VACC, MTA-NSW, MTA-SA and MTA-WA Submission Concerning the Fair Work Amendment (Remaining 2014 Measures) Bill 2015

Dated 22 December 2015

Introduction

This is a submission from the Victorian Automobile Chamber of Commerce (VACC), including the Tasmanian Automobile Chamber of Commerce (TACC), and its sister organisations: the Motor Trader's Association of New South Wales (MTA-NSW), Motor Trade Association of South Australia (MTA-SA) and Motor Trader's Association of Western Australia (MTA-WA) (collectively MTAs).

VACC is the peak body for the repair, service and retail sector of the automotive industry in Victoria and Tasmania. VACC represents approximately 5,000 members, primarily small businesses, which employ over 50,000 people and have an annual turnover of around $50 billion.

In addition to VACC and TACC, our sister organisations, the Motor Trade Associations, also represent the automotive industry for their respective state. MTA-NSW currently has approximately 4,000 members across New South Wales, MTA-SA represents close to 1,200 members throughout South Australia and MTA-WA represents and supports around 1,800 members across Western Australia.

The MTAs' members range from new and used vehicle dealers (passenger, truck, commercial, motorcycles, recreational and farm machinery), repairers (mechanical, electrical, body and repair specialists, i.e. radiators and engines), vehicle servicing (service stations, vehicle washing, rental, windscreens), parts and component wholesale/retail and distribution and aftermarket manufacture (i.e. specialist vehicle, parts or component modification and/or manufacture) and recycling.

The automotive industry is largely made up of small businesses. Small businesses with between one and 19 employees comprise approximately 54% of all automotive businesses. Medium to large business make up just 4% of the Victorian automotive industry, with the remainder operating as sole traders. About 14% of businesses have an annual turnover of less than $50,000.

According to the Department of Industry, total employment for the automotive industry, which includes both the automotive manufacturing sector, and the automotive retail, service and repair sector account for a total of 315,300 as of the 2013-14 financial year. With the departure of the three passenger vehicle manufacturers, there will be further structural change in the industry, as importation of vehicles will be 100%, rather than the current level of importation at 80%. The departure of these manufacturers is estimated to affect more than 40,000 workers directly employed in automotive jobs in the industry.

Some sectors of the industry have seen rationalisation and consolidation, corresponding with reduced levels of employment. As a consequence, employment levels within the industry overall declined by 3,500 over the previous financial year. Nonetheless, the industry has been a consistent contributor to the nation's GDP at around 2.5% as of 2013/14.

Key message

This submission reiterates many of the positions made by VACC, MTA-NSW and MTA-SA in their 13 March 2015 submission to the Productivity Commission Inquiry on the Workplace Relations Framework and the VACC, MTA-NSW, MTA-SA, MTA-WA and the Motor Trader's Association of Queensland submission on 17 February 2012 to the Fair Work Act Review Panel.

The MTAs support the measures set out in the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* and call upon the Australian Senate to enact the Bill in its entirety.

Annual leave loading on termination

Section 90(1) of the *Fair Work Act 2009* (the Act) makes it clear that the payment for annual leave is at the 'base rate of pay'. Section 90(2) of the Act indicates that upon termination an employee is paid what he would have been paid if he or she had taken the leave while working. It is our view that Section 90 prescribes the payment applicable for an employee covered by the National Employment Standards (NES). Modern awards such as the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* (VMRSR Award), provide for the payment of an annual leave loading when leave is taken. But clause 29.8 of the VMRSR Award determines that the leave loading is not paid on untaken leave paid out on termination. The VMRSR Award also provides a different and more beneficial payment than the 'base rate of pay' under the NES for annual leave when leave is taken during employment (see clause 29.7 of the VMRSR Award).

Unfortunately, since 2011 the Fair Work Ombudsman (FWO) has taken the view that the NES under Section 90 requires the payment of the annual leave loading on untaken leave on termination. This is a departure from the accepted position over the history of award coverage in the vehicle industry and other industries since the introduction of the annual leave loading as a general award provision. The FWO has not attempted to prosecute any employers leaving it to individual employees to make any claims in a local court. However, the recent Federal Court case of *Centennial Northern Mining Services Pty Ltd* v *Construction, Forestry, Mining and Energy Union* (No 2) [2015] FCA 136 agreed with the FWO's opinion.

This new Federal Court decision imposes a further substantial cost input on businesses, particularly small businesses. The decision, if not corrected by legislation, makes a mockery of the award modernisation principles which led to the introduction of modern awards on 1 January 2010. The original award modernisation request in June 2008 specified that it was not the intention of the award modernisation process to increase costs to employers.

The introduction of the NES on the same date as modern awards commenced operating directly contradicts the intention of the award modernisation request in Section 90(2) of the Act by adding an additional obligation to pay for annual leave loading when an employee is not physically taking annual leave.

The 2012 expert panel review of the Act recommended amending Section 90 to provide that annual leave loading is not payable on termination unless otherwise stated in a modern award or enterprise agreement. However, the previous government did not accept the expert panel's recommendation. This is an unsatisfactory position and the matter should be rectified with an appropriate notation in the legislation.

Annual leave on resignation

Clause 17.2 of the VMRSR Award provides that, where an employee fails to give the required notice, the employer may withhold an amount not exceeding the amount the employee would have been paid for working that notice period from any monies due to the employee on termination. The FWO's position on Section 90 of the Act purports to reduce the effectiveness of clause 17.2, by preventing an employer from withholding the period of notice not worked out from an employee's annual leave. As annual leave is often the only entitlement due to an employee on termination, this interpretation leaves employers with

little to no ability to protect their businesses during employee transition periods by enforcing resignation notice periods.

The FWO is very efficient at investigating underpayment claims where an employer has not paid the required statutory notice periods on termination. An employer has no recourse to a similar process where an employee walks out, not honouring their statutory obligation to work the prescribed notice period, leaving a business in the lurch by requiring them to recruit a replacement with no notice.

Leave entitlements during a period of workers' compensation

The MTAs support a simplified and unified national approach to the accrual and taking of leave during a period of workers' compensation. The current exemption created by Section 130(2) of the Act creates unnecessary administrative and cost burdens on businesses managing employees' leave entitlements across State and Territory boundaries.

The MTAs support the revocation of Section 130(2) of the Act.

Individual flexibility arrangements

Currently an employer cannot enter into an Individual Flexibility Agreement (IFA) prior to an employee being employed by the business or as a condition of employment. This is despite an employer being required to ensure that an employee is better off overall than if there was no IFA.

As an example in the VMRSR Award, vehicle salespersons are not subject to the provisions relating to 38 ordinary hours of work or overtime payments. There are special provisions for vehicle salespersons that provide that they work either a 5½ day week or 11 day fortnight for which they receive a retainer. The award provides the employer and the vehicle salesperson the opportunity to agree on a sales commission structure. The retainer/commission structure gives the salesperson the best opportunity to maximise their earning potential, which often falls within the salary range of $70,000 to $100,000 or more.

Case study
One Victorian dealership has changed the hours of work arrangements in the VMRSR Award by introducing IFAs which have resulted in salespersons receiving an extra 21 days off each year. However, the inflexibility of the IFA provisions in the Act mean that a vehicle salesperson cannot be signed up under the same IFA until after they have started with the business.

The practical effect of this restriction means that although the business has put a special roster in place based on the revised hours of work arrangements in the IFAs, a new salesperson may disrupt that roster. A salesperson must commence their employment under the award not the IFA. If the employee does not sign an identical IFA once they commence their employment, this inflexibility has the potential to compromise the new working arrangements and make the roster ineffective and unworkable. This would be to the detriment of all salespersons in the workplace.

Changes in many Modern Awards, including the VMRSR Award, have created a significant discrepancy between the termination notice periods of IFAs and Enterprise Agreements (EA). Following from Recommendation 11 of the 2012 Expert Panel's Review of the Fair Work Act, Clause 7.8(a) of the VMRSR Award was modified in 2013 to provide for a minimum notice period of 13 weeks. However, the current EA termination process remains at only 28 days. Section 203(6) of the Act should be amended to create uniformity between EA and IFA termination clauses in the Act and Modern Awards respectively.

Right of entry

There is still some confusion about how union visits should proceed at a workplace. Consideration should be given to providing an employer with as much information as possible so they know what to expect.

The Act should be amended to require the union to specify in the Entry Notice, which must be given 24 hours prior to the meeting, the general purpose/nature of the visit, the date of the proposed visit and whether they will be attending either during an authorised rest beak or the regular meal break.

Union permits should have a photograph identifying the union representative, similar to a drivers licence. Right of entry should be regulated under the Act and not be a permitted matter for variation through an Enterprise Agreement.

Unions are not limited in the number of right of entry permits that they can request for any one business. This can particularly effect small businesses, where a union can obtain regular entry permits over a relatively short period of time. Employers are becoming increasingly frustrated with union officials requesting repeat visits to workplaces where there is no interest from employees who end up eating their lunch outside of their own lunchroom.

Section 492 of the Act provides for a right of entry permit holder to use a business' lunch room if they cannot agree with the employer on an alternative room or area. In practice, unions take advantage of this to demand automatic access to lunch rooms and refuse to negotiate with employers on more appropriate meeting areas. This causes particular irritation for employees tired of union representatives invading their lunch areas during their rest breaks.

Dismissing unfair dismissal claims

There are several problems with the unfair dismissal system as it currently stands. These include overly complex procedural fairness requirements, lack of consistency and direction from FWC decisions, lack of relevant factors taken into account by the FWC, a Fair Dismissal Code that provides very little protection to small business and has not worked in the manner forecast and expected, the return of 'go away money', an unnecessarily complicated definition of 'genuine redundancy' and problems with the conciliation process.

Unfortunately, 'go away money' in unfair dismissal claims has returned in exactly the same way as it had operated prior to Work Choices. Employers are now resigned to the fact that it is likely they will receive an unfair dismissal claim even if they terminate an employee on genuine performance or conduct grounds and have taken a reasonable approach prior to making their decision.

Members are also aware of the time and cost of legal proceedings should they wish to defend an unfair dismissal claim. The level of commitment and complexity required to prepare a case now has increased significantly since unfair dismissals came under the jurisdiction of the Australian Industrial Relations Commission in the 1990's.

Where an applicant does not comply with directions given by FWC members, members go out of their way to contact them and give them every opportunity to comply with directions. Meanwhile, the employer has to attend on all occasions at a substantial cost of time and money. Employers are rarely granted the same procedural fairness allocated to employees. FWC members allocated to a particular case should dismiss an application if an employee has not complied with directions unless the applicant can demonstrate satisfactory and extenuating reasons as to why they have not complied.

The case studies below illustrate that employers will pay 'go away money' rather than go through the process of defending their right to terminate an employee. In our view, the objectives relating to fairness in the workplace are not being met.

Case study
An apprentice was dismissed after the owner of a business found his apprentice at the workplace on Good Friday with three of his friends. The apprentice and his friends were working on their cars and drinking alcohol. Two other employees were also on the premises however they were authorised to be there.

When the apprentice was asked to remove the vehicles, the apprentice swore at the owner and then on removing the last vehicle, he spun the wheels throwing up stones over the employer and his companions who were present. The apprentice also drove a vehicle off the property although he did not have a Victorian licence and spun the wheels again 100 metres from the business premises. The employee was dismissed.

The apprentice made an unfair dismissal claim and his defence was that other people were on the premises too. The matter was settled for four weeks' pay. The owner decided it would be too expensive and time consuming to go through a hearing.

Case study

In Victoria, a business cannot employ a person in a vehicle customer sales capacity under the Motor Car Traders Act 1986 if an employee has been convicted of a serious criminal offence. In order to comply with the Motor Car Traders Act, an employer must file a police record check within six weeks of the employee commencing employment. The employer cannot file the request without the consent of the employee.

The employer asked the employee to sign the required form on several occasions but the employee stalled. Due to the length of time taken to lodge the form and receive the police record, the employee had passed the six month minimum period of employment. The police record showed that the employee had been convicted of a serious offence as defined under the Act (unlawful assault).

The employer terminated the employee because he could not continue to employ him due to his criminal conviction based on the Motor Car Traders Act. The employee filed an unfair dismissal claim as he claimed he was terminated outside the six month qualifying period and the nature of the offence in the police record was not sufficient to warrant termination under the Motor Car Traders Act.

The claim was settled for two weeks' pay. The employer was not prepared to contest the claim due to the cost and time involved in running a case to hearing.