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Fair Work Amendment Bill 2013

Submission from Business SA

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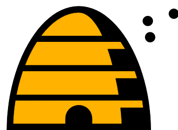

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Introduction

Business SA is South Australia's leading business membership organisation, representing thousands of businesses through direct membership and affiliated industry associations.

We represent businesses across all industry sectors ranging in size from micro-businesses to multi-national companies. Business SA is the voice of business in South Australia and advocates on behalf of business to propose legislative, regulatory, policy and program reforms to ensure sustainable economic development in the State.

We deliver a wide range of integrated services to business, including:

- lobbying and representation
- workplace relations advice
- consultancy services
- wide-ranging training programs
- reference publications and handbooks
- international trade services
- management of apprenticeships and traineeships.

As the peak employer organisation in South Australia, Business SA is well placed in representing the interests of members across most industries.

Overview

Business SA is pleased to have the opportunity to provide our views to the Committee with regards to the *Fair Work Amendment Bill 2013*. Business SA understands that the Bill is intended to give effect to a number of changes to the *Fair Work Act 2009* and these changes reflect the various announcements by the Government over the past couple of months.

The principal concern that Business SA has with these amendments is that they do not arise from the formal review of the Act which was conducted in 2012.

These proposed changes were not as a result of the Review Panel's recommendations but rather they are changes that the Government has formulated of its own motion.

In fact, a number of these proposed amendments are changes that the trade union movement has been calling for, and such changes are simply enhancing the unions' power base and assisting them in the area of membership recruitment.

Preventing workplace bullying and providing employees with family friendly working hours are goals that all our members strive to achieve in their workplaces. Business SA also supports flexibility in the workplace and the prevention of workplace bullying; however, the Bill before this committee is not a balanced approach.

The Bill does not reflect the needs of both employees and employers but rather it reduces the flexibility that is needed to run a successful business, and in particular small business.

With regards to the new workplace bullying provisions, there is nothing to suggest that these proposed changes will prevent or minimise the occurrences of bullying.

In addition, Business SA has major concerns about potential duplication of claims and the time consuming nature for business, and in particular small business in dealing with claims potentially in up to four jurisdictions.

It is also of great concern that a regulatory impact statement (RIS) is not being conducted but rather the "financial impacts will be announced as part of the 2013-14 Budget"(Explanatory Memorandum, page 13), whatever that means.

Industrial Relations reform needs to take a balanced approach and needs to focus on productivity and efficiency as well as employee related reforms, and the potential impact of such reform must be ascertained by way of a properly conducted RIS.

Business SA has outlined in more detail its concerns with the *Fair Work Amendment Bill 2013* below.

Parental Leave and transfer to a safe job

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Special Maternity Leave

The effects of this amendment will mean result in an employee will be absent from the business and make it potentially more difficult for the employee to integrate back into the business.

Accordingly, any additional leave should be capped at to ensure that an employee is not able to be absent from the workplace for more than two (2) years.

Parental Leave

These amendments will result in further regulatory burden on employers.

For example, whilst notice requirements apply, the period of concurrent leave has been significantly increased and may be taken at sporadic times during the first 12 months after the adoption or birth. Therefore, employers will have difficulty forecasting when and for how long the leave will be taken. This will be particularly problematic when both parents are within the same workplace.

If this amendment is to be adopted then employers must be provided with the ability to refuse such requests on reasonable business grounds.

Transfer to a safe job

This amendment will result in further regulatory burden on employers.

It would appear rather nonsensical to grant an employee unpaid leave where there is no entitlement to unpaid parental leave and no entitlement for the employee's job to be kept open.

Right to request flexible working arrangements

The current Act already provides employees with a right to request flexible working arrangements under certain conditions. The new provisions within this Bill aim to extend these rights to more employees. Business SA supports flexible work arrangements, if they meet reasonable business requirements, however is very concerned that all the flexibility provisions within the new Bill only address employees' flexibility, and ignore any notion of providing flexibility for employers.

While a right to refuse on reasonable business grounds would still exist under the Bill, it is likely that compliance costs for businesses will be increased. The Bill demands that employers look seriously at agreeing to non-standard working arrangements when, on the other hand, parts of the current Fair Work Act and modern awards restrict flexibility over rosters, part time, casual, contract work and individual agreement making.

Domestic violence not only is a serious social issue that affects the victim and the health and wellbeing of their immediate family, but also a criminal offence.

According to the Australian Law Reform Commission[1] all jurisdictions has enacted legislation to protect victims from family violence through for example restraining orders.

In addition, under State and Territory criminal codes violence, whether it be physical violence or mental abuse and threats, committed against family member or any other person is a criminal offence.[2]

Social issues and other issues in the personal life of an employee, whether it be experiencing family violence, alcohol or drug abuse or family conflict have impact on not only workplaces but any other public sphere.

Family violence severely can affect the health and well-being of the employee and negatively affect their ability to concentrate, focus, interact with colleagues and customers and their overall performance.

In addition, as illustrated by Access Economics' report "*The cost of domestic violence to the Australian Economy*" in 2004, the overall cost to the Australian Economy and the direct costs to business of domestic and family violence, includes:

- An estimated $8.1 billion (in 2002-2003) to the Australian economy;
- An estimated $483.9 million (in 2003-2003) in lost productivity;
- Absenteeism from work;
- Decreased productivity at work;
- Costs associated with permanent loss of labour, due to victims being unable to maintain employment.

The workplace can provide a sense of protection and normality for an employee experiencing family violence and the overwhelming number of employers support and accommodate employees experiencing difficulties in their personal lives, through for example the provision of counselling and time off to attend to personal circumstances.

[1] Australian Law Reform Commission 2010, Family Violence - A National Legal Response, Final Report Volume 1, ALRC Report 114, October 2010
[2] Ibid

However, family violence primarily is a social and criminal matter rather than a workplace matter. If there is need for further reforms to assist victims and raise awareness these should be through the provision of education, information, access to counselling, advocacy and support and if necessary, changes to criminal justice system, rather than placing further an even heavier regulatory burden on business.

We also reiterate the submissions of the Australian Chamber of Commerce and Industry[3] to the ALRC Inquiry – Family Violence and Commonwealth Laws that:

16. An employer, particularly a small business owner, is not a substitute for expert and professional counselling and assistance. Nor is it a substitute for the intervention of police or other officials or agencies. Equally, policy makers should not consider business as a de-facto community or government agency, given that those dedicated agencies are staffed with professionals and have power and resources to assist individuals.

18. Whilst business will continue to provide assistance to employees in various ways and as best they can, they will not appreciate feeling that they are directly or indirectly part of the problem when the act of violence occurs in the personal and private life of an individual worker away from the workplace. Nor will employers accept being forced to take on additional obligations above and beyond what is currently required by existing laws unless a strong case is made out for doing so.

Business SA strongly opposes the trend over the recent years which have seen increased regulation of business with a resulting increase in administrative and compliance costs in attempt to address matter outside the control of and with little or no connection to the business.

Unfortunately, the proposed amendment to the right to request flexible working arrangements is yet another example of this trend.

The Bill proposes a new section 65(1A) adding five additional grounds for requesting flexible working arrangements.

While the circumstances listed in subclause 1A(a)-(d) pertain to characteristics, such as age or having a disability, or responsibilities such as caring for a child of school age or younger or being a carer as defined in the *Carer Recognition Act 2010,* the circumstances in (e)-(f) relate to a problem of a social and criminal nature.

The practical impact of the amendment to section 65(1) on business, particularly small business, has not been properly analysed.

For example, whereas the grounds in section 65(1) currently are easily verifiable by an employer (having a child under school age or under 18 years of age with a disability), the new grounds particularly in proposed (e) and (f) cannot easily verified by an employer to whom a request has been made.

While the Bill does not propose to insert a definition of "family" and "violence", the Explanatory Memorandum[4] refers to the inquiry of the ALRC[5] into family violence and lists

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[3] ACCI 2001, ACCI Further Submission – Family Violence and Commonwealth Laws, ALRC Discussion Paper 76, p. 3

[4] Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 19

physical abuse that proposed of a definition of “family violence” with a non-exhaustive list of the following behaviours:

(a) Physical violence;

(b) sexual assault and other sexually abusive behaviour;

(c) economic abuse;

(d) emotional or psychological abuse;

(e) stalking;

(f) kidnapping or deprivation of liberty;

(g) damage to property, irrespective of whether the victim owns the property;

(h) causing injury or death to an animal irrespective of whether the victim owns the animal; and

(i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above.

Was a request for flexible working arrangements to be made under the amended section 65(1A) on the grounds of family violence in section (e) or (f), the employer would be required to undertake the following steps:

1. Determine whether the request would satisfy the grounds of “family violence” having regard to the guidance in the Explanatory Memorandum and the ALRC’s definition;

2. Assess the reasons for the changes and its impact on the business having regard to the “reasonable business” grounds as defined in proposed section 65(5);

3. Give a written response to the employee to the request within 21 days whether the request is granted or refused; and

4. If refused, include the details for the refusal having regard to the reasonable business grounds as defined in proposed section 65(5).

However, in determining the validity of the request and the reasons for the changes, the employer would have no right to request any evidence to satisfy themselves that the request was made for a reason specified in section 65(1A).

Instead they would be required to take the employee at their word.

Even if the employer would be allowed to ask for evidence, practically what evidence could an employer request if an employee made a request under section 65(1A)(e) or (f) where the family violence was related to the following circumstances:

- “injury or death to an animal”;
- “damage to property” such as the employee’s or immediate family member’s car or residential premises; or
- “economic abuse” such as pressuring the employee or their immediate family member to provide access to their bank account.

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[5] Australian Law Reform Commission 2011, Family Violence and Commonwealth Laws – Improving Legal Frameworks, Final Report, ALRC Report 117, November 2011, p. 77

The reference to the ALRC's definition or "family violence" is so broad that even if an employer undertook to assess whether a request was made for the purposes of family violence, they could be in breach of the new obligations.

While not questioning the seriousness of the behaviours and acts above, we are concerned that particularly small businesses without dedicated human resource expertise, would not identify "damage to property", "injury or death to an animal" or "economic abuse" as forms of family violence for the purposes of section 65(IA).

Hence, businesses, particularly small businesses mistakenly could refuse a request for flexible working arrangements when related to the circumstances above.

If an employer mistakenly denied an employee the right to request flexible working arrangements or failed to comply with requirements in section 65(4), this could have serious consequences.

For example, under section 44(1) a contravention of a provision of the National Employment Standards, other than section 65(5), is subject to the civil penalty provisions in Part 4-1, Division 2, of a maximum of $10,200 per breach for an individual and $51,000.

In addition, if the employer was of the belief that the employee did not have the right to request flexible working arrangements in the case of for example "injury or death to an animal", this potentially could be in contravention of section 345 – Misrepresentation.

It should also be noted that the proposed expansion of one of the components of the National Employment Standards in section 65(1A) will add another "workplace right " for the purposes of the general protections and workplace rights in Part 3-1, enabling an employee to claim "adverse action" against an employer.

With the reverse onus of proof and damages being uncapped, employers often are left with no choice but to settle the dispute and pay "go away" money, even when claims are of dubious nature.

There is a terminology used in these amendments which have no definition and will be open to interpretation.

Examples of these are, "member of the employee's family" and 'too costly".

The term 'immediate family" already appears in the Act and is defined, so what is meant by, "employee's family'?

Business SA also understands that the Bill is intended to clarify and further define what "reasonable business grounds" are for an employer to refuse a request for flexible working arrangements. Business SA is concerned that this will force business to meet a very high threshold in attempting to demonstrate a basis for refusing a request. For example, it has to be "too costly" not just costly.

How does one determine what is 'too costly"?

There is no definition of what constitutes "domestic violence" and to avoid ambiguity there should be a definition.

There is no requirement for an employee to provide evidence when requesting changes in working arrangements and without such evidence these proposed provisions will be open to abuse by employees.

Whilst no one condones domestic violence, it is a social issue not a workplace issue, and accordingly needs to be dealt with at the social level and not pushed onto the workplace and employers.

There is no empirical evidence that employers do not voluntarily assist employees who are subject to domestic violence.

Yet once again the Government wants to burden employers with more regulatory burden so as to be seen as somehow addressing the issue of domestic violence rather than properly tackling the issue at the social level.

It is unfair and unreasonable to extend flexibility provisions in only one direction. Employees and employers should have access to flexible options in the workplace, not just employees.

Consultation about changes to rosters or working hours

In addition to making changes to flexible working arrangements the Bill will also require that all Modern Awards from 1 January 2014 will need to include the provision for employers to consult with employees about a change to their "regular roster" and this must also allow time for employees to provide their views on the changes. There will also be an extra mandatory term in enterprise agreements that will require similar provisions but will also include the condition that employers consult about a major workplace change (noting that the word "major " is not defined).

Business SA is concerned about the additional compliance burden that these requirements place on business, particularly small business. We know that most businesses attempt to advise their employees as soon as practicably possible with regards to roster changes, however, there will be occasions where it is not always possible to await to hear extensive feedback from all employees about the change.

Business SA is also concerned that these provisions could extend to casual employees who work 'regular rosters.' Whilst some casuals do seem to work 'regular shifts' the nature of casual employment and why it is so important to business, particularly small business in retail and service sector, is that business can respond to busy or slow periods by changing the number of staff on the roster.

Business SA is concern that these new provisions will, once again, decrease flexibility for employers and the ability for employers to conduct their business effectively.

The effect of these proposed provisions will place yet another significant regulatory burden on employers.

Most modern awards already provide for the ability of an employer to change an employee's hours of work of rosters.

These changes will impose additional onerous consultative obligations on employers and significantly restrict an employer's ability to properly staff their business particularly where external influences require a quick or immediate response which includes fluctuations in demands for products or services.

And with it the cost of doing business will increase.

Modern awards objective

Business SA is very concerned about a provision proposed in the Bill to effectively enshrine penalty rates in the Modern Awards.

The new provision states that Modern Awards need to provide additional remuneration for overtime, shifts, weekend work, public holidays and the working of irregular hours.

In simply terms this means every award must include overtime and penalty rates.

Whilst overtime and penalty rates are a 'common' award provision, they are not contained in every award either because they are considered not appropriate for a particular industry or occupation, such as the real estate industry and professional employees awards or the awards allow for employees to be compensated in another manner, such as annualised salaries.

This provision would also severely restrict the Fair Work Commission's functions in the upcoming four (4) yearly review of modern awards which commences on 1 January 2014, which is an unwarranted and unnecessary restriction on the Commission's role of establishing appropriate award conditions for particular industries and occupations. Currently various employers in different industries reach agreements with employees to pay an annual salary rather than pay penalty rates, under this new provision this would no longer seem to be possible.

This amendment contradicts section 134(1) (d) of the Act which establishes an objective to *promote flexible modern work practices* by directly limiting the level of flexibility that can be considered.

The Commission has shown in recent decisions that it will only change penalty rates in awards where there is appropriate evidence that justifies the change.

We live in an ever changing society which affects how business in particular industries need to operate.
As local business attempts to compete in an online and globalised world, penalty rates on weekends and 'outside regular business hours' are drastically impacting upon their success. It is also the case that some employees would prefer to work weekends or irregular hours for a variety of reasons and yet businesses are often forced to shut and deny employees these hours as it is simply too expensive to operate.

Mandating such conditions in statue does not allow business to adapt to the needs of society.

This is another example of the decrease in flexibility for employers if this Bill is successful.

Anti bullying measures

There is no empirical evidence that these proposed amendments will in fact prevent or minimise the incidents of bullying in the workplace.

Further, that these changes will mean that workplace bullying will be subject to regulation by both the Fair Work Commission and the State Work Health and Safety regulators.

This is both unnecessary and impractical.

Workplace bullying should remain in the work health and safety jurisdiction only.

The Bill proposes to insert a new Part 6-4 – "Workers bullied at work" to an enable an employee to make an application to the Fair Work Commission for an order to stop bullying.

An order to stop bullying made under new section 789FF is subject to a civil remedy provision of a maximum of $10,200 for an individual and $51,000 for a corporation.

Business SA has a zero tolerance to bullying and provides advice, support and training to our members to prevent, identify, investigate, respond to and take appropriate action against harassment, bullying, threats, intimidation and other forms of serious misconduct.

We oppose the insertion of new part 6-4.

There are already extensive protections against workplace bullying and multiple avenues for employees to report instances of bullying and/harassment.

Firstly, under section 19 of the South Australian *Work Health and Safety Act 2012,* based on the model Work Health and Safety Law, a person conducting a business or undertaking (PCBU) must ensure, so far as is reasonably practicable, the health and safety of:

(a) workers engaged, or caused to be engaged by the person; and
(b) workers whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking.

The term "health" is defined in section 4 – definitions as "physical and psychological health".

In the second reading speech in the South Australian House of Assembly, the responsible minister explained this was intended to clarify that psychosocial risks to health like stress, fatigue and bullying are covered by the primary duty of care.

This means that an employee experiencing bullying in the workplace can make a complaint to the relevant health and safety regulator who then can prosecute the PCBU if there is evidence of having failed to comply with section 19.

Substantial penalties apply, up to $500,000 for a body corporate for category 3 offences and up to $1,500,000 for category 2 offences.

Secondly, under the South Australian *Equal Opportunity Act 1984*, employers are required to prevent bullying related to age, caring responsibilities, chosen gender, disability, marital or domestic partnership status, pregnancy, race, religious appearance or dress, sex, sexuality and spouse or partner's identity.

Under section 91 of the Act, employers are vicariously liable for the discriminatory or unlawful acts of their employees in their course of employment.

A complaint of bullying under the Act can be made to the Equal Opportunity Commission of South Australia for conciliation and if unsuccessful be referred to the Equal Opportunity Tribunal for determination.

Under section 96 of the Act, the tribunal may make one or more of the following orders:

- an order requiring the respondent to pay compensation (of such amount as the Tribunal thinks fit) to a person for loss or damage arising from the contravention;

- an order requiring the respondent to refrain from further contravention of the Act; and

- an order requiring the respondent or any other party to the proceedings to perform specified acts with a view to redressing loss or damage arising from the contravention or remedying a discriminatory or unlawful act.

Failing to comply with an order of the tribunal is an offence and subject to a maximum penalty of $5,000.

Thirdly, under Federal anti-discrimination and equal opportunity laws, including the Sex Discrimination Act 1984, Racial Discrimination Act 1975, Disability Discrimination Act 1992 and Age Discrimination Act 2004 employers are required to prevent harassment of their employees and are vicariously liable for the acts of their employees.

Complaints can be made to the Australian Human Rights Commission for conciliation.

If there is no reasonable prospect of the matter being settled by conciliation, the aggrieved person may refer the matter to the Federal Court or the Federal Magistrates Court for litigation.

In addition to the laws referenced above, a claim for workers compensation could also be pursued on the basis of harm of injury caused by workplace bullying.

The submission by the Australian Chamber of Commerce and Industry[6] to the House Standing Committee on Education and Employment's "Inquiry into workplace bullying" also highlighted other avenues for compensation as follows:

31. It is possible that bullying may also involve a breach of a relevant industrial instrument[21] or contractual term[22]. Tortious or equitable causes of action may also be pursued through the courts.[23]

Proposed section 789FH specifically allows for action in relation to bullying to be taken concurrently under the *Fair Work Act 2009* and the *Work Health and Safety Act 2012*.

[6] Australian Chamber of Commerce and Industry 2012, ACCI Submission, House Standing Committee on Education and Employment, Inquiry into Workplace Bullying, June 2012, p. 8

In practice this could result in an employer being faced with action under Federal or State anti-discrimination/equal opportunity laws, the *Work Health and Safety Act 2012* and proposed Part 6-4B of the *Fair Work Act 2009* in relation to the same complaint.

Many small businesses would not have the resources, time or experience to be able to actively engage with these processes and provide a response if a complaint were allowed to be hear under multiple laws.

In this context we are also concerned that an aggrieved employee could instigate action in three areas of law in order to cause maximum damage to their employer.

It should also be noted that in managing a bullying complaint, employers may find themselves subject to claims from both the complainant and the alleged perpetrator.
For example, employers commonly find that in the course of investigating the complaint, or in the case where a complaint has been substantiated and disciplinary action is to be taken, the perpetrator may engage in various forms of legal action.

This could involve workers compensation claims, claims for unfair dismissal, adverse action or breach of contract.

On the other hand, a victim or alleged victim may not be satisfied with the investigation or any disciplinary action taken against the perpetrator and consequently take action against their employer.

There is no detail as to how the Commission will interact with the State Work Health and Safety regulators nor if or how the Commission will ‘recognise’ the WHS legislation including the proposed Bullying Code of practice.

Rather than simplifying existing processes and assist employers in preventing, investigating and resolving workplace bullying, the proposed amendments add another layer of regulation and another set of penalties on business.

Right of Entry

In the lead up to the 2007 Federal Election, the current Federal Government released its industrial relations policy document called Forward with Fairness.

As part of their policy the government promised that it would not expand the union right of entry contained in the then current legislation the Workplace Relations Act 1996.

That is one of a number of promises made by the Federal government that it has subsequently broken.

Now the federal government is proposing to ‘further break’ that promise by expanding the union right of entry yet again.

Business SA strongly opposes the changes to right of entry that are proposed in this Bill.

Only 13% of employees in the private sector are union members.

These amendments need to be seen for what they really are and that is an avenue to assist unions to recruit new members.

As part of the amendments unions will be given the right to hold discussions in the area where meal breaks are taken.

If this amendment to the Fair Work Act is made employees will have to sit and listen to a sales pitch about joining a union or leave the lunch room.

Surely employees are entitled to eat a meal without being potentially harassed about joining a union.

Can you imagine going to your local café to have a meal and a chat with a friend only to be confronted with someone who is trying to sell you something. And your only options are to sit and listen or leave?

The provisions relating to remote areas will clearly capture sites that are fly in fly out (including off shore) and drive in drive out.

This will require an employer not only to incur costs but also to spend time and resources in the Commission if they refuse to enter into accommodation arrangements with permit holders.

The proposed amendments will enable permit holders to challenge an employer on every aspect of the arrangements including accommodation, undue inconvenience and whether the request was made within a reasonable time.

Considerable expense will be incurred by employers as they will need to supervise the permit holder throughout the duration of their stay on site.

In relation to these provisions if they were to be adopted, the permit holder 9union) should be made to bear the actual costs in full.

There are also issues of anyone entering a site having to undergo a safety induction which comes at a cost.

These amendments also potentially conflict with Section 493 of the Act in particular circumstances relating to a permit holder must not enter any part of the premises that are used mainly for residential purposes.

In addition to all of the above, there is a more fundamental issue. That is, why are these provisions necessary?

There has not been any demonstrated need for such provisions.

Alternative arrangements are available such as assembly points before workers fly out to remote sites and with modern technology there are many other communication options available such as video and tele conferences.

Conclusion

Business SA has serious concerns regarding the content of these amendments and the lack of genuine consultation with employer groups.

The business community has continually raised concerns about productivity and employer flexibility within the Fair Work Act and yet none of these concerns are being addressed.

But rather the Government appears to promoting the unions' agenda with a number of the amendments that do nothing more than assist unions, particularly in the area of member recruitment.

Through feedback and interaction with our members we know that most small to medium businesses strive to do the right thing by their employees, as all small business knows how valuable skilled and dedicated employees are to their business.

It is unfortunate that the Government is constantly drowning business in additional regulation and red tape when there is no empirical evidence that such regulation and red tape is justified.

All this does is add to the cost of doing business in Australia which is already internationally uncompetitive.

If businesses were allowed to flourish and develop they would be striving towards best practice in all areas but simply increasing regulation only encourages compliance.

Business SA supports some of the parental leave and pregnant worker protections that are outlined in this Bill.

However, on balance, the remaining provisions in the Fair Work Amendment Bill 2013 should not be passed as they do nothing to help make fairer or more productive workplaces in Australia.