



Australian Government
Department of Employment

*Post-implementation review of the Fair
Work Amendment Act 2013*



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The document must be attributed as the (Post-implementation review of the *Fair Work Amendment Act 2013*).

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1 – Context for this review

This post-implementation review (the Review) is required because the *Fair Work Amendment Act 2013* (the Amendment Act) was not accompanied by a Regulation Impact Statement when it was introduced into the Australian Parliament (as the former Prime Minister provided an exceptional circumstance exemption). In accordance with the *Australian Government Guide to Regulation*, the Department of Employment must complete this Review within two years of an Act being implemented (in this case by July 2015). This Review is intended to assess the impact of the Amendment Act, whether the regulation remains appropriate and how effective and efficient it has been in meeting its objectives.

The Amendment Act made a number of changes to the *Fair Work Act 2009* (the Fair Work Act) including broadening the application of the family friendly provisions, changing the right of entry provisions in relation to the location of discussion and resolution of disputes, requiring employers to consult about roster changes and allowing workers to apply to the Fair Work Commission for an order to stop bullying. The legislation implemented the second tranche of the former government's response to the 2012 report, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* (the Fair Work Act Review). The Fair Work Act Review, which also fulfilled the requirements of a post-implementation review (PIR) for the Fair Work Act, made specific recommendations in relation to special maternity leave and the right to request flexible working arrangements which were subsequently addressed by the Amendment Act.

The provisions of the Amendment Act came into effect at different times. This Review is focused on those provisions that came into effect on 1 July 2013, which are:

- Part 1 of Schedule 1 – Special maternity leave

This part ensured that employees do not lose unpaid parental leave when taking special maternity leave.

- Part 2 of Schedule 1 – Concurrent unpaid parental leave

This part increased the maximum period of concurrent unpaid parental leave from three to eight weeks, allowed the parents to choose when they want to take that leave in the first twelve months after the birth of the child and allowed leave to be taken in separate periods of at least two weeks unless otherwise agreed by the employee.

- Part 3 of Schedule 1 – Right to request flexible working arrangements

This part expanded the scope of who can request flexible working arrangements.

- Part 4 of Schedule 1 – Transfer to a safe job

This part provided pregnant employees with less than 12 months service the right to transfer to a safe job.

The remainder of the provisions will be examined in a second PIR due to be completed in early 2016.

Relative to the other components of the Amendment Act that were implemented at a later time (that is, those provisions related to right of entry, roster changes and bullying) the family friendly provisions outlined above were mostly technical in nature. The Explanatory Memorandum to the Bill¹ makes this clear and also outlines how the family friendly provisions engage various rights that already exist under international law including the International Covenant on Economic, Social and Cultural Rights (ICESR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC). Further, the final report of the Senate Education, Employment and Workplace Relations Legislation Committee on the Fair Work Amendment Bill 2013 concluded the following in relation to the extension of the right to request and roster change provisions:

Given that these changes are targeted at encouraging conversations between employees and employers, and there is no obligation to agree to requests and there is no review by the Fair Work Commission, it is difficult to accept arguments presented to the committee that these changes will impose an unfair administrative burden on businesses. Every day in workplaces across Australia employers are negotiating flexible working arrangements with employees and consulting about roster changes. The vast majority of employers are already accommodating the responsibilities of workers where it is practicable. Therefore, in large part, the amendments in the bill represent a codification of existing practice.²

In relation to the various parental leave amendments, the Committee further noted:

Employers have a long established duty to ensure that workplaces are safe environments for all workers. The committee agrees that the proposed enhanced protections for pregnant workers are sensible, and in large part consist of technical amendments to correct a previous oversight.³

This Review, in order to test that the regulation is performing as intended and is still relevant and needed, will draw on the following evidence:

- submissions from stakeholders affected by the amendments
- data collected by the Department of Employment
- other relevant sources of data.

¹ Fair Work Amendment Bill 2012. Explanatory Memorandum.

² Education, Employment and Workplace Relations Legislation Committee (2013) 'Fair Work Amendment Bill 2013 [Provisions]', Australian Senate, 2.20.

³ Education, Employment and Workplace Relations Legislation Committee (2013) 'Fair Work Amendment Bill 2013 [Provisions]', Australian Senate, 2.29.

2 – Purpose of the regulation

Application of the Amendment Act

Special maternity leave

Under the Fair Work Act, a female employee may be entitled to a period of unpaid special maternity leave if she is not fit for work during that period because:

- she has a pregnancy-related illness; or
- she has been pregnant, and the pregnancy ended within 28 weeks of the expected date of birth of the child otherwise than by the birth of a living child.

To be entitled to this leave, the employee has to have completed 12 months service with the employer by the expected due date of birth of the child.

The Amendment Act repealed subsection 80(7) of the Fair Work Act, which specified that a female employee's entitlement to 12 months of unpaid parental leave would be reduced by any amount of unpaid special maternity leave taken by the employee when she was pregnant. The Amendment Act also clarified (via legislative notes) that an employee may exhaust all paid personal/carer's leave entitlements before accessing unpaid special maternity leave.

The effect of the amendment was that an eligible employee's entitlement to unpaid parental leave was not reduced if unpaid special maternity leave was accessed during pregnancy.

Concurrent parental leave

Under the Fair Work Act each eligible member of an employee couple (that is, where one employee is the spouse or de facto partner of another employee) is entitled to take 12 months unpaid parental leave. Previously an employee couple was able to take up to 3 weeks unpaid parental leave at the same time ('concurrent leave'). The Amendment Act increased this period to 8 weeks. As before, concurrent leave can be taken in separate periods and each period has to be at least 2 weeks long. Concurrent leave is part of an employee's total unpaid parental leave entitlement of 12 months. This means that any concurrent leave taken is deducted from the total parental leave entitlement.

The Amendment Act increased the amount of concurrent unpaid parental leave that could be taken by new parents from three weeks to eight weeks. The amendments did not create any additional paid leave entitlements - they simply provided more flexibility in the way existing leave entitlements could be used.

Right to request flexible working arrangements

Previously, Section 65 of the Fair Work Act provided a right for employees to request flexible working arrangements to care for a child under school age or a child under 18 years with a disability. This entitlement sits under the umbrella of the National Employment Standards (NES).

The Amendment Act extended the right to request flexible working arrangements to an employee if any of the following circumstances apply:

- (a) employees who are parents, or who have responsibility for the care, of a child who is of school age or younger
- (b) employees who are carers (within the meaning of the *Carer Recognition Act 2010*)
- (c) employees with a disability
- (d) employees who are 55 or older
- (e) employees who are experiencing violence from a member of the employee's family
- (f) employees who provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.

The Amendment Act also clarified that an employee has a right to request part-time work on return from parental leave and provided a non-exhaustive list of what could constitute reasonable business grounds as a basis for an employer refusing a request.

The effect of this amendment was only to expand the categories of employees that had a right to request flexible working arrangements (as listed above). Employers may still refuse a request for a change in working arrangements on reasonable business grounds. While a list of reasonable business grounds was provided, the list was non-exhaustive.

Transfer to a safe job and unpaid no safe job leave

Previously under the Fair Work Act, employees who would have completed 12 months service at the expected date of birth of their child were entitled to transfer to a safe job. If no safe job is available, the employee is entitled to paid no safe job leave.

That is, if a pregnant employee who is fit for work but unable to continue her current position because of illness, or risks, arising out of pregnancy or hazards connected with the position, produces sufficient evidence (like a medical certificate if requested by their employer), an employer must transfer this employee to a safe job, with no other change to the employee's terms and conditions of employment.

The Amendment Act amended the Fair Work Act to ensure that a pregnant employee can transfer to a safe job where one is available, regardless of an employee's length of service. Where no safe job is available, employees that have less than 12 months service with an employer are entitled to unpaid no safe job leave during the risk period.

These provisions do not entitle an employee to unpaid parental leave once they have given birth (because they have less than 12 months service) but rather they create a new category of leave (unpaid no safe job leave).

3 – The case for change

The special pregnancy and parental leave amendments contained in the Amendment Act were precautionary and, while likely affecting very few employees, those employees who were affected likely experienced a positive benefit. The amendments to the right to request flexible working conditions create greater access to existing rights under the NES; they were not intended to rectify any issues with the existing family friendly provisions of the Fair Work system.

The amendments apply irrespective of business size or sector.

Special maternity leave

The reduction in unpaid parental leave when an employee took unpaid special maternity leave ensured that the maximum period an employer was required to maintain an employee's position during unpaid parental leave was not extended because of special maternity leave. However, while the special maternity leave provision was intended to protect a pregnant employee's position when she exhausted her paid leave entitlements, the practical effect was that the employee is effectively penalised for accessing this leave by the consequent reduction in unpaid parental leave.

This amendment was not a substantive policy change as the Act already enabled an employee to access personal/carer's leave during pregnancy, but it is arguable that this was not explicit on the face of the Act. The amendment made it clear that an employee may take paid personal leave during pregnancy and may exhaust all her paid personal leave entitlements before being required to take unpaid special maternity leave.

The Fair Work Act Review found in 2012 that the existing provisions were penalising pregnant employees who were experiencing a pregnancy related illness. The Panel stated that:

While the special maternity leave provision is clearly intended to protect a pregnant employee's position when she has exhausted her paid leave entitlements, the employee is then penalised for accessing this leave by the consequent reduction in unpaid parental leave. We note that there would be no consequent reduction in unpaid parental leave if the employee were able to simply take ordinary paid or unpaid personal leave⁴.

The Fair Work Act Review Panel recommended that s. 80(7) be repealed so that taking unpaid special maternity leave did not reduce an employee's entitlement to unpaid parental leave under section 70 (Recommendation 4).

Concurrent parental leave

The concept of concurrent parental leave was a long standing feature of industrial awards and legislation. Concurrent leave was first introduced in the Paternity Leave Test Case 1990 to allow the father to assist his spouse and care for the family at the time of birth of their child and has been included in some form within legislation to the present day.

⁴ Fair Work Act Review Panel (2012) 'Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation', Department of Education, Employment and Workplace Relations, p.94.

During the Family Provisions Test Case in 2005, the ACTU claimed that the period of concurrent leave should be increased from one to eight weeks. The former Australian Industrial Relations Commission (AIRC) agreed with the claim, introducing an award provision to give an employee the right to ask his or her employer to increase simultaneous unpaid parental leave to eight weeks. The AIRC took the position that, in most cases, there is no real benefit to any party in restricting an employee couple to three weeks concurrent leave. Additional cost to an employer would only occur where both members of the couple were employed by the same employer, which would not be the case in most situations.

Evidence also suggested the promotion of active fatherhood may be crucial in removing the obstacles that prevent women achieving their full potential at work.⁵ By encouraging fathers to take a greater role in childcare, both parents may be more able to balance work and family responsibilities, helping to provide the environment for increased maternal employment.⁶ This finding is supported by international studies.^{7, 8, 9, 10, 11} The amendment encouraged shared parenting while ensuring both employees maintain an attachment to the labour market and facilitated greater flexibility for parents in caring for their children and responding to exceptional circumstances. For example, a premature baby is likely to require constant monitoring in hospital for an extended period after birth. Removing the requirement for concurrent leave to be taken within the three weeks after birth would enable the secondary carer to choose to delay taking parental leave until the child is well enough to be taken home.

The Amendment Act provisions were intended to increase flexibility for parents to manage and share the caring arrangements of their child. They were also designed to alleviate some of the pressures of caring and working for parents and increase the involvement of fathers in the early months of a child's life.

Right to request flexible working arrangements

A number of submissions to the Fair Work Act Review in 2012 argued that the right to request flexible working arrangements should be extended to a broader range of carers. Supporting this view was the Australian Work and Life Index Report *The Big Squeeze: Work, home and care in 2012*, which found that levels of work-life interference are comparable between employees providing care for young children and employees providing care for other groups, for example the elderly. The Report suggested that a greater scope of carers, in addition to those caring for children, could benefit from access to a right to request.

5 Equality and Human Rights Commission (2009) 'Working Better: Meeting the changing needs of families, workers and employers in the 21st century'.

6 Ibid.

7 Johansson, E. (2010) 'The effect of own and spousal parental leave on earnings', Institute for Labour Market Policy Evaluation, working paper No. 4.

8 Flouri, E. & Buchanan, A. (2003) 'What Predicts Fathers Involvement with Their Children? A prospective study of intact families', *British Journal of Developmental Psychology*, Vol 21 no. 1, pp. 81-97.

9 Productivity Commission 2009, *Paid Parental Leave: Support for Parents with Newborn Children*, Report no. 47, Canberra, 4.36.

10 OECD (Organisation for Economic Co-operation and Development) 2007, *Babies and Bosses Recognising Working and Family Life: a Synthesis of Findings for OECD countries*, ISBN: 9789264032446.

11 Ruhm, C. (2000) 'Parental Leave and Child Health', *Journal of Health Economics*, vol. 19 no. 6, pp. 931-960; Tanaka, S. (2005) 'Parental Leave and Child Health Across OECD Countries', *Economic Journal*, vol. 115 no. 501, pp. F7-F2811.

A number of submissions to the Fair Work Act Review also emphasised that parents' caring responsibilities extend beyond pre-school age. Other submissions emphasised the importance of extending the right to request flexible working arrangements to employees with a disability, while the Australian Human Rights Commission argued that "the flexibility in working arrangements which assists workers with family and carer responsibilities is often the same as, or similar to, the flexibility which may be required by people with a disability in the workplace", and recommended that the right to request flexible working arrangements should be extended to employees with a disability. This argument was supported by the Human Rights and Equal Opportunity Commission Report, *WORKability II: Solutions: People with Disability in the Open Workplace* (2005) which was the result of extensive national consultation. In their report, the Fair Work Act Review Panel recommended that:

*while the introduction of the right to request flexible working arrangements represented an important development in providing additional rights to certain types of working carers, the scope of the caring arrangements under the current provisions should be expanded to reflect a wider range of caring responsibilities. Given that an object of the FW Act is to help employees balance their work and family responsibilities by providing flexible working arrangements, and the importance of maintaining a skilled workforce who may have caring responsibilities, the Panel recommends extending the right to request.*¹²

The amendments were intended to address these issues and provide greater scope for people to flexibly manage both work and their caring responsibilities.

At the time of the Amendment Act, it was considered that the current provisions were working as intended and that employers were taking the right to request seriously. The view was formed that extending the right to request provisions would positively contribute to providing appropriate flexible working arrangements for a broader range of employees with caring responsibilities.

Transfer to a safe job and unpaid no safe job leave

The transfer to a safe job provisions have an extensive history in Australian workplace relations legislation. The concept of transferring an employee to a safe job was first introduced into Victorian workplace legislation through the *Victorian Employee Relations Act 1992*.

The provisions were inserted into the federal *Workplace Relations Act 1996* when Victoria referred its workplace relations powers to the Commonwealth. At this time the provisions continued to apply only to Victorian employees. In 2005, the *Workplace Relations Amendment (Work Choices) Act 2005* extended the transfer to a safe job provisions to apply to all employees covered by the federal workplace relations system.

The then government chose to preserve the transfer to a safe job provisions in the Fair Work Act. However, the Fair Work Act was silent on what happens when it was not safe for a pregnant employee with less than 12 months service to work in her current role. If the employment instrument covering the employee was also silent, and the employee was unable to negotiate with

¹² Fair Work Act Review Panel (2012) 'Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation', Department of Education, Employment and Workplace Relations, p.98.

their employer a period of absence during the period, no safe work was available. It was therefore likely the worker would have no option but to resign, raising issues of discrimination or constructive dismissal on pregnancy grounds.

Access to safe work options for pregnant employees was identified as a problem by the Productivity Commission report, *Paid Parental Leave: Support for Parents with Newborn Children*. The report cited evidence that some factors, innate to a job itself, such as heavy lifting, long standing and walking, and shift work, may increase the risk of sickness absence for pregnant employees. However, many pregnant women can safely continue to work until shortly before birth without risk. These findings pointed to the need for flexibility for work and prenatal leave decisions, with the decisions about taking antenatal leave being left open to women in consultation with their employers and doctors.

The changes were therefore intended to ensure that all pregnant employees are safe at work and are not penalised as a result of their pregnancy, without requiring an employer to provide paid leave for employees who will not have completed 12 months service at the expected date of birth of their child.

The changes were intended to complement existing work, health and safety legislation, which generally places the primary duty of care on employers to ensure, so far as is reasonably practicable, the health and safety of their workers while they are at work.

It was difficult to determine the extent to which the transfer to safe job provisions would be used. Australian Bureau of Statistics data indicated that 357,500 women had a job while pregnant. In February 2013, 2.1 million (18.2 per cent)¹³ employees had been with their current employer/business for less than one year. Beyond these figures, there is no data available to determine the number of women likely to be pregnant, or the number who are in unsafe jobs and who have been with their employer for less than one year.

What other policy options were considered?

The Department is not aware of any alternative proposals that may have been considered in the development of the Amendment Act.

The current policy agenda

A number of the issues the Amendment Act sought to address remain important policy considerations in the context of the current Government's policy agenda. In November 2014 the Government asked the Productivity Commission to undertake an inquiry into Australia's workplace relations framework. In particular, the terms of reference for this review specify consideration of 'the ability for employers to flexibly manage and engage with their employees'. While this Review considers the impact of these individual measures, the Productivity Commission review will consider the issue of workplace flexibility within the broader workplace relations framework.

In relation to expanding the categories of workers who have the right to request flexible work, the Australian Government has committed to working towards increased female participation in the

¹³ <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6209.0>

workforce through the G20 taskforce on employment. The Government has noted that support for women to balance work and family responsibilities is crucial to achieving this goal.

Similarly, the importance of workforce participation by older employees has been reflected in the 2015 *Intergenerational Report*, which highlighted that the community and economy will benefit from opportunities to support older Australians who want to work, as well as boosting opportunities for women, young people, parents and people with disability to participate in the workforce. This can be achieved through policies that support people who choose to stay in the workforce for longer, or help them to re-enter it sooner after a temporary absence.

Providing assistance to women affected by domestic violence is also a high profile government priority with the 2015 Council of Australian Governments agreeing to take urgent collective action to address the unacceptable level of violence against women.

The Government has also introduced the *Fair Work Amendment Bill 2014* into Parliament. This Bill amends the Fair Work Act to prevent an employer from refusing a request for an extension of a period of unpaid parental leave unless the employer has given the employee a reasonable opportunity to discuss the request.

4 – Consultation

Consistent with the requirements of the PIR Guidance Note, this Review was undertaken in consultation with the relevant Ministerial Advisory Council (or relevant body that acts in this capacity). On 8 May 2015, Senator the Hon. Eric Abetz, then Minister for Employment, invited members of the National Workplace Relations Consultative Council (NWRCC) to contribute to the post-implementation review of the operation of the Amendment Act. The NWRCC provides a regular and organised means by which senior representatives of the Australian Government, employers and employees consult on workplace relations and labour market matters of national concern. This body is underpinned by legislation.

State and territory governments were also invited to participate. Submissions closed on 5 June 2015, though some extensions were granted to 12 June 2015. All submissions received were accepted.

NWRCC members were invited to provide advice to the Department on their views regarding the extent and nature of the problem(s) that the Amendment Act was intended to address, the objectives of government action, the impact of the regulation and whether the Government's objectives could be achieved in a more efficient and effective way. As well as their views on these issues broadly, the Department requested any data, information or advice on the operation of the provisions from their perspective. The Department drafted specific questions for members of NWRCC to help them in providing input into the Review – some NWRCC members circulated these questions to their own member groups. These questions went to how often the rights provided for by the amendments were exercised by employees, and what burden this placed on employers.

NWRCC members were also invited to participate in a workshop with the Department on 22 May 2015 in order to discuss the amendments. After providing verbal comments on the Amendment Act, some members chose to reemphasize their comments by email in lieu of a formal written submission.

The targeted consultation process reflects the narrow coverage of the legislation and ensured that the parties affected by the provisions had the opportunity to provide input to the Review. The targeted consultation process also reflects the advice of the Guidance Note on Best Practice Consultation that consultation not be burdensome. The parties consulted were invited to provide submissions in the manner which was most convenient, including either written or verbal submissions. State and territory governments were asked to provide input from the perspective of a large employer, and policy advice based on their regulatory experience.

A number of parties declined to provide submissions, directed the Department to their submission made to the current Productivity Commission review, or provided only brief written or verbal feedback – citing the current high level of consultation with Government that was creating a heavy workload for their organisation. Given this, and the lack of general concern raised by stakeholders about the Amendment Act, and the limited scope of the amendments, the Department considers the level of consultation to have been reasonable and appropriate.

The list of the 11 submissions is set out in the table below.

Stakeholder views were largely consistent, with general support for the intent of the provisions. This is supported by some submissions to the current Productivity Commission review of Australia’s workplace relations framework. There were two notable exceptions, the Australian Chamber of Commerce and Industry and Business SA, which presented the view that the provisions were either not necessary or not supported by evidence and therefore advocated for repeal.

Entity	Principal position
Australian Capital Territory Government	Feedback from sector-wide human resource stakeholders was that the amendments added no material regulatory burden and that the amendments remain appropriate and efficient in meeting their objectives.
Australian Chamber of Commerce and Industry	The four provisions considered by the Review should be repealed on the basis that either there is no evidence that a particular provision is necessary or that other existing laws are sufficient to address the matter.
Australian Council of Trade Unions	Reiterated their original support for the Amendment Bill, but believe that further protections should be in place to support working parents who need to request an alteration to their working arrangements in order to balance their caring responsibilities.
Australian Mines and Metals Association	Less impact of these regulations in the mines and minerals sector because it is a male dominated workforce – though requests for flexible arrangements or a safe job are challenging to accommodate on remote sites. Regulatory burden is low, with some up-front compliance and training costs.
Business Council of Australia	Did not provide specific comment, but provided their submission to the current Productivity Commission Workplace Relations Framework public inquiry. The submission outlined a new proposed framework for governing workplace relations in Australia that had substantial implications for the <i>Fair Work Act 2009</i> .
Business SA	Supported the comments made by the Australian Chamber of Commerce and Industry.

Entity	Principal position
National Farmers' Federation	Comments from National Farmers' Federation (NFF) members indicated that flexible working arrangements were supported as a measure to retain valued employees and that their administration was not materially burdensome. Some feedback indicated that replacement of employees who move from a job or take unpaid leave had associated second order costs.
New South Wales Government	Noted that there have been no apparent concerns expressed by NSW government agencies operating in the Commonwealth system about the obligations placed upon them by the changes to the Act.
South Australian Government – SafeWork SA	Supported the current flexible working arrangement provisions, but noted that there appears to be a lack of awareness of these rights.
Tasmanian Government	Strongly support the amendments regarding transfer to a safe job. Argued that these provisions should apply to all women regardless of length of service on workplace health and safety grounds. Further, employers across the country are already required to provide a safe workplace.
Victorian Government	Generally supportive of the flexible working arrangements introduced by the legislation, and considers that they will contribute to more productive and fairer workplaces. Emphasised the need to make employers and employees aware of the new entitlements.

In addition to the consultation process undertaken as part of this Review, stakeholders had the opportunity to provide feedback to the Senate Inquiry into the Fair Work Amendment Bill 2013.

Special Maternity Leave

The special maternity leave provisions in Part 1 of the Bill were supported by employee submissions and some legal advisory services.¹⁴ However, business, industry and employer organisations expressed varying levels of concern about the amendments.¹⁵

The Australian Industry Group (AiG) submitted that 'this provision would appear to have few adverse impacts upon employers'.¹⁶ In contrast, the Australian Chamber of Commerce and Industry (ACCI) rejected the proposal,¹⁷ commenting that 'the costs to changing existing rules around unpaid

14 Australian Council of Trade Unions (ACTU), *Submission 9*, p. 3; United Services Union (USU), *Submission 26*, p. 2; Australian Nursing Federation (ANF), *Submission 22*, p. 2.

15 Australian Chamber of Commerce and Industry (ACCI), *Submission 12*, p. 10; Business SA, *Submission 2*, p. 5; Master Builders Association (MBA), *Submission 14*, p. 7; Australian Business Industrial (ABI), *Submission 15*, p. 9; National Farmers' Federation (NFF), *Submission 3*, p. 8; Australian Motor Industry Federation (AMIF), *Submission 30*, p. 3; Business Council of Australia (BCA), *Submission 34*, p. 7; Australian Federation of Employers and Industries (AFEI), *Submission 38*, pp. 4-5.

16 Australian Industry Group (AiG), *Submission 32*, p. 4.

17 ACCI, *Submission 12*, p. 10.

parental leave have not been quantified and it is unclear what exact impact this may have on employers'.¹⁸ Business SA commented that any additional leave should be capped to ensure that an employee is not able to be absent from the workplace for more than two years.¹⁹

Master Builders Australia (MBA) submitted that though it supports unpaid special maternity leave being granted on compassionate grounds, it does not believe that a legislative enactment is required, commenting that the matter should be 'dealt with between employers and employees at the enterprise level'.²⁰

The Department of Education, Employment and Workplace Relations stated that:

some organisations have claimed that the bill has introduced new entitlements to special maternity leave ... This is incorrect. The concept... of special maternity leave ... [has] been included in federal workplace relations since 1996 and [has] had general application to all employees covered by the federal workplace relations system since 2005²¹.

Concurrent parental leave

The parental leave provisions were supported by employee organisations and some legal advice services. For example, the National Working Women's Centres commented on the efficacy of the amendments:

These changes will cater to the needs of a more diverse group of families and increase the bonding and relationships that are necessary with the birth or adoption of a child.²²

Business and industry groups provided divergent feedback on the amendments. AiG submitted that 'this provision would appear to have few adverse impacts upon employers'.²³ However, ACCI did not support these changes on the basis of the anticipated financial impact on employers.²⁴ Other business and employer groups expressed similar concerns.²⁵ Stakeholders did not provide further data or evidence to assist in quantifying any expected costs to employers.

18 ACCI, *Submission 12*, p. 16.

19 Business SA, *Submission 2*, p. 5.

20 MBA, *Submission 14*, p. 7.

21 Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 16

22 National Working Women's Centres (NWWCs), *Submission 8*, p. 3.

23 AiG, *Submission 32*, p. 4.

24 ACCI, *Submission 12*, p. 10.

25 Business SA, *Submission 2*, p. 5; ABI, *Submission 15*, p. 10; NFF, *Submission 3*, p. 10; Victorian Employers' Chamber of Commerce and Industry (VECCI), *Submission 17*, p. 3; AMIF, *Submission 30*, p. 5; BCA, *Submission 34*, p. 7; AFEI, *Submission 38*, pp. 4-5.

Right to request flexible work arrangements

Extending the right to request flexible working arrangements provisions was strongly supported by employee organisations, legal practitioners, domestic violence support services, carer organisations and the Australian Human Rights Commission.²⁶

The following passage from the Australian Council of Trade Unions (ACTU) typified the sentiments expressed by organisations that supported the proposed amendment:

Extending the right to these groups acknowledges the positive benefits workforce participation brings to these groups of workers as well as the significant benefits to the labour market and the national economy.

However, business and industry organisations expressed some reservations at these proposals, and many did not support their inclusion in the Act.²⁷ ACCI rejected the proposed amendments to the current rights of employees to request flexible working arrangements, on the grounds that the costs to employers had not been quantified.²⁸

AiG questioned the necessity of the provisions, commenting that in practice, many workers request and are granted flexible working arrangements without using the right to request provisions currently in the Act.²⁹ Similarly, MBA also opposed the proposed measures stating that workplaces offering flexible arrangements should be on a voluntary basis.³⁰

Safe job transfer

The provisions establishing a right for pregnant employees to request a transfer to a safer job during their pregnancy was supported by all employee organisations and legal practitioners.³¹

Though supporting the proposed amendment, the Law Society of New South Wales was concerned that there is 'uncertainty' in the existing provisions relating to safe-job transfers.³² NFF highlighted similar concerns.³³ Other business and employer organisations rejected the proposed amendment on the grounds that it was unnecessary. For example, ACCI stated:

26 ACTU, *Submission 9*, p. 5; Community and Public Sector Union (CPSU), *Submission 4*, p. 4; USU, *Submission 26*, p. 2; ANF, *Submission 22*, p. 2; Shop, Distributive & Allied Employees Association (SDA), *Submission 37*, p. 9; Textile, Clothing and Footwear Union of Australia (TCFUA), *Submission 39*, p. 5; Law Society of NSW, *Submission 6*, p. 5; NWWCs, *Submission 8*, p. 3; Australian Domestic and Family Violence Clearing House (ADFVCH), *Submission 20*, p. 1; Carers Victoria, *Submission 10*, p. 4; Australian Human Rights Commission (AHRC), *Submission 27*, p. 3; Employment Law Centre WA, *Submission 40*, p. 2.

27 ABI, *Submission 15*, p. 11; NFF, *Submission 3*, p. 13; Housing Industry Association (HIA), *Submission 19*, p. 5; South Australian Wine Industry Association, *Submission 21*, p. 3; VECCI, *Submission 17*, p. 4; Australian Mines and Metals Association (AMMA), *Submission 23*, pp. 24-25; AMIF, *Submission 30*, p. 7; BCA, *Submission 34*, p. 1; AiG, *Submission 32*, p. 5; AFEI, *Submission 38*, pp. 7-12.

28 ACCI, *Submission 12*, p. 10, 17.

29 AiG, *Submission 32*, p. 5.

30 MBA, *Submission 14*, p. 8.

31 For example, ACTU, *Submission 9*, p. 13; NWWCs, *Submission 8*, p. 3; USU, *Submission 26*, p. 2; ANF, *Submission 22*, p. 2; Law Society of NSW, *Submission 6*, p. 6; SDA, *Submission 37*, p. 14; ELC, *Submission 40*, p. 3.

32 Law Society of NSW, *Submission 6*, p. 6.

33 NFF, *Submission 3*, pp. 15-16.

*There is no evidence that these provisions are warranted and that employers and employees are not able to come to suitable arrangements when an employee requests a safe job despite not having a statutory right to unpaid parental leave.*³⁴

MBA argued that the new entitlements should be costed and ‘other mechanisms for social support of pregnant women considered, having regard to the cost on businesses.... Hence, deferral of the Bill until this process has been completed is recommended’.³⁵

Senate Committee comment

The Committee commented that there was a balance of views on the provisions contained within Schedule 1 of the Bill. The Committee recognised the concerns of some employers but was of the opinion that there were adequate safeguards in place to ensure that there is a balance between the needs of employers and employees in respect to the proposed schedule.

³⁴ ACCI, *Submission 12*, p. 18.

³⁵ MBA, *Submission 14*, p. 12.

5 – Impact of the regulation imposed by the Amendment Act

General qualitative feedback – consultation for this Review

The provisions of the Amendment Act considered by this Review are narrow in application. The rights they provide to employees, particularly those related to the Fair Work Act's parental leave provisions, are on the whole constrained to a small pool of individuals in specifically defined circumstances. Furthermore, most measures bring forward or extend an existing employee's entitlement and so are unlikely to impose an extra administrative process. The qualitative remarks made by employers and employer representative groups generally support this view.

Feedback from stakeholders in relation to the amendments varied. Government stakeholders were the most positive about the changes to entitlements that the Amendment Act introduced. The ACT Government was of the view that the identified regulatory amendments remain appropriate and efficient in meeting their objectives while the Tasmanian and Victorian Governments strongly supported the right to request and transfer to a safe job provisions.

Private sector employer representatives provided a broader range of views. Both ACCI and Business SA, who supported ACCI's submission, were of the view that the amendments should be repealed. ACCI contended that there was insufficient evidence to support the changes and that in several cases the regulation was unnecessary, for example because workplace health and safety laws already require an employer to take all reasonable steps to ensure that they do not expose employees to risks to their health and safety.

However, as noted in Section 3 above, the safe job transfer changes made by the Amendment Act were specifically intended to complement existing work, health and safety legislation, which generally places the primary duty of care on employers to ensure, so far as is reasonably practicable, the health and safety of their workers while they are at work. The Department was unable to find any quantitative evidence that the amendments amounted to additional or unnecessary burden.

No employer or employer representative indicated that there has been a material cost impact on employers as a consequence of any of the amendments. The ACT Government specifically reported that the impact of the requirements was 'negligible'. This view was supported by a number of members of the NFF as well as the Australian Mines and Metals Association (AMMA). Both the South Australian and Victorian Governments identified a lack of awareness of the rights provided by these provisions as a barrier to employees exercising these rights.

These views are supported by further evidence provided in submissions to the current Productivity Commission review of Australia's workplace relations framework. A number of organisations including Carers Australia, Kingsford Legal Centre, Family Policy Roundtable, National Foundation for Australian Women, Women's Legal Services NSW and National Working Women's Centres, all expressed support for the existing flexible work provisions. Many of these groups recommended that these and other family friendly provisions be extended. The Department could not find any specific concerns raised by stakeholders in their submissions to the Productivity Commission,

beyond more general claims about business costs and regulatory burden. For example, general concerns were raised by Glencore, who identified that the availability of multiple triggers for an employee to make a flexible work arrangement request of an employer has the potential to burden business with an increasing list of applications.³⁶ Given the breadth of the Productivity Commission review and the number of stakeholders who provided submissions, these general findings support the Department's view that evidence considered by this Review is reflective of the broader views of all key stakeholders.

The qualitative evidence considered by this Review indicates the limited regulatory impact of these provisions, with many of the identified costs not arising as a direct outcome of the regulation (second order costs). The Department has also attempted to quantitatively assess the impact of the regulation more generally, drawing on the few data sources available.

Quantitative data and analysis and specific qualitative feedback

In undertaking this Review, the Department considered the following sources of quantitative data:

- Data collected for the Australian Workplace Relations Study, 2015
- The Department of Employment's Workplace Agreement's Database (WAD)
- The Australian Work and Life Index (a national survey undertaken by the Centre for Work + Life at the University of South Australia).

There were a number of issues that restricted the use of this data. The available data often went to workplace flexibility matters more generally, rather than the specific provisions of the Amendment Bill. The sample sizes for the Australian Workplace Relations Study (AWRS) were extremely limited for the population affected by the regulations in question. Similarly, the WAD does not code information for enterprise agreements with a sufficient level of specificity to capture the regulations in question considered by this Review.

How data was considered, and what other information was sought for the Review, is set out for each provision below.

Special maternity leave

Research undertaken by the Department indicates that there is no available data with which to determine the specific impact on employers from this amendment, or the number of employees it has affected. In addition to checking its own databases, the Department engaged with the Australian Human Rights Commission, Workplace Gender Equality Agency and Fair Work Commission. No further relevant data sources were identified through this engagement.

Feedback from employers and employer representative groups is that these provisions are accessed rarely, while the ACTU expressed general support for the provisions but did not provide specific feedback. AMMA noted that since the provisions had only been in existence since 1 July 2013, the increased regulatory burden for resource industry employers from this change has been minimal. This view is consistent with those expressed by other stakeholders.

³⁶ Glencore (2015) 'Submission to Productivity Commission Australia's Workplace Relations Framework March 2015', accessed online <http://www.pc.gov.au/_data/assets/pdf_file/0005/188321/sub0185-workplace-relations.pdf> p.9.

Costing: Special Maternity Leave

The Amendment Act does not provide for a new entitlement. It provides that the amount of Special Maternity Leave taken (an unpaid entitlement) does not reduce the amount of other unpaid parental leave entitlements available to a pregnant employee. This means that this provision will not result in an increase in the number of requests nor will it increase any paid entitlement available to the employee. Therefore there is no additional regulatory requirement placed upon an employer arising from this amendment.

Total estimated cost

Total regulatory cost was estimated at \$0 across the Australian economy.

This costing is consistent with stakeholder feedback that the impact of these amendments was minimal.

Transfer to a safe job

Stakeholders provided limited feedback on this amendment beyond general comments supporting all the amendments as a package and noting the limited regulatory burden they impose. For example, the ACTU supported the amendments that extended the provisions on the basis that all employees, irrespective of how long they have been employed by the employer, should be entitled to a safe job. The ACTU also noted that these amendments complemented the policy objective of the parental leave provisions (paid and unpaid) to encourage and support parents' ongoing connection to the labour market.

Of the specific comments received, the AMMA noted that:

If the employee concerned works on a remote site, it is not always logistically possible to place them in a lower-risk role for the duration of the risk period, such as in an office environment.

This comment was provided in the context that female employees only make up on average 15 per cent of the total workforce in the resources industry and that the provisions as a whole therefore have less regulatory impact. It is the remoteness of some sites that make accommodating job transfer requests more problematic.

As discussed above, the provision to provide a safe work place for pregnant employees was drafted with the intent of being complementary to existing workplace health and safety laws. Given that workplace health and safety obligations are an existing requirement of employers operating remote worksites this Review considers that this provision does not impose a material additional requirement on employers.

An additional cost that was identified by AMMA was the necessity of providing training for human resource practitioners as an upfront compliance cost. An NFF member estimated the cost of finding a replacement employee at between \$3000-\$5000, including all human resource, administration and training costs together with unspecified reductions in productivity as the new employee learns the role.

This Review notes that the provisions of the Amendment Act extended the right to request to employees with less than 12 months service. The need to replace employees taking parental leave, or ensuring a safe working environment for employees, is already a requirement employers are obliged to meet and is considered a second order cost. Human resource training and other associated administrative functions would already need to exist to undertake these requirements. The administrative costs associated with the amendments would therefore likely be incurred by a normally efficient business with or without the change to regulation.

Further specific comments provided by NFF members varied. One respondent noted that they incurred a cost when replacing a pregnant employee who could no longer safely work in their role. However another commented:

Fortunately in our packing shed we have lighter duty jobs, so we simply move them from the more physically demanding jobs to the lighter duties, so no real impost on production, or on administration.

No respondents indicated whether the employees referred to had less than 12 months service, and so were specifically affected by the amendments, or had more than 12 months service. However, the following general comment concluded one stakeholder's feedback on this matter and serves to indicate the overall tenor of stakeholder views:

We did not experience any unreasonable administrative burden. We were pleased to be able to accommodate the request where we could. The price of child care meant that we could have lost a valuable and experienced employee otherwise.

The Department was unable to find any specific quantitative data with which to further evaluate these claims but has attempted to provide an estimate of the regulatory cost to business (set out below). Overall, it is considered that this amendment has had a positive effect on improving certain employees' workplace flexibility and in encouraging employers to accommodate employee requirements in order to retain valued staff.

Costing: Transfer to a safe job

As discussed elsewhere in this Report, there is limited data with which to cost the amendments. In order to establish some basis with which to consider the regulatory costs as a consequence of the amendments the Department considered the potential extra administrative burden to business based on the time required by human resource managers or supervisors to consider a request to take transfer to a safe job.

Disclaimer: Due to the lack of available data the impact is costed on the basis of broad assumptions and the use of proxy information to infer certain impacts. They are only intended to provide a general indication of the level of regulatory burden imposed on business. These costs should not be relied upon for any other purposes.

Employees affected

The Department considered the number of women who report having a job during their pregnancy.³⁷ It then reduced the potential number of women estimated to be eligible for the

³⁷ <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4913.0Nov%202011?OpenDocument>

entitlement by considering data from Safe Work Australia³⁸ regarding the number of serious workers' compensation claims in Australia in 2007-08, which showed that women lodged 9.4 claims per 1,000 employed people. Taking this as a proxy for dangerous work (noting this is all claims) the total number of employees affected per year was estimated.

Finally, the Department applied ABS data in order to remove from this estimate those employees who already had access to the transfer to a safe job entitlement because they had been employed with their employer for more than 12 months. Analysis of the ABS data indicates that, as at February 2013, only 18.2 per cent of employees became eligible to request the entitlement due to the Amendment Act.³⁹

Requests per annum

Each affected employee was assumed to make a single request per annum.

Time involved

It was assumed that on average the time involved was approximately half an hour of a human resource officer or manager's time. This is reasonable on the basis that this represents the time it would take to hold a meeting to discuss the request.

Wage

The wage rate used is the default hourly economy-wide wage rate plus on costs.

Total estimated cost across the economy

Total regulatory cost was estimated at \$20,028 per year over ten years.

This costing is consistent with stakeholder feedback that the impact of these amendments was minimal.

Concurrent unpaid parental leave

Few stakeholders provided specific data with regard to this particular amendment. However, AMMA did note that:

Changes to the amount of concurrent paid parental leave able to be taken by both partners have required employers to track what leave has been taken, at what time, and to obtain verification of the concurrent element of leave of the other partner who may be in a different workplace... there is [also] obviously an initial extra compliance element up-front in having to do calculations on a changed leave duration.

This Review notes that the provisions of the Amendment Act only extended the right to request concurrent unpaid parental leave from three to eight weeks and provided more flexibility about when the leave could be taken. Businesses would still have had to have administrative processes in place to accommodate concurrent parental leave requests. Given the nature of the entitlement is unpaid, the Department considers that there is no material additional cost incurred by business.

³⁸ <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features20Jun+2011>

³⁹ <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6209.0>

One respondent member of the NFF advised that they had two fathers take unpaid parental leave, but did not advise whether this was concurrent with their partner.

One additional source of relevant data is the WAD. The WAD is a database maintained by the Department of Employment that contains information on all known federal enterprise agreements that have operated since the introduction of the Enterprise Bargaining Principle in October 1991. Information entered on the WAD is derived from copies of federal agreements that are lodged with Fair Work Australia. Data from the WAD shows that the incidence of concurrent parental leave provisions in enterprise agreements decreased from 289 agreements (3.95 per cent) covering 172,482 (20 per cent) of employees between 1 July 2012 to 30 June 2013 to 14 agreements (0.15 per cent), covering 4,238 (0.29 per cent) employees, for enterprise agreements lodged between 1 July 2013 to 31 December 2014. This view is reinforced when the quarterly data is taken into account (Chart 1 refers).

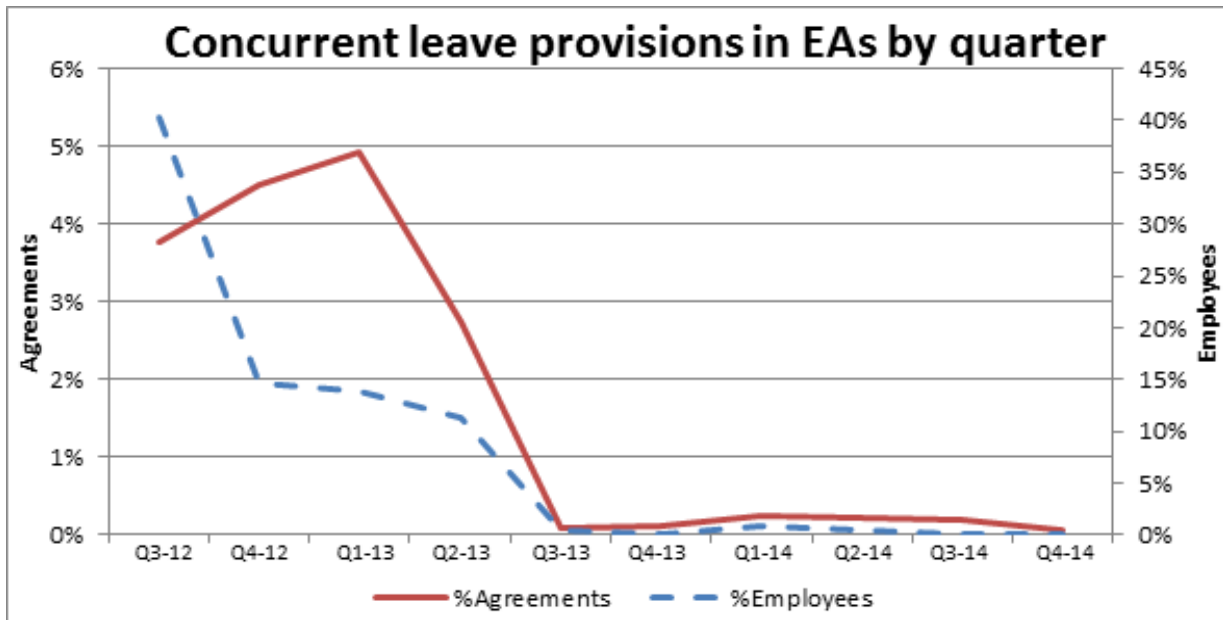


Chart 1: Percentage of agreements and employees with concurrent leave provisions, by quarter approved from 1 July 2012 – 31 December 2014

The data collected in the WAD indicates that the significant reduction in enterprise agreements, and employee coverage, containing concurrent leave provisions occurred as soon as the Amendment Act came into effect. This data, together with stakeholder feedback, supports the view that the concurrent leave entitlement set out in the Amendment Act has been accepted by both business and employees as sufficient, with the consequence that enterprise agreements are less likely to contain such clauses.

Costing: Concurrent leave

This provision did not add any additional administrative requirements on business, because the provision of concurrent parental leave already existed prior to the amendments. The Amendment Act only extended the number of weeks that could be requested from three to eight and provided more flexibility in relation to when the leave could be taken. On this basis it was considered that there would be no additional requests made per annum.

Total regulatory cost was estimated at \$0 across the Australian economy.

Requests for flexible working arrangements

Evidence regarding the impact of these amendments is mixed. Anecdotally, submissions made to the Review by AMMA and individual submissions from NFF members indicate a slight increase in requests for flexible working arrangement made by employees following the commencement of the amendments. However, this anecdotal change was not verified by data, nor was it possible to determine whether this change was a result of the changes to those who had the right to request or simply because of increased awareness of the provisions.

With respect to employees, the ACTU did not provide specific advice as to any change in uptake as a consequence of these amendments but did welcome the extension of the right to request provision to a wider range of caring responsibilities and noted that these amendments reflect positions advocated by the ACTU in submissions to other inquiries.

Data from the Australian Work and Life Index shows an increasing awareness of the right to request flexible working arrangements since 2012.⁴⁰ However, the same survey revealed the overall rate of request-making does not appear to have changed between 2012 and 2014, remaining steady at 20 per cent. Skinner and Pocock note that this is likely to be an outcome of the fact that slightly more than half the workforce still continue to be unaware of the right to request provisions.⁴¹ Skinner and Pocock found that another factor may be that most workers rely on informal negotiations with their supervisor, rather than relying upon their legislated right through the NES. This finding supports the view that the amendments have not had a material effect on the regulatory burden experienced by business as the amendments have served to formalise what is an existing practice in the workplace.

Data from the Department of Employment's WAD indicates that the incidence of flexible working hours provisions in enterprise agreements increased from 4,388 agreements (covering 590,875 employees) in the year before the amendments came into effect, to 6,280 (covering 1,201,538 employees) after the amendments came in effect (see Chart 2 below). However, this data incorporates all flexible work provisions, not just those provided for by the Amendment Act,⁴² and it is difficult to determine the specific impact of the amendments. Furthermore, the 'total' numbers

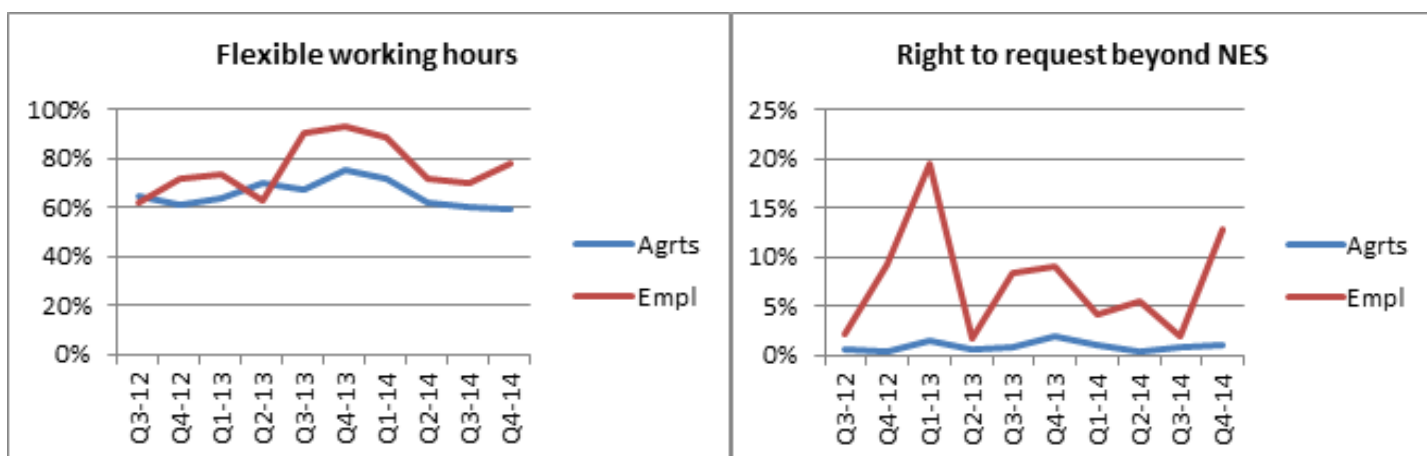
40 Skinner, Natalie and Pocock, Barbara (2014) 'The Persistent Challenge: Living, Working and Caring in Australia in 2014', *The Australian Work and Life Index 2014*, Centre for Work + Life, University of South Australia: http://www.unisa.edu.au/Documents/EASS/CWL/Publications/AWALI_2014_national_report_final.pdf.

41 Ibid.

42 This data captures all provisions that give the employee some degree of choice in the way working hours are organised. They can include provisions that allow for an employer and employee to negotiate the hours they work, those that allow the employees to determine the hours they will work by a majority decision, those that allow management to change employee hours but only after consultation, and those that allow employees to take time off from work and at a later date make up the hours lost.

should be considered in the context that the post-amendment numbers comprise 18 months of data while the pre-amendment numbers reflect 12 months of data. When considering the per cent change, the incidence of flexible working hours provisions in enterprise agreements increased more modestly from 64.83 per cent of agreements to 65.87 per cent. Again, this is for all flexible working hours provisions and not just for those amended by the Amendment Act.

The data (see Chart 3 below) also shows that the incidence of clauses extending the right to request flexible working arrangements beyond the National Employment Standards remained largely unchanged between the pre-amendment and post-amendment periods. Both survey data and anecdotal evidence suggest a general increase in awareness of right to request provisions, with evidence from enterprise agreement making also suggesting this view. However the trend data as indicated by Charts 2 and 3, as well as the other evidence available to date on the effects of the right to request amendments, is inconclusive. It is considered that insufficient time has elapsed to be able to accurately judge the impact of the particular extension of these rights to more categories of workers. The Department has developed an estimate of the regulatory costs involved, as set out below.



Charts 2 and 3: Trend percentage of agreements and employees by quarter approved from 1 July 2012 – 31 December 2014

Costing: extensions to right to request provisions

As discussed elsewhere in this Report, there is limited data with which to cost the amendments. In order to establish some basis with which to consider the regulatory costs as a consequence of the amendments the Department considered the potential extra administrative burden to business based on the time required by human resource managers or supervisors to consider a request for flexible working arrangements.

Disclaimer: Due to the lack of available data the impact is costed on the basis of broad assumptions and the use of proxy information to infer certain impacts. They are intended to provide a general indication of the level of regulatory burden imposed on business only. These costs should not be relied upon for any other purposes.

Employees affected

To determine these costs, the Department evaluated how many employees would fit into the additional categories for which people could request flexible working arrangements provided for by the Amendment Act. For disabled employees the Department applied the number of primary carers from the ABS 2012 Disability Ageing and Carers survey⁴³ and combined that with data from the Australian Work and Life Index (AWALI) which indicates that the number of people with caring responsibilities who made a right to request flexible working arrangements increased by 2.5 per cent following the extension of the right to request provisions. The AWALI survey indicated that the number of people aged over 55 who made a request increased by 0.9 per cent after the amendments came into effect. By applying these figures to ABS data on the number of workers over 55,⁴⁴ the Department calculated that the total number increase in requests arising from these two categories was 26,872. However it should be noted that this is a generous assumption given that the entire increase is ascribed to the amendments. It is possible, as indicated by the AWALI survey, that increasing awareness of existing rights is a factor in the changing number of requests.

The Department was unable to account for the number of employees experiencing domestic violence, though this is expected to be a smaller proportion than the people who are parents or mature age, or employees who have a disability who may wish to make a request.

Finally, the 2014 AWALI survey also found that only 2.8 per cent utilised the right to request under the NES to make their request. Therefore the Department concluded that the best estimate of additional requests arising from these amendments was 2.8 per cent of 26,872, which is 752.

Requests per annum

Each affected employee was assumed to make a single request per annum.

Time involved

It was assumed that on average the time involved was approximately half an hour of a human resource officer or manager's time. This is reasonable on the basis that this represents the time it would take to hold a meeting to discuss the request.

Wage

The wage rate used is the default hourly economy-wide wage rate plus on costs.

Total estimated cost across the economy

Total regulatory cost was estimated at \$24,609 per year over ten years.

This costing is consistent with stakeholder feedback that the impact of these amendments was minimal.

⁴³ <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4430.02012?OpenDocument>

⁴⁴ <http://www.abs.gov.au/ausstats/abs@.nsf/mf/8165.0>

Summary of evidence

In addition to engaging with members of the NWRCC and state and territory governments to request their input, the Department conducted an extensive search for data with which to undertake this review, including:

- Data collected for the Australian Workplace Relations Study, 2015
- The Department of Employment’s WAD
- The Australian Work and Life Index (a national survey undertaken by the Centre for Work + Life at the University of South Australia)
- Submissions to the Productivity Commission review into Australia’s workplace relations system.

It also engaged with the following organisations to ask if they had relevant information:

- Workplace Gender Equality Agency
- Australian Human Rights Commission
- Fair Work Commission.

These organisations were unable to provide any further data to support this Review. Furthermore, key stakeholders who were consulted during the review process did not provide data with regard to the regulatory cost of these provisions on employers.

The Department is of the view that it has undertaken all reasonable efforts to secure data with which to evaluate the regulatory impact of the Amendment Act. Unfortunately, given their limited scope, highly targeted nature and the short amount of time they have been operating, the data available is extremely limited.

Total costs across the economy

Using a number of assumptions and by applying other data as a proxy for estimating the impact of these amendments, the Department was able to provide an approximation of the potential extra administrative burden to business based on the time required by human resource managers or supervisors to consider a request for flexible working arrangements.

Provision	Estimated cost across the economy*
Special maternity leave	\$0
Transfer to a safe job	\$20,028 per year over ten years
Concurrent leave	\$0
Right to request	\$24,609 per year over ten years
Total	\$44,367 per year over ten years

*calculations have been subject to rounding

How did the amendments affect business?

The anecdotal stakeholder feedback supplied to this Review suggests the impact on business has not been material. As discussed above, there is limited data on which to quantify the impacts on

business. In particular, the more granular data which would enable the Department to consider the impact on businesses of different sizes is not available. With regard to the impact on specific sectors of the economy, AMMA provided anecdotal evidence that it considered the provisions would be very rarely relevant to workers in the mining industry.

The resource industry is largely male-dominated, with most AMMA members having a female workforce comprising from 5% to 20% of their total workforce, on average around 15%. As such, the 2013 amendments, which are largely to do with parental leave, requests for flexible working arrangements following the birth or adoption of a child, and transfers to a safe job for pregnant workers, will have less of a regulatory impact on our members than in female-dominated industries in terms of the number of requests.

Where they did have an impact, the most likely issue would be finding suitable work on a remote site for an individual who required a safe job. Given that a complementary workplace health and safety requirement also exists for employers, regardless of the provisions of the Amendment Act, the Department considers this particular sectoral impact to be one that a mining or resource industry firm would probably experience in the ordinary course of its business. AMMA's comments were the only evidence of the sectoral impacts of the Amendment Act that could be found by this Review.

The views of a member of the NFF provide another assessment of the specific impact of the amendments on businesses (this comment goes to the transfer to a safe job provisions):

We did not experience any unreasonable administrative burden. We were pleased to be able to accommodate the request where we could. The price of child care meant that we could have lost a valuable and experienced employee otherwise.

This comment is consistent with all stakeholder feedback in that the regulatory burden was slight, and provides an indication of the benefit business derives from the amendments. However, there is no additional evidence with which to evaluate this conclusion, or allow for any greater analysis of the impacts on business. The Review therefore considers that the following comment from AMMA reflects the general conclusion of the effects of the Amendment Bill (this comment is in relation to the concurrent leave provisions):

the compliance burden ... is roughly similar to what it was before the changes.

How did the amendments affect employees?

The amendments contained in the Amendment Act extended a number of existing entitlements set out in the Fair Work Act. These provisions support increased workplace flexibility for employees and encourage employment conditions that match an employee's life circumstances.

The amendments do not place any regulatory requirements on employees, other than a need to exercise their rights by requesting access to the entitlements in accordance with the requirements set out in the Amendment Act.

It is considered that there is no material regulatory cost borne by employees as a consequence of these amendments.

6 – Conclusion

This Review considered data from a range of sources, including the Department of Employment's Wages and Conditions Database and the Australian Work and Life Index Report. Targeted stakeholder consultation was also undertaken with members of the National Workplace Relations Consultative Council and state and territory governments. The targeted consultation process reflects the narrow coverage of the legislation and ensured that the parties affected by the provisions had opportunity to input into the Review. Feedback from these stakeholders provided further anecdotal evidence that supported the evaluation undertaken as part of this Review.

The targeted consultation process is also a consequence of the more substantial review of Australia's workplace relations system that is currently being undertaken by the Productivity Commission. The Department was conscious that significant efforts were being made by all stakeholders as part of that process, which includes the legislation considered by this Review as part of the broader consideration of the operation of the Fair Work Act.

Considering the limited input and overall lack of data from stakeholders that there is any substantial issue with the operation of the provisions, and the limited available data, the Department undertook a limited analysis using the Regulatory Burden Measurement Framework. This analysis only considered the potential extra administrative burden to business based on the time required by human resource managers or supervisors to consider a request for flexible working arrangements. The basis for this decision was that the administrative costs borne by employers in implementing these amendments would be incurred by a normally efficient business with or without the change to regulation and have been considered to be 'business as usual' for this reason.

While some employers pointed to the cost of training human resources professionals, the Department contends that these administrative costs would be incurred by a normally efficient business with or without these changes to regulation and should be considered 'business as usual'. Most measures do not impose an extra administrative process, but bring forward or extend an existing process. As a consequence the administrative processes and human resource training and knowledge would already need to be in place within businesses to manage the current requirements. The qualitative remarks made by most stakeholders support this view. The administrative burden of the family friendly provisions of the Amendment Act is considered to be very low.

The amendments do not place any regulatory requirements on employees, other than a need to exercise their rights by requesting access to the entitlements in accordance with the requirements set out in the Amendment Act. It is considered that there is no material regulatory cost borne by employees as a consequence of these amendments. The Review also considers that these provisions are likely to be supported by employees and employee representative groups, as evidenced by the ACTU's submission.

On the issue of potential duplication with workplace health and safety laws, it is noted that this issue was considered at the time of drafting of the Amendment Act. It was considered that the changes were intended to complement existing work, health and safety legislation, rather than duplicate

them. Given this specific drafting intention, and that the Review has received no material evidence to the contrary, the Department is of the view that it is reasonable to consider, at this time, that the provisions are not unnecessarily duplicative – noting that further evidence may require reconsideration of this view.

The available evidence considered by this Review does suggest that the extension of employee entitlements provided for by the Amendment Act are being utilised, but to a limited extent. This is consistent with the narrow scope of the amendments and the limited period of their operation. Furthermore, data from the Australian Work and Life Index survey and stakeholder feedback from the ACTU indicates that there remains an increasing but incomplete awareness of flexible working rights among Australian workers. This further supports the view that the entitlements provided for in the Amendment Act have been used in a limited number of circumstances.

Data from the WAD indicates that the inclusion of concurrent leave provisions within enterprise agreements has substantially reduced since the introduction of the Amendment Act, but there is no clear trend on other family friendly and flexibility provisions. It is possible to conclude from this evidence that bargaining representatives view the additional quantum of unpaid concurrent leave provided for by the Fair Work Act as sufficient and have preferred to focus instead on other bargaining matters.

Employers, employer representatives and governments were generally supportive of the amendments – however, there remains concern within the business community about duplicative or unnecessary provisions. There is also general concern over what is perceived to be the increasing level of regulation within the workplace relations system, with regard to employer and employee flexibility. Some respondents to the Review supported the repeal of the amendments on the basis that they were unnecessary or not supported by evidence. However other employers, notably governments, strongly supported the provisions, while some individual comments by stakeholders noted the benefit of the provisions in helping to retain valued employees.

The ACTU argued that further protections should be in place to support working parents who need to request an alteration to their working arrangements in order to balance their caring responsibilities. The ACTU also made a call for further protections to be in place to support flexible working arrangements.

The Review notes that the Government has commissioned a review of Australia's workplace laws by the Productivity Commission and that the flexibility provisions of the Fair Work Act will be considered in the context of that review.

Was there a net benefit to the community?

This Review considers that there has been a small net benefit to the community as a consequence of these amendments, for the following reasons:

- The Amendment Act did not have a material regulatory impact on business.

For the reasons set out above, this Review considers that the administrative costs borne by employers in implementing these amendments would be incurred by a normally efficient

business with or without the change to regulation and have been considered to be ‘business as usual’ for this reason. This view is supported by stakeholders representing a range of industries. Furthermore, the Department’s estimated regulatory costings indicate a total cost economy-wide of \$44,637 per year over ten years.⁴⁵ This minimal estimated cost and administrative burden is attributed to the amendments to the transfer to a safe job provisions and the extension to the right to request flexible working arrangements, including the time taken to hold a meeting and discuss the request. The special maternity leave and concurrent leave provisions are estimated to have a nil impact on the regulatory burden of business and are considered business as usual.

This is consistent with stakeholder feedback that the administrative burden for employers was roughly the same as before the amendments came into effect. Given that, as outlined above, it is likely that these costs would be incurred by a normally efficient business even without the regulation, this Review considers that these costs are not material.

More generally, supporting employees who require flexibility because they are pregnant or for other family or personal circumstances makes good business sense because it helps improve retention rates and overall job satisfaction; can attract new talent; reduce staff turnover; reduce recruitment and training costs; lower absenteeism; improve business productivity; foster a positive organisational culture; and promote diversity and innovation.⁴⁶ Additionally, according to the Full Bench of the Fair Work Commission, increased flexibility ‘is consistent with the encouragement of great workforce participation, particularly by working with caring responsibilities.’⁴⁷ These benefits, while not measured in this review, are likely to far outweigh the very small cost impost on businesses of these provisions.

- The Amendment Act extended a number of existing rights and protections to a small number of additional employees.

The changes provided a new group of employees, in narrowly defined circumstances, a number of additional rights and also served to ensure that some of their existing entitlements were not reduced. As noted by the ACTU in their submission:

protections should be in place to support working parents who need to request an alteration to their working arrangements in order to balance their caring responsibilities.

The Review therefore considers that the changes made in the Amendment Bill are to the benefit of employees.

Because there was no material regulatory impact on business and the Amendment Act extended existing workplace rights to a broader range of employees who did not have these rights before the Amendment Act came into effect, there was likely a small net benefit to the community from this regulation. Quantifying this benefit, however, is not possible without additional data which is not available at this time.

⁴⁵ ABS (2015) ‘The number of Australia businesses have increased’, *Australian Bureau of Statistics*,

<http://www.abs.gov.au/ausstats/abs@.nsf/mediareleasesbytitle/950EC94DB899312ECA2573B00017B8F4>

⁴⁶ Fair Work Commission 4 yearly review of modern awards—Common issue—Award Flexibility [2015] FWCFB 4466 [227]; ‘Childcare and Early Childhood Learning, Inquiry Report’, Productivity Commission 2014, 183-186 & 234; Australian Government, 2015 Intergenerational Report, 16-21; Carlson, D, Grzywacz, J, Kacmar, K (2010), ‘The relationship of schedule flexibility and outcomes via the work-family interface’, *Journal of Managerial Psychology*, vol. 25(4), 330-355; Diversity Council Australia (2012), Men get flexible! Mainstreaming flexible work in Australian business, Diversity Council Australia, (2012), Get flexible! Mainstreaming flexible work in Australian business; Workplace Gender Equality Agency (2013), Engaging men in flexible working arrangements.

⁴⁷ Fair Work Commission 4 yearly review of modern awards—Common issue—Award Flexibility [2015] FWCFB 4466 [227].

Findings and further review

1. The Department finds that the amendments to the Fair Work Act considered by this review are operating with limited impost on business and have been generally accepted by employers.
2. The Department notes the Fair Work Framework is currently subject to a review by the Productivity Commission that includes a focus on red tape reduction and the compliance burden on employers. The recommendations of that review may provide a further opportunity for the Government to consider the appropriateness of and awareness about family friendly provisions in the context of the overall workplace relations system.