AUSTRALIAN MOTOR INDUSTRY FEDERATION

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AMIF Submission to the Inquiry into the Fair Work Amendment Bill 2014

Dear Committee

Thank you for the opportunity to provide the Senate Education and Employment Legislation Committee with commentary in relation to the current inquiry into the Fair Work Amendment Bill 2014. This submission is made by the Australian Motor Industry Federation on behalf of the State and Territory Motor Trades Association and Automobile Chamber of Commerce Members.

The Australian Motor Industry Federation (AMIF) is the pre-eminent body representing the interests of over 100,000 retail motor trades businesses, which employ over 310,000 people and have an aggregated annual turnover in excess of $208 billion. These figures, combined with the industries scope and size, makes the retail motor trades the largest small business sector in Australia. The Federation's membership consists of the automobile chambers of commerce and the overwhelming majority of state and territory motor trades associations, and it is these Member's members who are the 'bricks and mortar' enterprises that are impacted by proposed changes contained in the Fair Work Amendment Bill 2014.

AMIF's Position:

AMIF broadly supports the proposed amendments to the Fair Work Act as set out within the Fair Work Amendment Bill, 2014. In particular, it strongly supports those amendments arising from the recommendations of the Fair Work Review Panel and the amendments which seek to alter the right of entry arrangements.

Due to reasons contained herein there should be no unnecessary delays to the progression of these amendments through the Australian Parliament. Many of the changes seek to properly rectify anomalies, oversights or unintended consequences which continue to have an impact on our membership, their employees and the industrial relations landscape generally.

Discussion:

Fair Work Review recommendations generally

AMIF supports each of the amendments in the Bill which seek to implement the recommendation of the Fair Work Review Panel. Substantial submissions by very many interested parties to the Review of the Fair Work Act were considered by the Review Panel - a Panel hand selected by the previous Government. The Review Panel properly considered and made valuable recommendations that would help ensure that the Fair Work Act would operate effectively in the way it was intended. As a result of the work of the review panel and the submissions before it, AMIF will not discuss each item in the Bill that seeks to address these recommendations. The basis and reasoning for change have already been well canvassed. The endorsement of the Review Panel's recommendations via the introduction of this Bill and hence it is accordingly open for the Committee to simply endorse these recommendations.

Specific areas of interest

Annual leave loading on termination - items 2, 3 and 4

Of particular interest to the AMIF and its members are items 2, 3 and 4 of the Bill which seek to remove the unintended consequences of requiring an employer to pay an employee at the time of termination annual leave loading on top of any untaken annual leave. This amendment was proposed by the Fair Work Review Panel in recommendation 6 and this should be adopted.

The history of the payment of annual leave loading is such that it was introduced as a payment made to further support an employee going on a period of annual leave. It was not installed as an entitlement to be paid to a person leaving the employ of an employer. Hence the vast majority of awards historically have not and presently do not provide for this entitlement. The only exception to this is where for good reason an award expressly provides this entitlement.

In particular the Vehicle Modern Award specifically prohibits the payment of annual leave loading on untaken annual leave paid out on termination. Many other awards use expressions such as: "During a period of annual leave an employee will receive a loading…"(Clerks-Private Sector Award 2010 – clause 29.3(a)). Such expressions have historically been interpreted to mean that no entitlement arises for the payment of the annual leave loading on termination.

A possible interpretation placed upon the present provision at Section 90(2) of the Fair Work Act that suggests that annual leave loading should be paid out on untaken annual leave has led to confusion by employers as to their obligations.

This issue needs to be rectified as soon as possible by this committee supporting these items in the Bill which will assist in rectifying this situation.

AMIF is of the view that these particular amendments should be implemented retrospectively to the commencement of the National Employment Standards on 1 January, 2010 so as to limit, as best as possible, the unintended consequences and reduce the risk and potential costs that some employers may confront when challenged about compliance with such laws as presently drafted. There should be no obligation on those employees that have received a payment of leave loading on untaken annual leave at the time of termination to repay this amount, so appropriate amendments to the Bill need to be included to give effect to this if retrospective operation is granted.

Unfair dismissal matters - Items 72 – 78

AMIF also offer supporting comment in relation to Items 72 – 78 of the Bill. The objective of these proposed changes is to facilitate scope for the Fair Work Commission (FWC) discretion to more effectively dismiss unfair dismissal matters in circumstances that warrant such action. An employer subject to an unfair dismissal claim can be subject to substantial costs. There are claims from time to time which may have little merit but also claims whereby the applicant loses interest. In the latter situation for example, one of our member organisations is presently involved in a matter where the applicant did not attend the telephone conciliation conference. The conciliator from FWC was unable to contact the applicant or leave a message and when contacted, the nominated representative advised that he was not the applicant's representative. In this case the FWC has written to the applicant giving the applicant 48 hours to contact otherwise the matter will be listed for arbitration. This latter step will mean that the employer will now be subjected to increasing costs as attendance and submissions will need to be prepared.

Quite simply this matter should be in a position to be dismissed if there is no response from the applicant to the Conciliator's correspondence. Alternatively, this matter should in fact be bought on to consider dismissal of the application rather than referral to arbitration. The amendments proposed in the Bill may assist to this end.

Right of entry arrangements

The right of entry amendments broadly seek to return a union's workplace right of entry arrangements back to where they sat prior to these present provisions that commenced 1 January, 2014. The present provisions were hastily introduced without consultation and in our opinion fail to properly respond to the operating needs of workplaces and the personal needs of employees in workplaces – and in particular employees that are non-union members. Those employees who seek out the union should have a right to meet with the union in their own time, but that meeting arrangement should not impact on, or have the potential to impact on, the workplace or others at workplaces who are not interested in union activities. Under the current arrangements the union will always push for the lunch room as this will give them the best exposure. Employees that are not interested will have their meal break disturbed so that they do not get the rest and recreation they require whilst they partake of a meal. The previous provision was a longstanding approach under previous legislation and ultimately the same approach was included in the Fair Work Act commencing 1 July 2009 after extensive consultation and submissions. The alteration of this to pander to the demands of the union movement was clearly inappropriate and has the potential to create disputation in a range of workplaces.

Individual flexibility arrangements (IFA) - Items 7 to 10

The increased flexibility provided to individual flexibility arrangements (IFA) at Items 7 to 10 will allow these provisions to be available to an increased number of employees and employers and offer increased levels of certainty in their application. The increase in the period by which a party can bring an arrangement to an end would see the legislation align with the notice period now reflected in modern awards. Clarification that the arrangements may also include non-monetary benefits too will increase certainty and open the way for an increased uptake of IFA's. The demand on dual income families to meet their obligations to family, friends and their local society exists across all communities. There will be those who value offsetting certain cash entitlements of other non-monetary benefits. The requirement for an employee seeking to enter into an IFA to detail why they believe they will be better off overall by having the IFA in place will assist the employee to fully comprehend what and why they are of this view and why it meets their genuine needs.

In conclusion, AMIF broadly supports the proposed amendments to the Fair Work Act as set out within the Fair Work Amendment Bill, 2014. In particular, it strongly supports those amendments arising from the recommendations of the Fair Work Review Panel and the amendments which seek to alter the right of entry arrangements.

Due to reasons contained herein there should be no unnecessary delays to the progression of these amendments through the Australian Parliament.

Yours sincerely

Richard Dudley
CEO
Australian Motor Industry Federation

23 April 2014