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15 April 2013

The Senate Education, Employment & Workplace Relations Committee
Parliament House
CANBERRA ACT 2600

By email

FAIR WORK AMENDMENT BILL 2013

In my capacity as Executive Director of the Real Estate Employers' Federation of NSW, I am pleased to forward a submission on behalf of my organisation in relation to *Fair Work Amendment Bill 2013*.

We thank the Committee for the opportunity to make these submissions.

Yours faithfully

GREG PATERSON
Executive Director

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REAL ESTATE EMPLOYERS' FEDERATION OF NEW SOUTH WALES

SUBMISSION

Inquiry into the Fair Work Amendment Bill 2013

Senate Education, Employment and Workplace Relations Legislation Committee

APRIL 2013

1. Introduction

1.1 The Real Estate Employers' Federation of New South Wales (REEF) is a registered industrial organisation within both the NSW and Federal jurisdictions. REEF is chartered to represent the industrial interests of the real estate industry in the State of New South Wales. While it has maintained its State based registration, on 7 December 2012 registration was granted as an association of employers under the Fair Work (Registered Organisations) Act 2009.

1.2 REEF is the primary industrial voice of the NSW real estate industry and we represent in the order of 1,500 businesses - the vast bulk of which engage less than 15 employees. Despite the small size of individual offices, according to the most recent ABS statistics[1] there was in the order of 30,000 people employed in the NSW real estate industry in 2002 though based on data from NSW Fair Trading[2], this figure has increased to in excess of 50,000 in 2010-13.

1.3 Approximately 73% of REEF members employ fewer than 15 employees and of these almost 47% employ fewer than 10 employees.

1.4 Our main role is to represent, advise and assist real estate employers in all aspects of workplace relations and human resource management. We provide advice and information on workplace regulation, human resource management, work, health and safety, anti-discrimination and aspects of the employment relationship specific to the real estate industry such as commission/bonus arrangements.

1.5 As an affiliated association of Australian Business Industrial (ABI), we have had the opportunity of reviewing the draft submission it will present to this Committee. REEF adopts and supports the submission of ABI. We too urge this Committee to reject the *Fair Work Amendment Bill 2013* (the "Bill") as it has been hastily introduced without a balanced consideration of the potential effects the legislation will have for business and in particular, the small business community.

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[1] Catalogue No. 8663.0 (2002-03)
[2] NSW Fair Trading – Year in Review 2010-11, page 25.

1.6 Particularly, we also wish to make independent submissions relating to **Schedule 2** and **Schedule 3** only of the Bill.

1.7 To help with a more informed understanding of the likely impact the change from Schedule 2 may have on the real estate industry in NSW, REEF conducted a survey of its members (the "Survey"). Over 300 responses were received to the Survey which was conducted on-line. Findings from the Survey will be referred to in parts of this submission.

1.8 REEF thanks this Committee for providing the opportunity to comment on particular elements of the Bill and its likely effects on the real estate industry.

2. The Fair Work Amendment Bill 2013 – an overview

2.1 The Bill comprises 7 Schedules which will amend the Fair Work Act 2009 (the FW Act). A number of changes arise from the report from the Fair Work Act Review Panel (the Panel)[3]. In this regard, the Bill introduces new family friendly arrangements together with obligations on employers to consult with employees about the impact of changes to regular rosters or hours of work (Schedule 1) and provides for expanded right of entry to workplaces for union officials (Schedule 4).

2.2 Importantly for the purposes of this submission, the Bill will amend the modern awards objective to require that the Fair Work Commission (FWC), when ensuring that modern awards together with the National Employment Standards provide a fair and relevant minimum safety net of terms and conditions, take into account the need to provide additional remuneration for employees working overtime; unsocial, irregular or unpredictable hours; working on weekends or public holidays; or working shifts (Schedule 2).

2.3 The Bill will also amend the FW Act to allow a worker who believes he/she has been bullied at work in a constitutionally-covered business, to apply to the FWC for an order to stop the bullying (Schedule 3). This part of the Bill gives effect to the Government's response to the report on workplace bullying[4].

2.4 Schedule 5 concerns changes to the administrative powers of the Fair Work Commission.

2.5 Schedules 6 and 7 contain numerous technical and transitional amendments resulting from the amending legislation.

2.6 For the reasons detailed in this submission, we urge this Committee to recommend to the Senate that it not pass this Bill.

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[3] "*Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*" – August 2012

[4] "*We just want it to stop*" – Report by the House of Representatives Standing Committee on Education and Employment into workplace bullying - October 2012

3. Schedule 2 – The Modern Awards Objective

3.1 On Thursday 14 March 2013, there were reports in the Australian media concerning an announcement by the Prime Minister at a summit of the Australian Council of Trade Unions (ACTU), that the Government would be writing into law, protection for workers' penalty rates. According to an on-line report in the Sydney Morning Herald, the Prime Minister in her speech to the summit stated:

> *"We will ensure that penalty rates, overtime and shift loading and public holiday pay are definite, formal considerations for the Fair Work Commission when it sets award rates and conditions."*[5]

The Prime Minister went on to say in her speech:

> *"We will make it clear in law that there needs to be additional remuneration for employees who work shift work, unsocial, irregular, unpredictable hours or on weekends and public holidays."*[6]

3.2 Prior to this announcement, there had been no consultation with the business community about the industrial, financial and employment effects that might be imposed on business as a result of such legislative change, particularly in industries covered by modern awards that do not currently contain penalty rates for weekend and/or evening work. The Real Estate Industry Award 2010 (RE Award) is such an award. This lack of consultation with representatives of the business community is surprising particularly given the seriousness of the Bill for business.

3.3 The *Fair Work Amendment Bill 2013* was introduced into the Parliament and read a first time on 21 March 2013. This was one week following the Prime Minister's announcement at the ACTU summit. In our submission, the Government has acted with undue haste in introducing the proposed legislation, especially with respect to Schedule 2.

3.4 Schedule 2 proposes to insert a new paragraph 134(1)(da) into the modern awards objective which would require the FWC to take account of –

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[5] Sydney Morning Herald - Thursday 14 March 2013 (on-line)
[6] Ibid.

*"**the need to** provide additional remuneration for:*

(i) employees working overtime or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays;

(iv) *Employees working shifts."* (our emphasis)

In other words it would require that the Fair Work Commission (FWC), when ensuring that modern awards together with the National Employment Standards provide a fair and relevant minimum safety net of terms and conditions, take into account the need to provide additional remuneration for employees working overtime; unsocial, irregular or unpredictable hours; working on weekends or public holidays; or working shifts (Schedule 2).

3.5 It seems to REEF that the primary intention of the Government in seeking to enact Schedule 2 to the Bill, is to ensure that employees continue to be adequately remunerated for working on weekends or in the evening, when considering applications to reduce or remove penalty rates from an award.

3.6 In addressing criticisms from business in relation to Schedule 2 of the Bill, the Sydney Morning Herald attributes the following quote to the Minister for Employment and Workplace Relations:

> *"This won't go to how you set individual rates....What the government's saying though is an objective of our fair workplace relations system is that when you work unsociable hours that needs to be taken into account and weighted into what people get paid."*[7]

3.7 However, as detailed in this submission, REEF remains concerned that the effect of Schedule 2 to the Bill will go far beyond that stated by the Minister. It could be readily anticipated that, subject to the question of interpretation which we consider below, the enactment of Schedule 2 will result in the mandatory insertion of penalty rates into awards that do not presently have such penalty rates regimes for weekend and evening work. This is particularly unfair where the exclusion of penalty rates from an

[7] Sydney Morning Herald – 15 March 2013 (on-line)

award was both deliberate and the result of agreement between employee and employer representatives after consideration of the particular structural features of the industry.

3.8 It is noted, that use of the expression "*the need to*" in the proposed new section 134(1)(da), is in itself unclear and open to different interpretations. It may on the one hand, express a mandated obligation on the FWC to insert penalty rates for all work performed relating to overtime, unsocial, irregular and unpredictable hours as well as hours worked on the weekend or shift, irrespective of any other considerations. Such an approach is anomalous, illogical and unjust and it belies the reasons that industrial tribunals inserted certain penalty rates into particular awards (or did not insert as the case may be) in the first place. We therefore see Schedule 2 as an assault on the independence of the FWC which has been tasked by the Government to be an independent, specialist industrial tribunal to set fair and relevant minimum award conditions.

3.9 Alternatively however, it may be that the expression "*the need to*" allows the FWC to exercise its discretion in determining whether a need exists for penalty rates to be inserted into an award where these do not currently apply. The uncertainty of the legislation in this regard, is of itself troubling.

3.10 Moreover, REEF submits that the use of the term "unsocial hours" in the context of the Bill is vague, imprecise and extremely subjective.

How Schedule 2 might change the way awards are made

3.11 It is REEF's submission that the Bill is underpinned by an incorrect assumption that as a matter of fairness and equity, all workers should be paid more than their normal rate of pay for working on weekends or in the evening. We contend the logic behind this principle is fundamentally flawed. Rather, we say, that as a matter of principle, the FWC as an expert, independent industrial tribunal, should have broad and largely unfettered discretion to make and vary awards (including penalty rates) in the manner that has applied for many years.

3.12 Industrial tribunals have long acknowledged that the history of an award is an extremely important consideration in determining any application to amend the award. This is because most awards have in the course of history evolved into a fair package of minimum terms and conditions of employment. That evolution would frequently have involved arbitrated outcomes, consent positions reached between award stakeholders/parties and other arrangements which have been reached to resolve disputes. REEF therefore contends that the long held industrial principle that awards contain a fair and reasonable package of terms and conditions of employment appropriate to an individual industry or occupation, should be the starting point for any proposed change to a modern award.

3.13 REEF is concerned that Schedule 2 may result in applications by employees and/or unions effectively asking the FWC to divine penalty rates from other awards into the RE Award, notwithstanding that those penalty rates developed as a result of the specific circumstances of the industry/occupation to which those awards apply.

3.14 Moreover, REEF urges the Committee to acknowledge that awards have never been made in a temporal vacuum. At least in part, awards generally reflect the prevailing social, economic, cultural, religious and regulatory environment of the period in which they were either made or varied.

3.15 We prefer and support the long standing approach of many industrial tribunals that parties seeking to vary an award should be required to establish that the change sought is necessary to maintain the award as a fair and reasonable package of terms and conditions and/or to establish that circumstances have changed to the extent that the award needs to be modified. In other words there is effectively a rebuttable presumption that each modern award already contains a fair and just package of employment conditions unless a party can rebut that presumption.

3.16 This point is also well illustrated by a decision of His Honour Justice Marks of the New South Wales Industrial Relations Commission in the decision of *Restaurant & C. Employees (State) Award*[8]. In this case, there were competing applications to create a new restaurant award in NSW. The relevant union was seeking to import into the new

[8] Unreported decision, IRC of NSW 216 of 1995, 23 August 1996 – pages 10-11

award the working conditions as applied to restaurants within a licensed club, pub or motel. On the question whether His Honour should apply some terms and conditions from certain awards into a different award, His Honour concluded:

> *"In order to determine whether I should automatically take the relevant working conditions and rates of pay from the relevant awards and utilise them for the purpose of a restaurant award it would be necessary for me to examine in some detail the circumstances under which each of these awards were made (whether by consent or otherwise) and whether and to what extent there was any trade off or other balancing involved in the establishment of particular working conditions and rates of pay. Insufficient evidence has been placed before me to establish such an analysis to be undertaken and the union certainly did not undertake that analysis in any detailed way.*
>
> *.....on a trading basis some care should be taken in transferring without qualification working conditions from one award to another. This is because the trading operations in each of these areas differs significantly."*

3.17 In its submission to Fair Work Australia on the subject of the legislative context applicable to determining applications in the current two-year review of modern awards, the Australian Government stated:

> *In the Government's view, Fair Work Australia should exercise its discretion to adopt a high threshold for making such changes [to modern awards]*[9]

We agree with the Government's position in this regard and submit that sufficient capacity already exists for an application to be made to vary the industrial conditions under an award, including the insertion/variation of penalty rates. This capacity should not be enhanced by further statutory regulation.

3.18 Appropriately, it should be noted that all modern awards are currently the subject of a 2-year review by the FWC with a further 4-year statutory review scheduled for the end of 2013. There has been no suggestion that the framework for considering modern awards was itself inadequate to an appropriate outcome, nor was there any indication that the modern awards objective was in some way deficient in protecting employees

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[9] Australian Government's submission to FWC "Preliminary Issue" – FWC Matter No. AM2012/8 at paragraph 3.3

under modern awards from inappropriate changes to a fair and relevant minimum safety net of employment conditions.

3.19 Further on this point, in its report into the *Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012*, this Committee noted:

> *Many submitters considered the bill to be ill-conceived as a matter of public policy given the overall framework of workplace relations law and an independent tribunal established by Parliament to oversee industrial matters such as the payment of penalty rates. With a view echoed by others, including the SDA, the ACTU argued that:*
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> *If passed, the Bill would remove existing wages and entitlements that have been determined by an independent tribunal established by the Parliament for the purpose of determining such matters. The tribunal has set (and is required to periodically review) the wages and entitlements attacked by the Bill, following the presentation of merits-based cases by representatives of workers and employers and consideration of all relevant facts and circumstances. There is no basis for Parliament to override this process for a section of the economy.*[10]

From this most recent enquiry into the vexed issue of penalty rates, the Committee will have noted that there was widespread support, including from the trade union movement, to leaving undisturbed the role of the FWC in independently setting the conditions of employment for employees under modern awards.

The Real Estate Industry Award 2010 – an award by the industry for the industry

3.20 Modern awards are generally based on a principal pre-modern Federal award or an amalgam of conditions from various State/Federal awards. This is a result of recognition by the FWC during the award modernisation process about the importance of award history. Therefore each existing modern award in its current form should be seen as being a precedent with significant persuasive value.

3.21 Specifically for the real estate industry, the RE Award came into existence during the award modernisation process. Except in relation to the Clerical & Salaried Staffs' (Agribusiness) Award 1999 which had only 9 respondents, there was no Federal award

[10] Senate Education, Employment and Workplace Relations Committee – at 2.48

in the real estate industry prior to the completion of the award modernisation process. The RE Award adopted provisions from various State based awards (NAPSAs[11]). These NAPSAs applied to the real estate industry in the following states:

- New South Wales;
- Queensland;
- South Australia; and
- Tasmania.

3.22 None of these State based NAPSAs contained a penalty rate in relation to work performed during "unsocial" hours (however defined) or work performed in the evening or on the weekend despite being the subject of review over many years by expert and independent State industrial tribunals. Further in this regard and unlike many industrial awards, these various NAPSAs did not contain a spread of hours during which "ordinary hours" must be worked (insofar as the awards concerned operational employees[12]).

3.23 The Notional Agreement Preserving the Estate Agents Award (Tasmania) was an instrument that regulated the employment of not only operational employees in a real estate office but also clerical/administrative staff. This NAPSA provided penalty rates for work performed by clerical/administrative employees on the weekend or outside a span of ordinary hours but property sales consultants and property management employees were specifically exempt from this provision.

3.24 The architects to the NSW NAPSA (Real Estate Industry (State) Award 2003), which included both union and employer representatives, determined it important that the NAPSA recognise the freedom demanded by employees in the industry to assemble their working week as they chose, subject to restrictions on the number of days worked in any week. The absence of penalty rates for evening and weekend work was a feature of the various real estate awards in the NSW jurisdiction since the first award was made in 1966.

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[11] Notional Agreement Preserving a State Award
[12] The term "operational employee" refers to employees engaged in a sales or property/strata management classification

3.25 In its submission to the then Australian Fair Pay Commission (AFPC) to establish a new Australian Pay & Classification Scale for commission-only employees, the Property Sales Association of Queensland (PSAQ) - union of employees - observed:

> *"The experienced salesperson is generally quite individualistic, likes to work with others but not for others, and doesn't want the responsibilities and/or ties of business ownership. He or she doesn't like being told what to do or when to work..."*[13]

3.26 REEF's agrees with the observations of the PSAQ in this regard. Operational employees in the real estate industry demand flexibility in their working hours and appreciate that such hours must be worked so as to maximise their income earning potential. This will invariably involve work in the evening, and particularly, work on the weekend. In the main, operational employees have an entrepreneurial attitude to their work. Their goal is clearly directed towards making sales or managing property because it's their success in this regard that will largely determine income levels. There has always been an emphasis in the real estate industry on payment "by results" rather than payment "by time". This is clearly a distinguishing feature of the real estate industry.

3.27 There is one very key defining commercial matter which further distinguishes the real estate industry from other industries - the "stock" (property listings) which forms the very basis of the business is unable to be obtained from a manufacturer, supplier or financial provider. Stock must be sourced and procured as a result of the agency's own efforts or those of its employees. It is recognised and understood, that such efforts must take place at the convenience of the customer (in the case of the real estate industry, the home owner).

3.28 The construction of the various State NAPSAs clearly recognised the need for employees to have this flexibility to work hours and days of their choosing without the application of a penalty rate to work performed at particular times of the day or week.

3.29 The RE Award was the product of a consent position between the unions and employer representatives in the industry. Consistent with all NAPSAs that operated within the industry, the modern RE Award made by the then Australian Industrial

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[13] PSAQ submission to the AFPC –page 5 – January 2007

Relations Commission (AIRC) in December 2009, did not contain penalty rates for work performed on the weekend or in the evening. It was an award made by the industry for the industry. The flexibility it provides in relation to hours of work is a reflection of its history as well as the particular characteristics of the industry. There is no evidence of the need for change (either statutorily or otherwise) in this regard. Any change imposed on the industry by way of Schedule 2 would be unjust, uncalled for and unwarranted.

3.30 Industrial tribunals are obligated to ensure that awards comprise a fair and reasonable set of minimum conditions of employment for employees. It should not be overlooked that, despite the opportunity to do so, the AIRC did not see fit to insert penalty rates for either weekend or evening work when it made the RE Award in 2009.

The unfairness of Schedule 2 to the Bill

3.31 REEF is concerned there is the potential for the FWC to be required by the Bill to hear applications seeking to insert penalty rates as if the award was 'tabula rasa' on the issue of penalty rates. In other words, it would require that the FWC have little or no regard for the historical reasons that there are no penalty rates in the award, without due regard to either the precedent decisions of the tribunals that made the awards and without due regard to whether the party seeking the change had previously consented to such arrangements or why that party had changed its position.

3.32 In the case of awards without blanket penalty rates for weekend or evening work, it will unfairly 'change the goal posts' in a manner that unjustly impacts on employers after decades of industrial history in those awards and their predecessor awards.

3.33 Furthermore, Schedule 2 will inevitably result in change and uncertainty for businesses which are already suffering from change fatigue after an onslaught of workplace relations changes over the past 8 years.

3.34 REEF is concerned that if Schedule 2 to the Bill is passed, it will result in a penalty rate regime being applied in awards based on the penalty rates from other unrelated awards. Such cross-contamination of penalty rates regimes between awards would result in manifestly unfair, unjust and illogical outcomes.

The weekend imperative in the real estate industry

3.35 While some industries have very little reason or incentive to operate on weekends, for others, including the real estate industry, it is a business imperative to operate at this time. The REEF survey showed that over 98% of respondents provide real estate services on a Saturday – the vast bulk of which (75%) operate for the entire day up to 5.00pm. 'Saturday' is considered a vitally important time to do business. 92% of respondents indicated that Saturday is an important time to conduct 'open homes', either for sale or lease. 65% indicated that it was an important time to arrange listing presentations in order to boost the stock for sale. Importantly, Saturday is a highly convenient time for the general public to attend to their real estate needs. Therefore REEF contends that there are powerful public interest grounds for not discouraging real estate agencies from providing services on the weekend or in the evening.

3.36 The Survey showed that approximately 35% of respondents conduct business on a Sunday. While this clearly suggests Sunday 'trading' to be less common in the industry, the motivation for these businesses to operate on Sunday is similar to those identified in 3.35.

3.37 Significantly, the Survey further showed that approximately 50% of respondents have at least one employee working before 7.00am and/or after 7.00pm. Work at this time is crucial to many businesses, particularly in relation to activities that assist with stock procurement. Either early morning or evening is a highly convenient time for home owners to meet with an agency representative to discuss the sale or management of the owner's property.

3.38 It would seem an unarguable proposition that remuneration in the real estate industry is very much "incentive driven". Contracts of employment for operational employees commonly contain some form of commission or other incentive based entitlement. Such arrangements are both diverse and complex. The introduction of penalty rates for unsocial hours and work performed on weekends will forcibly alter the fabric of how operational employees are remunerated in a way that which neither employees nor employers in the industry have called.

3.39 Almost 70% of respondents to the Survey indicated that the introduction of penalty rates would result in fewer employees being rostered to work on the weekend or lead to a reduction in the hours that staff work on the weekends (61%). 82% of respondents indicated that the introduction of penalty rates for work performed on weekends for operational employees, would potentially threaten the financial viability of the business. It is anticipated the economic impacts on both businesses and employees of introducing penalty rates to an industry currently exempt from such rates, will be significant.

Schedule 2 should not be enacted

3.40 REEF recommends that Schedule 2 not be enacted in its current form, nor enacted at present. We contend Schedule 2 is unnecessary to achieve the Government's principle of protecting penalty rates for employees working unsocial hours.

4. Schedule 3 – Anti-bullying measure

4.1 Schedule 3 proposes to insert a new Part 6-4B titled, "*Workers bullied at work*". This new part would allow a worker who believes he or she has been bullied at work to apply to the FWC for an order to prevent the worker from being subject to bullying at work. Schedule 3 is the Government's response to the report into workplace bullying of the House Standing Committee on Education and Employment titled "***Workplace Bullying – we just want it to stop***".

4.2 Firstly, REEF adopts and supports the submission of ABI that bullying in the workplace is totally unacceptable - in the same way it is unacceptable in other areas of public or private life.

4.3 REEF contends that the problem that is workplace bullying, is an extremely vexed, complex and little understood issue and this exacerbated by the fact that academics have primarily considered the issue from the perspective of complainants[14]. In particular, we submit there is little understanding of:

- the extent to which employees in Australia have been making bullying allegations which are completely false and baseless;
- the extent to which employees who have been undergoing a "reasonable" performance and disciplinary process, make false claims of bullying to derail the process;
- the extent to which bullying claims are made as a tactical manoeuvre to achieve success in other types of claims such as unfair dismissal;
- the extent to which the financial cost of bullying in the workplace is being exacerbated by false and baseless bullying allegations;
- the extent to which accused bullies (i.e. persons accused of bullying) then make false and baseless bullying allegations themselves;
- the incidence of 'upward bullying' i.e. workers bullying managers and employers;
- the consequences on individuals who are falsely accused of bullying (including the adverse psychological impacts on such people);
- the grey area between actual bullying (i.e. which can be readily identified as bullying) and the normal friction, tension or disagreement between individuals in the workplace;
- the extent to which providing additional legislative remedies in relation to workplace bullying may encourage a spate of false and vexatious bullying claims;

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[14] Jenkins, M.F., Zapf, D., Weinfield,H. and Sarris, A., "Bullying Allegations from the Bully's Perspective", British Journal of Management 2011 (British Academy of Management) published by Blackwell Publishing Ltd, Oxford UK and Malden MA USA

- the extent to which bullying allegations have not been able to be substantiated through workplace investigations;

- the extent to which false bullying allegations might increase a tense and potentially unsafe workplace environment. In the case of *Sluggett v Commonwealth of Australia* (a discrimination case which involved bullying allegations), the Federal Magistrate stated:

  > *"it seems to me to be more likely than not that it was [the complainant's] behaviour and attitude, which substantially created this difficult workplace situation.."*[15]; or

- the propensity for some employees to exploit legal rights such as those proposed by Schedule 3 to the Bill to intimidate their employers. In Sluggett, the Court found that the complainant *"did indeed use her undoubted familiarity with the mechanisms of complaint as an instrument of intimidation against the respondent and its agents."* [16]

4.4 REEF is also concerned that there are additional difficulties with the Bill's approach to alleged workplace bullying which have not been properly considered. Such difficulties include:

- the issue of whether or not someone has been bullied is often a very subjective assessment;
- there are often conflicting accounts between the complainant and the alleged bully and there are frequently no other witnesses; and
- there are already other remedies available for genuine workplace bullying which will overlap with Schedule 3 including work, health and safety laws, State and Federal anti-discrimination laws, the general protections provisions of the *Fair Work Act 2009* and common law actions. Some employees who believe they may have been bullied at work, may also have rights to utilise the dispute resolution provisions of under the award or agreement that regulates their employment. Extreme cases of workplace bullying may also constitute criminal assaults which may perhaps be better dealt with through the applicable criminal laws in the State or Territory where the bullying occurred.

4.5 The fact that workplace bullying exists and, on occasions, can have tragic consequences, is beyond dispute. The Brodie Panlock case is such an example. However, more common are bullying complaints made amidst disputes concerning workload, promotion or performance. As stated by ABI in its submission, one of the key issues in trying to give dimension to the incidence of bullying is where the line

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[15] Sluggett v Commonwealth of Australia [2011] FMCA 609 (30 August 2011) at paragraph 259
[16] Ibid. at paragraph 728

should be drawn between human diversity and unacceptable conduct. The question on whether or not bullying has occurred, will frequently hinge on the highly subjective notion of what is and isn't permitted in a vigorous exchange. Indeed, it's an unfortunate feature of the contemporary workplace that a range of human behaviours such as rudeness, impoliteness and steadfastness often attract the tag 'bullying'. Simply feeling that their working life is unpleasant or they are being inappropriately treated, should not give rise to a complaint of workplace bullying. REEF contends the proposed legislation will have the effect of opening the doors to an uncontrollable increase in unmeritorious bullying complaints with the consequential effect of 'encouraging' employers to offer "go away" money.

4.6 The Committee should have regard to high proportion of bullying complaints which do not in fact amount to bullying, are trivial or which cannot be substantiated. As reported by Guilliatt[17], more than two-thirds of the bullying complaints handled by WorkSafe Victoria in 2010-11 were not substantiated and less than **one per cent** were serious enough to warrant possible prosecution.

4.7 REEF does not believe that the issue of bullying belongs within the *Fair Work Act 2009* but rather is best dealt with through the relevant workplace, health and safety laws. We believe this is appropriate because:

- Bullying is such a complex and misunderstood issue as stated above;
- The factual matrix behind bullying allegations are often complex; and
- Bullying allegations often arise out of interpersonal disputes that may have little or nothing to do with the employer (for example if one employer 'defriends' another employee on a social media site or excludes them from a social function at which other work colleagues are invited).

4.8 Despite the provisions of section 789FD(2) of the Bill, REEF is concerned employers (and especially small business employers) will be severely restricted in their ability to conduct a counselling and disciplinary process for work performance issues or misconduct to the extent required to successfully defend an unfair dismissal claim. In our view, the Bill will provide far greater scope for employees to derail reasonable performance management actions by alleging that the performance management actions constitute bullying. The difficulty with this is that the focus and emphasis will then shift from the employee's performance to the question of whether the performance management action is reasonable or whether it is bullying.

4.9 REEF recommends that Schedule 3 not be enacted at this time. REEF contends that greater consultation should take place between the States and Territories and industrial stakeholders to establish appropriate processes for dealing with complaints of bullying.

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[17] Richard Guilliatt, The Australian newspaper 26 November 2011, "Workers at War" (on-line)

4.10 REEF again thanks the Committee for its consideration of these submissions.