VACC Submission to the Senate Inquiry into the Fair Work Bill 2008 (Cth)

January 2009

INTRODUCTION

The Victorian Automobile Chamber of Commerce (VACC) was formed in 1918 and has grown to represent approximately 5400 members predominantly in Victoria, Tasmania and Queensland. These businesses are principally involved in retail sales, manufacturing, assembling, distribution, parts and components, repairing and servicing of vehicles of all kinds. VACC has been a federally registered industrial organisation since 1940.

In Tasmania, members are represented by the Tasmanian Automobile Chamber of Commerce (TACC) which was federally registered from 1978 until 1998 when it merged with VACC. VACC is also a registered organisation in the Tasmanian industrial relations system.

VACC has also recently formed an affiliation with a NSW organisation, the Automotive Dealers Group (ADG), to provide administrative support, and employee relations and occupational health and safety advice. ADG has approximately 160 members.

PROFILE OF THE RETAIL MOTOR INDUSTRY

The retail motor industry in Australia is predominantly made up of small businesses which are spread across metropolitan regional and country areas. Until 2005, the retail motor industry organisations across Australia used an independent firm of consultants, AC Nielsen, to conduct a collective national survey of members.

These surveys, which were conducted from 2001 to December 2004, were used in support of submissions for national wage case hearings. They were also helpful to identify accurately the size, employment arrangements and economic considerations concerning wage adjustments.

The data derived from a national survey of members, conducted by AC Nielsen on behalf of the various retail motor industry organisations in December 2004, *(ACN December*

Survey 2004), indicated that up to 90% of the industry consisted of businesses employing fewer than 20 employees. The survey results also demonstrated that business activities in the retail motor industry are divided nationally across metropolitan, regional, (including country) locations.

Whilst some time has elapsed since the last national survey was conducted, VACC considers the statistical data remains a reliable indicator of the composition and distribution of businesses. A review of both ABS data and member demographics confirms this view.

SUBMISSION TO THE SENATE INQUIRY

VACC welcomes the opportunity to make a submission to the Senate Inquiry into the Fair Work Bill 2008 (Cth) (the Bill). We also commend and support the submission made by the Australian Chamber of Commerce and Industry (ACCI).

VACC does not intend to make comments on all aspects of Bill but will instead highlight a number of issues that are of concern to the retail motor industry in Australia.

RIGHT OF ENTRY

The Bill introduces expanded rights for union officials to enter workplaces. Many aspects of the current system have been retained, however the Bill provides that union officials will be able to exercise the right of entry merely for the purposes of holding discussions with employees.

Clause 484 provides that:

"A permit holder may enter premises to hold discussion with one or more persons:

(a) who perform work on the premises; and

(b) whose industrial interests the permit holder's organisation is entitled to represent; and

(c) who wish to participate in those discussions."

VACC acknowledges that it is appropriate for union officials to enter workplaces in certain defined circumstances such as investigating a suspected contravention of the Act or an award. However, this additional right is not necessary, may be used mischievously and is likely to result in lost productivity. It has the potential to really hurt small to medium sized businesses which are already struggling in the current economic climate. Even though clause 490 provides that discussions under 484 may only be held during meal times or other breaks, it is inevitable that these discussions will have some impact on the working time of employees.

VACC recommends this clause be removed and the circumstances for union officials to enter workplaces be confined to already well-established purposes such as investigating suspected contraventions of the Act or an award.

VACC is also concerned about the right for union officials to inspect the records of non-members under clause 482. Although this right is limited to situations where there is a suspected contravention, there is some concern that this is an unwarranted invasion of the privacy of those employees who are not members of the union. It is noted that the National Privacy Principles will apply to the collection, disclosure and use of information under this provision, however some non- union member employees may still be uncomfortable with union officials being able to inspect their records.

UNFAIR DISMISSAL PROVISIONS

The restoring of unfair dismissal rights for employees in businesses with fewer than 100 employees is also problematic.

Clause 387 sets out the factors which are to be taken into account when considering whether a dismissal has been unfair:

- whether there was a valid reason related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- whether the person was notified of that reason; and
- whether the person was given any opportunity to respond to any reason related to the capacity or conduct of the person; and
- any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions related to dismissal; and
- if the dismissal related to unsatisfactory performance by the person – whether the person has been warned about that unsatisfactory performance before the dismissal; and
- the degree to which the size of the employers enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- the degree to which the absence of dedicated human resources management specialist or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- any other matters that FWA considers relevant.

VACC is concerned that the long list of factors set out above will significantly increase compliance costs for businesses and will act as a disincentive for employment. At present, businesses with fewer than 100 employees are free to focus on the needs of the business when considering staffing levels.

Results of recent AC Nielsen polling referred to above show that 90% of the employers in the retail motor industry have fewer than 20 employees. The criteria set out in clause 387 will restrict the capacity of these businesses to comply with the legislation. Whilst it is noted that with the exception of clause 387(d) the criteria are the same as is currently set out in section 652(3) of the Workplace Relations Act 1996 (Cth), there will be a major impact on businesses with fewer than 100 employees which were not subject to the unfair dismissal regime under Work Choices.

VACC is also particularly concerned about clause 387(d) which relates to "any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions related to dismissal". There is danger that this will come to be seen as a *requirement* to make an offer to have a support person present even though the legislation and the Explanatory Memorandum state that there is no obligation to do so. It is only a small step between an obligation not to unreasonably refuse to have a support person present and a positive obligation to offer that opportunity to employees.

Further, it is unclear who the "support person" is intended to be. Can it be a lawyer or a union representative? Or is it to be restricted to a person or family member who provides moral support? It is also unclear how long an employer has to wait for a nominated support person to be available and whether or not an employer's offer to have a witness present will satisfy the requirement. Finally, does the expression "any discussions related to dismissal" extend to other meetings with employees in which conduct or performance is to be discussed, for example where a warning is given but dismissal is not imminent.

LEAVE ENTITLEMENTS

VACC has some concern about clause 76 in the Bill which relates to the extension of the period of unpaid parental leave for up to 12 months beyond the current entitlement to parental leave. Clause 76(3) provides than an employer must give the employee a written response to the request stating whether the employer grants or refuses the request for an extended period of unpaid parental leave.

Compliance with section 76(1) not only increases the administrative burden on small businesses but is likely to compel small business employers to seek paid legal advice about how to formalise in writing the reasons for not granting the additional leave.

REDUNDANCY

The Bill still has an exemption for cases of "genuine redundancy" however this will only be available where it was not reasonable in all the circumstances for the employee to be redeployed within the business. This is likely to have the effect of increasing compliance costs for employers.

More and more employers in the retail motor industry are facing the prospect of closing or having to make employees redundant as the global economic crisis continues. Additional compliance costs will only make the struggle for these businesses that much more difficult.

A further concern in relation to redundancy is the requirement to notify the relevant unions when making 15 or more employees redundant. Clause 786 provides that FWA may make an order under 787(1) if there has been failure to notify the "relevant registered employee associations" and the employer could "reasonably be expected to have known....that one or more of the employees were members of a registered employee association".

This effectively places an obligation on employers to find out which employees are members of unions. This may then may be used by employees to claim that any subsequent actions taken by the employer including redundancy were made on the basis of union membership and were therefore discriminatory.

It does not benefit the relationship between employer and employee to be obliged to find out whether employees are members of unions. Employees may choose to join or not join a union, and if an employer is aware of an employee's status as a union member, there is no difficulty in notifying the union if there are a large number of positions to be made redundant. However, the requirement should be confined to notifying unions when the employer *actually* knows employees are members of the union at the time of the decision to make the redundancies.

NOTICE OF TERMINATION

There are a number of problematic aspects with the provisions in Division 11. One concern is that the notice provisions are not a stand-alone item and are found within the division relating to redundancy. It is also quite difficult to locate certain important provisions such as those relating to when an employee may be dismissed without notice.

VACC is also specifically concerned about the way clause 117 may be interpreted. Clause 117(1) provides that "an employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of termination (which cannot be before the day the notice is given)".

This wording is ambiguous as it can be interpreted in a way that an employer must advise the employee about the termination in writing before the employer had an opportunity to discuss the termination with the employee.

VACC recommends that 117(1) be amended to read "once the employer has advised the employee that their employment will be terminated, the employer must confirm in writing the effective date of termination".

UNLAWFUL TERMINATION

VACC is also concerned about the period of time that an employee has to bring an action for an alleged unlawful termination. Clause 774 provides that an application for FWA to deal with an unlawful termination must be made within 60 days. This is a significant increase on the current time limit which is 21 days. This means there is a much greater period of time passing between the events that led to the termination and the attempt post-termination to resolve the dispute. Witnesses may no longer be available (particularly in industries with high staff turnover) and memories of events may have become much less clear during that time.

PATTERN BARGAINING

VACC would like to see a clarification of the issue of pattern bargaining in the Bill. In light of the diverse nature and size of businesses across the industry, it should be clearly set out that pattern bargaining is not permitted. The provisions relating to collective bargaining for the low-paid in Part 2-4, Division 9 of the Bill should state that the result of obtaining a "low-paid authorisation" to seek a multi-enterprise agreement does not entitle the parties to engage in pattern bargaining.

TRANSFER OF BUSINESS PROVISIONS

VACC is concerned about the proposed provisions in relation to transmission of business (now called "transfer of business"). The number of ways in which a transfer of business can take place has increased which creates uncertainty and additional administrative burden for employers.

The Bill now provides that transfer of business occurs where the old employer has outsourced the work performed by the transferring employees to the new employer or the new employer has ceased to outsource the work performed by the transferring employees to the old employer.

The inclusion of outsourcing into the concept of transmission of business imposes further limitation on small and medium business as to how to operate their business in the most efficient manner.

Under clause 311, VACC members who operate services stations will incur significant additional business costs when taking over the management of a service station site as licensed agents. Under the existing legislation, there is no transfer of business if a licensed agent's agreement with the site owner expires and the site management is granted by the site owner to another licensed agent.

VACC submits that further consideration must be given to the potential impact of the broader definition of transfer of business before the Bill is passed. These provisions

should be amended to ensure that situations such as that outlined above do not occur.

CONCLUSION

The Bill should be reviewed to ensure that the additional administrative burdens imposed on small businesses do not have an adverse effect on the Australian economy. Small businesses are already struggling with over-regulation and an uncertain economic environment. It should be noted that there is a significant difference between the economic conditions that prevailed at the time of the last federal election and a year later when the Bill was introduced. It is very important to take this into account when reviewing the Bill during this inquiry.