Flexible Work in 2010 – the impact of the *Fair Work Act 2009* on employer control of, and employee access to, flexible working hours

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Introduction

While flexibility is a key feature of the *Fair Work Act 2009*, this paper suggests that employer control over flexible working hours via individual flexibility agreements in modern awards and enterprise agreements are to the detriment of employee access to genuine flexibility; and at a cost to employee earnings, in particular women. Further, employee access to flexible working hours arising from the national employment standards right to request provisions are unenforceable, limited in provision and narrow in application. This minimal employee access to flexible working hours is further undermined by the promotion of individual flexibility agreements; for rather than explore options for employees through right to request applications, employers can offer flexibility at a price through Individual Flexibility Agreements. The use of Individual Flexibility Agreements so far suggests a price of longer hours and less take home pay for employees, yet they are being promoted as 'work and family' initiatives by Fair Work institutions. In public consultation discussions regarding sex discrimination and pay equity, the impact of these changes suggest employees and in particular women will be at a disadvantage under the *Fair Work Act 2009*. In comparison to employees in other countries, Australian employees have minimal rights to flexible working hours, and deserve to have a strong legislative right to flexible work without a cost to employees.

Flexible working hours – flexibility for whom?

In the election year of 2007, Kevin Rudd and Julia Gillard stated that, 'Working families face the daily challenge of balancing the pressures of work with the demands of family life.. This is a difficult task, but when Australian working families face cuts to their take home pay… the task becomes almost impossible. Labor believes in supporting Australian working families.' (*Forward with Fairness*, p. 8). On the 28th April 2007, the 'Forward with Fairness' policy document was launched by the Australian Labor Party. This policy committed that: 'A Rudd Labor Government will guarantee a right for parents to request flexible work arrangements until their child reaches school age. Employers will only be able to refuse any request on reasonable business grounds.' (*Forward with Fairness*, 2007, p.8) This policy document promoted working families and flexibility, and did not mention 'Industrial Flexibility Agreements'. The policy document stated in relation to agreements, 'Once an agreement is made then a deal is a deal. The agreement must be complied with..'. (*Forward with Fairness*, p.13.) Not only is there no mention of Individual Flexibility Agreements as a required term of enterprise agreements, the policy document states that: 'The only requirements will be that the terms of the agreement are lawful, the bargaining is conduced in good faith, the employees covered by the agreement are better of overall against the safety net, and a majority of employees vote in favour of the agreement.' (*Forward with Fairness*, p. 16).

Yet as Buchanan and others have observed, 'When the ALP released its original Forward with Fairness policy in April 2007 it met with overwhelming employer hostility... This hostility was supported by nearly all established press commentators. This reaction represented a remarkable display of collective ignorance. The original policy was extremely mild in terms of mainstream OECD labour law.' (Buchanan et. al, 2008, p.9) However mild the commitments to assist working families had been in April 2007, by the time of the introduction of the *Fair Work Act* in 2009, as this paper will demonstrate below, employee access to flexibility by means of the right to request provisions has resulted in a minimal, unenforceable legislative standard. Individual Flexibility Agreements (hereafter referred to as IFAs) became a requirement of awards and agreements, and since the commencement of the *Act*, individual flexibility agreements are promoted by government

agencies as a means by which employees can gain access to flexible working hours in awards and agreements (Fair Workplace Ombudsman, 2009).

Under the *Fair Work Act 2009*, IFAs are a new required feature of an award or enterprise agreement, which allows the employer and employee to vary the effect of a term of the award or enterprise agreement by agreement between the employer and individual employee. The IFA must be genuinely agreed to by the employee, can be terminated by the employee with 28 days notice, and must leave the employee 'better off overall' (the better off overall test, or 'BOOT' test) than their award or enterprise agreement. The Fair Work Ombudsman's guide to IFAs explains that, 'It is the employer's responsibility to ensure that the employee is better off overall than if there was no IFA. The employer's 'better off overall' assessment will usually involve comparing the employee's financial benefits under the IFA with the financial benefits under the applicable award or enterprise agreement. The employee's personal circumstances and any non-financial benefits which are significant to the employee can also be considered.' (Fair Workplace Ombudsman, *IFA Guideline*, 2009, p.2) It is important to note that non-financial benefits, such as flexible working hours, can be considered in assessing whether an employee is better off, even if the employee earns less for working the differing hours. In an IFA in an award, the employer or an employee can propose to vary arrangements for when work is performed such as working hours, overtime rates, penalty rates, allowances, and leave loading. An IFA in an agreement can vary any term of the agreement if agreed by the parties to that agreement, and if there is no specific clause regulating IFAs in the agreement, the IFA incorporates the model IFA term, which allows the employer and an individual employee the ability to vary the effect of clauses such as one or more of the following matters: arrangements about when work is performed; overtime rates; penalty rates; allowances; or leave loading.

IFAs are a feature of the *Act* much discussed in the public domain. In an address to a Labour Law Conference on the *Fair Work Act* (Watson, '*NES, Award Modernisation and FWA'*, 11 June 2010), Vice-President Watson of Fair Work Australia had noted the availability of individual flexibility, at this stage he suggests 'untested and unvalued' (Workplace Express, 11 June 2010). The use of flexibility for business or individual needs was observed as being confined to the award or agreement flexibility clause, above award arrangements, or terms in enterprise agreements. Vice-President Watson said, 'Once can ask, is the optimum extent of flexibility being achieved, are the processes an appropriate restraint on achieving the flexibility or proper safeguards?' (Workplace Express, 11 June 2010).

The Australian Mining and Minerals Association does not think that IFAs provide enough flexibility, asserting that IFAs do not work due to requirements such as having to be assessed against the 'better off overall test', employers not being permitted to make an individual flexibility agreement a condition of employment, employees are entitled to terminate an IFA with 28 days notice, and that the model IFA is not broad enough (Workplace Express, 20 May 2010). The Coalition have committed to make IFAs 'more flexible' (Workplace Express, 20 May 2010). Yet unions and government agencies have concerns about IFAs. The Australian Council of Trade Unions and Joint State Union Peak Councils have raised concerns that IFAs may undermine terms agreed in collective bargaining or provided by the safety net, and may adversely affect women through the implementation of lower terms and conditions (*Making it Fair*, November 2009, p. 188). A report of the House of Representatives Standing Committee on Employment and Workplace Relations, examining pay equity and related employment matters, noted the concerns of the New South Wales Office for Women's Policy in relation to the ability of IFAs to vary award terms, and quoted the submission of the agency:

> '*Any such variations [monetary entitlements such as overtime, penalty rates and allowances] are achieved through unregulated individual flexibility agreements between the employer and an individual employee, and so are to be distinguished from*

clauses that are common in existing awards and agreements permitting flexibilities departing from some award requirements to be negotiated at the workplace level. The concern is that this may have the potential to further reduce the total earnings of award- reliant women who would otherwise be entitled to such payments under the standard terms of their award, thus neutralising other efforts to reduce the gender earnings gap. In particular, it will potentially increase male/female earnings disparities within awards if women are effectively forced to trade-off these benefits for more family friendly hours and working arrangements. The lack of the collective dimension adds to the risk that individual women may feel pressured to accept loss of wages and other conditions in return for much needed flexibilities.'

Due to the clear capacity of IFAs to reduce wages through variations to penalty rates, overtime, and when hours are worked, the *Making it Fair* report compared IFAs with Australian Workplace Agreements (hereafter referred to as AWAs); highlighted the contribution of AWAs to the gender wage gap, and concluded that, '…there is a significant similarity between the AWA and the individual flexibility agreements being introduced. It is therefore important that these new agreements be monitored to ensure there is not a similar outcome.' (Workplace Express, 23 November 2009). The report recommended that the *Fair Work Act* be amended to require that individual flexibility arrangements are lodged with *Fair Work Australia*, to enable research on the outcomes of these agreements. This should not be a controversial recommendation, for when discussing the impact of AWAs on wages, and the actions of the Howard Government in not providing data on AWAs, Gillard had stated, 'What our whole policy platform, not just our workplace relations system, insists on is an evidence-based approach to decision making' (Gillard, 20 June 2008, p. 3.) The above concerns and recommendations regarding IFAs were noted in the early days of the operation of the Act. There are now enterprise agreements that illustrate employer proposed flexibilities for employees. These IFAs provide the employer with ability to propose to employees at a variety of working hours, but this flexibility is with a cost to employees.

Flexibility in working hours – at a price

IFAs allow the employer to initiate proposals to vary the terms of an agreement with individual employees, and as noted above, potentially undermine the benefit of collective conditions in which all employees participate, such as rosters of work hours, workload allocation, and working hours generally. As illustrated, unions had expressed concerns about IFAs and the potential to trade take home pay for flexibility at work, especially for workers with caring responsibilities who require flexibility in working hours. While employer representatives comment on union bids to restrict enterprise flexibility provisions (Workplace Express, 15 October 2009; Workplace Express, 22 April 2010); and unions have taken strike action over employer proposed IFAs in enterprise bargaining (Workplace Express, www.nteu.org.au), for example the Australian Manufacturing Workers Union dispute with Campbell's manufacturing, where the strike action was taken solely to oppose the use of the model IFA clause (Workplace Express, 17 September 2010); most enterprise agreements use the model or default flexibility term (Workplace Express, 22 October 2010), which allows employers to initiate variations in arrangements about when work is performed; overtime rates; penalty rates; allowances; or leave loading. Not surprisingly, union resistance to broad or model IFAs has been more successful in strong union sectors, such as manufacturing and education (Workplace Express, www.nteu.org.au). The Campbell's dispute was resolved with the parties agreeing to an IFA which only allowed employees to take annual leave in one day blocks (Workplace Express, 17 September 2009), and Higher Education sector agreements have generally featured discretionary terms in Individual Flexibility clauses, such as discretionary purchased leave schemes, placing rights to flexible work as a term of the collective enterprise agreements (see for example *Sydney University Enterprise Agreement 2009-2012* and other higher education enterprise agreements at www.nteu.org.au).

While the majority of agreements have included the broad model IFA clause, and while the implementation of their individual flexibility agreements with employees in many workplaces is currently unknown, there is emerging evidence of their usage. For example, the Virgin Blue subsidiary V Australia is using their IFA provision under the modern award to roster 22 hour shifts for flight attendants, longer than the 18 hour limit regulated by the awards (Workplace Express, 21 April 2010). Further, they are asking new employees to sign on to the IFA on engagement, which the union is consulting its members about disputing (Workplace Express, 21 April 2010).

Employers in the aged care, retail and fast food service sectors, all female dominated sectors, have pursued 'preferred hours' clauses via IFAs, where in exchange for an increase in the work hours offered by the employer, the employee agrees to not be paid overtime or penalty rates for working hours that would normally attract those rates (Workplace Express, 18 March 2010). Unions have contested the approval of these agreements, and a Full Bench of Fair Work Australia has quashed the original decisions to not approve the aged care and retail agreements on procedural grounds, but concluded that 'preferred hours' clauses are a disadvantage to employees (PR995839; Workplace Express 16 April 2010). While the Fair Work Australia Full Bench has rejected the notion of the offer of further work for a lower pay rate leaving employees better off overall, there are no restrictions on IFA variations to change the hours worked and therefore receive less pay for the hours worked if overtime or penalty rates are given up. The Act's *Explanatory Memorandum* predicts exactly such an agreement via an IFA: 'The Act's EM (at paragraph 867) gives as an example of an IFA that would pass the BOOT an arrangement allowing an employee to start work early two days a week in exchange for giving up the overtime rates that work would normally attract' (Workplace Express, 18 March 2010).

Why would employers in these female dominated sectors agree to consider a request to increase or change hours from an employee under the right to request provisions, when they could allow the employee to change hours in exchange for receiving a lower pay rate for the particular hours worked? Indeed, the Fair Workplace Ombudsman gives the example of fictional 'Dave' doing just that: 'Dave, an industrial chemist makes an individual flexibility agreement with his employer allowing him to start and finish work 30 minutes early to enable him to coach his son's football team, without incurring the usual penalty rate for the first half hour. …Under the example cited by the Ombudsman, Dave is covered by an enterprise agreement that includes a flexibility term allowing IFAs to be made about the hours an employee works within the agreement's span of hours. The wash-up, says the guide, is that "Dave is better off overall because he can attend his son's training, something he values as a significant non-financial benefit".' (Workplace Express, 31 August 2009). Yet if Dave had access to flexible work through a legislative standard, he would not have to trade penalty rates in order to start work earlier.

Unions have been accused of 'circumscribing as far as possible the range of issues on which employees can be allowed to reach their own deals', with an Industrial Relations Manager asserting '..that the flexibility provisions already contain very substantial protections, including... the right of the employee to walk away from a flexibility agreement at 28 days notice.' (Workplace Express, 22 April 2010). If an employee requires flexibility though, they could seek a right to request which the employer has no obligation to genuinely consider, or enter into an Individual Flexibility Agreement, with the potential price of penalty rates as envisaged by the Fair Workplace Ombudsman above. There are other costs for employees in the individual negotiation of IFAs, as this individual negotiation means that flexibility is considered not as a feature of the organisation of work for all employees, but rather as an individual arrangement which can be compensated for at a cost to the employee, and will be distinguished from standard arrangements due to that individual agreement. In this context, as an Industrial Relations Manager acknowledged 'One employee's flexibility can be another employee's restraint' (Workplace Express, 22 April 2010), yet this manager counsels that employers should utilise IFAs, as otherwise employers obligations to consider the flexibility needs of the individual could strengthen in safety net legislative entitlements, such as in the United

Kingdom (Workplace Express, 22 April 2010). It is easier for employers to negotiate individual flexibilities then have an obligation to consider individual employees work and family interests at an organisational and/or institutional level. An employer clearly has a financial benefit if they can trade penalty rates or overtime for flexibility in working hours. This financial benefit undermines the use of rights to request provisions by employees. If one employee in a workplace alters their working hours via a flexibility agreement, in order to change starting and finishing times, trading their right to penalty hours by agreeing that to an alternative span of hours, while all other employees work 9-5pm and after 5pm receive penalty rates; what motivation is there for an employer to grant flexible work to an employee who makes application via the right to request provisions, to change their starting and finishing times without losing their penalty rates? Under IFAs, flexibility will come at a price to the employee. This price undermines the potential use of right to request provisions, which are ineffective means of employee access to flexibility as they currently stand, a further hurdle for employees with caring responsibilities.

Employee access to flexible working hours – ineffective and unenforceable

As noted earlier, the Forward with Fairness policy document committed that: 'A Rudd Labor Government will guarantee a right for parents to request flexible work arrangements until their child reaches school age. Employers will only be able to refuse any request on reasonable business grounds.' (*Forward with Fairness*, April 2007, p.8) Unfortunately, no further detail was provided to substantiate the proposed right to request flexible work arrangements in the *Exposure Draft*, released on the 14th February 2008, after the employer feedback noted by Buchanon and fellow researchers (Buchanon et al., 2008). The *Exposure Draft* standard for requests for flexible working arrangements provided that an employee who is a parent of, or has caring responsibilities for, a child under school age will be entitled to request flexible working arrangements. These flexible working arrangements were not defined, but examples included reduced hours, different start or finish times or home-working arrangements. The employee would be required to make the request in writing, and the employer must only refuse the request on "reasonable business grounds". The *Exposure Draft* stated that these grounds would not be defined. The employer would be required to respond to the request within 21 days. The paper invited comment, and gave some discussion point examples, such as: 'Should the proposed flexible working arrangements NES expressly define what constitutes reasonable business grounds?' (*Exposure Draft*, p.13) and 'Are there any other matters that need to be taken into consideration when finalising the flexible working arrangements NES?' (*Exposure Draft*, p.13)

The proposed standard was narrow in application, minimal in provision and unenforceable. Many researchers and organisations expressed concern, and offered solutions to the issues raised in the *Exposure Draft*. Pocock and Elton noted that, '.. An unenforceable right, confusion about the meaning of reasonableness, the absence of any transparency or review, can all contribute to confusion and uncertainty at the workplace for employers and employees and the appearance of a right without real effect.' (Pocock & Elton, 2008, p.9). Other researchers perceived the proposed standards as sharing similar weaknesses with *Workchoices* minimum standards (Bamberry et. al., 2008). RMIT senior researchers stated in response to the *Exposure Draft*, '...They are too weak, even in comparison with obvious comparators such as New Zealand and the United Kingdom, and as a result the standards may not be able to function effectively as a component of a safety net.' (Bamberry et. al, 2008, p, 2, 3).

The eligibility requirement in the proposed standard was twelve months service for an employee, and on this length of time researchers observed that, 'In 2006 more than a quarter of all female employees (25.9%) has less than 12 months service with their employer (ABS 2006).' (Baird et. al., 2008 p.2, 3). Peetz expressed the view that the draft standards were 'unduly parsimonious or incomplete.' (Peetz, 2008, p.1). He noted that restricting the right to request flexible working hours to parents with children under school age is, 'an overly narrow restriction on eligibility, one that

fails to recognise the range of workers who may have a genuine family need for flexible working hours.' (Peetz, 2008, at 11). Peetz suggested that as a minimum the standard should apply to parents of pre-school children, parents of disabled children, and to carers; and that in the near future the standard be available to all employees, for reasons of equity, effectiveness and to avoid resentment of employees with access to it (Peetz, 2008, at 14, 15). The Human Rights Commission suggested that the standard apply '..to all forms of family and caring responsibilities and to employees with a disability', (HRC, 2008, p.5) Bamberry and other RMIT researchers also criticised the narrow scope of employees who could access a purported universal standard, and suggested extending the standard, '…to all carers and after a three year period of implementation, reviewed with a view to extending eligibility to all employees,' (Bamberry et. al, 2008, p.7).

The standard failed to require an employer to demonstrate genuine consideration of the employee's request, and failed to propose a process of consultation, so that, 'The steps involved in assessing an employee's request are manifestly inadequate.' (Peetz, 2008, at 16); Peetz and Pocock and Elton concluded that a right to a meeting including the right to a companion, should be a feature of the standard, based on the UK right to request provisions (Peetz, 2008: Pocock & Elton, 2008). On the issue of objective criteria, Peetz asserted that the criteria defining business grounds should be transparent, and modelled on the UK list which restricts the reasons to 7 defined grounds (Peetz, 2008). The Human Rights Commission proposed a list of factors to be considered by the employer when considering requests and determining 'reasonable business grounds' (HRC, 2008) Bamberry and others suggested requirements for the consideration of reasonable business grounds, such as the capacity of the employer to accommodate the request, and the consequences for the employee of not accommodating the request: (Bamberry et. al., 2008). Numerous submissions urged for an appeal right and/or dispute mechanisms for enforcement of the proposed standard (Peetz, 2008, p.7; Pocock & Elton, 2008, p.11; Bamberry et. al., 2008, p.7; Unions NSW, 2008, p.11; Human Rights Commission, 2008, p.5). Pocock and Elton concluded that, 'It is hard to bring to mind meaningful employment standards that expressly exclude any form of review, appeal or enforcement. Why should a right to request flexibility be any different to any other form of labour right, unless it is viewed as an inferior right, or a right without effect?' (Pocock & Elton, 2008, p.12).

The *Exposure Draft* stated, 'The Government will consider the submissions received and may make amendments to enhance the operation of the NES or to address any unintended consequences that arise from the drafting of the proposed NES.' (*Exposure Draft*, p. 2). Yet in June 2008, a standard on right to request flexible working arrangements was released, and no change was proposed: (Division 3, Section 13, p.12 of NES). The standard remained exactly the same until in Senate negotiations in 2009, in the hope of swift passage of the Bill (Workforce Daily, 2009) an amendment was accepted by the Government. In a letter to Greens Senator Bob Brown, the Deputy Prime Minister stated, '.. you indicated your intention to move an amendment to the National Employment Standards that would provide carers of disabled children under 18 years of age with the right to request flexible working arrangements. The Government agrees to support this amendment.' (Gillard, 2009). In response to outstanding concerns from the Greens and others, the Government agreed to extend a review clause of the Bill to review, along with bargaining effects on women, part time workers, and others; the right to request provisions. Specifically, the terms of review in relation to rights to request flexible work will be an examination of the use of flexibility arrangements, the circumstances in which requests are made, the outcome of the requests and the circumstances in which requests are refused (Gillard, 2009). Many expressed the view that the provisions are still 'too weak' (Workplace Express, 2009); too narrow (HRC, 2009); and remain unenforceable (Charlesworth & Campbell, 2008). A work and family expert stated, 'Though the current provisions is a small step in the right direction, it is so weak that it is, in my view, unlikely to be the catalyst for a serious move to substantial change in the workplace towards 'caring friendly' working hours and practices.' (Heron, 2009, p.1) The legislative standard will not provide flexible work options to Australian employees.

The pay equity report, *Making it Fair*, recommended in November 2009 that the right to request standard be extended to all employees (*Making it Fair*, 2009, p.191). A review of the *Sex Discrimination Act 1984*, by a Senate Committee produced a report in 2008 which recommended strengthening the *Sex Discrimination Act* to provide for a positive duty for employers to not unreasonably refuse requests for flexible working arrangements, stating:

> *'The committee also notes the evidence it received demonstrating that a failure to strike an appropriate balance between work and caring responsibilities has negative consequences for the health of carers and for their workforce participation. Striking such a balance is also important to overcoming some entrenched aspects of gender discrimination which continue to lock women into the role of carer and men into the role of bread-winner to the detriment of both sexes. …the committee supports providing for a positive duty on employers not to unreasonably refuse requests for flexible working arrangements to accommodate family or carer responsibilities. The committee notes ACCI's submission that the NES will provide a similar right to employees and that this change should be bedded down before any expansion of the positive duty on employers. However, the NES will not apply to all employees and does not extend protection to parents and carers generally but only to those caring for children under school age. As a result, the change proposed by the committee would.. recast this duty in positive terms and extend it to men with family responsibilities.*' (Senate Standing Committee on Legal and Constitutional Affairs, 2008, p.168).

It seems inconsistent and ineffective, that while in the realm of discrimination law the government's own Senate Committee can recognise the need for flexibility at work without a cost to employees, the *Fair Work Act* does not provide this right. Unfortunately, the government has chosen to not take up this recommendation, pointing to the review of the right to request provisions in the *Fair Work Act* in 2012. The Human Rights Commission, however, recognises the need to remedy discrimination against women, the overwhelming majority of employees with caring responsibilities (Bittman, 2004), not just via discrimination law, but in the industrial laws which shape all employees work and family lives: 'To make flexible work a normal part of workplace culture, the National Employment Standard and the Sex Discrimination Act should be amended to... provide comprehensive protection from discrimination on the grounds of all forms of family and carer responsibilities to both women and men in all areas of employment… (and) …place a positive duty on employers to reasonably accommodate a worker's family and carer responsibilities, including through the provision of flexible work arrangements.' (Human Rights Commission, *Human Rights Commission Gender Equality Blueprint – June 2010*, p.5)

International options for flexible work, and our future

Australian employees cannot create structural change to workplaces, eliminate discrimination and achieve flexible working hours without cost to the employee on an individual or enterprise basis. Yet international experience has shown this is possible to make progress in these areas through legislative standards, with nations such as New Zealand, Germany, the United Kingdom, Sweden and the Netherlands producing variations on rights to request flexible work through legislation (Murray, 2004, 5-9). The United Kingdom introduced a 'right to request flexible work' in 2002, which enabled parents with children under the age of 6, or disabled children under the age of 18, the right to request more or less hours of work, or different hours of work, or a change in workplace location. In April 2007, the provision was extended to include carers of spouses, partners and relatives, and again in May 2008 to cover parents of children up to 16 years old (Workplace Express, 2008). Unlike the Netherland and German legislative standards, the United Kingdom does not allow an employee who has had their request rejected a review of the decision. A procedural problem in the processing of the request can be addressed in a UK tribunal or equivalent, but the employers alleged inability to accommodate the request is not examined. The UK legislation has

been described as a 'negligible intrusion into managerial perogative' (Murray, 2005). However, in this year's UK elections, both major parties made commitments to extend the right to request provisions for employees, viewing them as an election promise which would win votes (Workplace Express, 14 April 2010). The Labour Government had promised to extend the right to request flexible work to older employees; while the Conservative Party had committed to extend it to all parents with children under 18, further committing that after consultation with employers the objective would be to extend the right to all employees (*Workplace Express*, 14 April 2010).

Legislative standards that place the onus on employers to incorporate the allocation of work via flexible working hours into their organisational practices and structures, such as Germany and the Netherlands, are required for Australian workplaces. As researchers have noted, a recognition of employer resistance was the reason for strong legislative provisions introduced into Germany (Campbell and Charlesworth, 2008), and strong resistance to flexible working hours without a price to the employee has been evidenced in Australia (Wells, 2009; 2007; 2005). The best of these international options is the Netherlands standard, which has 'broken free from a focus on traditional family responsibilities' (Murray, 2005, p.86) and promotes the universal value of adaptable working hours to all employees. The standard provides employees' with the opportunity to increase or decrease working hours or alter the distribution of working hours; by placing a request with their employer, having that request followed by a clear process which must be followed, and the employers failure to follow this process means that the employees' request is deemed to be approved (Murray, 2005). The employer has to show serious business reasons as to why the request cannot be accommodated, and these are not easily substantiated in court (Burri et. al, 2003). This standard would provide rights to flexible working arrangements to workers with caring responsibilities, and no incentive to discriminate against these employees, as the right would be universal. In the words of a permanent part time worker: 'Universality is the key' (Wells, 2005). Adaptation of this model is needed for the Australian context, in recognition of the high levels of casual work, so a requirement to provide flexible permanent work to casuals after a suitable qualifying period would make the standard much wider in scope. Further, this standard should work alongside a working hours legislative standard that effectively limits working hours each week (Campbell, 2005).

Conclusion

The current legislative standard provision of 'right to request flexible work' will not provide Australian employees with access to quality, permanent and cost free flexible working arrangements. Further, the Individual Flexibility Agreements introduced by the *Fair Work Act* into awards and enterprise agreements will not bring flexibility to employees with caring responsibilities without a price to pay, that price being a reduction in take home wages. Individual Flexibility Agreements should be phased out when reviewed in 2012, and genuine access to flexible working arrangements should be a feature of our minimum legislative standards for all employees, and an integral part of organisations work allocation principles. A strong legislative standard is required to produce this organisational and cultural change, and the Netherlands standard, with additions necessary for an Australian context, would provide this right effectively. We must pursue such a standard when the current inadequate right to request standard is reviewed in 2012. Opportunities for the development of a universal legislative standard that brings benefits to all employees, and is suitable for the Australian context, are with us now in the review to be conducted in 2012. The opportunity for flexible work should not come at a price to Australian employees.

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