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Committee on Education & Employment

*Fair Work Amendment Bill 2013*

By the Australian Mines & Metals  
Association (AMMA)

*April 2013*



AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for 95 years, AMMA's membership covers employers in every allied sector of this diverse and rapidly evolving industry.

Our members include companies directly and indirectly employing more than half a million working Australians in mining, hydrocarbons, maritime, exploration, energy, transport, construction, smelting and refining, as well as suppliers to these industries.

AMMA works with its strong network of likeminded companies and resource industry experts to achieve significant workforce outcomes for the entire resource industry.

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## INTRODUCTION

1. Employers require of the Australian workplace relations system that it supports their capacities to operate competitively, productively, sustainably and that it places them in a positive position to grow and create jobs and to provide appropriate remuneration and opportunities to their employees.
2. Many of those concepts are included in the Object of the Fair Work Act 2009 (Section 3):

*The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:*

- (a) *providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and*
- (b) *ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and*
- (c) *ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and*
- (d) *assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and*
- (e) *enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and*
- (f) *achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and*
- (g) *acknowledging the special circumstances of small and medium-sized businesses.*

3. At this stage of the life of the *Fair Work Act 2009*, for any further amendments to enjoy employer support they would need to address genuine and urgent concerns with the day-to-day operation of the workplace relations system or support the advancement of Australia's productivity, economic growth, workplace flexibility, and enterprise determination.

## Review panel recommendations

4. A review of the *Fair Work Act* took place in 2011 and 2012, following a commitment by the Government to review the operation of the legislation after two years of operation.
5. The *Fair Work Act* Review was conducted by a panel comprising Reserve Bank Board Member Dr John Edwards, former Federal Court Judge, the Honourable Michael Moore and legal and workplace relations academic Professor Emeritus Ron McCallum AO.
6. The Government initiated a review, selected the reviewers, and received a detailed report nine months ago<sup>1</sup>. The review report created a clear expectation that the recommendations of the review panel would determine the priorities for the amendment of the *Fair Work Act 2009* during the remaining life of this Parliament.
7. This has not been delivered upon. The priorities in the *Fair Work Amendment Bill 2013* are overwhelmingly not those identified by the review panel. The government received 53 recommendations from its review panel and it has not seen fit to base to any large extent this major tranche of amendments on those recommendations.
8. In particular, there is a manifest failure under this Bill to address the concerns of employers operating under the *Fair Work Act 2009*.
9. This creates a situation in which it becomes very difficult to provide any support for the amendments in the Bill. When the Bill is examined in detail, it only further underscores its flaws and the lack of policy foundation.

## Position of employers

10. On 19 March 2013, Australia's four leading employer representative organisations (AMMA, ACCI, BCA and AiG) wrote to the Prime Minister, the Leader of the Opposition, the Minister and Shadow Minister for Workplace Relations, the leader of the Greens, and independent Members and Senators, regarding the proposed amendments that constitute the *Fair Work Amendment Bill 2013* (See [Attachment A](#)).
11. The letter states that:

*“These amendments should not be progressed.*

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<sup>1</sup> Fair Work Act Review Panel's final report, "Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation" (2 August 2012)

*In fact there is a need to start again. The approach proposed by the government will not address the core issues raised by the private sector, and almost all are entirely outside the considerations and recommendations of the review of the Fair Work Act in 2012. Many elements of the proposed amendments fail the test of good policy design and good regulation.”*

12. This remains the case and has only been amplified in undertaking the detailed examination of the Bill outlined in the following pages.
13. AMMA maintains that these amendments should not be progressed and need to be subject to more policy development and engagement with the industrial relations policy community and that this engagement should start with the recommendations of the *Fair Work Act* Review Panel, not some new set of matters.

### **ACCI submission**

14. AMMA has focused this submission on core concerns for the resource industry.
15. AMMA is part of the ACCI network and we adopt and support the ACCI submission on the various other schedules and parts of the Amendment Bill.

## SCHEDULE 4 – RIGHT OF ENTRY

### Introduction

16. There are many places where right of entry for union permit holders theoretically exists but never occurs in practice, such as in high-security workplaces or medically or operationally sensitive environments.
17. It is not simply the case that unions can go anywhere that work is performed in and around Australia. Right of entry has never operated that way and such an assumption is not a sound way for this Bill to proceed.
18. In AMMA's view, forcing employers to facilitate union access to remote worksites by providing transport and accommodation, as proposed under this Bill, is as unreasonable as forcing entry to any of the above types of workplaces. This view is amplified when we take into account that alternative union discussion arrangements can be accommodated more safely and effectively onshore at more accessible locations.

### What the government promised

19. Prime Minister Julia Gillard famously promised back in 2007 when she was Deputy Leader of the Opposition that her government would keep the same right of entry laws that existed prior to the *Fair Work Act* being introduced<sup>2</sup>:

*“I’m happy to do whatever you would like. If you’d like me to pledge to resign, sign a contract in blood, take a polygraph, bet my house on it, give you my mother as a hostage, whatever you’d like ... we will be delivering our policy as we have outlined it.”*

20. The reality of course was quite different and the *Fair Work Act* completely opened up union access to worksites. It did this in several ways but in particular by linking right of entry to unions' eligibility rules rather than requiring a union to be covered by an agreement or award applying on a site in order to be given access privileges for discussion purposes.
21. As of 1 July 2009, unions have been able to enter worksites where there is no award or agreement in place to which they are a party and where they have no members onsite. As long as they have potential members, unions have entry rights even where industrial agreements are made with other unions or directly with employees.
22. There is no question that this has led to increased demarcation disputes between unions which were avoided under the previous legislation where if an employer chose to make a greenfield or collective agreement with one union, no other unions had access for recruitment purposes. In some cases the changes to right of entry have turned sane workplaces into battlegrounds for trade union membership.

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<sup>2</sup> Deputy Opposition Leader, Julia Gillard, National Press Club Address, 8 November 2007

### Further changes proposed under this Bill

23. There are three further areas of change proposed in this Bill which will further open up union access to worksites and create untold future liabilities for employers.
24. The Bill's proposals in this area will:
  - a. Require employers to facilitate union transport and accommodation in remote areas while at the same time limiting employers' ability to recoup the full costs of such exercises.
  - b. Make lunch rooms and crib rooms the default locations for unions to meet with potential members for discussion purposes or conduct interviews in situations where the parties cannot agree on alternative locations. This removes one of the few remaining rights of employers in this area – the right to designate the locations for unions to meet with workers.
  - c. Empower the Fair Work Commission to rule on the frequency of union entry for discussion purposes (which AMMA only supports if the power is used to curb excessive union visits with no possibility of further opening up workplaces to third-party disruptions).

### What the *Fair Work Act* review panel recommended

25. In its August 2012 final report, the *Fair Work Act* review panel proposed three key changes in the area of union access to worksites.
  - a. The panel recommended that s505 of the Act be amended to provide the Fair Work Commission with greater power to resolve disputes about the **frequency** of visits to a workplace by a permit holder in a manner that 'balances the right of unions to represent their members in a workplace and the right of occupiers and employers to go about their business without undue inconvenience'. The substance of this recommendation is adopted in the proposed legislation currently before this committee.
  - b. The review panel also recommended that s492 and s505 of the *Fair Work Act* be amended to provide the Fair Work Commission with greater powers to resolve disputes about the **location** of union interviews and discussions. This recommendation was not adopted in the way the panel recommended in that the government chose to cut out the 'middle man' and go straight to allowing default access to lunch rooms by union permit holders rather than giving the commission the discretion to resolve disputes over locations.
  - c. The panel also recommended the capacity for a permit holder to enter premises under s481 to investigate a suspected breach relating to a member of the union should continue to apply, with appropriate limits, following the end of the member's employment. This panel recommendation was not adopted at all in the current Bill and AMMA supports this approach.



26. The review panel made no recommendations whatsoever that would require employers to facilitate union access to remote worksites yet that is exactly what the Bill proposes to do in Division 7 of Schedule 4.
27. This is a brand new and massive right being proposed for unions that will have disproportionate impacts on employers in the resource industry. Indeed, it will have such far-reaching ramifications that it is difficult to assess the extent of the damage it will do. An already unfair and poorly operating system is to be further and deliberately skewed in favour of trade unions.
28. While AMMA opposes the passing of the Bill in its entirety, in particular the provisions opening up union access to worksites, if changes are to be made in the area of the location of union site visits, the committee should recommend reverting back to the review panel's recommendation. This was to empower the Fair Work Commission to hear disputes about locations of union entry visits, not to make lunch and crib rooms the default locations as has been proposed under this Bill.

### Accommodation and transport in remote areas

29. Division 7 of Schedule 4 of the Bill proposes never before legislated provisions in relation to accommodation and transport arrangements for unions in remote areas.
30. The types of sites that will be affected by the Bill's proposals include not only those in the middle of a body of water, but also those that are onshore but in remote, desert-like locations which are just as complex to manage access to from an operational perspective.
31. Under the proposed s521C(2) of the Bill, in situations where unions and occupiers are unable to agree on accommodation and transport arrangements to enable union access to remote sites, employers will be required to facilitate access by providing said transport and accommodation, for which it can then charge back only a portion of the costs.
32. This huge financial and operational impost on employers is proposed to be limited to situations where the only "reasonably available" transport and accommodation to the premises is that provided by the occupier.
33. However, the wording of the proposed ss521C(1) and D(1) does not require it to be essential for the permit holder to be provided with transport and accommodation to exercise their right of entry in order for the new obligations on employers to apply. They simply compel the occupier to provide accommodation and transport 'if rights under this Part are to be exercised by a permit holder on premises that are located in a place where accommodation [or transport] is not reasonably available to the permit holder'.
34. In AMMA's view, that is not the appropriate test on which to establish that an occupier should be compelled to provide accommodation or transport to a third party and assume significant new costs and liabilities as a result.
35. In reality, many remote locations, including offshore facilities and vessels, are accessible by commercially available transport. That is precisely how the occupier arranges, and pays, to transport workers and contractors to and from

a site. Where commercially available transport is available, unions should have to make their own arrangements if they require such transport to access remote worksites.

36. The proposed s521D(1) instead imposes an obligation on the occupier to provide the commercially available transport that it has arranged for its own workers and forces it to extend that to the union. There is absolutely no reason why a union cannot make its own commercially available transport arrangements in many cases in order to be able to access remote sites. It goes without saying that unions would also have to get the appropriate permission and approvals from the occupier before accessing a worksite via transport they have arranged themselves.
37. Further, union permit holders should be required to establish that transport and accommodation are necessary to enable, not simply assist them, to exercise their right of entry. In fact, given the unique nature of many remote workplaces, unions should have to demonstrate why they cannot more appropriately meet with workers onshore or in more accessible locations.
38. By way of attempting to appease employers about the massive new obligations they face under the Bill, ss521C(2)(a) and 521D(2)(a) state that an employer does not have to comply with the obligations to facilitate access if:
  - a. Providing accommodation or transport would cause the occupier 'undue inconvenience'; or
  - b. The request is not made in a reasonable period before the accommodation or transport is required.
39. What amounts to 'undue inconvenience' remains to be seen and, according to the Explanatory Memorandum to the Bill, will depend on the circumstances of each case and be up to the Fair Work Commission to decide. Examples given in the Explanatory Memorandum say 'undue inconvenience' could include where premises are an offshore installation and all accommodation on deck is already occupied by employees and/or contractors. In such cases, an occupier would not be expected to remove individuals from beds to make way for union officials, employers are told by way of reassurance. This is cold comfort and will not lessen the number of disputes that will arise every time employers refuse to facilitate access on the grounds permitted.

## Specific issues for employers

### Safety first and foremost

40. AMMA members in the resource and construction industries are fully committed to a safety culture that aims to see no-one getting hurt on their sites.
41. AMMA members are committed to ensuring the ongoing physical integrity of their facilities as well as the currency and effectiveness of their operating procedures with regard to safety. They are committed to conducting each of their activities in a manner that causes no harm to anyone.
42. Further, they are committed to complying with all relevant laws and regulations with a view to providing a safe and healthy work environment for all.

43. The plethora of safety issues associated with union access to remote sites includes the fact that infrequent travellers require escorting on all offshore platforms and in helicopters to ensure their safety at all times. This is a further distraction requiring extra resources to be diverted while at the same time opening up the occupier to significant risk and liability.
44. There are also complex legislative compliance issues applying offshore that require employers to not only comply with the *Fair Work Act* and general Work Health & Safety Acts but also with the Occupational Health and Safety (Maritime Industry) Act 1993 and the Offshore Petroleum and Greenhouse Gas Storage Act 2006. These are safety-critical, highly-regulated environments recognised as unique in the work health and safety system.
45. There is also an increased regulatory burden offshore due to the proliferation of regulators, in particular safety regulators, in that environment.
46. Visitors are also a liability in emergency response situations which is something that employers have to factor in for each and every workplace visit, and would need to be especially vigilant about in relation to any union visitors.
47. Additionally, many safety training programs are company-specific and have refreshable frequencies which incur extra costs and time. For instance, platform safety induction is a mandatory safety requirement as part of the offshore safety case.
48. It is important for the committee to remember that unions' target audience, in particular in an offshore environment, will be spread out across sometimes 10 or more platforms. It is therefore likely that unions will have a desire to travel to numerous sites. This multiplies the cost, disruption and safety issues already present in such environments.
49. AMMA cannot stress enough the importance of the committee taking into account the serious safety ramifications that the proposed provisions will have before considering whether the Bill should pass in its current form.

#### **Environmental and quarantine issues**

50. Many remote resource industry businesses operate to extremely strict quarantine and environmental regulations.
51. Barrow Island, for instance, where the Gorgon Gas Project operates is a 'Class A' nature reserve. This means that any interference with the natural resources of the island can have an environmentally catastrophic impact.
52. For instance, a charter vessel would not be allowed to land on the project given the strict quarantine guidelines.
53. These types of locations represent environments where there are more arguments against facilitating union access to them than there are in favour of doing so.

#### **Widespread accommodation shortages**

54. AMMA members' concerns with the Bill's provisions in relation to union access to remote sites include the fact that many resource sector sites, particularly those in the offshore hydrocarbons sector, continue to experience severe accommodation shortages. Motelling is an ongoing industrial issue at some sites that simply cannot be avoided. These proposals will simply add fuel to that fire and create an additional drain on already overstretched accommodation resources for no operational gain.
55. Under the Bill's proposals, it is unclear whether the choice will rest with the employer or the union as to whether to accommodate union officials overnight or fly them back the same day. If the proposals go ahead, employers must retain the choice in those situations according to their operational needs given the acute and widespread accommodation shortage, particularly during the construction phases of projects.
56. If unions are to be accommodated overnight, in order not to disturb employees sleeping off-shift, and in keeping with current protections given to employees in their private accommodations during non-work time, union officials would need to be put in separate rooms. It should also be noted that those rooms must be cleaned and maintained on a daily schedule, which is a further additional cost on the employer.
57. On some sites, unless an accommodation support vessel is being used and has excess sleeping capacity, union workplace visits requiring overnight accommodation will be disruptive in the extreme, in many cases unreasonably so.
58. In other cases, overnight visits will simply not be possible due to a lack of appropriate rooms for union officials and their escorts.
59. Employers at all times need to retain the flexibility to accommodate employees and contractors at short notice rather than having union officials tying up extra bed space that may be needed in a short lead time.

### **Protections for employees**

60. Under [s493](#) of the current *Fair Work Act*, union officials are expressly forbidden from entering any part of a premises used mainly for residential purposes when exercising right of entry. This is an explicit protection of the privacy of individual workers that distinguishes between worksites and private residences for the purposes of right of entry.
61. Those protective provisions have been in Australia's IR legislation since the Workplace Relations Act of 1996, prior to which entry by union officials was codified in industrial awards. Section 493 of the current Act has a particular purpose in ensuring a worker is not disturbed while enjoying their private, non-work time.
62. This provision must not be removed or derogated under any circumstances but the committee should note that its existence is at odds with the changes proposed in the Bill which will force employers to open up their accommodation facilities to visiting union officials.

63. Even if those legislative protections remain for employees, how can employers possibly monitor in practice whether unions are using their access to encroach on employees' private time and push their industrial and ideological agendas on them?
64. Despite any other provisions that may be enacted under this Bill, employers must retain the right to exercise complete control over the movement of union officials at onsite accommodations. Under no circumstances should a permit holder be able to move freely around accommodation areas and hold discussions with any person.
65. Any accommodation arrangements enforced under this Bill must also require strict compliance with camp or site rules by all union permit holders. Permit holders must be held liable for any damage they cause to accommodation and/or transport and must have their entry permits revoked if such damage is wilful and/or serious. Employers must be able to remove permit holders from the premises at any stage for breaching camp rules.
66. The proposed ss521C(4) and 521D(4) which treats the conduct of permit holders whilst entering into an accommodation or transport arrangement as conduct engaged in while exercising their rights of entry are not adequate to address the huge issues employers will face in trying to manage their obligations under these provisions. Like so much of this Bill, these requirements have simply not been thought through.

### **Transport logistics**

67. The provisions in this Bill requiring employers to enter into transport arrangements with unions to facilitate their access to remote sites ignore the realities of remote operations.
68. On most if not all flights to remote resource projects, whether onshore or offshore, seats are simply not available for union permit holders wishing to visit. Under no circumstances should employers be expected to charter special flights just for union officials wanting to visit members for recruitment purposes or be forced to kick operationally critical people off planes and helicopters so trade unionists can go onsite.
69. If such flights have to be scheduled on weekends when no other flights are scheduled, this would require the full complement of security, administrative and ground support staff, the same as at any other time, but on overtime rates of pay.
70. Some transport contracts expressly provide that flights are only for use by company personnel and contractors. This is the long-standing status quo for many operators of remote sites.
71. The indemnity/insurance regime under many such contracts actually prohibits third parties from sharing flights and, in the absence of a variation, would require an agreement between the company and the transport provider as well as an agreement between the company and its contractors consenting to shared flights outside of the existing indemnity regime. This would also require a blanket indemnity from unions indemnifying (to the extent permitted by law)

the company, its joint venture partners, the transport operator and its contractors for any and all damage or losses, injury or death.

72. At each point in the transport process there would be additional costs to employers.
73. Assuming that those significant indemnity issues were not present, the estimated minimum cost for two return flights on the basis of same-day travel to an offshore facility in the northwest shelf would be around \$4,200. Under the current rules, accommodation would not be provided at such a facility as it is not required under the *Fair Work Act* and such facilities would in any case be at their maximum capacity in terms of beds.
74. The committee must remember that flights to and from offshore facilities do not operate like airport taxi ranks. For instance, what are employers supposed to do with union officials for a full day when they are just there to attend a meal break meeting with employees with the aim of recruiting them? Employers will often be forced to squire union officials around a premises for an entire day solely for the purposes of a one-hour meeting.
75. The fact is that even different unions are likely to submit entry requests for the same dates and times so that mass meetings are more likely to occur, creating further transport and accommodation nightmares for employers.
76. An alternative to the above arrangements would be for the unions in question to deal directly with the transport company such as a helicopter company to charter a flight to the facility which would involve an agreement between the parties on indemnities, insurance and commercial rates. However, this option would still require occupier approval to land on the facility which again would require a blanket indemnity and be subject to operational requirements. This cost would then be negotiated between the union and the transport provider directly.
77. It is incredibly obvious that no single rate schedule as proposed by the Federal Government can cover all the above contingencies and that employers should be able to itemise and recoup all their costs.
78. In all cases where an employer incurs costs associated with travel arrangements, advance payment should be required from unions before providing the arrangements. In all cases, cost recovery would need to be in whole, not in part.

#### **Transport costs – offshore oil and gas construction projects**

79. Helicopter flights are a major cost to offshore construction projects as well as being the focus of complex logistics and stringent safety procedures.
80. Incoming personnel are typically flown into a city like Melbourne on commercial flights and accommodated in a hotel overnight before mobilisation to the project. Buses transport incoming and outgoing personnel between cities and the embarkation airports.

81. The helicopters used typically have two pilots and capacity for up to 18 passengers. Seats on each flight are always in high demand and empty seats are rare. Each flight can cost more than \$30,000.
82. Additionally, the embarkation airports typically require two security staff to administer breath tests and search bags, plus two administrative staff to weigh and check in passengers and their luggage. Administrative staff also provide a pre-flight briefing and assist passengers to correctly assemble the personal protective equipment required for each flight. Helicopters are serviced and refuelled by a team of permanent ground support staff.
83. If union officials are required to be transported offshore for a workplace visit, they require at least two seats in such a situation – one for each official and one for an industrial relations specialist to escort them. Offshore hydrocarbons projects also require a dedicated escort for all casual visitors who are not part of the construction crew.
84. On many offshore projects, there are several occasions where seats are not available on the flight for an offshore union visit. This required a special flight just for the union officials. When such a flight had to be scheduled on a weekend, costs could easily exceed \$40,000 for one flight. In reality, it would require two flights – one to deliver the union officials to the offshore barge/vessel, the other later in the day to pick them up.
85. It is important that the committee realise that helicopters cannot remain on a barge/vessel helipad for any length of time. They can only land, upload, reload and take off again. Under this scenario, the cost of a union visit would be twice \$30,000 plus on-ground support staff for the day. Again, the vast range of potential costs come to the fore, exposing a fundamental flaw in proposal s521C(3) and s521D(3) regarding employers' ability to recoup 'costs'.
86. The costs of an offshore union visit also often entail an onboard specialised crew including a fire safety team to meet the helicopter. This would be around 10 people. Most of those people have other duties aside from managing helicopter arrivals and departures so they would be drawn from their normal duties. Safety personnel are also required after union officials arrive onsite to provide an induction briefing and tour of safety features of the barge/vessel/platform.
87. If union officials meet with their members outside meal breaks, they draw those people away from their construction jobs. Productive working time lost offshore is extremely high-cost compared to onshore construction projects due to the cost of mobilising personnel to each location.
88. If union officials are to be accommodated offshore, the costs escalate further. Rooms and beds are in even greater demand than helicopter seats, particularly on offshore platforms.

#### **Onshore or 'virtual' meetings a safer, simpler option**

89. A much more cost-effective and safer option than what is proposed in this Bill would be for unions to meet with their members at transit points onshore rather than onsite in an offshore or remote location.

90. There is always waiting time before and after flight briefings at heliports and this is the perfect time for unions to make contact with members and potential members. Unions could also meet with their members at pre-mobilisation hotels the night before departure or at the airport after demobilisation following their swings but before their flights home.
91. Given the complexities involved, it would be preferable to find solutions whereby arrangements could be made to organise meetings between unions and workers at suitable onshore locations.
92. Offshore rosters typically operate so that employees spend around 40 per cent of their time at work and 60 per cent of their time onshore, allowing ample opportunity for unions to meet with employees at onshore or more central locations. Unions meeting with their members onshore would give them better access to a greater spread of employees.
93. Even in the Bass Strait, where offshore vessels are heavily unionised, it is easier and preferable for unions to meet with workers onshore as they get better access to more workers than they do offshore during meal breaks.
94. Offshore facilities are also typically equipped with internet, email and telephone facilities which make communication with unions easy and accessible if it is desired. There is rarely a genuine need for face to face visits for recruitment purposes in an offshore or remote onshore environment. Put another way, why can this not be facilitated through multimedia technology such as 'Skype'?
95. In some locations, unions have worked with employers to set up consultative committee forums. In other cases, there are formally elected shop stewards which, in combination with the workplace rights regime, affords them significant access to the workforce. Again, these are smart, effective ways of facilitating union engagement without the amendments proposed in Schedule 4, Division 7 of the Bill.

### **The restricted ability for employers to recoup expenses**

96. Putting to one side the massive logistical, regulatory and compliance difficulties associated with employers having to facilitate union visits to remote worksites, employers who do so will not be able to recoup their full costs under the Bill as currently drafted.
97. The proposed s521C(3) will limit the fee that organisations can charge a union or permit holder for accommodation to no more than is 'necessary to cover the cost to the occupier of providing the accommodation, or causing it to be provided'. If employers breach those provisions, they face civil penalties.
98. Similarly, s521D(3) states that transport costs charged to the permit holder are to be no more than is necessary to cover direct costs.
99. The Explanatory Memorandum states that it is not intended that incidental costs such as insurance premiums in the case of transport arrangements and, in the case of accommodation, electricity, be included in charges to the union.



100. But what about meals? Are they required to be provided and, if so, are they able to be charged back to the union? Catering in remote locations often equates to around \$75 a meal or \$225 a day. Are employers expected to bear those types of 'incidental' costs themselves?
101. The number of persons on board at any given time is also an issue in terms of service provision. For instance, catering numbers are governed by trigger points and just one extra person can trigger the need for a catering staff ramp-up.
102. Insurance is a huge cost associated with transport to and accommodation on offshore vessels that will not be able to be claimed back if the Bill passes in its current form. AMMA notes that we are yet to see the schedule of fees that is intended to apply in the event the parties cannot agree on costs.
103. However, AMMA fears that the rate schedule that is yet to be detailed will be substantially below the actual costs incurred. We also fear that costs are so variable and site-specific that a single rate schedule could not operate fairly and equitably as a simple matter of logic.
104. A schedule that allows a certain rate to be charged back based on, for example, the number of kilometres travelled to the site, will be manifestly inadequate.
105. The very real concern for AMMA members operating in remote environments both onshore and offshore is that they will not be able to recoup anywhere near their full costs of providing transport and accommodation in situations where that is required.
106. How is it in any way 'fair' that employers are always out of pocket for providing transport and accommodation?
107. In the event that the other provisions of this Bill pass, employers must be able to charge back their full costs for facilitating such arrangements and in all situations must be able to demand billing and payment in advance of facilitating any union visits.

## Interviews and discussions

### Location of Interviews and discussions

108. Schedule 4 of the Bill under the proposed s492 states that a union permit holder must conduct interviews or hold discussions in the rooms or areas of a premises agreed with the occupier.
109. However, if the permit holder and occupier cannot agree on a location, the lunch room or crib room becomes the default meeting place.
110. In simple terms, if this Bill passes it will no longer be up to employers to designate a reasonable onsite meeting place for unions. This represents a huge winding back of employers' control of third-party intrusion onto their premises which was not recommended by the *Fair Work Act* review panel.
111. Under the current legislation, if the facilities designated by the employer are seen as being unreasonable for the purpose of union interviews and

discussions, unions can dispute the reasonableness of the location and have the tribunal arbitrate.

112. That is the preferred position of AMMA and its members but failing that, if the commission is given greater powers in this area, the onus should be on unions to prove the locations designated by employers are not reasonable.
113. While some members of the tribunal have already interpreted the *Fair Work Act* as not providing employers with an absolute right to designate locations for union meetings, even under the current rules, if this Bill passes it will make that a certainty.
114. AMMA maintains that when a union is visiting an employer's site, the employer should determine the room where the union will be placed. The employer is running a business and should be able to control which rooms are used for which purposes.
115. Key among employers' concerns about the Bill's proposals in this area is freedom of association and the need to protect employees who have no desire to meet with unions or to have any intrusion into their rest time.
116. It is entirely possible that a lunch room of 50 people could see six different unions have constitutional coverage of different sets of workers. How are employers supposed to manage that under these proposals? Are 45 people supposed to leave the lunch room if they are not able to be represented by a particular union? Or would it be more reasonable to require the union to meet with a minority of employees at a different location designated by the employer? This could also lead to issues for employers in deciding which of their lunch rooms is the default lunch room if workers have lunch at different places.
117. One AMMA member spent \$500,000 constructing a purpose-built facility purely so unions would be able to hold meetings and discussions there with interested employees. Other employers have no doubt done likewise. What happens to the money spent on such facilities if lunch rooms are to be made the default meeting place in spite of perfectly adequate alternative facilities being available?
118. It is also important to remember there may be occasions where the presence of a union in a lunch room could be met with some hostility from individual workers. This also raises safety issues in terms of the potential for aggression to erupt during workers' private meal time.
119. Strong rules are required to protect the peace and privacy of disinterested employees. Employers feel very strongly that the 82 per cent of private sector workers who are not interested in being part of a union should not be subjected to such intrusions during their meal or other rest breaks.
120. In a further attempt to appease employers, the Bill states that the tribunal may restrict access privileges if a permit holder abuses their entry rights by repeatedly seeking to have discussions with a person in a lunch room to encourage them to become a union member when that person has made it clear they do not want to participate.

121. While it is technically open to employees to make it clear they do not want to meet or be approached by a union official, in reality a 23-year-old trades worker will almost certainly be unlikely to cause a fuss.
122. In this as in most other areas of the Bill, employers would expect a very high bar to be applied given that under the current system virtually no conditions have ever been imposed on entry permits and virtually no permits have ever been revoked or suspended.
123. At the end of the day, the proposal to open up crib rooms and lunch rooms as the default location for union meetings has been put in this Bill because of a very small minority of unions beating the drum. There is no reason for legislation to be passed simply because a minority of unions do not like the current rules. That minority, even under the current rules, can take a dispute over the reasonableness of a meeting room to the commission.
124. While the Bill specifies that lunch rooms will become the default meeting place in the absence of agreement, what is the process for determining there has been no agreement? Will orders be needed on each occasion?
125. There is absolutely no reason to disrupt resource industry workplaces across the country for a problem that, if it even exists, affects only a small minority of individuals, especially given the Federal Government's own review panel did not identify this as an issue.
126. The committee should also remember that there is nothing stopping employers and unions that have good working relationships from agreeing on lunchroom access for unions, but employers across the board should under no circumstances be compelled to do this.

#### Route to interviews and discussions

127. Under the proposed s492A, employers will retain the ability to make a 'reasonable request' for a permit holder to take a particular route to a room or area, while losing the right to designate that area. However, the reasonableness of a request to take a particular route can still be disputed.
128. The Bill also leaves it open for the Federal Government to make additional regulations around the 'reasonableness' test in relation to employers' choice of route.
129. It is of utmost importance that employers retain an absolute right to request unions to take a particular route to a meeting place and for unions to have to comply with such requests.
130. Under no circumstances should union officials be able to stroll through parts of an enterprise that could compromise the security of the business or the personal information of employees.
131. As mentioned, there are a plethora of very significant safety issues that arise whenever any visitor has access to a worksite and strict controls must be placed on union permit holders, including the ability for employers to have someone escort them at all times while they are on the premises. Despite the extra time and resources this chaperoning incurs for employers, it is essential

that site management is able to constantly monitor the permit holders' movements and whereabouts.

### Disputes regarding frequency of union entry

132. Under the proposed s505A(2) of the Bill, the tribunal will in extremely limited circumstances be able to deal with disputes about the frequency of union entry to workplaces.
133. Under the changes proposed, an employer or occupier would be able to dispute the frequency with which permit holders from the **same** union enter their premises under s484 to hold discussions. It is understood this ability would not arise in relation to entry under s481 to investigate suspected breaches of the Act.
134. The Bill proposes to allow the Fair Work Commission to deal with disputes about frequency on its own initiative or by application from an affected permit holder, union, employer or occupier. The commission can deal with disputes by mediation, conciliation, recommendation or by expressing an opinion. Options open to the commission via arbitration would include:
  - a. Imposing conditions on an entry permit;
  - b. Suspending an entry permit;
  - c. Revoking an entry permit;
  - d. Making an order about the future issue of entry permits to one or more persons; and
  - e. Any other orders it considers appropriate.
135. Importantly, however, the commission would only be able to make orders if the frequency of visits by officials from a single union would require an 'unreasonable diversion of the occupier's critical resources'. It is clear that unions would be able to play this system by strategically swapping which official from which union makes the entry.
136. It should also be noted that the above provision continues the trend of legislation being aimed at the occupier rather than the employer. This is problematic from an operational perspective in that there will usually be one occupier on a large resource site but there could be 10 employers that will also be impacted, perhaps more so, by the application of the provisions. Multiple impacts are felt by employers every time a new legislative provisions is directed at occupiers.
137. The Bill's Explanatory Memorandum points out that the ability for the Fair Work Commission to make orders in relation to frequency of entry would have an 'appropriately high' threshold given that disputes under s505A could displace a permit holder's legitimate right to enter premises in the absence of any 'intentional' misbehaviour or wrongdoing.
138. AMMA members legitimately fear that the bar for successfully disputing frequency of entry will be set so high as to make the provisions inaccessible. In

the end, the likelihood is that the provisions will never be used and will offer none of the purported comfort.

139. Among other things, the management of union right of entry on major projects will usually be performed by dedicated industrial relations personnel to avoid 'critical resources' being distracted from their real jobs. Therefore, employers will rarely be able to fulfil the required test.
140. If the Bill's provisions are to be made at all accessible, the necessity to too frequently allocate any resources to manage right of entry should be sufficient to meet the test.
141. AMMA remains unconvinced that empowering the commission in this way will have the desired affect for employers.
142. AMMA is also concerned to ensure the tribunal's discretion in this area can only go one way – to restrict excessive union access rather than making orders to open up competition for union access even further.
143. The ability for unions to bring applications under this section suggests that it will not be limited to curbing union excesses unless unions plan to dispute the frequency with which other unions enter a worksite. In the event such applications are received, this will only further disrupt worksites and lead to increased demarcation disputes.
144. Unless the proposed changes are limited to the tribunal restricting union access, AMMA maintains the tribunal should not be given further powers in this area.
145. It is AMMA's position that under normal circumstances, the federal industrial tribunal should not be given the power to determine the number of union visits as proposed under this Bill. Such decisions should continue to rest with employers.
146. However, where a dispute arises over the reasonableness of the number of entry requests from unions as a whole, the federal tribunal might, as a last resort, make a determination on conditions of entry restricting the number of visits by unions in general, not specific permit holders from one union.
147. AMMA recommends that the wording of the proposed provisions be changed so that only an affected employer can bring an application under this section, not a union or permit holder.
148. AMMA further recommends that an explicit cap be placed on union visits for discussion purposes and that this cap be set at one visit per union per worksite per month.

#### Other disputes regarding union entry

149. Under the proposed Bill, the Fair Work Commission will be able to deal with a broader range of disputes relating to right of entry.
150. Currently, the commission can deal with disputes encompassing:

- a. Whether an employer's request for a permit holder to comply with specific health and safety requirements is reasonable;
  - b. Whether an employer's request for a permit holder to meet in a specific location with employees is reasonable;
  - c. Whether a request for a permit holder to take a particular route to a designated meeting place is reasonable; and
  - d. When permit holders' rights to enter workplaces to investigate suspected breaches or to hold discussions may be exercised.
151. Under the proposals contained in this Bill, the commission will be given increased powers to deal with disputes including:
- a. Whether accommodation is 'reasonably available' on remote sites (as it pertains to an employer's refusal to provide accommodation to union permit holders on remote worksites);
  - b. Whether the premises are 'reasonably accessible' in terms of transport to remote sites (as it pertains to an employer's refusal to provide transport to facilitate union access to remote sites);
  - c. Whether providing a union permit holder with accommodation or transport would cause 'undue convenience' to the occupier of a remote site; and
  - d. Whether a union's request to provide accommodation or transport is made within a reasonable period.
152. The problems for employers under these proposed new dispute provisions are the same as those under the existing provisions. The dispute resolution mechanisms under the current s505 offer little recourse for employers, with just 22 orders being made under that section in the 2.5 years between July 2010 and December 2012<sup>3</sup>.
153. During that same period, the tribunal took just two actions under [s508](#) to restrict the entry rights exercisable by permit holders on the basis of misuse. This is despite some unions making hundreds of entries to particular sites to see the same employees and not behaving appropriately while there.
154. AMMA fears that none of the proposed new dispute resolution provisions that appear to have a pro-employer slant will ever be used.

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<sup>3</sup> Fair Work Australia quarterly reports

## SCHEDULE 1 – FAMILY-FRIENDLY MEASURES

155. Schedule 1 of the Bill contains a range of proposed amendments grouped under the heading “Family-Friendly Measures”.
156. AMMA draws to the committee’s attention that only two of the measures in this Schedule were recommended by the Fair Work Review Panel in its August 2012 report, as follows:

4	The Panel recommends that s. 80(7) be repealed so that taking unpaid special maternity leave does not reduce an employee’s entitlement to unpaid parental leave under s.70.
5	The Panel recommends that s.65 be amended to extend the right to request flexible working arrangements to a wider range of caring and other circumstances, and to require that the employee and the employer hold a meeting to discuss the request, unless the employer has agreed to the request.

157. Most of the proposals in this tranche of amendments have no link to the Government’s commissioned review into the operation of its legislation.

### Part 3 – Right to request flexible working arrangements

158. Part 3 of Schedule 1 would redefine eligibility to request changes to working arrangements and provide “*a non-exhaustive list of what might constitute ‘reasonable business grounds’ for the purposes of refusing a request under the Part*”. AMMA will restrict its input to the committee to this second proposition as to what will constitute reasonable business grounds.

#### **This is unnecessary**

159. If the Bill’s proposed s65(5A) genuinely does not limit what reasonable business grounds are then at best this amendment achieves nothing. However, at the very least this definition will be persuasive to the Fair Work Commission in its deliberations and so therefore will have a detrimental impact on employers’ ability to manage their own operations as they see fit.
160. Australian businesses are quite capable of understanding what reasonable business grounds are in addressing these requests from our employees, and do so in the context of complex human resources and organisational culture considerations (including maintaining employee motivation and fostering retention):
- a. Business does not need the additional assistance of proposed new s65(5A).
  - b. If anything, this is going to complicate the capacity of business to clearly and rapidly respond to requests for flexible working arrangements.
161. The right to request flexible working arrangements on work and family grounds has been part of Australian employment obligations since the Family Provisions Test Case Decision of 2005 and subsequent codification into the revised *Workplace Relations Act 1996*.

162. This concept is not new and Australian business already has policies and practices in place to comply with this obligation.

### Why enshrine subjectivity?

163. If the items in proposed s65(5A)(a) to (e) are solely indicative then they should be expressed as value-neutral considerations, without the subjective qualifiers in the construction of the proposed section.

164. The subjective qualifiers which are the grounds on which employers can refuse requests for flexible working arrangements are as follows (emphasis added):

(a) *that the new working arrangements requested by the employee would be too costly for the employer;*

(b) *that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;*

(c) *that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;*

(d) *that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;*

(e) *that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.*

165. It is one thing to encourage employers to have regard to cost, their capacity to accommodate and change working arrangements, efficiency and productivity, and impacts on customers. It is quite another to try to make the subjective decisions of management for employers in this country.

166. A clear implication of the construction of the above paragraphs is that employers are expected to suffer some level of lost efficiency and productivity, some level of negative impacts on customer service, and some level of additional costs as a result of granting such requests.

167. It is difficult to escape the conclusion that this will make day-to-day processing of employee requests to change working arrangements more complicated, more subjective and more uncertain. Employers are going to be compelled to try to navigate entirely unnecessary new patterns of workplace arrangements.

### The test case on the "right to request"

168. The 2005 Family Provisions Test Case gave us the form of words which became the existing s65 of the *Fair Work Act*. In relation to a return to work part-time after parental leave, the decision handed down the following model clause for inclusion in awards:

*P.2 The employer shall consider the request having regard to the employee's circumstances and, provided the request is genuinely based on the employee's parental*



*responsibilities, may only refuse the request on reasonable grounds related to the effect on the workplace or the employer's business. Such grounds might include cost, lack of adequate replacement staff, loss of efficiency and the impact on customer service.”<sup>4</sup>*

169. There is a significant difference between this arbitrated “umpire’s” decision on the ACTU’s test case claim and what the government is now attempting to legislate. In particular:
  - a. There is the loss in the Bill of the important bridging qualifier “might include”, in favour of “include” in relation to the listed grounds; and
  - b. The subjective qualifiers in the proposed s65(5A)(a) to (e) compare for example a consideration of “cost” versus something being “too costly for the employer”.
170. Business does not need the additional 'assistance' this amendment purports to provide.
171. The fact is that resource industry employers will facilitate requests for flexible working arrangements where possible as it is good business practice to do so, but the last thing employers need is the Federal Government telling them what to do in this area.

#### **Part 4 – Consultation about changes to rosters or working hours**

172. This is a critical area for employers as what is proposed under the Bill means that every change made to rosters is a change that will require consultation with the workforce represented by unions.
173. The essence of the changes in proposed Schedule 1, Part 4 of the Bill appears to be:
  - a. Creating new obligations in awards and agreements for an employer to consult employees on changes to rosters and hours of work;
  - b. Providing new rights of representation in regard to the new consultation arrangements;
  - c. Creating new obligations to provide information to employers and employees on roster changes; and
  - d. Creating new obligations to consider employee views on the impact of the changes upon them and their family commitments.

#### **What proof is there that this is a problem?**

174. The Federal Government has not demonstrated that any policy problem or statutory inadequacy exists to justify changing the legislative status quo in this area. No proof has been provided to the effect that:
  - a. The existing statutory framework is not operating adequately in terms of consulting employees over major workplace change;

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<sup>4</sup> Family Provisions Test Case Decision (August 2005), Print PR082005, Para [396]

- b. The issues concerned are not being addressed successfully at the workplace level, either under formalised processes or less formally; and
  - c. These are the right interventions that will have the intended effect and not have other unintended consequences.
175. There is a clear contrast between the amount of research undertaken on the right to request flexible working arrangements<sup>5</sup>, or parental leave<sup>6</sup> and the evidence provided to justify imposing new rostering obligations on employers.

### This should have been dealt with in the modern award review

176. There is a proper process to progress the considerations raised by these proposed amendments without rushing into amending legislation. This process should be followed without pre-empting it through rushed legislation.
177. This is precisely the type of consideration that should be dealt with in the scheduled modern awards review in relation to provisions to be included in awards. This could then be used as a guide as to what could be done in agreements or rather what needs to be included in agreements in relation to consultation provisions.

### Impracticality

178. If employers are exposed to these substantial obligations each time they tweak their rosters, even by providing more hours, this would not only be costly it would cause complete disruption to work, cutting across the basis on which there was a need for additional working hours in the first place. The Bill's impact in this area would border on the farcical if an employer attempted these consultations in a tight deadline situation.
179. At the very least, the proposed amendments will create additional litigation and ambiguity and could well create a new tool in the hands of trade unions seeking to disrupt employer operations.
180. The documented process this provision would require would be completely at odds with a busy workplace needing to reschedule working hours for a limited period or in some cases only for a single shift.
181. Even in cases where employers wanted to vary working hours around the margins, which would not be considered a major change, employers would be required to consult with every single employee or else face prosecution.
182. What's next? Employers being forced to consult every time the menu in the subsidised canteen is changed?

### Emergencies

183. Clause 20.4 of the Mining Industry Award 2012 (a modern award) reads as follows:

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<sup>5</sup> Part 2-2, Division 4 of the Fair Work Act 2009, noting the recent Fair Work Australia General Manager's report into the operation of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave, 2009–2012

<sup>6</sup> Through the Fair Work Review Panel

## 20.4 *Emergency arrangements*

*Notwithstanding anything elsewhere contained in this clause, an employer may vary or suspend any roster arrangement immediately in the case of an emergency.*

184. The above clause is not referred to in the Bill's proposed amendments and it is not clear whether this provision of the Mining Industry Award would survive the inclusion of the proposed s145A into the *Fair Work Act 2009*. It remains quite unclear how the proposed schema would address unforeseen circumstances such as emergencies.

### Representation

185. Proposed s145A(1)(b) would require a modern award to include a term allowing for the representation of employees during consultation required by the new provisions.
186. Representation by whom? Is this a union of whom the employee is a member, any union party to the award, or any union who has potential coverage on the site? Is this required to be representation by a trade union at all, or could it be some other agent or individual?
187. There is no clear definition of representation in s12 of the Act that would help resolve this, and further ambiguity on representation in relation to these matters would multiply the complications already being caused by the *Fair Work Act's* approach to several areas including right of entry.
188. **Does this create a veto?** What happens if the union is not available, or cannot attend the workplace in line with the employer's planned consultation with employees? Does this create an effective veto, and would it have the effect of delaying an essential business or operational decision on rostering?

### Consultation on major workplace change

189. The amendment proposed under s205(1)(a) would address agreement content only.
190. The first question the committee should consider is whether there is any evidence of the need for further consultative provisions in enterprise agreements.
191. This proposed amendment also begs the question as to why such consultation cannot be agreed between employers and employees and their representatives at the workplace level. If parties are capable of reaching an agreement under the *Fair Work Act 2009*, surely they are capable of agreeing on a consultation provision if that is a priority for them.
192. The proposed new paragraph appears to be based on the former introduction of change provisions handed down in the 1984 Termination, Change and Redundancy Test Case<sup>7</sup>.

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<sup>7</sup> Federal Termination Change and Redundancy Case 8 I.R. 34

193. At that time a Full Bench of the then Conciliation and Arbitration Commission concluded:

*We are prepared to include in an award a requirement that consultation take place with employees and their representatives as soon as a firm decision has been taken about major changes in production, program, organisation, structure or technology which are likely to have significant effects on employees.*

194. The current proposal is expressed much more loosely. It omits the temporal trigger of coming into play once a firm decision has been taken, and it omits the detail on the scope of changes that trigger the obligation.

195. This will create a situation in which litigation is encouraged and in which trade unions will test the scope of the new obligations to try to deal themselves into major commercial, operational and investment decision-making by Australian enterprises.

196. It will also create disputes about the point at which the consultation obligation is triggered, and whether Australian business needs to ask the permission of its staff and their representatives prior to making investment, capital expenditure and operational decisions. This is simply unacceptable.

197. Workplace change should remain a matter that can be addressed in agreements, subject to it being a permitted matter under the *Fair Work Act*, but not one that is imposed on bargaining parties.

198. At the end of the day, the committee needs to ask itself whether this new requirement to consult is going to leave employers free to run their businesses or is it yet another avenue via which the federal industrial tribunal will be able to tell business what to do.

## Part 5 – Transfer to a safe job

199. Part 5 of Schedule 1 of the Bill proposes to extend the right to transfer to a safe job to all pregnant employees regardless of length of service.

200. Currently, this right only applies to pregnant employees with at least 12 months' service.

201. Under the proposed changes, the right to transfer to a safe job will extend to all pregnant employees who provide evidence they are fit for work but that it is inadvisable to continue in their current role due to illness or risks arising out of their pregnancy or because of hazards connected with the role.

202. If there is a safe job available, the employer must transfer a pregnant woman to that role for the duration of the risk period, which in many cases will be the duration of the pregnancy.

203. If there is no safe job available, employees who are otherwise entitled to take unpaid parental leave (ie who have more than 12 months' service) will be entitled to take '**paid** no safe job leave' for the duration of the risk period or the pregnancy.

204. For employees who are not otherwise entitled to take unpaid parental leave (ie who have less than 12 months' service with their employer) and for whom there is no safe job available, they will be entitled to take '**unpaid** no safe job leave' for the duration of the risk period or pregnancy.

### **Problems for employers**

205. This extension of the right to transfer to a safe job to a wider range of pregnant workers was not recommended by the *Fair Work Act* review panel and will create particular problems for employers in the resource industry give the remoteness of many of their locations.
206. While this and other 'family-friendly' measures in the Bill on the face of them seem like positive measures, when looked at in terms of practicalities they could have adverse impacts such as discouraging employment.
207. This proposal in particular could have the effect of not only discouraging the future employment of women but of further reducing the proportion of women in the resource industry.
208. It is often extremely difficult if not impossible to find alternative safe jobs for women employed on remote mine sites. If a woman is employed in an operational role such as a truck driver, for instance, that role may well be seen as having risks associated with it even though the employer has an obligation to provide a safe workplace at all times.
209. There is an extremely limited number of desk-bound administrative roles at resource sector worksites, particularly in remote locations, and more often than not such requests are not able to be accommodated.
210. As the committee will appreciate, there is nothing more unproductive for a business than having to pay a worker for doing nothing in the absence of an alternative safe role. The fact that this paid non-working period can go on for up to nine months makes it extremely difficult to accommodate from an operational perspective.
211. While the proposed measures will largely result in unpaid leave being taken by employees rather than paid leave, there is still a positive obligation on employers to source an alternative role and to redeploy that person into it. Employers take their current obligations very seriously but would oppose any extension of those obligations, particularly when it threatens to be burdensome and discourage job creation.
212. It must be remembered that this is not just a 'right to request' a transfer to a safe job but an absolute right to a transfer, which places a strict duty on employers.
213. The fact that the Bill's provisions in this area are proposed to operate regardless of length of service will in particular make employers think twice before employing women, especially as those women could end up taking leave, whether paid or unpaid, within weeks of starting a new job.

214. This is surely not what the government intended at a time when it is actively working with organisations like AMMA to make resource industry employment a more viable prospect for a greater number of working women.

## SCHEDULE 2 – MODERN AWARDS OBJECTIVE

### Introduction

215. Schedule 2 of the Bill seeks to add a new paragraph (da) to the statutory objectives for the making of modern awards. Despite not using the well understood employment term directly<sup>8</sup>, the new paragraph addresses penalty rates.
216. The modern awards objective guides the Fair Work Commission in award making and award variation, including in the modern awards review processes. This object is one part of a larger system of provisions in Part 2-3, Division 3 of the *Fair Work Act*, which determine the content of modern awards.
217. **Resource industry considerations:** Many resource industry operations operate either directly under modern awards or under penalty rate arrangements drawn from modern awards into agreements.
218. Other parts of the industry operate under highly-evolved rostering arrangements, such as annualised salaries and continuous shifts.
219. These arrangements also have their foundations in hours and pay arrangements in modern awards. So to the extent the proposed amendment does have a material effect on wage arrangements and structures in awards, this could well flow on (or at least create pressures for flow on) across the resources industry.
220. This would be notwithstanding the fact that remuneration in the resource industry is already at the top end of the national distribution and well above award minima including both base rates of pay and penalty rates.

### The amendment rests on a politicised fallacy

221. **Penalty rates are already part of the system:** These proposed amendments are unnecessary. The existing modern awards objective under s134 requires that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions. This has been operationalised in the award modernisation process as retaining penalty rate arrangements in the overwhelming majority of modern awards. Some employers even saw penalty rate obligations increase as part of the move to modern awards. This demonstrates that the amendment is unnecessary.
222. **This is political:** Notions of threats to penalty rates are a deliberately constructed 'straw man', whose fate should be determined in the political arena not by our workplace relations legislation, and not in workplaces employers are trying to run productively and efficiently.
223. A workplace relations act peppered with provisions based on short-term political opportunity rather than regulatory merit would ill-serve the interests of all users of the system.

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<sup>8</sup> As s.139 of the Fair Work Act 2009 already does.

## The amendment is unnecessary

224. **This is already dealt with in s.139(1) of the current Act:** The terms that may be included in modern awards under the Act already include:

(d) *overtime rates;*

(e) *penalty rates, including for any of the following:*

(i) *employees working unsocial, irregular or unpredictable hours;*

(ii) *employees working on weekends or public holidays;*

(iii) *shift workers;*

225. Why make this additional amendment? What does it add that is not already being delivered under modern awards made under Part 2-3 of the *Fair Work Act 2009*?

226. **There is an existing penalty rate regime:** As would be expected given the current s139(1), modern awards already contain a substantial penalty rate regime, which reflects that developed in the conciliation and arbitration system across the 20<sup>th</sup> Century. This was determined under the existing statutory objectives for modern awards, which further illustrates that the proposals under consideration are simply not required.

227. **Penalty rates were upheld in the recent penalty rates case:** Shortly after the introduction of this Bill, the Fair Work Commission handed down its 18 March 2013 [Transitional Review Penalty Rates decision](#)<sup>9</sup>.

- a. This decision was determined by/under the existing modern awards objective (without the proposed amendment) and considered whether the existing statutory parameters could allow employer applications to reduce some existing penalty rates.
- b. This was not accepted, and the existing penalty rate structures in the applicable awards were not altered.
- c. This demonstrates that the proposed amendment to the modern awards objective is fundamentally unnecessary. There is quite adequate protection of penalty rates through the legacy of Australia's arbitrated award terms, operationalised under the modern award system, and existing Part 2-3 of the *Fair Work Act 2009*.

## Would the amendments create new penalty rates?

228. The committee needs to consider whether this amendment addresses a real issue or not, and whether it would have any practical effect.

229. How many modern awards do not already contain penalty rates for the circumstances set out in the Bill's proposed s134(1)(da)(i) to (iv)?

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<sup>9</sup> [2013] FWCFB 1635



230. Of the 122 modern awards<sup>10</sup>, how many fail to provide “additional remuneration” for:
- a. employees working overtime; or
  - b. employees working unsocial, irregular or unpredictable hours; or
  - c. employees working on weekends or public holidays; or
  - d. employees working shifts?
231. If the answer is none, or very few, then this amendment is patently unnecessary, and the “need for additional payments” is already being met under the existing Modern Awards Objective.
232. And what of an award that was modernised under the existing Act but does not contain penalty rates in some or all of the circumstances listed in the amendment?
- a. There would certainly be a reason for this based on the unique arbitral or negotiated history of the industry concerned; or else some previous agreement may have been struck for all-up or inclusive wage rates for particular roster patterns.
  - b. Would this amendment have the effect of requiring the Fair Work Commission to reverse a very recent decision to maintain a pre-modernisation award pay arrangement where it failed to provide additional remuneration in the circumstances listed? Would this amendment require the Fair Work Commission to reverse some of its award modernisation decisions?
  - c. Not only would this increase labour costs, but it would completely override the industrial and industry basis for any unique arrangements.
233. This amendment should not be progressed without Department of Education, Employment & Workplace Relations informing the committee of how many of the 122 modern awards do not already meet the additional remuneration requirements set out in proposed s134(1)(da).

### **Would the amendments increase existing penalty rates?**

234. The committee should also consider whether amending the Act as proposed would have the effect of encouraging litigation to increase existing penalty rates, or the circumstances that trigger the payment of penalty rates.
235. Amendments are made to be tested, and this amendment may invite trade unions to test the extent to which penalty rate arrangements in particular modern awards are actually based on unsociability, irregularity or unpredictability.

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<sup>10</sup> Source: <http://www.fairwork.gov.au/awards/modern-awards/Pages/default.aspx?friendlyURL=1&modernawards>

## Additional to what?

236. In imposing a need for “additional remuneration”, the proposed amendment begs the question – additional to what?
237. Does this mean in addition to base award / ordinary rates of pay (which is therefore simply a circular definition of a penalty rate), or is this implying awards must have the effect of delivering an actual additional takehome pay premium for any roster cycle in which an employee works hours that fall within proposed s134(1)(da)(i) to (iv)?
238. If the latter is the case, or there is any risk that the latter is the case, then this could have the effect of requiring additional payments even when working on long-standing, evened out or annualised rosters, paying well in excess of minimum award rates including penalty rates.
239. Specifically, if the effect of the amendment were that additional remuneration is required for any period in which the overtime, unsocial, weekend hours are worked, this could significantly undo and complicate long-standing annualised salary arrangements with which employers and employees are entirely happy (and which roll over from agreement to agreement).
240. The committee should note that the *Fair Work Act 2009* already specifically recognises scope to include annualised salaries in awards under s139(1)(f) so care needs to be taken that provisions are not included in the Act with potentially contradictory or conflicting effect.
241. The proposed amendment will at best achieve nothing. However, there is a real risk that it will create ambiguity and encourage fresh litigation aimed at increasing operating costs.
242. This proposal should not be accepted. Schedule 2 should not form part of any amendments, and there should be no amendment to s134(1) of the *Fair Work Act 2009*.

## SCHEDULE 3 – ANTI-BULLYING MEASURE

### Introduction

243. AMMA and its members recognise that workplace bullying is an issue that must be taken seriously and it is something that is taken seriously by resource industry employers.
244. In AMMA's July 2012 submission to the House of Representatives Standing Committee inquiry into workplace bullying, AMMA recognised that workplace bullying was, when it occurred, detrimental to resource industry productivity but highlighted there was already an array of legislative obligations on employers in respect of dealing with workplace bullying.
245. AMMA maintains that the current legislative and regulatory framework that imposes a duty of care on employers in this area is sufficient and no further regulation on employers in this area will assist in addressing this issue.
246. Employers are already dealing with what is a fraught area given the subjective and inherently challenging nature of many allegations of workplace bullying.
247. The Federal Government should not make this more difficult for employers by creating a new industrial jurisdiction for workplace bullying as proposed that will intersect in unforeseen ways with the plethora of other jurisdictions that already exist.
248. Rather, the government should provide more guidance for employers on how to most effectively prevent, manage and respond to workplace bullying without exposing them to increasing numbers of frivolous and unmeritorious claims. The aim must be to have a culture free of workplace bullying, not to litigate it after it happens.
249. The government must also do something about the very real problem of bullying by unionists which the *Fair Work Act* currently protects from an employer action. If conduct is unacceptable it should be deemed unacceptable by all perpetrators even if it is in the context of 'industrial activities'.

### What is proposed in the Bill?

250. Schedule 3 of the Bill proposes to amend [s576\(1\)](#) of the *Fair Work Act* to confer a new function on the Fair Work Commission in relation to 'workers bullied at work' (the proposed new s576(1)(q)).
251. If enacted, this would be a brand new function for the Fair Work Commission and is another new arc of regulation not recommended by the Fair Work Act review panel. The proposed measures represent the government's own policy priorities by way of responding to the House of Representatives Inquiry into workplace bullying that was completed in late 2012. Again, more consultation and policy development should have been undertaken before drafting a Bill.
252. A new s789FC is proposed under the Bill which states that a worker who 'reasonably believes that he or she has been bullied at work may apply to the

Fair Work Commission for an order under s789FF'. In response, the Fair Work Commission can make orders to stop the bullying if it believes there is a risk the bullying will continue.

253. Significantly, the term 'worker' proposed in the Bill is the same as that applying under the model Work Health & Safety Act 2011. Workers are individuals who perform work in any capacity, including employees, contractors, sub-contractors, outworkers, apprentices, trainees, students gaining work experience or volunteers. As such, a very broad spectrum of individuals will be able to bring claims, including volunteers.

## Volunteers

254. As an organisation operating under the Fair Work Act and its legislative antecedents for 95 years, as well as being a participant in the National Workplace Consultative Council with a wider national interest in how the Fair Work Act, the system and the tribunal operates, AMMA is very concerned with any proposal to extend the operation of the Act to volunteers.
255. The Conciliation and Arbitration Act 1904, the Industrial Relations Act 1988, the Workplace Relations Act 1996 and the Fair Work Act 2009 have as their very reason to regulate the 'employment relationship' between employers and employees. The 19<sup>th</sup> century antecedents to current industrial legislation were also entirely about employment and no other form of legal relationship.
256. The employment relationship is the very DNA of Australia's employment legislation and the institutions, decision making and ways of operating that have developed under that legislation for more than a century.
257. What looks like minor wording in this part of the Bill would actually herald a massive change of approach, culture and expertise for the Australian workplace relations infrastructure. It would also represent a massive change for the Australian charitable and volunteering sector. This needs to be properly canvassed and considered before these proposals are progressed under this Bill.

## Who orders will apply to

258. According to the Bill's Explanatory Memorandum, orders will not be limited to or apply only to the employer but could also apply to co-workers and visitors to the workplace. However, AMMA has serious concerns about enforceability.
259. While the orders the Fair Work Commission can make do not include financial compensation and are aimed only at 'stopping the bullying', most of the orders will be against employers or will at least require employers to take some form of action. The Bill as drafted gives the commission a wide discretion to make 'any orders' it considers appropriate to stop the bullying.
260. Orders can also be based on behaviour such as threats made outside the workplace if those threats relate to work, making it an even broader jurisdiction. Again, there are serious concerns regarding enforceability and employers' ability to discharge their obligations.
261. Examples of orders that can be made include:

- a. That the individuals stop the behaviour;
  - b. That the employer regularly monitor the behaviour;
  - c. That the employer ensure compliance with its workplace bullying policy;
  - d. That the employer provide information and additional support and training to workers; and
  - e. That the employer review its workplace bullying policy.
262. While the commission cannot make orders awarding penalties or compensation, if there is a breach of an initial order, a person affected by the breach, a union or inspector can apply to the courts for civil remedies. Maximum fines per breach are proposed to be \$10,200.
263. One of many problems for employers with this proposed new jurisdiction is that it is not difficult to envisage many situations where orders are made against employers to monitor behaviours or ensure compliance but through no fault of their own, those orders might be breached and employers rendered liable for penalties. There is also concern that employers may be ordered to train thousands of people at significant cost with no consideration of their capacity to pay.
264. AMMA maintains that the debate should not focus solely on the actions or inactions of employers but should rather adopt a shared responsibility approach to workplace bullying, with an equal onus on workers not to engage in behaviour that would affect the health and safety of others, along with appropriate deterrents.
265. This Bill as drafted does not adequately place responsibility for bullying on those that are actually engaging in the behaviour. Instead, the employer is held vicariously liable for conduct that may be outside its control.

### Existing legislative options to address bullying

266. There already exists a plethora of legislative obligations on employers in respect to workplace bullying at federal, state and territory levels.
267. Depending on the circumstances, there is a raft of legislative avenues that a victim of workplace bullying may be able to pursue. The applicant, whether a target of bullying themselves or a witness to bullying against a co-worker, could potentially:
- a. Have a course of action against an employer under Part 3-1 of the Fair Work Act (the general protections) if it is alleged the bullying occurred because of one of the unlawful grounds or Part 3-2 of the Fair Work Act (if they believe they have been unfairly dismissed as a result of bringing bullying claims to light);
  - b. Pursue a “constructive dismissal” case under the Fair Work Act;
  - c. Pursue a compensation claim through the workers’ compensation scheme in the various state jurisdictions. An employee may make a

claim regarding a compensable injury if it arises out of, or in the course of, their employment. For instance, in South Australia, psychiatric disabilities caused by bullying at work are compensable if the person's employment was a substantial cause of the disability under s30 of the *SA Workers Rehabilitation and Compensation Act 1986*;

- d. Cite a breach of a relevant industrial instrument;
  - e. Pursue a tortious or equitable course of action through the courts; or
  - f. Make a claim under state or federal anti-discrimination laws (including for unlawful harassment) if it is alleged the bullying occurred because the person possessed a protected attribute.
268. In the Commonwealth jurisdiction, victims of bullying have the following legislative avenues open to them:
- a. The Racial Discrimination Act 1975;
  - b. The Sex Discrimination Act 1984;
  - c. The Disability Discrimination Act 1992; and
  - d. The Age Discrimination Act 2004.
269. In the state jurisdictions, potential remedies for victims of bullying exist under:
- a. The ACT Discrimination Act 1991;
  - b. The NSW Anti-Discrimination Act 1977;
  - c. The NT Anti-Discrimination Act 1996;
  - d. The Qld Anti-Discrimination Act 1991;
  - e. The SA Equal Opportunity Act 1984;
  - f. The Tas Anti-Discrimination Act 1998;
  - g. The Vic Equal Opportunity Act 1995; and
  - h. The WA Equal Opportunity Act 1984.
270. A range of legislative avenues are also available to the alleged bully if they feel they have been mistreated or an investigation into complaints about them has been mishandled. In such cases, the alleged bully may have a course of action against an employer under:
- a. Part 3-1 of the Fair Work Act 2009 (the general protections);
  - b. Part 3-2 of the Fair Work Act 2009 (if they believe they have been unfairly dismissed because of the allegations against them); or
  - c. A tortious or equitable course of action to pursue through the courts.

271. In Victoria, recent amendments to the Crimes Act have expanded existing stalking behaviours to include:
- a. Making threats to the victim;
  - b. Using abusive or offensive words to, or in the presence of, the victim;
  - c. Performing abusive or offensive acts in the presence of the victim;
  - d. Directing abusive or offensive acts towards the victim; and
  - e. Acting in any other way that could reasonably be expected to cause a victim to engage in self-harm.
272. This new criminal offence in Victoria sends a clear signal to the community that anyone who commits such offences will face imprisonment.
273. In AMMA's view, the existing raft of options available to both victims and alleged perpetrators are sufficient if not excessive. Opening up yet another avenue for workplace bullying claims is misguided and rushed, and adds nothing at all to the system.
274. If the Federal Government wants to pursue these types of measures further, it should be done through the Council of Australian Governments and follow a proper consultation process with the states.

## Specific employer concerns

### Where is the line between discipline and bullying?

275. The definition of bullying proposed under s789FD of the Bill is that a worker is 'bullied at work' if an individual or group of individuals repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and that behaviour creates a risk to health and safety.
276. That section states that 'reasonable management action carried out in a reasonable manner' will be exempt from the definition of bullying.
277. However, as the committee will appreciate, what is deemed reasonable behaviour by one person is not necessarily viewed as reasonable by another. And what individual tribunal members consider reasonable may leave employers in jeopardy despite taking what would generally be viewed as reasonable responses.
278. Employers fear that the majority of cases to be heard under this jurisdiction will be supervisors accused of bullying in the course of performance managing their staff, with the applicants being encouraged and supported by unions to bring claims. As a result, s789FD(2) is a massive issue for AMMA members.
279. A manager repeatedly placing unreasonable workloads on a subordinate might be seen as unreasonable or 'bullying' by the worker but not by the manager. Who decides where the line is between the two?

280. While the above behaviour is perhaps inappropriate it is not the sort of behaviour intended to be captured by the term 'bullying', yet it is precisely those sorts of claims, and a broad range of others, that will be brought before the commission under these proposals.
281. AMMA is very concerned that the provisions will be used by employees to avoid or counteract discipline and performance management, just as the general protections provisions have been misused in this way.

#### Potential for groundless claims

282. Depending on the level of evidence required to support such applications, along with who bears the burden of proof, the potential in these proposals is huge for groundless and unmeritorious claims to be brought.
283. Bullying by its nature is extremely subjective; allegations are often complex and involve multiple people, conflicting facts and little documentation by way of evidence. It will be extremely difficult if not impossible for the Fair Work Commission to make a reasonable determination in many cases without a hearing. Therefore, giving an order to stop the behaviour in a short timeframe may not be practical or provide procedural or substantive fairness.
284. The commission's current emphasis on conciliation and settling claims in the unfair dismissal and adverse action jurisdictions could also lead to a huge increase in employers paying 'go away' money under these provisions. AMMA is also concerned with employee litigants' possible forum shopping within the Fair Work Act in order to get the most positive outcome.
285. If these proposals go ahead, which AMMA opposes, there must be an explicit requirement to provide evidence to support bullying allegations with the initial application and under no circumstances should there be a reverse onus of proof on other parties to defend claims.
286. Under the current adverse action/general protections provisions, employers already face insurmountable difficulties in having to prepare defences for claims that are not even outlined before the parties go to conciliation. On top of that, the conciliation process is skewed heavily towards financial settlements, even for unmeritorious claims.
287. Under no circumstances should the proposals in this Bill provide yet another jurisdiction where employers are forced to pay financial settlements to avoid huge legal costs associated with defending unmeritorious claims.
288. At a minimum, applicants under this proposed jurisdiction would be required to provide evidence of having pursued an internal grievance process first before bringing a claim to the commission. All claims should be automatically rejected if this is not undertaken.
289. There should also be an explicit and complete defence if an employer has put in place reasonable measures to prevent bullying by providing ongoing training in relation to existing policies and procedures and having a well-established and appropriate grievance procedure.



290. Under the Bill as currently worded, bullying complaints can be made against or by visitors to the workplace such as contractors, sub-contractors or volunteers.
291. How can employers reasonably be expected to ensure that visitors comply with their anti-bullying policies and procedures or be expected to provide appropriate training to those that are not their employees? That's a utopian impossibility and no business can be expected to lock itself down to customers and/or the public as an anti-bullying measure. Every delivery person or visitor cannot be inducted.
292. Will bullying issues have to be included in every site induction and, if so, what are the practical implications of that for Australian businesses?

### Anticipated increase in volume of claims

293. The proposed changes are expected to lead to an increased number of tribunal applications that employers will have to deal with, whether the claims are made specifically against them or one of their employees or contractors.
294. This will present a huge financial and time impost for employers in not only responding to claims but also preparing their legal defences if they want to challenge them.
295. The question remains as to how the Fair Work Commission is going to handle the increased volume of claims that will come its way.
296. Representatives of the commission told a Senate Estimates committee on 13 February 2013 that they would not be able to absorb the costs of dealing with the extra complaints and would need additional funding<sup>11</sup>.
297. Bernadette O'Neill, general manager of the Fair Work Commission, told Senate Estimates she had no idea what the extra volume of claims would look like or what extra resources would be needed but expected there would be professional development and training of members and staff required in relation to the new jurisdiction:

*"But until we see the legislation we cannot really predict what the role will be and what the requirements will be."*

298. This is a very specialised jurisdiction with highly specialised and honed skills required. This would be a brand new jurisdiction for the Fair Work Commission whose members have never before been exposed to bullying claims in significant numbers.
299. This is a duplication of the work performed very able and competently by the various state and federal anti-discrimination tribunals. Surely the Bill needs more work and greater considerations of these practical concerns, and then could be reintroduced.

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<sup>11</sup> Senate Education, Employment & Workplace Relations Committee, Additional Estimates Hansard, 13 February 2013

### Prioritising bullying claims over other applications

300. The requirement under the proposed s789FE that the Fair Work Commission start to deal with bullying applications within 14 days means these types of claims are going to be fast-tracked ahead of other applications.
301. Depending on the volume of bullying claims received (and if the adverse action jurisdiction is anything to go by, numbers of claims will be large) this could see lengthy delays to a raft of other applications before the commission.
302. Compromising the availability of members to hear other applications could, for instance, see employer applications to stop protected industrial action delayed and therefore amount to increased damages to business. It is unacceptable that a speculative, grafted on jurisdiction could compromise the tribunal's core business and responsibilities.

### Impact on employers' own investigations

303. The ability under the proposed s789FF for the Fair Work Commission to make orders to stop bullying is in danger of undermining employers' own investigations into such matters. We fear matters being elevated prematurely – cutting across sound workplace efforts and internal investigations.
304. The proposals also risk further undermining direct engagement between employers and employees by creating more third-party interference in workplace issues.
305. In cases where employees have made the bullying complaint internally before pursuing an application before the commission, a subsequent application under these provisions risks undermining the value of employers' own investigations and cutting off employer efforts to deal with problems using internal processes.
306. A particular issue that the committee must consider is that the proposed s789FF(2) requires the commission, in considering the terms of an order, to take into account any final or interim outcomes of other investigations undertaken by other persons or bodies into the matter.
307. This means that any documents and records relating to an employer's own investigation of a bullying complaint could be subject to 'discovery' and used against employers in the commission's own investigation of events.
308. If these proposals go ahead, the first an employer hears of a bullying complaint may be when they receive a copy of an application made to the tribunal. This is not good policy. First recourse must be at the workplace level.
309. In situations where an employer has already conducted or started to conduct its own thorough investigation, there is a real possibility the tribunal's involvement or any eventual orders will undermine its managerial prerogative and best possible discharge of its own responsibilities.
310. Other complications arise as to what employers are required to do in relation to the person accused of bullying once they become aware of an application before the commission.

311. In the majority of cases of alleged bullying, an employer will stand down an employee pending the outcome of the investigation into the alleged conduct.
312. This area becomes more problematic in cases where the employer has not conducted its own investigation into the allegations and therefore does not know if the claims are substantiated or otherwise. Employers could also find their exposure increased to adverse action claims by alleged perpetrators in the event that they fail to follow their own agreed internal processes. Counter claims or apprehended violence orders could further complicate matters.
313. What happens in cases where an employee of one company alleges they have been bullied by an employee of another company? The first employer may have absolutely no knowledge that a claim has been brought, no knowledge of the incident and no ability to control any outcomes in relation to orders handed down.
314. Putting all these complexities to one side, is there any merit in both an employer and the commission duplicating efforts in relation to a single matter? Not to mention the potential for the parties to arrive at different conclusions in relation to the same conduct.
315. The interaction between this jurisdiction and an employer's policies, procedures, industrial instruments and managerial prerogative will be extremely complex and is something the committee should take into account in relation to this Bill and not pass these provisions.

#### Test runs for work health and safety prosecutions

316. Section 789FH of the proposed Bill makes it clear that the usual rules barring multiple actions in relation to a workplace health and safety matter will not apply in relation to bullying applications made under the Fair Work Act.
317. In simple terms, this means that bringing an application to the Fair Work Commission for orders to stop bullying will not prevent applicants bringing applications in relation to the same conduct under the state Work Health & Safety Acts.
318. Section [115](#) of the model Work Health & Safety Act, which now applies in most states and the Commonwealth, would normally work to prohibit bringing civil proceedings under the Work Health & Safety Act if proceedings have been commenced under another state or Commonwealth law.
319. Under this Bill, access to those other remedies will not be blocked by an application to the Fair Work Commission for orders to stop bullying.
320. Additionally, if a worker alleges they have suffered discrimination, adverse action or dismissal as a result of raising a bullying matter, they will be able to pursue remedies under the Fair Work Act or the Work Health & Safety Act in relation to a bullying claim.
321. It remains unclear how the progress or outcome of an application before the Fair Work Commission would sit with or impact on separate proceedings under the work health and safety or workers' compensation schemes. But it does look like expanding employer legal costs and exposures considerably.

322. What if Safe Work Australia or WorkSafe WA decided to prosecute an employer under the work health and safety legislation in relation to a bullying allegation? How would Fair Work Act proceedings that were already on foot sit with that?
323. Further complexities as to the interactions between the jurisdictions arise from the different standards of proof required by the Fair Work Commission as a tribunal compared to the courts that will hear work health and safety matters.
324. It is not hard to imagine that once an applicant succeeds with a Fair Work Commission order they will be bolstered and more likely to seek to prosecute the same course of conduct under work health and safety laws. Either that or a regulator will bring the prosecution on their behalf once they become aware of the matter through the commission.
325. Increasing the commission's jurisdiction in relation to bullying could be expected to cause a flow-on effect to increased numbers of prosecutions under work health and safety and workers' compensation laws.
326. At the end of the day, the doubling up of jurisdictions in this area is unnecessary and cumbersome and will lead to nothing but confusion and headaches for all involved. It is nothing more than a recipe for expanded litigation that fails to address the fundamental and very serious problem of bullying.

#### Intersection with the adverse action jurisdiction

327. The Fair Work Commission's proposed new anti-bullying jurisdiction could also lead to increased numbers of adverse action / general protections claims being made, particularly by those accused of bullying.
328. While an employer would have strong grounds to stand someone down or separate them from a co-worker pending the outcome of a Fair Work Commission application, that may not stop people who feel they have been dealt with harshly from bringing an adverse action claim saying their rights have been breached.
329. Anecdotally, there are already a large number of unmeritorious adverse action claims being settled before the Fair Work Commission given the reverse onus of proof on employers and the low threshold of evidence required to mount a claim.
330. This trend can be expected to continue if not increase if the Bill goes ahead in its current form.
331. AMMA maintains that employers must be expressly protected from exposure to adverse action claims or other discrimination claims simply for doing what is required in relation to an allegation of workplace bullying.
332. This is particularly important in relation to the increased potential for adverse action claims to be made by union delegates and representatives given that recent court outcomes have continued to render union activities protected<sup>12</sup>.

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<sup>12</sup> *CFMEU v BHP Coal Pty Ltd (No 3)* [2012] FCA 1218 (7 November 2012)

## Bullying by unions remains protected

333. This Bill does nothing to address the fact that unionists' behaviour is protected from disciplinary action, even if they are exhibiting bullying-type behaviour, as long as the behaviour occurs in the context of their union activities.
334. A recent Federal Court decision in *CFMEU v BHP Coal Pty Ltd*<sup>13</sup> found a unionist had been dismissed for a prohibited reason because the behaviour over which he was dismissed occurred in the context of union activities, in which he had a workplace right to participate.
335. That particular worker engaged in behaviour that is typical of workplace bullying in that he sought to intimidate his colleagues who were not participating in industrial action by calling them 'scabs' and using other abusive language.
336. In the context of this Bill, the existing exemption for union activities opens up a whole new field of potential litigation against employers.
337. What these types of decisions highlight is that if bullying behaviour is part of a person's union activities or has the purpose of representing the views of their union, it is protected from disciplinary action.
338. It should not be. If this passes trade union bullies, regardless of whether they are officials or fellow employees should be equally exposed to liability, as should the trade union itself.
339. If further regulation is needed in the area of workplace bullying it must first and foremost target the very real problem of union bullying in the workplace and remove the current protections afforded to union activities.
340. As AMMA pointed out in its July 2012 submission to the House of Representatives Inquiry<sup>14</sup>, bullying by unions (including by officials, delegates and members) continues to be a serious issue, particularly in the resource and construction industries. Industrial abuse and threats are still abuse and threats.
341. AMMA members continue to report that unions are engaging in bullying in a workplace context including:
- a. Unions victimising employees who supported a proposed EBA that was not endorsed by the union;
  - b. Unions victimising employees who did not support strike action that the union had endorsed;
  - c. Co-workers treating a worker on light or suitable duties poorly (making snide remarks, ignoring them, etc) because other workers felt they were

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<sup>13</sup> *CFMEU v BHP Coal Pty Ltd (No 3)* [2012] FCA 1218 (7 November 2012)

<sup>14</sup> AMMA Submission to the House of Representatives Standing Committee on Education and Employment *Inquiry into workplace bullying*, July 2012

exaggerating their restrictions or they were seen as unduly placing a heavy workload on their co-workers;

- d. A worker being physically assaulted by a fellow union member for helping non-union contract labour on a worksite;
  - e. Workers being bullied and victimised for expressing concerns about 'downing tools' because it was a breach of their employment contract to take unprotected industrial action;
  - f. Workers being vilified by union members for asking their employer if they could return to work early following strike action endorsed by the union; and
  - g. Unions standing over employees to conform, such as pressuring them not to attend work functions.
342. In some cases this may be an issue of perception rather than direct action in that a worker may rightly fear persecution for opposing the union position without any direct bullying having occurred. But arguably bullying will often be subjectively not objectively considered.
343. In addition it is arguable that union officials sometimes expose the industrial relations staff of companies and employer associations, and even inspectorates such as the former Australian Building & Construction Commission to intimidating and threatening conduct that would constitute bullying. This would equally be able to be brought to the Fair Work Commission if it is to have a bullying jurisdiction.
344. It is AMMA's view that any new forays into anti-bullying in the industrial relations jurisdiction should first tackle the issue of union bullying before seeking to impose greater regulatory burdens on employers.

## CONCLUSION – HOW THE COMMITTEE SHOULD PROCEED

345. On 19 March 2013, Australia’s leading employer representatives united to call on the Federal Government not to progress these amendments (Attachment A).
346. Having seen the final form of the proposals, these concerns remain entirely unalleviated and, if anything, exacerbated.
347. Nothing has been provided to change the view of employers. This tranche of amendments includes a number of provisions that are likely to be significantly detrimental to the economy, business and jobs.
348. The explanatory memoranda, introductory speeches and other statements from government are quite insufficient, and should not satisfy the Committee that:
  - a. There is a sound policy basis for these changes;
  - b. They will improve the operation of the Fair Work Act, progress its objects, or improve Australia’s workplace relations system;
  - c. The wording of the changes will have its purported effect; or
  - d. That unexpected consequences and new avenues for either ambiguity or litigation have been properly identified and considered.
349. Employers welcome the convening of this inquiry but remain of the view that these proposals are flawed, and that the amending bill is simply too rushed and plagued by too many unknowns to pass into law.
350. The amendments would not improve the *Fair Work Act 2009*, nor would they address the key operational problems plaguing the legislation. In fact, they would create new problems and new uncertainties.
351. Employers in the Australian resource industry call on committee members to recommend against the passage of these proposals, and against the passage of the *Fair Work Amendment Bill 2013* as a whole.
352. The best outcome would be for this Bill to be withdrawn, rejected or lapse with the proroguing of the current Parliament.

## ATTACHMENT A

### JOINT EMPLOYER LETTER – AMMA, ACCI, AIG AND BCA (19 March 2013)



#### **Joint letter regarding proposed second tranche amendments to the Fair Work Act 2009**

19 March 2013

Dear [Member/Senator]

The government's recently announced second tranche of amendments to the Fair Work Act 2009 fail to address the core issues that will enhance productivity and competitiveness so as to provide an environment where employers can grow their business and provide more jobs.

Instead, this tranche of amendments includes a number of provisions which are likely to be significantly detrimental to the economy, business and jobs. These include:

- introducing arbitration for intractable disputes
- introducing greenfields agreement arbitration to be initiated by either the union or employer
- inadequately responding to issues associated with rights of entry of trade union representatives and location of meetings with trade union representatives
- requiring that awards and agreements include a provision that employers consult with employees and their unions before changing rosters or working hours
- taking legislative action to entrench penalty and shift loadings in the cost of the labour market
- using the Fair Work Commission as a way to address workplace bullying.

These amendments should not be progressed.

In fact there is a need to start again. The approach proposed by the government will not address the core issues raised by the private sector, and almost all are entirely outside the considerations and recommendations of the review of the Fair Work Act in 2012. Many elements of the proposed amendments fail the test of good policy design and good regulation.

#### *Arbitration*

While welcoming the introduction of good faith bargaining when negotiating a greenfields agreement, the benefit of such a provision is compromised by the introduction of greenfields arbitration and the proposal to introduce arbitration more broadly – a proposal that was not endorsed by the Fair Work Act review panel in 2012.



There is no demonstrated need for arbitration provisions, especially in light of the fact that there has been only limited recourse to provisions already in the Fair Work Act for dealing with intractable disputes.

The suggestion that criteria may be included in the legislation to limit the availability of arbitration does not mitigate the adverse impact of this proposal.

The introduction of arbitration is a significant backward step and reflects a major reversal in workplace relations policy under Labour and Coalition governments. Successive legislative reforms have been designed to limit third party interventions in workplace relations. Third party arbitration compromises the bargaining autonomy of employers and employees to agree an outcome and adds greater uncertainty to the end result.

The proposed amendments will in effect encourage and reward behaviour that contravenes good faith bargaining – the opposite to what the legislation is meant to do.

The government should not pursue these amendments.

Instead, the government should address directly the core issue associated with the negotiation of greenfields agreements. Employers and head contractors are now dealing with unions who are increasingly seeking excessive pay and conditions well above market rates. Employers and head contractors have limited options when they require a greenfields agreement so they can progress financing and project commencement.

What is required is an amendment to the Fair Work Act which provides a check on excessive demands. The Act should include capacity for the head contractor facing excessive demands to seek the review of the proposed agreement by the Fair Work Commission against a set of criteria including the relevant award, national employment standards and better overall test. Subject to the agreement meeting these criteria the commission should then have the power to issue a greenfields determination for the duration of the project.

### *Rights of entry*

The proposed changes to rights of entry fail to address the problems associated with excessive numbers of visits to workplaces by union officials – especially where the union does not have members at the site. The proposed change also severely limits the capacity for employers to exercise discretion as to where trade union representatives hold meetings and means of access to such places.

The arrangements that existed from 2006 should be reintroduced – where a union's right to enter a workplace is because:

- the union is covered by or is a party to an enterprise agreement that covers the site or be attempting to reach one
- the union can demonstrate that it has members on that site
- those members should have requested the union's presence.

### *Inclusion of model consultation clause on changes to rosters and working hours*

The proposal to include a new model consultation clause in modern awards and enterprise agreements is excessive and will add new compliance obligations at a workplace level that are unnecessary. It will also distort settled arrangements in awards, many of which were implemented following the Family Provisions Test Case. The proposal to extend these new rights to any rostering change, and not just changes based on particular caring or family responsibilities, is unprecedented in an Australian industrial relations context.

## *Workplace bullying*

Workplace bullying is of concern to us all. Our organisations are willing to develop, with government, appropriate pathways for individuals to seek redress. What is required is to ensure we have the right approach – poorly designed legislation will neither assist persons at risk of, or experiencing, bullying nor be supportive of good performance management practices within businesses.

The federal government should be working with state governments and business to build on the extensive and constructive work that has been underway across jurisdictions to address this issue.

We are of the view that rather than unilaterally establishing a new federal jurisdiction the government should work with all jurisdictions and business to identify a more appropriate way to provide people with protection from, and recourse, where workplace bullying occurs.

More broadly there is a need to address the unfinished business of amending the Fair Work Act to address broader issues of concern to business including:

- the need to reduce the range of matters that can be bargained over to ensure they truly pertain to the employment relationship
- enhancing the scope to agree flexibility arrangements with employees including through individual flexibility arrangements
- removing the capacity for unions to inappropriately use “aborted strike technique” (an issue acknowledged in the Fair Work Act review)
- amending the transfer of business arrangements to include a sunset clause after twelve months and to make it easier for employees within a corporate group seeking to transfer to a related entity to be employed under the conditions of the related entity.

Addressing these matters as a priority will assist businesses to adapt to change and be competitive. Resolving these issues will also contribute to Australia’s ability to capture the investment needed for the resources and infrastructure pipeline so essential to Australia’s economic growth and future jobs.

Yours sincerely

[signatures removed]

**Peter Anderson**  
Chief Executive,  
Australian Chamber  
of Commerce and  
Industry

**Innes Willox**  
Chief Executive  
Officer, Australian  
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**Steve Knott**  
Chief Executive,  
Australian Mines and  
Metals Association

**Jennifer Westacott**  
Chief Executive,  
Business Council of  
Australia

Letter sent to:

The Hon. Julia Gillard MP, Prime Minister of Australia

The Hon. Tony Abbott MP, Leader of the Opposition

Senator the Hon. Eric Abetz, Shadow Minister for Employment and Workplace Relations

Mr Adam Bandt MP, Member for Melbourne

Mr Tony Crook MP, Member for O'Connor

The Hon. Bob Katter MP, Member for Kennedy

Senator Christine Milne, Leader of the Australian Greens

Mr Robert Oakeshott MP, Member for Lyne

The Hon. Bill Shorten MP Minister for Employment and Workplace Relations

The Hon. Peter Slipper MP, Member for Fisher

Mr Craig Thomson MP, Member for Dobell

Mr Andrew Wilkie MP, Member for Denison

Mr Tony Windsor MP, Member for New England

Senator Nick Xenophon, Senator for South Australia