

**SUBMISSION TO THE
SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS
LEGISLATION COMMITTEE
FAIR WORK AMENDMENT BILL 2013 INQUIRY
BY THE MARITIME UNION OF AUSTRALIA**

INTRODUCTION

1. This Submission to the Senate Education, Employment and Workplace Relations Legislation Committee, Fair Work Amendment Bill 2013 Inquiry, is provided by the Maritime Union of Australia (MUA), in conformity with the Terms of Reference being the Fair Work Amendment Bill 2013.
2. This Submission will address and comment on the key Parts of the Fair Work Amendment Bill 2013.
3. It should be noted that the MUA also supports and adopts the submissions of the Australian Council of Trade Unions.

SUBMISSION

Schedule 1, Part 1 Special Maternity Leave

4. The MUA supports the proposed repeal of section 80(7) of the FW Act and proposed consequential amendment of sections 75(2) and 76(6) of the FW Act, in order that the taking of a period of unpaid special maternity leave by employees who are not fit to work whilst pregnant, including because an employee has a pregnancy-related illness, will not reduce such an employee's entitlement to unpaid parental leave under section 70 of the FW Act, as was the case before the amendments.

Schedule 1, Part 2 Parental Leave

5. The MUA supports the proposed amendment of sections 72(5)(a) and (b) of the FW Act which would see the period of concurrent unpaid parental leave increased from three to eight weeks, with concurrent unpaid parental leave being able to be taken in separate periods of at least two weeks each, or a shorter period if the employer agrees.
6. Furthermore, the MUA supports the proposed removal of the existing outer limit of the period within which concurrent unpaid parental leave can be taken, currently three weeks after the birth or placement of an adopted child (existing section 72(5)(b)), or three weeks later by agreement with the employer (existing section 72(5)(c)).

7. As evinced in the proposed amendments in Schedule 1, Parts 1, 2, and 5 (see below), the MUA supports the Government's clear and ongoing commitment to its international obligations, and in particular:
- the *International Covenant on Economic, Social and Cultural Rights*, Article 10(2) of which states that special protection should be accorded to mothers during a reasonable period before and after childbirth, with working mothers accorded paid leave or leave with adequate social security benefits during such period;
 - the *Convention on the Elimination of All Forms of Discrimination Against Women*, Article 11(2) of which requires that State Parties take appropriate measures to introduce maternity leave with pay or comparable social benefits without loss of former employment, seniority or social allowances; and
 - the *Convention on the Rights of the Child*, Article 18 of which provides that State Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.
8. However, consistent with those international obligations, in the MUA's submission, an employee should be able to take concurrent unpaid parental leave up to eight weeks before the birth of the child or placement of an adopted child without the agreement of the employer, being the total entitlement to concurrent unpaid parental leave provided by proposed new section 72(5)(a), and not as in the proposed new section 72(5)(c), only from the date of birth, or placement of an adopted child, unless otherwise agreed with the employer.

Schedule 1, Part 3 Right to request flexible working arrangements

9. The MUA supports the proposed amendments to section 65 of the FW Act which would extend the right of an employee to request a change in working arrangements to a wider range of caring and other circumstances as set out in proposed new section 65(1A), including that the employee is a parent, or responsible for the care of a child of school age or younger; is a carer as defined; has a disability as defined; is 55 or older; is experiencing violence from a member of the employee's family; or provides care or support to a member of their immediate family, or household, because the member is experiencing violence from the member's family.
10. Furthermore, the MUA supports the proposed guarantee in new section 65(1B) to an employee who is a parent, or who has responsibility for the care of a child, and who is returning to work after the birth or adoption of the child, to request to work on a part time basis.

Schedule 1, Part 4 Consultation about changes to rosters or working hours

11. The MUA supports proposed new section 145A(1)(a) which would require modern awards to include a term that requires employers to genuinely consult with employees about changes to their regular hours of work, and further supports proposed new section 145A(1)(b), which provides that employees can be represented by a representative from an employee organisation in such consultation.
12. Similarly, the MUA supports proposed amendments to section 205(1)(a) which would add to the existing requirement in section 205(1) of the FW Act that an enterprise agreement include a term requiring an employer to consult about major workplace changes that are likely to have a significant effect on employees, a requirement that an enterprise agreement include a term requiring an employer to consult with employees about a change to their regular roster, or ordinary hours of work.
13. The MUA supports the proposed amendments on the understanding that even where a change to an employee's regular roster or ordinary hours of work does not constitute a "*major workplace change*", the obligation to consult remains, noting that existing section 205(1)(b) of the FW Act, which allows for representation of employees by a representative of an employee organisation for the purposes of such consultation, will remain.
14. The MUA further supports the requirement in proposed new sections 145A(2) and 205(1A) that an employer consult employees about a proposed change to their regular roster or ordinary hours of work, by not only providing information about the proposed change to employees, but inviting employees to give their views about the impact of the change, including any impact in relation to their family or caring responsibilities, and considering any views put forward by employees, before making a decision to implement the change.
15. As evinced in the proposed amendments in Schedule 1, Parts 3 and 4, the MUA supports the Government's clear and ongoing commitment to its international obligations, and in particular:
 - the *Convention of the Rights of the Child*, Article 3 of which provides that the best interests of the child shall be a primary consideration; Article 5 of which provides that State Parties shall respect the responsibilities, rights and duties of parents; and Article 18 of which provides that State Parties shall use their best endeavours to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child; and
 - the *Convention on the Elimination of All Forms of Discrimination Against Women*, Article 5 of which provides that State Parties should take all appropriate measures to ensure that family education includes a proper understanding of

maternity as a social function, and the recognition of the common responsibility of men and women in the upbringing of their children.

Schedule 1, Part 5 Transfer to a safe job

16. The MUA supports the proposed new section 81 which would extend the existing entitlement to transfer to a safe job to a pregnant employee regardless of whether they have, or will have, an entitlement to unpaid parental leave.
17. Currently, a pregnant employee is only entitled to transfer to a safe job if they are entitled to unpaid parental leave. A pregnant employee is only entitled to unpaid parental leave if they have, or will have, completed twelve months of continuous service with their employee immediately before the unpaid parental leave is to start.
18. Furthermore, whilst the MUA supports the retention in proposed new section 81A of paid no safe job leave at an employee's base rate of pay for the ordinary hours of work of employees who are entitled to unpaid parental leave, in the MUA's submission, no safe job leave for employees who are not entitled to unpaid parental leave, should also be paid at an employee's base rate of pay for such an employee's ordinary hours of work, and not unpaid, as set out in proposed new section 82A.

Schedule 2 Modern Award Objective

19. The MUA supports proposed new section 134(1)(da) which would add to the factors to be taken into account by the Fair Work Commission in ensuring achievement of the Modern Award Objective of providing a fair and relevant minimum safety net of terms and conditions, the need to provide additional remuneration for:
 - employees working overtime; employees working unsocial, irregular or unpredictable hours;
 - employees working on weekends or public holidays; and
 - employees working shifts.

Schedule 3 Anti Bullying Measure

20. The MUA supports the proposed insertion of a new Part 6 – 4B in the FW Act to enable a worker who is bullied at work to apply to the Fair Work Commission for an order to stop the bullying, such order being enforceable by the proposed civil remedy provision in new section 789FG.
21. The MUA supports this measure noting that the Explanatory Memorandum makes clear that the Fair Work Commission may refer a matter to a work health and safety regulator where it considers it necessary and appropriate, and that the amendments in

Schedule 3 are not intended to preclude investigation and prosecutions under Workplace Health and Safety, and criminal law.

Schedule 4 Right of Entry

22. Whilst the MUA supports the proposed guarantee in proposed new section 492 of access to meal rooms to hold discussions as the default position in the absence of agreement between a permit holder and employer about the location of interviews and discussions, in the MUA's submission, permit holders should have access to any rooms or areas on the premises in which employees eligible to be covered by the permit holder's organisation are located.
23. In this regard, the MUA disagrees with the stated intent of proposed new section 492 as set out in the Explanatory Memorandum as meaning that, for example, "*a permit holder would not be authorised to hold discussions in a personal office or workspace or a room or location which is not provided for or used for meals or other breaks unless it is agreed*".
24. Similarly, the MUA opposes the limitation in proposed new section 505(5) on the powers of the Fair Work Commission to the effect that when dealing with a right of entry dispute, it must not confer rights on a permit holder that are in addition to, or inconsistent with, rights exercisable in accordance with Divisions 2, 3, and 7 of Part 3 – 4 "*Right of Entry*" of the FW Act.
25. Whilst the MUA acknowledges that under proposed new section 505(5), the proposed limitation would not apply to disputes about whether employer requests of permit holders are reasonable; and disputes about employer provided transport or accommodation to permit holders, the MUA sees no reason to limit the Fair Work Commission's powers in relation to any other disputes about right of entry under Part 3 – 4 of the FW Act.
26. Furthermore, the MUA opposes proposed new section 505A outright on the basis that ensuring a '*fair go all round*' or indeed, promoting "*more cooperative and productive workplace relations*" (see proposed amendment of functions of Fair Work Commission set out in Schedule 5 directly below) does not require that an employer be able to dispute the frequency with which a permit holder validly exercises right of entry, as otherwise so entitled under the FW Act, on the ground that the frequency of visits "*would require an unreasonable diversion of the occupier's critical resources*".
27. Curiously, as much is implicitly acknowledged in the Explanatory Memorandum which describes the ground of "*an unreasonable diversion of the occupier's critical resources*" as an "*appropriately high threshold*" given that the proposed new section

505A would have the potential to “*displace a permit holder’s legitimate right to enter premises for authorised purposes*” (emphasis added).

28. In the MUA’s submission, this proposed amendment has the potential to lead to further antagonism and disputation and critically, is inconsistent with Article 22 of the *International Covenant on Civil and Political Rights*, and Article 8(1) of the *International Covenant on Economic, Social and Cultural Rights*, which guarantee the right to freedom of association.
29. Whilst the Explanatory Memorandum refers to Article 22, and the obligations imposed therein, in the MUA’s submission, the proposed new section 505A fails to follow the guidance provided by the International Labour Organisation’s Committee on Freedom of Association in its 336th Report at [108] (and referred to in the Explanatory Memorandum) that “(g)overnments should guarantee access of trade union representatives to workplaces with due respect for the rights of property and management, so that trade unions can communicate with workers”.
30. Whilst communication with workers requires frequent visits to the workplace, the converse is not required to ensure due respect for the rights and property of management.
31. Furthermore, in the MUA’s submission, proposed new section 505A(3), which gives the Fair Work Commission the power to arbitrate disputes about the frequency of visits, including the power to impose conditions on, suspend, or even revoke a permit, is a gross infringement on the right to freedom of association.
32. In relation to the insertion of proposed new Division 7 into Part 3 -4 of the FW Act, the MUA is generally supportive of a regime which supports access of permit holders to workplaces in remote areas.
33. In particular, the MUA supports proposed new sections 521C and 521D which would place an obligation on employers to provide transport and/or accommodation to permit holders seeking to exercise right of entry to workplaces in remote areas where agreement on transport and/or accommodation cannot be reached.
34. However, whilst the qualification in sections 521C(2)(a) and 521D(2)(a) that the provision of accommodation or transport not cause the occupier undue inconvenience will be the subject of statutory interpretation in the tribunal, and possibly judicially, the example provided in the Explanatory Memorandum of an occupier of an offshore installation with all accommodation quarters on deck currently occupied not being required to remove existing occupiers to make way for permit holders is unhelpful, unnecessary and should be immediately removed.

35. Transport to, and accommodation on board, offshore installations is of critical importance to MUA permit holders and is often plagued by logistical difficulties that are frequently the subject of disputes regarding the operation of Part 3 – 4 of the FW Act.
36. In the MUA's submission, generalised examples provided in the Explanatory Memorandum are unnecessary, especially given that such extrinsic material may later be referred to in the Tribunal or a Court where a determination should be left to the specific circumstances involved in individual disputes regarding right of entry, on a case by case basis.

Schedule 5 Functions of the Fair Work Commission

37. The MUA notes the proposed insertion of section 576(2)(aa) to clarify the functions of the Fair Work Commission as including the promotion of more cooperative and productive workplace relations, and the prevention of disputes. In the MUA's submission, the FW Act achieves the right balance between an employee's democratic right to freedom of association, including the right to bargain collectively and organise and take protected industrial action, and employers' management prerogative.

Schedule 6 Technical Amendments

38. The MUA makes no submission in relation to the proposed technical amendments.

SUMMARY

39. The MUA supports the continuing attempts by the Government to achieve an appropriate balance between an employee's democratic right to freedom of association, including the right to bargain collectively and organise and take protected industrial action, and employers' management prerogative, but is concerned and opposes outright any attempt to derogate from the existing right of entry of permit holders under Part 3 - 4 of the FW Act.