



BAA Baking
Association
of Australia

ABN 65 142 608 204

SUBMISSION TO SENATE INQUIRY INTO THE FAIR WORK AMENDMENT BILL 2013

Introduction – Baking Association of Australia

The Baking Association of Australia Ltd is an organisation that represents the baking industry of Australia.

Our mission is to lead the baking and allied industry with regard to best business practice and best manufacturing process.

BAA provides a range of services to its members including workplace relations advice, business advice, access to a range of service providers including superannuation, finance and energy and

BAA also runs trade shows to allow members to showcase their baking skills.

Members include a range of bakery shops, franchises, bakery/cafes, manufacturers and suppliers to the industry.

Submission

BAA seeks to make submissions regarding two areas of the Fair Work Amendment Bill 2013:

- A. Consult with employees about the impact of changes to regular rosters or hours of work
- B. Anti-bullying measure

Baking Association of Australia

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Below are our comments on these two aspects of the Bill. The section of the Bill is extracted, followed by a comment on the section by BAA.

A. CONSULTATION WITH EMPLOYEES ABOUT CHANGES TO HOURS OR ROSTERS

Part 4—Consultation about changes to rosters or working hours

Fair Work Act 2009

19 After section 145

Insert:

145A Consultation about changes to rosters or hours of work

(1) Without limiting paragraph 139(1)(j), a modern award must include a term that:

(a) requires the employer to consult employees about a change to their regular roster or ordinary hours of work; and

(b) allows for the representation of those employees for the purposes of that consultation.

(2) The term must require the employer:

(a) to provide information to the employees about the change; and

(b) to invite the employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities); and

(c) to consider any views about the impact of the change that are given by the employees.

Comment:

The effect of s145A(1)(a) and (1)(b) is supported by BAA as it represents the reality of how employers change their regular roster.

BAA recommends:

1. amending the clause at the end of 145(2)(a) to add “including the operational reasons for the change” – this amendment will direct an employer’s attention to the business requirements that might necessitate a change to the regular roster or ordinary hours of work.

Example: In the baking industry there are seasonal changes to hours of work. During the busy season it is often the case that employees need to start earlier, so their starting time might be changed from 8am to 6am.

2. Delete the word “invite and insert “provide an opportunity for”. The word invite is not appropriate “provide an opportunity” is similar to the phrasing in the unfair dismissal provisions “provide an opportunity to respond”.

3. Delete the word “consider” and insert “take into account”. The phrase “take into account” is more appropriate to industrial relations usage.

B. ANTI-BULLYING MEASURE

Part 6 4B—Workers bullied at work

Division 1—Introduction

789FA Guide to this Part

This Part allows a worker who has been bullied at work to apply to the FWC for an order to stop the bullying.

789FB Meanings of employee and employer

In this Part, employee and employer have their ordinary meanings.

Division 2—Stopping workers being bullied at work

789FC Application for an FWC order to stop bullying

(1) *A worker who reasonably believes that he or she has been bullied at work may apply to the FWC for an order under section 789FF.*

(2) *For the purposes of this Part, worker has the same meaning as in the Work Health and Safety Act 2011.*

Note: Broadly, for the purposes of the Work Health and Safety Act 2011, a worker is an individual who performs work in any capacity, including as an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience or a volunteer.

(3) *The application must be accompanied by any fee prescribed by the regulations.*

(4) *The regulations may prescribe:*

(a) *a fee for making an application to the FWC under this section; and*

(b) *a method for indexing the fee; and*

(c) *the circumstances in which all or part of the fee may be waived or refunded.*

Comment:

BAA has concerns about the phrase “reasonably believes that he or she has been bullied”. All employees who make a complaint would “reasonably believe” they have been bullied. The issue is the word “bullied”. “Bullied” needs to be linked to possible health and safety issues arising from the bullying.

In our submission, there needs to be a reference to the Code of Practice so employees are fully aware of what constitutes bullying. “Bullied” is too loosely defined and could lead to minor matters being lodged at the Fair Work Commission. A more comprehensive definition would serve to limit frivolous claims and make more employees and employers aware of what bullying is.

If the definition of bullying is expanded then we submit more the more genuine claims will be dealt with.

We further submit that there should be a clause that relates to dealing with frivolous or vexatious claims that will deter these claims.

789FD When is a worker bullied at work?

(1) A worker is bullied at work if:

(a) while the worker is at work in a constitutionally covered business:

(i) an individual; or

(ii) a group of individuals;

repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and

(b) that behaviour creates a risk to health and safety.

(2) To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner.

(3) If a person conducts a business or undertaking (within the meaning of the Work Health and Safety Act 2011) and either:

(a) the person is:

(i) a constitutional corporation; or

(ii) the Commonwealth; or

(iii) a Commonwealth authority; or

(iv) a body corporate incorporated in a Territory; or

(b) the business or undertaking is conducted principally in a Territory or Commonwealth place;

then the business or undertaking is a constitutionally covered business.

Comment

In our submission, as noted above, the definition needs to be expanded. The definition:

- (a) repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; **and**
- (b) that behaviour creates a risk to health and safety.

There are two jurisdictional facts to be met. The first “repeatedly behaves unreasonably”.

The second is the creation of the health and safety risk. We note that there is no need for the behaviour to have actually caused a health and safety issue to arise, just that there is a risk. How a Complainant is meant to know whether a bullying incident creates a risk to health and safety as opposed to one that does not create a risk is not detailed in the clause.

A reference to what health and safety risks may arise (for example there are some detailed in the draft Code of Practice at page 5 of 22) may assist potential complainants.

789FE FWC to deal with applications promptly

The FWC must start to deal with an application under section 789FC within 14 days after the application is made.

Note: For example, the FWC may start to inform itself of the matter under section 590, it may decide to conduct a conference under section 592, or it may decide to hold a hearing under section 593.

Comment:

We submit that this could impose burdens on employers and employees. A telephone conference presided over by a member of the tribunal or a conciliator would be appropriate.

We also submit that there should be some guidance around who needs to take part in the conference. Should an employer take part in the conference, or simply the Complainant and the Respondent (if the Respondent is a fellow employee)? What if the Respondent is a contractor?

How are they to take part?

789FF FWC may make orders to stop bullying

(1) If:

(a) a worker has made an application under section 789FC; and

(b) the FWC is satisfied that:

(i) the worker has been bullied at work by an individual or a group of individuals; and

(ii) there is a risk that the worker will continue to be bullied at work by the individual or

group;

then the FWC may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the worker from being bullied at work by the individual or group.

(2) In considering the terms of an order, the FWC must take into account:

(a) if the FWC is aware of any final or interim outcomes arising out of an investigation into the matter that is being, or has been, undertaken by another person or body—those outcomes; and

(b) if the FWC is aware of any procedure available to the worker to resolve grievances or disputes—that procedure; and

(c) if the FWC is aware of any final or interim outcomes arising out of any procedure available to the worker to resolve grievances or disputes—those outcomes; and

(d) any matters that the FWC considers relevant.

Comment

Firstly, BAA submits that there needs to be a link to a risk to health and safety. This is not present in the clause. However this is an important jurisdictional fact as drafted in 789FD(1)(b).

Secondly, we submit that the Fair Work Commission needs to take into account the operational requirements of the business when making an order. Any order made that is inconsistent with

operational requirements could lead to court action being commenced due to the fact the order cannot be implemented.

For example, if Complainant cannot be moved to another shift due to operational requirements and they must remain in the presence of the Respondent, the order may not be able to be implemented.

789FG Contravening an order to stop bullying

A person to whom an order under section 789FF applies must not contravene a term of the order.

Note: This section is a civil remedy provision (see Part 4 1).

Comment

BAA submits that this is a harsh outcome. To simply go from an order to stop bullying to Federal Court or Federal Magistrate's Court action is excessive.

We propose that the Fair Work Commission convene another conference for the purpose of reviewing the issue before proceedings are commenced.

Secondly, if a Complainant does not have the funds to take the matter to court then the provision of a penalty will not be able to be commenced and the bullying may continue.

789FH Actions under work health and safety laws permitted

Section 115 of the Work Health and Safety Act 2011 and corresponding provisions of corresponding WHS laws (within the meaning of that Act) do not apply in relation to an application under section 789FC.

Note: Ordinarily, if a worker makes an application under section 789FC for an FWC order to stop the worker from being bullied at work, then section 115 of the Work Health and

Safety Act 2011 and corresponding provisions of corresponding WHS laws would prohibit a proceeding from being commenced, or an application from being made or continued, under those laws in relation to the bullying. This section removes that prohibition.

Comment

BAA supports this section. However, it appears that there may be a double jeopardy issue in that two actions could be commenced. This section does not go so far as to say that other action is to be foregone if this action is selected.

Drafted by:

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