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AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

ACCI SUBMISSION

Senate Education, Employment and Workplace Relations Committees

House Standing Committee on Education and Employment

Inquiry into the Fair Work Amendment Bill 2013

April 2013

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ABOUT ACCI

1.1 Who We Are

The Australian Chamber of Commerce and Industry (ACCI) speaks on behalf of Australian business at a national and international level.

Australia's largest and most representative business advocate, ACCI develops and advocates policies that are in the best interests of Australian business, economy and community.

We achieve this through the collaborative action of our national member network which comprises:

- All state and territory chambers of commerce
- 29 national industry associations
- Bilateral and multilateral business organisations

In this way, ACCI provides leadership for more than 350,000 businesses which:

- Operate in all industry sectors
- Includes small, medium and large businesses
- Are located throughout metropolitan and regional Australia

1.2 What We Do

ACCI takes a leading role in advocating the views of Australian business to public policy decision makers and influencers including:

- Federal Government Ministers & Shadow Ministers
- Federal Parliamentarians
- Policy Advisors
- Commonwealth Public Servants
- Regulatory Authorities
- Federal Government Agencies

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally;
- Business representation on a range of statutory and business boards and committees;
- Representing business in national forums including Fair Work Commission, Safe Work Australia and many other bodies associated with economics, taxation, sustainability, small business, superannuation, employment, education and training, migration, trade, workplace relations and occupational health and safety;
- Representing business in international and global forums including the International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, Confederation of Asia-Pacific Chambers of Commerce and Industry and Confederation of Asia-Pacific Employers;
- Research and policy development on issues concerning Australian business;
- The publication of leading business surveys and other information products; and
- Providing forums for collective discussion amongst businesses on matters of law and policy.

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INTRODUCTION

The Australian Chamber of Commerce and Industry (ACCI) welcomes the opportunity to provide a written submission to both the Senate Education, Employment and Workplace Relations Committee inquiry and the House Standing Committee on Education and Employment inquiry into the Fair Work Amendment Bill 2013 (the Bill).

This inquiry follows the Senate's Committee inquiry into the Fair Work Amendment Bill 2012. The Committee will note that ACCI participated in that inquiry by way of providing a written submission and appearing in support of the submission in hearings.

The Bill is described as a second tranche Government response to the Post Implementation Review (PIR) report titled, "*Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*" (the Report).

The Minister's second reading speech indicates that this "*Bill, the Fair Work Amendment Bill 2013, represents our further response to the Fair Work Act Review recommendations, but it also represents key policy priorities of this Government*".

PIR REPORT AND SECOND TRANCHE RESPONSE

By way of background, ACCI and its members provided detailed evidenced based submissions as part of the PIR of the Fair Work legislation. Those submissions also addressed a range of related workplace policy issues, not limited to the operation of the Fair Work legislation which are impacting employers and business. ACCI continues to reiterate its strong support for implementing those recommendations in full.

ACCI's submission follows extensive engagement with ACCI network members, employers (small, medium and large firms representing all major sectors of the economy) and members of the wider IR/HR/legal community since 2008/09. ACCI's submission outlined major problem areas employers have experienced since the laws commenced in July 2009 and makes over 75 specific recommendations to amend the laws to ensure that they meet the Government's commitments to industry as

contained in its key 2007 *Forward with Fairness* policy platform, which underpins the FW Act.

The evidence-based submission builds upon ACCI's most recent policy Blueprint dedicated to the burgeoning services sector "*Services: the New Economic Paradigm*" launched in 2011, which clearly highlighted that service sector firms need to be able to react in a more dynamic way compared to other industries. Inflexible labour rules, which operates on a "*one size fits all*" basis or a 9am to 5pm, Monday to Friday paradigm, do not reflect the evolution of the sector and specific needs of firms operating in the services sector. It also doesn't reflect the needs and capacities of the majority of Australian business employers (89.5%) which employs less than 20 employees.

In releasing the Report, the Minister for Employment and Workplace Relations, Hon. Bill Shorten MP, indicated that the Panel "*has also found the Act has not had a negative impact on productivity. I'm particularly pleased by this finding and I remain optimistic that it will be acknowledged and widely reported in the business papers.*" The Committee should note that the Government made numerous promises that its Fair Work system, particularly its new collective bargaining system, would "*promote productivity*", "*drive productivity*", "*shift the focus of negotiations towards boosting productivity*", and be "*less bound by regulation and red tape and is designed to have a positive impact on labour productivity*". The Government indicated in 2008 that the post-implementation review of the new system would be an important means of assessing the effectiveness of the new bargaining system. The Panel's Report notes that on this important score the Fair Work laws have actually not improved productivity levels and stated that productivity growth has been "*disappointing*" under the Fair Work system and that it is "*concerned that productivity growth has slowed*". The Panel ultimately recommended non-legislative changes and encouraged the Fair Work institutions "*play a more active role in encouraging productivity awareness and best practice*" to address this. The findings by the Panel that productivity has not improved under the Fair Work system is reiterated in the Australian Competition & Consumer Commission's (ACCC) latest report on the stevedoring industry, which found that both higher nominal unit labour costs increased by 7.5% during 2011-2012 and labour productivity significantly fell for the first time since 1998-99. The ACCC report also notes that industrial activity has increased since 2008, and this has been coupled with unofficial reports of "*go slow*" strategies. The ACCC warned that "*if industrial disputes become more frequent and widespread in Australian stevedoring, this could undermine investment in additional capacity and greater competition*". It concluded that it could "*put at risk the gains previously made in establishing a more productive stevedoring service and undermine the benefits of additional capacity and greater competition*".

ACCI believes that the Panel missed an important opportunity to recommend meaningful changes, with only a handful of useful recommendations inadequate to restore much needed balance to the IR system. Unfortunately, the Report, its recommendations and the first tranche response will do little to address the problems identified by Australian employers. This includes the majority of SME business owners, many of whom have mortgaged the family home whilst trying to create valuable employment opportunities and build wealth for all Australians. By simply ignoring the problems will not make them go away.

Whilst the first tranche contained a number of welcome amendments to discourage unmeritorious unfair dismissal applications, it was disappointing that the Government delayed the introduction of more important recommendations or give effect to findings made by the Panel to restore much needed balance to the system. These included amendments to encourage greenfield agreement making, stop the capacity for unions to take industrial action before bargaining has commenced, and proposals to encourage Individual Flexibility Arrangement (IFAs) making which have flat-lined according to research commissioned by the Fair Work Commission (FWC). ACCI remains critical of other changes which were not recommended by the Panel including the re-creation of two statutory Vice President roles.

The second tranche legislation continues to delay changes to the Act in favour of amendments which were largely not recommended by the Panel. The second tranche, as the second reading speech identifies, represents the key policy priorities of the Government. Unfortunately, the Bill in its current form is unbalanced as it fails to address the issues affecting the business community.

To reiterate, ACCI's position with respect to the technical amendments contained in the first tranche legislation and this second tranche Bill are inadequate to address the existing problems employers are experiencing with the Fair Work laws and will be more relevant to IR practitioners than SMEs. The Minister in his second reading speech concludes his speech indicating that, "*the Bill reflects the Government's commitment to improving the lives of Australian workers, whilst supporting business flexibility and profitability*". It is difficult to see how the Bill addresses business concerns in any real or practical way.

Whilst ACCI has welcomed consultations with the Panel, the issues which were identified by the business community in its submissions in the PIR have not been dealt with adequately in the second tranche Bill.

DUE PROCESS

It is worth noting that as far as industry is concerned, there has been a particular lack of due process to the framing of the existing Act and to subsequent amendments. Firstly, the Act was not subject to a Regulation Impact Statement (RIS). A post implementation review is not a substitute for assessing policy initiatives prior to enactment. Secondly, consultation through mechanisms, such as the statutory National Workplace Relations Consultative Council (NWRCC) which is subject to strict confidentiality requirements is not the same as a fulsome and open consultative process, prior to the Government making policy announcements. Thirdly, the second tranche response by the Government was largely announced by way of Ministerial media releases in February and March 2013 and was not the subject of consultation with stakeholders prior to these announcements. Finally, this Bill has been granted a Government exemption from an RIS and therefore deprives the Committee from assessing the impacts of the proposals on various stakeholders, including members of the wider public, employees and employers. The continued deferral by the Government of considering the benefits and costs of IR policy ultimately costs the stakeholders who are affected by such legislation.

The proposals in this Bill, particularly those that do not arise from the Panel's report, should have been the subject of an open and transparent consultative process with all stakeholders, prior to being introduced into the Parliament.

ACCI notes that two specific proposals contained in the Minister's second reading speech relating to greenfield agreements and intractable bargaining are not contained in the Bill and will be introduced into the Winter sittings. It is expected that any amendments to the Bill would be subject of further inquiry and report by the relevant Parliamentary committees. Whilst the Panel did make findings and recommendations with respect to greenfield agreement making, it did not make any recommendations on dealing with intractable disputes in the non-greenfield agreement making context. In fact, the Panel rejected making a recommendation sought by the unions in their submissions which would create an arbitration power for the FWC to deal with such disputes .[1] These proposals will be strongly opposed by the business community if they are contemplated by the Government, with employers considering all options at its disposal, not limited to the consideration of making a formal complaint to the International Labour Organisation. The

[1] Panel Report, at pp.146 -147.

Government clearly indicated in 2007 that its Fair Work system would not contain new forms of compulsory arbitration. However, the Act did ultimately include new forms of arbitration for low paid bargaining and good faith bargaining in breach of these promises. On the specific proposal of arbitration for intractable disputes, the then Deputy Prime Minister and now Prime Minister, Hon. Julia Gillard MP, on 1 May 2007 ruled this out in the following terms: "*And let me make this absolutely clear, there will [be] no compulsory last resort arbitration for collective agreements, as is desired by the ACTU, under Labor.*"[2] These types of proposals should be subject to a mandate in the 2013 Federal Election as occurred in 2007.

BULLYING PROPOSALS

ACCI participated in the House of Representatives Standing Committee on Education and Employment inquiry into workplace bullying. ACCI's opening statement to the inquiry is attached to this submission.

ACCI continues to represent industry at a national level by way of its membership on Safe Work Australia, including representing the views and legitimate interests of employers through the progression of a proposed Code of Practice on Bullying and guidelines.

ACCI supports dialogue with governments at the federal and state/territory levels to achieve a net reduction in workplace bullying. The business community supports further efforts to look at avenues for private complaints to be made and considered. However, the issue must remain as one pertaining to the workplace health and safety context and not inserted unilaterally by the Government into the national industrial relations system. ACCI's position is that issues of workplace bullying are too important to all stakeholders and the community to be subject to what was understood to be the Government's second tranche response to the Panel's review of the Act. ACCI's specific response to the proposal is contained in **Annexure 1**.

CONCLUSION

ACCI does not support the Bill in its current form. Whilst a number of provisions could be supported in the context of other amendments which would redress the existing problems identified by industry in its current

[2] Deputy Prime Minister, Hon. Julia Gillard MP, Speech to the Committee for Economic Development of Australia, Adelaide, 1 May 2007.

form, it is simply unbalanced. This is the view of the leading business organisations of Australia. The Government is attempting to legislate in a manner not contemplated even by its own independent Panel's report and given that a number of proposals are not supported by a 2007 or 2010 election mandate, the Government should seek this in the 2013 federal election, rather than pursuing these measures through a PIR related amendment Bill.

ACCI has always indicated that it stood ready to constructively engage with the Government as it considers the balance of the Panel's recommendations. ACCI will also continue to strongly advocate for reforms to the Fair Work system to restore much needed balance to the IR framework outside of the Panel's report and its recommendations.

ANNEXURES

ACCI's response to the Schedules of the Bill is contained in **Annexure 1.**

ACCI's without prejudice response to the Panel's Report on the operation of the *Fair Work Act 2009* (FW Act) and the *Workplace Relations Amendment (Transition to Forward with Fairness Act) 2008* is contained in **Annexure 2**.

ACCI's opening statement to the House of Representatives Standing Committee on Education and Employment inquiry into workplace bullying is contained in **Annexure 3.**

A copy of a joint letter signed by the Chief Executives of ACCI, BCA, AiG and AMMA is contained in **Annexure 4.**

ACCI's two written submissions to the Panel can be found at the Fair Work Review website:
www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview

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ANNEXURE 1

SCHEDULE 1 – FAMILY-FRIENDLY MEASURES

Subject	Summary	Response
Part 1 – Special maternity leave	This part amends the unpaid special maternity leave provisions of the FW Act. The effect of these amendments would be that any period of unpaid special maternity leave taken by an eligible employee would not reduce that employee's entitlement to unpaid parental leave under section 70 of the FW Act.	This amendment responds to Panel recommendation 4. The costs to changing existing rules around unpaid parental leave have not been quantified and it is unclear what exact impact this may have on employers who will need to ensure policies and procedures reflect changes to the Act.
Part 2 – Parental leave	This part amends the concurrent leave provisions of the FW Act. These amendments would provide parents with greater flexibility when caring for their child by increasing the maximum period of concurrent leave available under the unpaid parental leave provisions from 3 to 8 weeks. The amendments would also provide greater flexibility for when parents may choose to take concurrent leave, by enabling the 8 weeks' leave to be taken in separate periods (of at least 2 weeks, or a shorter period if agreed by the employer) at any time within the first 12 months of the birth or adoption of a child.	These measures reflect new Government policy and were not contained in the Panel's report. The National Employment Standards were the process of a consultative process in its own right and the proposals have not been subjected to an open consultative process prior to the Government announcing these changes. There is no evidence provided that the measures are warranted and necessary. The costs to changing existing rules around unpaid parental leave have not been quantified and it is unclear what exact impact this may have on employers who will need to ensure policies and procedures reflect changes to the Act.
Part 3 – Right to request flexible working	This part amends provisions of the FW Act about the requests for flexible working arrangements by extending the right to request a change in working arrangements to a wider range of caring and other	This amendment responds partly to Panel recommendation 5. Whilst the Panel recommended extending the provisions to "*a wider range of caring and other circumstances*", the proposals are extensive and would add

Subject	Summary	Response
arrangements	circumstances. The Part also provides a non-exhaustive list of what might constitute 'reasonable business grounds' for the purposes of refusing a request under the Part.	to the overall regulatory burden of employers. Given the significant expansion of the existing circumstances under s.65, the proposal should have been subject to a consultation process. The National Employment Standards were the process of a consultative process in its own right and the proposals have not been subjected to an open consultative process prior to the Government announcing these changes. Employers would be required to consider statutory requests, as distinct from other requests, from an expanded cohort of eligible employees. Whilst the provisions are intended to be facilitative, the legal requirements imposed on the employer would be that they consider new definitions to ensure eligibility and would need to consider a newly defined test of *"reasonable business grounds"*. The EM (at p.18) indicates that an employer is not able to request evidence which would satisfy a reasonable person of the employee's circumstances. The costs to changing existing rules around the right to request provisions have not been quantified and it is unclear what exact impact this may have on employers who will need to ensure policies and procedures reflect changes to the Act.
Part 4 – Consultation about changes to rosters or working hours	This part inserts new content requirements for modern awards and enterprise agreements in relation to employers consulting with employees about changes to regular rosters or ordinary hours of work.	These measures reflect new Government policy and were not contained in the Panel's report. There is no evidence that these provisions are warranted. These proposals have not been the subject of an open consultative process prior to the Government announcing these changes. They impose onerous new statutory obligations to consult employees and allow union representation. They are not "light touch" regulation as any single breach of a modern award may subject an employer to a penalty of up to 60 penalty units ($10,200 for an individual or $51,000 for a body corporate).

Subject	Summary	Response
		The EM (at p.19) indicates that the policy intention is *"to promote discussion between employers and employees ... about the likely impact of a change to an employee's regular roster or ordinary hours of work ..."*. There is no evidence offered to suggest that these conversations are not occurring in thousands of workplaces across Australia and that a statutory obligation is required. ACCI believes that these provisions are not necessary given that feedback by employers indicates that employees and employers are capable of having these discussions without Government rules which require strict compliance under pain of civil liability. The costs to changing existing rules around these measures have not been quantified and it is unclear what exact impact this may have on employers who will need to ensure policies and procedures reflect changes to the Act.
Part 5 – Transfer to a safe job	This part extends the existing entitlement to transfer to a safe job to a pregnant employee regardless of whether she has, or will have, an entitlement to unpaid parental leave.	These measures reflect new Government policy and were not contained in the Panel's report. There is no evidence that these provisions are warranted and that employers and employees are not able to come to suitable arrangements when an employee requests a safe job despite not having a statutory right to unpaid parental leave. Under relevant WH&S legislation, a duty holder has an obligation to ensure that a workplace is safe as far as reasonably practicable. These proposals have not been the subject of an open consultative process prior to the Government announcing these changes.

SCHEDULE 2 – MODERN AWARDS OBJECTIVE

Subject	Summary	Response
	This schedule amends the modern awards objective set out in section 134 of the FW Act so that FWC must take into account the need to provide additional remuneration for: • employees working overtime; • employees working unsocial, irregular or unpredictable hours; • employees working on weekends or public holidays; or • employees working shifts.	These measures reflect new Government policy and were not contained in the Panel's report. There is no evidence that these provisions are warranted. These proposals have not been the subject of an open consultative process prior to the Government announcing these changes. This amendment is strongly opposed on a number of grounds. Firstly, the proposal is not akin to an objective for FWC to take into account certain matters prior to exercising its powers. In its current wording, the amendments are rather more akin to a directive to the FWC for the need to provide additional remuneration under modern awards for: employees working overtime; unsocial, irregular or unpredictable hours; on weekends or public holidays; shifts. This would significantly undermine the FWC's existing discretion under the Act when making or varying modern awards. The Committee should note on 18 March, a Full Bench of the Fair Work Commission (Justice Ross, Watson SDP, Smith DP, Gooley C and Hampton C) published its decision ([2013] FWCFB 1635) on employer and union applications relating to a number of services sector modern awards (Hospitality Industry (General) Award 2010; General Retail Industry Award 2010; Food, Beverage and Tobacco Manufacturing Award 2010; Fast Food Industry Award 2010; Hair and Beauty Industry Award 2010) which were seeking to vary penalty rate and/or associated provisions. Whilst rejecting the employer applications in this two year review of modern awards, it is a significant concern that the FWC found that "*the General Retail Award has increased the relative cost of employment on Sundays for many retail employers, particularly in NSW and Queensland*". This highlights a breach of the Government's commitment to employers that modern awards would not increase employer labour costs.

Subject	Summary	Response
		It is clear from this most recent decision that the FWC is more than capable to exercise its discretion in a manner which does not require further legislative direction. Moreover, it is unclear what exactly is the policy rationale to justify this amendment. For example, where an application is made to create a new modern award or vary an existing one which does not contain penalty rates for overtime or weekend work, for example, the amendment would effectively give weight to the requirement for the modern award to contain additional remuneration for these circumstances. There is no other analogous provision in s.134 which creates a statutory modern awards objective in respect of the terms contained in s.139(1). Terms listed in s.139 are discretionary matters which could be included in modern awards. The amendment would effectively elevate such discretionary terms to a de-facto mandatory status without any strong policy rationale to justify this anomalous approach to deciding which terms should be included in the modern award safety-net. An approach which has not been contemplated in over 100 years of the federal IR system.

SCHEDULE 3 – ANTI-BULLYING MEASURE

Subject	Summary	Response
	This schedule amends the FW Act to include a new Part 6-4B to enable a worker who is bullied at work to apply to the FWC for an order to stop the bullying.	These measures reflect new Government policy and were not contained in the Panel's report. These amendments are part of the Government's response to the House of Representatives Standing Committee on Education and Employment Inquiry report *Workplace Bullying "We just want it to stop"* (Committee recommendations 1 and 23). ACCI participated in the workplace bullying inquiry by lodging a written submission and appearing in hearings conducted in Melbourne.

Subject	Summary	Response
		The amendments deal with a significant and important policy issue which should not be part of a second tranche response to the Panel's Report. For sound policy reasons and for decades standing, workplace bullying is an important and specific issue relevant to work health and safety frameworks (at both federal and state/territory levels). ACCI continues to represent industry at a national level by way of its membership on Safe Work Australia, including representing the views and legitimate interests of employers through the progression of a proposed Code of Practice on Bullying. ACCI supports dialogue with governments at the federal and state/territory levels to progress a significant reduction in workplace bullying. The business community supports further efforts to look at avenues for private complaints to be made and considered. However, business strongly considers that workplace bullying must remain fundamentally as pertaining to the health, safety and welfare of workers and not as a broader industrial relations matter to be dealt with by an industrial quasi-judicial commission nor by national industrial relations laws. The draft Code of Practice on the prevention of bullying and a guideline document to accompany the Code is yet to be finalised by Safe Work Australia. Industry has been actively involved in providing comments on the proposed Code of Practice. ACCI and its members have constructively sought to be part of the solution to this issue and continues to encourage employers to take proactive measures to prevent bullying from occurring in the first place, in addition to assisting employers in carrying out investigations in the workplace and responding to complaints in a lawful manner (ie. taking disciplinary action). Whilst ACCI supports the majority of the Committee's recommendations, ACCI

Subject	Summary	Response
		opposes the proposals to create a new jurisdiction within the FWC. The issue is far too important to be part of the Governments response to the Panel's report on the operation of the Act. These types of measures should be progressed only after thorough consultation and dialogue with all relevant jurisdictions, their WH&S agencies, and stakeholders. As with all public policy measures affecting business, they should be subject to a regulation impact assessment. Ideally, laudable policy objectives to reduce the incidence of workplace bullying should enjoy bi-partisan support and have the buy in of all stakeholders. Recommendation 23 of the House Committee report did not have bi-partisan support, despite many others having such support. Notwithstanding the Government's policy position underpinning these measures, the creation of a new anti-bullying jurisdiction within the FWC poses legal and practical difficulties for duty holders. The measures are not part of the WH&S framework and are said to "*complement, not replace, existing work health and safety obligations*" (Second reading, at p.7). The definition of "*worker*" is derived from the *Work Health and Safety Act 2011* (WHS Act). This is a broad definition which is not limited to the ordinary meaning of employer and employee. The definition of "*worker*" extends to contracts of service and contracts for service, as well as non-employment relationships, such as volunteers. The Act (and its antecedents) has historically and predominantly been limited to dealing with industrial relations matters pertaining to the relationship between employers and employees. In a number of particular protections, this can extend to independent contractors. To extend provisions in a federal industrial relations framework to volunteers is a significant and unprecedented step in the history of IR regulation. An issue which is significant and appears to have been overlooked is the interaction between civil and criminal jurisdictions. As the WH&S framework

Subject	Summary	Response
		imposes criminal sanctions, there appears to be little or no consideration on the face of the Bill as to how the disclosure of information within the FWC is to be used in criminal proceedings, should the matter involve a relevant WH&S regulator enforcing such matters. It is difficult to understand how information disclosed in proceedings before the FWC may not be used in criminal proceedings brought by relevant regulators and prosecutorial agencies. Legal advisers may caution an individual or company against providing details as to internal processes (such as investigations) in hearings before the FWC, where those matters may be the subject of investigation by a relevant WH&S regulator. Whilst orders for compensation and reinstatement are explicitly excluded, the orders which the FWC could make are significant and broad ranging, including requiring employers to comply with policies, provide support and training, and engage in regular monitoring of behaviours. Orders are not limited to employers and employees but third parties, such as visitors and members of the public (EM, at p.30). Whilst a member of the FWC may have some understanding of the matters involved in workplace bullying from a work health and safety perspective, members of the FWC are not specialists in workplace bullying matters, including dealing with complex behavioural and psychosocial hazards. Nor should they be expected to become one given their statutory remit is not to deal with such matters. Workplace bullying should remain within the expertise of WH&S agencies and their experienced and trained officers. Relevant WH&S agencies are already dealing with these matters, sometimes on a daily basis, and they are more than capable of triaging such matters as appropriate. Evidence to the House Committee inquiry suggested that thousands of complaints and inquiries are made to relevant jurisdictions. There is also an issue of adequate resourcing. The existing data (below) on the number of applications for unfair dismissal remedies suggests that an

Subject	Summary	Response
		additional jurisdiction will significantly impact on the existing capacity of the FWC to deal with matters within 14 days of receipt of an application, as intended by the Bill. There are also concerns that these measures will operate to attract employee grievances which are not, by the proposed definition, workplace bullying matters, and will require substantial resources of the employer and relevant individuals to respond to the application nonetheless. What should be particularly concerning to the Committee and all stakeholders is that in creating a new adjudicative and contestable jurisdiction within the FWC, inevitably bullying claims may lead to settlements at the instigation of either the alleged victim or employer, prior to any determination by the FWC, Depending on the nature of the alleged bullying and terms of the settlements reached, they may not assist the alleged victim and will unfortunately see some individuals exploit the system for their own purposes. This includes exploitation by individuals, (including those who may offer "*no-win no fee*" services to clients) in the expectation that some respondents (who we anticipate will generally be employers, notwithstanding the perpetrator may be someone else or a group of workers), may be willing to make a commercial decision to settle the matter even where there is no merit in the accusations made in an application to the FWC. It is an unfortunate reality that vexatious and unmeritorious claims are often experienced by employers under unfair dismissal, adverse action and ant-discrimination laws. This should not become a province for potentially vexatious claims to be made for such a serious WH&S matter. These types of issues reiterate why its important that bullying in a workplace context continues to remain part of the existing WH&S framework and enforced by relevant federal, state/territory agencies. The proposals risk creating a new layer of red-tape for potential applicants, overlapping and patchy coverage (noting not all persons will be covered due to the reliance

Subject	Summary	Response
		on limited constitutional powers available to the Commonwealth), and costs for respondents, in circumstances where bullying is not causing a risk to health and safety of individuals under relevant WH&S laws. ACCI considers the best way forward is to not progress with these proposals until all stakeholders and the social partners consider how best to progress the House Committee report and its recommendations. <u>Unfair dismissal applications</u> Number of applications for orders granting a remedy made under s.394 of the *Fair Work Act 2009*[3] 1st quarter 2010–11 (1 July 2010 to 30 September 2010): 3115 2nd Quarter 2010–11 (1 October 2010 to 31 December 2010): 3164 3rd Quarter 2010–11 (1 January 2011 to 31 March 2011): 3219 4th Quarter 2010–11 (1 April 2011 to 30 June 2011): 3307 1st Quarter 2011–12 (1 July 2011 to 30 September 2011): 3417 2nd Quarter 2011–12 (1 October 2011 to 31 December 2011): 3505

[3] Fair Work Commission, Quarterly reports – Unfair dismissal reports: http://www.fwc.gov.au/index.cfm?pagename=aboutquarterlyreports

Subject	Summary	Response
		3rd Quarter 2011–12 (1 January 2012 to 31 March 2012): 3574 4th Quarter 2011–12 (1 April 2012 to 30 June 2012): 3494 1st Quarter 2012–13 (1 July 2012 to 30 September 2012): 3521 2nd Quarter 2012–13 (1 October 2012 to 31 December 2012): 3867

SCHEDULE 4 – RIGHT OF ENTRY

Subject	Summary	Response
	This schedule amends Part 3-4 of the FW Act, which confers rights on officials of organisations who hold entry permits to enter premises and exercise certain powers while on those premises. This Schedule will make amendments to: • provide for interviews and discussions to be held in rooms or areas agreed to by the occupier and permit holder, or in the absence of agreement, in any room or area in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks and is provided by the occupier for that purpose; • give the FWC capacity to deal with disputes about the frequency of visits to premises for discussion purposes; • facilitate, where agreement cannot be reached, accommodation and transport arrangements for permit holders in remote areas and to provide for limits on the amounts that an occupier can charge a permit holder under such arrangements to cost recovery; and • give the FWC capacity to deal with disputes in	Notwithstanding that some amendments are in part are a response to a number of Panel recommendations, the right of entry provisions under the Act are a result of a broken promise by the Government in 2007 when it firmly indicated that the "*existing right of entry laws will be retained*".[4] Quite clearly, the existing right of entry regime is not the same as the previous laws which existed prior to the commencement of the Act in 2009 and the new proposals are both trying to fix issues as a result of these changes, but is also introducing new costs and problems on employers. Right of entry provisions are significant in that they provide a lawful right for a an individual to enter without the consent of an occupier, who at common law, is able to refuse (or put conditions) on the entry to a private premises. These matters should not be taken lightly by the Committee and need to be carefully balanced. Unfortunately, due to the broken promise in 2007, there have been instances of misuse or overuse of these statutory privileges by unions as indicated in the Panel's report and by employers in particular sectors, including the mining and resources industry (pp.193 – 194, Panel Report). ACCI opposes proposals which would require interviews or discussions to be held, absent agreement reached, in meal or other break locations. The Panel's recommendation 36 attempted to address issues raised by unions about the location of interviews or discussions to give greater discretion to the FWC on determining a reasonable location for interviews or discussions (p.197, Panel Report). There was no recommendation that a default position, absent

[4] Forward with Fairness – Policy Implementation Plan, at p.2.

Subject	Summary	Response
	relation to accommodation and transport arrangements and ensure appropriate conduct by permit holders while being accommodated or transported under an accommodation or transport arrangement.	agreement, would be the meal or other break locations at the workplace. This proposal is largely adopted by trade unions in their submissions to the Review Panel (see p.195, Panel Report). The Panel did not recommend any amendments to allow a statutory cap for costs associated with charging permit holders access to privately operated accommodation and transportation to remote sites. The Committee should note that the Fair Work Ombudsman currently has the capacity to investigate breaches of the Act, including visiting remote location sites. As noted by the Panel in its report, employers in particular sectors such as building and construction and the mining and resources sectors, have been particularly affected by unions use of the Act's statutory right of entry provisions. ACCI commends to the Committee ACCI member submissions on these particular amendments.

SCHEDULE 5 – FUNCTIONS OF THE FWC

Subject	Summary	Response
	This schedule amends the functions of the FWC.	No specific comment.

SCHEDULE 6 – TECHNICAL AMENDMENTS

Subject	Summary	Response
	Technical Amendments	No specific comment.

SCHEDULE 7 – APPLICATION AND TRANSITIONAL PROVISIONS

Subject		
	Technical amendments	No specific comment.