Business Council of Australia

Senate Education, Employment and Workplace Relations Committees

Inquiry into the Fair Work Amendment Bill 2013

APRIL 2013

The Business Council of Australia (BCA) brings together the chief executives of more than 100 of Australia's leading companies, whose vision is for Australia to be the best place in the world in which to live, learn, work and do business.

About this submission

This submission is made to the Senate Committee in response to the Fair Work Amendment Bill 2013 introduced in the Parliament 21 March 2013.

The Bill includes:

- changes to existing provisions relating to parental leave, the right to request flexible working arrangements and transfer to a safe job for pregnant women;
- new provision relating to consultation about changes to rosters or working hours
- an amendment to the 'modern awards objective' to protect overtime and penalty payments
- workplace bullying and
- right of entry for union officials.

The BCA has provided substantial material in relation to the Fair Work Act including two submissions to the 2012 review of the Fair Work Act and a joint business association letter. These documents can be found on the BCA website **www.bca.com.au**.

Key points

The government's recently announced second tranche of amendments to the Fair Work Act 2009 fails to address the core issues that need to be resolved in order to enhance productivity and competitiveness so as to provide an environment where employers can grow their business and provide additional employment opportunities.

This package of proposed amendments is a missed opportunity resulting from poor process and poor policy.

The amendments in no way address the core issues raised by the business in submissions to the review of the Fair Work Act in 2012. Indeed, several of the amendments fall outside the consideration and recommendations of the Panel who undertook the review.

The federal government has failed to meet its own commitments to business on regulation making.

Australia needs to move away from the adversarial approach that has characterised industrial relations policy formulation and implementation over recent decades. The workplace relations environment needs to promote direct engagement between employer and employee, and place a premium on, and reward, leadership, worker autonomy, collaboration and innovation.

The Fair Work Act needs to be amended to make it less adversarial and provide the capacity for employment arrangements that align with the operation of a business, work for the employer and employee and support the growth of jobs.

Key recommendations

The package of proposed amendments includes a number of provisions which are likely to be significantly detrimental to the economy, business and jobs and should not be passed in their present form. These include:

- changes to rights of entry of trade union representatives and location of meetings with trade union representatives
- requiring that awards and agreements include a provision that employers consult with employees and their unions before changing rosters or working hours

- expanding the objectives of modern awards to institutionalise penalty and shift loadings in the cost of the labour market
- introducing definitional issues with regard to 'reasonable business grounds' in considering flexible work arrangements
- using the Fair Work Commission as a forum to address workplace bullying
- using the Fair Work Act to address the impacts of domestic violence.

The current Bill does not include amendments in relation to arbitration. The government has indicated it is considering amendments to provide for arbitration for intractable disputes and greenfields agreements.

The BCA does not support any reintroduction of arbitration.

The reintroduction of arbitration would be a significant backward step and would reflect a major reversal in workplace relations policy under Labour and Coalition governments. Successive legislative reforms have been designed to limit third party interventions in workplace relations. Third party arbitration compromises the bargaining autonomy of employers and employees to agree an outcome and potentially encourage and reward behaviour that contravenes good faith bargaining – the opposite to what the legislation is meant to do.

The BCA considers that changes to workplace relations policy need to be directed to fostering innovation, promoting productivity growth and constraining business costs. Changes should:

- reduce the range of matters that can be bargained over to ensure they truly pertain to the employment relationship
- provide access to employer only Greenfield agreements in the advent that an employer is not able to make a Greenfield agreement with a union under good faith bargaining principles
- enhance the capacity to agree flexibility arrangements with employees including through individual flexibility arrangements
- reduce the scope of the adverse actions provisions with the aim of removing opportunities for vexatious claims
- limit access to protected industrial action where there has been unreasonable or capricious use of such action
- make unlawful clauses which exclude the engagement of contractors or labour hire companies
- modify the "better off overall test" to provide for a broadening of matters that may be taken into account in the application of the test
- modify provisions relating to majority support determinations (MSD) to ensure that they are made on the basis of a secret ballot and provide that the MSD can be revisited in situations where there has been protracted bargaining and agreement has not been reached
- amend the transfer of business arrangements to include a sunset clause after twelve months and to make it easier for employees within a corporate group seeking to transfer to a related entity to be employed under the conditions of the related entity.

DISCUSSION

Federal government fails to meet its regulation-making commitments to business

The federal government is a signatory to the April 2012 COAG National Compact on Regulatory and Competition Reform. This is a compact between Australian governments and business designed to improve regulation-making practices.

In recognising the benefits of good regulation-making processes, the federal government made a number of commitments, including to:

- 'engage early, engage genuinely and consult at each stage of the reform process

- apply best-practice regulation impact assessment and ultimately be responsible for demonstrating that the benefits of regulations outweigh the costs, including having regard to the differential impact and experience of regulation on small and large businesses
- be flexible in the approach taken to regulation. Unnecessary duplication and overlap between jurisdictions will be avoided and national market approaches adopted when appropriate. However, in some circumstances, bilateral agreements, multilateral approaches or competition between jurisdictions will lead to the best outcome.'[1]
- In introducing the Fair Work Amendment Bill 2013, the federal government has failed to meet its own commitments to business in relation to regulation making.

The development of the Bill fails the test of best practice regulation making

The purpose of regulation is to reduce risk – for example, risks to personal or public safety or risks to the economy and environment. A risk-based approach to regulation ensures that regulatory effort is directed at the areas where it will have most impact.

Adopting a risk-based approach to regulatory design, implementation and review is critical to lifting regulatory performance by ensuring that where regulations are introduced they are the appropriate lever for government to use to achieve a particular outcome efficiently and effectively.

The key principles underpinning best practice regulation using a risk management approach are:

- Before governments seek to regulate, they must understand the problem or policy priority in depth and test the case for regulation, along with the risks and consequences of not regulating a particular activity.
- The costs of new regulation are thoroughly assessed and tested with the community through cost–benefit analysis, which includes an explicit understanding of the costs to the community including business.
- Regulation is carefully targeted to achieve its stated objectives and minimise the cost impacts on the community including business.
- The attachment to this submission includes a more detailed best practice regulation making checklist. The processes related to the development of this legislation clearly fail the test.

It is important to note that a significant number of the amendments were not even subject to the considerations of the 2012 Fair Work Act Review or any discussions with employers prior to their introduction eg inclusions of new objectives in the Act and the provisions related to additional consultation on rostering.

The result is that regulation is being made where there has been:

- no evidence provided of the scale of the problem it is ostensibly intended to address
- no assessment as to whether the cost of the proposed regulation is in line with the risk and benefit of the regulation and
- no assessment as to whether there are other more appropriate means of addressing the matter.

The amendments fail the test of good policy

Improving workplace relations is critical to enhancing business and community confidence.

Workplace regulations directly impact on businesses' capacity to employ people and manage their labour force so as to innovate and to respond to competitive pressures.

Productive workplaces are ultimately the key to sustained improvements in the community's real income.

[1] Council of Australian Governments, National Compact on Regulatory and Competition Reform: Productivity Enhancing Reforms for a More Competitive Australia, at www.coag.gov.au.

Australia needs to move away from the adversarial approach that has characterised industrial relations policy formulation and implementation over recent decades.

The workplace relations environment needs to promote direct engagement between employer and employee, and place a premium on, and reward, leadership, worker autonomy, collaboration and innovation.

This Bill fails at both the test of reducing adversarial regulation and the test of promoting direct engagement between employers, managers and employees.

Arbitration

While welcoming the introduction of good faith bargaining when negotiating a greenfields agreement, the benefit of the provision would be compromised by the introduction of greenfields arbitration and the proposal to introduce arbitration more broadly – a proposal that was not endorsed by the Fair Work Act review panel in 2012.

Any reintroduction of arbitration would be a significant backward step and would reflect a major reversal in workplace relations policy under Labour and Coalition governments. Successive legislative reforms have been designed to limit third party interventions in workplace relations. Third party arbitration compromises the bargaining autonomy of employers and employees to agree an outcome and potentially encourage and reward behaviour that contravenes good faith bargaining – the opposite to what the legislation is meant to do.

Should the government proceed with amendments in regard to arbitration we ask that the Parliament not support the amendments.

Instead, the government should be asked to address directly the core issue associated with the negotiation of greenfields agreements. Employers and head contractors are now dealing with unions who are increasingly seeking excessive pay and conditions well above market standards. Employers and head contractors have limited options when they require a greenfields agreement so they can progress financing and project commencement.

What is required is an amendment to the Fair Work Act which provides a check on excessive demands. The Act should include capacity for the head contractor facing excessive demands to seek the review of the proposed agreement by the Fair Work Commission against a set of criteria including the relevant award, national employment standards and better off overall test. Subject to the agreement meeting these criteria the commission should then have the power to issue a greenfields determination for the duration of the project.

Rights of entry

The government while in opposition in 2007 committed it would maintain the arrangements at that time with regard to rights of entry. This commitment has not been honoured and the grounds for union entry were expanded under the Fair Work Act to include a right of entry even where a union was not party to an agreement on that site. The end result has been a substantial growth in visits.

The amendments included in this Bill, while supposedly designed in part to reign in union access, fail to address the problems associated with excessive numbers of visits to workplaces by union officials – especially where the union does not have members at the site:

- the requirement that the frequency of entry by permit holders ‘would require an unreasonable diversion of an occupier’s critical resources’ will lead to disputes over definition as well as constituting such a high threshold for access to relief that it may largely deprive the proposed provision of practical effect and
- the proposed changes apply only to excessive use of right of entry for purposes of meetings with members or potential members – entry for enforcement or WHS purposes is equally susceptible of abuse, and also must be addressed
- establishing a new default in the legislation that where there is no agreement between the employer and union as to the location of meetings the lunch room or lunch area is to be the

meeting location severely limits the capacity for employers to exercise discretion as to where trade union representatives hold meetings and means of access to such places.

The BCA does not support these amendments. At a minimum the provisions relating to rights of entry should be redrafted to reflect the arrangements that were previously in place ie:

- a union has a right to enter a workplace where:
  - the union is covered by an enterprise agreement that covers the site or be attempting to reach one
  - the union can demonstrate that it has members on that site
  - those members have requested the union's presence.

On the matter of location of meetings, the proposed default arrangements should be removed and the Fair Work Act Panel review recommendation should be used ie provide the Fair Work Commission with the capacity to hear disputes about location of union visits.

Inclusion of model consultation clause on changes to rosters and working hours

The Government has not articulated any clear or compelling rationale for this proposed change.

The Bill and the explanatory memorandum (EM) do not provide an adequate definition of when such a clause would apply. The EM, however, appears to be suggesting consultation will be required across a range of situations where changing hours would be the norm, including the hours of casual employment.

The Bill also introduces an expanded role for third parties in the day to day interactions between employers and employees on matters related to rosters and working hours and requires that 'the dispute resolution mechanisms of the relevant workplace instrument apply to the operation of the consultation term' (EM, para 48). Depending on the content of that 'dispute resolution mechanism', this could include the imposition of an arbitrated outcome in relation to any 'dispute' about proposed changes to rosters or hours.

The proposed amendment also appears to ignore the established arrangements in awards, many of which were implemented following the Family Provisions Test Case.

The provisions do not appear to have been thought through sufficiently – as evidenced by the lack of clarity as to what is to constitute a 'regular roster' or 'ordinary hours of work'.

The amendment leaves the way open to increased third-party intervention in the management of businesses, and could (depending on the content of dispute settling clauses) result in the imposition of arbitrated outcomes in relation to what ought properly be seen as matters for management.

Given the absence of evidence to justify this amendment the Parliament should reject this amendment.

This matter, instead, should be considered as part of the scheduled modern awards review.

Amending the 'modern awards objective' to protect overtime and penalty payments

On 14 March 2013 the Prime Minister announced that the Fair Work Act would be amended to 'ensure that penalty rates, overtime, shift work loading and public holiday pay are definite, formal considerations for the Fair Work Commission when it sets award rates and conditions'.

The Bill seeks to give effect to this commitment by providing for the amendment of section 134 of the Fair Work Act to the effect that the Fair Work Commission ('FWC') 'must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(da) the need to provide additional remuneration for:

- employees working overtime; or
- employees working unsocial, irregular or unpredictable hours; or

- employees working on weekends or public holidays; or
- employees working shifts.'

It should be acknowledged that there already exists under section 139 (1) of the Fair Work Act the capacity to address this matter. Under this section the terms that may be included in modern awards include amongst other matters both overtime rates and penalty rates for a range of situations including weekends and public holidays and unsocial or irregular or unpredictable hours.

Workplace bullying

Workplace bullying is of concern to us all. There should be appropriate pathways for individuals to seek redress. What is required is to ensure we have the right approach – poorly designed legislation will neither assist persons at risk of, or experiencing, bullying nor be supportive of good performance management practices within businesses.

Workplace bullying is not an industrial relations issue and should continue to be regulated through work health and safety laws.

We are of the view that rather than unilaterally establishing a new federal jurisdiction the government should work with all jurisdictions and business to identify a more appropriate way to provide people with protection from workplace bullying, and recourse where workplace bullying occurs.

The current drafting is particularly problematical in that it fails to provide any clear guidance to what would constitute 'reasonable management action' potentially leaving employers exposed to veracious claims.

Family friendly measures

Significant aspects of this part of the Bill have not been put through any consultation process and tested. In fact only two of the measures were raised in the context of the Fair Work Act review panel recommendations.

As a result there are substantial concerns about aspects of what is being proposed. In particular the new section 65(5A) which lists some of the factors that may be taken into account in determining whether there are 'reasonable business grounds' for refusing a request for flexible working arrangements.

While the provisions are not mandatory, the poor drafting of this section could be taken to mean an employer is expected or required to accept some level of cost or make changes to working arrangements of other employees or accept a loss of efficiency or reduce customer service so as to accommodate a request for flexible working arrangements.

Were this to be the case, it would be an excessive demand on employers as they balance the need to provide flexible working arrangements and operate a viable business.

The BCA is of the view that these provisions should not be included and that the legislation should not try to define 'reasonable business grounds'.

The Bill extends the right to request flexible working arrangements to those experiencing violence from a member of their family. In practice this proposal is likely to be unworkable. As drafted the amendment does not provide any basis for an employer to seek verification of the violence and leaves employers in a difficult situation having to compare requests.

Domestic violence is an intolerable action which needs to be addressed and requires direct intervention on the part of appropriate government agencies be they the police, the courts or social services.

The drafting of these provisions provide clear evidence of the inadequacy of the consultation process and poor regulation that has resulted. The government should be required to consult with business and other groups to identify how to address the issues associated with these proposed amendments.

Conclusion

The government's recently announced second tranche of amendments to the Fair Work Act 2009 fails to address the core issues that need to be resolved in order to enhance productivity and competitiveness so as to provide an environment where employers can grow their business and provide additional employment opportunities.

This package of proposed amendments is a missed opportunity resulting from poor process and poor policy.

The amendments in no way address the core issues raised by the business in submissions to the review of the Fair Work Act in 2012. Indeed, several of the amendments fall outside the consideration and recommendations of the Panel who undertook the review.

The federal government has failed to meet its own commitments to business on regulation making.

Australia needs to move away from the adversarial approach that has characterised industrial relations policy formulation and implementation over recent decades. The workplace relations environment needs to promote direct engagement between employer and employee, and place a premium on, and reward, leadership, worker autonomy, collaboration and innovation.

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Attachment: Detailed Checklist for New Regulation

This checklist is based on the Business Council of Australia Standards for Rule Making.

Standard
1. Government conducts an early up-front risk assessment
2. Government has clear objectives for considering regulation
3. All options that are proportionate to the problem at hand are considered, including non-regulatory options
4. Preliminary analysis and the need for regulation are tested with stakeholders
5. Cost-benefit analysis that includes a detailed understanding of the costs to business is the centrepiece of regulatory impact assessment processes
6. The depth of assessment is proportionate to the impact of the proposed regulation
7. The benefits of any new regulation are demonstrably assessed to outweigh the costs
8. Impact assessments ensure that proposed regulation does not unnecessarily restrict competition
9. Government and business regulatory treatment is neutral (where applicable)
10. Regulatory impact assessments are mandatory for significant regulations, with exceptions confined to very limited circumstances
11. Regulatory impact assessments are subject to adequate public consultation
12. Impact assessments have an eye to implementation
13. Regulation is generally drafted to be outcome-focused rather than prescriptively defining the inputs to regulatory compliance
14. Regulation is drafted in plain language and actually reflects the policy intent
15. Before drafting new regulation, governments test whether existing regulations or other Australian governments already address the same or related problem
16. Regulatory powers are designed to be proportionate to the problem being managed
17. All new regulations are introduced with a sunset clause

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