Meerkin & Apel

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Committee Secretary
Senate Standing Committees on Education, Employment and Workplace Relations
PO Box 6100
Parliament House
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Dear Secretary,

SUBMISSIONS REGARDING THE FAIR WORK AMENDMENT BILL 2013

Meerkin & Apel represents the industrial interests of 77 out of the 79 Victorian Local Councils, several Water Corporations, the majority of Victorian Library corporations as well as a diverse range of corporations in the private and social services sectors.

In the interests of our clientele, we wish to raise objections and concerns regarding the proposed amendments to anti-bullying measures, right of entry and the modern award objectives as contained in the *Fair Work Amendment Bill 2013* ("Bill").

We also wish to reiterate our concerns regarding certain amendments to the *Fair Work Act* 2009 which were introduced by way of the "*Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Bill 2012*", which received royal assent last year.

Anti-Bullying Measures

For the reasons outlined below, we object to the proposed amendment to give the Fair Work Commission (FWC) the jurisdiction to deal with bullying complaints:

FWC - inappropriate jurisdiction for bullying complaints

Workplace bullying is essentially an occupational health and safety issue which is more than adequately covered by existing occupational health and safety legislation which exists in all States and Territories.

In accordance with current occupational health and safety laws, employers have an obligation to eliminate and control hazards, including bullying, in the workplace. State regulatory bodies, such as WorkSafe Victoria, currently have the capacity to investigate and prosecute workplace bullying. For example, WorkSafe Victoria, has the statutory

authority or ability to investigate claims of bullying and to enforce compliance by employers and employees by issuing Provisional Improvement Notices.

Furthermore, if workplace bullying results in an injury or illness to an employee, then workers' compensation legislation enables such employee to be compensated and, in many cases, to be rehabilitated back into the workforce.

Occupational health and safety law is a highly specialised area. Current occupational health and safety laws and regulations offer the most appropriate mechanism for addressing workplace bullying.

We therefore respectfully submit that the FWC does not have the specialist knowledge or resources to deal with workplace bullying appropriately and/or effectively.

Proposed changes will impact on employers' procedures for responding to bullying

We note that, in many cases, employers have comprehensive procedures and policies in place to deal with bullying. As a result, employers often engage specialist external investigators to conduct investigations if an employee brings a complaint alleging bullying in the workplace.

If the proposed amendments are implemented, claims will be lodged and dealt with by the FWC prior to an external investigation being completed. For example, the Bill requires the FWC to deal with claims within 14 days. Within a larger organisation, it is highly unlikely and/or improbable that an external investigation regarding a bullying complaint would be completed within this timeframe.

Therefore, the proposed amendments will cut across employers' policies and procedures for dealing with bullying, resulting in unnecessary duplication, additional administrative burdens and increased costs for both the FWC and employers. Furthermore, the process will increase the existing widespread confusion about what workplace bullying is, and will potentially increase disputation within workplaces.

Proposed process is impractical and costly and may have other prejudicial impacts

We submit that providing the FWC with the power to arbitrate claims regarding bullying will potentially paralyse a workplace. Arbitration is a lengthy and rather disruptive process for all involved. Employees subject to participation in these hearings will be required to provide full and frank disclosure of information. This may inhibit the ability of some people to be able to participate in the investigations freely. We submit, at the very least, that the FWC should hold a compulsory conference prior to a hearing.

Currently, after an employee has lodged a claim alleging workplace bullying, it is common for the employee to go on sick and/or stress leave and receive workers' compensation. Therefore, we submit that the requirement for the aggrieved employee to attend a conference or hearing within such a short time period after the alleged bullying, will not only be impractical but also potential unsafe for the employee concerned.

The proposed process will also be time-consuming and costly for both employees and employers alike, including time away from work, disruption to operations, etc. In addition, the process (particularly open hearings) may have a detrimental effect on morale at the workplace, may discourage employees from coming forward with confidential information and may increase the likelihood of victimisation.

Right of Entry

We also oppose the proposed inclusion of section 492 which mandates that meal rooms or break areas are default locations for union officials to conduct interviews or hold discussions with employees.

We submit that the proposed changes have the effect of removing employers' right to reasonably request that interviews be conducted and discussions held in a particular area of the workplace. Further, the proposed amendments provide no incentive for unions to enter into sensible discussions with employers about a reasonable location.

Meal rooms and break areas are used by all employees, including those who are not union members and those who do not wish to participate in union discussions. In Victorian Local Government, only a minority of employees (about 20%) are union members. We submit that the proposed amendment will disproportionately impact on the right of non-union members not to be disturbed or interfered with during meal breaks.

Under the existing Act, unions have the right to challenge the location proposed by the employer in the FWC. We submit that the current mechanisms for dealing with Right of Entry disputes in the Act are appropriate for dealing with such disputes and that there is no need to implement the proposed amendment.

Modern Award Objective

We object to the proposal to insert a new element into the modern awards objective requiring the FWC to consider, when making or varying a modern award, the need to provide additional remuneration for employees working overtime, unsocial, irregular or unpredictable hours, weekends, public holidays, or shift work (section 134 of the Bill).

Clause 21(2)(b) of the *Local Government Industry Award 2010* (which currently only applies to the Northern Territory), provides that ordinary hours for employees (in numerous roles and work areas) can be worked Monday to Sunday. Clause 23.3 of the Award stipulates that "*Employees engaged in recreation centres or community services will not be entitled to weekend penalty rates for ordinary hours worked on Saturday or Sunday between the hours of 5.00 am and 10.00 pm*".

These clauses reflect traditional historical arrangements and allow Councils to continue to provide a variety of valuable services to the community. We submit that the requirement for FWC to consider the need to provide additional remuneration for weekend work fails to recognise that the Award does not provide for weekend penalty rates because of this long-standing historical arrangement.

The matter of penalty rates and hours of work in modern awards has been extensively dealt with already by the Commission. We submit that the proposed amendment will encourage applications to vary awards, and may result in a requirement to pay penalty rates, for ordinary hours, to employees in recreation centres or community services.

All Victorian Councils have enterprise agreements and therefore there would be no immediate impact, for the life of each enterprise agreement, if this eventuated. However, it would ultimately lead to increased costs for Local Councils and would potentially render unviable some of the important services that are provided to the community. These include family support services, welfare, children, youth, aged and domiciliary services, recreation, leisure, arts, visitor information services, and cultural/historical activities.

Later this year, it is expected that there will be a new modern award to replace the public sector transitional award (*Victorian Local Authorities Award 2001*) which currently applies to Victorian Local Government. It is likely that the content of the existing Local Government Industry Award 2010 will be reflected in the new modern award. Regardless, any such replacement award will become the new reference instrument for the "Better Off Overall Test" (BOOT). We submit that if weekend penalty rates become a feature of modern awards, it will be impossible for Councils to meet the requirements of the BOOT for new enterprise agreements in regard to recreational and community services workers.

This would in turn result in increased costs to the community and/or discontinuance of recreational and community services provided by Councils.

We can see no valid reason as to why the modern awards objective should be varied in the manner proposed.

Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and other measures) Bill 2012

By letter dated 22 August 2012, we wrote to you in relation to a drafting error and our issue with the provisions contained in Schedule 2 – Part 2 of the abovementioned Bill, in regard to the inclusion of section 84A – Replacement employees in the Act. We note that we did not receive a satisfactory response and reiterate our concerns expressed in our previous letter.

As a result of the abovementioned Bill receiving royal assent, our firm was asked to advise clients on the impact of the amendments. It came to our attention that there appears to be an error in drafting and some particularly prescriptive and somewhat unsavoury provisions, which have caused significant concerns for employers.

There appears to have been a drafting error at 84A(b)(ii) referring to the employee taking **unpaid personal leave**. We believe that the correct wording should be "*the employee taking unpaid **parental** leave*".

More importantly, our clients are shocked at the prospect of being required to include such confronting clauses and letters of appointment for "*Replacement employees*" as is prescribed by section 84A.

Currently, our clients include clarification regarding the nature of Parental Leave replacement appointment by referring to the rights of the incumbent employee to return to work before the designated end date for the temporary appointment. This notification to the replacement employee covers all of the scenarios which are contemplated in section 84A.

However, the amendments require the employer to specifically identify circumstances which will terminate the temporary appointment, as an example the amendment requires that the replacement employee is subject to termination earlier if "*the pregnancy ends other than by the birth of a living child or if the child dies after birth*".

This type of specific, confronting language is unnecessary and out of place in what is generally the first correspondence between an employer and a new employee. We can see no justification for the need for such explicit content, when the current practice adequately advises the employee of the possibility to end the temporary employment prior to the nominal end of the appointment.

CONCLUSION

We therefore respectfully request that our above submissions in relation to both the *Fair Work Amendment Bill 2013* and to the amendments introduced by the *Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Bill 2012*, be duly considered.

Yours faithfully

GARY KATZ