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Committee Secretary
Senate Education and Employment Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Submitted by email: eec.sen@aph.gov.au

Dear Committee Secretary

RE: FAIR WORK AMENDMENT BILL 2014

The Victorian Employers' Chamber of Commerce and Industry (VECCI) is pleased to have the opportunity to file this submission for the consideration of the Committee in its Inquiry and subsequent Report in relation to the *Fair Work Amendment Bill 2014* ("the Bill").

VECCI is the peak body for employers in Victoria, informing and servicing more than 15,000 members, customers and clients around the state.

Our membership base is diverse, with involvement from all levels and sectors of industry including, Manufacturing, Health and Community Services, Business Services, Catering & Hospitality, Construction, Transport, Retail and Tourism.

VECCI is involved in every facet of industry and commerce across the State. Our role is to represent the interests of business of all sizes at a State level as well as nationally. Our membership covers CBD, metropolitan and regional businesses and the Melbourne Chamber of Commerce. Our membership also includes businesses trading in both Victoria and other States & Territories.

VECCI is a member of Australia's largest and most representative business advocate, the Australian Chamber of Commerce and Industry ("ACCI") which develops and advocates policies that are in the best interests of Australian business, the economy and the wider community.

VECCI's SUBMISSION

It is well documented, but worth repeating, that the principal piece of legislation, the *Fair Work Act 2009* ("The Act") was not the subject of a Regulatory Impact Statement either on or following its inception.

The Act was reviewed during 2012 by a Review Panel appointed by the previous Government. While the terms of reference for this Review were deficient on account of their narrowness, in that they did not provide the scope to review whether the Act had made the workplace relations system more

or less flexible and bound in red tape and they prevented consideration of changes to either the objects of the Act or structure of the system, there was nonetheless engagement with the Review. The Review Panel received over 250 submissions, held a series of meetings and roundtable discussions with a large number of stakeholders including peak employer and employee associations, small businesses, academics and working women and ultimately made 53 recommendations to the previous Government. On the whole, the recommendations lacked the sort of measures that would substantially improve the Fair Work system established by the Act.

Notwithstanding this, one might have expected that the previous Government would have attached some weight to recommendations made by the Review Panel. Instead, when amending the Act on two occasions prior to its electoral defeat, it ignored the small parcel of recommendations that would have made a positive difference for employers and business and introduced new measures that were not supported by business because of the additional burdens they imposed. VECCI submitted at the time:

> *The amendments are not fair to employers. They are not balanced. Any flexibility goes one way only and the Government continues to ignore the concerns of Victorian business, particularly small business.*
>
> *It is time for the parliamentary and political leadership of Australia to immediately restore balance and reform workplace relations law so at to, at a minimum, achieve the following:*
>
> - *The prevention of unions adopting a strike first, bargain later approach to the pursuit of demands;*
> - *limiting the regulatory system to industrial matters only, so as not to interfere with the decision-making responsibilities of business - in particular the content of agreements must be limited to only those matters that pertain to the employment relationship;*
> - *eliminating the union veto and monopoly over the establishment of greenfield agreements for new projects;*
> - *restoration of pre-existing workplace laws sanctioned by the High Court of Australia on the sale or transmission of businesses – the changes introduced by the Government altering these laws were not foreshadowed ahead of its election and nor were they justified;*
> - *restoration of restrictions on union rights of entry that were promised by the Government in 2007;*
> - *elimination from the award system increases to employer costs that were promised by the Government in 2007 to not occur, but which have occurred; and*
> - *rather than enshrining penalty rates, the Government must review in a comprehensive fashion, the current system of penalty rates to ensure it is appropriate, fair and balanced for all participants in the modern economy.*

The current Government presented a workplace relations policy prior to the 2013 federal election, *The Coalition's Policy to improve the Fair Work Laws* ("the Policy"). The Policy contained a commitment to implement certain outstanding recommendations of the Review Panel. It contained a range of other measures. The Bill purports to implement the recommendations of the Review Panel adopted in the Policy. In other respects, the Bill is said to represent the implementation of other, but not all other, elements of the Policy.

Comment will now be made regarding specific amendments contained in **Schedule 1 of the Bill**.

Extension of period of unpaid parental leave - Part 1

The Bill proposes that an employer must not refuse 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.

VECCI opposes this amendment. Although this amendment arises out of a recommendation of the Review Panel, VECCI does not agree such a requirement is necessary. This is because the Review Panel also observed that where requests for an extension of unpaid parental leave had been made, they were agreed to by employers in all but a few instances ("*Towards More Productive and Equitable Workplaces – An evaluation of the Fair Work Legislation*, page 93). This being the case, imposing yet another compliance obligation on employers is not justified.

Payment for Leave- Part 2

The Bill proposes that the upon termination, an employer must pay an employee for his or her untaken paid annual leave at the employee's base rate of pay.

VECCI supports these amendments. They arise out of a recommendation of the Review Panel and the Policy and would have the effect of ensuring that annual leave loading will only be payable on termination of employment where this is expressly provided for under an applicable modern award, enterprise agreement or contract of employment. They will remove ambiguity, confusion and the potential liability to pay annual leave loading in circumstances where it has never applied or been contemplated.

VECCI shares concerns expressed by ACCI regarding the attempt by the ACTU to perpetuate the current ambiguity by seeking a variation to modern awards so they reflect the current wording of the Act. As such, VECCI supports the ACCI recommendation of an amendment that restricts award access to provision of annual leave loading upon termination to those awards which so provided prior to 1 January 2014. VECCI also supports these amendments applying to terminations on and from the date of Assent for which annual leave loading had not been paid, unless required pursuant to modern awards, enterprise agreements or contract of employments.

Taking or accruing leave while receiving workers' compensation- Part 3

The Bill will remove uncertainty by providing that employees absent from work and in receipt of workers' compensation will not be able to take or accrue any type of leave or absence.

VECCI supports this amendment. It represents excellent public policy and will remove an unwarranted administrative and cost burden for business.

Individual Flexibility Agreements- Part 4

It remains the view of VECCI that Australia will not have a truly modern and flexible workplace relations system while the Act contains within its objects a statement asserting that statutory individual employment agreements 'can never be part of a fair workplace relations system.'

When conceiving and designing the Fair Work System, the previous Government sought to assure business that there would be the capacity to make individual flexibility agreements ("IFAs") that would help accommodate the individual needs of employers and employees. In practice, the IFAs have been a dismal failure. The use of them has been minimal and their utility unduly restricted.

Items 6 and 14 of the Bill would introduce the requirement for a 'genuine needs statement' ("GNS") that would outline why the employee believes that an IFA meets their genuine needs and results in them being better off overall. Reading this with Item 8 of the Bill, the intention is that non-monetary benefits available to an employee under an IFA should be capable of satisfying the requirement that an employee is better off overall. **VECCI supports these amendments**, which take up

recommendations of the Review Panel, so long as the content of a GNS cannot be undermined by the opinion of a third party approver as to the significance or otherwise of the value of a monetary benefit foregone. As such, VECCI would suggest amending the Explanatory Memorandum.

Items 7 and 15 of the Bill would extend the period of notice for terminating IFAs from 28 days to 13 weeks. This essentially reflects a recommendation of the Review Panel. **VECCI supports these amendments** because they may contribute to making IFAs more attractive for employers by facilitating a greater degree of certainty in operational planning when an IFA is in use.

Items 9, 10, 16 and 18 if the Bill **are supported by VECCI** because they provide that an employer will not have contravened a flexibility term if, when it was made, the employer reasonably believed the requirements of the term were complied with. These amendments may contribute to making IFAs more attractive for employers because the spectre of a penalty for non-compliance is removed.

Item 11 of the Bill would ensure that if an enterprise agreement contains terms dealing with any of arrangements about when work is performed, overtimes rates, penalty rates, allowances or leave loading then the agreement's flexibility term must provide that they can be varied by an IFA. Additionally, Item 12 would require parties to agree and set out any other terms of the agreement they intend to be capable of being varied by an IFA. **VECCI supports these amendments**, noting they reflect a recommendation of the Review Panel and may provide greater certainty where IFAs are contemplated and used.

Greenfields Agreements- Part 5

Our workplace relations system must contain provisions that regulate Greenfields Agreements in a way that will attract significant investment to Australia for major projects. If our system makes investing in Australia seem too problematic and other countries more attractive, it must be changed. The Bill proposes amendments which would address current potential barriers to investment and **these amendments in Part 5 are on the whole supported by VECCI.**

Specifically, we believe it is entirely appropriate that good faith bargaining provisions apply to negotiations for Greenfields Agreements. VECCI notes that the Review Panel acknowledged there is no basis for excluding Greenfields Agreements from the good faith bargaining regime. Situations where unions hold potential investors to ransom with exorbitant claims cannot be tolerated.

Secondly, VECCI supports the imposition of a 3-month time limit for negotiating parties to reach agreement failing which, application can be made to the Fair Work Commission for approval of the agreement. This would provide a mechanism to break a bargaining deadlock and allow projects to proceed.

However VECCI rejects the proposed amendments in Item 33 of the Bill. The standard 'Better Off Overall' Test is sufficient and employers will always be faced with the requirement to balance the limits of their willingness to pay with the need to offer attractive terms and conditions of employment. There is no need in the approval process for the formal overlay of what might have been offered and paid elsewhere. It would be dangerous to impose such criteria because the capacity of each individual business to pay will always be different.

VECC supports and endorses the proposal of ACCI for the re-introduction of Employer Greenfields Agreements. Australia will not have a truly modern and flexible workplace relations system while Employer Greenfields Agreements and statutory individual employment agreements are excluded.

Transfer of Business- Part 6

VECCI remains highly critical of the Transfer of Business Rules introduced by the previous Government. It is salient to highlight that it did not foreshadow them prior to being elected in 2007. The introduction of the new rules disturbed established principles developed by the High Court over many years, a fact confirmed by the Review Panel when it stated "*The transfer of business provisions under the FW Act are a departure from the previous arrangements and are novel in many ways*" ("*Towards More Productive and Equitable Workplaces – An evaluation of the Fair Work Legislation*, page 208). VECCI believes the rules were enacted with the very clear intention of imposing restrictions on the practice of outsourcing of business operations and that they cannot be reconciled with the objects of the Act requiring laws that will promote productivity and economic growth and be flexible for businesses.

Accordingly, **VECCI supports the amendments in items 53-55 of the Bill**, noting they reflect another recommendation of the Review Panel and would remove procedural obligations parties currently face in circumstances where employees, on their own initiative, want to transfer to a related entity of their former employer. The proposed amendments would provide that in such circumstances, the employee will automatically be covered by the new employer's industrial instruments.

VECCI's broader position remains that the Transfer of Business Rules in the Act need a major overhaul.

Protected Action Ballot Orders- Part 7

VECCI supports the amendment in item 56 because it will eradicate the counter-productive practice of 'strike first, talk later'. This was recommended by the Review Panel and the recommendation should have been adopted by the previous Government.

Right of Entry – Part 8

In relation to the Right of Entry regime overall, VECCI is looking to the Government to deliver on its election commitment to reinstate, as far is as possible, the Right of Entry rules that applied in 2007. The amendments in the Bill address some problems with the current Right of Entry rules. They represent a good start.

While supporting the amendment in item 61, VECCI agrees with the suggestion of ACCI that there should be a requirement for all Union entries for discussion purposes to be preceded by an explicit invitation.

VECCI was vehemently opposed to the changes to the rules regarding accommodation and transport and the location of interviews and discussions introduced by the *Fair Work Amendment Bill 2013* and at the time submitted in relation to the proposed amendments regarding the location of interviews and discussions:

> *VECCI notes that this issue was considered by the Review Panel. The recommendation of the Review Panel was that the FWC be provided with greater power to resolve disputes about the location for interviews and discussions through a balanced approach. The proposed amendments do not achieve this. Instead, the proposed s492 makes the default location where parties cannot agree, meal and break areas. As there will be no oversight by the FWC as to whether or not a permit holder is unreasonably refusing to meet in a place suggested by the employer, permit holders can simply hold*

out, knowing the default position provided for by the proposed amendments will give them what they want.

The amendments do not provide FWC with oversight. They are not balanced and instead will reward obstinate permit holders. They deny employers a fundamental right to exercise control over their own property and should be rejected.

As to the proposed amendments regarding the dealing with disputes about the frequency of entry to hold discussions, VECCI notes that this issue was also considered by the Review Panel. The recommendation of the Review Panel was that the FWC be given greater power to resolve disputes about the frequency of entry through a balanced approach. The proposed amendments do not provide a fair balance. Again, they favour permit holders by imposing an almost impossibly high threshold that must be cleared before the FWC may make orders in relation to a dispute about the frequency of entry.

Pursuant to proposed s505A (4), FWC can only make remedial orders if it is satisfied that the frequency of entry "would require an unreasonable diversion of the occupier's critical resources." The explanatory memorandum gives no guidance, merely describing this as an "appropriately high threshold". The notion of "critical resources" has the potential to conjure up images of life or death scenarios or being the difference between a business continuing to operate or closing down.

In introducing this amendment, the Government has ignored the recommendation of the Review Panel that there be a balance between the right of unions to represent their members in a workplace and the right of occupiers and employers to go about their business without undue inconvenience (see Recommendation 35 of the Review Panel). The threshold the government would set is not balanced. It would render the discretionary powers of the FWC impotent and accordingly, the proposed amendments should be rejected.

As such, VECCI thoroughly endorses the various amendments in the Bill that would bring about the repeal of the changes to the rules regarding accommodation and transport and the location of interviews and discussions introduced by the previous Government in 2013.

Finally, VECCI also supports the introduction of a requirement for entry permits to include a photograph of the permit holder. The right of entry onto a private business premises is a privilege which must be protected from abuse.

FWC Hearings and Conferences – Part 9

VECCI supports the amendments in Part 9, noting they reflect a further recommendation of the Review Panel and where utilised, will reduce the time imposition and cost burden on businesses that are:

- in matters where an applicant has acted unreasonably by failing to attend a proceeding or comply with a Fair Work Commission order or direction; or
- forced to defend unfair dismissal applications that are vexatious or frivolous or have no reasonable prospects of success.

Unclaimed Money – Part 10

VECCI supports the amendments in Part 10.

Finally, VECCI associates itself with and supports the various submissions made by ACCI regarding suitable commencement dates for the various proposed amendments.

Anti-Bullying jurisdiction

The Bill does not contain any proposed amendments to the Anti-Bullying provisions in the Act. When the previous Government introduced the amendments that would establish the anti-bullying jurisdiction, VECCI called for extensive consultation with a range of stakeholders before they were proceeded with.

VECCI had previously acknowledged the work carried out by the House of Representatives Standing Committee on Education and Employment in its Inquiry into Workplace Bullying but the progression from that work to the amendments to the Act in 2013 missed vital steps, including fulsome consultation with the WHS regulators in the States and Territories. This was particularly the case with Victoria, given its established legislative response to workplace bullying in WHS laws and the criminal sanctions available through "*Brodie's law*".

VECCI's submission on behalf of Victorian business to that House of Representatives Standing Committee on Education and Employment Inquiry into Workplace Bullying raised the legitimate concern that there should be community education in relation to what constitutes workplace bullying. Secondly, it noted that workplace bullying was already comprehensively dealt with in Victorian legislation and finally, it supported analysis into the ways in which co-ordination between the various regulators could be improved. Unfortunately, the 2013 amendments to the Act were rushed through without regard for these points

While we were ignored then, VECCI's views remain unchanged. As the new anti-bullying laws have now commenced, VECCI urges the Government to review the design of the jurisdiction and be open to making changes that would deliver a better quality response to the serious issue of workplace bullying.

Concluding remarks

With minor exceptions, VECCI overwhelmingly supports the amendments in the Bill. They start the journey of restoring balance and flexibility to the workplace relations system but there is still some considerable way to go.

The Bill does not implement all outstanding matters in the Policy. VECCI therefore encourages the Government to progress the work required to do so but, as mentioned above, also be open to the exercise of some caution and new thinking when it comes to the anti-bullying jurisdiction that commenced on 1 January 2014.

VECCI otherwise thanks the Committee for the opportunity to make this submission and would welcome the opportunity to address the Committee in relation to it, should this assist further.

Yours sincerely

Richard Clancy
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Industry Policy and Workplace Relations Services