding bodies to do the following:

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

b) Engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other organisations;
c) Represent and advise disadvantaged workers; and
d) Conduct law reform work with a view to promoting workplace justice and equity for all Victorian workers.

Since 1999, we have maintained a comprehensive database of the callers who contact our telephone information service. To date we have collected over 150,000 caller records with each record usually canvassing multiple workplace problems including, for example, contract negotiation, discrimination, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face and what remedies, if any, they may have available at any given time. Currently, JobWatch's telephone information service takes approximately 5000 calls per year down from approximately 20,000 due to funding cuts.

The contents of this submission is based on the experiences of callers to and clients of JobWatch and the knowledge and experience of JobWatch's legal practice.

3. Flexible work arrangements: The case for enforceability

Currently, there is not an enforceable mechanism by which employees can obtain flexible working arrangements under the *Fair Work Act 2009* (**FW Act**) and, despite the Bill intending to increase the groups of employees who have the "right to request flexible working arrangements" it fails to provide for any enforcement mechanism where such requests are unreasonably refused by employers.

As such, the objectives of section 65 of the FW Act are and, as a result of the Bill, remain merely aspirational. In reality, all employees have the right to request flexible working arrangements so, without an enforcement mechanism, section 65 and the Bill fail to actually improve or enhance rights for employees who require flexible working arrangements. In JobWatch's opinion, a right or law that cannot be enforced is not a true right or law at all and is effectively meaningless.

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

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

Case study – unreasonable refusal of flexible work arrangements

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

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

Recommendation 1

For these reasons, employees who are members of the groups covered by section 65 and the Bill who have had their request for flexible working arrangements refused by their employer should have recourse to FWC for a quick, inexpensive and just review of the employer's decision and FWC should be empowered to make binding orders giving effect to such flexible work requests where appropriate. To maintain the status quo is untenable.

4. Anti-bullying measures

JobWatch has long been an advocate for reform in the area of workplace bullying and it has been JobWatch's considered opinion that the best way to

stop (and hopefully prevent) workplace bullying is to empower the aggrieved individual with the right to take legal action on their own behalf *(See attached as Appendix 1, JobWatch's submission to the House of Representatives' House Standing Committee on Education and Employment's inquiry into workplace bullying dated June 2012)*. To this end, JobWatch specifically congratulates the Federal Government for introducing the anti-bullying measures contained in the Bill and makes the following comments:

a) Definitions

- JobWatch is pleased that, should the Bill become law, there will finally be a legislated definition of workplace bullying in Australia.

- JobWatch is pleased that the definition of ***worker*** provided in the Bill (which has the same meaning as in the *Work Health and Safety Act 2011*) is sufficiently wide so as to capture any individual who performs work in any capacity including contractors and volunteers in addition to employees.

b) Constitutional limitations

- JobWatch recognises that there are currently constitutional limitations on the type of businesses to which the anti-bullying measures apply such that, in Victoria for example, employers who are sole traders or partnerships will not be captured by the anti-bullying measures.

- JobWatch recommends that the Federal Government continue to negotiate with the States to obtain a referral of the relevant residual occupational health and safety powers so that employees who are not employed by a constitutionally covered business do not miss out on the Bill's protections against bullying.

c) Time limits and FWC resources

- JobWatch is also pleased that the FWC must deal promptly with a stop bullying application, i.e. within 14 days, but this raises

questions about the resources of the FWC to deal with what will undoubtedly be a massive influx of stop bullying applications.

- For example, in the year to 24 June 2011, WorkSafe Victoria received more than 6000 complaints about workplace bullying.[1] If this figure is extrapolated across all Australian States and Territories, even by a conservative estimate, the FWC is going to receive hundreds if not thousands of stop bullying applications per year, possibly even more than 10,000.

- To this end, JobWatch submits that the Federal Government should fund a dedicated Australia-wide telephone service to advise and assist workers who believe they may have been bullied at work. The role of the service would not only be to listen to peoples' stories in a caring and empathic manner, but also to vet potential claims, discourage unmeritorious applications and provide other referral options where other legal or non-legal courses of action appear more appropriate, e.g. a discrimination complaint at the Australian Human Rights Commission or referral to a counselling service.

- This service would assist to ameliorate the drain on the FWC's resources whilst at the same time providing genuine assistance to workers dealing with workplace bullying. JobWatch is well-placed to provide this service.

- On the whole, JobWatch applauds the Bill's anti-bullying measures but remains concerned that a lack of FWC resources could effectively undo what is a timely, important and necessary amendment to the FW Act.

Recommendation 2

The Federal Government should fund a dedicated Australia-wide telephone service to advise and assist workers who believe they may have been bullied at work so as to assist both the worker or workers and the FWC.

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[1] The Age – Most workplace bullying claims fall short (24/7/11)

Thank you for considering our concerns.

Yours sincerely,

JOB WATCH INC

Per:

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Zana Bytheway
Executive Director