Victorian Hospitals' Industrial Association

88 Maribyrnong Street, Footscray VIC 3011 ABN 77 538 927 547
Switchboard 03 9861 4000 **Employment Advice** 1800 729 329
Fax 03 9867 8540 **Email** vhia@vhia.com.au **www.vhia.com.au**

22 December 2015

Committee Secretary
Senate Education and Employment Standing Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: eec.sen@aph.gov.au

Dear Committee Secretary,

Please find attached a submission on behalf of the Victorian Hospitals' Industrial Association (**VHIA**) with respect to the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015*.

VHIA is a registered organisation of employers that represents health and community service employers including public hospitals and community health services in Victoria.

Please note that we have confined our submission to those matters of particular relevance to our members. Specifically:

- Taking or accruing leave while receiving workers' compensation,
- Individual flexibility arrangements, and
- Right of entry.

We wish to express our thanks to the Committee for the opportunity to make a submission.

In the event there are any queries, please do not hesitate to contact the undersigned on

Yours sincerely,

Stuart McCullough
Manager, Advocacy Services
VICTORIAN HOSPITALS' INDUSTRIAL ASSOCIATION

VHIA submission to the Senate Education and Employment Standing Committee regarding the *Fair Work Act Amendment (Remaining Measures) Bill 2015*

With respect to the amendments proposed by the *Fair Work Act Amendment (Remaining Measures) Bill 2015 (***Bill**), VHIA submits as follows:

Part 2 – Taking or accruing leave while receiving workers' compensation

1. VHIA supports the repeal of subsection 130(2) of the *Fair Work Act 2009* (**the Act**).

2. Section 130(1) of the Act does not allow an employee to take or accrue leave during a period when the employee is absent from work and in receipt of workers' compensation payments. The Explanatory Memorandum to the Fair Work Bill states, in part, at paragraph 509:

   > *…the effect of clause 130 is to 'switch-off' the leave accrual …for the period of the employee's absence.*

   Such a provision is necessary having regard for the effect of s 22 of the Act which defines 'service' and 'continuous service' in a manner that includes periods of absence on workers' compensation. That is, s 130(1) of the Act operates to prevent the taking of leave and exempt the requirement to accrue leave under the National Employment Standards (**NES**) when an employee is absent from work on workers' compensation.

3. Currently, s 130(2) appears to operate as an exception to s 130(1) of the Act. Specifically, it states:

   > *Subsection (1) does not prevent an employee from taking or accruing leave during a compensation period if the taking or accruing of the leave is* <u>*permitted*</u> *by a compensation law.* (emphasis added)

4. The term 'permitted' is not defined by the Act.

5. We are mindful that the Act, generally, gives primacy to State legislation on specified subjects including workers' compensation legislation. (see s 27 (2)(b) of the Act)

6. It is our understanding that s 130(2) was intended preserve the 'status quo' with respect to the taking and accruing of leave during absences on workers' compensation. That is, whatever was permitted under the workers' compensation legislation of a particular state would be preserved by s 130(2) of the Act.

7. The meaning of 'permitted' and the application of s 130 (2) was examined in *NSW Nurses & Midwives Association –v- Anglican Care* [2014] FCCA 2580 (**NSWNMA v Anglican Care**). In that decision, the relevant workers' compensation legislation was the *Workers Compensation Act 1987* (NSW) (**the WC Act NSW**).

8. In effect, the Full Court held that the term 'permitted' should be defined as follows:

   The meaning given to the adjective "permitted" (of a thing, action, etc.) is "allowed, not forbidden".

   (See *NSWNMA v Anglicare* at paragraph 47.)

9. The Full Court further noted that workers' compensation legislation did not create or confer entitlements to leave. Rather, such legislation creates and confers rights to compensation (see *NSWNMA v Anglicare* at paragraph 50).

10. The Full Court considered s.49 of the *WC Act NSW*, finding that it was intended to allow for the accrual and taking of leave whilst absent from employment and on workers' compensation legislation. (see *NSWNMA v Anglicare* at paragraph 50)

11. Although not germane to the question before the Full Court, the decision in *NSWNMA v Anglicare* also refers to the Victorian *Accident Compensation Act 1985* (**AC Act Vic**) (see paragraphs 51 – 53 of *NSWNMA v Anglicare*).

12. We acknowledge that s 97 of the AC Act Vic was amended to allow the taking of leave during periods of absence on workers' compensation. However, the AC Act Vic does not allow for the accrual of leave during periods of absence on workers'

compensation. That is, the provisions of the AC Act Vic are distinguishable from those of WC Act NSW.

13. Our concern is that the decision in *NSWNMA v Anglicare* may, at least arguably, render s 130(1) of the Act nugatory. Specifically, that interpreting silence in workers' compensation legislation as 'permitting' the taking and accrual of leave, s 130(1) may be meaningless as a result.

14. In our view, repealing s 130(2) will enable s 130(1) to operate as intended. With respect to the accrual of leave during periods of absence on workers' compensation, it will preserve the status quo as it is in Victoria.

15. In the alternative, if s 130(2) is not repealed, the term 'permitted' should be defined to ensure that s 130(1) operates as was intended.

Part 3 – Individual flexibility arrangements

16. VHIA supports the proposed amendments with respect to individual flexibility arrangements.

17. VHIA's members are covered by enterprise agreements.

18. Individual flexibility arrangements have potential to support flexible work arrangements including those made under s 65 of the Act. In particular, individual flexibility arrangements can be used to support employees in balancing their work and caring responsibilities or altering work arrangements in response to family violence issues. However, despite this potential, individual flexibility arrangements are presently under-utilised. That is, there are impediments to their use.

19. The benefit of an individual flexibility arrangement may not be financial. It is appropriate to consider non-financial benefits and to have these acknowledged.

20. In the alternative, in the event the Committee held concerns regarding the recognition of non-monetary benefits for the purpose of the 'Better Off Overall' test, we submit

that those concerns would be alleviated if the relevant provisions and model clause stated that an employee was entitled to have a representative, including a union representative, assist them in making the individual flexibility arrangement.

Part 5 – Right of Entry

21. VHIA supports the reinstatement of previous rules with respect to the location of interviews and discussions.

22. Currently, s 492 of the Act provides that the meal or break room is the default location for interviews or discussions between a permit holder and employees who wish to participate.

23. In the case of a public hospital, it is common that the meal or break room is adjacent to patient areas. Where this is the case, the only means of getting to the meal or break room is to walk through patient areas. That is, the provisions of s 492A of the Act do not assist.

24. It is also the case that public hospitals will have a range of suitable meeting rooms available away from patient care areas. These may include general meeting rooms and lecture theatres. Such employers will, generally speaking, have several areas that are appropriate for meetings.

25. It is the view of VHIA that s 492 as it presently is, assumes that the default meeting location is a suitable distance from sensitive work areas and does not take into account the circumstances of employers such as public hospitals. It also assumes that a permit holder will be interested in reaching agreement to meet elsewhere.

26. Whilst the current s 492 has not resulted in widespread dispute, it has resulted in some disputation, including one instance in which the relevant union declined a meeting room located one floor up and which required an additional forty seconds travel time.

VICTORIAN HOSPITALS' INDUSTRIAL ASSOCIATION