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Committee Secretary
Senate Education, Employment and Workplace Relations
Committees
PO Box 6100
Parliament House
CANBERRA ACT 2600

**Victorian Employers'
Chamber of Commerce
and Industry**
ABN 37 650 959 904
486 Albert Street
East Melbourne
Victoria 3002 Australia
GPO Box 4352 Melbourne
Victoria 3001 Australia
Telephone: 03 8662 5333
Facsimile: 03 8662 5462
vecci@vecci.org.au
www.vecci.org.au

Submitted by email: eewr.sen@aph.gov.au

Dear Committee Secretary

RE: FAIR WORK AMENDMENT BILL 2013

The Victorian Employers' Chamber of Commerce and Industry (VECCI) is pleased to have the opportunity to file this submission for the consideration of the Committee in its Inquiry and subsequent Report in relation to the *Fair Work Amendment Bill 2013* ("the Bill").

VECCI is Victoria's leading and most influential employer group, servicing over 15,000 Victorian businesses every year. An independent, non-government body, VECCI was started by the business community to represent business. Our membership base is diverse, with involvement from all levels and sectors of industry including: manufacturing, health and community, business services, hospitality, construction, transport, retail and tourism.

VECCI is involved in every facet of industry and commerce across the State. Our role is to represent the interests of business at a State level as well as nationally. We act as a sounding board for government decision-making and as an instrument of active lobbying. Our focus is clear – to lead business into the future, actively represent the needs of employers in a complex regulatory climate, and provide real business value.

VECCI is a member of Australia's largest and most representative business advocate, the Australian Chamber of Commerce and Industry ("ACCI") which develops and advocates policies that are in the best interests of Australian business, the economy and the wider community.

VECCI'S SUBMISSION

With one exception, VECCI submits the proposed amendments in the Bill should be rejected.

At the outset, VECCI condemns the way in which the Government has gone about the introduction of the Bill into parliament. The process of developing the Bill was flawed and compounds earlier

flawed processes of the Government in the conception and implementation of its workplace relations system.

It is well documented, but worth repeating, that the principal piece of legislation, the *Fair Work Act 2009* ("The Act") was not the subject of a Regulatory Impact Statement either on or following its inception. The Act was reviewed during 2012 by a Review Panel appointed by the Government. The terms of reference for the Review were deficient on account of their narrowness. In particular, the terms did not provide the scope to review whether the Act had made the workplace relations system more or less flexible and bound in red tape (as had been the departmental advice) and they prevented consideration of changes to the objects or structure of the system. Nonetheless, the Review Panel received over 250 submissions. It held a series of meetings and roundtable discussions with a large number of stakeholders including peak employer and employee associations, small businesses, academics and working women. The Review Panel ultimately made 53 recommendations to the Government.

One might expect that the Government would attach some weight to recommendations made by the Review Panel. Indeed, initially it appeared to suggest it would consult and then respond to it. However, having already announced the date of the 2013 federal election, it has instead made a series of announcements of new policy during February and March 2013. With perhaps a minor exception, the measures announced were not recommended, considered or even contemplated by the Review Panel. They are designed to increase worker and union rights without offering anything to employers. This approach is all the more indefensible because having introduced a second "tranche" of amendments, the government has also, for a second time, ignored recommendations that were made by the Review Panel that would have made a positive difference for employers and business.

Instead of including election policies in various amendments contained in the Bill, the Government should seek an electoral mandate for them before forcing them through the parliament. If it does not, it stands accused of having acted in a way that it was highly critical of while in Opposition prior to the 2007 federal election.

Comment will now be made regarding aspects of the Bill.

Schedule 1: Family-friendly measures

Special Maternity Leave- Part 1, Clauses 1-11

The Bill proposes that any special maternity leave (eg: unpaid leave taken during a pregnancy due to a pregnancy-related illness) not reduce an employee's entitlement to 12 months of unpaid parental leave. This was a recommendation made by the Review Panel.

VECCI offers these amendments qualified support. The proviso is that the Act also be amended so that where additional unpaid parental leave is requested, the maximum period of time an employee can be absent on a combination of unpaid special maternity leave and unpaid parental leave is 2 years.

Parental Leave- Part 2, Clauses 12-15

The Bill proposes that the period of unpaid parental leave a couple may take together be increased from 3 weeks to 8 weeks and that the 8 weeks can be taken in 2-week blocks, or shorter periods by agreement. **This was not a recommendation** made by the Review Panel.

VECCI supports the maintenance of the current entitlement in the Act. It provides an adequate safety net entitlement. It is of course open for employers and their employees to make arrangements that exceed the safety net but VECCI also notes that the best place for such arrangements to be made is in individual workplaces. The overwhelming majority of employers recognise that the birth of a child is an important time in a parent's life and do what they can to accommodate absences. The proposed amendments are therefore rejected and the Government should seek an electoral mandate for them.

Right to request flexible working arrangements- Part 3, Clauses 16-18

The Bill would significantly expand the pool of employees eligible to request flexible working arrangements beyond the current pool (parents/carers with children below school-age or children under the age of 18 with a disability). While the Review Panel recommended an expansion of the right to request for employees with caring responsibilities it did not outline specific recommendations. It did not however make specific recommendations in relation to age, disability or domestic violence.

VECCI condemns domestic violence. It is a social issue that needs to be addressed in ways other than the granting of workplace entitlements. VECCI has grave reservations about attaching domestic violence to an employment entitlement that could give rise to a dispute if, for example, the violence is sporadic or repeated or indeed the subject of protracted legal proceedings. This would be a very undesirable outcome. VECCI believes the Government should invest some faith in the better nature of employers who look to support their employees wherever they can.

VECCI also notes there is already a substantial suite of laws that protect employees against discriminatory behaviour in relation to age, disability and caring responsibilities.

The Bill would also outline what the reasonable business grounds are for refusing a request. **This was considered by the Review Panel but not recommended.** VECCI objects to any codification of what reasonable business grounds are. It rejects the high threshold the definition in the Bill would impose. The language in proposed Subsection 65(1A), outlined in Clause 17 of Part 3 of Schedule 1 of the Bill suggests that the Government believes no request should be refused. Parliament is not in a position to best know what an individual business can or cannot accommodate.

VECCI maintains that the best place for agreement to be reached in relation to requests for flexible arrangements is in individual workplaces and would strenuously oppose any automatic appeal process that would give final decision-making power to a third party such as the Fair Work Commission. The Review Panel did not recommend the adoption of an appeals process. It also noted that employers are taking requests seriously and that in most cases can negotiate flexible arrangements despite the absence of an appeal process.

VECCI is increasingly frustrated at the Government's "one-way street" approach to flexibility. It is laughable when the Government seeks to suggest a commitment to flexibility evidenced by the introduction of a Bill that outlines new entitlements for workers when the same Bill also seeks to remove flexibility by further regulating the managerial prerogative to grant access to business premises and set rates of pay and hours of work! Once again the government has failed to respond

to the issues employers have raised about the Act. It is all the more galling for employers that even where the Review Panel has made recommendations that would assist them, the government has refused to implement them.

For the reasons outlined above, the proposed amendments are rejected. The Government should seek an electoral mandate for the expansion of the Right to request flexible working arrangements.

Consultation about Changes to rosters or working hours- Part 4, Clauses 19-21

The proposal for new terms in modern awards and agreements that require consultation about changes to rosters and hours of work along with the right to representation during the consultation was **again, not recommended by the Review Panel**.

The language of these amendments sets a threshold triggering the obligation to consult that is too low. Not just major, but **every** change to a “regular” roster or ordinary hours of work would require extensive consultation under the supervision of an employee representative. The amendments would leave employers trying to implement changes exposed to litigation based on allegations that award or agreement terms had been breached. The proposed changes would impose an additional administrative and operational burden on employers.

The proposed amendments should be rejected and the Government should seek an electoral mandate for them.

Transfer to a Safe job- Part 5, Clauses 22-30

VECCI rejects the proposed amendments that would extend the entitlement for pregnant employees to be transferred to a safe job or granted no safe job leave during a pregnancy to all employees and notes that this expanded entitlement **was not recommended** by the Review Panel. The passage of these amendments would create a ridiculous scenario whereby an employer would be required to hold open the position of an employee with less than twelve month’s service up until the birth but not afterwards! These proposed amendments create an unwarranted administrative and operational burden on employers and is another example of poor policy made “on the run”.

VECCI supports the maintenance of the current eligibility criteria which requires a minimum of twelve months service before an employee can access this entitlement. This strikes a fair balance. The proposed amendments should be rejected and the Government should seek an electoral mandate for them.

Schedule 2: Modern Awards Objective

The Bill would amend the Modern Awards Objective on s.134 of the Act so as to require the Fair Work Commission (“FWC”) to ensure that modern awards take into account the need to provide additional remuneration for overtime, unsocial, irregular or unpredictable hours, work on weekends and public holidays and shift work.

Again, this amendment was not suggested by the Review Panel. It was instead suggested by Mr Dave Oliver, the Secretary of the ACTU, in a speech on 6 February 2013 when he said “...we’ll be asking the government to enshrine penalty rates for weekend work - in legislation, to protect it forever”. That

the suggestion would be adopted by the Government was subsequently announced by the Prime Minister on 14 March 2013.

The amendment would make application the Modern Awards Objective unworkable because it is fundamentally inconsistent with other elements of it, including s.134(d), s.134(f) and s.134(1)(h), which require the FWC to take into account “*the need to promote flexible modern work practices and the efficient and productive performance of work*” and “*the likely impact on modern award powers on business, including on productivity, employment costs and the regulatory burden*” and “*the likely impact of any exercise of modern award powers on employment growth, inflation, sustainability, and competitiveness of the national economy*” respectively. It would be impossible to reconcile proposed s.134 (da) with the current ss.134 (d), (f) and (h).

It is important to remember that modern awards only commenced on 1 January 2010. They have been the subject of a general 2-year review and some discreet Applications for Variation. Relevantly, there has been recent consideration of penalty rates in modern awards by a FWC Full Bench in the *Transitional Review Penalty Rates Decision* ([2013] FWCFB 1635). The Full Bench, having considered various applications which sought to vary penalty rate provisions in a number of modern awards, determined at paragraphs [235] and [236]:

[235] We are not persuaded that a sufficient case has been made out to warrant varying the relevant awards in the manner proposed by the employers. While aspects of the applications before us are not without merit - particularly the proposals to reassess the Sunday penalty rate in light of the level applying on Saturdays - the evidentiary case in support of the claims was, at best, limited.

[236] The 4 yearly review of these awards is to commence in 2014. That review will be broader in scope than the Transitional Review and will provide an opportunity for the issues raised in these proceedings to be considered in circumstances where the transitional provisions relating to the relevant awards will have been fully implemented. In the event that the claims before us are pressed in the 4 yearly review we would expect them to be supported by cogent evidence. We would be particularly assisted by evidence regarding the matters referred to above and the likely impact upon employment levels, the organisation of work and employee welfare of any change in the penalty rates regimes.

Those applications failed and the decision indicates that the Act, as currently formulated, operates in such a way that requires “*cogent evidence*” if the FWC is to be persuaded to vary penalty rates in modern awards through the process of arbitration. It is clear therefore, that there is currently no need for the proposed s.134 (da).

It is also important to note that the Act provides for a 4-year review of the Modern Awards. This review should be conducted having regard to the framework that was in place when the Modern Awards were made. It is bad policy for the Government to seek, by this amendment, to influence the conduct of the 4-year review. It should instead wait and see what transpires in the 4-year review before making the proposed change.

VECCI has publicly called for a reasoned discussion about the structure of penalty rates that covers questions such as whether or not penalty rates should have regard to **the number of hours** worked on a day or during a 38-hour week as opposed to **when** those hours are worked and whether the penalty rates structure should accommodate scenarios where some workers actually prefer to work particular hours because they fit in with other commitments in their lives.

At a time when the current structure of penalty rates is crying out for a comprehensive review, this amendment would instead take the workplace relations system in the opposite direction. It is bad policy and the proposed amendment should be rejected.

Schedule 3: Anti-Bullying measure

The amendments in Schedule 3 of the Bill proposing a new Bullying jurisdiction for the FWC are further amendments that were **not recommended by the Review Panel.**

VECCI made a submission on behalf of Victorian business to the House of Representatives Standing Committee on Education and Employment Inquiry into Workplace Bullying dated 29 June 2012, in which it was submitted:

VECCI contends that bullying is not confined to the workplace and that any conversation about bullying ought to be comprehensive and extend to other areas such as cyber-bullying and bullying behaviour in schools. VECCI also submits that the Committee needs to ensure that what constitutes workplace bullying is identified and the community is educated about this. This would assist in scenarios where what could be capable of being characterised as legitimate and reasonable management action may be incorrectly regarded by an employee as being workplace bullying.

As to the terms of reference, workplace bullying is already comprehensively dealt with in Victorian legislation through a combination of OH&S and Crime Act provisions. The Fair Work Act 2009 also includes provisions to respond to bullying-type behaviour.

VECCI otherwise notes that one of the terms of reference asks whether there is scope to improve co-ordination between regulators and supports analysis into this issue, particularly because business can be confronted by both OH&S and workplace relations regulators in relation to behaviour arising out of the same incident.

That submission by VECCI raised a number of pertinent points. Firstly, it raised the legitimate concern that there should be community education in relation to what constitutes workplace bullying. Secondly, it noted that workplace bullying is already comprehensively dealt with in Victorian legislation and finally, it supported analysis into the ways in which co-ordination between regulators could be improved.

The proposed amendments do not address the issues VECCI raised during the House of Representatives Inquiry process. The proposed amendments would impose a compliance regime which pays little regard to regulatory regimes already in place and would introduce a layer of complexity for employers by leaving it open for there to be multiple investigations and/or grievance dispute resolution procedures running simultaneously. It does not address the requirement for community education. This is yet more bad policy that has not been thought through.

There has been a pitiful lack of consultation with the States ahead of these amendments and the Government has foisted this proposal on the FWC without regard for whether or not it is either resourced or capable of managing a Bullying jurisdiction. The General Manager of Fair Work Australia admitted to a Senates Estimates hearing on 13 February 2013 that she had told the Department of Finance that she would not be in a position to absorb the cost of the new work. The President of the FWC told the same Senate Estimates hearing that professional development and training would be required for tribunal members if they were to handle the jurisdiction. These comments indicate the recklessness of the Government's proposals.

The proposed amendments would invite a flood of new claims against employers, the defending of which will eat up yet more of their time and money. A common experience of Victorian employers is where the process of performance management is interrupted by an allegation of bullying by the subject employee. With a bullying jurisdiction available at FWC, it is not difficult to conceive of employees who are being performance managed lodging “retaliatory” claims in order to stymie the process.

The proposal to grant the FWC the power to “*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...*” (proposed s.789FF) would invest in the under-resourced and possibly unqualified tribunal an extraordinarily wide power. Good policy requires any order made being capable of being complied with without ongoing supervision by the tribunal and yet one could conceive of situations where an order might require a particular employee to avoid things like eye contact, physical or verbal interaction and speaking to or looking at a co-worker in a particular way. The proposed jurisdiction could result in the FWC effectively making operational decisions that bind an employer with ongoing or even indefinite effect.

VECCI rejects in their totality, the amendments in Schedule 3 of the Bill. Clearly extensive consultation is required with a range of stakeholders before proceeding further.

Schedule 4: Right of entry

A range of amendments are proposed in Schedule 4 of the Bill. To the extent these concern accommodation and transport arrangements in remote areas, VECCI anticipates that other employer representatives with direct experience with those issues, such as the Australian Mines and Metals Association, will make extensive, informed and cogent submissions. VECCI commends such submissions to the Committee.

As to the proposed amendments regarding the location of interviews and discussions, VECCI notes that this issue was considered by the Review Panel. The recommendation of the Review Panel was that the FWC be provided with greater power to resolve disputes about the location for interviews and discussions through a balanced approach. The proposed amendments do not achieve this. Instead, the proposed s492 makes the default location where parties cannot agree, meal and break areas. As there will be no oversight by the FWC as to whether or not a permit holder is unreasonably refusing to meet in a place suggested by the employer, permit holders can simply hold out, knowing the default position provided for by the proposed amendments will give them what they want.

The amendments do not provide FWC with oversight. They are not balanced and instead will reward obstinate permit holders. They deny employers a fundamental right to exercise control over their own property and should be rejected.

As to the proposed amendments regarding the dealing with disputes about the frequency of entry to hold discussions, VECCI notes that this issue was also considered by the Review Panel. The recommendation of the Review Panel was that the FWC be given greater power to resolve disputes about the frequency of entry through a balanced approach. The proposed amendments do not provide a fair balance. Again, they favour permit holders by imposing an almost impossibly high threshold that must be cleared before the FWC may make orders in relation to a dispute about the frequency of entry.

Pursuant to proposed s505A (4), FWC can only make remedial orders if it is satisfied that the frequency of entry “would require an unreasonable diversion of the occupier’s critical resources.” The explanatory memorandum gives no guidance, merely describing this as an “appropriately high threshold”. The notion of “critical resources” has the potential to conjure up images of life or death scenarios or being the difference between a business continuing to operate or closing down.

In introducing this amendment, the Government has ignored the recommendation of the Review Panel that there be a balance between the right of unions to represent their members in a workplace and the right of occupiers and employers to go about their business without undue inconvenience (see Recommendation 35 of the Review Panel). The threshold the government would set is not balanced. It would render the discretionary powers of the FWC impotent and accordingly, the proposed amendments should be rejected.

Schedule 5: Functions of Fair Work Australia

VECCI notes the proposed amendments in Schedule 5 go to the functions of the FWC. It also submits that the earlier insertion of Part 6-3A into the Act has been bad policy and has compounded the negative impact that the wider transfer of business rules implemented by the Government have had on the workplace relations system and the economy.

Concluding remarks

With one minor exception, the amendments should be rejected. The way in which the Government has introduced them is deplorable as is the manner in which it has responded to the recommendations of the Review Panel. The amendments are not fair to employers. They are not balanced. Any flexibility goes one way only and the Government continues to ignore the concerns of Victorian business, particularly small business.

It is time for the parliamentary and political leadership of Australia to immediately restore balance and reform workplace relations law so as to, at a minimum, achieve the following:

- The prevention of unions adopting a strike first, bargain later approach to the pursuit of demands;
- limiting the regulatory system to industrial matters only, so as not to interfere with the decision-making responsibilities of business - in particular the content of agreements must be limited to only those matters that pertain to the employment relationship;
- eliminating the union veto and monopoly over the establishment of greenfield agreements for new projects;
- restoration of pre-existing workplace laws sanctioned by the High Court of Australia on the sale or transmission of businesses – the changes introduced by the Government altering these laws were not foreshadowed ahead of its election and nor were they justified;
- restoration of restrictions on union rights of entry that were promised by the Government in 2007;
- elimination from the award system increases to employer costs that were promised by the Government in 2007 to not occur, but which have occurred; and
- rather than enshrining penalty rates, the Government must review in a comprehensive fashion, the current system of penalty rates to ensure it is appropriate, fair and balanced for all participants in the modern economy.

VECCI thanks the Committee for the opportunity to make this submission and would welcome the opportunity to address the Committee in relation to it.

Yours sincerely

Richard Clancy
Executive Director
Industry Policy and Workplace Relations Services